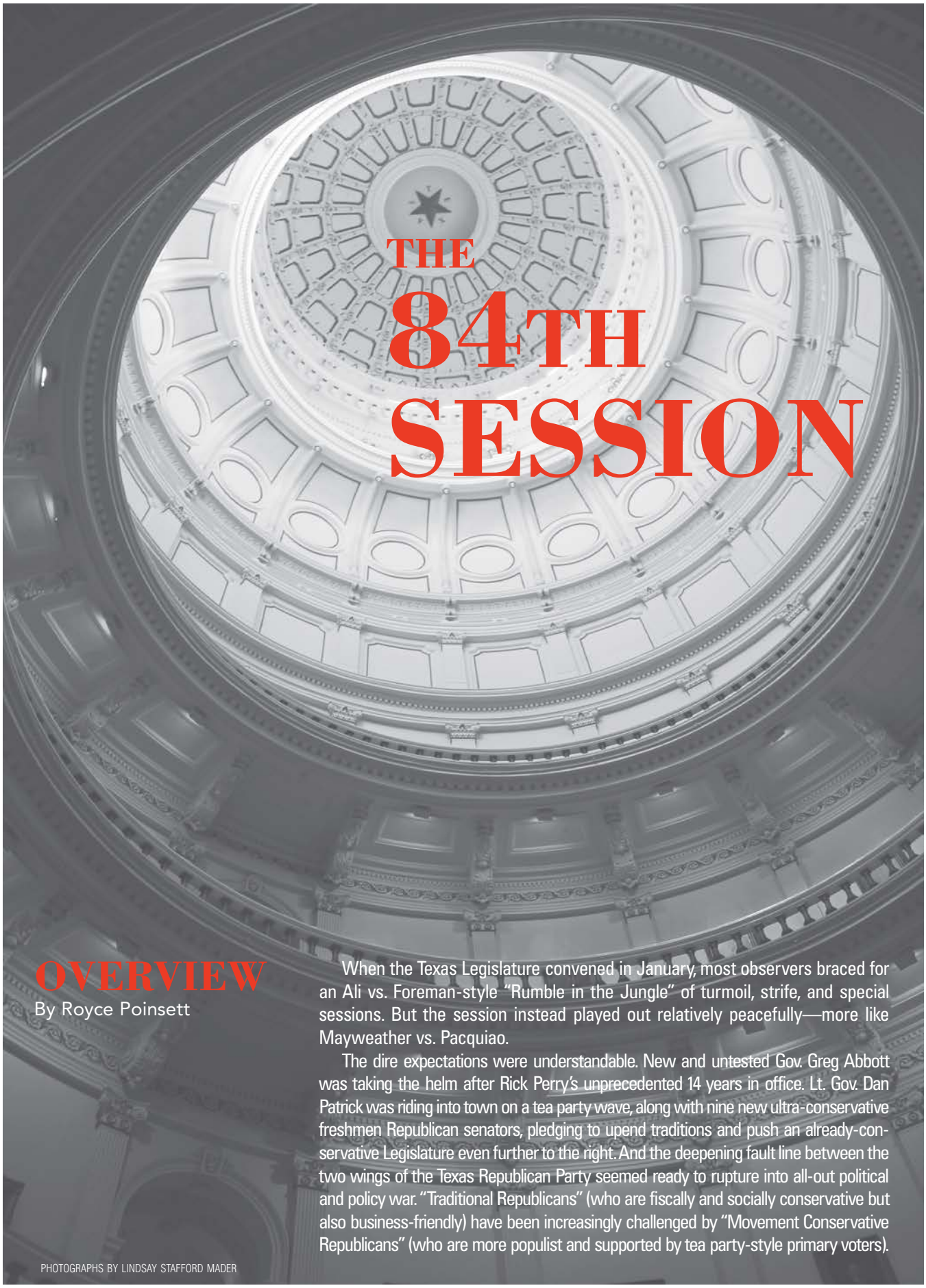


THE 84TH SESSION

OVERVIEW

By Royce Poinsett

When the Texas Legislature convened in January, most observers braced for an Ali vs. Foreman-style "Rumble in the Jungle" of turmoil, strife, and special sessions. But the session instead played out relatively peacefully—more like Mayweather vs. Pacquiao.

The dire expectations were understandable. New and untested Gov. Greg Abbott was taking the helm after Rick Perry's unprecedented 14 years in office. Lt. Gov. Dan Patrick was riding into town on a tea party wave, along with nine new ultra-conservative freshmen Republican senators, pledging to upend traditions and push an already-conservative Legislature even further to the right. And the deepening fault line between the two wings of the Texas Republican Party seemed ready to rupture into all-out political and policy war. "Traditional Republicans" (who are fiscally and socially conservative but also business-friendly) have been increasingly challenged by "Movement Conservative Republicans" (who are more populist and supported by tea party-style primary voters).

PHOTOGRAPHS BY LINDSAY STAFFORD MADER

But in the end, the Legislature surprised pessimistic spectators, finished its work, and went home on schedule. Gov. Abbott proved to be a steady hand, finding balance between providing direction and allowing the process to work its will. And while the two wings of the Republican Party definitely squared off, they managed to negotiate middle-ground, late-session compromises on the most controversial issues.

Looking forward to the 2016 election and the next legislative session in 2017, a major question is whether the current balance of power between the two Republican Party factions holds or whether movement conservatives tip the scales by continuing their recent success in ousting incumbent traditional Republicans in the primaries. If they seize more seats, these legislators may be less inclined toward compromise next session, and the Legislature may become even more conservative.

Major Legislation

The 2015 Texas Legislature considered more than 6,200 pieces of legislation and enacted more than 1,300 into law. Among this abundance of action are several major bills that deserve close attention.

Budget. Despite a recent stall in the oil and gas boom, a generally strong Texas economy left the state with a multibillion-dollar surplus for the current budget cycle and with $11 billion in its Rainy Day Fund. However, in constructing the next budget, the Legislature continued its recent trend of leaving billions of dollars on the table, unspent.

HB 1 enacts a two-year balanced budget with $209.4 billion in overall spending, an increase of 3.6 percent over the prior budget. Legislators left $6.4 billion in available revenues unspent, and used none of the Rainy Day Fund reserves. Conservatives argue that these monies should be held in reserve for rainier days, pointing at falling oil prices and pending school finance litigation as potential future drains on state finances.

Tax cuts. The session's most contentious battle between the Senate and the House, and between the two wings of the Republican Party, was over how to cut taxes. Senate leadership pushed a populist-style program of property tax cuts for homeowners and targeted franchise tax cuts for small businesses, a proposal widely supported by movement conservative legislators and tea party-style activists. The House leadership countered with a program of sales tax cuts for consumers and an across-the-board cut in the franchise tax for all businesses, a proposal widely supported by traditional conservative legislators and the business community. In the end, negotiators reached a compromise $3.8 billion tax cut package (with **SB 1/SJR 1** and **HB 32**) that, pending voter approval, will increase the state homestead exemption on school property taxes from $15,000 to $25,000 and cut the franchise tax by 25 percent across the board.

HB 7 repealed the longstanding $200 yearly "occupation taxes" charged to more than 650,000 professionals in 16 professions (including lawyers, accountants, and doctors), which represented an annual tax cut of $150 million.

Guns. Under **HB 910,** beginning January 1, 2016, Texans with a concealed handgun license may also carry their handgun openly in a hip or shoulder holster; however, private businesses will still have the right to prohibit guns on their property. Under **SB 11,** beginning August 1, 2016, public universities in the state must allow concealed handguns in dormitories, classrooms, cafeterias, and other campus buildings; however, public university presidents did win compromise language allowing them to declare certain areas off-limits for guns for safety reasons, and private universities won a total exemption from the legislation.

Education. The Legislature continued to put aside public school finance reform as it awaited a ruling from the Texas Supreme Court on the current system's constitutionality (the court heard arguments on September 1, 2015). However, the Legislature did increase public school funding in the state budget by $1.5 billion per biennium.

Legislators also revamped the manner in which public school campuses are evaluated with **HB 2804,** decreasing the reliance on high-stakes testing and replacing the current "Met Standard/Improvement Required/Not Rated" rankings with an "A through F" scale.

In higher education, the Legislature approved in **HB 100** the issuance of $3.1 billion in bonds to fund renovation and new construction at 64 public campuses, the first such approval since 2006.

Transportation. Legislators are finally directing serious funding toward addressing our growing state's transportation needs. Emboldened by recent voter approval of $1.2 billion for new roads from the Rainy Day Fund, legislators ended $550 million in yearly diversions of gas tax revenues to other state functions in the state budget and teed up for voter approval of an additional $2.5 billion in funding from sales tax revenues in **SJR 5**.

Border security and immigration reform. "Border security" has largely replaced "immigration reform" as the rallying cry for Texas Republicans. **HB 11** is an $800 million border security program, under which the Texas Department of Public Safety will purchase new law enforcement equipment and hire hundreds more officers to patrol the region.

Local control. Oil and gas regulators and companies won a major victory with the enactment of **HB 40,** a response to the hydraulic fracturing ban approved by Denton voters in November 2014. The new law expressly preempts local regulation of oil and gas drilling, leaving cities with only limited power to regulate surface activities in a "commercially reasonable" fashion. And **HB 1794** partially curtails suits by local governments against companies for alleged environmental infractions.

But local officials enjoyed their own legislative victories, defending their ability to enact plastic bag bans, install red light cameras, and regulate car-for-hire companies (such as Uber and Lyft) on a city-by-city basis.

Criminal justice. With the enactment of **HB 2150,** legislators replaced the unusual Texas "pick-a-pal" grand jury system (in which judge-appointed commissioners select grand jurors) with a random selection system.

Even some conservative Texas legislators are pondering the pros and cons of marijuana legalization. But this session they only dipped their toes in the water, passing **SB 339** to permit epilepsy patients to utilize doctor-prescribed, non-recreational "low-THC cannabis" in their treatment.

Energy and environment. While **HB 40** was the primary battle between industry and environmentalists this session, industry also prevailed with the passage of **SB 709** to curtail the scope and length of Texas Commission on Environmental Quality-contested case hearings and to quicken the issuance of environmental permits for major industrial projects.

Social issues. **HB 3994** narrowed the "judicial bypass" option by, among other things, heightening the standard of proof required to utilize this process where a minor may petition a judge for authorization to have an abortion without parental consent.

The session ended before the U.S. Supreme Court's *Obergefell v. Hodges* ruling that legalized gay marriage, but the Legislature did pass the **SB 2065** "Pastor Protection Act," shielding clergy from lawsuits if they decline to marry same-sex couples.

New Laws That Affect the Real World

Around water coolers and dinner tables, "real people" may be most interested in these new "real world" laws:

Let's light this candle. **HB 1150** expands legal fireworks-buying seasons in Texas to include the days before Texas Independence Day, San Jacinto Day, and Memorial Day.

A moveable buzz. **HB 2339** repeals laws prohibiting sports fans from carrying their alcoholic beverages from one area of an arena to another.

That's e-legal to you, Junior. **SB 97** prohibits the sale of electronic cigarettes to minors.

Class outside today. **SB 265** clarifies state law regarding permitted medications, expressly authorizing students to bring sunscreen to public school campuses.

Lido deck. **HB 2430** repeals a rarely enforced state regulation prohibiting eating or drinking at "swim-up bars" at hotels and resorts.

ACCESS TO JUSTICE

By Bruce P. Bower

As the *Dallas Morning News* stated in an editorial on May 3, 2015, 5.6 million Texans meet the financial eligibility criteria for publicly funded, basic civil legal services in Texas, but legal aid providers are able to serve only 20 percent of persons in need. The article further stated that funding per person for legal aid in Texas is $5.46, a drop from $12.56 per person 20 years ago.

In his address to the 84th Texas Legislature on the State of the Judiciary in Texas, Texas Supreme Court Chief Justice Nathan L. Hecht stated that "funding for legal aid helps provide the infrastructure to connect clients needing services with lawyers willing to help"—making the point that pro bono legal services by attorneys in private practice contribute mightily to the cause of access to justice. The appropriations that are described in this summary reflect approvals by the governor, the lieutenant governor, the speaker of the House of Representatives, and the attorney general. That is to say, the appropriations would not have occurred if any of those statewide elected officials had been opposed.

With leadership by the Texas Supreme Court, the 84th Texas Legislature in a strongly bipartisan manner responded to calls for funding for legal aid. The appropriations made by the Legislature for legal aid are administered pursuant to orders of the Supreme Court. The financial eligibility guidelines are available at teajf.org/grants/admin_forms.aspx. The household income limits for eligibility for legal aid in Texas are typically 125 percent of the federal poverty guideline for the particular size family (except for veterans and victims of crime, for whom income limits are somewhat higher). Thus, a household of two parents and two minor children generally cannot have a total gross income of more than $588 weekly to qualify for state-funded legal aid. There is not a deduction from income for food, clothing, shelter, or medical care. In addition to income limits, households must meet asset limits to receive legal aid provided through funding from the State of Texas.

For the 2015-2016 biennium, the Legislature appropriated $17.56 million in general revenue for basic civil legal aid, $10 million for basic civil legal services to victims of sexual assault, and $3 million for basic civil legal services specifically for veterans, in addition to funding for veterans treatment court programs. Also, the Chief Justice Jack Pope Act (Texas Government Code §402.007) was amended to increase the amount of civil penalties collected by the attorney general and not otherwise dedicated, which can be allocated to "the judicial fund for programs approved by the supreme court that provide basic civil legal services to the indigent." This amendment to the Chief Justice Jack Pope Act resulted from **HB 1079**.

In addition to financial eligibility criteria, all legal services provided with state funding are subject to restrictions on who can be served and what types of basic civil legal matters can be handled. These are available at http://www.teajf.org/grants/docs/2011-12/TAJF%20Funding_Restrictions.pdf. They reflect the focus of the orders of the Texas Supreme Court that basic civil legal services be provided to Texans of very modest means.

At a press conference at the Texas Capitol on February 18, a veteran described a typical case handled by legal aid—the adoption of his six-year-old son. A video of this is available at http://www.house.state.tx.us/video-audio/press-conference/. Members of the Supreme Court and members of the Legislature from both parties participated, as well as former presidents of the State Bar of Texas. All present on the dais were bound by a common thread of humility. As the veteran—a Purple Heart recipient—stated, the object of funding for legal aid is that "former members of the military and other people can still get the legal services they desperately need."

5.6 million Texans meet the financial eligibility criteria for publicly funded, basic civil legal services in Texas, but legal aid providers are able to serve only 20 percent of persons in need.

The Texas Access to Justice Foundation's website (teajf.org) has a list of organizations that receive state funds to provide basic civil legal aid. As Chief Justice Hecht made clear in his address to the Legislature, legal aid programs and attorneys providing volunteer services can work together to provide access to justice. Legal aid programs provide backup to volunteer attorneys and assist with clinics at which private practice lawyers consult with Texans of modest means on a pro bono basis. Members of the bar are encouraged to contact their local legal aid program to learn in more detail about the legal services being provided and opportunities for volunteering. In his address, Chief Justice Hecht mentioned that legal aid offices handle family law matters, domestic violence matters, evictions and foreclosures, and legal matters of the elderly. Members of the bar can inform their local legal aid program regarding local priorities (keeping in mind the restrictions that necessarily attach to the available funds).

BUSINESS LAW

By Daryl B. Robertson

All bills are effective on September 1, 2015, unless otherwise indicated. Many of the changes are based on provisions in the Model Business Corporation Act or the Delaware General Corporation Law.

CORPORATIONS AND FUNDAMENTAL BUSINESS TRANSACTIONS BILL

SB 860 amends various provisions of the Texas Business Organizations Code relating to corporations and to fundamental business transactions, which include mergers, conversions, or interest exchanges. The more significant amendments are summarized below.

Fundamental Business Transactions

Combined tender offer and short-form merger. SB 860 authorizes the acquisition of a Texas public for-profit corporation through a "two-step" tender offer and merger process. The process consists of a "front-end" tender offer for the public corporation's shares by the acquirer followed by a "back-end" merger between the acquirer and the public corporation. If the specified conditions are met, the back-end merger may be effected without shareholder approval but remains subject to dissenters' rights. The provisions are derived from the DGCL.

Owner liability. An owner or a member of a domestic entity cannot become subject to owner liability as a result of a merger, conversion, or interest exchange transaction without the consent of that owner or member. A new definition of "owner liability," which is based on the MBCA, generally refers only to personal liabilities imposed on owners or members pursuant to statute or the governing documents and not pursuant to independent contracts with the owner or member, such as a guaranty or promissory note.

Use of formula. A formula can be used (1) to determine the manner and basis of converting or exchanging ownership or membership interests (a) in a plan of merger, (b) in a plan of exchange, or (c) in a plan of conversion; and (2) by the board of directors of a for-profit corporation to determine the amount of consideration to be received for the issuance of shares in the corporation.

Interests can remain outstanding. The ownership or membership interests of an organization that is a party to the merger can remain outstanding rather than being converted or exchanged as part of the merger if the organization survives the merger.

Plans can be dependent on outside facts. Based on the DGCL, SB 860 clarifies that the terms of a plan of merger, plan of exchange, or plan of conversion may be made dependent on facts ascertainable outside of the plan if the plan clearly and expressly states the manner in which those facts will operate on the terms of such transaction.

Amended and restated certificate of formation in plan or certificate of merger. Substantive amendments authorize (1) a plan of merger to include restatements, or amendments and restatements, of governing documents and (2) a certificate of merger to have as an attachment a restated certificate of formation containing amendments or a certificate of amendment.

Certificated and Uncertificated Ownership Interests

A for-profit corporation, real estate investment trust, or professional corporation may issue and have outstanding both certificated and uncertificated ownership interests of the same class or series at the same time.

Ratification of Void or Voidable Corporate Acts or Share Issuances

SB 860 adds new Subchapter R to Chapter 21 containing provisions that specify procedures for ratification of void or voidable corporate acts or share issuances by for-profit corporations. These provisions are modeled on relatively new provisions added to the DGCL. A defective corporate act or putative shares are not void or voidable solely as a result of a failure of authorization if the act or shares are ratified in accordance with Subchapter R or validated by the district court in a proceeding brought under Subchapter R.

Ratification procedures. Ratification of the defective corporate act or putative shares requires that the board of directors first adopt a resolution containing specified information. The board's resolution must be approved by shareholders if shareholder approval of the defective corporate act to be ratified was required either at the time of the defective corporate act or at the time when the board adopts the required resolution. The procedures for submission of the resolution to shareholders and the notice, quorum, and voting requirements are specified in detail. The filing of a certificate of validation with the filing officer containing specified information is required if the defective corporate act being ratified would have required the filing of a filing instrument with the filing officer.

Validation procedures for a district court. A corporation or any of various other interested parties may apply to a district court to determine the validity of various matters relating to any defective corporate act or to modify or waive any of the foregoing ratification procedures. The

court may take any of several specified actions, including declaring effective any defective corporate act or putative shares. An action challenging a ratification by the board of directors must generally be filed within 120 days after the ratification becomes effective.

Term of Shareholders' Agreements

SB 860 removes the antiquated 10-year time limit on the valid duration of shareholders' agreements under Subchapter C of Chapter 21, subject to grandfathering of pre-existing agreements.

Authorizing Shareholder Access to Proxy Statements

SB 860 authorizes bylaws of for-profit corporations to allow shareholder access to proxy statements. The bylaws of a for-profit corporation may contain a provision requiring the corporation to include in its proxy statement, when soliciting proxies for the election of directors, the nominees of a shareholder.

PARTNERSHIPS AND LIMITED LIABILITY COMPANIES BILL

SB 859 amends various provisions of the TBOC relating to partnerships and limited liability companies. The more significant amendments are summarized below.

Replacement of Annual Registration Requirement for LLPs

In substantive amendments effective January 1, 2016, SB 859 eliminates the antiquated requirements for a limited liability partnership to file an annual renewal of registration. An LLP will be required to file an annual report, and the fees for this are the same as for the annual renewal of registration. The due date for filing of the annual report is June 1 of each year. The failure to file the annual report and pay the fee by May 31 of the year following the year in which the annual report was due will result in automatic termination of the LLP's registration. To mitigate potential liability problems arising from minor compliance errors, SB 859 clarifies that the acceptance by the secretary of state of an application for registration is conclusive evidence of the satisfaction of all conditions precedent to an effective registration and that the registration remains effective so long as there is substantial compliance with the registration and annual reporting requirements.

Enforceability of Powers of Attorney in Governing Documents

Powers of attorney are frequently included in limited liability company agreements, partnership agreements, and related documents. SB 859 clarifies the enforceability of these irrevocable power-of-attorney provisions for a limited liability company, general partnership, or limited

partnership. A power of attorney is irrevocable for all purposes under the new provisions if the power of attorney is coupled with an interest sufficient in law to support an irrevocable power and states that it is irrevocable.

Series of Entity Treated as Person Under Texas UCC

Effective May 23, 2015, **SB 1077** amended the Texas Business and Commerce Code to clarify that the term "person" includes a particular series of a for-profit entity. This change confirms that a series of a Texas limited liability company or a series of a foreign for-profit entity can independently engage in the sale and lease of goods and other transactions that are subject to the Texas Uniform Commercial Code as contained in the TBCC.

NOTARIZED CONSENT TO USE OF SIMILAR NAME

SB 1313 amended the code, effective June 19, 2015, to specify that the prohibitions against reservation or registration of a name with the secretary of state when a similar name is already reserved or registered by another entity or person do not apply if that other person or entity provides to the Texas secretary of state a notarized written consent of such entity or person to the use of the similar name.

PUBLIC INFORMATION REPORTS FOR PROFESSIONAL ASSOCIATIONS AND LIMITED PARTNERSHIPS

HB 2891 amends the TBOC and the Tax Code, effective January 1, 2016, to require professional associations and limited partnerships to file the same annual public information report that corporations and limited liability companies are required to file with the Texas comptroller.

CONSTRUCTION LAW

By Ben L. Aderholt and Jarett Dillard

Construction law was left generally unaffected by new legislation. There had been much discussion and study of an overhaul of the lien and bond statutes, but action was deferred until the next session. On the other hand, during the past year the Texas appellate courts handed down major opinions concerning wide topics that significantly affect the construction law practice.

On the business side, the construction industry may see increased funding for public projects. In **HB 1,** the Legislature put about $1.2 billion from gas tax money into road construction. It elected to fund the Texas Department of Public Safety from general revenue rather than the state highway fund and by allocating about $2.5 billion from funds raised through the 2014 constitutional amendment that dedicates a portion of tax revenue collected from increased oil and gas taxes to road construction. The Legislature also authorized $3 billion in tuition revenue bonds for capital expenditures for higher education.

Public Projects. **HB 20** imposed additional restrictions on the use of design-build for highway construction under Section 223.242 of the Transportation Code. The current statutory limitation of three design-build projects per year was extended beyond August 31, 2015, and the threshold for design-build projects was increased.

SJR 5 is a proposed constitutional amendment that will go to the voters on November 3, 2015. It would require the comptroller to deposit to the dedicated state highway fund the first $2.5 billion of any net revenue from sales and use taxes (under Chapter 151 of the Tax Code) that exceeds $28 billion in any given fiscal year and an amount equal to 35 percent of the net revenue from motor vehicle taxes under Chapter 152 that exceeds $5 billion. These deposited funds could only be appropriated to construct or maintain public roadways.

Chapter 176 of the Local Government Code was amended to provide for the disclosure of business relationships between local government officials and "vendors" entering into contracts for the sale or purchase of real property, goods, or services.

New Section 2252.098 of the Government Code requires all persons contracting with a governmental entity (including an institution of higher education) having a contract value of at least $1 million or requiring an action by the governmental entity's governing body to submit a "disclosure of interested parties" on a form prescribed by the Texas Ethics Commission. The "disclosure of interested parties" must state those persons who have a controlling interest in the contract or who actively participate in negotiating the contract on behalf of the contractor, including brokers, advisers, and attorneys.

Chapter 2261 of the Government Code was amended to require a state agency to post on its website a list of each contract that the agency enters into—including those procured without inviting, advertising for, or otherwise requiring "competitive bidding" before selection of the contractor—and statutory authority for entering into each respective contract that was procured without complying with the competitive bidding procedures. State agency employees involved in procurement or management of contracts for an agency are subject to strict conflict of interest prohibitions and disclosure requirements.

HB 2475 establishes the center for alternative finance and procurement within the Texas Facilities Commission to assist governmental entities in the receipt of proposals, negotiation of agreements, and management of qualifying public-private partnerships under Chapter 2267.

Section 2269.252 of the Government Code was amended to prohibit a governmental entity's project architect or engineer from also serving as a construction manager at risk for that project. Under current law, the project architect or engineer could be part of the construction manager at risk "team" provided it was selected under a separate selection process.

Chapter 501 of the Local Government Code was amended to expand the authority of "economic development corporations" to undertake projects for transportation facilities, including airports, hangars, rail and marine ports, rail and cargo facilities, and parking located at an airport or railport facility. An economic development corporation will also be authorized to own and operate such a facility as a "business."

Section 271.102(a) of the Local Government Code was amended to expand the authority of "cooperative purchasing programs" to include local government entities and local cooperative organizations of other states.

Indemnities. Section 271.904 of the Local Government Code was amended as to limitations on the rights of local governmental agencies to require architects and engineers to indemnify and defend the agency against liability caused by the negligence of the architect or engineer. Currently, local governmental entities are permitted to require architects and engineers to indemnify and defend governmental entities for liability caused by the negligence of the architect or engineer. But, there is no determination of fault at the time the obligation to defend arises, and professional liability insurance policies may not provide a defense to third parties such as local governmental agencies.

Section 271.904 was amended to remove the obligation to "defend" and to limit the obligation to indemnify

to those damages to the extent caused by the negligence of the architect or engineer. A new subsection (b) is added that spells out a prohibition on the obligation to defend (the prohibition is not absolute; it only precludes an obligation to defend a claim based on the negligence of the governmental agency or other entities over which the agency exercises control other than the architect or engineer). A contract may provide for the reimbursement of a governmental entity's attorneys' fees in proportion to the engineer's or architect's liability. A new subsection (c) permits the governmental entity to require that it be named as an additional insured on the architect or engineer's general liability policy and provide a defense.

New subsections (d) and (c) establish a standard of care for architects and engineers to perform services with the professional skill ordinarily provided by engineers or architects practicing in the same locality under similar circumstances. Contractual requirements that attempt to establish a different standard of care are void and unenforceable. These apply to contracts with a municipality, county, school district, conservation and reclamation district, hospital organization, or other "political subdivision" of the state.

Residential Condominiums. New Sections 82.119 and 82.120 of the Property Code impose conditions precedent on actions brought by unit owner associations for construction defect or design claims for condominiums with eight or more units. Developers and their design professionals questioned whether Chapter 27 of the Property Code (the Residential Construction Liability Act) provided sufficient protection from frivolous suits brought by unit owner associations that initiate claims without fully obtaining the informed consent of the individual unit owners.

New Section 82.119 requires an independent third-party report from a licensed professional engineer as a precondition to filing any legal action; will mandate a procedure for inspection and opportunity to cure those conditions set out in the report; and will mandate a procedure for holding a meeting of the unit owners to authorize any legal action (approval must be obtained from unit owners holding more than 50 percent of the total votes allocated under the declaration) before filing any legal action.

At least 30 days prior to the date for the meeting of the unit owners, a written notice must be provided to the unit owners describing the nature of the claim, the relief sought, the anticipated duration of prosecuting the claim, and the likelihood of success. The notice must also include: (a) a copy of the engineer's report; (b) a copy of the contract with legal counsel selected to pursue the claim, along with a description of attorneys' fees for which the association may be liable; (c) a summary of the steps previously taken to resolve the claim; (d) a statement that initiating a suit or arbitration may affect the market value, marketability, or financing of units while the claim is prosecuted; and (e) a description of the manner in which the association proposes to fund the cost of prosecuting the claim. The notice must be prepared and signed by a person who is not the attorney or employed by the attorney who represents the association in the prosecution of the claim.

The period of limitations for filing suit or an arbitration proceeding is tolled until the first anniversary of the date that the procedures are initiated by the association, provided that the procedures are initiated during the final year of the applicable period of limitation.

New Section 82.120 authorizes condominium declarations to mandate binding arbitration for the resolution of construction defect and design claims and will limit the ability of the unit owners to amend the condominium declaration to modify mandatory arbitration requirement for claims based upon acts that occurred prior to the amendment.

Grateful recognition is given to Robert C. Bass of Winstead who compiled much of this information.

CRIMINAL LAW

By Kristin Etter, David Gonzalez, Allen D. Place Jr., and Patricia Cummings

Guns, the grand jury system, and marijuana decriminalization measures dominated much of the criminal justice arena this legislative session. The bipartisan criminal justice reform movement that was born out of and coalesced with the Michael Morton Act last session continued during the 84th Texas Legislature. Interestingly, the left and the right came full circle during this session and found agreement on many issues. The many high-profile police shootings across the country and the nationwide push for grand jury reform also made its way to Texas and resulted in some important changes aimed at making the process fairer and more transparent.

Gun Legislation

HB 910, the open-carry bill, allows for open carry of firearms by licensed holders in Texas. While it seemed there was hardly any vocal opposition to the bill this session, the big debate came toward the end and involved an amendment that would have prevented police from asking anyone openly carrying for proof of their required license. This amendment was supported by some Democrats and tea party Republicans due to concerns about racial profiling and police being able to stop law-abiding carriers. Ultimately, however, the bill passed without the amendment. Beginning January 1, 2016, individuals with a concealed carry license will be able to carry handguns openly (under current law, individuals can already openly carry rifles and shotguns).

SB 11, the campus-carry bill, allows holders of concealed handgun licenses to carry guns on college campuses. However, the version of SB 11 that passed allows for universities and colleges to establish their own rules and regulations regarding storage and carrying of concealed handguns.

HB 554 prohibits a peace officer from arresting a concealed handgun carrier for possessing a handgun in an airport as long as the person immediately exits the screening checkpoint after notification.

Synthetic marijuana has been causing mayhem in some emergency rooms that are seeing increases in patients overdosing and suffering from severe reactions after ingesting it.

Grand Jury Legislation

HB 2150 abolishes the current grand jury "key-man" or "pick-a-pal" method, wherein a judge selects three commissioners to be in charge of choosing persons to serve on a grand jury. Instead, HB 2150 utilizes the random selection method for grand jurors like that already in use to pick petit jurors. The aim of this legislation is to increase transparency and curtail concerns over potential conflicts of interest.

Marijuana Legislation

HB 2165 and **SB 339** were important milestones for the marijuana legalization movement. Rep. David Simpson, a Republican of Longview, spearheaded what has become a challenge to big government by tea party Republicans by filing HB 2165, which would have legalized marijuana. With bipartisan support, the House Criminal Jurisprudence Committee actually voted the bill out favorably, but it did not make it to the floor. However, SB 339, which did pass, legalizes the medical use of cannabidiol (frequently called CBD), a non-intoxicating marijuana compound that is used by some who have epilepsy.

SB 173 criminalizes all strains of synthetic marijuana, which is evidence that while the legislative tide is slowly shifting in favor of real marijuana, it is moving in the opposite direction for the substance marketed as K2 or Spice. Synthetic marijuana has been causing mayhem in some emergency rooms that are seeing increases in patients overdosing and suffering from severe reactions after ingesting it. The problem with making synthetic marijuana illegal in previous years stemmed from the fact that chemists would continually tweak the chemical compounds to skirt the law. However, SB 173 covers the 12 potential cores and ring structures from which synthetic compounds can be made. With all of these now illegal, the bill aims to close the loophole by banning the manufacture, possession, use, and sale of all synthetic marijuana.

Decriminalization and Criminal Justice Reform Legislation

HB 2398 decriminalizes truancy and makes skipping school a civil—rather than a criminal—offense. After years of controversy surrounding the criminal prosecution of students for school absences, the bill also creates truancy prevention programs and civil truancy courts.

HB 1396 formally codifies the "rule of lenity," which requires courts to resolve statutory questions of ambiguity in favor of the defendant for criminal offenses that are found outside of the penal code. The bill passed with two important amendments that increased the standard value ladder thresholds for theft offenses (increasing the values for classification level of offense) to properly account for inflation, as well as requiring peace officers to obtain a warrant to search a person's cellphone and other wireless communication devices.

HB 3724 clarifies that defendants may have their convictions reexamined in a post-conviction proceeding if the expert who testified at trial later rejects the testimony based on new knowledge and scientific improvements.

SB 1743 expands the jurisdiction of the Office of Capital Writs to include representation of defendants whose convictions were based on forensic errors or junk science.

HB 48 creates the Timothy Cole Exoneration Review Commission to investigate wrongful convictions and to recommend changes to prevent further wrongful convictions in Texas.

SB 1902, which has been called the second chances bill, allows people with certain low-level misdemeanor convictions to petition the court to have their record sealed.

Other Highlights

SB 1135 makes it a crime to disclose or promote "revenge porn." Despite many concerns by defense lawyers over First Amendment protections, the bill not only provides criminal penalties for this new offense, titled Unlawful Disclosure or Promotion of Intimate Visual Material, but also establishes civil remedies that are targeted to websites that promote and publish the material.

HB 1061 provides an easier way to prosecute people for "doxing"—the public release of identifying and personal information—of police officers. It amends the current crime of interference with public duties by creating a rebuttable presumption that a person is interfering with a peace officer if he or she intentionally disseminates the home address, home telephone number, or Social Security number of the officer or a family member of the officer.

HB 207 makes it a crime to commit voyeurism, which is when a person, with the intent to arouse or gratify a sexual desire, observes—without consent—another person in a dwelling or structure where that person has a reasonable expectation of privacy.

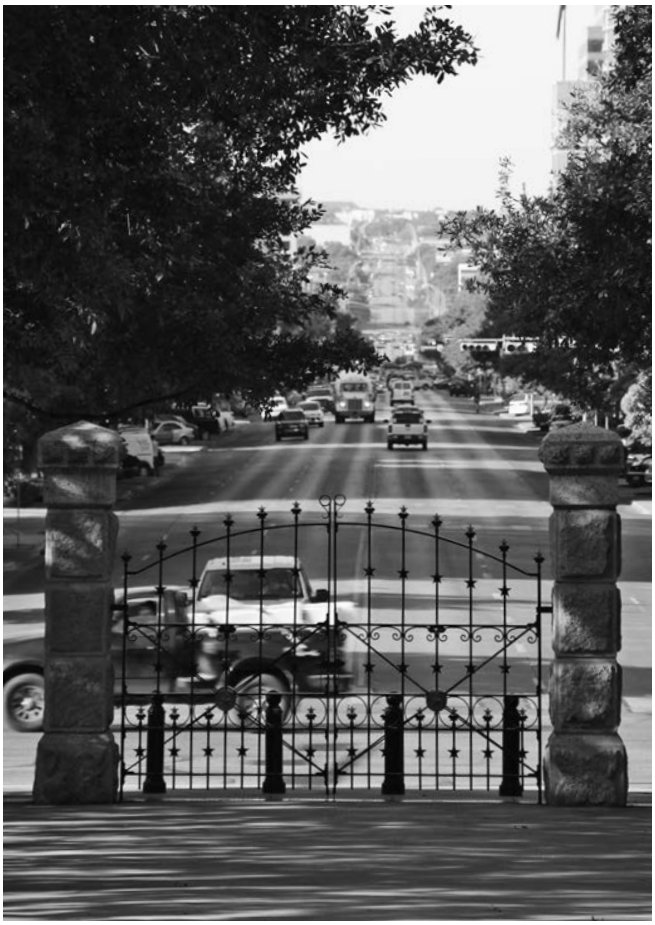
HB 189 eliminates the statute of limitations for sexual assault if probable cause exists to believe that the defendant has committed the same or a similar sexual offense against five or more victims.

HB 1690 creates a special process for the prosecution of public officials and state employees accused of prohibited offenses including ethics violations. It moves prosecution of these cases from the Travis County Public Integrity Unit to the official's home county despite where the crime may have occurred. HB 1690 also sets up a special preliminary investigative process that must begin with the Texas Rangers before removal to the official's home jurisdiction.

SB 158 provides $10 million in grants to encourage local police agencies to equip peace officers with body cameras and requires departments that accept funding to follow specified rules.

Conclusion

The 84th Texas Legislature made incremental but important steps toward reforming our criminal justice system. Our state still has a long way to go to address systemic problems, so we remain hopeful that the bipartisan efforts of reform will continue into the interim as well as future legislative sessions.



ESTATE, GUARDIANSHIP, AND TRUST LAW

By William D. Pargaman

For additional information on statutory changes and a more-detailed version of these materials, including a list of effective dates, go to the author's firm website at snpalaw.com/resources/2015legislativeupdate.

Disclaimers

The Texas Uniform Disclaimer of Property Interests Act (**HB 2428**) is a "Tex-ified" version of the uniform act proposed by the Real Estate, Probate & Trust Law Section of the State Bar of Texas, found in new Chapter 240 of the Property Code (more information at texasprobate.com). Highlights include elimination of the nine-month deadline for disclaimers for state law purposes, provisions allowing fiduciaries to disclaim in certain circumstances, and more relaxed rules for delivering or filing disclaimers.

Decedents' Estates

The REPTL decedents' estate bill (**SB 995**)[1] contained a number of miscellaneous changes. Wills may now be modified or reformed to accomplish the testator's

tax objectives, qualify for government assistance, or correct a scrivener's error. The scrivener's error ground requires a higher burden of clear and convincing evidence. If the executor files an affidavit in lieu of inventory, copies no longer need to be sent to beneficiaries who weren't required to receive the Chapter 308 notice. Rules voiding provisions in favor of ex-spouses are extended to revocable pour-over gifts to trusts, powers of appointment, and account designations.

Several changes apply to wills executed outside Texas. Self-proving affidavits conforming to the law of the state of the testator's domicile at the time of execution were recognized in 2011, and this has been extended to the law of the state where the will is executed or the testator has a residence. If a will has been probated elsewhere within four years of death, it may be probated and an administration opened here more than four years after death.

The definition of a payable-on-death account is expanded to include a transfer-on-death account, and a guardian or agent under a financial power of attorney is allowed to sign a POD agreement. If you use the one-step, self-proving affidavit, the verb tense is corrected in several places. When filing the Ch. 308 affidavit or attorney's certificate of notice to beneficiaries, you no longer need to include the beneficiaries' addresses. Another bill (**HB 3136**) requires small-estate affidavits to identify the assets that are considered exempt. "Homestead" and "exempt property" are limited to property that would be eligible to be set aside during an estate administration.

Guardianships

The REPTL guardianship bill (**HB 1438**) also featured several miscellaneous changes. An existing bond will remain in effect while a guardianship is transferred to another court. If there is no guardianship estate, costs may be assessed against a Chapter 1301 management trust. An interested person wishing to intervene in a guardianship proceeding must file a timely motion, serve all parties, state the grounds for intervention, and attach a pleading setting forth the purpose. The court has discretion to grant or deny the motion.

The verb tense of the one-step, self-proving affidavit in a guardianship declaration is corrected. The family member exception for criminal background checks for proposed guardians is eliminated, so only attorneys are exempt from those background checks. Provisions have been added facilitating the creation of safekeeping agreements prior to a guardian's qualification. The duration of a temporary guardianship pending a contest is limited to nine months, unless renewed following a hearing.

All management trustees, not just those with existing guardianships, must file an initial report of assets within 30 days of creation of the trust. A court may appoint an ad litem to sell property of a minor without a parent, guardian, or ward whose guardian is appointed by a court outside Texas. And court investigators may compel discovery of a customer's financial information.

Judges will be randomly assigned to hear recusal motions. Following recusal of a statutory probate judge, the presiding statutory probate judge will assign a new judge. The judge hearing a recusal motion may assess attorneys' fees and expenses if the judge determines the motion was groundless and filed in bad faith or for the purpose of harassment or clearly brought for unnecessary delay without sufficient cause. A movant may be enjoined from filing further recusal motions without the consent of the presiding statutory probate judge.

The Texas Judicial Council Elders Committee and the Texas Working Interdisciplinary Network of Guardianship Stakeholders proposed **HB 39** to foster the imposition of the least restrictive alternative on a ward or proposed ward. Numerous existing alternatives to guardianships are listed in the statute. An incapacitated person subject to a limited guardianship is presumed to retain capacity to make personal decisions regarding the person's residence. "Supports and services" are defined as resources and assistance that enable an individual to meet basic needs, manage health and finances, and make certain personal decisions. An attorney ad litem should investigate and discuss alternatives that might avoid the need for a guardianship or if certain powers of the guardian should be limited. A guardian ad litem should investigate the need for a guardianship and evaluate alternatives and supports and services. Any information gathered by the guardian ad litem is subject to court examination.

An attorney for the applicant in a guardianship proceeding must now complete the four-hour ad litem certification course, with one hour devoted to alternatives and supports and services. An application for a guardian must state whether alternatives and supports and services were considered, whether any are available and feasible, and whether the proposed ward's right to make residence decisions should be terminated. A physician's certificate must state whether any improvement in the ward's condition is possible, and if so, when the ward should be reevaluated. If that time is less than one year, the order must include a deadline for the updated certificate. The court must make a reasonable effort to consider a proposed ward's preferred guardian. The court's order must find by clear and convincing evidence that alternatives and supports and services were considered, but were not feasible, and must specifically state any rights retained by the ward and whether supports and services are needed to exercise those. Finally, absent an emergency, a guardian of the person must obtain court approval to place a ward

in a more restrictive care facility.

SB 1881 facilitates the use of "supported decision-making agreements," a less restrictive alternative to guardianship for adults who are not "incapacitated" but need assistance with daily living decisions. These authorize a "supporter" to provide supported decision-making without deciding on behalf of the adult; assist the adult in accessing and understanding relevant information; and assist the adult in communicating decisions. (Note that the language of SB 1881 is also included in HB 39.) **SB 1882** adds a ward's bill of rights to new Estates Code Section 1151.351.

Other REPTL Proposals

The REPTL decedents' estates bill clarifies that the "other" exempt property to be set aside after an inventory is filed and approved means the homestead and property listed in Property Code Section 42.002(a). The REPTL exempt property bill (**HB 2706**) increases exempt tangible personal property value limits from $30,000 for a single person and $60,000 for a family to $50,000 and $100,000, respectively (accounting for inflation since 1991). The REPTL TUTMA bill (**SB 1202**) increases the amount a fiduciary or obligor may transfer to a TUTMA custodianship from $10,000 or $15,000 to $25,000. And the REPTL disposition of remains bill (**HB 3070**) adds executors and administrators to the end of the list of persons with the right to control the disposition of remains. Any of the listed persons is authorized to seek reimbursement from the decedent's estate. The statutory form for designating agents becomes permissive, any authority granted in that form to a spouse terminates upon dissolution of the marriage, and appointments are valid without the agents' signatures, although an agent must sign before exercising the authority to dispose of the remains.

Trusts

The Texas Bankers Association proposed a bill related to directed trusts (**HB 3190**). Current Section 114.003 will become applicable only to charitable trusts, while all others will be subject to new Section 114.0031. A person with authority to direct, consent to, or disapprove a trustee's investment, distribution, or other decision is considered a fiduciary, unless the trust provides otherwise. A trustee acting in accordance with those directions is not liable for the consequences absent willful misconduct on the part of a trustee. A trustee is not liable for following the directions just because it knows of willful misconduct on the part of the adviser, nor is a trustee liable for any act resulting from the adviser's failure to provide a required consent after a request is made by a trustee, except in cases of the trustee's willful misconduct or gross negligence. Further, a trustee who does not receive the requested consent is not liable for ordinary negligence stemming from any decision it makes without that consent. A trustee has no duty to monitor the adviser's conduct, provide advice to or consult with the adviser, or communicate with or warn any beneficiary or third party. Absent clear and convincing evidence, a trustee's acts within scope of the adviser's authority are presumed administrative only.

Advance Directives

Several minor changes in the terminology used in a directive to physicians were enacted by **HB 3074,** so revise your forms. A more substantive change is that following a determination that life-sustaining treatment is medically inappropriate, the patient or surrogate may request a 10-day extension in many situations to seek out another facility that will provide the treatment.

A trustee is not liable for following the directions just because it knows of willful misconduct on the part of the adviser, nor is a trustee liable for any act resulting from the adviser's failure to provide a required consent after a request is made by a trustee.

Access to Probate and Estate Planning Initiative

Several bills were passed as part of an initiative to increase access to probate and estate planning for those having difficulty paying legal fees (more information at texasatj.org). **HB 705** provides a simplified process for obtaining an intestate's bank account and **HB 831** provides a simplified process for a surviving spouse to obtain information about the mortgage on a homestead. Financial institutions must now make certain disclosures to the customer regarding nontestamentary accounts when an account is opened (**SB 1791**). A TOD deed has been authorized based on the Uniform Real Property Transfer on Death Act (**SB 462**). And the Texas Supreme Court has been directed to promulgate forms for small estate affidavits, muniment of title pleadings, and simple wills for married and single individuals with adult, minor, or no children (**SB 512**). (**SB 478** is a similar bill relating to the promulgation of simple landlord-tenant forms.)

Note

1. The REPTL decedents' estates and guardianship bills incorporated additional non-REPTL proposals by the time they passed.

FAMILY LAW

By Brian L. Webb and Brant M. Webb

A complete listing of family law-related legislation may be found on the State Bar of Texas Family Law Section's website at sbotfam.org (access is restricted to members only). Unless otherwise noted, all legislation applies to proceedings commenced on or after the effective date. To access the full text of the bills discussed in this article, use the Texas Legislature Online Bill Lookup tool at legis.state.tx.us/BillLookup/BillNumber.aspx. For a comprehensive discussion of this legislation by the Texas Family Law Foundation and State Bar of Texas, go to texasbarcle.com/CLE/AABuy0.asp?sProductType=EV&lID=14449. The authors wish to express appreciation to the Hon. Judy Warne and Warren Cole for their tireless efforts in monitoring legislation.

Title 1: The Marriage Relationship

Persons authorized to conduct ceremony. **HB 2278** amends Section 2.202(a) of the Texas Family Code and authorizes certain current and retired associate judges (but not those in the family courts) to conduct a marriage ceremony. Effective September 1, 2015.

Rights of and discrimination against religious organizations. **SB 2065** amends Chapter 2 of the Family Code and adds Subsection G. The bill allows certain religious organizations and individuals employed by the same the freedom to refuse to: (1) perform any marriage, or (2) provide services, accommodations, facilities, goods, or privileges for a purpose related to the solemnization, formation, or celebration of any marriage if the action would cause the organization or individual to violate a "sincerely held religious belief." Further, SB 2065 provides that a refusal under those circumstances may not be the basis for any civil or criminal cause of action or any other action to penalize or withhold benefits or privileges from any protected organization or individual. (Note: Upon a two-thirds vote of all the members elected to each house—as provided by Section 39, Article III of the Texas Constitution—SB 2065 was implemented immediately.) Effective June 11, 2015.

Temporary restraining orders. **SB 815** amends Section 6.501(a) of the Family Code to expand the scope of prohibited actions that may be contained in a temporary restraining order granted during a divorce proceeding. Among other things, the bill brings the laundry list of prohibited actions further into the 21st century. Parties may now be prohibited from communicating and threatening each other via electronic voice transmission, video chat, or electronic messaging (email, social media, etc.). Additionally, the definition of property now includes intellectual property and electronically stored or recorded information. Effective September 1, 2015.

Title 2: Child in Relation to the Family

Uniform definitions. **SB 822** amends Title 2 of the Family Code by adding Subtitle E. The bill provides that the definitions under Chapter 101 of the Family Code (i.e., "suit affecting the parent-child relationship" definitions) apply to Title 2. Additionally, SB 822 provides that Chapter 107 (special appointments and custody/adoption evaluations) applies to the appointment of an attorney ad litem, guardian ad litem, or amicus attorney under Title 2. Effective September 1, 2015.

Title 4: Protective Orders and Family Violence

Dating violence and family violence. **SB 817** broadens the definition of dating violence under Section 71.0021(a) of the Family Code to include an act committed against an applicant for a protective order. Additionally, the bill broadens the definition of family violence and the definition of abuse under Section 71.004. Finally, SB 817 amends Section 153.005 of the Family Code by requiring the court to consider certain factors. Effective September 1, 2015.

Title 5: The Parent-Child Relationship and Suit Affecting the Parent-Child Relationship

Disclosure of family violence. A parent who is appointed

conservator of a child must disclose certain information regarding family violence. **SB 818** amends Section 153.076 of the Family Code and broadens the mandatory disclosure requirements in situations where a conservator: (1) establishes a residence with a person who the conservator knows is the subject of a final protective order sought by an individual other than the conservator that is in effect on the date the residence with the person is established; (2) resides with, or allows unsupervised access to a child by, a person who is the subject of a final protective order sought by the conservator after the expiration of the 60-day period following the date the final protective order is issued; or (3) is the subject of a final protective order issued after the date of the order establishing conservatorship. Effective September 1, 2015. (Section 153.076 applies, as amended, to a suit to modify a court order rendered before the effective date.)

Associate judges and name changes. **SB 812** amends Chapter 201 of the Family Code and allows for appointment of associate judges in family law proceedings involving a name change. Effective September 1, 2015.

Enforcement of temporary orders. **HB 3121** amends Chapter 157 of the Family Code and adds Subsection E. A motion for enforcement may be filed to enforce "any provision" of either a temporary or final order rendered in a suit, and the court may enforce by contempt *any provision* of a temporary or final order. Subsection E defines a temporary order to include a temporary restraining order, standing order, injunction, and "any other temporary order" rendered by a court. Effective September 1, 2015.

Temporary orders in modification suit. **HB 1500** amends Section 156.006 of the Family Code and adds Subsection (b)(1). A person must execute and attach an affidavit when filing a motion for a temporary order requesting that the designation of the person who has the exclusive right to designate the primary residence of the child under the final order be changed because the present circumstances would significantly impair the child's physical health or emotional development. This affidavit must contain facts based on the person's personal knowledge (or the person's belief based on representations made to the person by a person with personal knowledge) that support the allegation that the child's present circumstances would significantly impair the child's physical health or emotional development. The court shall deny the relief sought and decline to schedule a hearing on the motion unless the court determines, *on the basis of the affidavit*, that facts adequate to support the allegation are stated in the affidavit. If the court determines that the facts stated are adequate to support the allegation, it shall set a time and place for the hearing. Effective September 1, 2015.

Child custody evaluations. **HB 1449** amends Chapter 107 of the Family Code by, among other things, replacing the term "social study" with "child custody evaluation." An order for a child custody evaluation must include: (1) the name of each person who will conduct the evaluation, (2) the purpose of the evaluation, and (3) the specific issues or questions to be addressed in the evaluation. HB 1449 raises the minimum qualifications for a child custody evaluator. Significant changes include an education level of "at least" a master's degree (no longer a bachelor's degree) or a license to practice medicine in Texas and a board certification in psychiatry. Pursuant to Section 104.008, only the child custody evaluator is permitted to make a custody recommendation. Effective September 1, 2015. (Changes in the law apply only to suits affecting the parent-child relationship that are filed on or after March 1, 2016.)

Definition of "school." **SB 821** amends the definition of "school" under Section 101.028 of the Family Code by replacing references to "primary" school with "elementary" school. A reference to elementary school includes pre-K. These nonsubstantive changes are intended to conform references to "school" in the Family Code to usage in other law. Effective September 1, 2015.

Dental insurance. **SB 550** amends the Family Code to include provisions requiring dental support for a child who is the subject of a child support order. "Dental insurance" and "dental support" are defined under Chapter 101 of the Family Code. Effective September 1, 2018. (Yes, 2018. That is not a typo.)

Additional Legislation

Digitized signatures. **SB 813** amends the Family Code to allow for digitized signatures (graphic images of handwritten signatures having the same legal force and effect for all purposes as handwritten signatures) on pleadings or orders in proceedings initiated under Title 1, Title 2, or Title 4 of the code. Effective September 1, 2015.

Waiver of citation. **SB 814** amends the Family Code to allow a party to waive the issuance or service of citation in certain proceedings. A waiver may be executed in divorce proceedings under Chapter 6 and proceedings under Chapters 31 and 45 and Title 5 of the Family Code. The party executing the waiver may not sign it using a digital signature. Further, a waiver executed by a party who is incarcerated is not required to be notarized. Effective September 1, 2015.

INSURANCE LAW

By Daniel Kruger

The 84th session of the Texas Legislature enacted numerous changes to the Texas Insurance Code, many of which increased consumer protection in the State of Texas. Several of these updates are discussed more fully in this article.

Delivery of Insurance Policies

Chapter 525 has been added to the Insurance Code. It requires personal automobile or residential property insurance companies, the Texas Windstorm Insurance Association, the FAIR Plan Association, and the Texas Automobile Insurance Plan Association to deliver a policy to the policyholder, or to the insurer's agent for delivery to the policyholder, not more than (a) 30 days after the effective date if the policy term is more than 30 days; (b) the 10th day after the effective date if the policy term is more than 10 days but fewer than 31; or (c) within the policy period for a policy with a term of 10 days or fewer. An insurer to whom this chapter applies is required to deliver a renewed or amended policy to the policyholder or to the agent not later than 15 days after receiving such a written request.[1]

Consumer Inquiry

Chapter 544 has been expanded to apply to standard fire, homeowner's, or farm and ranch owner's insurance policies and also to include a farm mutual insurance company, a county mutual insurance company, a Lloyd's plan, and a reciprocal or interinsurance exchange.[2] The insurer is now prohibited from: (a) using an underwriting guideline or increasing a rate based solely on whether a consumer inquiry has been made, or (b) charging a rate that is different from the rate charged to other individuals for the same coverage. In addition, insurers are now prohibited from assigning a rate consequence solely to a consumer inquiry or a claim filed by an insured under a personal automobile insurance policy that is not paid.[3]

Unfair Methods of Competition Regarding Discount Health Care Programs

It is now an unfair method of competition or an unfair or deceptive act or practice for a discount health care program operator to require a pharmacy or pharmacist to: (a) participate in a specified provider network as a condition of processing a claim for prescription drugs under the discount health care program, or (b) participate in, or process claims under, a discount health care program as a condition of participation in a provider network.[4]

It is also unfair or deceptive for a discount health care program operator to pay any consideration to a health care service provider or an employee of a provider in order to: (a) encourage an individual to claim a discount for prescription drugs under a discount health care program, or (b) include discount health care program information on a prescription for a drug or in accompanying materials.[5] It is also unfair or deceptive for a program operator to provide written prescription forms that could reasonably mislead an individual to believe that the program is or provides coverage similar to health insurance.[6]

Health Maintenance Organization

An HMO is now prohibited from: (a) terminating participation of a physician or provider solely because they inform an enrollee of the full range of physicians and providers available,[7] and (b) requiring a physician, dentist, or provider to notify a current, prospective, or former patient, or a person designated by the patient, that the provider is out-of-network if the notifying form is intended

or presented in a manner that is intended to intimidate the patient.[8]

Annuity Contracts

Due to the amendment of Chapter 1116, the commissioner is now authorized to adopt reasonable standards for contingent deferred annuity contracts, including: (a) standards for the review and approval by the Department of Insurance, and (b) criteria to be used in approving the contracts as well as replacement, suitability, and disclosure requirements that are consistent with regulations from the National Association of Insurance Commissioners (this will include the advertising of contracts).[9]

Coordination of Dental Benefits

Chapter 1203 now includes insurance policies that provide dental benefits (not separate dental policies that exclusively provide noncoordinated fixed indemnity benefits for dental care).[10] If an insured is covered by at least two insurance policies that provide dental benefits, the primary insurance company must exhaust its benefits before the secondary insurer is required to pay for services that exceed the primary's limits. An insurance company subject to this provision may not deliver, issue for delivery, or renew a policy if it uses the following reasons to exclude or reduce the payment of dental benefits: (a) the dental benefits are payable, or have been paid to or on behalf of the insured, under another policy; and (b) the exclusion or reduction would apply before the full amount of the expenses covered by both policies have been paid.[11] Any provision that violates this section is void.[12]

Preferred Provider Benefit Plan

In Preferred Provider Programs, insurers provide payment for an above-basic level of coverage. If the insured person uses a preferred provider, an insurance company may not prohibit or attempt to prohibit, penalize, terminate, or otherwise restrict that preferred provider from communicating with the insured about the availability of out-of-network providers.[13] An insurer may not terminate the contract of or otherwise penalize a preferred provider solely because the provider's patients use out-of-network providers.[14] The insurance company's contract with the preferred provider may require that, before making an out-of-network referral, the preferred provider inform the insured that he or she: (a) may choose a preferred provider or an out-of-network provider, and (b) may incur higher out-of-pocket expenses if choosing the out-of-network provider. The preferred provider must inform the insured if it has a financial interest in the out-of-network provider.[15] An insurer may not require a physician or provider to furnish a current, prospective, or former patient, or a person designated by the patient, with a notification form stating that the physician or provider is out-of-network if the form contains information or is presented in a manner that is intended to intimidate the patient.[16]

Access to Optometrists and Ophthalmologists

Chapter 1451 now prohibits a managed care plan from directly or indirectly: (a) controlling or attempting to control the professional judgment, manner of practice, or practice of an optometrist or therapeutic optometrist; (b) employing an optometrist or therapeutic optometrist to provide a vision care product or service; (c) paying an optometrist or therapeutic optometrist for a service not provided; (d) restricting or limiting choice of sources or suppliers of services or materials; or (e) requiring an optometrist or therapeutic optometrist to disclose a patient's protected health information unless authorized by the patient or permitted under federal law.[17] Optometrists or therapeutic optometrists must now disclose any business interest they have in an out-of-network supplier or manufacturer to which they refer the patient.[18]

Cost for Pharmacy Drug Benefit

Chapter 1369 has been expanded to require a health benefit plan issuer or pharmacy benefit manager to: (a) disclose to a pharmacist or pharmacy (upon entering into a contract or upon request) the sources of data used in formulating maximum allowable cost prices,[19] (b) establish a process that will eliminate drugs from maximum allowable cost lists or modify maximum allowable costs prices to remain consistent with changes in pricing data,[20] (c) provide a process that readily accesses the applicable maximum allowable cost list,[21] and (d) provide a procedure for pharmacists or pharmacies to appeal a drug's maximum allowable cost price 10 or fewer days after making a pharmacy benefit claim for the drug.[22] The health benefit plan issuer or pharmacy benefit plan manager is also prohibited from charging or holding a pharmacist or pharmacy responsible for a fee related to the claim adjudication process.[23]

Tests for Ovarian and Cervical Cancer

Chapter 1370 now requires that a health benefit plan covering diagnostic medical procedures must cover expenses for annual diagnostic examinations for the early detection of ovarian cancer or cervical cancer.[24]

Disclosure of Provider Status

The definition of "facility-based physician" has been expanded to include an assistant surgeon.[25] If the facility-based physician bills a patient covered by a preferred provider plan or a non-contracted plan, the billing statement shall contain a conspicuous, plain-language explanation of the mandatory mediation process available under Chapter 1467 if the amount owed is greater than $500.[26]

Digital Network Drivers

Chapter 1954 has been added to require that companies using a digital network to connect individuals with company drivers who provide fee-based prearranged rides carry insurance polices with: (a) a minimum coverage with a total aggregate limit of liability of $1 million for death, bodily injury, and property damage for each incident; (b) uninsured or underinsured motorist coverage; and (c) personal injury protection coverage.[27] The company driver is required to carry proof of insurance that satisfies this requirement.[28] The company is required to disclose to the driver that a personal automobile insurance company is allowed to exclude coverage for any loss or injury that occurs while employed as a company driver.[29]

Title Insurance Escrow Officer

Title insurance companies now must appoint escrow agents and file a written appointment with the Department of Insurance on the form provided.[30] The department is required to make available to the public the name of each escrow officer, the license number, continuing education compliance status, and appointment history.[31] The appointment form must: (a) certify that the individual is a bona fide employee of the agent or direct operation making the appointment, (b) certify that the agent or direct operation has an office in Texas, (c) be signed and sworn to by the agent or direct operation and by the escrow officer, and (d) certify that the escrow officer is covered by a surety bond or deposit.[32]

Licensed Public Insurance Adjuster

A public insurance adjuster is now prohibited from: (a) directly or indirectly soliciting employment for an attorney, or (b) entering into a contract with an insured for the primary purpose of providing an attorney referral and without intending to perform services customary of licensed public insurance adjusters. This provision does not prohibit a public insurance adjuster from recommending a particular attorney,[33] but does prohibit the adjuster from having an insured sign a representation agreement[34] and from accepting a valuable consideration in exchange for the referral to any attorney, appraiser, umpire, construction company, contractor, or salvage company.[35] The Deceptive Trade Practices Act has been amended accordingly.[36]

Expedited Review by a Utilization Review Agent

When individuals are denied prescription drugs or intravenous infusions for which they were receiving health insurance policy benefits, a notice of an adverse determination must now include a description of the right to an immediate review by an independent organization.[37] The review must be conducted not later than 30 days before the prescriptions or infusions will be discontinued.[38] The procedure for appealing an adverse determination must include a review by a health care provider that has not previously reviewed the case and that is of the same or a similar specialty as the health care provider that would typically manage the condition, procedure, or treatment.[39]

Direct Primary Care

Physicians who agree to provide direct, ongoing primary care services for a patient in exchange for a direct fee from the patient may not bill an insurance company or a health maintenance organization for direct primary care that is paid pursuant to the medical service agreement.[40] A physician providing direct primary care is not considered an insurer or health maintenance organization, and the physician is not subject to regulation by the Texas Department of Insurance for the direct primary care, nor is a medical service agreement considered a health or accident insurance policy.[41]

Notes

1. Texas Insurance Code, Section 525.002.
2. Texas Insurance Code, Section 544.552.
3. Texas Insurance Code, Section 1953.051.
4. Texas Insurance Code, Section 562.055.
5. Texas Insurance Code, Section 562.056.
6. Texas Insurance Code, Section 562.056(b).
7. Texas Insurance Code, Section 843.306(f).
8. Texas Insurance Code, Section 843.363(a-1).
9. Texas Insurance Code, Section 1116.003.
10. Texas Insurance Code, Section 1203.051.
11. Texas Insurance Code, Section 1203.053.
12. Texas Insurance Code, Section 1203.054.
13. Texas Insurance Code, Section 1301.0058(a).
14. Texas Insurance Code, Section 1301.0058(b).
15. Texas Insurance Code, Section 1301.0058(d).
16. Texas Insurance Code, Section 1301.067(a-1).
17. Texas Insurance Code, Section 1451.156(a).
18. Texas Insurance Code, Section 1451.156(e).
19. Texas Insurance Code, Section 1369.354(c).
20. Texas Insurance Code, Section 1369.355.
21. Texas Insurance Code, Section 1369.356.
22. Texas Insurance Code, Section 1369.357.
23. Texas Insurance Code, Section 1369.402.
24. Texas Insurance Code, Section 1370.003(a).
25. Texas Insurance Code, Section 1456.001(3) and Health and Safety Code, Section 324.001(8).
26. Texas Insurance Code, Section 1456.004(c).
27. Texas Insurance Code, Section 1954.052.
28. Texas Insurance Code, Section 1954.056.
29. Texas Insurance Code, Section 1954.101.
30. Texas Insurance Code, Section 2652.002.
31. Texas Insurance Code, Section 2652.006.
32. Texas Insurance Code, Section 2652.1511(b).
33. Texas Insurance Code, Section 4102.158(d).
34. Texas Insurance Code, Section 4102.158(e).
35. Texas Insurance Code, Section 4102.164.
36. Texas Business and Commerce Code, Section 17.46(b)(31).
37. Texas Insurance Code, Section 4201.303(c).
38. Texas Insurance Code, Section 4201.304(b).
39. Texas Insurance Code, Section 4201.357(a-1).
40. Texas Occupations Code, Section 162.254.
41. Texas Occupations Code, Section 162.253.

REAL ESTATE LAW

By Richard A. Crow and Richard L. Spencer

This article is drawn from the final report of the Real Estate Legislative Affairs Committee of the Real Estate, Probate & Trust Law Section of the State Bar of Texas. During session, Texans' elected representatives introduced 6,476 bills and joint resolutions. Among those, the committee identified more than 2,241 to track. The authors chose for inclusion in this report four bills that we believed would be of interest to practitioners of Texas real estate law, but readers are encouraged to review the final report prepared by RELAC, as there are other bills that may also be of interest. (The final report is available at reptl.org; access is restricted to section members only.)

HB 2063. Residential foreclosures usually require the designation of a substitute trustee (to replace the original trustee), and nearly all residential deeds of trust allow substitution without formality, except that it be in writing. Appointments have no practical function in real estate records unless a foreclosure actually occurs, and only appointments related to actual sales matter. Thus, recorded appointments designating substitute trustees for sales that do not occur add nothing and may actually confuse the state of title.

HB 2063 simplifies and clarifies by further defining the process for a lender to designate a substitute trustee to conduct the foreclosure sale. This law allows the notice of sale, served on the borrower under the Texas Property Code, to also act as the written designation of a substitute trustee. It will be recorded as an attachment to the substitute trustee's deed and signed by an attorney with that attorney's bar number. Current law already requires that the notice of sale identify and give an address for the substitute trustee(s) and that the notice be served on borrowers, posted at the courthouse, and filed with the county clerk where the property is located. HB 2063 also permits the recording of other documents that may be proof of satisfaction of certain foreclosure prerequisites. Thus, this bill facilitates the organization of all foreclosure information in one document in the real property records, preventing duplication and confusion.

It is important to note that this bill should not and does not prevent other historically used methods for document-

ing foreclosure events. An appointment of substitute trustee or resolution can still be recorded in other appropriate places or times in the real property records. Consumers should not be disadvantaged in any way by this change. To the contrary, this law should actually enhance their notice of important facts about the foreclosure early in the process.

HB 2066. This bill allows a trustee to correct errors and omissions in a foreclosure sale that has already occurred. It is to no one's benefit to have a defective foreclosure sale. Such a sale merely clouds the title to the property in question and prompts time-consuming litigation. In modern legal practice, facts that would have affected a foreclosure sale, if known, occasionally are not discovered until after the sale occurs. Such facts might include a bankruptcy filed immediately before the sale or a suit invoking an automatic stay under Texas Rule of Civil Procedure 736. A receivership, an undiscovered dependent probate or administration, or death of an intestate borrower could also impair or render a foreclosure sale void. A workout may be achieved at the last minute before a sale, but that information does not reach the selling trustee quickly enough.

A TOD may not be revoked by a will, which is perhaps counter-intuitive and should be stressed to anyone electing to use a TOD.

Where such mistakes occur and can be promptly identified, it is important that they be promptly corrected. Rather than having an unsaleable property, resulting in lengthy and unproductive litigation, this addition to Chapter 51 of the Property Code allows a trustee to rescind a sale without judicial action, if done within 60 days. This change requires a trustee to return the funds to a purchaser, with interest, to eliminate harm to a third party, and it essentially restores the loan parties to their pre-sale rights and positions. Once rescinded, defects could be corrected and a "clean" sale would result, making title more certain. Neither third-party purchasers nor borrowers would be damaged by this streamlined corrections process.

HB 2067. This law gives the parties to a mortgage loan transaction more flexibility and certainty. Increasingly, federal and state regulation and federally backed foreclosure avoidance programs can make the default resolution (whether through workout or foreclosure) a very lengthy process.

Texas caselaw currently implies that notices of acceleration can be waived and the related installment loan can be put back on an installment basis. But decisional law reaches varying conclusions about how that waiver or rescission can be effectively accomplished. Texas courts mostly agree that acceptance of payments is effective to reinstate a defaulted loan and beyond that the law is mixed and case-specific. Courts have held Civil Practice and Remedies Code Section 16.035 to be a general statute of limitations and not a catchall, so fact-specific limitations "tolling" concepts are frequently at play, making it difficult to calculate when a limitations period may expire. This uncertainty on how to waive an acceleration to restore a loan's installment character encourages litigation. Because caselaw is made in diversity jurisdiction cases, federal courts guessing at what Texas courts would do are more frequently the source of that decisional law. This bill gives them direction.

HB 2067 provides a clear and uniform rule that allows a unilateral waiver of a unilateral act as well as acceleration of the debt, and it places the borrower and the lender in their original positions. By having a statutory method to essentially reset the clock, both parties can be assured that they have time to work toward an agreement. Forcing a deadline rarely results in satisfactory compromise.

SB 462. This bill, also called the Texas Real Property Transfer on Death Act, adds Chapter 114 to the Estates Code and creates the "transfer on death deed," which will allow for the transfer of real property after the transferor's death without the necessity of probate. A TOD does not create any legal or equitable interests in the designated beneficiary, as such interests vest upon the death of the transferor.

To be effective, a TOD must: (1) contain the same legal requirements as a recordable deed, (2) state that the interest in real property to the designated beneficiary shall transfer upon the transferor's death, and (3) be recorded in the applicable real property records before the transferor's death. A helpful sample form of TOD is included in the statute to ensure compliance with the statute.

A TOD may not be revoked by a will, which is perhaps counter-intuitive and should be stressed to anyone electing to use a TOD. Instead, a TOD may be revoked only by one of the methods set forth in the statute, including by recording of an instrument specifically revoking the TOD or recording a subsequent TOD.

Because the TOD is brand new to Texas, it might be prudent to exercise some caution before advising a client to use one; however, attorneys should at least consider this option when advising clients seeking to limit or even eliminate the need for probate.

THE TEXAS JUDICIARY

By David Slayton

The 84th Legislature produced one of the most active sessions for the Texas Judiciary, with more than 1,500 filed bills affecting the branch. While just over 300 of those became law, several will have significant impact upon the function of the courts. This includes multiple bills requested by the policy-making Texas Judicial Council.[1] The following is a brief description of some new legislation that will directly affect the judiciary and attorneys who practice in Texas courts. All bills are effective September 1, 2015, unless otherwise indicated. A full legislative report published by the Texas Judicial Council is available at txcourts.gov/media/1047353/84th-tjc-legislative-report.pdf.

Truancy Reform

In his 2015 State of the Judiciary speech, Texas Supreme Court Chief Justice Nathan L. Hecht recognized that "playing hooky is bad." "But," he asked, "is it criminal?"[2] Hecht called for the Texas Legislature to decriminalize a student's failure to attend school while still ensuring accountability to attendance laws. The Legislature passed such a reform in **HB 2398,** which repeals both the criminal offense and the juvenile offense of truancy and replaces these with a new civil offense of truant conduct.

Judges hearing truant conduct cases are given similar remedies to existing ones in current law, except for criminal convictions and fines. A new Title 3A of the Texas Family Code sets out the procedural process for these cases and establishes a $50 fee to assist with funding. The law also requires courts to expunge conviction and dismissal records that occurred before the September 1, 2015, effective date, which is estimated to include more than one million cases from 1995 to 2015.

Improving the Guardianship System

Texas continues to see an increase in the number of residents who are over the age of 65. This "silver tsunami" is expected to triple the state's senior population by 2050.[3] With this already impacting the Texas courts,[4] the Texas Judicial Council studied and recommended several reforms to the guardianship system. **HB 39** enacts these reforms, focusing on five key areas:

Exploring alternatives to guardianship and supports and services. The law gathers a list of all statutory alternatives to guardianship in the Texas Estates Code provisions on guardianship, making it easier for attorneys, judges, and other interested parties to explore those options. The law requires that those involved in a guardianship proceeding certify that all alternatives to guardianship have been considered prior to the filing and granting of a guardianship. Lastly, it requires that judges, attorneys, and applicants consider whether supports and services could be used to prevent the need for a guardianship or limit the guardianship scope.

Ensuring judges have access to information about potential improvements in ward capacity. When proposed wards are evaluated by physicians, there is no requirement in current law that the physician report whether the proposed ward's condition might improve and in what period of time that improvement might occur. HB 39 requires the physician's certificate to include this information so that an individual might be reevaluated to determine if improvement terminates the need for continued guardianship.

Limiting the ability of guardians to move wards to more restrictive living facilities. HB 39 requires judges and attorneys to consider the proposed ward's ability to retain decision-making control over his or her personal residence. It also requires guardians to provide notice to the court and other interested parties before moving the ward to a more restrictive living facility. The court may schedule a hearing on the placement prior to the move or upon an objection by one of the interested parties. There was previously no requirement to take these actions.

Establishing a framework for supported decision-making agreements. Supported decision-making agreements are an alternative to guardianship whereby a person chooses an associate to help make decisions in the case that the person's capacity is limited. HB 39 and **SB 1881** (effective June 19, 2015) establish a statutory framework for these agreements.

Improving attorney education in guardianship. HB 39 requires the applicant's attorney to be certified as having successfully completed a course in guardianship law. This requirement has previously existed for court-appointed attorneys in a guardianship proceeding. The training is also increased to include an hour on alternatives to guardianship and supports and services.

New Courts

The Legislature passed **SB 1139** to form seven new district courts (the 440th, 446th, 451st, 469th, 470th, 505th, and 507th) and five county courts at law (No. 7 of Collin County, No. 5 of Fort Bend County, criminal court No. 16 of Harris County, and No. 4 and No. 5 of Cameron County) with varying creation dates. As part of the creation of the 451st District Court, SB 1139 abolished the County Court at Law of Kendall County.

Three-judge court for certain matters. **SB 455** provides for the convening of a special three-judge district court

for a suit regarding public school finance or redistricting matters filed against the state, a state officer, or a state agency. The attorney general is authorized to request that the chief justice of the Texas Supreme Court convene the special court. The law sets out the parameters of the selection of the judges, the venue, and other procedural matters. The Supreme Court is authorized to adopt rules for the operation and procedures of the court.

Grand Jury Selection Reform

HB 2150 makes several amendments to the Texas Code of Criminal Procedure and Government Code regarding the selection of grand jurors. In particular, the law eliminates the position of jury commissioner for the selection and impaneling of a grand jury and replaces it with a random selection system similar to that for petit juries.

Creation of Forms in Probate and Landlord-Tenant Matters

In an effort to assist litigants and attorneys practicing in probate and landlord-tenant matters, **SB 478** and **SB 512** require the Texas Supreme Court to promulgate certain forms and instructions. Once approved, court clerks are required to make the forms available in English and Spanish.

Expansion of Eligibility for Nondisclosure Orders

SB 1902 expands the types of criminal cases eligible for an order of nondisclosure and simplifies the process for certain types of cases. Individuals placed on deferred adjudication for most misdemeanor offenses would be eligible to obtain an order of nondisclosure without filing a petition (currently a separate civil case). The individual would still be required to pay a $28 fee for the order. In cases where the defendant is eligible for this type of an order of nondisclosure, the judge would be required to issue it upon the defendant's discharge and dismissal from the deferred adjudication case.

In certain misdemeanor cases and all felony cases, a defendant would still be required to file a civil petition and pay the required fees to obtain an order of nondisclosure. Individuals convicted of certain misdemeanors would be eligible to file a petition for an order of nondisclosure under certain conditions. This type of proceeding would require the filing of a new civil case and payment of the civil filing fees.

Remote Interpreters Authorized in All Criminal Proceedings

SB 1139 clarifies existing law in the Code of Criminal Procedure that telephonic interpreters can be used in all criminal proceedings, regardless of in which court the proceeding is filed.

Electronic Notices

SB 1116 authorizes judges and court clerks to send notices or documents required by civil or criminal statutes by email using the address registered with the electronic filing system or provided by the person. Notices requiring proof of delivery are not included.

Appointments and Fee Reporting

SB 1876 requires each court in a county of 25,000 or more to establish and maintain lists of attorneys ad litem, guardians ad litem, guardians, and mediators. The courts are required to appoint from the lists using a rotation system unless the parties agree on and the court approves the appointment. A court can deviate from the list in complex matters if certain factors are met. Courts are required to annually post each list at the courthouse and on the court's website.

SB 1369 requires court clerks, beginning in September 2016, to submit a report monthly to the Office of Court Administration indicating certain information about the payment of fees to attorneys ad litem, guardians ad litem, guardians, mediators, and competency evaluators. Courts that fail to do this would be ineligible for grant money awarded by the state or a state agency.

Judicial Bypass

HB 3994, effective January 1, 2016, changes the requirements related to the notice of and consent to an abortion for a minor. The new law prohibits courts from appointing the same individual as the minor's attorney ad litem and guardian ad litem. The venue requirements are modified to place restrictions on where the minor may file the petition. The standard of proof is increased from preponderance of the evidence to clear and convincing evidence with the court required to consider additional factors in making the determination. Courts must decide the cases within five business days (increased from two), and the law removes the automatic granting of the petition when that time frame is exceeded.

Indigent Defense and Civil Legal Aid Funding

The Legislature increased funding to the Texas Indigent Defense Commission by $7.5 million over the current biennium to assist in "closing the gap" between state and local indigent defense funding and in expanding the Regional Public Defender for Capital Cases.

The state increased funding for civil legal aid by $13 million, of which $10 million will be used to provide basic civil legal services to victims of sexual assault and $3 million will be used to provide legal assistance to veterans and their families. HB 1079 expanded the types of fines, fees, and other collections that can be allocated to the basic civil legal services fund.

Exoneration Review Commission

HB 48, effective June 1, 2015, established the Timothy Cole Exoneration Review Commission under the auspices of the Texas Judicial Council to review and examine Texas cases in which an innocent defendant was convicted

and subsequently exonerated after January 1, 2010. The commission must submit its report by December 1, 2016, to the governor, Legislature, and the Texas Judicial Council, at which time the commission is abolished.

Notes

1. Tex. Government Code Ch. 71.
2. Nathan Hecht, Chief Justice, Texas Supreme Court, The State of the Judiciary in Texas, Address Before the 84th Texas Legislature (Feb. 18, 2015), *in* Texas Bar Journal, April 2015, 282-285.
3. Lloyd B. Potter & Nazrul Hoque, Office of the State Demographer, *Texas Population Projections, 2010 to 2050* (November 2014). http://osd.state.tx.us/Publications/2014-11_ProjectionBrief.pdf.
4. The number of active guardianships in the state have increased by 60 percent in the past four years.

WATER LAW

By Mary K. Sahs

In the water law legislative arena, the continuing drought has shifted the emphasis from traditional sources of water supply to those generally referred to as "innovative technology." Desalination is addressed in a number of bills. Aquifer storage and recovery received comprehensive treatment. Personal use of gray water also moved forward. This article summarizes some of the major bills of general applicability affecting Texas water resources enacted into law by the 84th regular session. It does not attempt to cover all water bills from the session.

Desalination

The state moved forward with the use of desalted water as a source of supply, through desalination of brackish groundwater and seawater. For the first time, regional and state water planning must address "opportunities for and the benefits of developing large-scale desalination facilities for seawater or brackish groundwater ..." Additionally, the Texas Water Development Board's biennial progress report on desalination of seawater is expanded to include desalination of brackish groundwater. See **HB 30**.

Groundwater conservation districts under Water Code Chapter 36 manage the state's groundwater. The extent to which that authority and responsibility extends to brackish or salty groundwater has been an open question. The Legislature provides a partial answer in HB 30 by establishing a process to designate "brackish groundwater production zones," which arguably will be managed separately from fresh groundwater. The act aims to incentivize the development of brackish groundwater "in areas where that development would have a minimal impact on existing fresh groundwater use …" The TWDB must designate such zones to reduce the use of fresh groundwater. Protection of freshwater aquifers must be of paramount concern. The bill limits designation based on geology and hydrology, salinity, proximity to wastewater injection disposal wells, location in the Edwards Aquifer Authority and the state's two subsidence districts, and locations where slightly saline groundwater is a significant source of water supply. The act amends Water Code Chapter 16.

One impediment to widespread use of desalinated water is disposal of the brine, or concentrate, generated by desalting brackish groundwater. The concentrate is often disposed of by injecting it into wastewater disposal wells. In recent years, some of the regulatory hurdles making injection an expensive disposal method have been reduced. **HB 2230,** adding Water Code Section 27.026, continues that trend by expanding the types of regulated underground injection disposal wells that can be used for that purpose.

HB 2031 adds Chapter 18 to the Water Code to consolidate and streamline seawater desalination project permitting and regulatory requirements, such as water rights and wastewater discharge permits, and drinking water standards when applicable. Among other provisions, the new chapter directs the Parks and Wildlife Department and the General Land Office to identify in the Gulf of Mexico zones that are appropriate, taking into account protection of marine organisms, for the diversion of seawater and for the discharge of brine from the desalination. The new chapter also authorizes bed and banks conveyance of certain treated marine seawater.

HB 4097 addresses the use of seawater for desalination and for industrial use by adding Section 11.1405 to the Water Code and amends Utilities Code Chapter 39 to require that the Public Utility Commission study the adequacy of existing infrastructure for seawater desalination projects and the potential for such projects to participate in the electric power market.

Aquifer Storage and Recovery

In the simplest terms, aquifer storage and recovery is a process by which water is injected into an underground aquifer for storage and later withdrawn for beneficial use. Several state statutory and regulatory programs apply to such a project. Additionally, a project could be under the jurisdiction of a groundwater conservation district. **HB**

655 is intended to streamline and simplify the permitting process and to clarify the roles of the Texas Commission on Environmental Quality and GCDs.

Under HB 655, an entity with a water right permit or contract for surface water may use ASR to store the water without obtaining additional water rights authorization from the TCEQ. HB 655 also allows the TCEQ to issue water rights contingent on water being available during wetter years with higher river flows, thus allowing those "excess" flows to be stored using ASR.

In some instances, the source water is groundwater that has been transported to the ASR facility for injection into the underground reservoir. Under HB 655, any groundwater source, if located within a GCD, must follow the production and permitting rules of that GCD. The actual ASR injection and recovery wells, if located in a GCD, must be registered with the district and the operator of the wells must report injection and withdrawal volumes to the GCD. A GCD may not require permits for such wells nor are such wells subject to the district's spacing and production requirements or assessment of fees as long as the recovery volume does not exceed the injection volume.

As clarified by HB 655, the TCEQ has exclusive jurisdiction over the regulation and permitting of ASR injection wells.

Groundwater Regulation

The use of groundwater as a water supply source continues to be the focus of legislation. Groundwater has become increasingly regulated by GCDs because it is the only water source for a large part of Texas, is an alternate source for areas where surface water resources are dwindling, and is an often less-expensive source for all uses. This session, similar to all sessions since the end of the 1990s, the Legislature passed numerous bills addressing GCD regulation.

Designed to streamline processes and provide greater predictability about groundwater production permits, **HB 2179** changes the contested case process and **SB 854** streamlines the permit renewal process. For example, HB 2179 amends Water Code 36, Subchapter M to clarify that a GCD may act on uncontested permit applications at a public meeting; introduces a method for apportioning costs among parties to a contested case conducted by the State Office of Administrative Hearings; and revises the requirements related to a district's final decision after a contested case hearing. SB 854 requires renewal of a production permit without a hearing as long as the renewal does not include a request for a permit amendment that otherwise would require a hearing.

The availability of groundwater to meet water supply needs is addressed in a Water Code Chapter 36 process involving regional water planning, euphemistically called the groundwater management area joint planning process. The water availability related decisions made during this process, particularly the desired future conditions, are often disputed. **HB 200** establishes a process by which an affected person may initiate a contested case hearing, which will be heard by SOAH. The GCD may accept, amend, or reject the proposal for decision issued by SOAH. The district's final decision is appealable to the local state district court.

Practitioners interested in groundwater law should also see **HB 2767, HB 3163,** and **HB 4112**.

Protecting and Conserving Water Resources

A handful of bills address protecting and conserving water resources. For example, **HB 930** amends the Occupations Code, primarily to restore the Department of Licensing and Regulation apprentice programs for water well drillers and pump installers. **HB 1902** amends Health and Safety Code Section 341.039 so that the TCEQ may impose minimum standards for the use of gray water, designed to prevent contamination of the potable water supply.

Under **SB 912,** certain spills at local government-owned wastewater treatment facilities are exempt from TCEQ reporting requirements. To be exempt, the spill must be no more than 1,000 gallons and controlled to prevent entering state streams and to protect water supply sources, the public, and the environment. Codified in Chapter 26 of the Water Code.

For more on this subject, see **SB 1356** (sales tax exemption for water-efficient products), **HB 3264** (enforcing domestic wastewater treatment facility permits), **SB 551** (Water Conservation Advisory Council), **HB 949** (mitigation of water utility system water loss), and **HB 1146** (water system operator licensing).

Water Utilities

SB 1148 amends Chapters 5 and 13 of the Water Code to address issues that have arisen due to the transfer of the rate and certificate of convenience and necessity programs from the TCEQ to the PUC. One of the principle changes is to add Subchapter K-1 to Chapter 13, establishing the PUC's emergency order authority and procedures.

Surface Reservoirs

Few sites remain on Texas rivers and streams for construction of new surface water reservoirs. The conflicting interests of preserving the ecology of those water bodies and increasing the state's water supply are reflected in legislation from this session. **HB 1016** classifies segments of the Nueces, Frio, Sabinal, San Marcos, and Comal rivers as being of unique ecological value, thus generally prohibiting public construction of reservoirs. In **HB 1042,** the site of the proposed Ringgold Reservoir on the Little Wichita River is designated as having unique value for the construction of a reservoir. TBJ

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