

2023 Legislative Preview

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

Presented by:

Lauren Davis Hunt

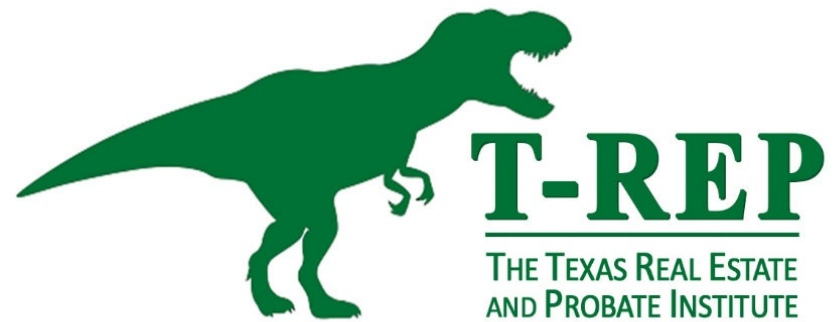
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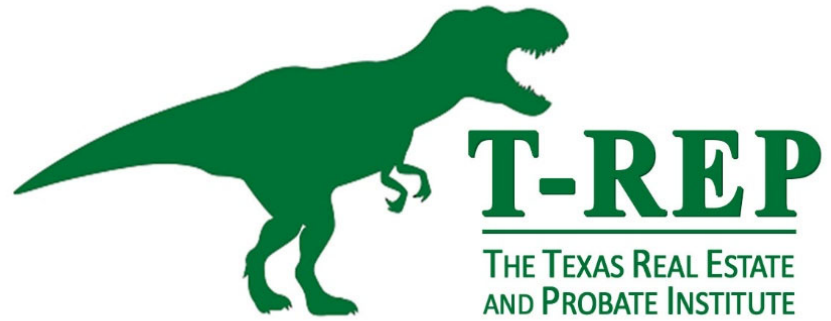
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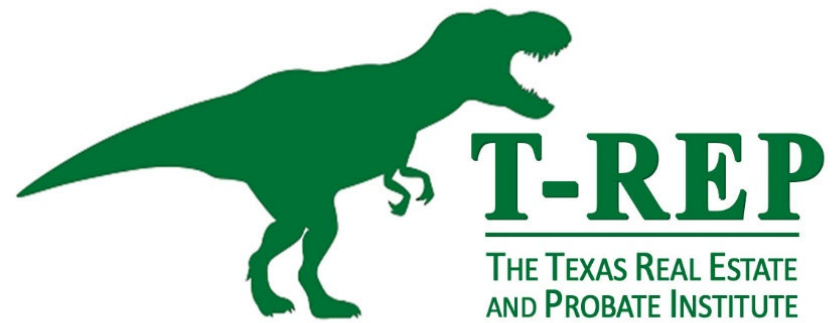
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Legislative Session

2023 T-REP Chair of Estate and Trust Legislative Affairs:

Lauren Davis Hunt, ldhunt@ohkslaw.com



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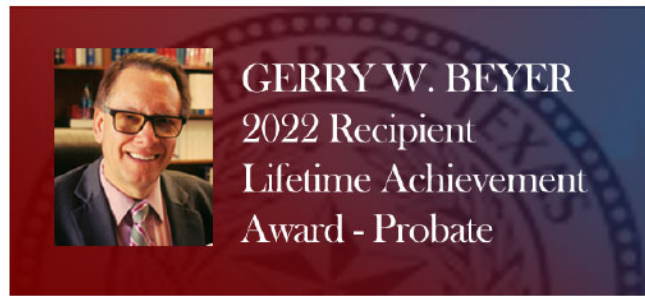
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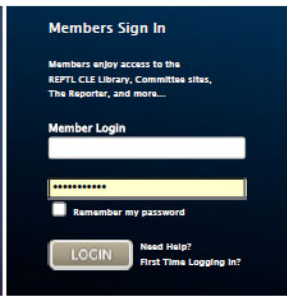
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- [2023 "Estate and Trust" Legislative Update](#)
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T-REP 2023 DECEDENT'S ESTATES BILL

Arielle Prangner

Chairs of Decedents' Estates Committee

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T-REP's 2023 Decedents' Estates Bill

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



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T-REP's 2023 Decedents' Estates Bill

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



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T-REP's 2023 Decedents' Estates Bill

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

DHL Express:

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

FedEx:

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

UPS:

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

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T-REP's 2023 Decedents' Estates Bill

Community Property Subject to Creditors' Claims

• **Current Law:**

- Probate Code 156 was titled “Liability of Community Property for Debts”
- When moved to EC 101.052, it was named “Liability of Community Property for Debts *of Deceased Spouse*”

Problem:

- Section should apply to debts of surviving spouse, too.
- Language of statute should conform to language of Ch. 453 re: Administration of Community Property

New Legislation:

- Changes title, clarifies language, but no substantive change.

Statutes amended: EC 101.052



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T-REP's 2023 Decedents' Estates Bill

Multi-Party Accounts

Clarifies that brokerage accounts are included in the types of accounts governed by TEC Ch. 113 regarding multi-party accounts.

Statute amended: EC 113.001



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T-REP's 2023 Decedents' Estates Bill

List of Property in Heirship Proceeding

Clarifies that you only have to list property subject to court's jurisdiction (i.e. within Texas) in proceeding to declare heirship



Statute amended: EC 202.005

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T-REP's 2023 Decedents' Estates Bill

Affidavit of Heirship as Evidence

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

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

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

Statute amended: EC 202.151

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T-REP's 2023 Decedents' Estates Bill

New procedures for serving minors 12+ years of age

Current Law:

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

2023 Proposal:

- Certain persons can waive personal service on behalf of minor under age of 16
- Minors 16+ can waive personal service

Statutes amended: EC 202.056 & 258.002



T-REP's 2023 Decedents' Estates Bill

Foreign Wills Exception

TEC 251.051 lists requirements for written, signed and attested will

TEC 251.053 says 251.051 does not apply to a written will executed in compliance with the law of a state or foreign country where the will was executed

Amendment: The 251.053 exception only applies if the foreign will does not meet the TX requirements listed in 251.051

Statute amended: EC 251.053

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T-REP's 2023 Decedents' Estates Bill

Felons and Estate Administration

Would allow a person convicted of a felony to qualify as executor/administrator of an estate IF:

- All distributees consent in writing, and
- The written consent acknowledges the person was convicted of a felony

Statute amended: EC 304.003



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T-REP's 2023 Decedents' Estates Bill

Unsworn Declarations in Lieu of Sworn Oath

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

Statutes amended: Multiple

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T-REP's 2023 Decedents' Estates Bill

Sales of Personal Property in Dependent Administration

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

Statute amended: EC 356.105



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T-REP's 2023 Decedents' Estates Bill

“Community Debts” are OUT!

• **Current Law:**

- There are references to “community debts” in several sections of the EC related to administration of a decedent’s estate

Problem: there’s no such thing as “community debts”

New Legislation:

- Removes reference to “community debts” and instead says “debts for which some community property is liable for payment”

Statutes amended: 453.003, 453.006, 453.007

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T-REP 2023 TRUST BILL – HB 2196

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Chair of Trusts Committee
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T-REP's 2023 Trust Bill: HB 2196

Revocable Trusts Qualifying as Homesteads

Benefits of homestead status:

Creditor protection (Property Code)

Tax exemption (Tax Code)

Tex. Prop. Code 41.0021(a)(1)



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T-REP's 2023 Trust Bill: HB 2196

Revocable Trusts Qualifying as Homesteads

Current statutes: To qualify as a homestead, Trust must say:

- Prop Code 41.0021(a)(1): settlor/beneficiary has right to occupy property “**at no cost**”
- Tax Code 11.13(j)(3)(A): settlor/beneficiary has right to occupy property “**rent free and without charge.**”

Tex. Prop. Code 41.0021(a)(1)

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T-REP's 2023 Trust Bill: HB 2196

Revocable Trusts Qualifying as Homesteads

The Fix: Harmonize the provisions of the Tax Code and the Property Code.

- Prop Code 41.0021(a)(1): settlor/beneficiary has right to occupy property “at no cost OR rent free and without charge”

Tex. Prop. Code 41.0021(a)(1)



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T-REP's 2023 Trust Bill: HB 2196

Spendthrift Provisions and Testamentary GPOAs

Trust beneficiary holds a testamentary general power of appointment over Trust property

Question: Is the Trust property that is subject to the power of appointment subject to creditor's claims?

Tex. Prop. Code 112.035



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T-REP's 2023 Trust Bill: HB 2196

Spendthrift Provisions and Testamentary GPOAs

Restatement 2nd: Property **NOT** subject to claims of creditors **unless** power is exercised

Restatement 3rd: Property **IS ALWAYS** subject to claims of creditors regardless whether power is exercised

Tex. Prop. Code 112.035



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T-REP's 2023 Trust Bill: HB 2196

Spendthrift Provisions and Testamentary GPOAs

Clarify the Law:

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

Tex. Prop. Code 112.035



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T-REP's 2023 Trust Bill: HB 2196

RULE AGAINST PERPETUITIES EFFECTIVE DATE

(c) “an interest in a trust must vest, if at all, not later than 300 years after the effective date of the trust...”

(b) The effective date of a trust is the date the trust becomes irrevocable.

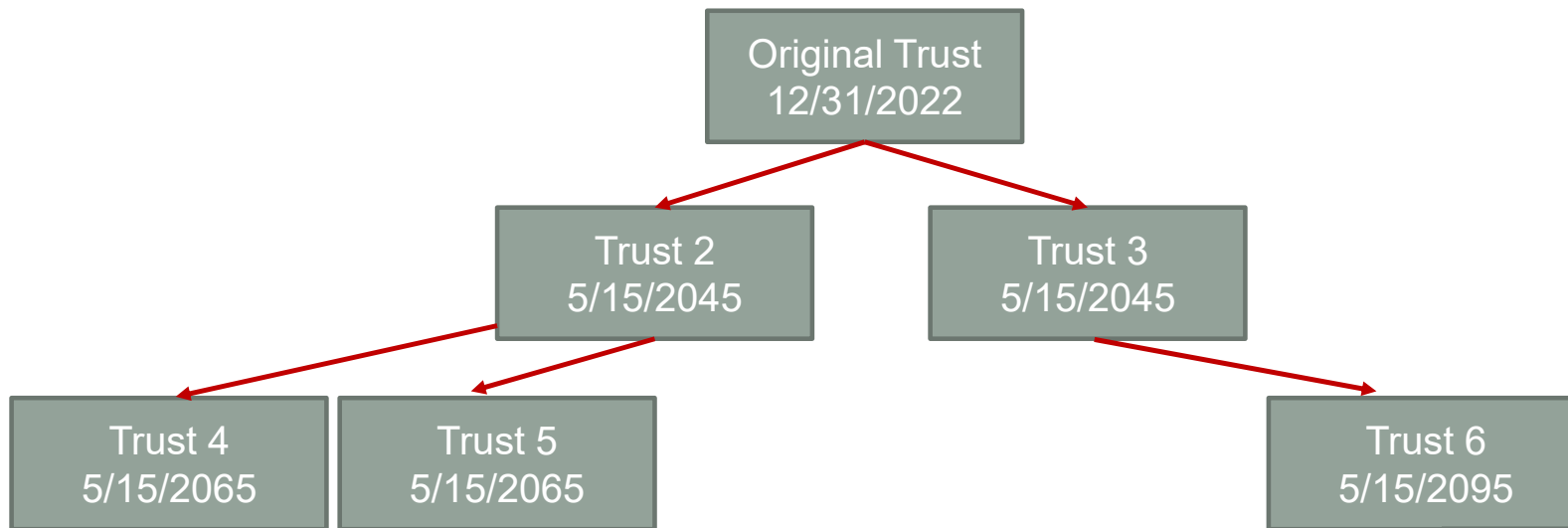
Tex. Trust Code 112.036(b)



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T-REP's 2023 Trust Bill: HB 2196

RULE AGAINST PERPETUITIES EFFECTIVE DATE



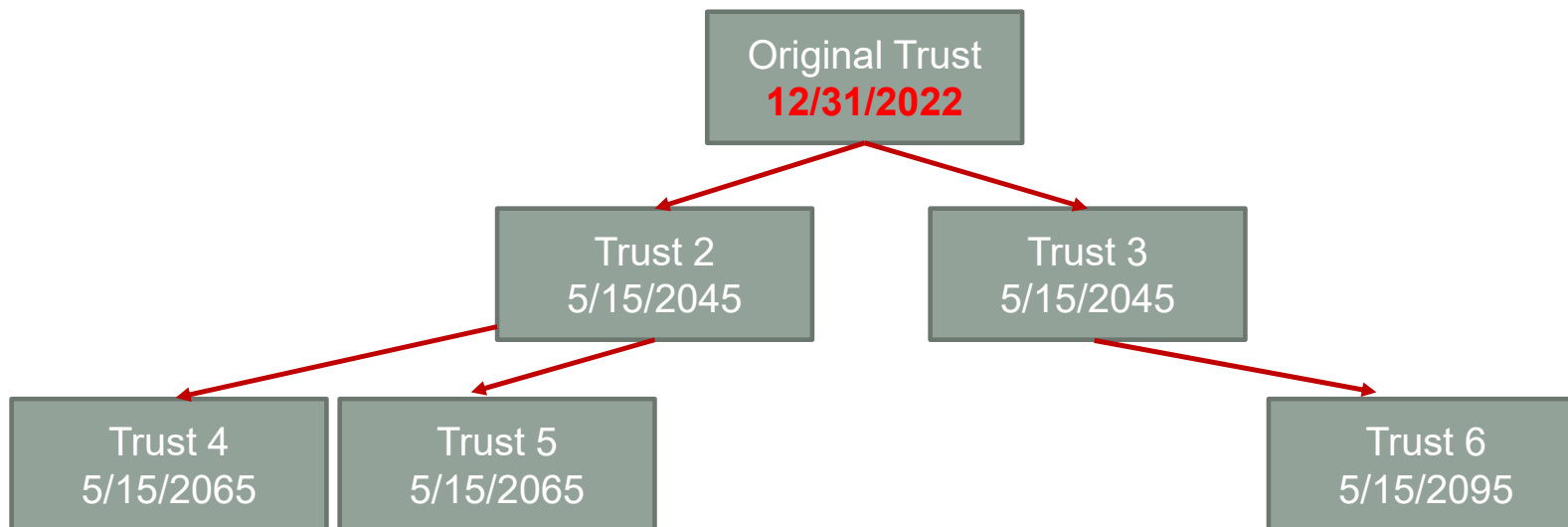
Tex. Trust Code 112.036(b)



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T-REP's 2023 Trust Bill: HB 2196

RULE AGAINST PERPETUITIES EFFECTIVE DATE



Tex. Trust Code 112.036(b)

T-REP's 2023 Trust Bill: HB 2196

Rule Against Perpetuities

Proposal clarifies when an interest in a trust must vest, if at all:
the Fertile Octogenarian and Methuseleh issue



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T-REP's 2023 Trust Bill: HB 2196

Decanting

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

Tex. Trust Code 112.0715



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T-REP's 2023 Trust Bill: HB 2196

Appointing Attorney ad Litem to Trust Proceeding

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

Tex. Trust Code 115.014(b)



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T-REP 2023 DURABLE POWER OF ATTORNEY BILL

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Co-Chairs of PAAD Committee



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T-REP's 2023 DPOA Bill

Statutory Durable Power of Attorney

Clarifies: a principal who signs a durable power of attorney must be an adult “**individual**” rather than a “person” (which can include a lot more than an adult “individual”).

Statute Amended: EC 751.002(5)



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T-REP's 2023 DPOA Bill

Effect of Appointment of Guardian on Validity of DPOA

	Temporary Guardian	Permanent Guardian
Authority of DPOA:	Automatically suspended	Automatically revoked
	<u>Unless</u> court orders otherwise	

Amendment: adds “unless court orders that the powers of the agent be suspended during pendency of guardianship of the estate”

Statute Amended: EC 751.133(a)

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T-REP's 2023 DPOA Bill

Statutory Durable Power of Attorney

Current Section 751.251: allows certain persons to “bring an action requesting a court to:

- construe, or determine the validity of or enforceability of a DPOA, or
- review an agent’s conduct under a DPOA and grant appropriate relief

Statute Amended: EC 751.251



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T-REP's 2023 DPOA Bill

Statutory Durable Power of Attorney

Current Section 751.251: allows certain persons to “bring an action requesting a court to:

- construe, or determine the validity of or enforceability of a DPOA, or
- review an agent’s conduct under a DPOA and grant appropriate relief

Proposed Amended Section 751.251:

- Would specify that the TX Dept. of Family Protective Services is a person who can bring this type of action, and
- Would allow a court to award reasonable and necessary costs and attorney’s fees as deemed equitable and just



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T-REP's 2023 DPOA Bill

Statutory Durable Power of Attorney

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

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T-REP 2023 MEDICAL POWER OF ATTORNEY BILL – HB 2589

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Co-Chairs of PAAD Committee



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T-REP's 2023 MPOA Bill – HB 2589

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

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REPTL MPOA Proposal – HB 2589

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



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T-REP's 2023 Removal of Remains Bill

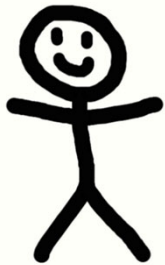
The order and identity of persons who must consent to remove decedent's
is the same as the persons who
have right to control initial disposition of remains



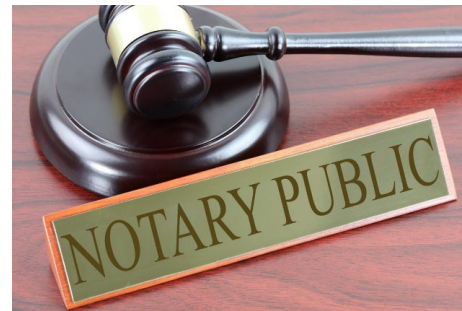
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T-REP's 2023 Anatomical Gifts Bill

When someone signs statement of anatomical gift for another person, the statement may be executed before two witnesses or a notary



OR



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T-REP 2023 GUARDIANSHIP BILL

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T-REP's 2023 Guardianship Bill

- Alternative to Certified Mail-Return Receipt Requested

Solution: Replace “registered or certified mail” with “qualified delivery method”



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T-REP's 2023 Guardianship Bill

Service on Attorney ad Litem

Proposal: Attorney ad Litem could accept service on behalf of Proposed Ward for pleadings filed after appointment of AAL.

Statute Amended: EC 1051.055



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T-REP's 2023 Guardianship Bill

Appointment of Successor Guardian

Current law: Surviving parent appointed guardian of adult incapacitated child can designate successor if surviving parent (1) dies, or (2) incapacitated.

* Current law only applies to parent appointed (a) guardian of the person, or (b) guardian of the person & estate, **but not** if only appointed guardian of estate

- **Proposed change:**

- (1) Allow surviving parent solely serving as GE to appoint successor;
- (2) Allow surviving parent to appoint if they resign

Statute Amended: EC 1104.103



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T-REP's 2023 Guardianship Bill

Guardian of Person Access to up to \$20,000

Proposal: allow guardian of person, upon motion and order of court, to manage and expend funds of ward up to \$20,000

Purpose: avoid need for guardian of estate when limited funds

Safety net: GP would file a bond and report annually each receipt/disbursement

Statute Amended: EC 1151.051(c)



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T-REP's 2023 Guardianship Bill

Notices to Unsecured Creditors

Amendment: A successor guardian would not have to publish another notice to unsecured creditors if a predecessor guardian already published notice

* This is already the law for notice to *secured* creditors.

Statute Amended: EC 1153.005



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T-REP's 2023 Guardianship Bill

Compensation to Guardian of Person

Amendment: a guardian of the person only could receive compensation up to \$3,000 annually, paid in monthly installments of \$250 per month

* This is the same amount allowed by 1155.202(a) for guardian of recipient of medical assistance

Statute Amended: EC 1155.002(a)



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T-REP's 2023 Guardianship Bill

Sale & Mortgage of Real Property up to \$250,000

Current law: permits sale and mortgage of real property by minors or wards without necessity of guardianship of the estate for property worth \$100,000 or less.

Amendment: increases amount to \$250,000

Statute Amended: EC 1351.001 et seq.

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T-REP's 2023 Guardianship Bill

Orders re: Community Property

Situation: spouse who is not incapacitated is unable to comply with order to deliver incapacitated spouse's ½ community property to guardian of the estate

Solution: would allow court to order third party in possession of such assets to deliver them to the guardian of the estate

Statute Amended: EC 1353.004

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T-REP's 2023 Guardianship Bill

Withdrawal of Funds by Non-Resident

Issue: withdrawal of funds owing to a nonresident minor or incapacitated person

Statute Amended: EC 1355.002



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NON-T-REP BILLS IN 2023

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NON-T-REP BILLS IN 2023

- HB 654 – Rep. Allison – “Independent Guardianship”
- HB 1430 – Rep. Meza - raises minimum wage for in-home Medicaid caregivers
- HB 1552 / SB 843 Guillen/Hinojosa – Trust accounting bill
- HB 1547 – Rep. Cook - Family law – reimbursement claims
- HB 942 – Rep. Dutton – relating to persons disqualified from serving as PR of decedent’s estate when divorce filed
- Electronic Wills

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