

Note:

PowerPoint and audio for the August 20, 2015, “CFPB Implementation” webinar is now be available on our website.

For Escrow Officer Credit please e-mail **one time only** to CEcertificate@stewart.com – for certificates, include:

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- ✓ Webinar Title

For this webinar, please include “**Estates Code and Related Matters**” in the subject line of your email.

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ADDITIONAL HOUSEKEEPING INFORMATION

Because of opinions expressed by the Texas Insurance Department concerning rebates, legal credit is available **only** to:

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We welcome any other lawyers to listen, but cannot provide continuing education credit to you.



Stewart Legal Services

Legislative Update 2015:
Estate Code and Related Matters

August 25, 2015

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PROMULGATED FORMS



HB512—Amends the Government Code by adding Section 22.020 such that the Supreme Court shall promulgate certain forms with instructions for use in probate matters including:

- small estate affidavits
- probate of a will as muniment of title
- simple will forms (married individual with an adult child; married individual with a minor child; married individual with no children; unmarried individual with an adult child; unmarried individual with a minor child; and unmarried individual with no children)

The forms and instructions must also be available in Spanish, but only for the purpose of assisting in the understanding of the form. Forms cannot be submitted in Spanish.



What you should know: The probate court shall accept a promulgated form so long as it has not been “completed in a manner that causes a substantive defect that cannot be cured.”

What you should do: If you have a form that appears to have a substantive defect, consult with an underwriter. If the form you receive is in Spanish, you will need an official translation.





HOMESTEAD



HB 3136—Amends Chapter 205 Estate Code to Add Section 205.000 to Define Homestead or Exempt as a Homestead or Either Related Exempt Property

What you should know:

It appears that this bill simply clarifies the common understanding of the term homestead to include other exempt property and not simply the home itself.





TEXAS DISCLAIMER ACT



HB 2428—Texas Disclaimer Act

The Texas Uniform Disclaimer of Property Interests Act (“Texas Disclaimer Act”) replaces the disclaimer sections contained in the Estates and Trusts Codes and can now just be found in the new Chapter 240 of the Property Code.





Summary of the Texas Disclaimer Act:

1. There is just one statute.

2. There is no state law time limit for disclaimers.

A disclaimer still may have to be made for tax purposes, but a disclaimer can be effective for state law purposes even if it is made more than nine months after decedent's death.

3. The technical requirements are less restrictive, but whether property is *ACCEPTED* remains key.

4. Different types of property are specifically addressed.

(i.e., survivorship property, beneficiary designation property, trust property, powers of appointment, disclaimer of a power by agent, etc.)

5. Fiduciary disclaimers are expanded with clear rules for different types of fiduciaries.



When should the disclaimant follow the new rules (under Chapter 240 of the Property Code) or the rules of prior law?

If the disclaimer is based on a decedent dying on or before November 30, 2014 the old law applies, including the 9-month deadlines + the notice and filing requirements.



If the disclaimer is based on a decedent dying on or after December 1, 2014, ***but before*** September 1, 2015 the disclaimant has a choice:

1. He/she may disclaim prior to September 1, 2015, following the old law, including the 9-month deadline and its rules about notice and filing;
2. or he/she may wait until September 1, 2015, or later and follow the new law.

(9-month deadlines under the former law do not apply, even though the death giving rise to the disclaimer occurred before the effective date of the new law, BUT the new notice requirements would apply.)



WHAT YOU SHOULD KNOW:

Under the new Texas Disclosure Act, different types of property each have different persons entitled to receive delivery of the disclaimers.

Disclaimers may be delivered by personal delivery, first-class mail, facsimile, e-mail or “any other method likely to result in the disclaimer’s receipt.”



WHAT YOU SHOULD DO:

Consult the Texas Disclaimer Act for the provisions that specifically relate to the type of property to be disclaimed and do not assume “one size fits all” for who gets the disclaimer. If you have any question on the timeframe for if the disclaimer falls under the old law or the new law, consult an underwriter.

Only accept disclaimers where receipt has been acknowledged by the appropriate recipient or mailed to the intended recipient by certified mail, return receipt requested, at an address the disclaimant in good faith believes is likely to result in the disclaimer’s receipt.



DURABLE POWERS OF ATTORNEY



HB 3316—Time limit for recording a durable power of attorney

This bill amends current law by imposing a **time limit** for recording a durable power of attorney (DPOA) for certain real property transactions. Current law (**Section 751.151**, Estates Code) requires that a durable power of attorney for real property transactions that require the execution and delivery of instruments be recorded in the office of the county clerk of the county in which the property is located. If the durable power of attorney is not recorded along with the instrument, the chain of title of the real property is broken and can cause problems in the future when it is unclear from the recorded documents who has power to convey the real property.

HB 3316 clarifies **Section 751.151** to state that a durable power of attorney must be filed ***no later than 30 days after the date the related instrument is filed for recording.*** Applies to any real property transaction entered into, on, or after September 1, 2015.



What you should know: The purpose of this bill appears to be to ensure that there are current DPOAs of record to evidence the authority of the agents/attorneys in fact to sign real estate instruments under the related DPOA, even if they could not file it beforehand. The *HRO Bill Analysis* summarized that the bill would make certain transactions **voidable by any person** if a durable power of attorney was required for the transaction and was not recorded on or before the 30th day after the instrument related to the transaction was filed for recording.

To avoid putting title insurers in the position of watching a transaction close without the DPOA already on file with the hope that one will be found and then filed within 30 days thereafter, you should still require the filing of the DPOA either **before or contemporaneously** with the instrument to which it relates and not allow late filings to cause the transaction to be voidable.



GUARDIANSHIPS



HB 39—Dealing with Guardianships

Chapter 1101, Estates Code

- Provides for a number of alternatives to guardianship
- Deals with duties of an attorney ad litem
- Affirms the right of the proposed ward to make personal decisions regarding residence
- Requires certain findings as to rights and powers of the guardian and the ward and proof required
- Creates a support decision-making agreement between the adult with a disability and a supporter



HB 39—Dealing with Guardianships

Underwriting Position: The supporter is not allowed to make decisions for the person but only gather information that would allow an informed decision. Accordingly, the supporter may not sign deeds or deeds of trust.



HB 1438—Relating to Guardianships and Other Matters Related to Incapacitated Persons

This bill makes many technical amendments to the Estates Code. For title insurance purposes, Section 8 amending **1101.001** defining the third degree of consanguinity may be useful to title examiners.

Section 14 amends **104.154** to provide an alternative to the self-proving affidavit for appointment of a guardian for the declarant's children in substantially the form stated in the statute.



OTHER MATTERS



SB 995—Amends various sections of the Estates Code:

Subsection added to the **Will Provisions Made Before Dissolution of Marriage** in **Sec. 123.001** to include irrevocable trusts such that unless the will provides otherwise, the former spouse or former spouse's family members will be treated as if they had failed to survive the testator or in other cases of nomination of an irrevocable trust as if they had died immediately before the dissolution of the marriage.

This new section would not apply if a court order or express provision of a contract relating to the division of the marital estate provided otherwise. The change only applies to an individual whose marriage is dissolved after 9-1-2015.





Section 123.052(a) relating to the revocation of certain nontestamentary transfers; treatment of former spouse as beneficiary under certain policies and plans – is amended to clarify the dissolution of marriage affects provisions in a trust instrument for *revocable* powers of appointment or nominations.

The change only applies to an individual whose marriage is dissolved after 9-1-2015.



Section 201.051 and **201.052** have been amended to limit maternal and paternal inheritance from a child's biological or adopted mother and/or father to only children (and their issue) "born before, or is in gestation at, the time of the intestate's death and survives for at least 120 hours" as stated under revised Sec. 201.056.

A person is:

1. Considered to be in gestation at the time of the intestate's death if insemination or implantation occurs at or before the time of the intestate's death; and
2. Presumed to be in gestation at the time of the intestate's death if the person is born before the 301st day after the date of the intestate's death.





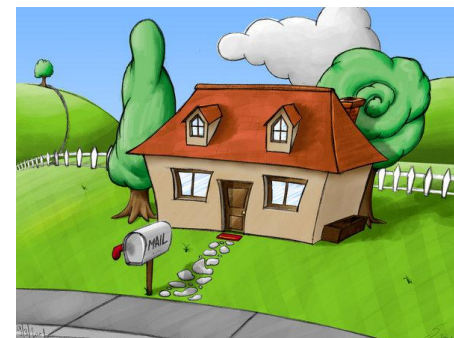
What should you do: If you receive an Affidavit of Heirship that includes a person that appears to fall under **Section 201.056**, you need to require a letter from a family or fertility physician overseeing the insemination or implantation confirming gestation as defined in the statute or confirm the child's date of birth occurred before the 301st day after the date of the intestate's death.

Practical Note: Only apply to the estate of a decedent who dies after 9-1-2015.





The following sections replace references to “time” with “date” and references to “residences” to “physical addresses where service can be had” where applicable:




Sections 202.005 regarding the Application for Proceeding to Declare Heirship;

Section 256.052(a) regarding Contents of Application for Probate of Will;

Section 257.051(a) regarding Contents of Application Generally;

Section 301.052 regarding Contents of Application for Letters of Administration

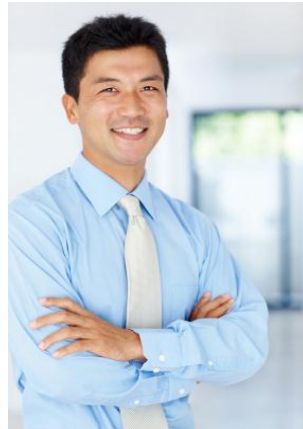


Sections 202.055 and 202.056 have also been revised as to service of citation and waiver to citation.





The following sections remove the requirement of “age, marital status” and add “whether the person is an adult or minor”:



VS



Section 256.054 regarding Additional Application Requirements When No Will is Produced (Standard Probate)

Section 257.053 regarding Additional Application Requirements When No Will is Produced (Probate of Will as Muniment of Title)

Section 301.052 regarding Contents of Application for Letters of Administration




Section 251.053 is a new section related to will requirements. Foreign wills are excluded from the will requirements of **Section 251.051** if the foreign will complies with the law of the state or foreign country where the will was executed or where the testator was domiciled, as the law existed at the time of the of will's execution or at the time of the testator's death.




What should you know: Foreign wills need to be submitted for Ancillary Probate in the appropriate Texas court.

Effective date/Practical Note: Only apply to the estate of a decedent who dies after 9-1-15.



Section 253.001 is amended to add a court cannot prohibit a person from revoking a will. This section already does not allow a court to prohibit a person from changing a will or executing a new will.





What you should know: If you are presented with a court order that purports to prohibit a person from changing a will, executing a new will or revoking a will, that portion of the order “is void and may be disregarded without penalty or sanction of any kind.”



What should you do: Ask an underwriter to review any portions of a court order that appears to prohibit a person from any of the above scenarios involving a will.



Subchapter I. Class Gifts Section 255.401 regarding Posthumous Class Gift Membership is added to clarify that in order to be included as a member of the class gift, the person must be “born before, or is in gestation at, the time of the testator’s death and survives for at least 120 hours.”

A person is:

1. considered to be in gestation at the time of the intestate’s death if insemination or implantation occurs at or before the time of the intestate’s death; and
2. presumed to be in gestation at the time of the intestate’s death if the person is born before the 301st day after the date of the intestate’s death.

If the will provides a different provision for defining the class gift, the will prevails.



What should you do: If you receive a will that includes a person that appears to fall under **Section 255.401**, you need to require a letter from a family or fertility physician overseeing the insemination or implantation confirming gestation or confirm the child's date of birth occurred before the 301st day after the date of the intestate's death.





Subchapter J. Section 255.451 is added to allow a court to order the terms of a will be modified or reformed. A court is allowed to modify or reform the terms “to prevent waste or impairment of the estate’s administration, or to meet the testator’s tax objectives or qualify for governmental benefits, or to correct a scrivener’s error even if unambiguous, to conform to the testator’s intent.”

The order can have a retroactive effect. No duty is created for the personal representative to petition the court to make such an order.



What you should do: You can rely on a court order that modifies or reforms a will so long as no appeal is filed and the 30 day appeal period is expired.



Section 256.003 is amended to clarify that the four year time constraint for admitting a will for probate does not apply to foreign wills that fall under Section 501.001 of the Estates Code.

Similarly **Section 301.002(a)** is amended to clarify that the four year time limitation for an application for the grant of letters testamentary or of administration of the estate excludes foreign wills that fall under Section 501.006 of the Estates Code.

Lastly, **Section 301.151** is amended to clarify the application of letters testamentary or of administration to not require proof that 4 years have not elapsed with respect to a foreign will under Section 501.006.



Section 256.051(a) is amended to include an independent administrator designated by all of the distributees of the decedent under Section 401.002(b) as an eligible applicant to probate a will. Previously, the section just allowed an executor named in a will or an interested person to file an application with the court of an order admitting probate.



Section 301.051 is amended to include an independent administrator designated by all of the distributees of the decedent under Section 401.002(b) as an eligible applicant for letters testamentary or administration.



Section 501.001 relating to the Authority for Ancillary Probate of Foreign Will is amended to clarify that the foreign will may be admitted to probate in this state ***at any time*** if all of the other requirements per the statute are met.



Although amendments to the Estates Code mentioned herein seem to clarify that the 4 year anniversary of the testator's death to open a probate does not apply to ancillary proceedings, an additional subsection has been added to **Section 501.006(a)** for the requirements for ancillary letter testamentary to be issued that seems to show how this timeframe is still relevant for ancillary proceedings.

The letters testamentary can be issued if the will is admitted to ancillary probate in Texas after the 4th anniversary of the testator's death, the executor apparently must continue to serve in that capacity in the jurisdiction in which the will was previously admitted to probate.



What you need to know: For title purposes, we don't find the Ancillary Letters Testamentary particularly useful in determining authority of the party(ies) to sell the property. We look for the authority from the will and an order from the court.



SB 462

Amends the Estates Code by adding Chapter 114 relating to authorizing a revocable deed that transfers real property at the transferor's death ("Transfer on Death Deed")

How does it work?

- Using a Transfer on Death Deed, individuals can transfer their interest in real property to one or more beneficiaries to be effective at their death.
- Always revocable during the life of the transferor.
- Cannot be created through use of a power of attorney. ***Thank you Stewart Legislative Team - We made sure of that!*



SB 462

What must it contain?

The essential elements and formalities of a recordable deed

State that the transfer of an interest in real property to the designated beneficiary is to occur at the transferor's death; and

Be recorded before the transferor's death in the deed records in the county clerk's office of the county where the real property is located.

No notice, delivery, acceptable or consideration is required!

WHAT YOU SHOULD DO:

Stewart will accept a Transfer on Death Deed as a vesting instrument so long as it substantially conforms to the statutory form as provided in Estates Code Sec. 114.151. If you receive a non-statutory form that appears to not contain the elements required above, seek underwriter approval.



How is the TODD different than a Lady Bird Deed?

- In a Lady Bird Deed, the Grantor reserves a life estate (full possession, benefit, and use of the property for the remainder of the life of Grantor). The Grantee holds a remainder interest in the Property until Grantor's death. Therefore, two distinct interests are held by both parties.
- In a TODD, the Grantor retains all interest in the property during Grantor's lifetime and the designated beneficiary has no interest until Grantor's death. The TODD functions much like a pay-on-death account.



WHAT YOU SHOULD DO:

Stewart will accept a Transfer on Death Deed as a vesting instrument so long as it substantially conforms to the statutory form as provided in Estates Code Sec.

114.151. If you receive a non-statutory form that appears to not contain the elements required above, seek underwriter approval.



Revocation of a TODD and the Effect of Will or Marriage Dissolution

Effective revocations:

- 1) Subsequent TODD that revokes the preceding TODD or part of the TODD expressly or by inconsistency;
- 2) Instrument of revocation that expressly revokes the TODD or part of the TODD;
- 3) Final judgment of a court dissolving marriage operates to revoke the TODD as to the designated beneficiary if recorded before the transferor's death in the deed records.
 - Revocation by one transferor in a TODD made by more than 1 transferor, does not affect the deed as to the interest of the one not revoking.
 - TODD made by joint owners with right of survivorship is revoked only if it is revoked by all of the living joint owners.



Revocation of a TODD and the Effect of Will or Marriage Dissolution

Must be:

- 1) Acknowledged by the transferor after the acknowledgment of the deed being revoked; and
- 2) Recorded before the transferor's death in the deed records in the county clerk's office of the county where the deed being revoked is recorded.



Revocation of a TODD and the Effect of Will or Marriage Dissolution

WHAT YOU SHOULD DO:

Stewart will accept a Cancellation of Transfer on Death Deed as a valid revocation so long as it substantially conforms to the statutory form provided in Estates Code Sec. 114.152 and has been acknowledged by the transferor after the acknowledgement of the TODD being revoked AND recorded before the transferor's death in the deed records in the county clerk's office of the county where the deed being revoked is recorded. While not expressly limited statutorily, Stewart will not accept a revocation of a TODD made through a power of attorney.

Look out for a more detailed Stewart Bulletin on the Transfer on Death Deed coming soon!!



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Next Month's Texas TIPS Online presentation is

September 17, 2015

**“Documentation Retention Rules,
Courthouse Access, Title Companies as
Trustees, etc.”**

presented by:

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