

SUBJECT: Probate Code revisions concerning estates of decedents

COMMITTEE: Judiciary — committee substitute recommended

VOTE: 6 ayes — Hartnett, Homer, Hopson, Cook, Gonzales, Goolsby

0 nays

3 absent — Alonzo, Hughes, Krusee

WITNESSES: For — Guy Herman, Statutory Probate Judges of Texas; Glenn Karisch, Real Estate, Probate, and Trust Law Section, State Bar of Texas;  
(*Registered, but did not testify*: Alvin Golden, Texas Academy of Probate and Trust Lawyers; Craig Hopper)

Against — Jack Marr, Texas Family Law Foundation

DIGEST: CSHB 193 would amend the Probate Code to:

- revise the rules under which a charity or a government agency could disclaim or reject a bequest or gift from a decedent's estate;
- allow the validity of a marriage to be challenged after the death of the decedent;
- interpret provisions of a will made before dissolution of a marriage so a spouse and certain others were treated as having failed to survive the testator;
- eliminate oral wills;
- provide for notification of and procedures for the opposition to the forced sale of an estate's assets; and
- change when and to whom letters of administration of an estate could be issued.

The bill also would include determinations of heirship in the existing rules on venue for probate actions; alter emergency intervention applications regarding funds for burials and funerals from an estate; and alter how a proof of a written will could be established when the will itself was not admitted into court.

**Marriage challenges.** CSHB 193 would amend ch. II of the Probate Code by adding sec. 47A, which would allow a court to declare a marriage

invalid after death if the court found the decedent did not have the mental capacity to consent to the marriage nor understand the nature of the marriage ceremony, if a ceremony occurred. CSHB 193 would not allow such a finding if the decedent later gained the capacity to recognize the marriage and did recognize the marriage relationship. This new provision would apply to a marriage subject to annulment under sec. 6.111 of the Family Code.

CSHB 193 would amend sec. 69 of the Probate Code to alter will provisions made before dissolution of marriage by treating the former spouse and each relative of the former spouse who was not a relative of the testator as if they had failed to survive the testator. An exception would be allowed for spouses who subsequently had remarried the testator.

**Disclaimers.** CSHB 193 would amend sec. 37A of the Probate Code to allow charities and governmental entities greater flexibility to disclaim a bequest by allowing them more time to issue a disclaimer and by enabling their attorneys or an individual granted durable power of attorney to issue such a disclaimer. Charities and governmental agencies would have to file the disclaimer no later than the first anniversary of the date the beneficiary received notice or six months after the inventory of the estate was filed, whichever occurred first.

**Elimination of oral wills.** CSHB 193 would remove oral wills from the Probate Code. It would remove references to oral wills from secs. 82, 91, and 128(a) and (b), and would repeal secs. 64, 65, 81(c), 86, and 89A(c).

**Application for order of sale of estate property.** CSHB 193 would regulate how a court could hear an application for an order for the sale of estate property. It would amend sec. 344 by requiring the court clerk to inform anyone interested in the estate about the property to be sold and to inform them of their right to oppose the sale. Opposition would have to be made to the court in writing within the time period set forth in the notice from the clerk. CSHB 193 would add sec. 345A to the Probate Code to direct the court to then set a hearing and allow the judge, by entries on the docket, to continue such a hearing until the judge was satisfied concerning the application.

**Granting of letters of administration of decedents' estates.** CSHB 193 would amend sec. 178 to direct a court to issue letters of administration of an estate if the administration were necessary to receive or recover funds or other property due the estate.

The bill would amend sec. 179 of the Probate Code to restrict the group of people of who could oppose the administration of an estate to those who were interested in the estate. To be considered interested, a person would have to be eligible to receive property from the estate either under the will or under intestacy.

**Additional minor changes.** CSHB 193 would allow the contents of a written will that had not been produced in court to be substantially proved by the testimony of a witness who could identify a copy of the will.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2007.

**SUPPORTERS  
SAY:**

**Marriage challenges.** CSHB 193 would work to prevent fraud by allowing a marriage to be challenged after the death of one of the spouses. It would target cases of elder abuse where individuals, commonly caregivers, secretly married their charges and after the death of the patient, claimed their share of the community property. Current law allows no method of challenging a marriage after the death of one of the spouses.

Under the bill, if the decedent did not have the mental capacity to consent to the marriage and to understand the nature of the marriage ceremony, if a ceremony occurred, then the marriage could be challenged on the grounds that the decedent could not have consented to the marriage because the decedent lacked the mental capacity to do so.

CSHB 193 would provide safeguards to ensure that the right to challenge was not misused. First, it would employ a high burden of proof. It is difficult to prove that a person lacked the mental capacity at the time of the marriage to consent to it and to understand the ceremony itself. Also, CSHB 193 would allow the marriage to be validated if the decedent ever gained the mental capacity to recognize the marriage relationship and did so. Further, CSHB 193 would carry a statute of limitations. Parties wishing to challenge a marriage would have to do so within one year of the decedent's death. If there were no challenge, then the marriage would

be unassailable. Also, challengers would be able to examine only the last three years of the decedent's life for lack of mental capacity. Thus, if a man remarried after the death of his first wife and was married to his second wife for more than three years before he died, then his children from the first marriage would not be able to challenge the second marriage under CSHB 193, regardless of the circumstances.

**Disclaimer.** The changes in the disclaimer statutes are necessary to protect charities and government agencies like colleges and universities because both of these groups receive a great deal of funding from bequests. Sometimes, though, these groups may wish to decline a bequest either because they find it objectionable or simply impractical. Allowing these groups more time to respond and to act through their agents would allow them to better consider bequests and avoid later complications or possible litigation.

**Elimination of oral wills.** CSHB 193 would eliminate oral wills because they are antiquated and unwieldy. In recent years the law has developed to curtail the application of oral wills. Current law already heavily restricts oral wills. Oral wills now may be used only when:

- the testimony of the witness who heard the decedent make the oral will must be given within six months or it will be inadmissible;
- they were made by the decedent within ten days prior to death at his home, with some exceptions;
- they dispose of property worth less than \$30; or
- if they dispose of property worth more than \$30, in which case there must be at least three witnesses to the fact that the deceased chose a person to take notice or bear witness that such was the deceased's intention.

Texas law provides many other ways for an individual to make a will and is accommodating to handwritten wills. Texas law also allows a person to dictate a will to another and adopt that drafting of the will as long as it was properly attested and witnessed. These methods provide certain indications of reliability that oral wills lack. Eliminating oral wills would update Texas law by requiring one of these superior methods for conveying testamentary intent.

**Application for order of sale of estate property.** CSHB 193 would provide additional protections to all parties during the sale of an estate's property by:

- requiring notice be given to all interested parties;
- setting forth guidelines on how a party could oppose the sale; and
- granting a court continuing jurisdiction to hear the matter until the judge was able to resolve it.

CSHB 193 would provide protections for interested parties to protect adequately those interests through predictability of operation and notice of rights.

**Granting of administration letters of an estate.** When there is no proper will to dispose of an estate, a court may issue letters of administration. Letters of administration are legal documents that allow people to operate an estate to settle debts and dispose of property according to the wishes of the decedent or through the intestacy laws. Current law allows the administration of an estate only if it is necessary to do so. Necessity is established through a showing that:

- two or more debts exist against the estate;
- it is desired to have county court partition the estate among distributes; or
- when a court finds it necessary to do so upon the proof presented before it.

CSHB 193 would add a fourth trigger – when the administration was necessary to receive or recover funds or other property due the estate. This trigger would be necessary because some businesses and institutions will not deal with estate administrators or executors unless they have a letter of administration. These include some insurance providers and certain government entities that otherwise are unwilling to consent to the partitioning of land. Adding this fourth reason is necessary, even in light of the catch-all clause, to avoid confusion and litigation and to provide for a more timely distribution of the estate.

CSHB 193 would provide protection for the testamentary intent of the decedent by making it more difficult to disqualify the executor of the will. The bill would allow a court to remove an executor only when the executor had failed to deliver the will to the court within 30 days of the

death of the decedent unless the court found there was no good cause for not presenting the will for probate during that period. This would allow a court to decide that if a grieving spouse who was the executor of a deceased spouse's estate delayed beyond 30 days because the survivor was paralyzed with grief or consulting with a lawyer on how to proceed was acting with a good cause and thus could not be removed. Such a finding would preserve the intent of the deceased spouse to establish the surviving spouse as the executor of the will.

**OPPONENTS  
SAY:**

CSHB 193 would lead to a flood of litigation because it would allow marriages to be challenged after the death of one of the spouses. Children of first marriages might move to void their parents' second marriages because they did not like the new spouse. These challenges would undermine the important principle of marital property because it no longer would be clear what the community property of the marriage was.

A better method of preventing fraud that would still respect the important principle of marital property would be to allow any suits challenging the validity of a marriage that were in existence at the time of death to survive that death and continue to be heard on their merits.

**NOTES:**

The committee substitute made several changes to the bill as filed. It shortened the time period in which a marriage could be challenged to one year after the death of the testator and would allow that challenge to consider only the last three years of the decedent's life for purposes of determining if a marriage occurred without the necessary mental capacity.

The substitute also granted charities and state agencies additional time to disclaim bequests.

The original bill did not contain changes to the venue rules regarding probate actions nor did it address emergency funding for funerals and burials. The committee substitute addressed these by amending the existing venue scheme for probate actions to include determination of heirship actions in sec. 8 of the Probate Code and by removing required listings of social security numbers in applications for emergency funding for burials and funerals in sec. 111(a) and sec. 12.