

2023 Legislative Session



Trusts, Guardianship, Powers of Attorney & Advanced Directives

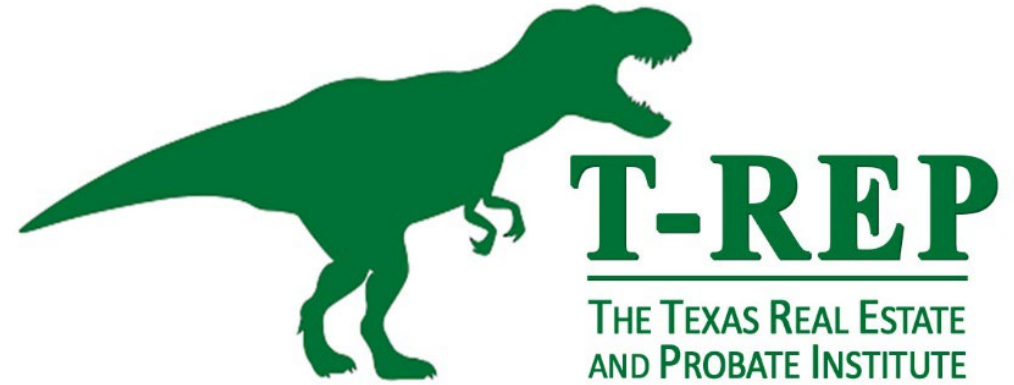
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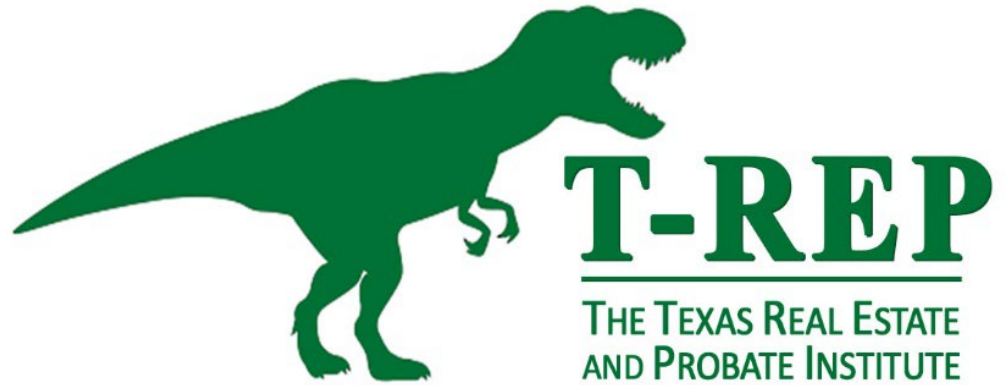
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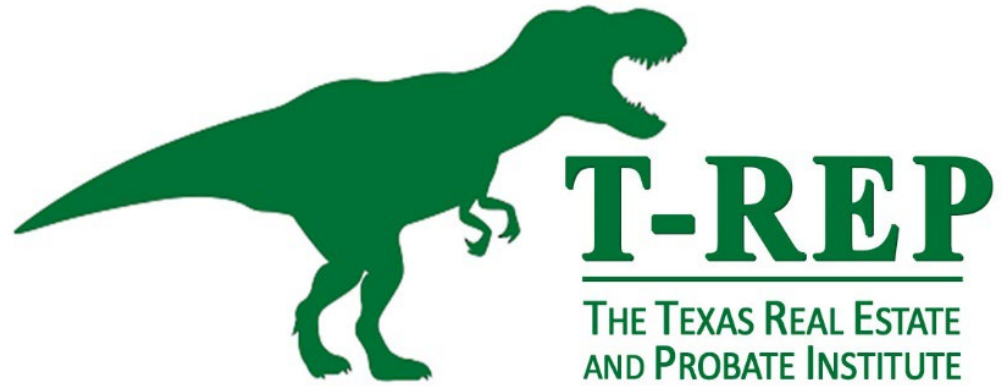
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Legislative Session

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Lauren Davis Hunt, ldhunt@ohkslaw.com

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Estate and Trust Legislative Updates

2023 SESSION

- [2023 "Estate and Trust" Legislative Update](#)
- [2023 "Estate and Trust" Legislative Update Statutory Language Supplement \(coming after the session\)](#)

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- [2021 "Estate and Trust" Legislative Update Statutory Language Supplement](#)
- [2019 "Estate and Trust" Legislative Update](#)
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- [2011 "Estate and Trust" Legislative Update](#)
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T-REP's 2023 Legislative Session

- **6 bills signed by Governor:**

- Decedent's Estates
- Guardianship
- Durable Power of Attorney
- Disposition of Remains
- Anatomical Gifts
- Trusts

SB 1650 (Sen. Parker)

HB 3562 (Rep. Smithee) was the House
companion bill

T-REP 2023 DURABLE POWER OF ATTORNEY BILL – SB 1650

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Co-Chairs of PAAD Committee

T-REP's 2023 DPOA Bill: SB 1650

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”).

T-REP's 2023 DPOA Bill: SB 1650

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)

T-REP's 2023 DPOA Bill: SB 1650

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

T-REP's 2023 DPOA Bill: SB 1650

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

Amended Section 751.251:

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

T-REP's 2023 DPOA Bill: SB 1650

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

SB 1457 (Sen. Zaffirini)

HB 3184 (Rep. Senfronia Thompson) was the House
companion bill

T-REP 2023 GUARDIANSHIP BILL – SB 1457

Dyann McCully
Chair of T-REP Guardianships Committee
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T-REP's 2023 Guardianship Bill: SB 1457

- Alternative to Certified Mail-Return Receipt Requested

Problem: Multiple sections in Estates Code require notice be given by “registered or certified mail”

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



T-REP's 2023 Guardianship Bill: SB 1457

Alternatives to Certified Mail-Return Receipt Requested

- Alternative to Certified Mail-Return Receipt Requested
 - **Solution:** Replace “registered or certified mail” with “qualified delivery method”
 - “Qualified delivery method” includes:
 - 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

T-REP's 2023 Guardianship Bill: SB 1457

“Private Delivery Service” (as of 6/1/23):

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.

T-REP's 2023 Guardianship Bill: SB 1457

Service on Attorney ad Litem

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

T-REP's 2023 Guardianship Bill: SB 1457

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

2023 Legislation:

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

T-REP's 2023 Guardianship Bill: SB 1457

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

Change: 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

T-REP's 2023 Guardianship Bill: SB 1457

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.

T-REP's 2023 Guardianship Bill: SB 1457

Compensation to Guardian of Person

Amendment: a guardian of the person only could receive compensation the greater of

- \$3,000 annually, paid in monthly installments of \$250 per month*
- 5% of ward's annual income

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

Statute Amended: EC 1155.002(a)

T-REP's 2023 Guardianship Bill: SB 1457

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.

T-REP's 2023 Guardianship Bill: SB 1457

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

T-REP's 2023 Guardianship Bill: SB 1457

Withdrawal of Funds by Non-Resident

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

Statute Amended: EC 1355.002

Non-t-rep bills in 2023

Non-t-rep bills in 2023

New Statutory Probate Courts:

- **Travis County**
- **Harris County**
- **Bexar County**
- **Montgomery County**
- **Cameron County**

Statutory Probate Courts

2020 Census Data

<https://demographics.texas.gov/InteractiveTools/2021/CBR/edistrictingCounty>

County	Population	Probate Courts
Harris County	4,731,145	4 ⁵
Dallas County	2,613,539	3
Tarrant County	2,110,640	2
Bexar County	2,009,324	2 ³
Travis County	1,290,188	1 ²
Collin County	1,064,465	1
Denton County	906,422	2
Hidalgo County	870,781	1
El Paso County	865,657	2
Fort Bend County	822,779	
Montgomery County	620,443	¹
Williamson County	609,017	
Cameron County	421,017	¹
Brazoria County	372,031	
Bell County	370,647	
Nueces County	353,178	
Galveston County	350,682	1
Lubbock County	310,639	

Non-t-rep bills in 2023

HB 266 Guardianship Application

- Applicant in guardianship proceeding **must** file an affidavit with **court** (not the clerk) containing known contact info for each person entitled to notice of proceeding
- Information remains confidential and privileged
- Copy of info goes to guardian on appointment

Non-t-rep bills in 2023

HB 3009 – Guardianships & APRNs

- Authorizes *Advanced Practice Registered Nurse* acting under physician's supervision
- To prepare letter or certificate to the court re: proposed ward's incapacity or restoration of capacity
- Opinion of APRN must be signed by supervising physician
- Letter is considered opinion of the physician

Non-t-rep bills in 2023

HB 1624 – Lengthy Guardianship Bill

- **Attorney ad Litem or Attorney retained by ward/proposed ward:**
 - Duty includes representing ward/proposed wards *expressed wishes*
 - Has access to proposed ward's relevant records
- **If ward/proposed ward retains an attorney**
 - On motion by any party, court can hold hearing to determine whether ward has capacity to retain attorney
 - If ward does not have capacity, court can appoint attorney ad litem
- **Guardian ad Litem**
 - Must not be an interested person
 - Can't be also be the attorney ad litem (with exceptions)

Non-t-rep bills in 2023

HB 1624, cont. – Lengthy Guardianship Bill

- **Examination of Proposed Ward:** Sec 1101.103
 - Psychologist can perform incapacity exam on adult proposed ward IF alleged incapacity results from a mental condition
- **Ward's Bill of Rights:** Sec 1151.351
 - Adds Ward's right to have private communication with medical professionals unless the court, after a hearing, orders private communications limited due to risk of substantial harm to ward, or unduly burdening medical professional
- **Annual Report:** Sec 1163.101
 - GP's annual report must include:
 - Description of supports & services ward receives, including action guardian is taking to encourage development of ward's maximum self-reliance and independence
 - Guardian's opinion whether ward has sufficient capacity with supports and services to have capacity restored or guardianship modified

Non-t-rep bills in 2023

HB 1624, cont. – Lengthy Guardianship Bill

- **Annual Review:** Sec 1201.052 & 1201.053
 - A court may conduct a hearing regarding an annual review
 - In a statutory probate court, the annual review should include a follow-up report by court investigator or court visitor at least every 3 years.
- **Judicial, Investigator and Visitor Training:** Gov't Code Sec. 22.0133 & TEC 1054.157
 - At least every 2 years, every judge with jurisdiction over guardianship proceedings must have 1 hour training related to guardianship alternatives and supports and services.
 - Court investigators and court visitors must also complete 2 hours of training, including 1 hour training related to guardianship alternatives and supports and services.

Non-t-rep bills in 2023

HB 1624, cont. – Lengthy Guardianship Bill

- **Restoration Proceedings: Evidence of Capacity With or Without Supports and Services:**
Secs 1202.152
- **In a restoration proceeding, a court must consider:**
 - A letter signed by licensed physician or psychologist certified by HHSC
 - Statement from local mental health or intellectual and developmental disability authority listing services received by ward and their effectiveness
 - Affidavits of treating physicians re: effectiveness of supports and services
 - Other documents listed in statute
- **If incapacity based on intellectual disability, letter must instead provide:**
 - Physician/psychologist's opinion re: whether ward has capacity with supports & services to provide food, clothing, shelter, care for ward's physical health and manage financial affairs;
 - How ward's ability to communicate decisions is affected by ward's mental capacity

Non-t-rep bills in 2023

HB 1606 – Evidence Required for IDD

- If intellectual disability is basis for incapacity
- A letter/certificate is **required** from physician or psychologist licensed or certified by the HHSC
- Statute provides what is required in letter/certificate
 - Must state how the proposed ward's ability to communicate decisions about himself or herself is affected by his or her mental health

Non-t-rep bills in 2023

HB 3474– Transfers of Probate and Guardianship Cases

- Probate clerk of a transferring court must use electronic filing system to transfer case to transferee court
- Transferring clerk must record any unrecorded documents in a guardianship within 10 working days after date of transfer order

Non-t-rep bills in 2023

HB 525 – Delivery of Court Orders through the Electronic Filing System

Requires the following to deliver copies of orders to the parties through the electronic filing system:

- Statutory County Courts
- District Courts
- Appellate Courts

Note – this does not apply to Statutory Probate Courts

Non-t-rep bills in 2023

HB 5010 – Grievances Involving Guardianships, Estates & Trusts Attorneys

- “Complaints” are now defined as grievances that merit full investigations and dispositions
- “Inquiries” are now defined as grievances on their face that do not rise to the level of a complaint and do not receive the same level of investigation
- A grievance will only be classified as a “complaint” if it is submitted by:
 - 1. person with a cognizable interest in the legal matter, or
 - 2. family member of ward in a guardianship proceeding that’s subject of the grievance;
 - 3. family member of a decedent in a probate matter that is subject of the grievance
 - 4. trustee of a trust or executor of an estate if the matter subject of the grievance relates to the trust or estate
 - 5. the judge, prosecuting attorney, defense attorney, court staff member or juror in the legal matter that is subject of the grievance; or
 - 6. a trustee in a bankruptcy that is subject of the grievance

Non-t-rep bills in 2023

HB 1547 – Reimbursement Claims

- Modifies Chapter 3 of Family Code (applies to probate)
- Defines a claim for reimbursement
- Addresses:
 - Required proof
 - Calculation of the value of and offsets against benefit conferred
 - The court's determination of whether unjust enrichment will occur in absence of reimbursement.

Non-t-rep bills in 2023

SB 1780 – Online Notaries

- Expands authority of online notaries (but not traditional notaries) to notarize wet ink signatures
- REMINDER: the Covid-era ability to notarize documents with traditional notary appearing on Zoom no longer exists

Non-t-rep bills in 2023

SB 944 – Commitment of Individual with IDD to a State Supported Living Center

- A guardian or parent of a person with intellectual disability, or an interdisciplinary team recommending placement,
- Can petition court to commit the person to long-term placement in a state supported living center IF the court determines beyond a beyond a reasonable doubt that proposed resident meets the requirements for commitment to a residential facility

Non-t-rep bills in 2023

SB 1785 – Criminal History Records

- County clerk will be liable if damage results to a ward because of clerk's failure to obtain required criminal history record of proposed guardian
- Court can use criminal record information only to determine whether to appoint, remove or continue the appointment of a guardian
- If JBCC obtained DPS criminal history, clerk does not have to get another one, but still is required to obtain an FBI criminal history for proposed guardian

Non-t-rep bills in 2023

SB 189 – Prevention of Abuse of Elderly and Disabled: Failure to Report

- It is now a Class A misdemeanor for a landlord of a boarding home facility to fail to report abuse, neglect, or exploitation of a resident of the facility if the landlord has actual knowledge of it.

Non-t-rep bills in 2023

HB 2187 – Prevention of Abuse of Elderly and Disabled: Abandoning or Endangering an Elderly or Disabled Individual

- Expanded the scope of the felony of abandoning or endangering a child to include the same actions against an elderly or disabled individual
- Conforming amendments are made to Sec. 1104.353(b) of the Estates Code, adding a presumption that it is not in the best interest of a ward to appoint a person who has been finally convicted of abandoning or endangering a child, elderly individual, or disabled individual

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