

2011 Legislative Update: Probate Litigation

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Editor-in-Chief

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The 2011 session of the Texas Legislature resulted in at least two amendments that will impact probate litigation.

1. Executor Removal for Conflict of Interest

An independent executor can be removed for a "material" conflict of interest under a new paragraph added to Probate Code § 149C. This amendment may have been in response to the Texas Supreme Court's 2009 decision in *Kappus v. Kappus*, in which the factors used to evaluate potential executor conflicts of interest were discussed.

The *Kappus* case involved the most frequently encountered potential conflict of interest: a person who is named in the will as both the executor and as a beneficiary. Executors in those situations can make estate administration decisions that would also benefit themselves as a beneficiary.

The *Kappus* court said that merely being both a beneficiary and the executor does not automatically disqualify the executor, particularly when the testator drafted the will knowing that one of the estate beneficiaries would also serve as the executor.

It would appear that the factors listed in *Kappus* and the additional language in § 149C will provide a framework for probate courts to make a fact finding of what constitutes a "material" conflict of interest, which is likely to be determined on a case by case basis.

2. Closing the Estate, Starting the Limitations Period

One of the effects of closing an independent administration is to start the statute of limitations running on any claims against the executor. If the administration remains open, the limitations period for making claims against the executor arguably does not begin to run.

Historically, the two most common methods for an executor to close an estate have been to: (1) file a closing affidavit under Probate Code § 151; or (2) obtain a judicial discharge under Probate Code § 149E. The 2011 Legislature amended § 151 to allow an independent executor to file a verified notice of closing the estate. If no one files an objection within 30 days, then the estate is considered closed.

3. Conclusion

These two Probate Code changes illustrate the potential liability that executors face. In order to minimize their liability exposure, executors should consult experienced legal counsel when conducting estate business.

If you have questions, click [here](#) to contact Steve Spitzer.

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Your Probate Litigation Resource

Cowles & Thompson's probate litigation section has a web site at www.TexasEstateDisputes.com. The web site provides current information on disputed probate, heirship and trust issues, including the latest on statutory changes made by the Texas Legislature.

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