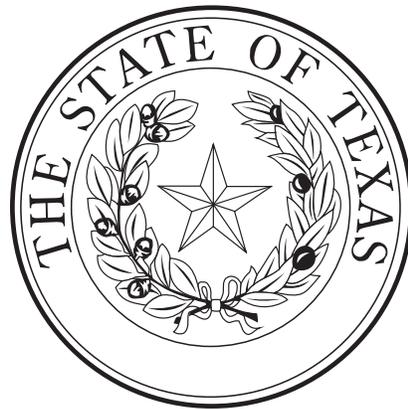




Interim Report

to the 84th Legislature

House Committee on
Judiciary & Civil Jurisprudence



December 2014

**HOUSE COMMITTEE ON JUDICIARY & CIVIL JURISPRUDENCE
TEXAS HOUSE OF REPRESENTATIVES
INTERIM REPORT 2014**

**A REPORT TO THE
HOUSE OF REPRESENTATIVES
84TH TEXAS LEGISLATURE**

**TRYON D. LEWIS
CHAIRMAN**

**COMMITTEE CLERK
KARI KING**



Committee On
Judiciary & Civil Jurisprudence

December 1, 2014

Tryon D. Lewis
Chairman

P.O. Box 2910
Austin, Texas 78768-2910

The Honorable Joe Straus
Speaker, Texas House of Representatives
Members of the Texas House of Representatives
Texas State Capitol, Rm. 2W.13
Austin, Texas 78701

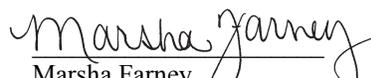
Dear Mr. Speaker and Fellow Members:

The Committee on Judiciary & Civil Jurisprudence of the Eighty-third Legislature hereby submits its interim report including recommendations and drafted legislation for consideration by the Eighty-fourth Legislature.

Respectfully submitted,


Tryon Lewis

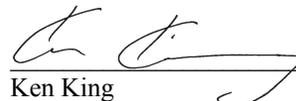

Jessica Farrar


Marsha Farney


Lance Gooden


Ana Hernandez


Todd Hunter


Ken King


Richard Peña Raymond


Senfronia Thompson

Members

TRYON LEWIS (C) • Jessica Farrar (VC) • Marsha Farney • Lance Gooden •
Ana Hernandez • Todd Hunter • Ken King • Richard Peña Raymond • Senfronia Thompson

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INTRODUCTION

Speaker Joe Straus appointed 9 members to the House Committee on Judiciary and Civil Jurisprudence: Tryon Lewis, Chair; Jessica Farrar, Vice-Chair; Marsha Farney, Lance Gooden, Ana Hernandez, Todd Hunter, Ken King, Richard Pena Raymond, and Senfronia Thompson.

The House Rules adopted by the 83rd Legislature as House Resolution 4 on January 14, 2013, give the House Committee on Judiciary and Jurisprudence its jurisdiction. Rule 3, Section 23 reads as follows:

Section 23. Judiciary and Civil Jurisprudence — The committee shall have nine members, with jurisdiction over all matters pertaining to:

- (1) fines and penalties arising under civil laws;
- (2) civil law, including rights, duties, remedies, and procedures thereunder, and including probate and guardianship matters;
- (3) civil procedure in the courts of Texas;
- (4) administrative law and the adjudication of rights by administrative agencies;
- (5) permission to sue the state;
- (6) civil law as it relates to familial relationships, including rights, duties, remedies, and procedures thereunder;
- (7) uniform state laws;
- (8) creating, changing, or otherwise affecting courts of judicial districts of the state;
- (9) establishing districts for the election of judicial officers;
- (10) the State Commission on Judicial Conduct;
- (11) the Office of the Attorney General, including its organization, powers, functions, and responsibilities;
- (12) courts and court procedures except where jurisdiction is specifically granted to some other standing committee; and
- (13) the following state agencies: the Supreme Court, the Courts of Appeals, the Court of Criminal Appeals, the State Commission on Judicial Conduct, the Office of Court Administration of the Texas Judicial System, the State Law Library, the Texas Judicial Council, the Guardianship Certification Board, the Office of the Attorney General, the Court Reporters Certification Board, the Board of Law Examiners, the State Bar of Texas, and the State Office of Administrative Hearings.

HOUSE COMMITTEE ON JUDICIARY & CIVIL JURISPRUDENCE

INTERIM STUDY CHARGES

- CHARGE 1: Examine the constitutional qualifications and term lengths for appellate court judges, and consider whether changes would benefit the public and the judiciary.
- CHARGE 2: Study the potential issues involving civil liability for interacting with ex-offenders. In particular, examine the implications of HB 1188 (83R) and the potential expansion of similar protections to landlords.
- CHARGE 3: Review the methods used by state agencies and courts to prepare and publish electronic legal materials. Examine the processes used to ensure reliability and permanence of these materials and strategies used to harmonize those processes with national standards, including possible adoption of the Uniform Electronic Legal Materials Act.
- CHARGE 4: Study issues that inhibit the use of wills and access to the probate process in Texas, particularly for low-income individuals.
- CHARGE 5: Examine the public policy implications of litigation related to environmental contamination brought by local governments, in particular whether such litigation supports effective remediation.
- CHARGE 6: Study the issue of whether Regional Presiding Judges should be appointed by the Chief Justice rather than the Governor.
- CHARGE 7: Conduct legislative oversight and monitoring of the agencies and programs under the committee's jurisdiction and the implementation of relevant legislation passed by the 83rd Legislature. In conducting this oversight, the committee should:
- a. consider any reforms to state agencies to make them more responsive to Texas taxpayers and citizens;
 - b. identify issues regarding the agency or its governance that may be appropriate to investigate, improve, remedy, or eliminate;
 - c. determine whether an agency is operating in a transparent and efficient manner; and
 - d. identify opportunities to streamline programs and services while maintaining the mission of the agency and its programs.

CHARGE 1

Examine the constitutional qualifications and term lengths for appellate court judges, and consider whether changes would benefit the public and the judiciary.

SUMMARY OF COMMITTEE ACTION CHARGE 1

CHARGE 1: Examine the constitutional qualifications and term lengths for appellate court judges, and consider whether changes would benefit the public and the judiciary.

Committee Hearing

The House Committee on Judiciary & Civil Jurisprudence met in a scheduled public hearing on Monday, March 17, 2014 at 10:00am in room E2.010, Texas State Capitol.

The following is the list of invited testimony who either testified on behalf of themselves or the listed entity:

Wallace Jefferson, Former Chief Justice, Supreme Court of Texas
Nathan Hecht, Chief Justice, Supreme Court of Texas
Sharon Keller, Presiding Judge, Court of Criminal Appeals
Steve McKeithen, Chief Justice, 9th Court of Appeals
David Slayton, Administrative Director, Office of Court Administration

Discussion of Constitutional Provisions

Texas is one of the few states that elects all judges, including Justices of the Supreme Court and the Court of Criminal Appeals, by a partisan election. Most states have moved to selection by appointment or selection by non-partisan election. Texas also has one of the least restrictive set of qualifications to serve on appellate courts. In Texas, one must be a resident of the state, over the age of 35, and licensed by the State Bar.

Article 5 of the Texas Constitution sets out the standards for eligibility to serve on the Supreme Court: "No person shall be eligible to serve in the office of Chief Justice or Justice of the Supreme Court unless the person is licensed to practice law in this state and is, at the time of election, a citizen of the United States and of this state, and has attained the age of thirty-five years, and has been a practicing lawyer, or a lawyer and judge of a court of record together at least ten years."¹

Further, the Constitution creates the terms of office for Supreme Court Justices; "Said Justices shall be elected (three of them each two years) by the qualified voters of the state at a general election; shall hold their offices six years; and shall each receive such compensation as shall be provided by law."²

The judges on the Court of Criminal Appeals "shall have the same qualifications and receive the same salaries as the Associate Justices of the Supreme Court, and the Presiding Judge shall have the same qualifications and receive the same salary as the Chief Justice of the

¹ Tex. Const. Art. V § 2 (Vernon 2013)

² *Id.*

Supreme Court. The Presiding Judge and the Judges shall be elected by the qualified voters of the state at a general election and shall hold their offices for a term of six years."³

Section 6 of the Article 5 sets out provisions for the courts of appeals: "(a) The state shall be divided into courts of appeals districts, with each district having a Chief Justice, two or more other Justices, and such other officials as may be provided by law. The Justices shall have the qualifications prescribed for Justices of the Supreme Court...(b) Each of said Courts of Appeals shall hold its sessions at a place in its district to be designated by the Legislature, and at such time as may be prescribed by law. Said Justices shall be elected by the qualified voters of their respective districts at a general election, for a term of six years and shall receive for their services the sum provided by law."⁴

Summary of Testimony

Chief Justice Wallace Jefferson

Former Texas Supreme Court Chief Justice Wallace Jefferson testified that the qualifications to serve do not take into account any sort of merit or particular experience. There is merely an age and licensing qualification. He had concerns that the electorate may not know who their judges are, and often vote for judges based on one of three factors: 1) party affiliation, 2) the sound of a candidate's name, or 3) how much money a candidate was able to raise, therefore increasing their name identification with the electorate. He favors the Arizona Model, which he thinks will result in a highly qualified judiciary, would greatly reduce the amount spent on judicial races, and would enhance the public's respect for the judiciary.

Under the **Arizona Model**, the Governor, Lieutenant Governor, and Speaker of the House of Representatives would appoint a commission, along with input from the State Bar, practitioners, and citizen panels. The commission would be chaired by the Chief Justice. Applications would be public, and the criteria would be specific: number of jury trials, number of years licensed, and the commission would solicit peer reviews. Deliberations would be public, which eliminates some outside interest groups from influencing decisions, and eliminates patronage. The commission would make recommendations and send them to the governor, and the Senate would confirm. The terms would be extended to 8 years, and subsequently a nonpartisan retention election would occur. The judges would be reviewed during their term, by a qualifications commission, and then receive either a "keep" or "remove" recommendation.

Chief Justice Jefferson noted that there are obstacles to adopting this type of selection method. Implementation would be difficult, legislation would probably require a constitutional amendment, and it may be necessary to receive preclearance from the Justice Department.

During the hearing, committee member Richard Raymond asked whether the Arizona model had been introduced as a bill in the Texas Legislature. Chief Justice Jefferson answered that although the Arizona model had not been contemplated, Senator Robert Duncan has filed bills in the past few sessions similar to the **New Mexico model** of appoint, elect, retain. In the

³ *Id.* at § 4

⁴ *Id.* at § 6

New Mexico model, the Governor appoints a judge, and then the public has the opportunity to vote on the judge in the next election. If that judge is elected, subsequent elections are merely retention elections and the public votes whether to retain the judge or remove them from office. Another possibility is the **Missouri model**, where a non-partisan judicial commission reviews applications, interviews candidates, and selects a judicial panel. That panel appoints a judge, and after a period of no more than a year on the bench, the judge then stands in a retention election.

Chief Justice Nathan Hecht

Current Chief Justice of the Supreme Court Nathan Hecht testified that he agrees with former Chief Justice Jefferson, and that reform is necessary to maintain a stable judiciary. Texas has six year terms for its Supreme Court judges, and no state has a shorter term for its highest court's judges. Partisan elections, like we have in Texas, create the least stable environment for staying on the bench. Six years is really a very short time for appellate justices nationwide, and this is only exacerbated by the fact that Texas selects its appellate judges through partisan elections. The vast majority of states have longer terms than Texas, and most of them do not select their judges through partisan elections.

With regard to the basic qualifications for serving as an appellate court judge, Chief Justice Hecht agreed with Chief Justice Jefferson that these probably should not be changed. However, it would be very helpful to the judiciary and the State to have the kind of commission discussed to review qualifications and merit. A selection commission could better take into account diversity amongst the judiciary, which the ballot box is not good at achieving.

Presiding Judge Sharon Keller

Presiding Judge Sharon Keller testified that there is no consensus among the judges of the Court of Criminal Appeals about changing the method of judicial selection. She acknowledged that the current system is not perfect but there are good and bad aspects to every method of judicial selection. She testified that in some instances, during partisan sweeps, good judges are swept out of office. She pointed out, however, that some of the judges that have been elected in such sweeps have turned out to be outstanding judges. She also pointed out that the electorate may be more educated because of the internet.

Chief Justice Steve McKeithen and Chief Justice Ann McClure

Steve McKeithen, Chief Justice of the 9th Court of Appeals, testified on behalf of Chief Justice Ann McClure of the 8th Court of Appeals and the Council of Chief Justices, who was unable to attend the committee hearing. Justice McClure submitted written testimony to the committee, advocating for increasing the constitutional qualifications for appellate court justices. "As Chief Justice Gray has aptly stated, when the Texas Constitution was adopted, the life and career expectancy was much less than it is today. By the age of 35 -- the current requirement -- folks had lived a pretty long life, had experienced a lot more of 'living', had endured the challenges and difficulties of organized society, and thus had a greater appreciation of what was important." She noted that there are a few chiefs who believe that young and energetic newcomers offer a fresh viewpoint, ensure consideration of modern cultural changes, and enhance the collaborative process. Most of the chief justices agree that the age should be

increased to 40 years and the length of practice increased to fifteen years.

She expressed that there is agreement that there should be no specific practice qualification, such as certification in any area by the Texas Board of Legal Specialization; nor should experience on the trial bench be a prerequisite. The Council of Chief Justices agreed that "the broad perspectives judges bring to the appellate bench enhance the quality of vigorous discussion and better reasoned opinions."

Further, she said that "most chiefs favor an increase to eight year terms. One believes that this can be problematic when a newly elected judge comes to the court with a poor work ethic." She believes that enduring a slowdown for six years is difficult enough, but an eight year term increases the opportunity for statistics and legislative performance measures to be skewed. The impact is increased in smaller courts. With a three-judge court, the result could be devastating." On the other hand, she noted that another chief believes that the current six year term provides the right balance between predictability and continuity.

Justice McClure closed her written testimony by stating that "the universal belief of the Council is that the staggering of terms should be re-addressed. Four of the seven justices in Fort Worth stood for re-election this cycle. At the 8th Court, two of the three justices are on the same cycle. In reality, staggering is impacted by internal shuffling of positions. A judge's retirement before the end of the term means an appointment will be made for the unexpired term. Depending upon the time of the appointment, that judge must run at the next election. He or she must then run again at the true end of the term. Staggering has now been altered. When this occurs on multiple occasions within one election cycle, staggering is seriously impacted."

David Slayton, Office of Court Administration

David Slayton, Administrative Director of the Office of Court Administration, is also the Executive Director of the Texas Judicial Council. The Judicial Council is the policy-making body for the state judiciary. The Council was created in 1929 by the 41st Legislature to study and report on the organization and practices of the Texas judicial system. The Council studies methods to simplify judicial procedures, expedite court business, and better administer justice. It examines the work accomplished by the courts and submits recommendations for improvement of the system to the Legislature, the Governor and the Supreme Court. The Council receives and considers input from judges, public officials, members of the bar, and citizens.

He testified that the Judicial Council has long been an advocate of judicial selection reform. In fact, every year since 1929, the Judicial Council has made recommendations for change. 38 states allow some form of judicial election for the high courts, and only 7 are partisan, including Texas. For election to the high courts, 14 states have non-partisan judicial races, 17 states hold an uncontested retention election after an initial appointment, and 12 states grant life tenure or some sort of re-appointment procedure that does not involve an election. There are only 39 states with an intermediate appellate court of some type, and of those, 6 states conduct partisan elections, and 11 states conduct non-partisan elections. Additionally, 14 states hold an uncontested retention election after an initial appointment, and 8 states grant life tenure of some sort of re-appointment procedure that does not involve an election.

Representative Raymond asked about the number of cases that were reversed by appellate courts in Texas, and Mr. Slayton responded that of the 10 million cases disposed of in Texas in 2013, only 11,500 were appealed. Of those 11,500 that were appealed, only 5.9% of the cases were reversed, and 5.5% of the cases had a mixture of reversal and affirmed. Representative Raymond suggested that the system may not need to be changed, but that additional qualifications would be of some benefit to the judiciary and the public.

Recommendations

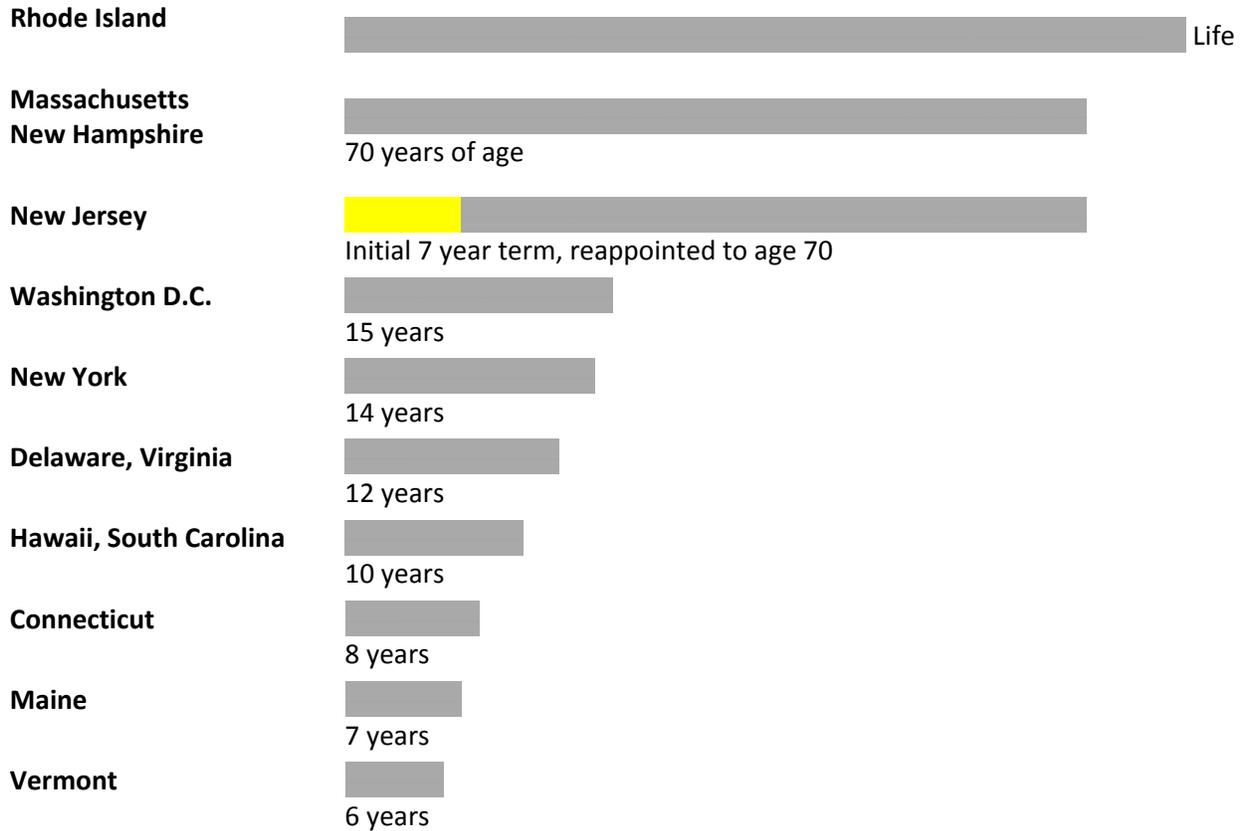
Based on the testimony of the witnesses during the hearing, the committee believes that the term lengths for appellate court justices should be extended, possibly to 8 years. The committee further believes that the qualifications should be extended to require membership in the State Bar of Texas continuously for 10 years, and a potential appellate court candidate may not have been sanctioned as punishment for professional misconduct, had their license suspended based on a violation of the Texas Disciplinary Rules of Professional Conduct, or at any point been subject to disbarment.

The following exhibits were provided to the committee:

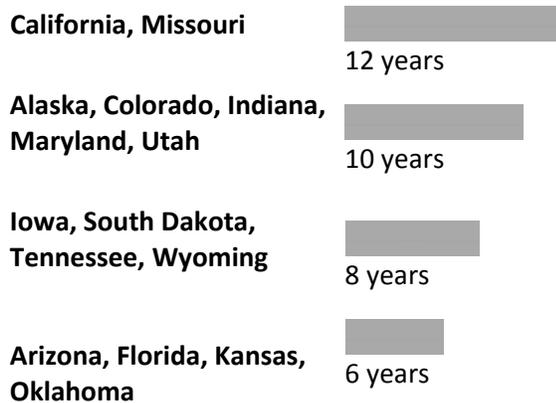
1. Map of Courts of Appeals Districts
2. Chart of State High Court Terms
3. Chart of State Intermediate Court Terms
4. Chief Justice McClure testimony

State High Court Terms¹

Selected and retained by Appointment



Selected by Appointment; retained by Retention Election



¹ Original data came from the National Center for State Courts, State Court Organization comparative data, Table 21a. Selection of Appellate Court Judges: Judicial Selection: Full Term (available at <http://data.ncsc.org/OvAJAZZfc/opensoc.htm?document=Public%20App/SCO.qvw&host=OVS@qlikviewisa&anonymous=true&bookmark=Document\BM87>).

State High Court Terms (continued)

Nebraska



More than 3 years for first term; 6 years thereafter

Selected and retained by Nonpartisan Election

North Dakota, Wisconsin



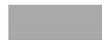
10 years

**Arkansas, Kentucky,
Michigan, Mississippi
Montana, North Carolina**



8 years

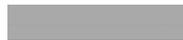
**Georgia, Idaho
Minnesota, Nevada
Oregon, Washington**



6 years

Selected by Partisan Election; retained by Retention Election

Illinois, Pennsylvania



10 years

New Mexico



8 years

Selected and retained by Partisan Election

West Virginia



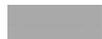
12 years

Louisiana



10 years

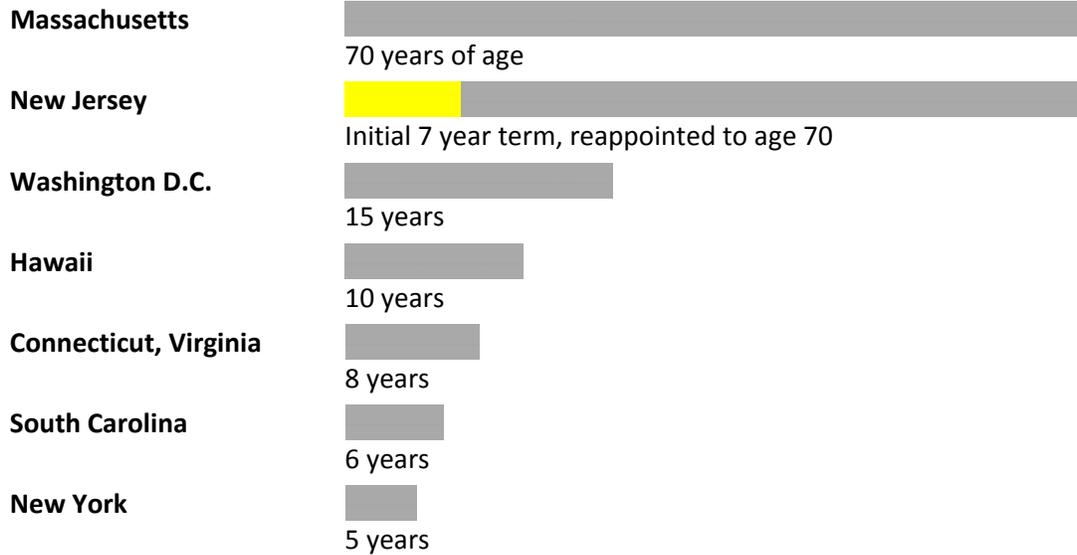
Alabama, Ohio, Texas



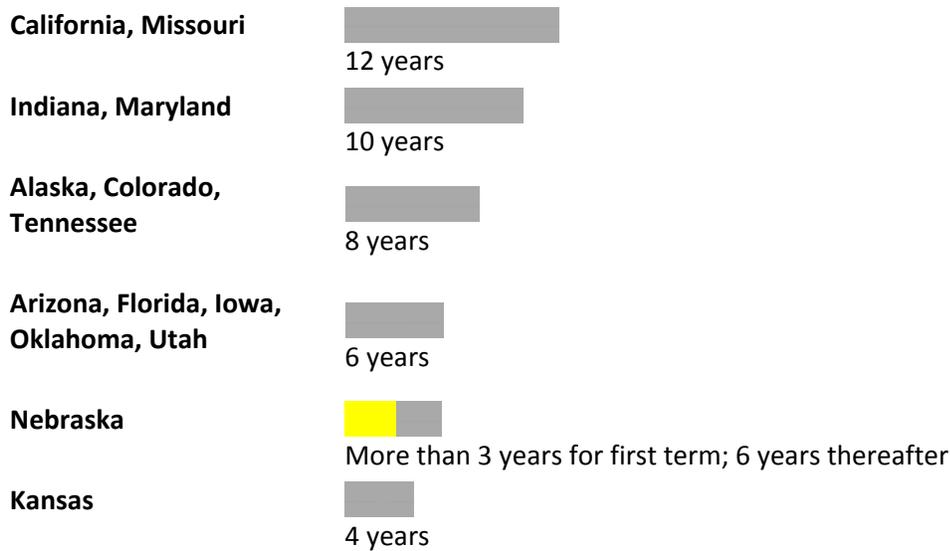
6 years

State Intermediate Appellate Court Terms^{2,3}

Selected and retained by Appointment



Selected by Appointment; Retained by Retention Election

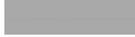


² Delaware, Maine, Montana, Nevada, New Hampshire, North Dakota, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming do not have intermediate appellate courts in the traditional sense, so they have been omitted from this chart.

³ Original data came from the National Center for State Courts, State Court Organization comparative data, Table 21a. Selection of Appellate Court Judges: Judicial Selection: Full Term (*available at* <http://data.ncsc.org/QvAJAXZfc/opensdoc.htm?document=Public%20App/SCO.qvw&host=QVS@qlikviewisa&anonymous=true&bookmark=Document\BM87>).

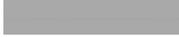
State Intermediate Appellate Court Terms (continued)

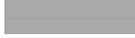
Selected and retained by Nonpartisan Election

Arkansas, Kentucky,
Mississippi, North Carolina 
8 years

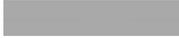
Georgia, Idaho, Michigan,
Minnesota, Oregon, 
Washington, Wisconsin 6 years

Selected by Partisan Election; Retained by Retention Election

Illinois, Pennsylvania 
10 years

New Mexico 
8 years

Selected and retained by Partisan Election

Louisiana 
10 years

Alabama, Ohio, Texas 
6 years

**Testimony of Chief Justice Ann McClure
before the House Committee on Judiciary and Civil Jurisprudence
March 17, 2014**

My name is Ann McClure. I am the Chief Justice of the 8th Court of Appeals in El Paso and Chair of the Council of Chief Justices. I appreciate the invitation to participate in today's hearing. I apologize that my medical team has grounded me due to the H1N1 flu, which is running rampant in El Paso and has killed 19 people thus far.

I offer this as written testimony. I have also asked that either another chief who is attending the hearing or David Slayton, the Executive Director of the Office of Court Administration, read it to the Committee.

It is not my intention to advocate for any particular changes. I consider myself to be a resource as you consider options for the future. I placed your questions on the agenda for the Council's last meeting two weeks ago. While we do have differences in opinion, there are significant trends of thought.

QUALIFICATIONS

There is a consensus that the constitutional qualifications should be increased. As Chief Justice Gray has aptly stated, when the Texas Constitution was adopted, the life and career expectancy was much less than it is today. By the age of 35 -- the current requirement -- folks had lived a pretty long life, had experienced a lot more of "living", had endured the challenges and difficulties of organized society, and thus had a greater appreciation of what was important. There are, of course, a few chiefs who believe that young and energetic newcomers offer a fresh viewpoint, ensure consideration of modern cultural changes, and enhance the collaborative process. Most of the chiefs agree that the age should be increased to 40 years and the length of practice increased to fifteen years.

There is agreement that there should be no specific practice qualification, such as certification in any area by the Texas Board of Legal Specialization. Nor should experience on the trial bench be a prerequisite. The broad perspectives judges bring to the appellate bench enhance the quality of vigorous discussion and better reasoned opinions.

LENGTH OF TERMS

There are trends in this area as well. Most chiefs favor an increase to eight year terms. One believes that this can be problematic when a newly elected judge comes to the court with a poor work ethic. She expressed that enduring a slowdown for six years is difficult enough, but an eight year term increases the opportunity for statistics and legislative performance measures to be skewed. The impact is increased in smaller courts. With a three-judge court, the result could be devastating. On the other hand, another chief believes that the current six year term provides the right balance between predictability and continuity.

The universal belief of the Council is that the staggering of terms should be re-addressed. Four of the seven justices in Fort Worth stood for re-election this cycle. At the 8th Court, two of the three justices are on the same cycle. In reality, staggering is impacted by internal shuffling of positions. A judge's retirement before the end of the term means an appointment will be made for the unexpired term. Depending upon the time of the appointment, that judge must run at the next election. He or she must then run again at the true end of the term. Staggering has now been altered. When this occurs on multiple occasions within one election cycle, staggering is seriously impacted.

With these comments, I remain sincerely yours,

Ann McClure
Chief Justice

CHARGE 2

Study the potential issues involving civil liability for interacting with ex-offenders. In particular, examine the implications of HB 1188 (83R) and the potential expansion of similar protections to landlords.

SUMMARY OF COMMITTEE ACTION CHARGE 2

CHARGE 2: Study the potential issues involving civil liability for interacting with ex-offenders. In particular, examine the implications of HB 1188 (83R) and the potential expansion of similar protections to landlords.

Committee Hearing

The House Committee on Judiciary & Civil Jurisprudence met in a scheduled public hearing on Monday, April 28, 2014 at 10:00am in room E2.010, Texas State Capitol.

The following is the list of invited testimony who either testified on behalf of themselves or the listed entity:

Mark Kincaid, Texas Trial Lawyers Association
Marc Levin, Texas Public Policy Foundation Center for Effective Justice
Sarah Pahl, Texas Criminal Justice Coalition
Beth Van Winkle, Texas Apartment Association

Background

H.B. 1188 by Representative Senfronia Thompson was passed during the 83rd Legislative Session. H.B. 1188 limited business owners' liability on charges of negligently hiring or failing to adequately supervise an employee who has prior convictions. According to the Bill Analysis, "A person with a criminal record seeking employment will receive less than half as many job offers as a person without a criminal record. Many employers view an applicant with a criminal record as a potential liability in negligent hiring actions and may disregard such individuals as potential employees. In response to this issue, interested parties note that employment protection policies may enhance public safety, raise employment levels, decrease recidivism, and allow job seekers with criminal records to become self-sufficient, law-abiding citizens." The bill included employers, general contractors, premises owners, and other third parties. The legislation did not preclude causes of action for offenses committed by employees in the routine performance of their duties if the business owner knew or should have known of the conviction and the conviction is for a sexually violent offense, or an act under 3(g), Article 42.12 of the Texas Code of Criminal Procedure, known as "aggravated offenses." A similar idea has been proposed with regard to landlords and their liability when renting to ex-offenders.

Advocates of the proposed legislation maintain that it can be difficult for an ex-offender to obtain housing because most landlords run background checks and do not want to be liable for any crime that may be committed on their property. There is a shortage of housing for those convicted of crimes, and the rate of recidivism is increased when these ex-offenders cannot find adequate housing. Additionally, when an ex-offender cannot find adequate housing, they may be forced to live on the streets, thereby increasing the homeless population. The proposed legislation could ease assuage owners' concerns because liability would be limited, unless the ex-

offender had been convicted of an aggravated or sexually violent offense.

The Texas Apartment Association has proposed the following language:

SECTION 1. Chapter 92, Subchapter H, Texas Property Code is amended by adding Section 92.356 to read as follows:

Sec. 92.356. LIMITATION ON LIABILITY FOR LEASING TO TENANT.

(a) Nothing in this chapter requires a landlord to lease to any person arrested, convicted or otherwise adjudicated for an offense.

(b) A cause of action may not be brought against a landlord solely for leasing a dwelling, based on evidence that the tenant has been arrested, convicted or otherwise adjudicated for an offense.

(c) This section does not preclude a cause of action for negligent leasing by a landlord of a dwelling to a tenant, if:

(1) the landlord knew or should have known of the conviction; and

(2) the tenant was convicted of:

(A) an offense listed in Section 3g (a), Article 42.12, Code of Criminal Procedure; or

(B) a reportable conviction or adjudication under the sex offender registration program, as defined by Article 62.001, Code of Criminal Procedure.

(d) This section does not create a cause of action or expand an existing cause of action.

SECTION 2. Sec. 92.356, as added by this Act, applies only to a cause of action that accrues on or after the effective date of this Act. A cause of action that accrues before the effective date of this Act is governed by the law in effect immediately before that date, and the former law is continued in effect for that purpose.

There is disagreement among the advocates of the proposed legislation, and some argue that the following should replace (a):

(a) Nothing in this chapter should be construed to impose any additional burdens, obligations, or duties beyond those in Chapter 92, Texas Property Code.

Summary of Testimony

Representative Farrar, acting as chair, introduced the first panel consisting of Beth Van Winkle with the Texas Apartment Association, Marc Levin of the Texas Public Policy Foundation Center for Effective Justice, Sarah Pahl of the Texas Criminal Justice Coalition, and Mark Kincaid of the Texas Trial Lawyers Association.

Beth Van Winkle, Texas Apartment Association

Beth Van Winkle testified that she was pleased that the Speaker of the House selected this as an interim charge for the legislature to study and that her experience in the field allows her to provide observations. According to Ms. Van Winkle, the Texas Apartment Association (TAA) understands the issues that ex-offenders face in regards to housing, and at the same time the complicated position that rental property owners are placed in providing such housing options. Because the first priority of these rental property owners is the safety of their residents and employees, Ms. Van Winkle offered that the history of ex-offenders create challenges to

providing adequate housing. She also voiced concerns that residents, or families of residents, are likely uncomfortable with the possibility of their family member residing in a property filled with ex-offenders.

Local governments and neighborhood groups also pressure rental property owners not to house ex-offenders in rental units, according to Ms. Van Winkle, and while the TAA does not have a comprehensive list, the association can confirm that there are more than 30 Texas cities that have ordinances prohibiting sex offenders from residing within a certain proximity of schools, playgrounds, and other places where children congregate. Ms. Van Winkle also shared that it is not uncommon for law enforcement to encourage or require criminal background checks of applicants by property owners.

As part of their understanding the complex nature of the issue, TAA partnered with a non-profit in the 1990's to help educate offenders on strategies that could improve their chances in acquiring rental housing. The association also met with managers of a facility in Kyle to educate ex-offenders taking life skills classes and officials at the Texas Department of Criminal Justice (TDCJ) to explore possible solutions.

In 2007, TAA supported a bill by Senator Royce West that would have ensured that prospective renters could see the property's rental criteria. The provisions protected ex-offenders from expending time and resources in providing an application and fee when the rental property owners already had a policy of denying tenants with criminal backgrounds.

As stated in a handout provided to the committee, TAA encourages property owners to have policies that take into account the nature of the offense and the timeframe in which it occurred. Along with that that advisement, the TAA also created an additional background question that allow applicants to provide more information so that the rental property owners may make better informed decisions when approving rental applicants.

Ultimately, Ms. Van Winkle believes that because of the nature of the situation, ex-offenders will face more hurdles than others in securing rental housing options, but providing relief from liability to rental property owners would be one significant step to addressing this issue. The obligations to landowners being named in a lawsuit for the criminal acts of an ex-offender are large, according to Ms. Van Winkle, and limiting the exposure to these obligations could provide for a more lenient application criteria and improving the options of rental housing for ex-offenders.

The Texas Apartment Association Board of Directors has made providing relief to rental property owners from civil liability a priority in their affirmative legislation, according to Ms. Van Winkle, and offered some proposed language to the committee. The language, a revision of HB 1188 (83R) by Thompson, would create a several new sections of the Texas Property Code that would guarantee the right of landowners not to provide housing to ex-offenders, but also provide an exemption from civil liability in certain situations.

Ms. Van Winkle also testified that TAA looks forward to working with the legislature to craft a reasonable solution to address this issue and thanked the committee for their time and service.

Mark Kincaid, Texas Trial Lawyers Association

Mark Kincaid with the Texas Trial Lawyers Association (TTLA) testified that the TTLA is offering their comments with neutrality on the issue. While the objective of providing housing to ex-offenders is laudable, the limitation of causes of action in cases where a landlord leases to an individual with a bad criminal history may present issues in its application according to Mr. Kincaid. He also provided suggestions on the language provided by the TAA and his hopes that there be efforts with stakeholders to clarify the intent of the legislature in the future.

Marc Levin, Texas Public Policy Foundation Center for Effective Justice

Marc Levin with the Texas Public Policy Foundation (TPPF) testified that the addressing issues dealing with ex-offenders, particularly the landlord liability issue is incredibly important. He offered that in New York, 38% of ex-offenders that lived in a shelter absconded from legal obligations compared to the 5% of ex-offenders residing in permanent housing. Studies have shown that stable housing decreases the likelihood of re-offense and that in Texas almost 1/3 of released ex-offenders do not know where they will live.

According to Mr. Levin, this legislation allows those ex-offenders that can afford to live in a rental unit a better opportunity at success and that while reasonable concerns exist, a solution does also. He also presented some adjustment to the language provided by the TAA and offered that after 7 years ex-offenders are as likely as a non-offender to commit a crime, and even after 5 years, the difference is miniscule.

Mr. Levin also recommended that along with liability relief, some funding of housing ought to be made for ex-offenders, access to non-disclosure conditions for certain offenders, allowing victims of human trafficking to have access to expunction for crimes of prostitution, and increasing access to deferred adjudication for certain offenders ought to be a priority as well.

In response to a question by Chairman Lewis, Mr. Levin and Ms. Van Winkle answered that they could not offer specific case-law precedents on landlord liability, but offered to provide that information later.

Sara Pahl, Texas Criminal Justice Coalition

Sara Pahl with the Texas Criminal Justice Coalition (TCJC) testified that HB 1188 (83R) offered limited liability to employers in certain cases and there is a significant similarity in the position of employers and landlords as they relate to ex-offenders. According to Ms. Pahl, the liability offered to employers ought to be extended to landlords in that its benefits improve family stability, increase public safety, and reduce recidivism by ex-offenders. The impact on recidivism would save taxpayers from the costs of reintroducing ex-offenders back into the prison system.

Ms. Pahl also testified that while TCJC supports extending liability protection to landlords, TCJC would oppose an effort to include language offered as a guise to insulate landlords who deny housing to those arrested, convicted, or offered deferred adjudication.

TCJC has identified several barriers to ex-offenders, including affordability and the availability of housing. When offenders are released, they struggle with a lack of income and limited options in the job market. The costs of moving, such as application fees and deposits for rental units, utilities and other services are often difficult for ex-offenders to bear. Individuals with few housing options may also face exploitation whereby other tenants and landlords may employ manipulative tactics in duties or costs than offenders must live with to maintain the living situation. There is also some difficulty in obtaining public housing because of various legal or situational obligations imposed on or by public housing authorities. Ms. Pahl also testified that the application provided by the TAA to landlords do not state specifically enough what criminal history is subject to denial by the rental property owners. Ms. Pahl concluded by reaffirming the commitment of the TCJC to support legislation to provide liability protected to landlords.

In response to a question by Vice-Chair Farrar, Ms. Van Winkle testified that the costs of background checks vary by company and property owner.

Recommendations:

The Committee is supportive of extending liability limitations to rental property owners for the actions of renters who have past criminal convictions, but makes no recommendation on the exact wording of the proposed legislation. The Committee directs those in favor of reform to work together to achieve language that is amenable to all parties.

CHARGE 3

Review the methods used by state agencies and courts to prepare and publish electronic legal materials. Examine the processes used to ensure reliability and permanence of these materials and strategies used to harmonize those processes with national standards, including possible adoption of the Uniform Electronic Legal Materials Act.

SUMMARY OF COMMITTEE ACTION CHARGE 3

CHARGE 3: Review the methods used by state agencies and courts to prepare and publish electronic legal materials. Examine the processes used to ensure reliability and permanence of these materials and strategies used to harmonize those processes with national standards, including possible adoption of the Uniform Electronic Legal Materials Act.

Committee Hearing

The House Committee on Judiciary & Civil Jurisprudence met in a scheduled public hearing on Monday, April 28, 2014 at 10:00am in room E2.010, Texas State Capitol.

The following is the list of invited testimony who either testified on behalf of themselves or the listed entity:

Barbara Bintliff, Self
Mary Camp, Legislative Reference Library
Jon Heining, Texas Legislative Council
Jane O'Connell, Self
Dan Procter, Office of the Secretary of State
Lisa Rush, Self
David Slayton, Office of Court Administration

Summary of Uniform Electronic Legal Materials Act (UELMA)

The Uniform Electronic Legal Materials Act, or UELMA, is a uniform law that provides guidelines for states publishing official primary legal materials online. As more states begin to publish legal materials online UELMA offers a technology-neutral, outcomes based approach to ensure that online state legal material deemed official would be preserved and permanently available to the public in unaltered form.¹ Approved by the Uniform Law Commission in 2011, UELMA establishes a framework for making online legal material available to the public with the same integrity provided by publication in a law book.² As of August 2014, UELMA has become law in ten states; California, Colorado, Connecticut, Delaware, Hawaii, Idaho, Minnesota, Nevada, North Dakota, and Oregon, and additionally, UELMA is pending in Illinois, Massachusetts, Pennsylvania, and Rhode Island.³

UELMA applies only to electronic legal material that has been designated as the official record, with four types of legal information specifically enumerated: the state constitution, session laws, codified laws, and agency rules. If legal material is only published electronically,

¹ UELMA Summary and Frequently Asked Questions, American Association of Law Libraries, September 2014

² Preserving State Government Digital Information-UELMA, Exploring Authentication Options, Library of Congress, Fall 2011

³ UELMA Summary and Frequently Asked Questions, American Association of Law Libraries, September 2014

there are three obligations in order for the documents to be compliant with UELMA. It requires that the data be: capable of being authenticated, preserved, and permanently accessible to the public.⁴

Under UELMA, the state is not required to adopt a particular method of authentication and is free to explore the methods that best suit its needs. There are various forms of authenticating electronic legal materials. The three most common authentication methods are digital signatures, hash-keys, and public key infrastructure programs.⁵ The state also has the ability to determine if the document will be preserved electronically, physically, or both. The state may also choose to develop its own software technology to provide users with the presumption of accuracy when accessing electronic legal materials.

Digital signatures allow citizens viewing electronic materials the opportunity to view the identity of the document creator, as well as the reason, time, and date the document may have been altered.⁶ Hash-key systems establish unique identifiers to authenticate the documents validity⁷, and public key infrastructure programs create security by the exchange of private and public keys to allow users of public networks to access secure data⁸. All of these systems are unique and the Texas Department of Information Resources has experience in utilizing the services.⁹

Summary of Committee Hearing

Barbara Bintliff, Director -Tarlton Law Library/Jamail Center for Legal Research

Barbara Bintliff testified on her own behalf, but also serves as Director of the Tarlton Law Library/Jamail Center for Legal Research and is the Joseph C. Hutcheson Professor in Law at The University of Texas at Austin School of Law. Professor Bintliff spoke about the basic function and responsibility of government to provide citizens information on changes in law that citizens are expected to follow. Government must also ensure that the information provided is accurate and that old laws are preserved.

Speaking in support of UELMA, she noted that it afforded citizens the benefit of having access to electronic legal information in a cost effective format without any questions of its validity. She also noted that the requirements stipulating the information be authenticated, preserved permanently, and easily accessible for citizens would not be a difficult undertaking and would go far in ensuring transparency and accountability.

Professor Bintliff testified to the technologies available to provide citizens with the ability to review the official and definitive source of the legal material. She noted that although

⁴ UELMA Summary and Frequently Asked Questions, American Association of Law Libraries, September 2014

⁵ UELMA Summary, Uniform Law Commission, Fall 2011

⁶ Guidelines for the Management of Electronic Transactions and Signed Records, Texas Department of Information Resources, May 2003

⁷ Encryption Policies, Attachment A Terms, Texas Department of Information Resources, Fall 2008

⁸ Public Key Infrastructure, Microsoft Developers Center, 2013

⁹ Guidelines for the Management of Electronic Transactions and Signed Records, Texas Department of Information Resources, May 2003

digital signatures, hash-keys, and public key infrastructure systems may be used, Minnesota has established an original state official software system of authentication and North Dakota is working to create its own.

According to Professor Bintliff, the U.S. Open Source Data System is currently creating an open source system that would be freely available to the state for this purpose in the future and that adoption of UELMA and its technical obligations have caused no fiscal implications to adoptive states.

With regard to preservation, Professor Bintliff discussed the cost savings available to the state by digitally archiving rather than physically storing documents as well as savings to the citizens by allowing them to access documents easily without having to purchase subscription services. She also noted that UELMA provides the benefit of reciprocity, ensuring that Texas law will be afforded the presumption of authenticity in court proceedings and other situations in which electronic legal materials are necessary. According to the professor, UELMA is also citizen friendly and the discretion in the authentication and preservation processes is beneficial.

In response to a question from Vice-Chair Farrar, Professor Bintliff stated that adoption of UELMA would have minimal impact on subscription services because of the value added by these services in citing relevant information along with serving as a database of electronic legal materials.

Jane O'Connell, Deputy Director-Tarlton Law Library

Jane O'Connell, the Deputy Director of the Tarlton Law Library at the University of Texas at Austin School of Law, also testified on her own behalf. Succinctly she shared her full support of the comments made by Professor Bintliff and adoption of UELMA.

Mary Camp, Legislative Reference Library

Mary Camp with the Legislative Reference Library (LRL) testified that currently the library retains the physical documents that may be needed to establish the accuracy of online information, specifically actual bill files that are certified through the Chief Clerk's office.

Similarly, she testified on the types of documents that would be covered under UELMA that the LRL currently has oversight of: specifically session laws, and house and senate journals. While supportive of making these documents electronic, she stated that for official purposes the LRL should continue to preserve hard copies. Ms. Camp also shared that with technological advancements, some may lack access, and in the event of a power failure, a book may be pulled from a shelf but a digital document cannot be retrieved.

In response to a question from Representative Lewis on logistical difficulties, Ms. Camp answered that the largest burden on an agency from UELMA would be determining who is responsible for providing the electronic legal materials and ensuring adequate staffing and resources to coordinate this undertaking.

Representative Thompson asked how the LRL would address the new electronic filing of house bills, and Ms. Camp testified that there would still be hard copies retained by the library to ensure all needs by the Legislature are met.

Lisa Rush, Travis County Law Library

Lisa Rush, the manager of the Travis County Law Library testified that currently a paywall exists between citizens and their laws and the adoption of UELMA would offer a framework to an alternative less costly system. She also testified that libraries would spend an average of \$7,500 a year on printed law books, a cost most citizens could not afford, and one that presents challenges to many small and rural libraries.

Ms. Rush also testified that she does not think vendors of subscription services will be adversely affected by the adoption of UELMA and that providing low cost access to laws is a worthy goal.

Dan Procter, Office of the Secretary of State

Dan Procter with the Office of the Secretary of State, (SOS), testified that with regard to documents covered by UELMA, the SOS is responsible for the signed copies of legislative bills, state agency rules published in the Texas Register, and agency rules in the Texas Administrative Code.

Mr. Procter noted that placing documents online allow for the convenient, timely and reliable access to legal materials, but the documents placed online are not official even though citizens accept their authenticity. Mr. Procter also noted that after each session of the Legislature, the Secretary of State assigns a chapter number for each enrolled bill. Publication is the next step in the format of searchable PDF files available on the Secretary's web site. These files are maintained by the Secretary in an Oracle database. The paper originals of signed bills and resolutions are microfilmed. Finally, these originals are bound in hard cover volumes and delivered to the State Archives. The University of North Texas Libraries' Portal to Texas History maintains an online archive for each session beginning with the 78th Legislature (2003). Should a question arise regarding the official text, the signed original documents housed in the Archives determine authenticity.

With regard to administrative rules, state agencies file rules and other notices with the Secretary of State under the Texas Government Code Chapters 2001 and 2002. The Secretary maintains a permanent register of each rule on paper. Publication of the rules and other legal notices is accomplished as follows.

The Texas Register serves as the journal of state agency rulemaking for Texas, and is published each Friday in PDF and HTML formats. Print editions are sent to the State Library and Archives Commission, State Law Library, and Legislative Reference Library. The University of North Texas Libraries' Portal to Texas History has an online archive of all back issues of the Texas Register.

The Texas Administrative Code, the compilation of each state agency's rules, is published by the Secretary of State via an online Oracle database. The Administrative Code is updated each day to the current calendar date. The database maintains superseded versions of the Administrative Code, beginning with versions from 1999. Also, the Code database contains the individual agency rules and other notices that are published in the weekly Texas Register. As noted above, the Secretary maintains a permanent register of each rule on paper, but the Secretary publishes no hard copy compilation of agency rules. Thompson Reuters Westlaw annually issues a print edition of the Texas Administrative Code.

Mr. Procter noted that the SOS does not employ a method of authentication for electronic legal materials, though adopting a system of authentication would be achievable with reasonable effort. He testified that there is the option of purchasing authentication software, like Colorado did in purchasing Adobe Acrobat, or utilizing in house resources like Utah and Minnesota did to establish their own. Mr. Procter also mentioned that he had spoken to the U.S. Open Data Institute and a new, open source, system would be offered soon.

David Slayton, Office of Court Administration

David Slayton, with the Office of Court Administration, testified that records produced like court records, opinions, and rules that the Supreme Court and the Court of Criminal Appeals issue would be applicable to the provisions of UELMA.

Mr. Slayton also testified that there is currently not a uniform system in place to authenticate documents in use by the courts. Most courts retain signed original copies with authentication occurring when necessary by comparing against the originally stored document. According to Mr. Slayton, each court also has their own retention policy. The Supreme Court and the Court of Criminal Appeals store the original case files as the official record. The 3rd, 4th, and 13th Courts of Appeal publish scanned copies and retain the original as the official copy, while the 12th Court utilizes the electronic version as the official record yet still maintains the original.

The Supreme Court's rules allow courts to establish electronic records as the official record and do not require them to retain the legal materials on paper. Mr. Slayton noted that only 3 states, Connecticut, Hawaii and Idaho, required judicial records to comply with their versions of UELMA. Mr. Slayton also noted that if adopted by Texas, UELMA would not require significant efforts for the OCA to comply. He also testified that agencies may need to be afforded the opportunity to adopt their own method of authentication and whether there ought to be one method or more in use at a time.

Answering questions raised by Representative Thompson on cost savings, Mr. Slayton testified that cost savings are seen by clerks that have chosen to utilize electronic versions of documents and with the use of e-filing systems, documents are authentic as electronically filed and storage costs have decreased since there is no longer a need for physical storage.

Mr. Slayton, answering a question by Chairman Lewis, further explained that the rules promulgated by the Supreme Court allow appeals through the online portal, but some appellate courts are retaining paper and the paper version is the official version, and some have made the

electronic record the official record. Only electronic records deemed official would have to comply with the provisions of UELMA.

Jon Heining, Texas Legislative Council

Jon Heining of the Texas Legislative Council (TLC) testified that the online presence of TLC has increased with the development of the Texas Legislature Online (TLO) which provides legislative proposals, analyses from various entities, and votes on diverse issues. The TLC also produces the free online service to review the Texas Constitution and Statutes. Mr. Heining testified that instead of this database being created solely as an information portal for the public, the service is actually a by-product of the need to have an indexed database for the purposes of drafting legislative proposals for the legislature. The software developed by the TLC recognizes the recitals of text from bills that alter the statutes and, as Mr. Heining noted, neither database are official. Official drafts of legislation remain with the Chief Clerk, Committee Chairs, the Secretary of State, and the Secretary of the Senate.

With regard to possible implementation of UELMA, Mr. Heining noted that ample time would be necessary for the production of an application for authentication and that the TLC would like to work with the Legislature to develop a process that would not negatively impact the primary mission of the Council to serve Members of the Legislature. Mr. Heining also believed that in order for the online publications to be official and authenticated, significant changes to the present process would be needed that there are possible unknown consequences. He suggested that the automating may require time and recommended a pilot program as a means to test an effective plan.

According to Mr. Heining, a change in law may not be required in order to instruct the TLC to begin this process, as the enacting language establishing the TLC allows the Legislature to instruct service enhancements, and that may be the best course of action instead of enacting new legislation.

Recommendation

As an essential function of transparent and accountable government, electronic legal materials utilized by the public ought to be credible and accurate. It is the recommendation of the committee that the legislature instruct the Records Management Interagency Coordinating Council, RMICC, a council serving under the State Library and Archives Commission, to review the feasibility of establishing a framework of compliance with the provisions of the Uniform Electronic Legal Materials Act. This review should be accommodating in nature, and allow each agency to adopt a process that serves its obligations to the public. The RMICC serves as a unique communicative body in state government and should be authorized the ability to seek assistance from the Texas Legislative Council, the Department of Information Resources, and any other unit that may assist in accomplishing this mission. In this review, the RMICC shall evaluate the best means to authenticate documents, including the adoption of an existing method, the creation of a new method, or a system of several methods of authentication. The legislature shall also appropriate the necessary resources including funds and personnel to assist the State Library and Archives Commission. The RMICC shall report to the Texas Legislature its findings no later than December 1, 2016.

The following exhibits were provided to the committee:

1. Written Testimony of Dan Procter, Director of Government Filings, Office of the Secretary of State
2. Written Testimony of Barbara Bintliff, Law Librarian
3. Texas-Related UELMA Supporters: Associations and Individuals

**House Committee on Judiciary and Civil Jurisprudence
April 28, 2014**

**Written Testimony of
Dan Procter, Director of Government Filings Business and Public Filings Division
Office of the Secretary of State**

The Secretary of State is responsible for the electronic publication of legislative acts and administrative rules. These postings and publications are popular and frequently visited on the Secretary's website. Those who rely on these publications seldom question the authenticity of the documents. Currently, however, these electronic publications are not designated as official. The official documents are maintained on paper and/or microfilm. Exceptions are the *Texas Administrative Code* and online posting of open meeting agendas, which are described below under the subheading for Administrative Rules.

With reasonable effort and the necessary resources, providing online authentication for these documents is achievable. The Secretary is committed to the long term preservation of these electronic documents. Databases are routinely backed up by Data Center Services. As software applications evolve, the information is migrated to new platforms.

Acts of the Legislature

After each session of the Legislature, the Secretary of State assigns a chapter number for each enrolled bill. Publication is the next step in the format of searchable PDF files available on the Secretary's web site. These files are maintained by the Secretary in an Oracle database. The paper originals of signed bills and resolutions are microfilmed. Finally, these originals are bound in hard cover volumes and delivered to the State Archives. The University of North Texas Libraries' Portal to Texas History maintains an online archive for each session beginning with the 78th Legislature (2003). A print edition of the General and Special Laws is available from Thompson Reuters Westlaw.

Should a question arise regarding the official text, the signed original documents housed in the Archives determine authenticity.

Administrative Rules

State agencies file rules and other notices with the Secretary of State under the Texas Government Code Chapters 2001 and 2002. The Secretary maintains a permanent register of each rule on paper. Publication of the rules and other legal notices is accomplished as follows.

The *Texas Register* is published each Friday in PDF and HTML formats. A print edition of the *Texas Register* is available from LexisNexis Matthew Bender. Print editions are sent to the State Library and Archives Commission, State Law Library, and Legislative Reference Library. The University of North Texas Libraries' Portal to Texas History has an online archive of all back issues of the *Texas Register*.

The *Texas Administrative Code* – the compilation of each state agency's rules – is published by the Secretary of State via an online Oracle database. The *Administrative Code* is updated each

day to the current calendar date. The database maintains superseded versions of the *Administrative Code*, beginning with versions from 1999. Also, the *Code* database contains the individual agency rules and other notices that are published in the weekly *Texas Register*. As noted above, the Secretary maintains a permanent register of each rule on paper, but the Secretary publishes no hard copy compilation of agency rules. Thompson Reuters Westlaw annually issues a print edition of the *Texas Administrative Code*.

The Texas Open Meetings Law (specifically, Texas Government Code §551.048) directs the Secretary to post on the internet the notices of meetings for state and regional government bodies. The Oracle database for the *Texas Register* and *Texas Administrative Code* also contains all pending and past open meeting agendas beginning with those from 1999. The database contains the official versions of these notices. Government bodies do not file other information relating to open meetings, such as minutes, with the Secretary of State.

The University of North Texas Libraries' Portal to Texas History provides a daily online posting of all pending meeting agendas as an alternative source in the event that the Secretary's website should be offline temporarily.

The contents of the Texas Register and Administrative Code are to be judicially noticed and are prima facie evidence of the text of the documents. Texas Government Code, §2002.022, 2002.054. But if a conflict exists, the official text of a rule is the text on file with the secretary of state and not the text published in the Texas Register or on file with the issuing state agency. Texas Government Code, §2001.037.

Dan Procter is Director of the Secretary of State's Government Filings Section. He oversees the publication of the final legislative bills and resolutions at the close of each Legislature and the publication of state agency rules in the Texas Register and Texas Administrative Code. He is the Secretary of State's designee and current chair for the Records Management Interagency Coordinating Council, which studies and reports on records management issues within state government and higher education.

**House Committee on Judiciary and Civil Jurisprudence
April 28, 2014**

**Written Testimony of
Barbara Bintliff
Regarding the Uniform Electronic Legal Material Act (UELMA)**

Thank you for the invitation to address you regarding UELMA, the Uniform Electronic Legal Material Act. Your interest in considering this potential legislation speaks to your forward-looking perspective on preserving our state's legislative and other legal history, and making it accessible for generations to come.

I must make clear at the outset that I am not speaking for the University of Texas. I am, rather, speaking as a law librarian who deals with legal materials in electronic and print formats every day.

E-books and electronic publishing become more and more a part of our normal business operations every day. The publication of laws and legal information is no exception. All states publish some legal information online, which aids in transparency and accountability in government, brings efficiency in publication processes, and fulfills the state's moral responsibility to make its laws available to its citizens.

This Act addresses the problem caused when a state eliminates its print legal resources in favor of electronic-only resources, without assuring their trustworthiness and reliability. UELMA provides an outcomes-based approach that will ensure that, when Texas begins offering its important legal material in only electronic format, its law is guaranteed with the same level of trustworthiness as traditionally provided by print publication.

With so much inaccurate information available via the Internet, citizens must have confidence in the legal texts they find at Texas government websites. They need to know that electronic legal information designated as official is authentic, meaning it is trustworthy and has not been tampered with. This can be accomplished in many ways. UELMA provides for those options.

Further, we law librarians are frequently asked for earlier versions of a law, to allow citizens to understand the law that was in effect when their question arose. At present, the earlier versions of the Texas statutes are not online. Citizens must be able to find and use with confidence that earlier law. It must be preserved and made permanently and publicly available.

UELMA is a roadmap for states that are publishing their important legal materials electronically. It is an act designed to give states maximum discretion in developing a system for authenticating, preserving, and making publicly accessible their official electronic legal material. Only four types of legal material are required to be covered by UELMA: the state's constitution, the session laws, the codified laws, and regulations with the force and effect of law. The legislature is given discretion to include any other legal materials it wishes, consistent with state practice.

UELMA is proactive legislation. It may not have an immediate effect on Texas, but rather would serve as a map as the state travels the road to electronic legal publication, ensuring the right road is taken. It lays the groundwork for the future we know is coming. UELMA would ensure that Texas can exercise its own discretion in choosing methods to authenticate, preserve, and make available electronic legal information. It requires no new administrative structures, and can rely on existing personnel for its implementation.

UELMA provides for reciprocity between adopting states. Texas's electronic legal material covered by UELMA will be recognized as presumptively authentic by other states that have adopted the Act, making expensive and time-consuming proofs unnecessary. The electronic legal material of other states that have enacted UELMA will be similarly recognized in Texas courts, again enhancing efficiency in proceedings and saving costs.

UELMA is supported by the Houston Association of Law Libraries, the Dallas Association of Law Libraries, the American Association of Law Libraries, the Texas Library Association, the American Bar Association, and the Uniform Law Commission. Many other stakeholders, including the U.S. Government Printing Office, the National Archives and Records Administration, the Society of American Archivists, the National Center for State Courts, the Association of Reporters of Judicial Decisions, and commercial legal database vendors were active participants in its drafting process.

I think the issues covered by UELMA are important enough that I spent three years working on its drafting and approval. I strongly urge you to support the UELMA, which will establish Texas as a leader among states understanding that official electronic legal material must be authenticated, preserved, and made permanently available to the public. Thank you very much for your consideration.

**Texas-Related UELMA Supporters: Associations and Individuals
April 2014**

Associations:

American Bar Association
American Association of Law Libraries
Dallas Association of Law Libraries
Houston Association of Law Libraries
Texas Library Association
Uniform Law Commission

Individuals:

(NOTE: The individuals below personally support UELMA. Affiliations are included for identification purposes only. Individuals do not purport to speak for their institutions.)

Barbara Bintliff

Joseph C. Hutcheson Professor in Law and Director, Tarlton Law Library
The University of Texas at Austin

David Cowan

Vice President, Professor of Law, and Director of Library Services
South Texas College of Law

Edward Hart

Assistant Dean for Law Library and Assistant Professor of Law
University of North Texas/Dallas College of Law

Robert Hu

Professor of Law and Director, Sarita Kenedy East Law Library
St. Mary's University

Jane O'Connell

Lecturer in Law and Deputy Director, Tarlton Law Library
The University of Texas at Austin

DeCarlous Spearman

Assistant Professor of Law and Director, Thurgood Marshall School of Law Library
Texas Southern University

Spencer Simons

Associate Professor of Law and Director, O'Quinn Law Library
University of Houston

Arturo Torres

Professor of Law and Associate Dean for Law Library and Information Technology
Texas Tech University

CHARGE 4

Study issues that inhibit the use of wills and access to the probate process in Texas, particularly for low-income individuals.

SUMMARY OF COMMITTEE ACTION CHARGE 4

CHARGE 4: Study issues that inhibit the use of wills and access to the probate process in Texas, particularly for low-income individuals.

Committee Hearing

The House Committee on Judiciary & Civil Jurisprudence met in a scheduled public hearing on Monday, April 28, 2014 at 10:00am in room E2.010, Texas State Capitol.

The following is the list of invited testimony who either testified on behalf of themselves or the listed entity:

Bruce Bower, Self
Craig Hopper, Self, Real Estate Probate Trust Law Section (REPTL), State Bar of Texas
Frances Leos Martinez, Texas Title Project
Trish McAllister, Texas Access to Justice Commission
David Slayton, Office of Court Administration

Summary of Charge

According to the Texas Access to Justice Commission, there are almost six million Texans who qualify for legal aid, and yet legal aid and other pro bono programs can only assist about twenty percent of those with civil legal needs.¹ Data from the Access to Justice Commission and the Office of Court Administration suggest that, while over 20 percent of civil case filings are filed by pro se litigants, only 2.4% of filings in probate court are by pro se litigants. The courts in general, and particularly the probate system, can seem complicated and overwhelming, especially to a person of limited resources or education. One of the greatest concerns that these individuals have with regard to probate matters is resolving estates of relatives and friends without guidance or oversight from a probate court. Some of these individuals have prepared wills, but most die intestate, or without a will. This charge focuses generally on improving these individual's access to the probate system, and specifically on creating a simpler and easier method for these people to obtain and probate a simple will.

Background of Probate Law

In Texas, there are five possible procedures to distribute a decedent's assets: Administration of an Estate, a Muniment of Title, a Determination of Heirship, a Small Estate Affidavit, and an Affidavit of Heirship.² If an individual dies with a valid will, the will must be

¹ Texas Access to Justice Commission report to the Committee, p. 1, see Attachments

² Texas Access to Justice Commission report to the Committee, p. 2, see Attachments

probated within four years of the testator's death.³ A valid will must be in writing, and either signed by the testator or signed by another person at the direction of the testator, and in his presence. The will must also be attested and signed by 2 witnesses who are at least 14 years of age. A holographic, or handwritten, will can also be valid if it is written wholly in the testator's handwriting. Any interested person may file an application for an order admitting a will to probate. An applicant must prove that the testator is dead, that the will is valid, and that the court has jurisdiction over the estate.⁴ If the court is satisfied that the will should be admitted, it will enter an order admitting the will to probate. After the will is admitted, interested parties have two years to contest the will's validity, except in extenuating circumstances such as fraud or incapacitation.⁵ Once admitted, a personal representative, either an executor or administrator, is appointed to administer the estate. This can include taking inventory of assets, paying debts, and distributing assets to beneficiaries. An estate can be administered through an independent or a dependent administration. A dependent administration requires court supervision for the representative's actions, while an independent administration does not require a court's approval for the distribution of assets or any other action the representative may take.

In Texas, you can probate an estate using a muniment of title, which allows for a less costly and simpler transfer of property without the appointment of an estate administrator.⁶ A muniment of title can only be utilized when the only existing debt is secured by real property. An order admitting a will to probate as a muniment of title constitutes sufficient legal authority for the payment or transfer of an estate asset without liability to a person described in the will as entitled to receive the asset. A muniment of title is the only mechanism for probating a will more than four years after the decedent's death. In some jurisdictions, however, simply being unaware of the legal requirement that a will be probated has been held insufficient to allow a judge to authorize a late probating of a will.⁷

If an individual dies intestate, the Texas Estates Code provides statutory guidelines for the distribution of the estate.⁸ If the individual is married, the spouse generally receives the community property, with a few statutory exceptions. If the individual is not married, or there are questions as to the beneficiaries of the estate, the probate court may hold a proceeding to declare heirship, and the court would appoint an attorney ad litem to represent unknown heirs.⁹

³ Tex. Est. Code Ann. § 256.003 (Vernon 2014)

⁴ See, generally, Tex. Est. Code § 256 (Vernon 2014)

⁵ *Id.*

⁶ Sec. 257.001. PROBATE OF WILL AS MUNIMENT OF TITLE AUTHORIZED. A court may admit a will to probate as a muniment of title if the court is satisfied that the will should be admitted to probate and the court:

(1) is satisfied that the testator's estate does not owe an unpaid debt, other than any debt secured by a lien on real estate; or

(2) finds for another reason that there is no necessity for administration of the estate.

Tex. Est. Code Ann. § 257.001 (Vernon 2014).

⁷ See *In re Estate of Rothrock*, 312 S.W.3d 271, 274-75 (Tex.App.—Tyler, 2010, no pet. h.).

⁸ ESTATE OF AN INTESTATE NOT LEAVING SPOUSE. (a) If a person who dies intestate does not leave a spouse, the estate to which the person had title descends and passes in parcenary to the person's kindred in the order provided by this section.

(b) The person's estate descends and passes to the person's children and the children's descendants.

(c) If no child or child's descendant survives the person, the person's estate descends and passes in equal portions to the person's father and mother.

Tex. Est. Code Ann. § 201.001 (Vernon 2014)

⁹ Tex. Est. Code Ann. § 202 (Vernon 2014)

If someone dies without a will, and the total value of the estate does not exceed \$50,000, the heirs can file a small estate affidavit to have the assets distributed without the appointment of a personal representative.¹⁰ There are statutory guidelines with which the affidavit must comply in order to be approved by the probate court.¹¹ A small estate affidavit can be used to transfer homestead property but not any other type of real property.

According to the Texas Access to Justice Commission, “when no will exists, real and personal property cannot be properly transferred according to the decedent’s wishes. While the property may be informally given to the person that the decedent wanted to have the property, title cannot properly pass. Without title, that person cannot sell the property, encumber the property, use it as collateral on a loan, or qualify for property tax exemptions for which they would otherwise be eligible, such as the disability exemption or the over-65 exemption. Issues of co-ownership can also arise, as well as issues of clouded title.”¹² If a will does not exist, or is not timely probated, the property passes through intestate succession to heirs as tenants in common.¹³ Locating heirs is often time and cost-prohibitive, and unknown heirs must be represented by an attorney ad litem, which is an additional expense that lower income individuals may not be able to afford.

Several groups, including the Real Estate, Probate, and Trust Law Section of the State Bar, as well as the Texas Access to Justice Commission, have begun work on court-approved forms that can easily be accessed by individuals who cannot afford the expense of probate court. These groups recommend some best practices for creating the forms, including clear instructions, a glossary of terms, and the availability of forms in Spanish and other languages. They are working on drafts for five different types of forms: married with adult children will; married with minor children will; single with adult children will; single with minor children will; and single with no children will. They are additionally drafting forms in plain language for muniment of title, small estate affidavits, and declaration of guardianship in advance for a minor.

¹⁰ *Id* at § 205

¹¹ Sec. 205.001. ENTITLEMENT TO ESTATE WITHOUT APPOINTMENT OF PERSONAL REPRESENTATIVE. The distributees of the estate of a decedent who dies intestate are entitled to the decedent's estate without waiting for the appointment of a personal representative of the estate to the extent the estate assets, excluding homestead and exempt property, exceed the known liabilities of the estate, excluding any liabilities secured by homestead and exempt property, if:

- (1) 30 days have elapsed since the date of the decedent's death;
- (2) no petition for the appointment of a personal representative is pending or has been granted;
- (3) the value of the estate assets, excluding homestead and exempt property, does not exceed \$50,000;
- (4) an affidavit that meets the requirements of Section 205.002 is filed with the clerk of the court that has jurisdiction and venue of the estate;
- (5) the judge approves the affidavit as provided by Section 205.003; and
- (6) the distributees comply with Section 205.004.

Tex. Est. Code § 205 (Vernon 2014)

¹² Texas Access to Justice Commission report to the Committee, p. 5, see Attachments

¹³ Sec. 101. 002. EFFECT OF JOINT OWNERSHIP OF PROPERTY. If two or more persons hold an interest in property jointly and one joint owner dies before severance, the interest of the decedent in the joint estate:

- (1) does not survive to the remaining joint owner or owners; and
- (2) passes by will or intestacy from the decedent as if the decedent's interest had been severed.

Tex. Est. Code § 101.002. (Vernon 2014)

Summary of Committee Hearing

Trish McAllister, Texas Access to Justice Commission

Trish McAllister, from the Texas Access to Justice Commission, testified to the fact that the majority of low-income individuals do not have wills. Numerous issues arise as a result of questions regarding property and other assets, as well as attempting to find unknown heirs, and having to probate an estate within four years of the decedent's death. There is a lack of understanding about the importance of a will, and the public assumes that the family will be allowed to distribute assets in the way they would like. When no will exists, however, property cannot be properly transferred, and therefore title is not perfected.

She also testified that, although the Texas Rule of Civil Procedure 7 allows pro se litigants to appear in probate court,¹⁴ in practice there are only two scenarios in which a pro se litigant can represent themselves in probate court. The first is when the litigant is the sole beneficiary of a will, and the second is when they are probating a will as a muniment of title or filing a small estates affidavit. This is based on case law in Texas involving pro se litigants, including *Steele v. McDonald*, 202 S.W. 3d 926 (Tex. App.—Waco 2006, no pet. h.)¹⁵ and *In re Guetersloh*, 326 S.W. 3d 737 (Tex. App.—Amarillo 2010, no pet. h.)¹⁶ She mentioned that pro se litigants are allowed much greater access to probate courts in other states, and many states have adopted the Uniform Probate Code, which outlines procedures for informal administration of estates.

Ms. McAllister had several recommendations for the committee to improve access to the probate system. First, develop plain language forms with instructions, a glossary of terms, and make them available in Spanish and other languages. Once the Texas Access to Justice Commission and the Real Estate, Probate and Trust Law Section of the State Bar create these forms, they will be submitting them to the Supreme Court for approval. Her second suggestion was for the Legislature to create an interim task force or committee to study the impact of the probate system on low-income individuals and make recommendations as to any necessary changes. Third, she suggested that there is a great need to educate the public and increase awareness on the probate process in general, the laws of intestate succession, and the importance of having a will and probating within a timely manner. Finally, she recommended that her Commission, along with the Office of Court Administration, continue to address guardianship issues with respect to greater access to the probate court.

Bruce Bower

Bruce Bower, who works for the Texas Legal Services Center but represented himself,

¹⁴ There is no constitutional right to represent yourself without an attorney in civil matters, but "any party to a suit may appear and prosecute or defend his rights therein, either in person or by an attorney of the court." Tex. R. Civ. Pro. § 7 (Vernon 2014)

¹⁵ In this case, the appellate court held that all court appearances and filings by an independent personal representative require a licensed attorney. *Steele v. McDonald*, 202 S.W. 3d 926 (Tex. App.—Waco 2006, no pet. h.)

¹⁶ "If a non-attorney trustee appears in court on behalf of the trust, he or she necessarily represents the interests of others, which amounts to the unauthorized practice of law." *In re Guetersloh*, 326 S.W. 3d 737 at 740 (Tex. App.—Amarillo, 2010, no. pet. h.)

testified that the allowance of basic will forms in other states, including Wisconsin, has greatly reduced the number of intestate cases. There are four states that currently have statutory will forms: Wisconsin, Maine, California, and Michigan. Mr. Bower saw advantages in a court-approved will form rather than a statutory will form, because these form allows greater flexibility. If there is a need to change the will form, the judiciary can much more easily modify a form than one that is legislatively adopted. He echoed others' concerns that the basic will forms need step-by-step plain language instructions. He mentioned that one unintended consequence of intestate succession in Texas is that there are a lot of surprised heirs in Mexico. This creates logistical problems, because even if the heirs are willing to waive their interest in the property, the difficulty in having the waivers signed and returned to the probate court is very challenging. Finally, with regard to the pro se issue, he mentioned a growing legal movement called "unbundled" or "limited scope legal services," where a lawyer may take on a client's matter, but with understood limitations. These "coached pro se" litigants are advised as to the probate court's procedures, and advised when filling out forms, but the litigants represent themselves in court.

Frances Leos Martinez, Texas Title Project

Frances Leos Martinez, representing the Texas Title Project, testified that her organization is currently working with over 200 families affected by hurricanes along the Gulf. They work to assist these families to obtain clear title so that they can access disaster relief for their flooded and damaged homes. The consequences of intestacy, especially in these areas, is great; sometimes the last deed for the home was dated in the 1920s, but the homeowner must provide current ownership documentation before they are eligible for disaster relief funds. She emphasized the need for plain language forms, coupled with extensive community legal education and increased legal services, including creative programs that match trained attorneys with those in need.

David Slayton, Office of Court Administration

David Slayton, the Administrative Director of the Office of Court Administration, testified that a "silver tsunami" is occurring in Texas. The elderly population is growing exponentially, and the OCA is looking closely at the effects on the probate system, specifically with regard to guardianships. There are over 46,000 active guardianships in Texas, and the OCA has created a network of guardianship stakeholders to study issues, engage in outreach education, and better train individuals to prepare them for the guardianship process. There are several barriers to successful guardianships, including a lack of legal and community services, a lack of county or statewide guardianship services, and a lack of family resources. There is a bonding requirement to become a guardian, and some lower-income people cannot afford the cost of guardianship, so they do not utilize the system. Mr. Slayton testified that the Texas Judicial Council will be looking to make specific recommendations to the Legislature next session, but that their top priorities include making educational resources available to increase awareness of the guardianship system, and establishing support services so that guardians will be more aware of their duties and responsibilities.

Craig Hopper, REPTL

Craig Hopper, representing the Real Estate, Probate, and Trust Law Section of the State Bar of Texas, testified that the REPTL section has an ongoing interest in ensuring that the probate process is accessible to all individuals. He stressed the importance of an efficient system, and pointed out that education is a key aspect of streamlining the probate process. He said that REPTL is committed to working with the Access to Justice Commission to create forms, but mentioned the difficulty of drafting the forms because there is a huge body of statutory and case law that the forms must comply with, and yet the forms must be in plain language so that they are easily understood by the public. REPTL pledged to work to ensure that the forms will be valid testamentary documents, that they will be understandable by lay people without the advice of counsel, and that implementation of the forms will only require nominal costs to heirs.

Conclusion and Recommendations

The Committee agrees with both the Access to Justice Commission and the Real Estate, Probate, and Trust Law Section of the State Bar that access to the probate system can be greatly improved. The courts, and specifically probate courts, can seem overwhelming and unavailable, and much more needs to be done to expand access to the justice system, particularly with regard to those in a lower income bracket. The proposed will forms, along with education programs and ventures such as the Texas Title Project, are critical aspects of increasing accessibility to the probate courts.

Interim workgroup on access to probate

Testimony responding to the interim charge on access to probate recommended that a workgroup meet during the interim to propose small changes to alleviate barriers to accessing probate or using alternatives to probate. Following this recommendation, Representative Farrar convened a workgroup made up of various attorneys and judges who practice real estate or probate law, or whose practice involves increasing access to the courts. The group, facilitated by Representative Farrar's office, included attorneys, probate judges, professors from the University of Texas School of Law, and the Executive Director of the Access to Justice Commission. Meeting regularly throughout the summer, the group focused its efforts on three reforms: increasing use of pay-on-death accounts, providing a process for heirs to access decedent's bank account information, and adopting a statutory transfer-on-death deed.

First, the group recommends increasing use of pay-on-death (POD) accounts by ensuring more consumers know the option is available when opening a bank account. A POD account allows the designated beneficiary to receive funds from decedent's account without going through probate, an expensive process, or using a small estate affidavit, which requires each heir's signature and cannot be used in every situation. The group suggests improvements to current disclosures on POD accounts, including that they be made separately from other account disclosures, before an account is selected, and in 14-pt, boldfaced type.

Second, the group recommends providing a process for banks to provide account information upon court order or to a decedent's heir. Lack of access to this information can be a

barrier to families who would otherwise be able to use a small estate affidavit, a process that requires a listing of estate assets to show that assets exceed liabilities.

Finally, the group recommends that Texas adopt a statutory transfer-on-death (TOD) deed. A TOD deed transfers an interest in real property without going through probate. Many low-income Texans lack wills, and frequently estates are not probated because, among other obstacles, the process is expensive. This problem has led to cloudy titles and complex, unintended co-ownership structures that pose difficulties for owners, title companies, local governmental entities, and other real estate stakeholders. A TOD deed offers a way for an owner to pass real property while avoiding the expensive and sometimes confusing probate process.

The following exhibits were provided to the committee:

1. Texas Access to Justice Commission report to the committee
2. Texas Title Project report to the committee

**A Report to the House Judiciary & Civil Jurisprudence Committee
From the Texas Access to Justice Commission
On the Primary Needs of the Poor in Probate and Estate Matters
April 28, 2014**

INTRODUCTION

There are almost six million Texans who qualify for legal aid, yet legal aid and pro bono programs are only able to help about twenty percent of those with civil legal needs. Significant decreases in funding to legal aid programs from reduced Interest on Lawyer Trust Accounts (“IOLTA”) revenue and federal funding levels,¹ combined with one of the highest poverty rates in the nation, means that there will be fewer legal aid lawyers to help the growing numbers of poor who need assistance.

The Supreme Court of Texas established the Texas Access to Justice Commission (“Commission”) in 2001 to serve as the statewide umbrella organization for all efforts to expand access to justice in civil legal matters for the poor. It is the role of the Commission to assess national and statewide trends on access to justice issues facing the poor, and to develop initiatives that increase access and reduce barriers to the justice system. The Commission is comprised of ten appointees of the Court, seven appointees of the State Bar of Texas, and three ex-officio public appointees.

There are three overriding issues that impact low-income Texans with probate and estate matters: access to wills, access to guardianships, and access to the courts for those who must represent themselves without a lawyer. This report will focus on the reasons that these issues are important to our communities and suggest some solutions to these problems.

ACCESS TO WILLS

Overview of Probate and Alternatives to Probate in Texas

Types of Wills

To execute a will in Texas, a person must be an adult of sound mind and sign the will in front of two witnesses who are at least 14 years old and who sign their names in the testator’s presence.² Texas also recognizes holographic, or handwritten, wills. A holographic will must be entirely in the decedent’s handwriting and must be legible. Unfortunately, while most people know that they can write their own will, they do not know to insert language that allows for the independent administration of the estate. They are similarly unaware that unless a bond is waived in the will, one will have to be posted. If there is no self-proving affidavit, two witnesses must testify that

¹ Funds generated from IOLTA have decreased from \$20 million in 2007 to estimated \$4.0 million in 2014. Federal funds have declined from \$12.56 per poor person in 1995 to \$5.46 per poor person in 2014.

² Estates Code Sec. 251.001. WHO MAY EXECUTE WILL Under the rules and limitations prescribed by law, a person of sound mind has the right and power to make a last will and testament if, at the time the will is made, the person: (1) is 18 years of age or older; (2) is or has been married; or (3) is a member of the armed forces of the United States, an auxiliary of the armed forces of the United States, or the United States Maritime Service.

the handwriting belongs to the decedent.³ Clearly, a holographic will should only be executed in very limited circumstances when there is no other alternative. Nuncupative, or oral, wills were previously allowed in Texas to pass personal property valued at less than \$500, but were excluded in the recent move of the probate code to the new estates code.

Probating a Will in Texas

Probate matters are handled in statutory probate courts or county courts at law. Statutory probate courts are limited to urban areas. There are eighteen statutory probate courts but they exist in only ten counties.⁴ There are five possible procedures to dispose of assets: an Administration of the Estate, a Muniment of Title, a Determination of Heirship, a Small Estate Affidavit, or an Affidavit of Heirship. In Texas, wills must be filed within four years after death unless good cause is shown. Additionally, property cannot be inherited until all debts are paid.

If a will exists and there are outstanding debts, there are two options: an Administration of the Estate or a Muniment of Title. An Administration of the Estate must be filed if the estate has any debt not secured by real property. A Muniment of Title can only be filed when the sole existing debt is secured by real property. No other debt, such as a car loan or credit card debt, is allowed. It is a disposition of property that is unique to Texas and provides a streamlined process for probating a will that is less costly than traditional probate because it does not require the appointment of an administrator or an executor. The will is simply filed for probate and once everything is found in order, the court issues a court order that can be used to transfer title to the person listed in the will. Importantly, it is also the only mechanism for probating a will more than four years after death of the decedent.⁵ The main drawbacks to a Muniment of Title are that it transfers a lesser title to the property, and because it is unique to Texas, it can cause problems when working with out-of-state financial institutions or attorneys.

If a will does not exist, property must pass by Texas' laws of intestate succession. No easy way currently exists to address the issue in probate court, such as with the Muniment of Title. If all debts have been paid, assets can be disposed by filing a Determination of Heirship, an Affidavit of Heirship, or a Small Estates Affidavit. When a Determination of Heirship is filed, all known heirs must be located and an attorney ad litem must be appointed to represent the interests of the unknown heirs. Title to the property vests as soon as the court signs the order. However, Affidavits of Heirship filed outside a Determination of Heirship must be on file at least five years before a title company will recognize them. If the property is valued at \$50,000 or less, a Small Estate Affidavit can be filed, but an affidavit must be sworn to by each heir of the estate with legal capacity.

³Estates Code Sec. 256.154. PROOF OF EXECUTION OF HOLOGRAPHIC WILL. (a) A will wholly in the handwriting of the testator that is not self-proved as provided by this title may be proved by two witnesses to the testator's handwriting. The evidence may be by: (1) sworn testimony or affidavit taken in open court; or (2) if the witnesses are nonresidents of the county or are residents who are unable to attend court, written or oral deposition taken in accordance with Section 51.203 or the Texas Rules of Civil Procedure. (b) A witness being deposed for purposes of proving the will as provided by Subsection (a)(2) may testify by referring to a certified copy of the will, without the judge requiring the original will to be removed from the court's file and shown to the witness.

⁴ Statutory probate courts are in ten counties, but Bexar, Dallas, El Paso, Harris, and Tarrant counties all have more than one statutory probate court, resulting in a total of eighteen courts.

⁵ If the will is not brought forth within four years and the person filing the will is not at fault for the delay, a court can recognize the will only through a Muniment of Title.

While intestate succession clearly delineates where title lies, it can be difficult and time consuming – and consequently expensive – to locate the heirs, especially when several generations have passed from the original owner. Once located, they must then agree on how to dispose of the property. The greater the number of heirs, the harder it is to reach an agreement.

Alternatives to Probate

There are several ways that a person can pass property without going through probate. Making use of these options, when appropriate, saves both time and money. For low-income people who cannot afford probate, these options can make the difference between the property being properly transferred or not transferred at all.

Transfer on Death Accounts

To transfer certain personal property, such as a bank account, the account owner can create a transfer on death account, which allows the account holder to name a beneficiary who can access the assets in the account after the account holder dies without the need for probate. Transfer on death accounts do not give the beneficiary access to the assets while the account holder is alive, which eliminates the possibility of the beneficiary taking advantage of the account holder by using or depleting the assets in the account. More importantly for low-income Texans, transfer on death accounts are not considered a transfer of property for the purposes of Long-Term Care Medicaid (LTC Medicaid) or Supplemental Security Income (SSI) benefits.⁶

Joint Tenancy with Right of Survivorship

Another way to transfer property is to create a joint tenancy with a right of survivorship, which gives access to the asset while the asset holder is still alive.

With personal property, such as a joint bank account, it can be useful in certain situations, such as help with paying bills, but exposes the account holder to the potential for financial abuse. Unfortunately, a family member is the most likely person to take assets from an account holder, which is why this option is not regularly recommended.

A homeowner can also create joint ownership with a right of survivorship in real property. Many low-income elderly people who do not have a will are given erroneous information that they should give their property to their family members prior to death or it will go to the state. However, because access to the asset is given to another person while the real estate owner is still alive, it is considered a transfer of assets under the Medicaid Estate Recovery Program (MERP) for LTC Medicaid and SSI purposes. If the transaction occurred within the look-back period (five years for LTC Medicaid or three years for SSI), they will be ineligible for those

⁶ Transfers of assets can cause a person to be ineligible for Medicaid or SSI. A person must be very careful about making uncompensated transfers of assets ("gifts") within a 60-month period before applying for the Long-Term Care Medicaid Program or 36-months for SSI. This period is known as the "look back period." The purpose of the look back period is to determine whether an individual divested otherwise available assets to qualify for Medicaid or SSI. Generally, whenever an individual makes an uncompensated transfer of property, a time period of ineligibility ("penalty period") is generated.

benefits for a penalty period that is determined by the value of the asset transferred and the value of the benefits that would have been received. If the transaction occurs while the property holder is already receiving benefits, the benefits will be terminated for an indefinite period of time for LTC Medicaid and up to three years for SSI. It is important to note that these consequences are not clear in the Estates Code, except for Class 7 claims (MERP claims).

Lady Bird Deed

An alternative means of conveying real property in Texas is through the Lady Bird Deed, which allows the owner to deed the property to another person while retaining a life estate. The Lady Bird Deed allows the life tenant to improve the property, encumber the property with a loan, and sell the property. Other states have a “transfer on death deed” which is similar to the Lady Bird Deed. The Lady Bird Deed is not viewed as a transfer of property since the life tenant retains control.

Poor Texans Do Not Have Wills

Most low-income people do not have a will.⁷ There is a general lack of understanding around the importance of having a will and the general public assumes that their family will divide their personal and real property according to their wishes.⁸ Even when the importance of having a will is understood, it is simply cost-prohibitive for the poor to hire an attorney to prepare one. Because the poor are the least likely to have a will, the consequences associated with not having a will have a disproportionate impact on low-income Texans.⁹

Problems Arise When No Will Exists or Will Not Probated

When no will exists, real and personal property cannot be properly transferred according to the decedent’s wishes. While the property may be informally given to the person that the decedent wanted to have the property, title cannot properly pass. Without title, that person cannot sell the property, encumber the property, use it as collateral on a loan, or qualify for property tax exemptions for which they would be otherwise eligible, such as the disability exemption or the over-65 exemption. Issues of co-ownership can also arise as well as issues of clouded title.

When a will is not timely probated, it is as if no will exists, and property must pass by intestate succession to heirs as tenants in common. When property passes by intestate succession, all known heirs must be located. When there are multiple generations or large families involved, the location of heirs can be extremely challenging. An attorney ad litem must also be appointed to represent the interests of the unknown heirs, which is an additional expense and serves as another barrier to probate for low-income families.

⁷ Only 10% of colonias owners have a will. *Contract for Deed Prevalence Project: A Final Report to the Texas Department of Housing and Community Affairs (TDHCA)*, Ward, Way, Wood, August 2012, Chapter 6, page 4.

⁸ Some families make a formal arrangement to transfer title by deeding the house to child, but this is not the norm. Approximately 46% have informal arrangements for giving the home to a family member but are unaware that these will be trumped by intestacy laws. *Id.*

⁹ Similar problems have been seen in older African-American communities in the state and country where property titles have passed across multiple generations via intestacy, leading to serious problems with the delivery of disaster recovery and other government rebuilding assistance, barring families’ ability to sell their property, and a host of other issues. *Id.*

When property passes by intestate succession, the home is usually sold unless the heirs can be found and they agree to give ownership to a family member(s). When the property is sold, the low-income Texan previously living in the house is often left without a place to live. It is not uncommon that these individuals are elderly or disabled. If family members do not take them in, they wind up in shelters, living on the street, or in assisted living facilities or nursing homes. The situation is made more tragic due to the fact that the amount received by each heir from the sale of the home is often negligible. This is especially true for low-income homeowners, since the value of their homes tend to be low and the cost of probate, paid for by the proceeds of the sale, can be high. Some properties are not worth selling because the cost of probate is higher than the property value, leading to property abandonment and blight.¹⁰

Frequent Probate Issues Faced by Poor Texans

As previously mentioned, the poor are the least likely to have a will and the most likely to have title issues arising from improper transfer of title or the complete lack of transfer of title.¹¹ Even when a will exists, the poor often do not timely probate it.¹² Many do not know that they must probate the will within four years.¹³ For others, the expense of hiring an attorney to probate the will is simply cost-prohibitive. Normally, people who cannot afford an attorney have the option of trying to represent themselves in court. However, in probate court, people are not allowed to proceed without an attorney except in very limited circumstances.¹⁴ The situation is exacerbated because some judges do not consider the inability to pay an attorney as good cause for failing to timely probate a will and will not allow the will to be probated as a Muniment of Title, even when all other criteria are met.

To complicate matters further, disabled heirs or heirs with medical needs can be terminated from receiving needed LTC Medicaid or SSI benefits if they inherit from a will that was not probated or if the will did not include a special needs trust.¹⁵ This makes probating the will critical, yet impossible for many poor Texans due to the expense.

Other issues arise when an adult or minor heir lacks capacity and may require a guardian to manage or dispose of the estate, or seek exemptions based upon disability. Guardianships of the estate are not financially feasible for the poor because of bond requirements, which are double the value of the estate.

The family home is often the only asset that a low-income family has. Many times, the home is fully paid, having passed down from generation to generation. Legal aid typically sees these families when they have gotten behind on property taxes and the county moves to foreclose. Generally, low-income people will not qualify for a loan to pay the debt. The home cannot be used as collateral because they do not have title to show that they own it. The situation is more

¹⁰ *Id.*, page x.

¹¹ *Id.*, Chapter 5.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See note 7, *supra*.

heartbreaking when the home is occupied by an elderly or disabled person who would qualify for a property tax exemption if title had been properly passed and would not be obligated to pay the property taxes owed.

Common Stories of Poor Texans

Terminally Ill Elderly Woman Loses Medical Benefits

Maria was diagnosed with a terminal illness that required weekly treatment and qualified her for SSI benefits. She owned her home and could not afford an attorney to draft a will. She decided to gift the home to her daughter before she died to avoid any problems with ownership after she was gone on the agreement that she could live there until she passed. She did not know that SSI would consider the gift a transfer of property for eligibility purposes and that she would lose her much needed medical benefits. Unfortunately, that is exactly what happened and she was no longer able to obtain the treatment she needed. If Maria had access to a will, there would have been no risk of an inadvertent transfer of property during her lifetime. Additionally, if Maria had knowledge of, and access to, a Lady Bird Deed, she would have been able to accomplish the same goals of ensuring that her daughter got the property without the expense of going through probate and that she would be able to live in her home until she died.

Disabled Man At Risk of Losing Family Home Over \$2000 Property Tax Debt

Don grew up in the family home that his grandmother bought fifty years earlier. When his grandmother died, his mother and his siblings continued to live there. Eventually, Don's siblings moved out but he continued to live in the home with his mother. When she died, Don's siblings agreed that it was best for him to remain in the home. Don had physical and mild mental disabilities but was able to live independently and the house was fully paid. Unfortunately, Don got behind on his property taxes. When he talked to the county about the disability property tax exemption, he learned that he did not qualify for the exemption because he did not legally own the home like he thought. In fact, the home was owned by the multiple heirs of his grandmother. Don did not even know who some of them were. When he arrived at legal aid, the county had moved to foreclose on the home he had lived in his entire life because he owed \$2,000 in property taxes. Fortunately, legal aid was able to track down the heirs and they all agreed to give their small share to Don so that he could remain in the home. However, the situation could have been completely avoided if his grandmother and his mother had executed wills that were subsequently probated.

Woman Loses Home; Heirs Get \$500 Each

When Sarah's mother died, Sarah found her will in a shoe box under her bed. Her mother had six children but had left the home to Sarah. Sarah had cared for her mother full-time when she was ill for the last several years of her life and this was her mother's way of thanking her. Sarah could not afford an attorney, so she put the will back in the shoe box and moved into the home with her children. Six years later, her deceased brother's son sued her for his share of the house. Sarah contacted legal aid for help. Since it was well past the four year time limit to probate a will, her only option was to see if the court would probate the will as a Muniment of Title. The

judge refused and ordered the house sold. The home was located in a rural part of Texas and valued at \$15,000. By the time the legal expenses were paid and the proceeds divided between the heirs, each person received \$500. Sarah and her children moved into a shelter until more permanent housing could be found.

Recommendations to Improve Situation for Poor Texans

Several things can be done to improve the situation for poor Texans, including the development of Court-approved forms, reviewing the probate process for improvements, and increased education and awareness on common misconceptions about the probate process.

Court-Approved Forms

The most critical need is the development of plain language forms that can be easily used by low-income people, which are approved by the Supreme Court of Texas. It is a best practice for the forms to have inner lined instructions and a glossary of terms, and be available in Spanish and other common languages. Forms needed to address the lack of access to wills include basic will forms for married and single individuals with and without children, Small Estate Affidavit form, and Muniment of Title forms. It would also be helpful to make the current statutory forms plain language and to include a glossary and instructions for use. Additional forms would be beneficial, such as a declaration of guardianship in advance and a Lady Bird Deed form.

The Commission and the Real Estate Probate and Trust Law Section of the State Bar of Texas (REPTL) have been collaborating on the development of forms for use by poor Texans. The Commission and REPTL are in the process of forming a joint committee to make forms that have been developed by REPTL into plain language forms with instructions and a glossary that will be easy to use. Once this process is complete, the forms will be jointly submitted to the Supreme Court of Texas for approval.

Improvements to Probate Process

It would be helpful to create a committee to study the impact of the probate code and system on low-income Texans and make recommendations as to needed change. It would be useful for an informal task force to look at these issues during the interim session so that some may be able to be addressed in the upcoming legislative session. While by no means a comprehensive list, it would be helpful to:

- Clarify the consequences of using certain vehicles to transfer property on LTC Medicaid or SSI in the Estates Code;
- Investigate ways of making probate more affordable for low-income people, especially when the estate is very small and the cost of probate exceeds the value of the estate, possibly by creating a process by which very small estates could pass outside of probate;
- Review the current tools available to low-income people to see if they could be improved to make them easier to use and access;
- Examine the possibility of uniformly defining the inability to afford an attorney as good cause for failing to timely probate a will when proceeding under a Muniment of Title;

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- Examine the possibility of easing the standard regarding the existence of debt when probating a will as a Muniment of Title; and
 - Examine the need for a pilot study to test effectiveness of newly developed tools or code changes.
 - Examine the need for a comprehensive study of how the probate code impacts the poor and the most significant barriers encountered by low-income people in addressing their probate and estate needs.

Increase education and awareness

There is a great need to educate the general public and increase awareness on a variety of issues, including:

- What happens when no will exists and the laws of intestate succession. The general public still assumes that everything will go to their family members, who will then decide how to divide it. They are not aware of, and do not understand, Texas laws of intestate succession.
- The importance of timely probating a will and when the laws of intestate succession apply.
- The unintended consequences of transferring property. Many attorneys are also not aware of these consequences.
- The existing vehicles that convey real property in a manner that protects the property owner and prevents unintended consequences for LTC Medicaid and SSI benefits.

ACCESS TO GUARDIANSHIPS

Overview of Guardianships in Texas

In Texas, guardianships can be expensive and burdensome. Attorneys charge approximately \$2,000 or more to handle an uncontested guardianship, not including the filing, service, and attorney ad litem fees. Although a low-income applicant can qualify for an affidavit of inability to pay costs, the litigant's ability to pay an attorney can give rise to a contest of the affidavit. Additionally, while the attorney ad litem fees are supposed to be paid for by the county if the ward is indigent, an attorney is generally needed to make that argument in court. Statutory probate court jurisdictions typically require corporate surety bonds, which must be renewed every year, even when SSI is the ward's only income and factors would justify a cash or personal bond.

Once a guardianship has been finalized, annual reports are required to renew it. The guardian does not receive any reminder from the court to renew the guardianship and may not understand the renewal requirement. It is not uncommon for guardians whose letters of guardianship expired years earlier to suddenly be cited by the court to appear and show cause with a requirement of producing several years worth of annual reports.

Guardianships remove the civil rights of an individual who is, by definition, vulnerable. Legal aid providers have articulated a concern that there are not enough protections for the proposed ward in non-statutory probate court jurisdictions. The Commission has received reports that ad litem do not perform the recommended due diligence and do not evaluate less restrictive alternatives. A full guardianship is simpler and less expensive than seeking a tailored or limited guardianship, which provides no incentive for an applicant for guardianship to do so even though the law requires these options.

A guardianship over a minor child may circumvent the due process notice requirements to parents in a Suit Affecting the Parent Child Relationship in family court. With pressure on nonparent caregivers of minor children to obtain a custody order, usually from schools, guardianship can be the easiest route. Parents must be notified only if their whereabouts are known and there are no parental presumption or standing requirements in a guardianship. However, the situation becomes problematic if a parent later wants to assert their rights as natural guardian because the Estates Code does not authorize removal or termination of a guardianship because a parent is now fit or available to take care of his or her child.

Common Guardianship Situations

A typical guardianship applicant is a single parent whose disabled child requires full-time care. The only income for the family may be the child's SSI check, which is capped at \$721, and sometimes child support. When the child becomes an adult, a guardianship is required for the parent to continue making decisions for their child, such as medical and educational decisions. There is simply no money available to pay the costs associated with a guardianship. Money to pay attorneys, filing fees, and bond requirements is money that deprives the family of necessities.

Additionally, acting as a guardian can make a parent ineligible to serve as a home health care provider in certain types of Medicaid waiver programs. For a parent-caregiver, this is often the only income available outside of the disabled adult's SSI check.

Another common occurrence seen by legal aid providers is unnecessary guardianships of the estate. Under case law, SSI income does not constitute an estate for guardianship purposes. Unfortunately, legal aid routinely sees guardianships of the estate where SSI income is the only estate. Guardianships of the estate have more onerous reporting requirements and an attorney is required to prepare the annual report, an expense that low-income families cannot afford.

Recommendations to Improve Situation for Poor Texans

The Office of Court Administration (OCA) is working on two fronts to address guardianship issues. OCA and the American Bar Association WINGS Initiative (Working Interdisciplinary Network of Guardianship Stakeholders) have partnered together to make suggestions regarding guardianships and alternatives to guardianships. OCA is also working with the Elder Committee of the Court's Judicial Council on addressing guardianship issues in probate court. Both groups will be making recommendations on what can be done to improve guardianships and alternatives to guardianships in Texas. The Commission is confident that these groups are aware of the issues that have arisen in Texas and will adequately address them. Our recommendation is simply to act on the suggestions arising from these two groups.

PRO SE LITIGANT ACCESS TO PROBATE COURT

Pro Se Litigants Have Very Limited Access to Probate Court

Texas Rule of Civil Procedure 7 allows any party to a lawsuit to represent themselves in court without an attorney.¹⁶ However, this is generally not the case in Texas probate courts. Unlike other areas of law, a person may not represent themselves in probate court except in very limited

¹⁶ Any party to a suit may appear and prosecute or defend his rights therein, either in person or by an attorney of the court. Tex. R. Civ. Pro. 7.

circumstances. This occurrence is largely a result of interpretation of case law stemming from *Steele v McDonald* in 2006 and *In re Guetersloh* in 2010.¹⁷ An attorney is required when a person is applying for letters testamentary, letters of administration, determinations of heirship, and guardianship of the person or the estate. While someone may serve as an executor, administrator, or guardian, they must be represented by an attorney in the underlying case.

There are two main exceptions. A person may proceed pro se when probating a will as a Muniment of Title if he or she is the sole beneficiary under the will and there are no debts against the estate other than those secured by real estate. The other exception is in the limited circumstances of when a small estate affidavit is appropriate for use.

This restricted access to probate court prevents low-income litigants from resolving their legal matters. Wills cannot be probated. Guardianships cannot be obtained.

More Poor, Fewer Lawyers to Help

With almost six million Texans qualifying legal aid and the legal aid and pro bono resources to help about twenty percent of eligible people with civil legal needs, there are not enough lawyers to help the growing numbers of poor who need assistance.

This means that more and more people are in the unfortunate position of needing to represent themselves in court. Data from OCA shows that over 20% of civil case filings are filed by pro se litigants. While over 20% of all family law filings are filed by pro se litigants, and over 45% of divorce filings is suspected, only 2.4% of filings in probate court are by pro se litigants.

Majority Pro Se Are Poor

Although OCA does not track the income levels of pro se filers in district and county courts, we do have information on user income levels of TexasLawHelp, the largest online self-help source for free legal information and free forms in Texas.¹⁸ User income levels are extremely low. When viewing income levels with household size, approximately 81% of users qualify for food stamps.¹⁹ Even excluding household size, users are clearly poor, with 24% earning less than \$9,570 annually and 62% earning less than \$29,000 annually.²⁰ Because all information and forms on the website are available at no cost, there is no incentive for users to lie about their income or household size.

Increased Pro Bono Will Not Meet Need

Legal aid and pro bono programs closed over 100,000 cases last year. There are over 90,000 attorneys licensed by the State Bar of Texas. Even if every lawyer were required to represent at

¹⁷ *Steele v McDonald*, 202 S.W. 3d 926 (Tex. App.-Waco, 2006) and *In re: Guetersloh*, 326 S.W. 3d 737 (Tex. App. – Amarillo, 2010)

¹⁸ In 2011, the site had 596,555 visits, averaging 1,634 visits per day. Interview with Colton Lawrence, Website and Special Projects Coordinator, Texas Legal Services Center, January 6, 2012.

¹⁹ Graphic of TexasLawHelp user income and household size survey results from Feb 1, 2012 through March 6, 2012. See Exhibit F at <http://www.texasatj.org/files/ExhibitsAQtoReport.pdf>.

²⁰ *Id.*

least one pro bono client, we would still only be able to serve less than 40% of the poor who seek help from legal aid. A major additional barrier is that we do not currently have the infrastructure in place to coordinate urban pro bono lawyers with rural clients.

Greater Access to Probate Courts for Pro Se Litigants in Other States

Pro se litigants are allowed greater access to probate courts in other states. Many states have adopted the Uniform Probate Code, which outlines the procedure for informal administration of estates. For example, in Wisconsin, informal administration is the most common form of probate. It does not require the assistance of an attorney and may be used if the will does not prohibit its use and there are \$50,000 or more of assets. All parties must agree to use informal administration and any party can petition for formal administration, which does require the assistance of an attorney. Informal administration proceedings are administered by a probate registrar instead of a judge. For estates with less than \$50,000 in assets, parties in Wisconsin can proceed pro se using Summary Settlements, Summary Assignments, or Transfers of Property without Estate Administration.

There may also be situations that are low risk or are of little monetary value that could be addressed on a pro se basis. For example, it may be possible to establish inheritance rights to bank accounts where no transfer on death beneficiary is on file. Most banks will not accept an affidavit of heirship but instead require a court order, such as a small estate affidavit or heirship determination. Bank account deposits for low-income families are rarely more than \$1,000, such that the value of the estate would be eaten up by attorney fees.

Recommendations to Improve Situation for Poor Texans

The Commission recommends that the Legislature establish a committee to study how pro se litigants in other states access to probate courts, and to investigate ways to increase access to the probate courts in Texas, including evaluating ways to allow low-income pro se litigants with very small estates or lower risk situations to address them without a lawyer. The Commission believes it is feasible for this committee to be the same one that would study the impact of the probate code and system on low-income Texans and make recommendations as to needed change as mentioned in the Access to Wills section of this report. In other words, that the committee have a dual charge of investigating ways to increase pro se litigant access to probate court and investigating ways to improve the impact of the probate code and system on low-income Texans.

The Commission also recommends, to the extent needed, the implementation of pilot studies to test the efficacy of potential solutions to increase pro se litigant access to the probate courts. Pilot studies are helpful in situations where there are concerns that the means of increased access may have unintended consequences. Often, this is the point at which the potential solution is discarded rather than tested.

CONCLUSION

While many of the issues faced by low-income Texans regarding probate and estate matters require more study, there are some that could begin immediately, such as the development of

forms. The Commission and REPTL will begin working collaboratively on making the forms already developed by REPTL into plain language and develop instruction and a glossary to accompany them. The Commission is delighted to offer assistance with any efforts that the Legislature believes will lead to greater access for low-income Texans to the probate system.

A HOME BUT NO WILL:
Problems Faced by Low-Income Homeowners Lacking Access to Probate Systems in Texas

Texas Title Project¹
William Wayne Justice Center for Public Interest Law
The University of Texas School of Law

April 28, 2014

I. Background

This report details the problems experienced by **low-income families who have historically lacked, and currently lack, access to probate systems²** due to poverty and lack of information. The problems discussed below were experienced firsthand by the disaster victims who became the clients of the Texas Title Project, a project housed within the William Wayne Justice Center for Public Interest Law at The University of Texas School of Law.³ However, these problems are, in our experience, quite common among low income-homeowners across Texas outside of disaster zones.⁴

The clients of the Texas Title Project this past year needed clear title in order to participate in disaster recovery programming. More generally, having clear title generally means that no one else has a claim of ownership or interest in the property that is “superior to” the owner of record, and that no one else has a financial interest in the property. Having a “cloud” on the title can prevent a person from selling his or her land, from obtaining loans needed to improve or repair the property, or from qualifying for many government assistance programs. The problems created by the lack of clear title can lead to underinvestment in land, the deterioration of property

¹ The opinions and conclusions expressed here are solely those of the authors, Frances Leos Martinez and Lucy Wood, and do not represent the opinion or policy of the Texas General Land Office, the William Wayne Justice Center for Public Interest Law, The University of Texas School of Law, or The University of Texas at Austin. The authors thank Texas Title Project fellows Amelia Friedman and Molly Powers for their contributions to this report and to the Project.

² We use “probate systems” herein to refer broadly to the legal services that would allow low-income homeowners to execute wills protecting their assets, and to the court systems that, if rendered accessible, would allow them to probate these wills. We also include with this term the alternatives to traditional probate which do or might allow for assets to be passed on without the imposition of unforeseen co-ownership structures.

³ See <http://www.utexas.edu/law/centers/publicinterest/txtitleproject/> The Texas Title Project is funded by the Texas General Land Office and is an initiative of the Justice Center composed of members of the law school community committed to the study of, and fostering of, the acquisition of clear title by low-income homeowners in Texas. The Title Project was formed in response to an immediate need for title clearing and other legal services for victims of Hurricanes Ike and Dolly, which ravaged the Texas Gulf Coast and Lower Rio Grande Valley in 2008. It grew out of the work of several members of the UT Law community already engaged in title clearing in the context of community development in low-income informal settlements in Central Texas, and in the study of titling practices and land acquisition among the poorest of the poor via contracts for deed and other similar vehicles notorious for creating or compounding title defects. *Infra* note 4.

⁴ For example, many of the barriers and problems discussed here were also observed in a 2012 study (the “CFD Study”) conducted by the Justice Center, available online at <http://www.tdhca.state.tx.us/housing-center/docs/CFD-Prevalence-Project.pdf>. Others have been observed as well through the work of the Entrepreneurship and Community Development Clinic at the University of Texas School of Law, <https://www.utexas.edu/law/clinics/community/>, and through the work of Lone Star Legal Aid, Texas RioGrande Legal Aid and Texas Community Building for Attorney Resources, <http://texasbar.org/>, entities with which the authors of this report are also involved.

and neighborhoods, and the abandonment of property that then becomes extremely difficult to redevelop. Over generations, these problems – impacting both poor people and the local government entities responsible for the maintenance of abandoned property – can lead to crime and other social ills associated with abandonment.⁵

The sources of the clouds on titles are diverse and complex. **This report focuses on those clouds, or title problems, created by the lack of access to probate systems we found pervasive among our client base.**

II. Summary of Findings

This report is organized around eight key findings, each of which is accompanied by case studies illustrative of the problems our clients encountered in not having access to probate systems:

- (1) Low-income homeowners lack wills.
 - (2) Those who manage to write wills do not probate them.
 - (3) Co-ownership structures significantly burden low-income homeowners.
 - (4) Low-income families have a very tough time making use of causes of action designed to relieve the burdens of co-ownership through forced sale or partition of property.
 - (5) These families can seldom make use of the doctrine of adverse possession.
 - (6) The persistence of contracts for deed makes probate access even more important.
 - (7) Invalid liens interact with poor families' lack of probate access to render the small amounts of equity in family homesteads even less accessible to these families.
 - (8) Forms can help ameliorate problems created by lack of access to probate systems.
- Additional, accessible legal services will be needed to meet the needs of this population.

III. Case Studies

Finding 1: Low-Income Homeowners Lack Wills

The CFD study⁶ demonstrated the very high (about 90%) rate of absence of wills among low-income homeowners in informal settlements, particularly along the border. These families frequently have aging (over 65) heads of households and large families (more children than in TX or US families, on average), indicating that this lack of wills will quickly spawn even more rampant co-ownership issues, and clouded titles, in these areas.⁷

Our work with our current clients has verified this finding. Of the nearly two hundred families represented in our client base⁸ who reported having received their properties upon the death of a family member, only a handful reported having been named beneficiaries in a will; of these wills, only a few had been probated. Many of our clients have expressed an interest in drawing up a will to protect their primary assets following their receipt of title clearance assistance. Strikingly, none of our clients has had a will.⁹

⁵ For more information about the costs of and government responses to abandonment, please see the recent HUD publication at <http://www.huduser.org/portal/evidence.html>.

⁶ *Supra* note 4.

⁷ *Supra* note 4. See also Way and Wood, *Homeownership Without a Net*, Shelterforce, Spring 2013. http://www.shelterforce.org/article/3472/homeownership_without_a_net/

⁸ At the time of this report, our project had served about 185 individuals.

⁹ As we began to do this work, we heard from many people that affidavits of heirship could function as as “poor man’s will.” However, these affidavits serve only to record the “family tree” and do not allow low-income homeowners to allocate their resources to specific members of that “tree.” Second, even if the homeowner desired to have their property allocated upon their death in the way that is dictated by our state’s laws of intestate succession, the affidavit would not operate to “prove up” the co-ownership structure created upon death as would a probate proceeding. For that, the decedent’s family would need to hire a lawyer. An example of a case involving an

*Case Study: No Money for a Will? A Work-Around Gone Wrong.*¹⁰

When Alma Barrientos learned that her health was failing, she sought to transfer her only asset of value – her homestead – to her daughter. The cost of a will was prohibitively expensive for the family. To deal with this problem, Ms. Barrientos used a form Warranty Deed to transfer the property to her daughter instead. Because Mrs. Barrientos remained as resident but not an owner and her daughter became an owner but not a resident, the arrangement made the family unable to meet the requirements for disaster recovery. This is just one story that illustrates some of the difficulties that can arise when low-income owners use work-arounds to address their inability to afford the legal services needed in drafting and executing wills. Informal and alternative arrangements are quite commonly attempted, particularly in informal settlements and colonias.¹¹

Finding 2: Wills Frequently Not Probated

Case Study: “We Didn’t Know We Had To Probate The Will.”

When Jose De Los Santos passed away fifteen years ago, his grieving daughter Clara and wife of more than 40 years took solace knowing that they had taken care of his financial affairs. The family had, before his death, scraped together the money necessary to hire an attorney and allow Mr. De Los Santos to execute a will. When the family’s homestead was destroyed by Hurricane Dolly in 2008, they were shocked to learn that they lacked clear title to the property: the will had never been probated.

This particular family was ultimately successful in probating the will many years¹² after the death of Mr. De Los Santos; they were, due to their status as hurricane victims, able to receive free legal services. However, under Texas law, simply being unaware of the legal requirement that a will be probated has been held insufficient to allow a judge to authorize a late probating of a will.¹³ And, even had the De Los Santos family been aware of the requirement, they likely would not have filed a timely application to probate the will as a muniment, they say, because they lacked the money commonly asked by attorneys in their region to do so. Had they not been successful in their effort to probate the will of their husband and father, the De Los Santos family would not have been able to qualify for the HOP program,¹⁴ which will ultimately put them in a new home outside of the floodplain and in an area of increased economic opportunity and safety.

Finding 3: Co-ownership Structures Created by Lack of Wills (Or, in Some Cases, Created by Wills) Significantly Burden Low-Income Homeowners

Many people – even lawyers – with whom we’ve discussed our project’s work have been surprised by the co-ownership structures we’ve encountered among our client families, some of which have involved more than several dozen family members and potentially hundreds of “unknown heirs” or unidentified co-owners. “Heirs’ property” is a phrase used to describe property passed to family members without a will, and is most often used to refer to property that has passed through several generations of intestate deaths. In these situations, Texas intestacy

“Application to Determine Heirship” appears below in the Appleton casestudy.

¹⁰ Each of these case studies presents a factually accurate depiction of a case handled by our project. We have changed names in an effort to protect their confidentiality. Where photos are presented, we have obtained the client’s consent to include photos and to discuss their actual names and facts in this publication, but have used different names in an abundance of caution.

¹¹ Almost half of the families surveyed (44%) in the CFD study had made such arrangements. *Supra*, note 4, Chapter 5, p. 26.

¹² See Tex. Estates Code Ann. §256.003.

¹³ See, e.g., *In re Estate of Rothrock*, 312 S.W.3d 271, 274-75 (Tex.App.—Tyler, 2010, no pet.)

¹⁴ http://www.glo.texas.gov/GLO/_documents/disaster-recovery/housing/hop-guidelines.pdf

law produces fractionalized ownership among children or brothers and sisters in which each owner's share is undivided. Often, in Texas and in other states with similar laws, it is difficult to locate all (or sometimes recall the names of all) of the heirs that may have a claim of ownership. With each generation, the number of heirs involved increases exponentially, and the opportunity for collaboration becomes exceptionally remote. In such situations, it can be extremely difficult to obtain all of the signatures needed to take out loans to make needed repairs, or to sell or even rent the co-owned property. Sometimes co-owners, caught in a collective action problem, fall behind in the payment of taxes, resulting in the loss of the family property. Even when all co-owners are known, communicate effectively, and are willing to chip in, they often do not agree about what to do with the familial property. For our clients it has been no different. The families for whom we have resolved co-ownership issues have had to work extensively to persuade members to gift their shares of property in order for one member to qualify for relief. This process is time-consuming and incredibly emotionally taxing on family members.

Case Study: No Will? Pursue Fifteen Gift Deeds.

When Lucia's husband Armando passed away, she had hoped simply to remove her husband off the deed to her home, assuming that the property was hers. Instead, she lacked the clear title that would become necessary in the wake of Hurricane Dolly. Unbeknownst to Lucia, parts of her husband's ownership interest in the property had passed to his ten children via intestate succession. Years later, in order to consolidate the property ownership in Lucia, our project prepared fifteen gift deeds for the children, and the children of two of those children who had since died, to sign. This work is not ordinarily performed by local attorneys, who would need to be paid considerably to track down, make contact with, and convince family members (who often don't know of their ownership interests) to sign deeds.

Case Study: Will Conferring Equal Shares? No Agreement to Consolidate.

Wills tracking the laws of intestate succession can create the same problems. One client family of four brothers was presented with the opportunity to obtain disaster recovery for a family home destroyed by Dolly. The brother resident in the home and eligible to pursue relief was the "black sheep" of the family and disliked by his brothers, who refused to gift their undivided interests in the property to him to enable him to relocate out of flood plain and into a newly-constructed home worth many times the value of the old family estate. They remained resistant even after much counseling around possible ways for them to retain ownership interests in the newly-constructed, more valuable, home. In other words, the dynamics in some families are such that even the prospect of each member's significant enrichment will not lead to cooperation within co-ownership structures, even when those structures are created by the wills of well-meaning parents.

Finding 4: Families Without Wills Have Tough Time Making Use of Causes of Action Designed to Relieve Burdens of Co-ownership Created by Intestate Succession

Chapter 29 of the Texas Property Code allows a tax-paying co-owner to seek reimbursement from other co-owners for her payment of taxes and to buy their interests when not reimbursed. We found that, in practice, few of our clients could make use of this law. First, many had just recently become co-owners in families where the parents, lacking access to probate, had only recently passed away. Not enough time (a minimum of three years) had passed for these resident co-owners to have qualified to use Chapter 29. Second, in "doing the math" with our clients, we found that the amounts owed by co-owners who had failed to pay was relatively small when split among multiple co-owners. One co-owner sent us a check for twenty dollars, threatening our client's ability to use Chapter 29 at all with just that small amount. Finally, many low-income

resident co-owners lack the resources to buy out other co-owners' shares, even when the price of these shares is discounted by the taxes they've paid.

Chapter 23 of the Texas Property Code, the partition statute, is of even less help. The provision allows a co-owner to force a sale or division in kind. However, in cases where the number of co-owners is high, or the size of the parcel of land is small -- or both, as we found was common -- the law favors a forced sale, which would have been devastating for our clients. Because we feared partition suits were unlikely to bring about clear title to land to our clients, who could not afford to buy property at auction, we chose not to bring suit in several cases.

Case Study: Heir Property Litigation

Nancy Appleton owns an undivided fractional interest in her family's historic home. Because her property is located in an industrial zone, she has not been afforded the option to rebuild, and has been required to consolidate ownership and present clear title in order to receive disaster relief in the form of relocation. Having paid all of the property taxes for several years, Nancy is eligible under Chapter 29 to seek reimbursement from the multiple known and unknown co-owners. She plans to use the partition statute to ask the judge to award her sole ownership to the property, because the value of the taxes she had paid on behalf of the co-owners, combined with the improvements she had made to the property, exceed its post-hurricane value.

Even though we worked exclusively with owners of homes severely damaged by storm, in no other case did we manage to locate a home owner for whom the taxes paid actually exceeded the value of their asset, making Chapter 29 a seldom-considered option for most of our clients. The vehicle is designed for co-owners with resources to "buy out" other co-owners. Worse, the costs involved in a partition suit are considerable, because notice by publication can cost thousands of dollars, as can the appointment of an ad litem to represent the interests of unknown heirs.

Appraiser and surveyor costs add even more to total costs. The costs of litigating Nancy's case have already exceeded the value of her homestead -- and this is without any attorneys' fees included.

Finding 5: Once Lack of Access to Probate Leads to Co-ownership, Adverse Possession Not Helpful Within Families

Several of our clients might have been able to consolidate ownership in their names had they been able to use the doctrine of adverse possession against family members. Adverse possession is a doctrine that traditionally has allowed those making obvious use of land to claim ownership of it after a certain period of time and under certain other circumstances.¹⁵ Under Texas law, co-owners are rarely allowed to claim property by adverse possession. This is yet another way in which why co-ownership structures burden those seeking to prove up ownership to property in the ways available to those who have had proper access to probate systems. We had several clients for whom we wished this doctrine had been available to clear title.

Case Study: Adverse Possession Against Whom?

Even when a low-income resident can fulfill the requirements of the doctrine, the prevalence of co-ownership in this region stemming from lack of access to probate can make victory improbable. Ana Martinez, who has lived with her four boys in a colonia prone to flooding for nearly fifteen years, will rely upon the doctrine to claim title to a property she attempted to purchase from a record land-owner who died without a will. His failure to execute a will means that the court must now appoint an attorney to look after the interest of the "unknown heirs." As in the Appleton matter, the costs of safeguarding the interests of the "unknown heirs" created by

15 Texas Civil Practice and Remedies Code, Chapter 16, Subchapter B.

intestate succession and lack of access to probate make these kinds of cases prohibitively expensive. As in Appleton, the litigation costs and fees will certainly dramatically exceed the value of the asset.

Finding 6: Persistence of Contracts for Deed Makes Probate Access Even More Important

Contracts for deed (CFDs) are alive and well, particularly in low-income settlements.¹⁶ When users of CFDs lack access to probate, title problems abound. We saw many contracts for deed in our work this past year, about half of which were unrecorded.

Case Study: “It Wasn’t Yours To Sell To Me?”

Antonio Garza and his wife took care of Antonio’s grandmother, whose will left the family homestead to her three grandchildren and not to any of her children. After her death, Antonio and his wife lived on their property for more than ten years, buying the shares of the other two grandchildren over time through an informal unrecorded contract for deed. When the hurricane hit, the couple applied for relief and were stunned: they could not present clear title because the grandmother’s will had not been probated. And through the contract for deed, the two grandchildren who had not inherited any interest in the property under the laws of intestate succession had inadvertently tried to sell something owned by their aunts and uncles!

Antonio was fortunate in that a county judge allowed him to probate his grandmother’s will as a muniment of title even though he was late in filing. He was also fortunate that none of the family members who would have inherited under the laws of intestate succession contested the will. Nor did his cousins fail to honor the terms of the contract for deed. This kind of an outcome might not be expected in most families, and could not have been obtained without extensive attorney involvement.

Finding 7: Invalid Liens Further Complicated by Lack of Access to Probate Systems

Second only to co-ownership caused by intestate succession, clouds created by liens on our clients’ properties posed the most common barrier to clear titles, affecting nearly one third of families we encountered. Strikingly, of the 187 liens we discovered, 155 turned out to be invalid for one reason or another. These liens were invalid for having been filed in the wrong person’s name (130), had already been paid off (15), or were by law not able to attach to homestead property (10). That is, only 17 percent of liens were valid, often purchase liens. Like other title defects, liens are made far worse by the expansion of co-ownership that results from lack of access to probate systems for poor people. When a lien is filed in a county’s deeds records it appears to attach to all property in which the person subject to the lien has any interest. As property becomes held by larger and larger numbers of people, it appears to become subject to more and more liens, even when the resident or tax-paying co-owner has no relationship to the lien-holder, and even when the lien is invalid.

Case Study: “Your Lien is My Lien?”

In the case of the Roberts family, the parents of seven children died leaving a co-ownership arrangement that put title in two siblings. One of these co-owning siblings -- the seventh child -- had had a child support lien filed against him in the deed records. Mabel, the sibling resident during the hurricane, had significant difficulty in clearing title to her residence, even once her sibling had expressed the desire to transfer his interest in the property to her. The title company involved refused to remove the exception of the child-support lien until our project was able to convince the local assistant attorney general to file a document with the county clarifying that the

¹⁶ *Supra* note 4.

lien was invalid as to Mabel's homestead property. A will transferring the interest in the property to Mabel alone would have ensured that the child-support lien of the seventh child would not have interfered with Mabel's ability to repair the home or relocate.

Finding 8: Forms Can Help Ameliorate Problems Created by Lack of Access to Probate But Must Be Accompanied By Accessible Legal Services

Our work has involved the filling out of countless simple forms to clear title for, and consolidate ownership in, Texas hurricane victims whose families have historically lacked access to probate systems. These forms make the voluntary transfer of property less burdensome on all involved, and additional forms are needed, such as Form Wills and Lady Bird Deeds Forms, among others, to increase access to probate for this population. We also feel strongly that increased access to legal services will be necessary to assist those unable to make use of forms, and those whose cases are sufficiently complicated as to necessitate the involvement of an attorney.

IV. Recommendations

The Texas Title Project appreciates having had the opportunity to report on the lack of access to probate confronting poor homeowners in Texas. In reviewing the problems created by this lack of access among our clients, we make the following recommendations:

- 1. Forms.** There is a significant need for form wills to be officially promulgated and for resources to be devoted to their dissemination. There is an especially significant need for Spanish forms. The forms should be in plain language and accompanied by a glossary and detailed instructions on how and when to use each form. The Texas Title Project has begun to collect a number of these forms used in various clinics or other pro bono contexts. We understand that the Commission and the State Bar of Texas Real Estate Probate and Trust Law Section are working collaboratively on several forms to be approved by the Supreme Court of Texas. We look forward to using them once completed.
- 2. Community Education About the Need to Probate Wills.** Although the importance of wills is noted in our first finding, "wills campaigns" will not be enough if low-income persons with wills do not have the means to pursue timely probate or have not been educated about the requirement. One relatively easy step would be to place on form wills a cautionary note about timely probate.
- 3. Increased Access to Legal Services.** Because the use of work-arounds without lawyers has proven harmful to some families, and because probating a will involves money many families do not have, the solutions to the lack of access to probate problem must address the underlying lack of access to legal services. Added staffing at the county level, perhaps in county clerks' offices, should be considered. In a best-case scenario, lawyers would be on staff at these offices, or at regional satellites, to assist with the drafting of and timely probating of simple wills.
- 4. Interim Workgroup to Develop Potential Solutions to Lack of Probate Access.** A workgroup of experts to look at the **issue of lack of access to probate** should be convened immediately and throughout the summer months. The work group should look for relatively simple "fixes" or "tweaks" to the existing probate system that would enhance access to probate for the poor in an effort to bring them to the attention of the Texas Legislature this session. It should look to other states and possibly other countries, particularly those with informal settlements in which title problems persist and have proved intractable, in thinking creatively about ways to transfer low-value real property that are financially accessible to very low-income homeowners. Options for this group to consider could also include:

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- A system of automatic transfer upon death similar to what is used in the mobile home context;
 - The creation of a specialized probate court (not unlike a small claims court) for the affordable probate of low-value estates; and
 - The facilitation of pro se or assisted pro se solutions for some proceedings.

5. Legislatively-Created Task Force. A Task Force should be charged with developing additional long-term solutions to the **problems caused by co-ownership** structures created by the persistent lack of access to probate over generations. In addition to the ideas generated by the interim workgroup, the solutions to be considered by the Task Force might also include:

- A voluntary mediation program for families wanting but unable to consolidate ownership in one or more family members;
- Allowing ways for tax-paying resident co-owners to obtain clear title to property without litigation;
- Establishing new co-ownership structures that allow a single family member to make decisions, including the decision to sell, on behalf of other owners; and
- Reviving SB 473 from the 82nd session in order to allow for adverse possession against a cotenant heir.

6. Study. An in-depth regional study of the most significant barriers to probate access, including those listed in the eight findings of this report and those additional barriers, if any, identified by the Work Group, should be designed and conducted concurrently with the convening of the Task Force, beginning in the fall of 2015. Study components should include:

- The selection of and in-depth *survey* of five communities with historically low access to probate and high prevalence of co-ownership structures;
- *Focus groups* held with court staff, local attorneys, and others knowledgeable of probate systems in the same geographic areas to deepen the understanding of barriers identified by the survey of low-income residents;
- *Additional research*, if necessary, around the implementation of potential solutions to the most prevalent barriers to probate access identified;
- The *piloting* in three communities of one or more identified solutions to lack of access to probate and/or to the persistence of co-ownership structures.

For more information about this report or its recommendations, please contact Lucy Wood at (512) 626-2060 or Frances Leos Martinez at (512) 232-1222.

CHARGE 5

Examine the public policy implications of litigation related to environmental contamination brought by local governments, in particular whether such litigation supports effective remediation.

SUMMARY OF COMMITTEE ACTION CHARGE 5

CHARGE 5: Examine the public policy implications of litigation related to environmental contamination brought by local governments, in particular whether such litigation supports effective remediation.

Committee Hearing

The House Committee on Judiciary & Civil Jurisprudence met in a scheduled public hearing on Friday, May 16, 2014 at 10:00am in room E2.012, Texas State Capitol.

The following is the list of invited testimony who either testified on behalf of themselves or the listed entity:

John Ballotti, City of Commerce
Nathan Beedle, Melcher Family
Jack R. Cagle, Self; Harris County Commissioners Court
George Christian, Texas Civil Justice League
John Dahill, Texas Conference of Urban Counties
John Horn, Hunt County
David Jones, Hunt County Homeland Security
Heather Mahurin, Texas Municipal League
Stephen Minick, Texas Association of Business
Jon Niermann, Office of the Attorney General
John Riley, Self; Waste Management
Nelson Roach, Self; Texas Trial Lawyers Association
Cathy Sisk, Harris County
Robert Soard, Harris County
Caroline Sweeney, Texas Commission on Environmental Quality

Background

The Texas Commission on Environmental Quality (TCEQ) is tasked with regulation and remediation of contaminated properties in Texas, including contamination of air, water, soil, or other natural resources. There are several legislative initiatives that TCEQ oversees which are designed to encourage the remediation of contaminated properties, including the Petroleum Storage Tank Responsible Party Lead Program,¹ the Voluntary Cleanup Program,² the Innocent

¹ The program's mission is to supervise the cleanup of spills from regulated storage tanks by recording and evaluating all reported incidents of releases of petroleum and other hazardous substances from underground and above-ground storage tanks. The goal is to assure that the public is not exposed to hazardous levels of contamination by requiring the removal of the contamination to levels protective of human health and the environment. TCEQ website, https://www.tceq.texas.gov/remediation/pst_rp/mission.html

² The Texas VCP provides administrative, technical, and legal incentives to encourage the cleanup of contaminated sites in Texas. Since all non-responsible parties, including future lenders and landowners, receive protection from liability to the state of Texas for cleanup of sites under the VCP, most of the constraints for completing real estate transactions at those sites are eliminated. TCEQ website, <http://www.tceq.state.tx.us/remediation/vcp/vcp.html>

Owner Program,³ and the Dry Cleaner Remediation Program.⁴ Companies which have engaged in activities that result in contaminated property work with the TCEQ to develop remediation plans and are monitored by the TCEQ until the remediation and clean-up is completed. Recently, there have been several lawsuits involving counties entering into contingent-fee agreements with outside law firms against those responsible for contaminated properties, which have sparked the interest of attorneys, large corporations, environmental groups, and cities, and counties.

One example of this kind of lawsuit is a case where litigation is currently pending, *Harris County v. International Paper Company*.⁵ The litigation involves disposal of paper mill waste by McGinnes Industrial Maintenance Corporation, along the San Jacinto River outside of Houston. Sometime in the 1960s, the Champion paper mill began to release carcinogenic waste into the San Jacinto River. The area where the release of waste occurred has been designated a "Superfund" site by the Environmental Protection agency. These types of sites are "designated a national priority for environmental remediation because of known or threatened releases of hazardous substances at the site."⁶ The Harris County Commissioners Court authorized the County Attorney retain a law firm to file an environmental enforcement action⁷ against International Paper, who acquired Champion, and Waste Management, who acquired McGinnes. In the original petition, Harris County alleged that the Defendants were responsible for the contamination and sought civil penalties of up to \$25,000 per day per violation, in accordance with the Texas Water Code, which sets out statutory guidelines for the amount of civil penalties in these types of cases.⁸

The TCEQ, along with the EPA, had already been involved in remediating the contamination of the Superfund site. Generally, when contamination occurs, either the party responsible or a third party notifies TCEQ of the contamination, and TCEQ begins enforcement proceedings to remediate the waste. The responsible party hires (and pays for) a registered and licensed consultant who works to remediate the site, and TCEQ oversees the remediation process to ensure that correct disposal procedures are used in accordance with TCEQ guidelines. If the remediation is discontinued before TCEQ gives final approval, or if the company is found to be in violation of the compliance agreements, TCEQ can initiate an enforcement case against the company. For a minor violation, the TCEQ issues a "notice of violation." For a more egregious violation, TCEQ issues a "notice of enforcement." Either can result in penalties levied by TCEQ, which go directly to the state's General Revenue fund.⁹ The maximum penalty is \$25,000

³ The Texas IOP, created by House Bill 2776 of the 75th Legislature, provides a certificate to an innocent owner or operator if their property is contaminated as a result of a release or migration of contaminants from a source or sources not located on the property, and they did not cause or contribute to the source or sources of contamination. TCEQ website, <http://www.tceq.state.tx.us/remediation/iop/iop.html>

⁴ The Dry Cleaner Remediation Program (DCRP) establishes a prioritization list of dry cleaner sites and administers the Dry Cleaning Remediation fund to assist with remediation of contamination caused by dry cleaning solvents. TCEQ website, http://www.tceq.state.tx.us/remediation/dry_cleaners/

⁵ *Harris County v. Internat'l Paper Co.*, No. 01-12-00538-CV, 2013 Tex. App. LEXIS 9188 (Tex. App.–Houston [1st Dist.] July 25, 2013, no pet.)

⁶ *Id.*, See 42 U.S.C. §§ 9601-9626 (Comprehensive Environmental Response, Compensation, and Liability Act).

⁷ Tex. Water Code Ann. § 7.351 (Vernon 2013) sets out guidelines for suits by others; "a person...may institute a civil suit...in the same manner as the commission in a district court by its own attorney for the injunctive relief, or civil penalty, or both, as authorized by this chapter."

⁸ Tex. Water Code Ann. § 7.052 (c) (Vernon 2013), "The amount of the penalty for all other violations within the jurisdiction of the commission to enforce may not exceed \$25,000 a day for each violation."

⁹ Tex. Water Code Ann. § 7.051 (Vernon 2013), "Administrative Penalties." The penalties are laid out in § 7.052.

per day, per violation. One provision of §7.051 that should be highlighted is "[T]he commission may assess an administrative penalty against a person as provided by this subchapter if... (2) a county, political subdivision, or municipality has not instituted a lawsuit and is not diligently prosecuting that lawsuit under Subchapter H against the same person for the same violation."¹⁰ According to discussions with the TCEQ, they could not think of an instance where TCEQ had assessed a penalty and the local government had filed for the same violation.

The TCEQ uses a formula of compliance,¹¹ which takes into account factors such as past violations, remediation efforts, and willingness of the company to continue the remediation process. The penalties can be appealed to the State Office of Administrative Hearings before TCEQ makes a final adoption of the penalties during the enforcement proceedings. After the final adoption is made, the appeal would be proper in Travis County District Court. Practically speaking, however, this rarely happens. Most sophisticated parties want to mitigate the damage as quickly as possible, and accept the penalty imposed by TCEQ. Section 7.068 of Water Code, entitled "Administrative Penalties," provides that "[p]ayment of an administrative penalty under this subchapter is full and complete satisfaction of the violation for which the penalty is assessed and precludes any other civil or criminal penalty for the same violation"¹² and further provides "a penalty collected under this subchapter shall be deposited to the credit of the general revenue fund."¹³

In the *International Paper* case, the Harris County Commissioners Court authorized the County to retain the law firm of Connelly-Baker-Wotring (CBW) as special counsel on a contingent fee basis. The agreement provided that the County would pay all attorney's fees awarded, and 25% of each additional dollar in excess of the award of attorney's fees.¹⁴ The agreement further provided that "in the event of a settlement...the County would pay 35% of any settlement...if the settlement did not contain provisions for attorney's fees...or attorney's fees plus 25% of each additional dollar awarded to the County."¹⁵ The Defendants answered and filed counterclaims that alleged, *inter alia*, that the County's agreement with CBW was void because they did not receive approval from the Texas Comptroller before entering in to the agreement. According to the Texas Government Code, "[A] public agency, as defined under Section 30.003(3), Water Code, may not enter into a contract as provided by Subchapter C, Chapter 2254, without review and approval by the Comptroller."¹⁶ The applicable Water Code statute defines a public agency as "any district, city, or other political subdivision or agency of the state which has the power to own and operate waste collection, transportation, treatment, or disposal facilities or systems..."¹⁷ Chapter 2254 (C) of the Government Code is entitled "Professional and Consulting Services-Contingent Fee Contract for Legal Services,"¹⁸ and sets out provisions for when a state governmental entity can hire contingent fee attorneys. It should be noted that the TCEQ, by statute, is deemed a "necessary and indispensable party" to these types of lawsuits.¹⁹

¹⁰ *Id.*

¹¹ Tex. Water Code Ann. § 7.053 (Vernon 2013), "Factors to be considered in determination of penalty amount."

¹² Tex. Water Code Ann. § 7.068 (Vernon 2013)

¹³ Tex. Water Code Ann. § 7.069 (Vernon 2013)

¹⁴ *Internat'l Paper Co.*, 2013 LEXIS 9188 at *4

¹⁵ *Id.*

¹⁶ Tex. Gov't Code Ann. § 403.0305 (Vernon 2013)

¹⁷ Tex. Water Code Ann. § 30.003(3) (Vernon 2013)

¹⁸ Tex. Gov't Code Ann. Chap. 2254.101 (Vernon 2013), "Contingent Fee Contract for Legal Services."

¹⁹ Tex. Water Code Ann. § 7.353 (Vernon 2013)

The Defendants sought to temporarily and permanently enjoin CBW from continued representation, and further alleged that the County's agreement was void because the agreement "calculated the contingent fee based on the total recovery...and therefore pledged monies earmarked by statute for the state's treasury to private attorneys without legislative consent and in violation of the separation of powers doctrine"²⁰ because, under the Texas Water Code, "a civil penalty recovered by a local government under (d) must be divided equally between the state and the local government that brought the suit."²¹

The trial court denied the Defendants' temporary injunction application, finding that the County attorney could proceed with the lawsuit, but found that Harris County had not received prior approval from the Comptroller's office, and therefore the agreement was void for statutory noncompliance. The Defendants filed an interlocutory appeal, challenging the trial court's denial of injunctive relief for various reasons, including the statutorily required approval from the Comptroller's office. Defendants also claimed due process violations, because the county sought to recover penalties, and therefore the proceedings could be deemed quasi-criminal. During the appeal, the County executed a modified fee agreement, which was approved by the Comptroller, that provided "any fee payable to [CBW] will be from the portion of any award, judgment, and/or settlement allocated by law to the County, not out of recovery to which the State is entitled by law."²²

The appellate court found that, because the County had executed a modified agreement with CBW which had been approved by the Comptroller, there was no live controversy and therefore that issue was moot. As for the due process violations, the court found that "the Due Process clause has not been interpreted as establishing a blanket prohibition against the use of contingent fee lawyers" and further opined that "the use of contingent-fee lawyers may allow a governmental entity to pursue complex, non-frivolous litigation that it could not otherwise afford."²³ The appellate court affirmed the trial court's order denying injunctive relief, and the case is back in the trial court and will be going to trial in the fall of 2014.

Two separate bills were filed in the 83rd Legislature that dealt with this issue. H.B. 3117 by Burkett would have amended the Water Code to allow the Attorney General to intervene in suits brought by local governments and settle these suits without consent or approval of the local governments.²⁴ H.B. 3119 by Burkett would have amended the Water Code to prohibit local governments, such as counties, from entering into contingent fee agreements such as the agreement used in the *International Paper* case.²⁵ When the bills were heard in committee,

²⁰ *Internat'l Paper Co.*, 2013 LEXIS 9188 at *5-6

²¹ Tex. Water Code Ann. § 7.107 (Vernon 2013)

²² *Internat'l Paper Co.*, 2013 LEXIS 9188 at *8

²³ *Id* at *17, 35

²⁴ Tex. H.B. 3117, 83rd Leg., R.S. (2013) would have added: § 7.359. SETTLEMENT AUTHORITY. The attorney general may settle in full satisfaction of the claims asserted a civil suit brought by a local government under this subchapter without the consent or approval of the local government: (1) for an amount that is consistent with the policies of the state; or (2) at the direction of the commission.

²⁵ Tex. H.B. 3119, 83rd Leg., R.S. (2013) would have added: § 7.359 PROHIBITION ON CERTAIN CONTINGENT FEE CONTRACTS. A local government that is a public agency as defined by Section 30.003 may not enter into a contingent fee contract as described by Section 2254.101, Government Code, for legal services associated with a civil suit brought under this subchapter.

representatives from various counties testified that such contingency-fee suits were necessary because most counties do not have the financial resources, nor the manpower, to maintain environmental litigation sections to protect counties from possible contamination. They also testified that counties were entitled to be involved in settlement negotiations involving lawsuits with their county. Several representatives from large corporations testified that these lawsuits were excessive, given that the parties were already involved in remediation proceedings with TCEQ, were currently or had finished clean-up of hazardous materials, and had already paid penalties to the state for the contamination. Both bills were heard in the House Committee on Environmental Regulation, but neither were passed out of committee.

During the Regular Session of the 83rd Legislature, Representative Senfronia Thompson filed an amendment to SB 59 which provided, in part, that any entity who received a final judgment which required payment of a penalty would not be liable “after the order is filed for any additional penalties sought to be imposed by a public agency relating to an act or omission that is the subject of that order.”²⁶ In other words, once TCEQ imposed a penalty upon an entity, that entity would be exempt from any further penalty or litigation brought by a local government. The amendment was withdrawn and was not included in the final version of the bill.

The House Judiciary Committee was assigned an interim charge on the controversy. The committee heard testimony regarding whether such litigation should be allowed to continue because it discourages bad actors from contaminating property in violation of TCEQ regulations; whether the counties should be allowed to hire contingent-fee attorneys because they cannot afford to keep experts on environmental law on their payroll full time; and whether the Attorney General should be allowed to intervene on these cases and represent the county in lieu of these contingent-fee attorneys.

Summary of Committee Hearing

Chairman Lewis introduced the first panel offering testimony on Interim Charge 5; Caroline Sweeney with the Texas Commission on Environmental Quality (TCEQ) and Jon Niermann with the Office of Attorney General (OAG).

Caroline Sweeney, Texas Commission on Environmental Quality

Caroline Sweeney with the Texas Commission on Environmental Quality (TCEQ) testified that the TCEQ is primarily involved in litigation brought by local governments concerning environmental contamination through the agency’s enforcement process. The statutes governing the TCEQ enforcement process are in Chapter 7 of the Texas Water Code. There are generally three ways in which TCEQ is involved in enforcement: 1) administrative actions by the agency; 2) civil actions through referral to the Office of the Attorney General; and 3) civil actions by local governments with the agency as a necessary and indispensable party. The latter situation involving local governments is most applicable to the interim charge but a short explanation of the other two enforcement avenues may be useful for context.

²⁶ Tex. S.B. 59, 83rd Leg., R.S. (2013)

Administrative Actions by TCEQ

The majority of TCEQ enforcement cases are handled through the administrative enforcement process. For example, in fiscal year 2013, TCEQ issued 2,182 administrative enforcement orders as compared with having 43 civil judicial orders related to enforcement.

The TCEQ's enforcement process begins when a violation is discovered during an inspection conducted either at the regulated entity's location or through a review of records submitted to TCEQ. Based on factors set forth in the agency's Enforcement Initiation Criteria dealing with the nature of the violation, the regulated entity is either given a chance to correct the violation and come into compliance or is referred for formal enforcement.

The first step in the formal enforcement process is to verify the information staff has documented about the violations. After reaching out to the respondent, TCEQ staff drafts an agreed administrative order, which describes the violation, any actions needed for compliance, and sets forth the administrative penalty. The TCEQ calculates an administrative penalty using the appropriate version of the TCEQ Penalty Policy, which is based on statutory factors for determining such penalties. Under Section 7.052 of the Texas Water Code, the maximum penalty for a violation, with some specific exceptions, is generally \$25,000 a day for each violation. The respondent in an enforcement action is generally given 60 days to sign an agreed order.

If the respondent is not interested in an agreed order, a TCEQ attorney is assigned to the case and files the Executive Director's Preliminary Report and Petition (EDPRP) with TCEQ's Chief Clerk's Office. The EDPRP sets forth the violations, the penalties assessed, and any corrective action needed to bring the respondent back into compliance. Within 20 days of receiving the EDPRP, the Respondent must file an answer requesting a hearing pursuant to 30 Texas Administrative Code Section 70.105. If the Respondent fails to file an answer or sign an agreed order, the TCEQ attorney pursues a default order, in which the Commission finds the allegations in the EDPRP true and orders the respondent to pay a penalty and undertake the corrective actions sought in the EDPRP. The default order is presented to the Commission for adoption at a public meeting.

When a respondent files an answer and chooses to pursue an administrative hearing, the case is referred to the State Office of Administrative Hearings (SOAH) and a hearing is set before an administrative law judge (ALJ). After the hearing, the ALJ issues a Proposal for Decision (PFD), which is presented to the Commission at a public meeting. The Commission then decides which portions of the PFD to adopt, if any, and issues an administrative order to that effect. The respondent may appeal the administrative order in Travis County District Court.

Civil Actions through Referral to the Office of the Attorney General

The Executive Director of the TCEQ may also refer an enforcement case directly to the Office of the Attorney General (AG) for civil enforcement in Travis County District Court, pursuant to Texas Water Code, Section 7.105. Section 70.6 of the TCEQ rules also includes criteria for referring a case to the AG rather than pursuing administrative enforcement and includes factors such as the need for immediate action and the egregious nature of the violation.

A case brought by the AG in district court will generally seek a civil penalty, attorney’s fees, and court costs as well as possibly an injunction requiring compliance. Different types of violations have different civil penalty ranges, determined by statute, with a maximum amount of up to \$25,000 per day per violation.

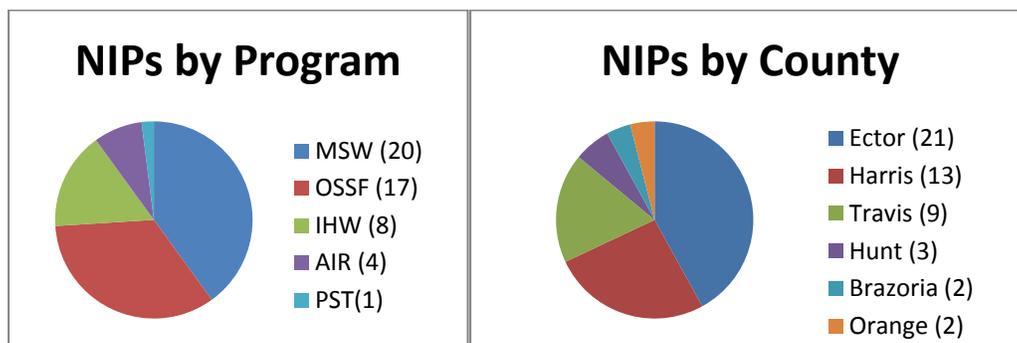
Civil Actions by Local Governments with the TCEQ as a Necessary and Indispensable Party

Under Section 7.351 of the Texas Water Code, a local government may bring a civil suit to enforce a statute, rule, order or permit, in the same manner as the TCEQ. Section 7.353 makes the TCEQ a necessary and indispensable party (NIP) in these local government suits.

When a local government entity files a civil suit to enforce a matter within the jurisdiction of the TCEQ, it names the TCEQ as a NIP in the pleadings and forwards a copy of the pleadings to the TCEQ. The case usually arises from an investigation conducted by the local government entity and may be brought in either the county where the alleged violation occurred or in Travis County. Like a civil enforcement case brought by the AG, the local government entity may seek an injunction requiring compliance, civil penalties, attorney’s fees, and court costs. Since the AG generally represents the TCEQ in any action in the state or federal court system, the NIP cases are referred to the AG.

Any civil penalties awarded by the court are split between the local government entity and the state in accordance with Texas Water Code, Section 7.107.

TCEQ currently has 50 active NIP cases, divided by program area and county below:



In answering a series of questions from Chairman Lewis, Ms. Sweeney testified that currently a case by case system exists with the impact of civil suits against remediation. Ms. Sweeney shared that, to her knowledge, there is not an impact on remediation because of the filing of civil suits.

In addition she clarified for the committee the distinction between an administrative penalty and a fine. First, an administrative penalty is a structured process within the enforcement abilities of the Commission, whereas fines are sought when the TCEQ enters into district court by the OAG to pursue a calculated amount.

Ms. Sweeney also shared that her understanding is that pursuant to the Texas Water Code, Section 7.068, an agreed upon administrative penalty would preclude further actions to be taken for the same violation.

Representative Luna asked whether the amount of administrative penalty is final when offered by TCEQ, and Ms. Sweeney stated that the penalty may change as situations require.

In answering a question from Representative Farrar regarding the efficacy of the collection of penalties and where the funds go, Ms. Sweeney testified that the TCEQ collects a significant portion, although in cases where funds are not collected, the entity is referred to a collection agency for payment and the OAG.

Jon Niermann, Office of the Attorney General

Jon Niermann with the Office of the Attorney General (OAG) testified that the OAG is a necessary and indispensable party to suits filed.

In response to a question from Vice-Chair Farrar, Mr. Niermann testified that the OAG is referred cases as a necessary and indispensable party, and they file a notice of appearance on behalf of the State of Texas. The OAG reserves for a later date whether they will join in any part of the claims. In some cases, they may decline or have additional claims. The OAG typically coordinates with local prosecutors, but the level of coordination varies widely depending on the complexity of the case, the experience of the counsel for the local governments, and the interest in the enforcement priorities.

Representative Raymond asked whether the TCEQ or the OAG have staffing issues that prevent them from accomplishing their mission, and Mr. Niermann and Ms. Sweeney testified that they have adequate staffing resources to serve the state.

Chairman Lewis introduced the second panel, consisting of: Jack R. Cagle representing himself and the Harris County Commissioners Court, Cathy Sisk representing Harris County, and Robert Soard also representing Harris County.

Jack R. Cagle, Self; Harris County Commissioners Court

Jack R. Cagle, representing himself and the Harris County Commissioners Court, testified that in his experience and knowledge there are six cases dealing with environmental remediation litigation in Harris County, of which three are pending, and that there does not seem to be a pressing need to address the issue. He testified that his concern is ensuring local control in the matters, rather than deferring to Austin or Washington D.C., and allowing the county to provide its own legal representation for these issues. In one issue regarding the San Jacinto River, Commissioner Cagle stated the importance of allowing the local community to resolve the issues.

Cathy Sisk, Harris County

Cathy Sisk with Harris County testified that in 1953 the Harris County Stream and Air Pollution Office was created. In response to industrial pollution the Department was established and was staffed with investigators and health professionals. According to Ms. Sisk, at the time the actions were common law nuisance based actions and they are the basis for the actions taken now. Ms. Sisk also testified that environmental laws established by the Legislature, particularly Chapter 7 of the Texas Water Code, are modeled after the actions taken in Harris County.

Harris County officials review, issue, and investigate permits along with TCEQ, and according to Ms. Sisk, coordinate necessary responses to complaints when appropriate. She also testified that allowing the Harris County to operate these functions affords the state the opportunity to act in areas where local governments lack the resources. Ms. Sisk also mentioned that she is aware of concerns that local governments may be acting inconsistent with state policies but is unaware of an instance occurring that reflects those concerns.

Robert Soard, Harris County

Robert Soard with the Harris County Attorney's Office testified that Harris County is the largest county in Texas, and therefore has a large staff. There are 100 lawyers and 100 non-lawyers serving the county. Of those attorneys, four serve the environmental needs of the county and at times contract with outside counselors on terms consistent with the statutes. He testified that only six have been hired on a contingency-fee basis and that when that is done, there is an internal review by the county attorney.

In response to a question raised by Representative Raymond, Mr. Soard testified that the three resolved cases were negotiated settlements accomplished through mediation and that the county spent one to two years on those cases while spending more time on the cases currently pending.

Mr. Soard, in response to a question by Vice-Chair Farrar, elaborated on a case of dioxin contamination in the San Jacinto River, where he believed the county ought to be compensated for remediation. Mr. Soard also testified that the claims in the other cases involve the leaking of underground storage tanks that have an impact on water quality and public health.

Representative Farney asked if the county historically cooperates with companies that in good faith self-report contamination and Ms. Sisk stated that 96% of all violation notices by Harris County are resolved without formal action. Ms. Sisk stated that enforcement cases usually involve egregious conduct or significant harm is not being addressed by the violator. Ms. Sisk testified that the county does not take action where a property owner is responsible and cooperating with the county.

Commissioner Cagle also mentioned that prior to the hiring of outside counsel; the approval of the item is placed on the agenda for public input and a vote by the commissioners.

Chairman Lewis then introduced the panel consisting of George Christian with the Texas Civil Justice League and John Reilly with Waste Management.

George Christian, Texas Civil Justice League

George Christian with the Texas Civil Justice League testified that local enforcement is critical and that efforts toward remediation ought to be solved by ensuring those responsible for contaminations are best equipped with a process that is clear and practical.

In response to a question by Representative Raymond, Mr. Christian answered that he lacks familiarity with the issue or evidence that local governments are engaging in actions inconsistent with remediation goals.

John Riley, Self; Waste Management

John Riley, an attorney representing Waste Management, testified that the Legislature has created a system that is practically responsive to needs across the state. Mr. Riley also stated that certain cases are handled federally by the Superfund, and that the suits currently being discussed aren't aimed toward remediation.

While acknowledging his difference in perspective from those in local government, Mr. Riley testified in support of several state initiatives that incentivize companies to remediate issues, without the need for litigation. Mr. Riley also stated that TCEQ has effectively acted properly with its discretion to ensure remediation efforts to occur. Mr. Riley testified that consistency in application of process and penalties is a simple but important aspect with regard to state and local actions.

Mr. Riley answering a question by Chairman Lewis stated that in economic terms, companies are less likely to pursue locations that may have a history of contamination, when they may be liable for activity that occurred prior to the purchase under some theories made by claimants. Mr. Riley also testified that he believes there must be a more predictable and transparent method of operation by local government entities in dealing with remediation.

Vice-Chair Farrar also stressed the need to incentivize locations that may have a history of contamination to again become productive areas of economic growth.

Chairman Lewis invited John Ballotti with the City of Commerce, David Jones with Hunt County Homeland Security, and John Horn of Hunt County to testify before the committee as the fourth panel.

John Ballotti, City of Commerce

John Ballotti, Mayor of Commerce, testified that retaining local control of local enforcement actions is a vital concern since an environmental contamination could have dire consequences very quickly. For example, damage to the municipal water system would require the local government to pass the cost of remediation to taxpayers instead of the actors, if there was not legal recourse. Mayor Ballotti offered examples of where the Office of the Attorney General interceded to assist with remediation efforts.

In answering a question from Representative Farney, Mayor Ballotti clarified that there is an ongoing suit separate from remediation efforts that was pursued by the OAG.

John Horn, Hunt County

John Horn, serving as the Hunt County Judge, reiterated with the importance of ensuring local governments have the tools necessary to ensure they are adequately protected from threats, including environmental threats. Judge Horn stressed that the issue with individuals illegally dumping materials across the county causes large problems and that TCEQ is not equipped to handle the large number of local cases that exist because they lack boots on the ground.

David Jones, Hunt County Homeland Security

David Jones serves as an investigator for the Hunt County Office of Homeland Security, and in that capacity testified that there are a number of obstacles with ensuring that the environmental issues facing the county are swiftly dealt with. In characterizing the situations, Mr. Jones testified that many bad actors in Hunt County do not come forward, they must be pursued. Mr. Jones stated that the TCEQ lacks the numbers of investigators that are needed to investigate cases across the state.

Caroline Sweeney, recalled by the committee to answer questions by Representative Raymond, re-affirmed that TCEQ maintains a proper and adequate force of investigators that result in administrative procedures. Ms. Sweeney referred to over 100,000 investigations completed in fiscal year 2013. Ms. Sweeney answered a question by Representative Farney, to clarify that the enforcement process could result in penalties to some actors that are uncooperative in remediation.

Chairman Lewis introduced the fifth panel consisting of Stephen Minick with the Texas Association of Business and Nathan Beedle representing the Melcher Family.

Stephen Minick, Texas Association of Business

Steven Minick, representing the Texas Association of Business testified that the models established by Texas are models for the nation and the evolution of these programs signals the agreement by the legislature to solve the issue of remediation and reserving enforcement for the egregious cases. Mr. Minick also noted the lengths to which the industries cooperate by paying fees, for example to fund the Federal Superfund, to ensure effective remediation efforts. Mr. Minick emphasized how well the current programs have worked but stated that new types of litigation may negatively impact remediation efforts and the legislature should act that the focus remains on remediation funded by the bad actors. Mr. Minick stated the issues in the cases discussed are about assessing penalties rather than instituting remediation and that to step backward from incentivizing contamination clean-up would be a mistake.

With regard to the economic impact of actions that may be taken from a purchaser of a property with a history of contamination, Mr. Minick stated that the consequences of retroactively assessing penalties would be significant.

In answering a question by Representative Raymond, Mr. Minick stated programs that could protect investors interested in a property from being penalized after their purchase exist and that is a great thing for the state.

Nathan Beedle, Melcher Family

Nathan Beedle, representing the Melcher family, a participant in a remediation program, shared the difficulty in working with local governments to remediate damages. Mr. Beedle testified and offered materials that show that regardless of the compliance efforts by dry-cleaners with TCEQ, Harris County has taken action that is impacting the ability of remediation. Mr. Beedle offered his opinion that not only has Harris County enforcement action stalled investigative operation it has also stalled remediation efforts.

In answering a question by Representative Raymond, Mr. Beedle stated that TCEQ stalled remediation efforts because they have found no proof of contamination but litigation initiated by Harris County has the Melcher family potentially accountable for a \$25,000 fine per day, and that the situation is not unique.

Mr. Beedle offered that there ought to be factors to be considered with regard to environmental remediation fines and that the legislature ought to consider instituting factors for these types of fines. Mr. Beedle also testified that Harris County does not, as they have stated, only act in egregious cases, and there ought to be a clear process of enforcement by cities or counties.

The Committee re-invited Mr. Riley and Ms. Sisk to join the committee to answer questions.

As an answer to a question posed by Representative Raymond, Ms. Sisk shared that an avenue of agreement between cities, counties, and industries, exists to protect a purchaser of a new property from contamination that may have existed prior to their purchase.

Mr. Riley, answering the same question agreed, but stated that additionally there may be several local governmental entities that may be authorized to bring claims of environmental damage and that a large amount of work would have to be done to determine in each case, the applicable local governmental entities.

Answering a question from Representative Farney, Ms. Sisk testified that if the entity still exists they are required to cover the costs of remediation, and that penalties sought in suits is partially resources expended by the entity to bring the entity to cooperation.

Chairman Lewis introduced the final panel consisting of John Dahill with the Texas Conference of Urban Counties, Nelson Roach with the Texas Trial Lawyers Association, and Heather Mahurin representing the Texas Municipal League.

Heather Mahurin, Texas Municipal League

Heather Mahurin representing the Texas Municipal League testified that tools that allow the entities to recoup costs associated with environmental damage are purposeful and meaningful. Also the provision allowing for civil suits require local government approval through an open process that allows citizens to support or oppose the measure. Ms. Mahurin also stated that it would be contrary to the purpose for the communities to negatively impact economic development.

Nelson Roach, Texas Trial Lawyers Association

Nelson Roach testifying for the Texas Trial Lawyers Association testified that it is the belief that suits certainly assist in effective remediation. Mr. Roach referenced that in Blackwell, Oklahoma, a location was to be selected a Superfund site, but was not for economic reasons. In the process of that the state agreed to remediate the site and according to Mr. Roach, tests done later found high levels of lead in the area, twenty years after the site had been remediated. Mr. Roach continued to testify that without the legal mechanisms afforded to the community the site would have lacked the recourse to remediate the site and that Texas should not remove the tools afforded to local governments for these types of situations.

John Dahill, Texas Conference of Urban Counties

John Dahill representing the Texas Conference of Urban Counties testified that the goals of public policy are to encourage entities not to pollute, and if they do, to clean up the contamination. Mr. Dahill also offered that it is necessary and proper to allow local governments the ability to address contamination in their communities and it would be imprudent for the state to step in the way of local governments.

In response to a question from Representative Lewis, Mr. Dahill thought the jury setting allowed both parties to bring forth factors to consider in determining the proper course of finds, but was unaware of how the appellate courts may review the factors that the jury considered at the time.

Recommendations

The goal of effective remediation of environmental contamination is important for public safety and health, and the Committee acknowledges the potential for conflict with enforcement by separate local and statewide governmental units. The Committee notes that while such a potential for conflict may exist, no instances were presented showing that local enforcement has frustrated remediation by the Texas Commission on Environmental Quality (TCEQ). The Committee further acknowledges that cities and counties have been able to, and should continue to primarily, cooperate with TCEQ remediation. While the committee makes no recommendation on changing the present law at this time, it reaffirms the state's interest in environmental remediation and encourages further cooperation and coordination between local governments and the state.

The Committee also believes that transparency and consistency in regulation and application of penalties are important for citizens and industries. Currently there is potential for unlimited fines which can be assessed in litigation. Further, the committee finds that there is a lack of guidance to finders of fact regarding the amount of those fines, and recommends that the legislature adopt standards and practices to guide fact-finders and courts in assessing appropriate fines, similar to those established for the TCEQ in statute.

CHARGE 6

Study the issue of whether Regional Presiding Judges should be appointed by the Chief Justice rather than the Governor.

SUMMARY OF COMMITTEE ACTION CHARGE 6

CHARGE 6: Study the issue of whether Regional Presiding Judges should be appointed by the Chief Justice rather than the Governor.

Committee Hearing

The House Committee on Judiciary & Civil Jurisprudence met in a scheduled public hearing on Monday, March 17, 2014 at 10:00am in room E2.010, Texas State Capitol.

The following is the list of invited testimony who either testified on behalf of themselves or the listed entity:

Nathan Hecht, Supreme Court of Texas
David Peeples, Regional Presiding Judges
David Slayton, Office of Court Administration

Summary of Committee Hearing

Texas is divided into nine administrative judicial regions, each with a presiding judge that is appointed by the Governor to serve a four year term. The Regional Presiding Judge "may be a regular elected or retired district judge, a former judge with at least 12 years of service as a district judge, or a retired appellate judge with judicial experience on a district court."¹ The duties of the presiding judge include "promulgating and implementing regional rules of administration, advising local judges on judicial management, recommending changes to the Supreme Court for the improvement of judicial administration, and acting for local administrative judges in their absence. The presiding judges also have the authority to assign visiting judges to hold court when necessary to dispose of accumulated business in the region."²

Section 74.005, Texas Government Code, provides:

The governor, with the advice and consent of the senate, shall appoint one judge in each administrative judicial region as presiding judge of the region.

At the time of the appointment, a presiding judge must be:

- 1) a regularly elected or retired district judge;
- 2) a former judge with at least 12 years of service as a district judge; or
- 3) a retired appellate judge with judicial experience on a district court.

Section 74.044 of the Texas Government Code provides that a presiding judge serves a term of office of four years from the date of qualification as the presiding judge.³

¹ Office of Court Administration website, <http://www.courts.state.tx.us/>

² *Id.*

³ Tex. Gov't Code Ann. § 74.044 (Vernon 2013)

A presiding judge shall:⁴

- 1) ensure the promulgation of regional rules of administration within policies and guidelines set by the supreme court;
- 2) advise local judges on caseload management and auxiliary court services;
- 3) recommend to the chief justice of the supreme court any needs for judicial assignments from outside the region;
- 4) recommend to the supreme court any changes in the organization, jurisdiction, operation, or procedures of the region necessary or desirable for the improvement of the administration of justice;
- 5) act for a local administrative judge when the local administrative judge does not perform the duties of that office;
- 6) implement and execute any rules adopted by the Supreme Court;
- 7) provide the supreme court or the Office of Court Administration statistical information requested; and
- 8) perform the duties assigned by the Chief Justice of the Supreme Court.

Summary of Testimony

Regional Presiding Judge David Peeples

Judge David Peeples, the Regional Presiding Judge for the Fourth Administrative Judicial region, testified that the Regional Presiding Judges have no official opinion on the question of whether Presiding Judges should be appointed by the Chief Justice of the Supreme Court, or the Governor. They were all appointed by the Governor, and they believe that all of the current Presiding Judges are doing an excellent job. He further testified that this proposed change would increase unification among the judiciary, and that the Chief Justice may have a better sense of the needs of the judiciary than the Governor. He concluded that if the Chief Justice is to be held accountable for the actions of the Judiciary, he should have the authority to appoint and remove the Regional Presiding Judges, but reinforced that he has no criticism of any of the previous or current appointments that the Governor has made.

Chief Justice Nathan Hecht

Chief Justice Hecht testified that Regional Presiding Judges are an integral part of the judiciary, and that efficiency would be increased somewhat if Regional Presiding Judges were appointed by the Chief Justice. In most states, these presiding judges are selected within the judicial branch by either the Chief Justice or the high court itself. Only three states, including Texas, utilize gubernatorial appointments. Regional Presiding Judges have a tremendous workload, and they work in cooperation with the Court on every issue that has come up.

David Slayton, Office of Court Administration

David Slayton testified as a resource, and had no opinion on the appointment procedure of the Regional Presiding Judges. He testified that Regional Presiding Judges oversee all of the trial courts, including child support and child protection judges, and assign alternate judges when

⁴Office of Court Administration website, <http://www.courts.state.tx.us/>

a judge cannot hear a case because of vacation, illness, or recusal. The Regional Presiding Judges hear many types of appeals, including appeals when a fee voucher for a criminal case is denied, and they hear all Rule 12 Appeals, which is the judiciary's Public Information rule. Additionally, RPJs annually review the trial courts to ensure that all trial dockets are appropriately maintained and that there is no backlog in the courts.

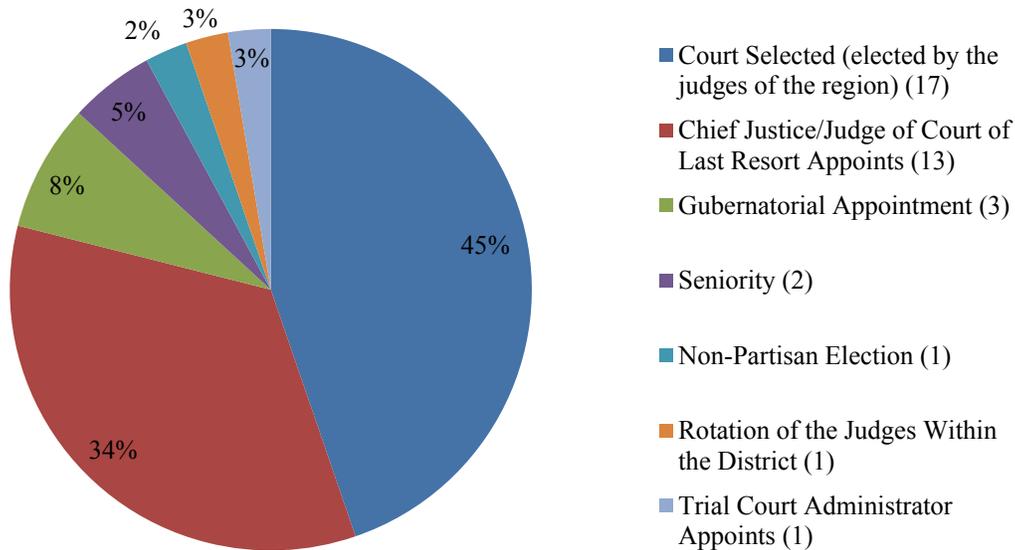
Recommendations

The Committee finds that able, respected, and capable Regional Presiding Judges have been selected through the current system of gubernatorial appointment. Therefore, the Committee is unable to determine that there is an immediate problem with the present system. Nevertheless, the Committee does note that most states utilize systems in which such selection is made within the Judicial Branch itself. The Committee concludes that any change in the present system should be considered in the context of comprehensive changes or reform of the administrative responsibilities in the Judiciary.

The following exhibits were provided to the committee:

1. Selection of Presiding Judges
2. Map of Judicial Regions

Selection of Presiding Judges^{1,2}



Court Selected

Alabama, Arkansas, Florida, Idaho, Illinois, Kentucky, Missouri, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Tennessee, Utah, Virginia, Washington, and West Virginia

Chief Justice/Judge of Court of Last Resort Appoints

Alaska, Colorado, Connecticut, Hawaii, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Oregon, South Carolina, South Dakota, and Wisconsin

Gubernatorial Appointment

New Hampshire, Texas, and Wyoming

Seniority

Mississippi, North Carolina

Non-Partisan Election

Georgia

Rotation of the Judges Within the District

Montana

Trial Court Administrator Appoints

New York

1 The following 12 jurisdictions were excluded from this chart because they do not have a district or circuit presiding judge system that is comparable to Texas: Arizona, California, Delaware, District of Columbia, Kansas, Louisiana, Maine, New Jersey, Ohio, Pennsylvania, Rhode Island, and Vermont.

2 Original data came from the National Center for State Courts, State Court Organization comparative data, Table 38b. Presiding Judges: Method of Selection and Term (*available at <http://data.ncsc.org/QvAJAXZfc/opendoc.htm?document=Public%20App/SCO.qvw&host=QVS@qlikviewisa&anonymous=true&bookmark=Document\BM149>*), but decisions as to which jurisdictions to exclude because their systems were not comparable to Texas were made by a Supreme Court staff attorney.

CHARGE 7

Conduct legislative oversight and monitoring of the agencies and programs under the committee's jurisdiction and the implementation of relevant legislation passed by the 83rd Legislature.

SUMMARY OF COMMITTEE ACTION CHARGE 7

CHARGE 7: Conduct legislative oversight and monitoring of the agencies and programs under the committee's jurisdiction and the implementation of relevant legislation passed by the 83rd Legislature.

Committee Hearing

The House Committee on Judiciary & Civil Jurisprudence met in scheduled public hearings on Monday, March 17, 2014 and Friday, May 16, 2014 at 10:00am in room E2.012, Texas State Capitol.

The following is the list of invited testimony who either testified on behalf of themselves or the listed entity:

Nathan Hecht, Supreme Court of Texas
Michelle Hunter, State Bar of Texas
Sharon Keller, Court of Criminal Appeals
David Slayton, Office of Court Administration
Cathleen Parsley, State Office of Administrative Hearings
Tom Walston, State Office of Administrative Hearings

Summary of Committee Hearing

The Supreme Court of Texas

Chief Justice Nathan Hecht testified for the Supreme Court of Texas that, as of December 1, 2013, the Court is now “caught up” on cases carried over from the previous term, with most already decided. The Chief Justice cited historical progress in dispensing of cases before the court decreasing the number of cases carried over from 57 in 2007 to 11 cases in 2013. He noted that the large number of new justices over the years led to the creation of a backlog and stated that the goal of the court is to keep the number of cases carried over manageable with the intent to clear the docket each fiscal year. Chief Justice Hecht also provided an update on rulemaking before the court and the status of access to justice initiatives.

Rulemaking

In the area of rulemaking, the Chief Justice recognized the good partnership the court has had with the legislature over the last 15 years in passing laws and allowing the court to exercise rulemaking to implement policy proposals. Currently, the rulemaking committee consists of 50 lawyers, judges, and academics whose experience makes them well suited to establish rules that work well in practice. The Chief Justice also provided a status update on the five most recent subjects that the Court has been tasked with establishing rulemaking. They are as follows:

1. Lengthen statute of limitations on prosecutorial misconduct (Completed)
2. Expedited judicial foreclosure forms (Completed)

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3. Judicial Branch Certification Commission (In progress)
 4. Texas Rule of Evidence 902 (Close to completion)
 5. Review rules on the State Commission on Judicial Conduct (SCJC submitted proposed rules in Dec. 2013. SCOTX beginning the process to review and modify)

Access to Justice

Chief Justice Hecht also offered a report on the status of funds aimed at access to justice programs. Interest on Lawyer's Trust Accounts (IOLTA) funds are down while Legal Services Corporation (LSC) funds are slightly up.

The Chief Justice noted the following rankings recently published by the National Center for Access to Justice:

1. 4th (subjective) in the nation in helping the disabled population
2. 6th (subjective) in the number of self-represented litigants
3. 20th (subjective) for assisting those with limited English proficiency
4. 50th (statistical) in the nation for assistance with civil legal aid because of the number of poor and the amount of money there is for legal aid in Texas

In a move to increase strained funding for access to justice measures, the legislature passed H.B. 1445 (83rd Leg., R.S.). H.B. 1445 allows civil restitution recovered from an action by the attorney general on a matter that violates a consumer protection, public health, or general welfare law to be used to fund access to justice programs and increases an existing cap on the amount that may be transferred to the judicial fund to \$50 million.

Chief Justice Hecht pointed out that although the legislature has continued to expand the types of cases eligible to fund access to justice initiatives, the funding is contingent on the eligible cases being filed, and that may not prove to be reliable.

The Texas Court of Criminal Appeals

Also invited to provide testimony to the committee was Presiding Judge of the Court of Criminal Appeals, Sharon Keller. Judge Keller notified the committee that the court is current on their docket, having disposed of 9,400 matters over the last year and that the turnover issues that the Texas Supreme Court has seen are not seen by the Court of Criminal Appeals.

Indigent Defense

HB 1318 (83rd Leg., R.S.) creates a new requirement for attorneys that engage in indigent defense in certain situations and also requires the Indigent Defense Commission to prepare a weighted caseload study by January 1, 2015.

The Indigent Defense Commission has worked with the Office of Court Administration to develop a form to be used by attorneys that engage in indigent defense and the Commission has partnered with the Public Policy Research Institute at Texas A&M University to complete the caseload study.

The State Bar of Texas

Michelle Hunter, the Executive Director of the State Bar of Texas, provided an update on various commissions, funds, programs, and services that the State Bar offers to its members across the State of Texas.

Commission on Lawyer Discipline Statistics

The Commission for Lawyer Discipline is a permanent committee of the State Bar of Texas and is composed of six attorney members appointed by the Bar's president and six public, non-attorney members appointed by the Supreme Court of Texas. In 2012-13, 367 attorneys were sanctioned, including 39 disbarments, 24 resignations, 122 suspensions, 37 public reprimands, and 89 private reprimands.

Client Security Fund

The Client Security Fund was established by the State Bar of Texas to restore client confidence when a Texas attorney abuses his position of trust in financial dealings with the client. It provides financial relief to clients whose lawyers have stolen money intended for the client, or failed to refund an unearned fee. In the latest reporting year (2012-13) 109 applications approved more than 900k in funds distributed to clients

Client Attorney Assistance Program

The Client Attorney Assistance Program (CAAP) is a confidential statewide dispute resolution service of the State Bar of Texas. CAAP's objective is to facilitate communication and foster productive dialogue between Texas lawyers and their clients in an effort to assist them in resolving minor concerns, disagreements, or misunderstandings that are impacting the Attorney-Client relationship. In 2012-13, more than 45k calls were answered. In nearly $\frac{3}{4}$ of all cases CAAP successfully re-established communication between clients and attorneys

Texas Lawyers Assistance Program

TLAP provides confidential help for lawyers, law students and judges who have problems with substance abuse and/or mental health issues. Assistance was provided to 605 attorneys and 224 concerned others in 2012-13.

Alternative Careers for Lawyers Seminar

This new seminar connects attorneys with career counselors to utilize legal training in new or non-traditional ways.

Care Campaign

The Care Campaign, launching in the fall of 2014, will work to empower attorneys who want to serve the millions of low-income Texans who need legal help by incentivizing attorneys to make pro bono work a routine part of their legal practice. Some of the planned incentives are practical training programs that offer CLE credit, a mentorship program that shares experience and advice, language assistance to reach underserved populations, and malpractice insurance for pro bono and reduced-fee cases.

Texas Lawyers for Veterans Program

In its 4th year, the program has supported pro bono local clinics for veterans in Texas. More than 3k attorneys in the 1st three years have provided services to over 10k veterans. The program has achieved positive results and is the model for other states establishing similar programs.

Lawyer Referral and Information Service

This program helps the 240 counties not served by metropolitan bar referral services and assists more than 80k callers each year.

Lawyer Related Education Program in Texas

The LREP provides the latest in civil and law related education materials and training to more than 7,300 teachers in Texas to expand the interest in law for elementary students. One new initiative, that meets Texas Essential Knowledge and Skills standards for elementary students, has students explore 21 historical figures in U.S. and Texas History. This program has reached 4,800 teachers and 196,000 students across the entire state.

Texas Young Lawyers Association

The association has reviewed issues of human trafficking, mental health, voter participation, and most recently created a presentation (“What do lawyers do?”) to answer questions and increase interest in those seeking to enter the legal profession.

A question raised by the chair asking how the State Bar has continued to offer services without raising dues was answered by Director Hunter, stating that the Bar has done more with less by utilizing technology and employees in a better fashion. 10 years ago the Bar employed 310 individuals while now they employ 265 and they have undergone significant technological upgrades to further assist in their efficacy as an agency.

Office of Court Administration

David Slayton, Administrative Director of the Office of Court Administration, offered the committee an update on e-filing, the Judicial Branch Certification Commission, upcoming initiatives, and a layout on the annual report of statistics submitted to the Committee by OCA.

E-Filing Update

Change in contract providers for e-filing support and the issues that were addressed because of the change. Savings have been reported by local governments in paper, processing, and storage costs. There are concerns and OCA will continue to request that the legislature provide funding to assist counties in their transition to e-filing during the next session. The OCA also sent users of the new e-filing system a survey and have recently completed tallying the responses and comments. Of the respondents, 58% believe that they are saving money and 58% also believe that they are saving time in utilizing e-filing.

Judicial Branch Certification Commission

Update on the status of SB 966 (83rd Leg., R.S.) that consolidated the functions of the Process Server Review Board, Guardianship Certification Board, Licensed Court Interpreter Board, and the Court Reporter Certification Board.

Initiatives

Tech support for the Texas Supreme Court, Court of Criminal Appeals, and judicial agencies is ongoing. New case management software being utilized is decreasing reliance on paper, increasing savings, and fostering better transparency through agencies and for the public. While OCA was tasked with receiving complaints, there was not an investigator to review complaints. Pursuant to funding by the Legislature in 2013, OCA has now hired an investigator. OCA is working to provide better services to those with limited English proficiency. The Texas Court Remote Interpreter Service aims to reduce costs by providing interpreters to courts through video or voice conferencing.

Forms and Studies

Through the passage of legislation, OCA has been instructed to create forms and produce studies.

1. S.B. 107 (83rd Leg., R.S.)-Create a non-disclosure form (now available)
2. H.B. 1435 (83rd Leg., R.S.)-Create a uniform form for suits that challenge the constitutionality of a state statute (now available)
3. S.B. 1080 (83rd Leg., R.S.)-Study the compensation of Constitutional County Judges (ongoing)
4. S.B. 1908 (83rd Leg., R.S.)-Study filing fees and court costs to determine which are still necessary (ongoing)
5. Rider in the General Appropriations Act-Study DPS Sting Operations and their impact on county governments. (ongoing)

Specialty Courts Update

Caseload has determined the creation of new specialty courts in the following areas.

1. Child Support Court in El Paso
2. Child Protection Court in Lubbock County
3. Child Protection Court in Ector County
4. Child Protection Court in Atascosa, Karnes, and Wilson Counties
5. Child Protection Court in Harris County

Judicial Council Update

Preliminary data on SB 393 (83rd Leg., R.S.), have shown marked improvements in reducing ticketing of Education Code offenses.

An Elders Committee has been created to assist in interactions between the judiciary and elderly committee as well as address the future issues relating to adult guardianship. The committee hopes to provide recommendations to be addressed by the next legislature.

State Office of Administrative Hearings

Cathleen Parsley, Chief Administrative Law Judge, and Tom Walston, General Counsel, gave an update on the State Office of Administrative Hearings. SOAH is currently under Sunset Commission review. SOAH has 57 Administrative Law Judges, both in Austin and in field offices around the state. They have 109 employees, and have 7 field offices. SOAH is assigned between 35,000 and 40,000 cases per year, and they conduct hearings and mediations in contested cases and hear appeals from state agencies. SOAH believes that their mission statement and enabling statutes correctly outline their responsibilities.

One item that SOAH would like for the Sunset Commission to study is the way that the agency is funded. Currently, the agency is funded through multiple methods of financing, and the methods are not allowing the agency to operate in the most efficient manner that it can. SOAH would like to be funded by General Revenue, which would give them predictably and stability in their funding methods.

Representative Raymond asked several questions about the percentage of decisions by SOAH that are upheld or agreed to by agencies in contested hearings. Judge Parsley responded that she did not have the exact numbers but she estimated that the percentage was fairly high, possibly in the 80-90% range. Representative Hunter asked a number of questions with regard to certain circumstances, wherein an agency may disregard or overturn the decision of a SOAH Administrative Law Judge. Representative Hunter suggested that an agency should not be able to overturn the decision of an Administrative Law Judge, and asked that SOAH work with the Legislature to draft new statutory language to address this issue.