

BILL ANALYSIS

Senate Research Center
82R5501 KLA-D

H.B. 2492
By: Naishtat (Uresti)
Jurisprudence
5/13/2011
Engrossed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

H.B. 2492 amends current law relating to the family allowance, treatment of exempt property, and an allowance in lieu of exempt property in the administration of a decedent's estate.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1.01. Amends Sections 139, 140, and 143, Texas Probate Code, as follows:

Sec. 139. APPLICATION FOR ORDER OF NO ADMINISTRATION. Provides that if the value of the entire assets of an estate, not including homestead and exempt property, does not exceed the amount to which the surviving spouse, minor children, and adult incapacitated children of the decedent are entitled as a family allowance, there may be filed by or on behalf of the surviving spouse, minor children, or adult incapacitated children an application in any court of proper venue for administration, or, if an application for the appointment of a personal representative has been filed but not yet granted, then in the court where such application has been filed, requesting the court to make a family allowance and to enter an order that no administration shall be necessary. Requires that the application state the names of the heirs or devisees, a list of creditors of the estate together with the amounts of the claims so far as the same are known, and a description of all real and personal property belonging to the estate, together with the estimated value thereof according to the best knowledge and information of the applicant, and the liens and encumbrances thereon, with a prayer that the court make a family allowance and that, if the entire assets of the estate, not including homestead and exempt property, are thereby exhausted, the same be set aside to the surviving spouse, minor children, and adult incapacitated children, as in the case of other family allowances provided for by this Code. Makes nonsubstantive changes.

Sec. 140. HEARING AND ORDER UPON THE APPLICATION. Requires the court, upon the hearing of the application, if the court finds that the facts contained therein are true and that the expenses of last illness, funeral charges, and expenses of the proceeding have been paid or secured, to make a family allowance and, if the entire assets of the estate, not including homestead and exempt property, are thereby exhausted, to order that no administration be had of the estate and to assign to the surviving spouse, minor children, and adult incapacitated children the whole of the estate, in the same manner and with the same effect as provided in this Code for the making of family allowances to the surviving spouse, minor children, and adult incapacitated children. Makes nonsubstantive changes.

Sec. 143. SUMMARY PROCEEDINGS FOR SMALL ESTATES AFTER PERSONAL REPRESENTATIVE APPOINTED. Requires the personal representative, whenever, after the inventory, appraisal, and list of claims has been filed by a personal representative, it is established that the estate of a decedent, exclusive of the homestead and exempt property and family allowance to the surviving spouse, minor children, and

adult incapacitated children, does not exceed the amount sufficient to pay the claims of Classes One to Four, inclusive, as claims are hereinafter classified, to, upon order of the court, pay the claims in the order provided and to the extent permitted by the assets of the estate subject to the payment of such claims, and thereafter present the personal representative's account with an application for the settlement and allowance thereof. Authorizes the court, with or without notice, to adjust, correct, settle, allow or disallow such account, and, if the account is settled and allowed, to decree final distribution, discharge the personal representative, and close the administration.

SECTION 1.02. Amends Sections 271(a) and (b), Texas Probate Code, as follows:

(a) Requires the court, unless an affidavit is filed under Subsection (b) of this section, immediately after the inventory, appraisal, and list of claims have been approved, to, by order, set apart:

(1) Makes no changes to this subdivision; and

(2) all other property of the estate that is exempt from execution or forced sale by the constitution and laws of this state for the use and benefit of the surviving spouse, minor children, unmarried adult children remaining with the family of the deceased, and each other adult child who is incapacitated.

(b) Provides that before the approval of the inventory, appraisal, and list of claims:

(1) Makes no changes to this subdivision; and

(2) any unmarried adult child remaining with the family of the deceased, any other adult child who is incapacitated, or a person who is authorized to act on behalf of the adult incapacitated child may apply to the court to have all exempt property other than the homestead set aside by filing an application and a verified affidavit listing all of the other property that the applicant claims is exempt.

SECTION 1.03. Amends Sections 272, 273, 274, 275, 276, 286, 287, 288, 290, 291, and 292, Texas Probate Code, as follows:

Sec. 272. TO WHOM DELIVERED. Requires that the exempt property set apart to the surviving spouse and children be delivered by the executor or administrator without delay as follows: (a) Requires that the whole of such property, if there be a surviving spouse and no children, or if the children, including any adult incapacitated children, be the children of the surviving spouse, be delivered to the surviving spouse.

(b) Requires that such property, if there be children and no surviving spouse, except the homestead, be delivered to the guardian of each of those children who is a minor, to each of those children who is of lawful age and not incapacitated, and to the guardian of each of those children who is an incapacitated adult or to another appropriate person, as determined by the court, on behalf of the adult incapacitated child if there is no guardian, rather than requires such property be delivered to children if they be of lawful age, or to their guardian if they be minors.

(c) Requires that the share of such children in such exempted property, except the homestead, if there be children of the deceased of whom the surviving spouse is not the parent, be delivered to the guardian of each those children who is a minor, to each of those children who is of lawful age and not incapacitated, and to the guardian of each of those children who is an incapacitated adult or to another appropriate person, as determined by the court, on behalf of the adult incapacitated child if there is no guardian, rather than to be delivered to such children if they be of lawful age, or to their guardian, if they be minors.

Sec. 273. ALLOWANCE IN LIEU OF EXEMPT PROPERTY. Prohibits the allowance in lieu of a homestead from in no case exceeding \$15,000 and the allowance for other exempted property from in no case exceeding \$5,000, exclusive of the allowance for the support of the surviving spouse, minor children, and adult incapacitated children which is hereinafter provided for.

Sec. 274. HOW ALLOWANCE PAID. Requires that the allowance made in lieu of any of the exempted property be paid either in money out of the funds of the estate that come to the hands of the executor or administrator, or in any property of the deceased that such surviving spouse, children who are of lawful age, guardian of children who are minors, or guardian of each adult incapacitated child or other appropriate person, as determined by the court, on behalf of the adult incapacitated child if there is no guardian, rather than such surviving spouse, or children, if they be of lawful age, or their guardian if they be minors, shall choose to take at the appraisal, or a part thereof, or both, as they shall select; provided, however, that property specifically bequeathed or devised to another may be so taken, or may be sold to raise funds for the allowance as hereinafter provided, only if the other available property shall be insufficient to provide the allowance.

Sec. 275. TO WHOM ALLOWANCE PAID. Requires that the allowance in lieu of exempt property be paid by the executor or administrator, as follows: (a) Requires that the whole, if there be a surviving spouse and no children, or if all the children, including any adult incapacitated children, be the children of the surviving spouse, be paid to such surviving spouse.

(b) Requires that the whole, if there be children and no surviving spouse, be equally divided among them and each of their shares shall be paid as follows, rather than the whole be paid and equally divided among them: if the child is of lawful age and not incapacitated, to the child; if the child is a minor, the child's guardian; or if the child is an incapacitated adult, to the adult incapacitated child's guardian or another appropriate person, as determined by the court, on behalf of the adult incapacitated child if there is no guardian, rather than if they be of lawful age, but if any of such children are minors, their shares shall be paid to their guardians.

(c) Requires the surviving spouse, if there be a surviving spouse, and children of the deceased, some of whom are not children of the surviving spouse, to receive one-half of the whole, plus the shares of the children of whom the survivor is the parent, and requires the remaining shares to be paid with respect to each of the children of whom the survivor is not the parent as follows:

(1) if the child is an adult who is not incapacitated, to the child;

(2) if the child is a minor, to the child's guardian, rather than or, if they are minors, to their guardian; or

(3) if the child is an incapacitated adult, to the adult incapacitated child's guardian or another appropriate person, as determined by the court, on behalf of the adult incapacitated child if there is no guardian.

Sec. 276. SALE TO RAISE ALLOWANCE. Requires the court, on the application in writing of such surviving spouse and children, or of a person authorized to represent any of those children, if there be no property of the deceased that such surviving spouse or children are willing to take for such allowance, or not a sufficiency, and there be no funds, or not sufficient funds, of the estate in the hands of such executor or administrator to pay such allowance, or any part thereof, to order a sale of so much of the estate for cash as will be sufficient to raise the amount of such allowance, or a part thereof, as the case requires.

Sec. 286. New heading: FAMILY ALLOWANCE TO SURVIVING SPOUSES, MINORS, AND ADULT INCAPACITATED CHILDREN. (a) Requires that, unless an

affidavit is filed under Subsection (b) of this section, immediately after the inventory, appraisal, and list of claims have been approved, the court fix a family allowance for the support of the surviving spouse, minor children, and adult incapacitated children of the deceased.

(b) Authorizes a surviving spouse or any person who is authorized to act on behalf of minor children or adult incapacitated children of the deceased, before the approval of the inventory, appraisal, and list of claims, to apply to the court to have the court fix the family allowance by filing an application and a verified affidavit describing the amount necessary for the maintenance of the surviving spouse, minor children, and adult incapacitated children for one year after the date of the death of the decedent and describing the spouse's separate property and any property that minor children or adult incapacitated children have in their own right. Provides that the applicant bears the burden of proof by a preponderance of the evidence at any hearing on the application. Requires the court to fix a family allowance for the support of the surviving spouse, minor children, and adult incapacitated children of the deceased. Makes conforming changes.

Sec. 287. AMOUNT OF FAMILY ALLOWANCE. Makes a conforming change.

Sec. 288. WHEN FAMILY ALLOWANCE NOT MADE. Requires that no such allowance be made for the surviving spouse when the survivor has separate property adequate to the survivor's maintenance; nor such allowance be made for the minor children or adult incapacitated children when they have property in their own right adequate to their maintenance.

Sec. 290. FAMILY ALLOWANCE PREFERRED. Makes a conforming change.

Sec. 291. TO WHOM FAMILY ALLOWANCE PAID. Requires the executor or administrator to apportion and pay the family allowance:

(a) Provides that to the surviving spouse, if there be one, for the use of the survivor and the minor children and adult incapacitated children, if such children be the survivor's.

(b) Requires that the portion of such allowance necessary for the support of such minor child or children of whom the survivor is not the parent, if the surviving spouse is not the parent of such minor children and adult incapacitated children, or of some of them, be paid to the guardian or guardians of such child or children who are minors, and to the guardian of each adult incapacitated child or another appropriate person, as determined by the court, on behalf of the adult incapacitated child if there is no guardian.

(c) Requires that the allowance to the minor child or children, if there be no surviving spouse, be paid to the guardian or guardians of such minor child or children, and that the allowance to each adult incapacitated child be paid to the guardian of the adult incapacitated child or another appropriate person, as determined by the court, on behalf of the adult incapacitated child if there is no guardian.

(d) Requires that the entire allowance, if there be a surviving spouse and no minor child or adult incapacitated child, rather than if there be a surviving spouse and no minor child or children, be paid to the surviving spouse.

Sec. 292. MAY TAKE PROPERTY FOR FAMILY ALLOWANCE. Requires the surviving spouse, the guardian of the minor children, or the guardian of an adult incapacitated child or another appropriate person, as determined by the court, on behalf of the adult incapacitated child if there is no guardian, as the case may be, to have the right to take in payment of such allowance, or any part thereof, any of the personal

property of the estate at its appraised value as shown by the appraisal; provided, however, that property specifically devised or bequeathed to another may be so taken, or may be sold to raise funds for the allowance as hereinafter provided, only if the other available property shall be insufficient to provide the allowance.

SECTION 1.04. Makes application of the changes in law made by this article prospective.

ARTICLE 2. CHANGES TO ESTATES CODE

SECTION 2.01. Amends Sections 353.051(a) and (b), Estates Code, as effective January 1, 2014, as follows:

(a) Requires the court by order, unless an application and verified affidavit are filed as provided by Subsection (b), immediately after the inventory, appraisal, and list of claims of an estate are approved, to set aside:

(1) Makes no changes to this subdivision; and

(2) all other estate property that is exempt from execution or forced sale by the constitution and laws of this state for the use and benefit of the decedent's:

(A) surviving spouse and minor children;

(B) unmarried adult children remaining with the decedent's family; and

(C) each other adult child who is incapacitated.

(b) Provides that before the inventory, appraisal, and list of claims of an estate are approved:

(1) Makes no changes to this subdivision; and

(2) any of the decedent's unmarried adult children remaining with the decedent's family, any other adult child of the decedent who is incapacitated, or a person who is authorized to act on behalf of the adult incapacitated child may apply to the court to have all exempt property, other than the homestead, set aside by filing an application and a verified affidavit listing all property, other than the homestead, that the applicant claims is exempt.

SECTION 2.02. Amends Sections 353.052(b), (c), and (d), Estates Code, as effective January 1, 2014, as follows:

(b) Requires the executor or administrator, if there is a surviving spouse and there are no children of the decedent, or if all the children, including any adult incapacitated children, of the decedent are also the children of the surviving spouse, to deliver all exempt property to the surviving spouse.

(c) Requires the executor or administrator, if there is a surviving spouse and there are children of the decedent who are not also children of the surviving spouse, to deliver the share of those children in exempt property, other than the homestead, to:

(1)-(2) Makes no changes to these subdivisions; or

(3) the guardian of each of the children who is an incapacitated adult, or to another appropriate person, as determined by the court, on behalf of the adult incapacitated child if there is no guardian.

(d) Requires the executor or administrator, if there is no surviving spouse and there are children of the decedent, to deliver exempt property, other than the homestead, to:

(1)-(2) Makes no changes to these subdivisions; or

(3) the guardian of each of the children who is an incapacitated adult, or to another appropriate person, as determined by the court, on behalf of the adult incapacitated child if there is no guardian.

SECTION 2.03. Amends Section 353.053(b), Estates Code, as effective January 1, 2014, to prohibit the allowance in lieu of a homestead from exceeding \$15,000, and the allowance in lieu of other exempt property from exceeding \$5,000, excluding the family allowance for the support of the surviving spouse, minor children, and adult incapacitated children provided by Subchapter C (Family Allowance).

SECTION 2.04. Amends Sections 353.054(b), (c), and (d), Estates Code, as effective January 1, 2014, as follows:

(b) Requires the executor or administrator, if there is a surviving spouse and there are no children of the decedent, or if all the children, including any adult incapacitated children, of the decedent are also the children of the surviving spouse, to pay the entire allowance to the surviving spouse.

(c) Requires the executor or administrator, if there is a surviving spouse and there are children of the decedent who are not also children of the surviving spouse, to pay the surviving spouse one-half of the entire allowance plus the shares of the decedent's children of whom the surviving spouse is the parent. Requires that the remaining shares be paid to:

(1) the decedent's adult children of whom the surviving spouse is not a parent and who are not incapacitated;

(2) the guardian of the children of whom the surviving spouse is not a parent and who are minors, rather than the guardian of children described by Subdivision (1), if those children are minors; or

(3) the guardian or another appropriate person, as determined by the court, if there is no guardian, of each child who is an incapacitated adult.

(d) Requires the executor or administrator, if there is no surviving spouse and there are children of the decedent, to divide the entire allowance equally among the children and pay the children's shares to each of those children who are adults and who are not incapacitated, rather than the children, the guardian of each of those children who are minors, or the guardian or another appropriate person, as determined by the court, if there is no guardian, of each of those children who is an incapacitated adult, rather than the children, if the children are of legal age, or, if any of the children are minors, pay the minor children's shares to the guardian of the minor children.

SECTION 2.05. Amends Section 353.055(a), Estates Code, as effective January 1, 2014, as follows:

(a) Requires that an allowance in lieu of any exempt property be paid in the manner selected by the decedent's surviving spouse or children of legal age, or by the guardian of the decedent's minor children, or by the guardian of each adult incapacitated child or other appropriate person, as determined by the court, if there is no guardian, as follows:

(1) in money out of estate funds that come into the executor's or administrator's possession;

(2) in any of the decedent's property or a part of the property chosen by those individuals at the appraisalment; or

(3) part in money described by Subdivision (1) and part in property described by Subdivision (2).

SECTION 2.06. Amends Section 353.056(a), Estates Code, as effective January 1, 2014, to require the court, on the written application of the decedent's surviving spouse and children, or of a person authorized to represent any of those children, to order the sale of estate property for cash in an amount that will be sufficient to raise the amount of the allowance provided under Section 353.053 or a portion of that amount, as necessary, if the decedent had no property that the surviving spouse or children are willing to take for the allowance or the decedent had insufficient property, and there are not sufficient estate funds in the executor's or administrator's possession to pay the amount of the allowance or a portion of that amount, as applicable.

SECTION 2.07. Amends Section 353.101, Estates Code, as effective January 1, 2014, as follows:

Sec. 353.101. FAMILY ALLOWANCE. (a) Makes a conforming change.

(b) Authorizes the decedent's surviving spouse or any other person authorized to act on behalf of the decedent's minor children or adult incapacitated children, before the inventory, appraisal, and list of claims of an estate are approved, to apply to the court to have the court fix the family allowance by filing an application and a verified affidavit describing the amount necessary for the maintenance of the surviving spouse, the decedent's minor children, and the decedent's adult incapacitated children for one year after the date of the decedent's death, and the surviving spouse's separate property and any property that the decedent's minor children or adult incapacitated children have in their own right.

(c) Makes a conforming change.

(d) Prohibits a family allowance from being made for:

(1)-(2) Makes no changes to these subdivisions; or

(3) any of the decedent's adult incapacitated children, if the adult incapacitated child has property in the person's own right adequate for the person's maintenance.

SECTION 2.08. Amends Section 353.102(a), Estates Code, as effective January 1, 2014, to make a conforming change.

SECTION 2.09. Amends Section 353.104, Estates Code, as effective January 1, 2014, to make a conforming change.

SECTION 2.10. Amends Sections 353.105(b), (c), (d), and (e), Estates Code, as effective January 1, 2014, as follows:

(b) Requires the executor or administrator, if there is a surviving spouse and there are no minor children or adult incapacitated children of the decedent, to pay the entire family allowance to the surviving spouse.

(c) Requires the executor or administrator, if there is a surviving spouse and all of the minor children and adult incapacitated children of the decedent are also the children of the surviving spouse, to pay the entire family allowance to the surviving spouse for use by the surviving spouse, the decedent's minor children, and adult incapacitated children.

(d) Requires the executor or administrator, if there is a surviving spouse and some or all of the minor children or adult incapacitated children of the decedent are not also children of the surviving spouse, to pay the portion of the entire family allowance necessary for the support of those minor children to the guardian of those children, and the portion of the entire family allowance necessary for the support of each of those adult incapacitated

children to the guardian of the adult incapacitated child or another appropriate person, as determined by the court, on behalf of the adult incapacitated child if there is no guardian.

(e) Requires the executor or administrator, if there is no surviving spouse and there are minor children or adult incapacitated children of the decedent, to pay the family allowance for the minor children, to the guardian of those children, and for each adult incapacitated child, to the guardian of the adult incapacitated child or another appropriate person, as determined by the court, on behalf of the adult incapacitated child if there is no guardian.

SECTION 2.11. Amends the heading to Section 353.106, Estates Code, as effective January 1, 2014, to read as follows:

Sec. 353.106. SURVIVING SPOUSE, MINOR CHILDREN, OR ADULT INCAPACITATED CHILDREN MAY TAKE PERSONAL PROPERTY FOR FAMILY ALLOWANCE.

SECTION 2.12. Amends Section 353.106(a), Estates Code, as effective January 1, 2014, to entitle a decedent's surviving spouse, the guardian of the decedent's minor children, or the guardian of an adult incapacitated child of the decedent or another appropriate person, as determined by the court, on behalf of the adult incapacitated child if there is no guardian, as applicable, to take, at the property's appraised value as shown by the appraisal, any of the estate's personal property in full or partial payment of the family allowance.

SECTION 2.13. Amends Section 353.107(a), Estates Code, as effective January 1, 2014, to require the court to, as soon as the inventory, appraisal, and list of claims are returned and approved, order the sale of estate property for cash in an amount that will be sufficient to raise the amount of the family allowance, or a portion of that amount, as necessary, if the decedent had no personal property that the surviving spouse, the guardian of the decedent's minor children, or the guardian of the decedent's adult incapacitated child or other appropriate person acting on behalf of the adult incapacitated child is willing to take for the family allowance, or the decedent had insufficient personal property, and there are not sufficient estate funds in the executor's or administrator's possession to pay the amount of the family allowance or a portion of that amount, as applicable.

SECTION 2.14. Amends Section 354.001(a), Estates Code, as effective January 1, 2014, to make a conforming change.

SECTION 2.15. Amends Sections 451.001(a) and (d), Estates Code, as effective January 1, 2014, as follows:

(a) Authorizes an application, if the value of the entire assets of an estate, excluding homestead and exempt property, does not exceed the amount to which the surviving spouse, minor children, and adult incapacitated children of the decedent are entitled as a family allowance, an application to be filed by or on behalf of the surviving spouse, minor children, or adult incapacitated children requesting a court to make a family allowance and to enter an order that no administration of the decedent's estate is necessary.

(d) Makes a conforming change.

SECTION 2.16. Amends Section 451.002(b), Estates Code, as effective January 1, 2014, to make conforming changes.

SECTION 2.17. Repealers: Section 139 (Application for Order of No Administration), 140 (Hearing and Order Upon the Application), 143 (Summary Proceedings for Small Estates After Personal Representative Appointed), 271(a) (relating to requiring the court, by order, to set apart the exempt property), 271(b) (relating to providing that before the approval of the inventory, appraisal, and list of claims certain parties may claim exempt property), 272 (To Whom Delivered), 273 (Allowance in Lieu of Exempt Property), 274 (How Allowance Paid), 275 (To

Whom Allowance Paid), 276 (Sale to Raise Allowance), 286 (Family Allowance to Surviving Spouses and Minors), 287 (Amount of Family Allowance), 288 (When Family Allowance Not Made), 290 (Family Allowance Preferred), 291 (To Whom Family Allowance Paid), and 292 (May Take Property for Family Allowance), Texas Probate Code.

SECTION 2.18. Effective date of this article: January 1, 2014.

ARTICLE 3. EFFECTIVE DATE

SECTION 3.01. Effective date, except as otherwise provided by this Act: September 1, 2011.