



**THE ATTORNEY GENERAL  
OF TEXAS**

**AUSTIN 11, TEXAS**

**JOHN BEN SHEPPERD  
ATTORNEY GENERAL**

**April 22, 1955**

**Hon. Allan Shivers  
Governor of Texas  
Austin, Texas**

**Opinion No. MS-203**

**Re: Constitutionality and effect of  
Senate Bill 97, the Probate  
Code.**

**Dear Governor Shivers:**

We quote the following excerpt from your letter requesting our opinion on the above captioned matter.

"Ten days was not sufficient time for our office to make a full review of Senate Bill 97, the Probate Code, nor do we have the proper facilities to conduct a complete study of this bill. Therefore, I would appreciate it very much if your department would review the bill for its constitutionality and effect to make sure that it does not create an unworkable condition. Although I have already signed the bill, it would be most helpful if you will let me have your reply as soon as possible so in the event anything is seriously wrong, I can ask the present Legislature to correct it before the bill becomes effective January 1, 1956."

Senate Bill 97 is two hundred and forty-nine pages long. It is the result of ten years of work by The Joint Committee for Reform of the Texas Probate Laws.<sup>1</sup> Obviously no complete study of the effect of this bill or of all possible constitutional questions that might be raised in connection therewith can be made in the time within which you desire this opinion. However, we have examined the entire bill and have reached the following conclusions.

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<sup>1</sup> In 1945 the State Bar Committee on Real Estate, Probate and Trust Law began work on a proposed revision of the probate statutes. Since that time additional work on the Code has also been done by committees and official representatives of The Texas Civil Judicial Council, The Trust Section of the Texas Bankers Association and the Texas Law Schools.

The caption<sup>2</sup> of the bill, although exceedingly short and expressed in general terms, satisfies the requirement of Section 35 of Article III of the Constitution<sup>3</sup> in that it gives reasonable notice of the subject matter of the bill. Lowery v. Red Cab Co., 262 S.W. 147 (Tex. Civ. App. 1924, error ref.) Likewise, there is but one subject embraced in the bill. In this connection, we call your attention to the fact that numerous cases have held that Section 35 should be liberally construed. State v. The Praetorians, 143 Tex. 565, 186 S.W. 2d 973 (1945) and authorities cited therein.

The enacting clause is in the form prescribed by Article III, Section 29 of the Texas Constitution.

Chapter I of Senate Bill 97 is entitled "General Provisions." Section 2 provides that the Code will govern all probate proceedings brought on and after January 1, 1956, "and also all further procedure in proceedings in probate then pending, except to the extent that in the opinion of the court, with respect to proceedings in probate then pending, its application in particular proceedings or parts thereof would not be feasible or would work injustice, in which event the former procedure shall apply." However, acts and accrued rights prior to the effective date of the act are expressly affirmed and preserved. We are, therefore, of the opinion that the Code does not violate Section 16 of Article I of the Texas Constitution (prohibiting ex post facto or retroactive laws) or the due process clauses of the State and Federal Constitutions.

The remainder of Chapter I makes various changes in the present law by providing for a uniform method of serving citation or giving notice. Under the present law, there is a wide divergence of

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<sup>2</sup> "AN ACT to establish and adopt a probate code for the State of Texas by revising and rearranging the statutes of this State which pertain to descent and distribution, wills, administration of decedents' estates, actions to declare heirship, guardianship, and other probate matters; and by making various changes in, omissions from, and additions to, such statutes; defining the meaning of certain words and terms used in the code; and fixing the effective date of the code; providing for the application of the code; validating certain proceedings had under existing and prior statutes; repealing statutes and all laws or parts of laws in conflict with the code; containing a severability clause; and declaring an emergency."

<sup>3</sup> "Sec. 35. No bill, . . . shall contain more than one subject, which shall be expressed in its title. But if any subject shall be embraced in an act, which shall not be expressed in the title, such act shall be void only as to so much thereof, as shall not be so expressed."

methods for giving notice. Also, under this chapter, notice may be served on a guardian, executor, or administrator by registered mail with return receipt requested.

By virtue of a new provision, a judge may transfer administration from one county to another if he finds that such transfer would facilitate the administration of the estate. These procedural changes do not contravene any provisions of the State or Federal Constitutions.

Various substantive changes include broadening the definition of "persons of unsound mind" to include mentally ill persons who do not fall into the old category of lunatics, idiots, or insane persons; a definition of independent executor; and a definition of "minors" which provides that that term shall include persons under 21 years of age who have never been married or who have not had their disabilities of minority removed. This last mentioned change in the law would allow a man of 19 to serve as executor of his wife's estate.

These substantive changes are clearly within the scope of the legislative power to enact laws declaring the policy of this state with regard to probate matters and are not prohibited by any provision of the Federal or State Constitutions.

Chapter II of Senate Bill 97 re-enacts the present statutes pertaining to descent and distribution, the simultaneous "death statute," enacted in 1951, and the statute governing inheritance by adopted children which the legislature enacted in 1951. In most cases the re-enactment has been verbatim. Most of the statutes have been on the books for many years. Their constitutionality is well established; and their effect will, of course, in no wise be changed by the fact of their embodiment in the Code. Such substantive changes as are made do not, as we see it, raise any constitutional questions or create any unworkable conditions.

Chapter III is entitled "Determination of Heirship" and presents no problems since the present statutes are re-enacted without any change in substance.

Chapter IV pertains to the execution and revocation of wills. Section 57 modifies Article 8281, Vernon's Civil Statutes, by providing that persons who have attained 19 years of age may make a will. Most of the other Articles of Title 129,<sup>4</sup> are embodied either verbatim or in substance. We will briefly summarize the changes effected by this chapter.

Section 59 includes a new provision whereby the testator and the witnesses may make the will "self-proved." Section 60 allows the testator of a holographic will to make the will "self-proved."

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<sup>4</sup> Articles as mentioned throughout this opinion are references to Vernon's Civil Statutes.

Section 67 makes a substantial change in Article 8293, by including a provision whereby the birth of an after-born child will not necessarily void a will and in no event will leave administration uncertain for more than one year.

Likewise, Section 69 changes the present law by providing that a provision of a will, executed prior to divorce, leaving property to the former spouse or appointing said spouse to act in a fiduciary capacity is void.

Section 70 omits the requirements of Article 8298 (pertaining to management of separate property) that the distributees be the minor heirs and that the surviving spouse be mother or father of said minor heirs.

Section 71 provides for deposit of a will with the County Clerk during the testator's lifetime.

We find no constitutional objections to these changes; nor do we think an unworkable condition will be created thereby.

Chapter V is entitled "Probate, Grant of Administration and Guardianship." This chapter pertains, in part, to Estates of Decedents. Section 75 imposes new duties and liabilities upon a custodian of a will. The period in which a will can be contested is reduced from four to two years.

A portion of Chapter V deals with procedure pertaining to foreign wills. Sections 100-104 are new provisions in our law. They relate to the control and probate of foreign wills and are drawn from the Uniform Probate of Foreign Wills Act. Articles 3365, 3366 and 8305 (pertaining to Executors of wills probated in another jurisdiction) are retained in substance in Sections 105-107.

None of the above enumerated changes or those effectuated by the sections dealing with Estates of Minors and Incompetents present any serious constitutional or practical problems.

Chapter VI is entitled "Special Types of Administration and Guardianship." This chapter provides a new and simple method whereby small estates can be administered upon the basis of affidavits rather than by the lengthy process of regular administration. Another innovation is a provision which allows the temporary administrator to pay claims if a will contest is lengthy.

The present law with regard to community administration has been rewritten. Under the new law the re-marriage of a widow will not divest her of her powers as community administrator. The wife of an insane husband is also given full power to manage their property.

Chapter VII, entitled "Executors, Administrators and Guardianship," includes a provision which allows a personal surety on the bond of an executor, administrator or guardian to create a lien on his real property to secure the bond. Another new provision empowers an executor, administrator or guardian to deposit money or securities of an estate under an agreement whereby the consent of the surety must be obtained before they can be withdrawn.

Chapter VIII pertains to proceedings during administration and guardianship. This chapter contains a new provision which allows one inventory and appraisement to serve both for the purposes of administration and for inheritance tax purposes. Other innovations relate to the handling of contingent claims and additional powers for personal representatives with regard to sales of easements or right-of-ways. Uniform procedure is established for guardians, executors and administrators with regard to inventories, appraisements, lists of claims, sales, hiring and renting, mineral leases, pooling and unitization agreements, and treatment and payment of claims. Certain additional powers and duties are conferred upon personal representatives. Chapters VI, VII and VIII retain many provisions of the present law. We find nothing unconstitutional or that will create an unworkable condition in these Chapters.

Chapter IX entitled "Specific Provisions Relating to Persons of Unsound Mind and Habitual Drunkards," and Chapter X, entitled "Payments of Estates into State Treasury," re-enact the existing law without change and present no problems.

In final support of our conclusions with regard to the constitutionality of Senate Bill 97 we cite the long established and indeed elementary rule of law that if there is any doubt as to the validity of a law, that doubt should be resolved in favor of its constitutionality. Brown v. City of Galveston, 97 Tex. 1, 75 S.W. 488 (1903).

Yours very truly,

APPROVED:

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