

A Review of Texas Laws Concerning Intestate Succession

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This article represents only the author's opinion and interpretation of certain portions of the Texas Probate Code and is not intended to serve as legal advice. Hopefully it will be of help to those in the industry, but as always, you should seek the advice of your own legal advisor.

I. Community Property

Probate Code Section 45 was amended in 1993 and made a major change in the intestate descent and distribution of community property. A surprising number of people in the oil and gas industry do not seem to be aware of this amendment.

Prior to its amendment, Probate Code Section 45 read as follows:

“ Upon the dissolution of the community estate by death, all property belonging to the community estate of the husband and wife shall go to the survivor, if there be no child or children of the deceased or their descendants; but if there be a child or children of the deceased or descendants of such child or children, then the survivor shall be entitled to one-half of said property, and the other one-half shall pass to such child or children, or their descendants. But such descendants shall inherit only such portion of said property to which they would be entitled under Section 43 of this code. In every case, the community estate passes charged with the debts against it.”

In recognition that this scheme of descent and distribution often had, for the surviving spouse, both unintended and undesirable results, the Legislature amended Section 45, effective September 1, 1993, so that, in the limited circumstance where all the surviving children (or their descendants) of the decedent are also descendants of the surviving spouse. In that event, the deceased spouse's interest in the community estate passes to the surviving spouse and not to the children. The text of Section 45 now reads as follows:

“(a) On the intestate death of one of the spouses to a marriage, the community property estate of the deceased spouse passes to the surviving spouse if:

- (1) no child or other descendant of the deceased spouse survives the deceased spouse; or
- (2) all surviving children and descendants of the deceased spouse are also children or descendants of the surviving spouse.

(b) On the intestate death of one of the spouses to a marriage, if a child or other descendant of the deceased spouse survives the deceased spouse and the child or descendant is not a child or descendant of the surviving spouse, one-half of the community estate is retained by the surviving spouse and the other one-half passes to the children or descendants of the deceased spouse. The descendants shall inherit only such portion of said property to which they would be entitled under Section 43 of this code. In every case, the community estate passes charged with the debts against it.”

Note: Section 43 of the Probate Code sets forth the standard for determining whether a distribution will be per capita or per stirpes.

In summary, community property descends as follows:

Community Property:

Prior to September 1, 1993:

Surviving Spouse/no descendants – decedent's ½ to surviving spouse

Surviving Spouse/surviving descendants – decedent's ½ to descendants

Post September 1, 1993:

Surviving Spouse/no children – decedent's ½ to surviving spouse

Surviving Spouse/surviving children where all decedent's descendants are also descendants of surviving spouse – decedent's ½ to surviving spouse

Surviving Spouse/surviving children where all decedent's descendants are not also descendants of surviving spouse – decedent's ½ to decedent's descendants

II. Separate Property

Section 38 of the Probate Code governs the descent and distribution of all types of property except community property. It has not been amended since 1956 but a review never hurts. Section 38 provides as follows:

“§ 37. Passage of Title Upon Intestacy and Under a Will

(a) Intestate Leaving No Husband or Wife. Where any person, having title to any estate, real, personal or mixed, shall die intestate, leaving no husband or wife, it shall descend and pass in parcenary to his kindred, male and female, in the following course:

1. To his children and their descendants.
2. If there be no children nor their descendants, then to his father and mother, in equal portions. But if only the father or mother survive the intestate, then his estate shall be divided into two equal portions, one of which shall pass to such survivor, and the other half shall pass to the brothers and sisters of the deceased, and to their descendants; but if there be none such, then the whole estate shall be inherited by the surviving father or mother.
3. If there be neither father nor mother, then the whole of such estate shall pass to the brothers and sisters of the intestate, and to their descendants.
4. If there be none of the kindred aforesaid, then the inheritance shall be divided into two moieties, one of which shall go to the paternal and the other to the maternal kindred, in the following course: To the grandfather and grandmother in equal portions, but if only one of these be living, then the estate shall be divided into two equal parts, one of which shall go to such survivor, and the other shall go to the descendant or descendants of such deceased grandfather or grandmother. If there be no such descendants, then the whole estate shall be inherited by the surviving grandfather or grandmother. If there be no surviving grandfather or grandmother, then the whole of such estate shall go to their descendants, and so on without end, passing in like manner to the nearest lineal ancestors and their descendants.

(b) Intestate Leaving Husband or Wife. Where any person having title to any estate, real, personal or mixed, other than a community estate, shall die intestate as to such estate, and shall leave a surviving husband or wife, such estate of such intestate shall descend and pass as follows:

1. If the deceased have a child or children, or their descendants, the surviving husband or wife shall take one-third of the personal estate, and the balance of such personal estate shall go to the child or children of the deceased and their descendants. The surviving husband or wife shall also be entitled to an estate for life, in one-third of the land of the intestate, with remainder to the child or children of the intestate and their descendants.
2. If the deceased have no child or children, or their descendants, then the surviving husband or wife shall be entitled to all the personal estate, and to one-half of the lands of the intestate, without remainder to any person, and the other half shall pass and be inherited according to the rules of descent and distribution; provided, however, that if the deceased has neither surviving father nor mother nor surviving brothers or sisters, or their descendants, then the surviving husband or wife shall be entitled to the whole of the estate of such intestate.”

Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956. (Amended by Acts 1969, 61st Leg., p. 1703, ch. 556, § 2, eff. June 10, 1969. Amended by Acts 1981, 67th Leg., p. 2537, ch. 674, § 3, eff. Sept. 1, 1981.)

In summary, separate property passes as follows:

Separate Property:

No Surviving Spouse/surviving descendants – all to descendants

No Surviving Spouse/no surviving descendants – ½ to surviving mother; ½ to surviving father

Surviving Spouse/surviving descendants –

Personal Property: surviving spouse - 1/3; surviving descendants - 2/3

Real Property: surviving spouse - 1/3 life estate; surviving descendants - 2/3 plus remainder interest in 1/3

Surviving Spouse/no surviving descendants –

Personal Property: surviving spouse - All

Real Property: surviving spouse 1/2

III. Miscellaneous Probate Code Provisions

There are numerous other provisions in the Probate Code of interest to land professionals. Several of these seem to be designed to trap the unwary. A few of favorites are as follows:

A. Adopted children: Adopted children may inherit from both their adoptive and their natural parents but only adoptive parents can inherit from adopted children. Natural parents of adopted children cannot inherit from the adopted child(ren). A recent case held that even though the adoption was not final, the natural mother could not inherit because her parental rights had already been terminated.

“§ 40. Inheritance By and From an Adopted Child: For purposes of inheritance under the laws of descent and distribution, an adopted child shall be regarded as the child of the parent or parents by adoption, such adopted child and its descendants inheriting from and through the parent or parents by adoption and their kin the same as if such child were the natural child of such parent or parents by adoption, and such parent or parents by adoption and their kin inheriting from and through such adopted child the same as if such child were the natural child of such parent or parents by adoption. The natural parent or parents of such child and their kin shall not inherit from or through said child, but said child shall inherit from and through its natural parent or parents. Nothing herein shall prevent any parent by adoption from disposing of his property by will according to law. The presence of this Section specifically relating to the rights of adopted children shall in no way diminish the rights of such children, under the laws of descent and distribution or otherwise, which they acquire by virtue of their inclusion in the definition of "child" which is contained in this Code. (Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956.)”

B. Who are the decedents children?: According to the Probate Code, all children, both biological and adopted are the children of their mother for all purposes. Children are only the children of their father only if the child is born under circumstances described by Section 151.002, Family Code, is adjudicated to be the child of the father by court decree as provided by Chapter 160, Family Code, was adopted by his father, or if the father executed a statement of paternity as provided by Section 160.202, Family Code, or a like statement properly executed in another jurisdiction. Some but not all of the referenced Family Code provisions are set forth below. Section 42(b)2 provides some protection to those relying on an affidavit of heirship.

“§ 42. Inheritance Rights of Children

(a) Maternal Inheritance. For the purpose of inheritance, a child is the child of his biological or adopted mother, so that he and his issue shall inherit from his mother and from his maternal kindred, both descendants, ascendants, and collaterals in all degrees, and they may inherit from him and his issue.

(b) Paternal Inheritance. (1) For the purpose of inheritance, a child is the child of his biological father if the child is born under circumstances described by Section 151.002, Family Code, is adjudicated to be the child of the father by court decree as provided by Chapter 160, Family Code, was adopted by his father, or if the father executed a statement of paternity as provided by Section 160.202, Family Code, or a like statement properly executed in another jurisdiction, so that he and his issue shall inherit from his father and from his paternal kindred, both descendants, ascendants, and collaterals in all degrees, and they may inherit from him and his issue. A person claiming to be a biological child of the decedent, who is not otherwise presumed to be a child of the decedent, or claiming inheritance through a biological child of the decedent, who is not otherwise presumed to be a child of the decedent, may petition the probate court for a determination of right of inheritance. If the court finds by clear and convincing evidence that the purported father was the biological father of the child, the child is treated as any other child of the decedent for the purpose of inheritance and he and his issue may inherit from his paternal kindred, both descendants, ascendants, and collaterals in all degrees, and they may inherit from him and his issue. This section does not permit inheritance by a purported father of a child, whether recognized or not, if the purported father's parental rights have been terminated.

(2) A person who purchases for valuable consideration any interest in real or personal property of the heirs of a decedent, who in good faith relies on the declarations in an affidavit of heirship that does not include a child who at the time of the sale or contract of sale of the property is not a presumed child of the decedent and has not under a final court decree or judgment been found to be entitled to treatment under this subsection as a child of the decedent, and who is without knowledge of the claim of that child, acquires good title to the interest that the person would have received, as purchaser, in the absence of any claim of the child not included in the affidavit. This subdivision does not affect the liability, if any, of the heirs for the proceeds of any sale described by this subdivision to the child who was not included in the affidavit of heirship.

(c) Homestead Rights, Exempt Property, and Family Allowances. A child as provided by Subsections (a) and (b) of this section is a child of his mother, and a child of his father, for the purpose of determining homestead rights, distribution of exempt property, and the making of family allowances.

(d) Marriages Void and Voidable. The issue of marriages declared void or voided by annulment shall be treated in the same manner as issue of a valid marriage. (Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956. Amended by Acts 1977, 65th Leg., p. 762, ch. 290, § 1, eff. May 28, 1977; Acts 1979, 66th Leg., p. 40, ch. 24, § 25, eff. Aug. 27, 1979; Acts 1979, 66th Leg., p. 1743, ch. 713, § 5, eff. Aug. 27, 1979.)

(Subsec. (b) amended by Acts 1987, 70th Leg., ch. 464, § 1, eff. Sept. 1, 1987. Amended by Acts 1989, 71st Leg., ch. 375, § 35, eff. Sept. 1, 1989. Subsec. (b)(1) amended by Acts 1997, 75th Leg., ch. 165, § 7.54, eff. Sept. 1, 1997; amended by Acts 1997, 75th Leg., ch. 1302, § 4, eff. Sept. 1, 1997.”)

FAMILY CODE

“§ 151.002. Presumption of Paternity

a) A man is presumed to be the biological father of a child if:

(1) he and the child's biological mother are or have been married to each other and the child is born during the marriage or not more than 300 days after the date the marriage terminated by death, annulment, or divorce or by having been declared void;

(2) before the child's birth, he and the child's biological mother attempted to marry each other by a marriage in apparent compliance with law, although the attempted marriage is or could be declared void, and the child is born during the attempted marriage or not more than 300 days after the date the attempted marriage terminated by death, annulment, or divorce or by having been declared void; or

(3) after the child's birth, he and the child's biological mother have married or attempted to marry each other by a marriage in apparent compliance with law, although the attempted marriage is or could be declared void or voided by annulment, and:

(A) he has filed a written acknowledgment of his paternity of the child under Chapter 160;

(B) he consents in writing to be named and is named as the child's father on the child's birth certificate; or

(C) he is obligated to support the child under a written voluntary promise or by court order.

(b) A presumption under this section may be rebutted as provided by Section 160.110. (Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995. Amended by Acts 1995, 74th Leg., ch. 751, § 22, eff. Sept. 1, 1995..Amended by Acts 1999, 76th Leg., ch. 556, § 7, eff. Sept. 1, 1999.)”

“CHAPTER 160. DETERMINATION OF PARENTAGE

SUBCHAPTER A. GENERAL PROVISIONS

§ 160.001. Applicability

This chapter governs a suit affecting the parent-child relationship in which the parentage of the biological mother or biological father is:

(1) sought to be adjudicated;

(2) voluntarily admitted by the putative father; or

(3) jointly acknowledged by the mother and putative father.

(Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995.)

(Amended by Acts 1999, 76th Leg., ch. 556, § 36, eff. Sept. 1, 1999.)

§ 160.002. Time in Which to Bring Suit to Determine Parentage

(a) A suit affecting the parent-child relationship to determine parentage under Subchapter B may be brought before the birth of the child, but must be brought on or before the second anniversary of the date the child becomes an adult, or the suit is barred.

(b) This section applies to a child for whom a parentage suit was brought but dismissed because a statute of limitations of less than 18 years was then in effect.

(c) Repealed by Acts 1999, 76th Leg., ch. 556, § 81, eff. Sept. 1, 1999.

(Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995.)

(Amended by Acts 1999, 76th Leg., ch. 556, § 81, eff. Sept. 1, 1999.)

§ 160.006. Final Order Regarding Parentage

- (a) On a verdict of the jury, or on a finding of the court if there is no jury, the court shall render a final order declaring whether an alleged parent is the biological parent of the child.
- (b) The effect of an order declaring that an alleged parent is the biological parent of the child is to confirm or create the parent-child relationship between the parent and the child for all purposes.
- (c) If parentage is established, the order shall state the name of the child.

(Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995.)

SUBCHAPTER B. PARENTAGE SUIT

§ 160.101. Denial of Paternity

(a) The presumption that a man is the biological father of a child under Chapter 151 may be contested by:

- (1) the biological mother of the child;
- (2) a person related within the second degree of consanguinity to the biological mother of the child, if the biological mother of the child is deceased;
- (3) a man presumed to be the father of the child, who may contest his own or another man's presumed paternity;
- (4) a man alleging himself to be the biological father of the child; or
- (5) a governmental entity, authorized agency, or a licensed child-placing agency.

(b) A contest of paternity must be raised by an express statement denying paternity of the child in a party's pleadings in the suit, without regard to whether the presumed father or biological mother is a petitioner or respondent.

(c) In a suit in which a question of paternity is raised, the court shall conduct the pretrial proceedings and order scientifically accepted paternity testing as provided by this chapter. (Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995. Amended by Acts 1995, 74th Leg., ch. 751, § 62, eff. Sept. 1, 1995. Amended by Acts 1997, 75th Leg., ch. 962, § 1, eff. Sept. 1, 1997. Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995.)

SUBCHAPTER C. ACKNOWLEDGMENT OR DENIAL OF PATERNITY

§ 160.201. Voluntary Acknowledgment Of Paternity

The mother of a child and a man claiming to be the father of the child may execute an acknowledgment of paternity as provided by this subchapter to establish the man's paternity. (Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995. Amended by Acts 1995, 74th Leg., ch. 751, § 64, eff. Sept. 1, 1995. Amended by Acts 1999, 76th Leg., ch. 556, § 37, eff. Sept. 1, 1999.)

§ 160.202. Execution of Acknowledgment of Paternity

(a) An acknowledgment of paternity must:

- (1) be in writing;
- (2) be signed by the mother and the putative father; and

(3) state whether the child whose paternity is being acknowledged has a presumed father under Section 151.002.

(b) If the mother declares in the acknowledgment that there is a presumed father of the child, the acknowledgment must be accompanied by a denial of paternity signed by the presumed father, unless the presumed father is the man who has signed the acknowledgment. (Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995. Amended by Acts 1995, 74th Leg., ch. 751, § 64, eff. Sept. 1, 1995. Amended by Acts 1999, 76th Leg., ch. 556, § 37, eff. Sept. 1, 1999.)

§ 160.203. Filing Acknowledgment of Paternity

(a) An acknowledgment of paternity executed under this subchapter shall be filed with the bureau of vital statistics.

(b) The bureau of vital statistics may not charge a fee to file the acknowledgment. (Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995. Amended by Acts 1995, 74th Leg., ch. 751, § 64, eff. Sept. 1, 1995. Amended by Acts 1999, 76th Leg., ch. 556, § 37, eff. Sept. 1, 1999.)

§ 160.205. Effect of Acknowledgment of Paternity

(a) Subject to the right to rescind or contest an acknowledgment of paternity under this subchapter, a signed acknowledgment of paternity filed with the bureau of vital statistics is a legal finding of paternity of a child equivalent to a judicial determination.

(b) If the mother or the man claiming to be the father falsely denies the existence of a presumed father in an acknowledgment of paternity, the acknowledgment of paternity is voidable within the time to rescind under Section 160.206. (Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995. Renumbered from § 160.206 by Acts 1995, 74th Leg., ch. 751, § 64, eff. Sept. 1, 1995. Amended by Acts 1999, 76th Leg., ch. 556, § 37, eff. Sept. 1, 1999.)

§ 160.207. Suit to Contest Acknowledgment or Denial

(a) A person who may contest a presumption of paternity under Section 160.101 may contest an acknowledgment of paternity or a denial of paternity by filing a suit affecting the parent-child relationship. A suit to contest an acknowledgment of paternity or a denial of paternity that is filed after the time for a suit to rescind under Section 160.206 may be filed only on the basis of fraud, duress, or material mistake of fact. The party challenging the acknowledgment of paternity or the denial of paternity has the burden of proof.

(b) A suit to contest an acknowledgment of paternity or a denial of paternity shall be conducted in the same manner as a proceeding to determine parentage under this chapter.

(c) A person must bring suit to contest an acknowledgment of paternity or a denial of paternity not later than the fourth anniversary of the date the acknowledgment of paternity or the denial of paternity is filed with the bureau of vital statistics.

(d) A suit to contest an unrescinded acknowledgment of paternity may not be filed after the date a court has rendered an order, including a child support order, based on the acknowledgment of paternity.

(e) Notwithstanding any other provision of this chapter, a collateral attack on an acknowledgment of paternity executed under this subchapter may not be filed after the fourth anniversary of the date the acknowledgment of paternity is filed with the bureau of vital statistics. (Added by Acts 1999, 76th Leg., ch. 556, § 37, eff. Sept. 1, 1999.)

§ 160.209. Court Ratification

An unrescinded and uncontested acknowledgment of paternity is valid and effective without court ratification. In a judicial, administrative, or other proceeding, parentage of a child may be proved by evidence that an unrescinded and uncontested acknowledgment of paternity of the child has been filed with the bureau of vital statistics. (Added by Acts 1999, 76th Leg., ch. 556, § 37, eff. Sept. 1, 1999.)

§ 160.251. Paternity Registry; Purpose

(a) The bureau of vital statistics shall establish a paternity registry.

(b) The bureau of vital statistics shall administer the registry to:

(1) protect the parental rights of fathers who affirmatively assume responsibility for children they may have fathered; and

(2) expedite adoptions of children whose biological fathers are unwilling to assume responsibility for their children by registering with the registry or otherwise acknowledging their children.

(c) The registry does not relieve a mother of the obligation to identify the known father of her child.

(d) A man is not required to register with the paternity registry if he:

(1) is presumed to be the biological father of a child under Chapter 151;

(2) has been adjudicated to be the biological father of a child by a court of competent jurisdiction; or

(3) has filed an acknowledgment of paternity under Subchapter C.

(Added by Acts 1997, 75th Leg., ch. 561, § 6, eff. Sept. 1, 1997. Amended by Acts 1999, 76th Leg., ch. 556, § 38, eff. Sept. 1, 1999.)

§ 160.258. Effect of Failure to File Notice of Intent

Except as provided by Chapter 102 and Chapter 161, a man who fails to file a notice of intent to claim paternity before the 30th day after the date of the birth of the child may not assert an interest in the child other than by filing a suit to establish paternity before the termination of the man's parental rights.

§ 160.260. Furnishing of Certificate of Registry Search

On request, the bureau of vital statistics shall furnish a certificate, signed by the state registrar of vital statistics, attesting to the results of a search of the registry regarding a notice of intent to claim paternity to:

(1) a court;

(2) the mother of a child;

(3) an authorized agency;

(4) a licensed child-placing agency;

(5) an attorney licensed to practice law in this state who is participating or assisting in an adoption; or

(6) any other person or entity the bureau of vital statistics considers to have a legitimate interest in the information. (Added by Acts 1997, 75th Leg., ch. 561, § 6, eff. Sept. 1, 1997.)"

C. Persons Not in Being; Heirs of the Whole and Half Blood; Aliens; Convicted Persons and Suicides

Unborn children cannot inherit unless they are lineal descendants of the decedent. An heir of the half blood takes one half the share received by an heir of the whole blood. Status as an alien, convicted person or suicide does not affect the right to inherit (except as to insurance proceeds). See Section 41 below.

“§ 41. Matters Affecting and Not Affecting the Right to Inherit

(a) Persons Not in Being. No right of inheritance shall accrue to any persons other than to children or lineal descendants of the intestate, unless they are in being and capable in law to take as heirs at the time of the death of the intestate.

(b) Heirs of Whole and Half Blood. In situations where the inheritance passes to the collateral kindred of the intestate, if part of such collateral be of the whole blood, and the other part be of the half blood only, of the intestate, each of those of half blood shall inherit only half so much as each of those of the whole blood; but if all be of the half blood, they shall have whole portions.

(c) Alienage. No person is disqualified to take as an heir because he or a person through whom he claims is or has been an alien.

(d) Convicted Persons and Suicides. No conviction shall work corruption of blood or forfeiture of estate, except in the case of a beneficiary in a life insurance policy or contract who is convicted and sentenced as a principal or accomplice in willfully bringing about the death of the insured, in which case the proceeds of such insurance policy or contract shall be paid as provided in the Insurance Code of this State, as same now exists or is hereafter amended; nor shall there be any forfeiture by reason of death by casualty; and the estates of those who destroy their own lives shall descend or vest as in the case of natural death. (Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956. Amended by Acts 1969, 61st Leg., p. 1922, ch. 641, § 2, eff. June 12, 1969.)”

D. By the Head or by the Roots?

If the group who will inherit all stand in the same degree of relationship to the decedent, each member will take per capita, or “by the head”. If any member of the group is deceased, their descendants, standing in a different degree, will inherit “by the roots” only such portion of the property as the parent through whom they are entitled to inherit would be entitled to, if the parent had survived. For example, if a decedent is survived by no spouse, leaving two children, A and B and the 2 children of a deceased child (Grandchildren C and D), A will inherit 1/3, B will inherit 1/3 and C and D will each inherit 1/2 of 1/3 or 1/6 each. If A failed to survive and left 5 children then B will inherit 1/3 and C and D will inherit 1/2 of 1/3 or 1/6 each and A’s five children will inherit 1/5 of 1/3 or 1/15 each. If A and B both failed to survive, and A left 5 children and B left three children, then all 10 grandchildren would split the estate 1/10 each. In other words, don’t count your chickens before they hatch.

“§ 43. Determination of Per Capita and Per Stirpes Distribution

When the intestate's children, descendants, brothers, sisters, uncles, aunts, or any other relatives of the deceased standing in the first or same degree alone come into the distribution upon intestacy, they shall take per capita, namely: by persons; and, when a part of them being dead and a part living, the descendants of those dead shall have right to distribution upon intestacy, such descendants shall inherit only such portion of said property as the parent through whom they inherit would be entitled to if alive. (Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956. Amended by Acts 1991, 72nd Leg., ch. 895, § 3, eff. Sept. 1, 1991.)”