Independent administration of estates in Texas stretches back to even before Texas was a state. Since 1843, when the Congress of the Republic of Texas allowed a testator to provide “that no other action than the probate and registration of the will shall be had in the Probate Courts,” Texas has allowed estate administration free of judicial supervision. William I. Marschall Jr., *Independent Administration of Decedents’ Estates*, 33 *Tex. L. Rev.* 95, 97 (1954). Texas has so fiercely guarded independent administration that, initially, an independent executor could not be removed for any reason except for failure to post a bond. Elizabeth R. Kopecki, Comment, *Removal of Independent Executors: Examining the Standard in Texas after the Addition of Material Conflict of Interest to Section 149C of the Texas Probate Code*, 44 *St. Mary’s L.J.* 281, 287 (2012). Practitioners were concerned that giving a court the removal power for any other reason would interfere with independent administration.

It was not until the legislature passed a statute in 1979 that a formal mechanism existed to remove an independent executor. *Id.* at 287 n. 29. Even today, those specifically enumerated statutory grounds are the only way to remove an independent executor.

It was with that background in mind that the Texas Supreme Court decided *Kappus v. Kappus*, 284 S.W.3d 831 (Tex. 2009). In *Kappus*, the court determined that a conflict of interest could be, but was not as a matter of law, grounds for removing an independent executor. *Id.* In the subsequent legislative session, the Texas Legislature passed a bill that added a new subsection to the removal statute

1 providing for removal when “the independent executor becomes incapable of properly performing the independent executor’s fiduciary duties due to a material conflict of interest.” *Tex. Estates Code § 404.0035(4).*

Some commentators have decried this addition. STANLEY M. JOHANSON, JOHANSON’S *TEX. ESTATES CODE ANN.* § 404.0035 cmt. at 470-72 (Thomson Reuters 2017); Kopecki, *Removal of Independent Executors*, 44 *St. Mary’s L.J.* at 315-16. The chair of the Estate and Trust Legislative Affairs Committee of the State Bar of Texas Real Estate, Probate, and Trust Law Section said the new subsection “appears to be an attempt to statutorily overrule the decision in *Kappus v. Kappus*.” JOHANSON, supra at 472. Professor Johanson calls it “a litigation-breeding statute with no hope of a fine-tuning legislative fix as to what might constitute a ‘material’ conflict” and recommends its repeal for being in contravention of *Kappus*. *Id.*

Because the conflict of interest language was added in the first legislative session after *Kappus*, the addition is rightly considered a response to that case. But what kind of response?

1 The removal statute for independent executors is found at Texas Estates Code § 404.0035 (hereinafter, the “removal statute”). A separate statute exists at Texas Estates Code § 361.052 that governs the removal of dependent executors and administrators. Analysis of that statute is beyond the scope of this article.
Comparing *Kappus* to the New Subsection

The controversy in *Kappus* began with two brothers who owned a plot of land fifty-fifty as co-tenants. *Id.* at 834. Both brothers made improvements to the land. *Id.* After one brother died, the other qualified as his independent executor and proposed to sell the land to pay the decedent’s debts. *Id.* His plan was to split the proceeds from the sale evenly between himself and the estate. *Id.* The decedent’s ex-wife opposed the fifty-fifty split, asserting that the improvements her ex-husband made were more valuable than those made by the surviving brother, and the estate should therefore get a higher percentage of the sales proceeds. *Id.* When the executor disagreed, she then sought his removal on the grounds he had a conflict of interest. *Id.* The trial court refused to remove, but the 9th Court of Appeals in Beaumont disagreed and found that the conflict of interest required removal. *Id.*

The Texas Supreme Court heard the executor’s appeal and noted “no subsection [in the removal statute] specifically covers ‘conflict of interest’ in those express terms.” *Id.* at 835. However, in analyzing the removal statute, the court found that a conflict of interest could fall into the subsection allowing for removal for “gross misconduct or gross mismanagement.” *Id.* at 837. In reading a conflict of interest into the statute, the court observed “[a] good-faith disagreement over the executor’s ownership share in the estate is not enough, standing alone, to require removal” because “[a] potential conflict does not equal actual misconduct.” *Id.* But “there may be scenarios where an executor’s conflict of interest is so absolute as to constitute what the statute terms ‘gross misconduct or gross mismanagement.’” *Id.*

In deciding whether a conflict of interest rose to the level of gross misconduct or mismanagement, the court imparted several factors “including the size of the estate, the degree of actual harm to the estate, the executor’s good faith in asserting a claim for estate property, the testator’s knowledge of the conflict, and the executor’s disclosure of the conflict.” *Id.* at 838. In applying those factors to the *Kappus* dispute, the court determined that removal was not warranted and reversed the court of appeals.

That was the state of removal jurisprudence when the legislature acted in 2011. Now, the statute declares that independent executors can be removed if they “become[] incapable of properly performing the independent executor’s fiduciary duties due to a material conflict of interest.” TEX. ESTATES CODE § 404.0035(4). The statute does not define “material.” Looking to the dictionary for its plain meaning, “material” means “having real importance or great consequence.” *WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY* 1392 (2002). The mere existence of a material conflict of interest is not enough. Instead, the conflict actually hinders the administration of the estate by preventing the independent executor from properly performing his or her duties.

Now, compare the rationale of *Kappus* to how the legislature amended the removal statute. Both determined that simply having a conflict of interest is not enough to warrant removal. Both required the existence of additional circumstances beyond a conflict of interest. Both insisted that the conflict cannot be hypothetical—it must actually harm the estate. The only minor differences are that first, the court found all of this in an existing subsection in the statute, while the legislature added a specific subsection for it. And second, the court gave factors to use in analyzing whether a conflict of interest warranted removal, while the legislature did not.

One explanation for why the legislature acted is that incorporating a conflict of interest into the removal statute prevents an overruling of *Kappus*. After all, a conflict of interest is not an explicit ground for removal in the statute, and the holding would have been vulnerable to a later court deciding that it should not have been read into “gross misconduct or gross mismanagement.” Now, a conflict of interest is enshrined in the removal statute and protected from the Texas Supreme Court changing its mind.
Statutory Construction Tools

Even for the two small differences between Kappus and the legislature’s addition, the tools of statutory construction show that they can be reconciled.

A long-standing rule of statutory construction is that if a subsequent amendment to a statute does not change the substance of a court’s previous decision, the holding remains applicable. In re Pirelli Tire, L.L.C., 247 S.W.3d 670 (Tex. 2007). One of the issues facing the court in Pirelli was what factors a trial court should consider in deciding a forum non conveniens motion—those from a previous decision or those from a more recent statute. Id. at 675. In its analysis of the issue, the court observed that the common law and statutory factors largely overlapped. Id. at 677. The court reasoned that the similarities meant that the legislature did not intend to displace the prior supreme court decision. Id. Thus, the court read the two together in holding that the legislature incorporated the common law factors into the statute. Id.

Similarly, Kappus laid out factors for when a conflict of interest warranted removal. Then the legislature passed an amendment that added a material conflict of interest subsection to the removal statute. Had the legislature provided guidance in conflict with Kappus, one could rightly conclude the legislature overruled Kappus. But, because the legislature passed an overlapping (but not conflicting) amendment, the similarities allow a court to read the two together and incorporate the Kappus factors into the statute.

Legislative History

Additional support for the argument that the legislature did not overrule Kappus comes from legislative history of the subsection in question. The material conflict of interest subsection was added in the 2011 legislative session as part of a larger omnibus bill that was originally drafted by the State Bar of Texas Real Estate, Probate and Trust Law Section. H. COMM. ON JUDICIARY & CIVIL JURISPRUDENCE, BILL ANALYSIS, Tex. S.B. 1198, 82nd Leg., R.S. (2011). However, the conflict of interest provision was not in the original bill. Id. It was only after senate passage and referral to the House Jurisprudence Committee that the material conflict of interest subsection (one of several amendments the committee adopted) was added. Id. at 12. After some back and forth between the senate and the house, the house amendments were adopted and the omnibus bill was signed into law by Gov. Rick Perry. H.J. of Tex., 82nd Leg., R.S. 4792, 4805, 5892, 6873, 6913 (2011); S.J. of Tex., 82nd Leg., R.S. 3643, 3996, 5084, 5148, 5151 (2011).

Though the amendment adding the material conflict of interest subsection was not discussed or analyzed in committee or on the floor, that lack of discussion is still telling. As part of the same omnibus bill, the legislature amended a Probate Code section, in response to Holmes v. Beatty, 290 S.W.3d 852 (Tex. 2009), to provide that a survivorship agreement will not be inferred simply because a bank account is designated JT TEN, or joint tenancy. In describing the joint tenancy changes, the bill analysis states they “are intended to overturn the ruling of the Texas Supreme Court in Holmes v. Beatty, 290 S.W.3d 852 (Tex. 2009).” H. COMM. ON JUDICIARY & CIVIL JURISPRUDENCE, BILL ANALYSIS, Tex. S.B. 1198, 82nd Leg., R.S. (2013). The legislature could not have been more explicit.

However, in the very same omnibus bill, there is no similar expression that the legislature intended to overrule or otherwise modify Kappus. In fact, the legislative history is entirely silent as to Kappus. The legislature clearly knew how to express its intent to overrule a Texas Supreme Court decision but chose not to do so. That further suggests that the legislature did not intend to overrule Kappus.
Conclusion

Did the legislature overrule *Kappus* when it added a conflict of interest as a ground for removal? No. It codified it. By adding a material conflict of interest subsection to the removal statute, the legislature removed the analysis from the gross misconduct subsection and placed it in its own stand-alone subsection.

Interpreted in this light, what constitutes a material conflict of interest is neither unknown nor mysterious. The holding of *Kappus* remains applicable and provides guidance. After all, some of the factors you would consider in determining what makes a conflict of interest of real importance or great consequence are the size of the estate, the degree of harm to the estate, the good faith of the executor, the testator’s pre-existing knowledge of the conflict, and the executor’s disclosure of it. The very same factors listed by the court in *Kappus*. Those same factors also help determine whether the material conflict of interest renders the independent executor incapable of performing his duties.

Reading the legislature as building upon *Kappus* rather than overruling it makes the most sense and provides the greatest consistency to Texas law.