

# **DEATH OF A SPOUSE: PHANTOM ESTATE ADMINISTRATION**

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## I. INTRODUCTION

Historically, when an individual died, the property that the decedent owned immediately prior to death typically passed by reason of the decedent's death to the decedent's heirs and/or devisees subject to possible probate administration. The common law offered an exception to the general rule – the joint tenancy with a right of survivorship. If married and domiciled in a community property state, the decedent's estate typically consisted of the decedent's separate property and the decedent's undivided one-half interest in the couple's community property, although one hundred percent of the community may have been subject to probate administration. In Texas, if the husband died first, the entire community estate was typically subject to probate administration.

Today, increasingly, property that a decedent owned prior to death passes by way of a nonprobate means at the owner's death. These means include joint accounts with rights of survivorship, payable on death and transfer on death accounts, life insurance and retirement plans payable to third party beneficiaries, transfer on death deeds and other arrangements sanctioned by the Texas Estates Code, including the increasingly popular revocable trust.

Until 1985, Texas law prohibited couples from owning community property with rights of survivorship. Now, married couples in Texas can now create community property with rights of survivorship. Further, the Matrimonial Property Act of

1967 and the subsequent enactment of the Texas Family Code changed dramatically marital property management rules with a dramatic consequential effect on the administration of the probate estate upon the first spouse's death.

Consequently, fewer assets pass through probate administration at their owners' deaths. In fact, there may not be any assets subject to probate administration following an owner's death. The purpose of this paper is to address the issues that this new reality presents for the decedent's surviving spouse, the couple's creditors and the designated executor or appointed personal representative of the deceased spouse's estate.

## A. Nonprobate Dispositions

The Texas Probate Code was amended in 1979 to authorize a variety of nonprobate means of disposing of property at death. Today that authorization is found in Tex. Est. Code § 111.052 and includes contractual and property arrangements entered into prior to death that control the change of ownership at death. Community property with rights of survivorship, joint tenancies, multi-party accounts, and transfer on death deeds have their own specific provisions. But there is one common denominator applicable to all nonprobate means; utilization of a nonprobate means, *in and to itself*, does not affect the rights of the decedent's creditors. Tex. Est. Code § 111.053.

Accordingly, the property passing nonprobate by these means remains liable for the decedent's debts as if the asset was still a probate asset unless there is an applicable statutory exemption like those for life insurance in the Texas Insurance Code and the exemptions found in the Texas Property Code. However, only three

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\*The author appreciated Bill Pargamen's editorial comments

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specific provisions offer a procedure for a personal representative to recover the nonprobate disposition from the designated beneficiary in order to pay creditors, Tex. Est. Code §§ 112.252, 113.252, 114.104, 114.106 (community property with rights of survivorship, multi-party accounts and transfer on death deeds).

### B. Marital Property Issues

The general rule is that the death of a spouse works a partition of the couple's community property because community property can only exist with a married couple. Thus, at the first spouse's death, the surviving spouse retains an undivided one-half interest in what was community property, and the decedent's undivided one-half interest passes to the decedent's heirs and/or devisees. During the period of formal administration, a personal representative is entitled to possession of those probate assets that were the couple's joint management community and the deceased spouse's sole management community property. The surviving spouse may retain possession of what was that spouse's sole management community property. Tex. Est. Code § 453.009.

However, the general rules above do not apply if the ownership of a community asset passes nonprobate at a spouse's death. Further, Section 111.053 states that a nonprobate disposition does not affect the rights of the decedent's creditors. *See also* Texas Estates Code § 112.252 (community property with rights of survivorship). The nonprobate disposition may pass ownership of the asset to the surviving spouse. But, if the nonprobate asset passes to someone other than the surviving spouse, the surviving spouse may have a claim for fraud on the community.

### C. The Phantom Estate

After a spouse's death, there may not be a probate estate to administer—what Bill Pargaman has named the “phantom estate.” Perhaps it is because the estate passed nonprobate. Perhaps it is because the entire community estate was the surviving spouse's sole management community property and the deceased spouse did not own any separate property. What effect do these situations have on the rights of creditors? What effect does it have on the duties of a personal representative and the responsibilities of the surviving spouse?

## II. MARITAL PROPERTY CHARACTERIZATION

The Supreme Court of Texas in *Arnold v. Leonard*, 114 Tex. 535, 273 S.W. 799 (1925) and *Kellett v. Trice*, 95 Tex. 160, 66 S.W. 51 (1902) made it clear to practitioners and the legislature that it is the Texas Constitution which ultimately defines what is separate or community property and not the legislature or the parties involved. Accordingly, in order to properly characterize marital assets in Texas, it is necessary to understand the relevant provision of the Texas Constitution, Article XVI, Sec. 15 (eff. Jan 1, 2000).

### A. Article XVI, Sec. 15

All property, both real and personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of that spouse; and laws shall be passed more clearly defining the rights of the spouses, in relation to separate and community property; provided that persons about to marry and spouses, without the intention to defraud preexisting creditors, may by written instrument from time to time

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partition between themselves all or part of their property, then existing or to be acquired, or exchange between themselves the community interest of one spouse or future spouse in any property for the community interest of the other spouse or future spouse in other community property then existing or to be acquired, whereupon the portion or interest set aside to each spouse shall be and constitute a part of the separate property and estate of such spouse or future spouse; spouses may also from time to time, by written instrument, agree between themselves that the income or property from all or part of the separate property then owned or which thereafter might be acquired by only one of them, shall be the separate property of that spouse; and if one spouse makes a gift of property to the other that gift is presumed to include all the income or property which might arise from that gift of property; spouses may agree in writing that all or part of their community property becomes the property of the surviving spouse on the death of a spouse; and spouses may agree in writing that all or part of the separate property owned by either or both of them shall be the spouses' community property.

### **B. The Test for Community**

It is important to note that the Constitution does not define community property. *Arnold v. Leonard*, *supra*, explained the significance of the Texas constitutional approach to characterization: if an asset does not fall within the constitutional definition of separate property, it must be community property — "the rule of implied exclusion." A logical extension of this rule leads to a more practical definition for the term "community property": *that property of the marriage*

*which is not proven to be separate property. See II, C, infra.*

#### 1. Graham v. Franco

The court in *Graham v. Franco*, 488 S.W.2d 390 (Tex. 1972), resorted to a more historical Spanish/Mexican approach and affirmatively defined community property as ". . . that property is community which is acquired by the works, efforts, or labor of the spouses. . . ." *See also Whittlesey v. Miller*, 572 S.W.2d 665 (Tex. 1978); *Bounds v. Caudle*, 560 S.W.2d 925 (Tex. 1977).

#### 2. Income from Separate

The rationale of *Graham v. Franco*, *supra*, would suggest that any income generated by a spouse's separate property would be the owner's separate property. However, the general rule concerning income from separate property is that it is community property, placing Texas in a minority position among the community property states.

#### 3. Traceable Mutations

*Arnold v. Leonard*'s "rule of implied exclusion" would suggest that property purchased with separate property during a marriage would be community property. However, Texas courts, going all the way back to *Love v. Robertson*, 7 Tex. 6 (1855) and *Rose v. Houston*, 11 Tex. 323 (1854), have consistently held that such property is a "traceable mutation" of the consideration used to acquire the property. Thus, the character of separate property is not changed by a sale, exchange or change in form. *Texas Pattern Jury Charges*, PJC 202.4 (2018).

*Note: Absent an agreement of the parties and notwithstanding some of these cases, the author is of the opinion that "the rule of*

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*implied exclusion" remains the general rule for determining what is community property.*

### C. Community Presumption

Generally, all assets of the spouses on hand during the marriage and upon its termination are presumed to be community property, thereby placing the burden of proof on the party (e.g., a spouse, or that spouse's personal representative, or the heirs/devisees of the spouse) asserting separate character to show by "clear and convincing evidence" that a particular asset is, in fact, separate. Tex. Fam. Code § 3.003.

#### 1. Management Presumption

The fact that an asset is held in one spouse's name only, or is in the sole possession of a particular spouse, is not determinative of its marital character and only raises a presumption that the asset is subject to that spouse's sole management and control while the community presumption dictates it is presumptively community. Tex. Fam. Code § 3.104.

#### 2. Form of Title

The fact that record title is held in a particular way due to certain circumstances may cause the community presumption to vanish in favor of a rebuttable separate presumption. *See Smith v. Strahan*, 16 Tex. 314 (1856); *Higgins v. Johnson's Heirs*, 20 Tex. 389 (1857); *Story v. Marshall*, 24 Tex. 305 (1859). The other spouse may not be allowed to rebut the presumption if that spouse was a party to the transaction. *Lindsay v. Clayman*, 151 Tex. 593, 254 S.W.2d 777 (1952).

### D. Traditional Means of Creating Separate Property

Consequently, the first step of characterization is ascertaining the facts and circumstances surrounding the acquisition of an asset – "the inception of title rule." *Creamer v. Briscoe*, 109 S.W. 911 (Tex. 1908). The second step is determining whether evidence of those facts and circumstances place the asset within the definition of separate property. Prior to the 1980 Amendment to Art. XVI, Sec.15, there were limited means of creating separate property in Texas. Generally, separate property was limited to:

#### 1. Previously Existing

Property owned prior to marriage. Tex. Fam. Code § 3.001.

#### 2. Gratuitous Transfers

Property acquired during marriage by gift, devise or descent. Tex. Fam. Code § 3.001.

#### 3. Marital Partitions

Property resulting from the partition of presently existing community property. Tex. Fam. Code § 4.102.

#### 4. Certain Credit Acquisitions

Property acquired on credit during marriage is separate property if the creditor agreed to look only to separate property for repayment. *Broussard v. Tian*, 156 Tex. 371, 295 S.W.2d 405 (1956).

#### 5. Personal Injury Recoveries

Certain personal injury recoveries (other than for loss of earning capacity). Tex. Fam. Code § 3.001. *See II, I, infra.*

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### 6. Traceable Mutations

Property acquired during marriage which is traceable as a mutation of previously owned separate property. *Tarver v. Tarver*, 394 S.W.2d 780 (Tex. 1965).

*Note: Casualty insurance proceeds traceable to separate property are separate property even if the premiums were paid with community. Tex. Fam. Code § 3.008.*

### E. **1980 Amendment**

The 1980 amendment to Art. XVI, Sec. 15 authorized the creation of separate property in new ways:

#### 1. Premarital Partitions

Persons intending to marry can partition and exchange community property not yet acquired. Tex. Fam. Code § 4.003.

#### 2. Spousal Partitions

Spouses can partition and exchange not only presently existing community property but also community property not yet in existence into the spouses' separate properties. Tex. Fam. Code § 4.102.

#### 3. Income from Separate Property

Spouses may also agree that income from one spouse's separate property will be that spouse's separate property. Tex. Fam. Code § 4.103.

#### 4. Spousal Donations

A gift by one spouse to the other spouse is presumed to include the income generated by the donated property so that both the gift and the future income from the gift can be the donee spouse's separate property. Tex. Fam. Code § 3.005.

### F. **Mixed Characterization**

Property acquired during marriage may be part separate property of one or both spouses and part community property. Such an item may be part separate property of each spouse. Certain assets, like bank accounts, may be brought into a marriage, but take on mixed characterization during marriage.

#### 1. Inception of Title

If the community estate of the spouses and the separate estate of a spouse have an ownership interest, the respective ownership interests are determined by the inception of title rule. Tex. Fam. Code § 7.006. For example, when the consideration used to acquire an item of property consists of both community property and traceable separate property, the item is both separate and community property.

#### 2. Calculation

The part that is separate property is the percentage of the purchase price paid with separate property or "separate credit" (i.e., the creditor agreed to look to separate property for payment. *See* II, D, 4, *supra*.) To calculate a separate property interest, one can divide the separate property contribution by the total purchase price. The percentage interest remaining after all separate property interests have been deducted is community property. *Texas Pattern Jury Charges*, PJC 202.6 (2016).

#### 3. Part Gift, Part Purchase

Property may be acquired partly by *gift* and partly by purchase. In such a case, the portion acquired by *gift* is separate property. The portion acquired by purchase can be separate, community or both, depending on the source of the funds or credit used to make the purchase. *Texas Pattern Jury*



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*Charges*, PJC 202.6 (2016). For calculation, see II, F, 2, *supra*.

### G. Commingling

An item of property that might have mixed characterization is presumptively community, meaning the party asserting the separate character of an interest in the item must prove the separate interest is separate property by clear and convincing evidence. The failure to meet that burden of proof results in the interest being community property.

Certain types of assets are particularly susceptible to this result. They are bank accounts, brokerage accounts, IRA accounts and even ERISA defined contribution retirement plans. Texas Family Code Section 3.007 provides that the separate property interest in a defined contribution retirement plan may be traced using the same tracing and characterization rules that apply to other assets.

In these types of assets, the failure to meet the burden of proof results in a “commingling” and the accounts and/or plans being community property.

### H. Life Insurance

Unlike the defined contribution plans and financial accounts discussed in II, G, *supra*, the characterization of most life insurance policies is dependent on the application of the inception of title rule.

If a policy was acquired before marriage or the initial premium was paid during marriage with separate property, the policy is separate property, even if subsequent premiums were paid with community property. *McCurdy v. McCurdy*, 372 S.W.2d 381 (Tex. Civ. App. Waco 1963 writ ref'd). The payment of premiums with community property may give the non-owner spouse a claim for reimbursement.

*Note: If the policy is a group life policy offered by an employer for employees, the policy is a form of compensation and likely to be found to be community property once the employee is married; similarly, a simple term policy may also take the characterization of the last premium paid.*

### I. Quasi-Marital Property

According to the Texas Family Code, the separate property of a spouse which was acquired while the spouses were not residing in Texas, but what would have been community had they resided in Texas at the time of acquisition, will be treated in a divorce proceeding as if it were community property. Tex. Fam. Code § 7.002. See *Cameron v. Cameron*, 641 S.W.2d 210 (Tex. 1982). A 2003 amendment to Sec. 7.002 treats as separate property any community property that was acquired while the couple resided in another state that would have been separate had they resided in Texas at the time of its acquisition. Quasi-community property is still treated as separate if the marriage terminates by reason of a spouse's death. *Hanau v. Hanau*, 730 S.W.2d 663 (Tex. 1987). Presumably “quasi-separate” property would be treated as community property if the marriage terminates by reason of a spouse's death, if the reasoning of the *Hanau* case, *supra*, is followed.

### J. Personal Injury Recoveries

Personal injury recoveries for loss of earning capacity during marriage are defined as community property. Tex. Fam. Code § 3.001(3). Notwithstanding this statutory provision, the author is of the opinion that actual “lost earnings” should be deemed community property while “loss of earning capacity” should be considered separate property. Lost earnings are properly

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characterized as community property since the community estate will be liable for payment of medical expenses and will suffer as a result of losing one spouse's community earnings.

However, characterizing the recovery for lost earning capacity as community property requires a presumption that the husband and wife will remain married indefinitely. In reality, should the spouses divorce following the injury, community recoveries will be divided on a just and right basis; or should the non-injured spouse die, his estate will be entitled to one-half of the entire recovery. Since the primary purpose of a personal injury recovery is to compensate the injured spouse, classifying lost earning capacity as community property and giving the non-injured spouse a one-half interest therein may leave the injured spouse with only a fraction of the amount awarded. The potential for such a situation clearly warrants a distinction between lost earnings and lost earning capacity which characterizes the former as community and the latter as separate.

*Note: The same rationale suggests a distinction should also be made for incurred medical expenses and future medical expenses.*

### **K. Observations**

Today, in order to properly characterize the assets of a marriage in either an estate planning or administration situation, the practitioner will need to be thoroughly familiar with the ever-changing rules of characterization and be alert to the possibility that in either a premarital or marital agreement the parties changed the legal result. For example, income from separate property is not always community property. *See* II, E, *supra*.

### **III. MARITAL PROPERTY MANAGEMENT**

Unlike characterization, rules relating to the management of marital property are within the rulemaking authority of the legislature. *Arnold v. Leonard*, 273 S.W. 799 (Tex. 1925). The Texas Family Code now prescribes which spouse has management powers over the marital assets during the marriage.

#### **A. Matrimonial Property Act, 1967**

Historically in Texas, the husband managed not only the community property of the marriage but also the separate property of both spouses. A women's rights reform movement began in 1913 with the gradual expansion over the next fifty years of the wife's right to manage her own separate property and personal earnings. One of the early changes was to grant to the wife the right to manage her own personal earnings and the income from her separate property. This reform movement culminated when both spouses were granted separate but equal rights in the management of their respective separate properties in the Matrimonial Property Act of 1967. The Act also granted women for the first time equal rights with their husbands in the management of their community property. These concepts were then codified as Sections 5.61 and 5.62 of the Texas Family Code enacted in 1969, effective Jan. 1, 2000, and are codified currently as Sections 3.201, 3.202 and 3.203 of the Texas Family Code. *See* Joseph W. McKnight, "Recodification and Reform of the Law of Husband and Wife" (Texas Bar Journal, Jan. 1970).

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### B. Texas Family Code

#### 1. Separate Property

Each spouse has sole management, control and disposition of his or her separate property. Tex. Fam. Code § 3.101.

#### 2. Sole Management Community

Each spouse has sole management, control and disposition of the community property that he or she would own, if single, including personal earnings, revenue from separate property, recoveries for personal injuries and increases and revenues from his or her “special community property.” Tex. Fam. Code § 3.102(a).

#### 3. Joint Management Community

All other community property is subject to both spouses' joint management, control and disposition – “the joint community property.” Tex. Fam. Code § 3.102(b).

### C. Special Community Property

The term “special community property” was originally defined by Texas courts as that portion of the community estate which was under the wife’s exclusive control and not liable for the husband’s debts following the landmark decision of *Arnold v. Leonard, supra*, where the Texas Supreme Court held that the legislature could not define the rents and revenue from the wife’s separate property and her personal earnings as her separate property, but could exempt those assets, her “special community property,” from his debts. *Moss v. Gibbs*, 370 S.W.2d 452 (Tex. 1963). Today, it is common practice to refer to the community assets subject to either spouse’s “sole management, control and disposition” under Section 3.102(a) as his or her “special community property.”

### D. Presumptions

In addition to the community presumption of Section 3.003, an asset titled in one spouse’s name (or untitled but in the sole possession of one spouse) is presumed to be subject to that spouse’s sole management and control. Tex. Fam. Code § 3.104. Thus, an asset held in either spouse’s name is presumed to be that spouse’s sole management community property. However, the actual definition of “sole management community property” is found in Tex. Fam. Code § 3.102(a). If an asset does not fall within the statutory definition of “sole, management community,” it is “joint community,” even if held in one spouse’s name.

### E. Record Title

Whether an asset is held in one spouse’s name or in both spouses’ names, it is presumptively community property, thereby placing the burden on a spouse claiming separate status to prove why it is separate property.

#### 1. Presumption

The fact that title is held in one spouse’s name (or it’s untitled, but in the sole possession of one spouse) creates a rebuttable presumption that the asset is the spouse’s sole management community property. Tex. Fam. Code § 3.104.

#### 2. Rebutting the Presumption

If the facts indicate that a community asset is not property the “titled” spouse would have owned, if single (e.g., personal earnings, income from separate property, increases and expenses from special community property), Section 3.102(c) indicates it is joint community.

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### 3. Mixing Sole Management Community

If one spouse's sole management community is "mixed" with the other spouse's sole management community (or presumably their joint community), the "mixed" community is converted into joint community and subject to both spouses' debts. This result typically occurs when the spouses deposit their respective salaries into a joint account. If an asset is subsequently purchased with funds from the joint account and placed in one spouse's name (absent donative intent of the other spouse), the asset is presumptively subject to that spouse's sole management, but may be found to be joint community for liability purposes due to its traceable "joint" source.

### 4. The "Sole Management" Joint Account

If only one spouse deposits his or her special community funds into a joint account, the account is community property, and the account agreement will dictate who can write the checks or otherwise make withdrawals (typically, either spouse can write a check or make a withdrawal). However, if the other spouse's creditors attempt to subject it to the contractual debts of the non-depositing spouse, the depositing spouse has a good argument that the account is still the depositing spouse's special community property and exempt from other spouse's non-tort and any premarital creditors. A joint account belongs to the party who deposited the funds. Tex. Est. Code § 113.102.

## IV. MARITAL PROPERTY LIABILITY

The Legislature's basic rules of marital property liability are found in Sections 3.201, 3.202 and 3.203 of the Texas Family Code.

## A. Statutory Rules

### 1. Separate Property Exemption

As a general rule, a spouse's separate property is not subject to the debts of the other spouse. Tex. Fam. Code § 3.202(a).

### 2. Special Community Exemption

As a general rule, a spouse's sole management community property is not subject to any debts incurred by the other spouse prior to the marriage or any nontortious debts of the other spouse incurred during the marriage. Tex. Fam. Code § 3.202(b).

### 3. Other Rules of Law

These two exemptions exist unless both spouses are personally liable under "other rules of law." Tex. Fam. Code § 3.201. See III, B, *infra*.

### 4. Exempt Property

Of course, the family homestead and certain items of personal property are generally exempt from the debts of both spouses, regardless of the marital character of the property. Tex. Prop. Code §§ 41.001 and 42.001. The Texas Property Code and Texas Insurance Code also create exemptions for retirement benefits and life insurance.

### 5. Creditors' Rights

Accordingly, a spouse's nonexempt separate property and sole management community property are subject to any liabilities of that spouse incurred before or during the marriage. Nonexempt joint community is liable for the debts of both spouses. In addition, the nonexempt sole management community properties of both spouses are subject to the tortious liabilities of either spouse incurred during marriage.

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Tex. Fam. Code § 3.202 (c) and (d). *See* IX, *infra*.

### 6. Order of Execution

A court may determine, as deemed just and equitable, the order in which particular separate or community property is subject to execution and sale to satisfy a judgment. In determining the order, the court is to consider the facts and circumstances surrounding the transaction or occurrence on which the debt is based. Tex. Fam. Code § 3.203.

### **B. Other Factors**

The general rules described in III, A, *supra*, apply unless both spouses are personally liable under “other rules of law.”

#### 1. Joint Obligations

Of course, both spouses may sign a contract or commit a tort which would make them jointly and severally liable and thereby subjecting the entire nonexempt marital estate to liability. “Generally, both spouses are jointly and severally liable for the tax due on a joint return. Thus, a spouse may be liable for the entire tax liability, although the income was totally earned by the other spouse.” *Kimsey v. Kimsey*, 915 S.W.2d 690, 695 (Tex. App.—El Paso 1998, pet denied).

#### 2. “Necessaries”

Each spouse has a duty to support the other spouse and a duty to support a child generally for so long as the child is a minor and thereafter until the child graduates from high school. Tex. Fam. Code Secs. 2.501 and 154.001. Accordingly, all nonexempt marital assets (separate and community) are liable for such “necessaries.” *See*, III, D, *infra*.

#### 3. Principal-Agent

The law also defines other situations where any person can be held personally liable for debts of another. These situations include the following relationships: respondeat superior, principal/agency, partnership, joint venture, etc. These special relationships can exist between husband and wife and can impose vicarious liability on an otherwise innocent spouse. *See Lawrence v. Hardy*, 583 S.W.2d 795 (Tex. App.—San Antonio 1979, writ ref’d n.r.e.). The Texas Family Code has codified this concept. Tex. Fam. Code § 3.201(a)(1). However, the marriage relationship, in and to itself, is not sufficient to generate vicarious liability. Tex. Fam. Code § 3.201(c). *See also Wilkinson v. Stevison*, 514 S.W.2d 895 (Tex. 1974).

#### 4. Points of Clarification

Except as provided in IV, B, *supra*, community property is not subject to a liability that arises from act of a spouse. Tex. Fam. Code §3.201(b). Retirement allowances, annuities, accumulated contributions, optional benefits and money in the various public retirement system accounts *which are one spouse’s sole management community property* are generally not subject to a claim of a criminal restitution judgment against the other spouse. Tex. Fam. Code § 3.202(e).

### **C. Child Support**

Prior to 2007 legislation, unless otherwise agreed in writing or ordered by a court, a parent’s child support obligation ended when the parent died; now the Family Code provides that court-ordered child support obligations survive the obligor’s death. Tex. Fam. Code § 154.006. Subsequent amendments to the Family Code also provide that the obligor’s child support

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obligations can be accelerated upon the obligor's death and a liquidated amount will be determined using discount analysis and other means. Tex. Fam. Code § 154.015. An amendment to the probate code makes the liquidated amount a class 4 claim. Tex. Est. Code § 355.102. The court can also require that the child support obligation be secured by the purchase of a life insurance policy. Tex. Fam. Code § 154.016.

### D. The Necessaries Doctrine

A spouse's duty of support extends beyond the marital relationship itself. A spouse who fails to discharge this duty is liable to others who provide necessities to the other spouse. Tex. Fam. Code § 2.501(b). Accordingly, when third parties (e.g., doctors, hospitals, nursing homes – perhaps even lawyers) provide services deemed reasonably necessary for one spouse's support, both spouses are personally liable for the costs of such services. While the spouse who actually incurs the debt may be deemed to be "primarily liable," both spouses are "jointly and severally" liable to the third party under the necessities doctrine. Tex. Fam. Code § 3.201(a)(2). A debt incurred for necessities exposes the entire nonexempt marital estate (separate and community) to liability. Tex. Fam. Code § 3.202.

*Note: Parents are legally obligated to support their children until the children attain the age of 18 or graduate from high school. Tex. Fam. Code § 154.001.*

### E. Spousal Necessaries Cases

1. *Approved Personnel Serv. v. Dallas*, 358 S.W.2d 150 (Tex. App.—Texarkana 1962, no writ) ("No case is cited holding a contract for services of the nature

rendered here to be a necessary. There are numerous cases in which courts have, on the basis of facts of the particular case, held medical, dental and legal services to be necessities. . . . The facts and circumstances of a case control and mold the meaning of the term as here used and the formulation of a comprehensive definition is difficult. Decision in this case must be made on the basis that the term encompasses such services as the husband is financially able to and should provide for the wife's benefit and that are suitable to the maintenance of the condition and station in life the family occupies").

2. *Finney v. State*, 308 S.W.2d 142 (Tex. Civ. App.—Austin 1957, writ ref'd n.r.e.) (court held deceased wife's estate liable for medical bills incurred by deceased husband while he was a patient at three state facilities).

3. *Fleming v. Oring*, Civil Action No. 3:04-CV-1303-B, 2005 U.S. Dist. LEXIS 5062 (N.D. Tex. Mar. 29, 2005) (facts of case concern suit against husband for funds that caretakers spent in order to provide for basic needs of husband's wife; case was dismissed for lack of personal jurisdiction.)

4. *Jarvis v. Jenkins*, 417 S.W.2d 383 (Tex. Civ. App.—Waco 1967, no writ) (husband ordered to reimburse wife's attorney, who paid for her groceries and an airline ticket for her to travel to Virginia to visit family and seek medical treatment; items considered to be necessities).

5. *Turner v. Lubbock County Hospital District*, No. 07-96-0272-CV, 1998 Tex. App. LEXIS 53 (Tex. App.—Amarillo

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1998, no pet.) (court found that as a matter of law, medical services are necessities).

6. *White v. Lubbock Sanitarium Co.*, 54 S.W.2d 1058 (Tex. Civ. App.—Amarillo 1932, writ dism'd w.o.j.) (wife's medical expenses held to be necessities; husband and wife found to be jointly liable for the medical debt).

*Note:* The author's research discovered statements from various sources suggesting that once one spouse has qualified for Medicaid nursing care the other spouse no longer has any personal liability for the nursing care. The author appreciates Clyde Farrell confirming this general understanding of this complex set of Medicaid rules. Clyde also explained that, while the community spouse is still generally liable for other "necessaries," when the other spouse is in the nursing home, Medicaid covers most of the needs of the other spouse. If the other spouse is receiving Medicaid home care, Medicaid does not pay for "necessaries" other than medical care (including personal attendant care). However, for the purpose of this paper, it will be assumed that neither spouse has qualified for Medicaid nursing care.

### F. No Community Debt

The Texas Family Code's liability rules do not support the notion of a "community debt." See *Tedder v. Garner Aldrich, LLP*, 421 S.W.3d 651 (Tex. 2013). That term suggests that (i) both spouses have personal liability for the debt and (ii) all non-exempt community property can be reached to satisfy the debt. Neither statement is necessarily true. Please also refer to *Marital Property Liabilities: Dispelling the Myth of the Community Debt*, State Bar of Texas, Advanced Estate

Planning and Probate Course, June, 2009, and the *Marital Property Liabilities: Dispelling the Myth of Community Debt*, Featherston and Dickson, *Texas Bar Journal*, January, 2010.

### G. Summary

Accordingly, absent a statutory exemption, a spouse's separate property and sole management community property, as well as the joint community property, are liable for that spouse's debts during the marriage. If the liability is a tort debt incurred during the marriage, the other spouse's sole management community property is also liable for the debt (the other spouse's separate property may be exempt depending upon the circumstances).

If the debt is not a tort debt incurred during the marriage, the other spouse's separate property and sole management community property are exempt during the marriage from the debt unless the other spouse is personally liable under other rules of law. In which event, the other spouse's property (i.e., that spouse's sole management community and separate) is liable as well.

However, if the debt was incurred as a reasonable expense for the support of either spouse, each spouse has personal liability, and the entire nonexempt marital estate (each spouse's separate property and their community property) is liable.

### H. Key Questions

The Texas Legislature has enacted a logical liability process that utilizes a multiple-step process to determine which nonexempt marital assets of a husband and wife are liable for which debts during the marriage. Texas courts are finally getting it right. See *Beal Bank v. Gilbert*, 417 S.W. 3d 704 (Tex. App.—Dallas 2013, no pet. h.).

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The process is dependent upon the answers to four questions:

1. When was the debt incurred? *It was incurred either prior to or during the marriage.*
2. Whose debt is it? *It is either the debt of the husband, the debt of the wife or both spouses' debt.*
3. What type of debt is it? *Was it tortious or contractual in nature? Or was it incurred for a "necessity"?*
4. If not a "necessity," was the spouse who incurred the debt acting as the other spouse's agent?

The ultimate answer depends on the relevant facts and circumstances and the specific answers to these four questions.

*Note:* However, the statutory liability rules change when the first spouse dies. See, V, VI and VII, *infra*.

### V. DEATH OF SPOUSE

When a married resident of Texas dies, the marriage terminates and their community property technically ceases to exist because only spouses can own community property. As a general rule, nonprobate assets pass to the surviving spouse or other third-party beneficiaries. Death generally works a legal partition of the *community probate assets*; the deceased spouse's undivided one-half interest passes to the deceased spouse's heirs and/or devisees, and the surviving spouse retains his/her undivided one-half interest therein.

Presumably, the spouse's mutual obligation of support also terminates. The surviving spouse does not even have the legal duty to bury the deceased spouse. See Tex. Est. Code § 355.110.

*Note:* The general rules described above have their exceptions. Section 804.001(3) of the Texas Government Code terminates the community interest of a deceased spouse in a state employee's retirement plan. See *Rogers v. Foxworth*, 214 S.W.3d 196 (Tex. App.—Tyler 2007, no pet.), involving teacher retirement.

*Note:* More importantly, upon the death of a participant in an ERISA regulated retirement plan, the surviving spouse may have an ERISA mandated right that overrides the participant's beneficiary designation. If the spouse predeceases the participant, the spouse may not be able to transfer the spouse's community interest in the participant's plan. See *Boggs v. Boggs*, 570 U.S. 833, 117 S. Ct. 1754 (1997). Federal law may also preempt state law if the decedent or spouse participated in a federally created plan.

#### A. Marital Liabilities

But what happens to the existing debts of a married couple when the first spouse dies? The question sounds simple enough. It is obvious that the debts don't go away. There are no community debts. Not all of the debts were the debts of both spouses. Prior to the first spouse's death, the surviving spouse may or may not have had personal liability for the debts of the deceased spouse, and the deceased spouse may or may not have had any personal liability for the debts of the surviving spouse.



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The deceased spouse's death does not create any personal liability on any party that did not exist prior to the deceased spouse's death. The surviving spouse is still personally liable for the debts of the surviving spouse. The surviving spouse does not assume personal liability for any debts of the deceased spouse for which the survivor did not have preexisting personal liability. It is the deceased spouse's "estate" that may be liable for the deceased spouse's debts.

### B. Historical Explanation

The Texas Supreme Court has explained the legal effect of the transition of ownership and liability by reason of the owner/debtor's death by and through the decedent's "estate." "A suit seeking to establish the decedent's liability on a claim and subject property of the estate to its payment should ordinarily be instituted against the personal representative or, under certain circumstances, against the heirs or beneficiaries." *Price v. Estate of Anderson*, 522 S.W.2d 690, 691 (Tex. 1975). "Debts against an estate constitute a statutory lien. This lien arises at the moment of death." *Janes v. Commerce Fed. Savings & Loan Ass'n*, 639 S.W.2d 490, 491 (Tex. App. – Texarkana 1982, writ ref'd n.r.e.). "Possession, then, by an heir does not subject him to liability. He holds the property with the encumbrance, but he cannot be required to relieve the estate of the burden [sic]." *Blinn v. McDonald* 50 S.W. 931, 931 (Tex. 1899), *Van v. Webb*, 215 S.W.2d 151, 154 (Tex. 1998).

"This language has been construed to mean that all of the unsecured creditors of the decedent have a lien upon his non-exempt property, which arises at the moment of death. Upon allegation and proof that no administration is pending, and

that none is necessary, the creditor's remedy is a suit to foreclose his statutory lien upon the property held by the heirs or devisees." 17 Woodward & Smith, *Probate and Decedent's Estates*, § 174 (1971).

### C. Probate v. Nonprobate

The assets of a decedent should initially be divided into two separate and distinct categories. Certain assets fall within the *probate* class and others are classified as *nonprobate* assets. An asset is nonprobate if during the decedent's lifetime, the decedent entered into an inter vivos transaction, as opposed to a testamentary transaction, that controls the disposition of the asset at death.

#### 1. Nonprobate Transfers

Many nonprobate dispositions are contractual arrangements with third parties or the intended beneficiaries, and the terms of the contracts control the dispositions. Tex. Est. Code § 111.052. Common examples of these types of contractual arrangements include joint accounts with rights of survivorship, P.O.D./T.O.D. accounts and trust accounts as defined in Chapter 113 of the Texas Estates Code, most life insurance policies and certain employee benefits. Nonprobate assets remain liable for the decedent's debts unless there exists a statutory exemption like the one for life insurance policies under the Texas Insurance Code or the one for retirement benefits under the Texas Property Code. Tex. Est. Code § 111.053(b).

*Note: The surviving spouse is frequently the designated beneficiary of the nonprobate disposition. For example, the surviving spouse is the named beneficiary of a life insurance policy, a retirement account or a multiple-party account. The couple may have owned separate property as joint*

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*tenants with rights of survivorship or community property with rights of survivorship. On the other hand, if the deceased spouse makes a nonprobate disposition of his/her sole management community property to a third party, fraud on the community issues are raised. But ERISA may mandate the surviving spouse be the beneficiary of an ERISA regulated retirement plan. If it is a group life insurance payable to a third party, the spouse must plead and prove actual fraud. Barnett v. Barnett, 67 S.W.3d 107 (Tex. 2001).*

### 2. Inter Vivos Gifts

In other nonprobate dispositions, the ownership of a future interest in the property (e.g., a remainder interest) is transferred to the intended beneficiary during the owner's lifetime, and the future interest becomes possessory upon the death of the owner. Of course, the typical inter vivos gift of the ownership and possession of an asset prior to the owner's death can be considered a nonprobate disposition and also subject to a fraud on the creditors' analysis.

*Note: Likewise, such a gift of a spouse's sole management community could be subject to a fraud on the community analysis.*

### 3. Transfer on Death Deeds

T.O.D. deeds were authorized by the legislature in 2015. According to Sections 114.000 – 114.152 of the Texas Estates Code, such deeds are effective to convey the grantor's interest in real property to one or more beneficiaries upon the death of the grantor.

*Note: The statute's language suggests that a spouse could only transfer that spouse's*

*undivided one-half interest in that spouse's sole management community property. The Texas Family Code suggests that a spouse may not be able to use a T.O.D. deed to transfer that spouse's interest in the couple's joint management community or the other spouse's sole management community. Tex. Fam. Code § 3.102.*

### 4. Probate

Probate assets are those assets which are not controlled by an inter vivos or nonprobate arrangement and pass at the owner's death to the owner's heirs or devisees, subject to possible probate administration. A married individual's probate estate consists of the decedent's separate probate assets and his or her undivided one-half of the community assets which are not subject to an inter vivos or nonprobate arrangement. The surviving spouse retains, not inherits, his or her undivided one-half interest in the community probate assets.

### 5. Survivorship Rights

Joint tenancies (with rights of survivorship) are created in Texas when co-owners of property agree to create survivorship rights. Tex. Est. Code § 111.001. Absent such an agreement, co-owners are tenants in common (without survivorship). Both joint tenants and tenants in common are presumed to own their individual undivided interests equally. Tex. Est. Code § 101.002. Spouses may own separate property as tenants in common or joint tenants. Spouses may own community property with rights of survivorship. Tex. Est. Code § 112.051.

Joint accounts (with or without survivorship rights) defined in Chapter 113 of the Texas Estates Code are not joint tenancies. Such joint accounts are owned by

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the parties in accordance with their “net contributions.” Tex. Est. Code § 113.102

### D. Chapter 101

The deceased spouse’s probate “estate” generally passes to the deceased spouse’s heirs and/or devisees *subject to the deceased spouse’s debts*. Tex. Est. Code §§ 101.001, 101.051. Thus, the deceased spouse’s separate property and undivided one-half interest in the community property are generally liable for the payment of the debts of the decedent. Tex. Est. Code § 101.052. *As to the liability of the surviving spouse’s interest in the community property, see V, E, infra.*

If appointed and qualified, the personal representative of the deceased spouse’s estate shall recover possession of the decedent’s “estate” and hold it in trust to be disposed of in accordance with the law. Tex. Est. Code § 101.003. “As trustee, the executor is subject to the high fiduciary standards applicable to all trustees.” *Humane Society v. Austin National Bank*, 531 S.W.2d 574,577 (Tex. 1975). If the decedent was married at the time of death, see Tex. Est. Code § 453.009 and VI, *infra*.

### E. Deceased Spouse’s Debts

Section 101.052 of the Texas Estates Code states that the one-hundred percent (100%) of the community property subject to the sole control of the deceased spouse or joint control of both spouses during the marriage continues to be subject to the *debts of the deceased spouse*. In addition, the decedent’s one-half interest in the community property subject to the sole control of the surviving spouse passes to the deceased spouse’s successors charged with the *deceased spouse’s debts*. Tex. Est. Code § 101.052.

*Note: It is significant that Section 101.052 does not refer to the surviving spouse’s debts. There is a reference to “the liabilities of that spouse.” See VII, infra.*

### F. Administration of Community Property

In addition to collecting the probate of the estate, paying the decedent’s debts and distributing the remaining assets to the decedent’s heirs and/or devisees, the administration of a married decedent’s estate may include the actual partition of the community probate property. While death may work a legal partition of the community probate assets, it is often necessary to open a formal administration to effectively handle the claims of creditors and/or divide the community probate property among the surviving spouse and the decedent’s heirs and/or devisees. *See VI, infra.*

*Note: Absent the opening of a formal administration, the surviving spouse can administer the community and can pay “community debts” and discharge the “community obligations.” See Tex. Est. Code Sec. 453.003. That term traces its roots back to the Texas Probate Code in effect prior to the Matrimonial Property Act of 1967. See VIII, infra.*

*Note: If the deceased spouse died intestate and the surviving spouse is the sole heir, there may not be a need for any type of formal administration. Tex. Est. Code Sec. 453.002.*

### G. Intestate Death

#### 1. Community Probate Property

If a spouse dies intestate, the surviving spouse continues to own (not inherits) an undivided one-half interest in

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the community probate assets. If there are not any descendants of the deceased spouse surviving, or all surviving descendants are also descendants of the surviving spouse, the decedent's one-half undivided interest passes to the surviving spouse, who would then own the entire community probate estate. If there are any descendants surviving who are not descendants of the surviving spouse, the decedent's undivided one-half interest in the community probate assets passes to the decedent's descendants per capita with right of representation. Tex. Est. Code § 201.003. Prior to September 1, 1993, the surviving spouse inherited the deceased spouse's one-half of the community only if no descendants of the deceased spouse were then surviving. Tex. Prob. Code § 45 (now repealed). The rules relating to "representation" were modified to be effective September 1, 1991. Tex. Prob. Code § 43 (now repealed). *See* Tex. Est. Code § 201.101.

### 2. Separate Probate Property

If a spouse dies intestate, the decedent's separate probate assets are divided in the following manner: (i) one-third of the personal property passes to the surviving spouse and two-thirds thereof to the decedent's descendants and (ii) the surviving spouse receives a life estate in one-third of the separate real property and the descendants of the decedent receive the balance of the separate real property. If there are no descendants, the surviving spouse receives all of the personal property and one-half of the real property. The other one-half of the real property passes in accordance with the rules of intestate succession. Tex. Est. Code § 201.002.

### H. **Testamentary Power**

Every person who is or has been married has received a broad grant of authority from the Legislature to dispose of his or her probate property. There is no forced heirship in Texas. Tex. Est. Code §§ 251.001, 251.002. This broad grant of testamentary authority is, however, effectively limited to the testator's separate probate property and his or her undivided one-half interest in the community probate property. *Avery v. Johnson*, 108 Tex. 294, 192 S.W. 542 (1917).

### I. **Express or Implied Election**

If the surviving spouse is a beneficiary under the will, the testator may be able to effectively expand his or her testamentary power to the entire marital estate through an express election or the doctrine of implied election. But the surviving spouse's consent is required. *See Wright v. Wright*, 274 S.W. 2d. 670 (Tex. 1955).

### J. **Protection for Surviving Spouse**

Despite the very broad general grant of testamentary power given a married testator and the limited rights of inheritance given the surviving spouse when the decedent dies intestate, there exists certain constitutional and statutory provisions which exist for the benefit of the surviving spouse, whether the decedent died testate or intestate.

#### 1. Homestead

The Texas Constitution still exempts the homestead from the claims of some of the decedent's creditors. Tex. Const. Art. XVI, Sec. 50. In addition, notwithstanding the provisions of the decedent's will or the rules of intestate succession, the surviving spouse is given an exclusive right of

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occupancy of the homestead so long as he or she elects to occupy it as his or her home. Tex. Const. Art. XVI, Sec. 52. This right of occupancy exists whether the home is separate property of the deceased spouse or the couple's community property. See Ch. 102, Texas Estates Code. In the event there is not a family home, the probate court is required to set aside an allowance in lieu of a homestead. Tex. Est. Code § 353.053.

### 2. Homestead Responsibilities

While exercising the homestead right of occupancy, the surviving spouse is treated like a “life tenant” and owes the decedent’s successors in interest a duty not to commit waste. *Sargent v. Sargent*, 15 S.W.2d 589 (Tex. 1929). Accordingly, the surviving spouse is responsible for utilities, property taxes and ordinary maintenance and repairs. *Sargent, supra*, and *Dakan v. Dakan*, 85 S.W.2d 620 (Tex. 1935). If the homestead is encumbered, the surviving spouse is responsible for the interest payments, but the underlying owners of the property (the surviving spouse and the decedent’s successors or the decedent’s successors in interest) should be responsible for each owner’s proportionate share of principal payments. Insurance premiums should be paid by the party with the insurable interest in the ownership of the property. The last two, principal payments on a mortgage and insurance premiums, depend on whether the homestead was separate property or community property and whether the deceased spouse died testate or intestate (i.e., who owns the homestead. See Tamborello, “A House Divided: The Rights and Duties of Homesteaders, Life Tenants and Remaindermen,” 2016 Advanced Estate Planning and Probate (S.B.O.T.)

### 3. Exempt Personal Property

Certain items of tangible personal property are exempt from creditors of the decedent if the decedent is survived by a spouse. Tex. Est. Code §§ 353.051, 353.052. These items are described in the Texas Property Code and generally include the household furnishings, personal effects and automobiles in an amount that does not exceed \$100,000. Tex. Prop. Code Sec. 42.002. In addition, during administration, the surviving spouse can retain possession of these items and will receive ownership of these items if the decedent's estate proves to be insolvent; otherwise the decedent's interest in these items passes to his or her heirs and/or devisees when the administration terminates. Tex. Est. Code §§ 353.152, 353.153. There is also an allowance in lieu of exempt personal property. Tex. Est. Code § 353.053.

### 4. Family Allowance

In addition to the allowances in lieu of homestead and exempt personal property, an allowance for one year's maintenance of the surviving spouse may be established by the probate court. Tex. Est. Code §§ 353.101, 353.102. The allowance is paid out of the decedent's property subject to administration. *Ward v. Braun*, 417 S.W.2d 888 (Tex. Civ. App.—Corpus Christi 1967, no writ). The amount is determined in the court's discretion and is not to be allowed if the surviving spouse has a sufficient separate estate. Tex. Est. Code Sec. 353.101(d); *Noble v. Noble*, 636 S.W.2d 551 (Tex. App.—San Antonio 1982, no writ).

### 5. Waiver/Election

The surviving spouse may have waived these rights in a marital or premarital

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agreement. A surviving spouse may be put to an election concerning these rights.

### **K. Authority of Surviving Spouse – No Personal Representative**

When there is no personal representative for the estate of the deceased spouse, Sec. 453.003 enables the surviving spouse to sue in order to recover community property, to sell or otherwise dispose of community property to pay debts payable out of the community estate, and to collect claims owing to the community estate. The survivor may be sued by a third party in a matter relating to the community estate. That section also grants to the surviving spouse the authority needed under the circumstances to exercise such other powers as are necessary to preserve the community estate, to discharge obligations payable out of community property and to generally "wind up community affairs."

The survivor is entitled to a "reasonable commission" for administering the community and can incur reasonable expenses in the management of the estate. Like any other fiduciary, the surviving spouse is accountable to the deceased spouse's heirs and/or devisees who are entitled to their share of the remaining community assets after the debts properly payable out of the community assets have been paid. *See* Tex. Est. Code §§ 453.006-453.008 and *Grebe v. First State Bank*, 150 S.W.2d 64 (Tex. 1941).

*Note: In 2007, the Legislature repealed the provisions of the Probate Code relating to the creation, administration and closing of an administration by a "qualified community administrator." Repealed Sec. 169 directed the community administrator to pay debts within the time, and according to the classification, and in the order*

*prescribed for the payment of debts as in other administrations. Section 160(a) simply directed the surviving spouse to "preserve the community property, discharge community obligations and wind up community affairs."*

### **VI. ADMINISTRATION OF DECEASED SPOUSE'S ESTATE**

The purposes of a decedent's estate administration are to collect the assets of the estate, to pay the decedent's debts and to distribute the remaining assets to the decedent's heirs and/or devisees. In addition, the administration of a married decedent's estate may include the actual partition of the community probate property. As discussed previously, death works a legal partition of the community probate assets, but it is often necessary to open an administration to effectively set aside the homestead, exempt property and family allowance, handle the claims of creditors and/or divide the community probate property among the surviving spouse and the decedent's heirs and/or devisees.

#### **A. Section 453.009**

During formal administration, the personal representative is granted authority to administer not only the deceased spouse's separate property but also what was the couple's joint community property and the decedent's sole management community property. The surviving spouse may retain possession of the survivor's sole management community property during administration or waive this right and allow the personal representative to administer the entire community probate estate. Tex. Est. Code § 453.009.

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### **B. Authority of Representative**

The authority of the personal representative over the survivor's one-half of the community should be limited to what is necessary to satisfy the debts of the deceased spouse properly payable out of such community assets even if the decedent's will purports to grant to the representative more extensive powers over the decedent's separate assets and one-half interest in the community.

### **C. Executor's Elective Power**

However, if there is a will and the surviving spouse is a beneficiary of the will, the surviving spouse who accepts any benefits under the will may have elected to allow the executor to exercise more extensive powers over his or her share of the community assets during administration.

### **D. Comparing Family Code and Estates Code Provisions**

The Estates Code's division of authority dovetails with the contractual management and liability rules of the Texas Family Code and facilitates the personal representative's ability to step into the decedent's shoes and satisfy the deceased spouse's debts in most situations. *See* Tex. Fam. Code §§ 3.102 and 3.202.

#### 1. Contract Debts

One hundred percent of the couple's joint management community property and the deceased spouse's sole management continue to be liable for the decedent's debts. However, if the deceased spouse's sole management community and the joint management community assets in possession of the personal representative and available to satisfy the deceased spouse's contractual creditors are insufficient for that purpose, Tex. Est. Code

§ 101.052 indicates that the deceased spouse's one-half interest in the surviving spouse's sole management community property can be reached to satisfy those creditors.

*Note: One hundred percent of the other spouse's sole management assets had been generally exempt from the claims of the deceased spouse's non-tortious creditors during the marriage (as well as any premarriage debts).*

#### 2. Tort Debts

Prior to the deceased spouse's death, all nonexempt community property was liable for the tort debts of either spouse. Section 101.052 suggests that only the decedent's one-half interest in the surviving spouse's sole management community may continue to be liable for any tort debts of the deceased spouse. *In other words, the statutory language indicates that the surviving spouse's one-half interest in the survivor's sole management community is no longer liable for any tort debts of the deceased spouse.*

### **E. Authority of the Surviving Spouse**

Generally, when a personal representative is administering the estate of the deceased spouse, including the surviving spouse's one-half of the decedent's sole management community and the couple's joint community, the surviving spouse's fiduciary authority over the survivor's sole management community property enables the survivor to exercise all the powers granted to the surviving spouse where there is no administration pending. Tex. Est. Code § 453.009. This statutory language suggests that the survivor can deduct from the special community being administered "necessary and reasonable expenses" and a

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"reasonable commission." The survivor shall keep a distinct account of "all community debts" allowed or paid. See Tex. Est. Code § 453.006.

*Note: Like their predecessors in the Texas Probate Code, Sections 160 and 168, Texas Estates Code Sections 453.003 and 453.006 still refer to "community debts" and "community obligations," terms carried forward from pre-1967/1971 law; however, as Professor McKnight explained, a "community debt" or "community obligation" should be interpreted to mean nothing more than some community property, or a portion thereof, is liable for its satisfaction, the same meaning given by the Supreme Court in Tedder. See IV, infra.*

### F. Allocation of Liabilities after Death

#### 1. Probate Assets

As pointed out previously, the Texas Estates Code's division of authority tracks the contractual management and liability rules of the Texas Family Code and facilitates the personal representative's ability to step into the decedent's shoes and satisfy primarily the deceased spouse's contractual debts, but it does not specifically address the debts of the surviving spouse which are not debts of the deceased spouse. It also does not address the order in which assets subject to administration are liable for which debts.

#### 2. Nonprobate Assets

In the past, many believed in the "urban myth": probate assets pass subject to the decedent's debts whereas nonprobate assets pass to their designated beneficiaries, free of the decedent's debts. Today, the statutory rules negate the application of that

myth. See Tex. Est. Code §§ 111.053, 113.252, 114.106. See also V, C, *supra*.

#### 3. General Power Theory

Even if the Uniform Fraudulent Transfer Act is not violated, the Texas definition of a general power of appointment would seem broad enough to capture most nonprobate dispositions, including joint tenancies and revocable trusts, within its coverage and, thereby, subject the property in question to the liabilities of the donee of the power, either during the donee's lifetime or at death, unless there is a specific statutory exemption. In *Bank of Dallas v. Republic National Bank*, 540 S.W. 2d 499 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.), the court explained, "If the settlor reserves . . . a general power (the power to appoint to the settlor) . . ., his creditors can reach the principal." A general power includes the ". . . authority to alter, amend or revoke. . . ." Tex. Prop. Code § 181.001(2).

#### 4. Abatement Generally

Despite the growing need for a comprehensive statute which would complement Sec. 111.053 of the Texas Estates Code and define the rights of creditors in and to the probate and nonprobate assets of a deceased debtor, the Legislature has only codified the order in which property in the probate estate would be liable for debts and expenses properly chargeable to the probate estate. Tex. Est. Code § 355.109.

#### 5. Abatement Among Community and Separate Assets

Sec. 355.110 of the Texas Estates Code directs a representative to pay the deceased spouse's *funeral expenses* out of the decedent's separate and one-half of the community, but Sec. 355.109 fails to give



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directions on how to pay the deceased spouse's debts. Sections 101.052 and 453.009 explain which of the deceased spouse's property remains liable for the debts. The potential for a conflict of interest is obvious; the expenditure of separate funds to satisfy a debt will inure to the benefit of the surviving spouse while using community funds would accrue to the benefit of the decedent's estate. Presumably Sec. 3.203 of the Texas Family Code would be relevant, and the facts and circumstances surrounding the source of the debt should be considered. For example, is it a purchase money indebtedness? Is it tortious or contractual in nature?

### 6. General Guidelines

The author is not aware of any definitive cases on point that offer any clear guidance. Accordingly, it is the author's opinion that certain claims should be paid out of the decedent's separate property or the decedent's one-half of community assets. These claims would include funeral expenses, separate property's purchase money indebtedness, and tort claims against the deceased spouse only. Other claims, like debts incurred for living expenses (e.g., credit cards and utilities), or for community property purchase money indebtedness, should be paid out 100% of the community property under administration.

*Note: If there is a will, language in the will may direct the executor to pay the decedent's debts out of the decedent's "residuary estate." This may be interpreted to require the executor to pay any and all debts for which the deceased spouse had personal liability out of the deceased spouse's separate property and one-half of the community. Absent that language, certain debts should be paid out of both*

*halves of the community property under administration.*

### G. **Closing the Estate**

Upon the death of the first spouse and while record legal title still reflects that some community assets are held in the decedent's name, some are held in the survivor's name and others are held in both names, the surviving spouse and the heirs and/or devisees of the deceased spouse are, in effect, tenants in common as to each and every community probate asset, unless the surviving spouse is the sole distributee of some or all of the deceased spouse's one-half interest in such assets.

Assuming that the decedent's one-half community interest has been left to someone other than the surviving spouse, the respective ownership interests of the survivor and the decedent's distributees are subject to the possessory rights of either a court appointed personal representative or the surviving spouse for administration purposes. When administration is completed, the survivor and the distributees are generally entitled to their respective undivided one-half interests in each and every community probate asset. Tex. Est. Code § 101.001.

*Note: A non-pro rata distribution of the community following the first spouse's death is a frequent topic of discussion, but beyond the scope of this paper.*

### H. **The Phantom Estate**

If the deceased spouse's separate property and the deceased spouse's interest in their community property passed nonprobate, and/or the only probate type assets remaining were the surviving spouse's sole management community property, Section 453.009 indicates that the

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personal representative would not have any property to administer unless the surviving spouse waives the right to retain possession of what was surviving spouse's sole management community property, an unlikely event.

### 1. Debts

Section 101.052 states that the deceased spouse's one-half interest in what was the surviving spouse's sole management non-exempt community property is still liable for the deceased spouse's debts. Section 111.053 indicates that any nonprobate assets which were the deceased spouse's separate property or sole management community property, as well as the couple's joint management community property, remain liable for the decedent's debts absent an applicable statutory exemption.

### 2. Administration

Absent a specific statutory process, like for community property with rights of survivorship, multi-party accounts and transfer of death deeds, is there an estate for a personal representative to administer? Must the creditors of the deceased spouse who are creditors of the surviving spouse pursue their claims against the surviving spouse or the beneficiaries of the nonprobate assets? Does an executor or administrator have the authority to pursue from the surviving spouse what was the deceased spouse's one-half interest in the surviving spouse's sole management community property in order to pay the deceased spouse's debts? Does the representative have the authority to pursue the nonprobate assets that have already passed to the beneficiaries?

If so, what is the representative's cause of action against the surviving spouse?

*Perhaps a partition?* Absent one of the statutory processes mentioned above, what is the cause of action against the nonprobate beneficiaries? *Perhaps a constructive trust?*

### 3. Spouse as Beneficiary

If the surviving spouse is the sole beneficiary of the deceased spouse's estate, or for whatever reason wishes to cooperate with the deceased spouse's heirs and /or devisees, waiving the right to retain possession of what was the surviving spouse's sole management community property and allowing the surviving spouse or someone else to administer that property would add some certainty to the administration of the community estate.

## VII. SURVIVING SPOUSE'S DEBTS

This outline focuses primarily on the Legislature's statutory design for handling the debts of the spouses during the marriage and the debts of the deceased spouse during the probate administration of the deceased spouse's estate. As noted earlier, the Texas Estates Code does not specifically address the *debts of the surviving spouse* (defined herein to mean a debt for which the deceased spouse did not have personal liability). Many lawyers have assumed that the death of the first spouse should not affect the substantive rights of the spouses' creditors. But it does as explained in VI, D, E, *supra*.

### A. **Section 101.052**

Section 101.052 of the Texas Estates Code is captioned: *Liability of Community Property for Debts of Deceased Spouse*. Subsection (a) states that community property subject to sole or joint control of a spouse during marriage continues to be subject to the liabilities of that spouse on

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death. Does the term “a spouse” in subsection (a) refer only to the deceased spouse or does it refer to either spouse? In view of the caption, it is arguable the reference is only to the deceased spouse.

*Note:* Section 112.252, *Liability of Deceased Spouse Not Affected by Right of Survivorship*, specifically states that community property subject to sole or joint management of a spouse continues to be liable of that spouse on “that spouse’s death.” Section 101.052 states that community property subject to sole management continues to be liable to the liabilities of that spouse “on death.” It doesn’t state which spouse’s death.

### B. Secured Debts

If Section 101.052 only refers to the debts of the deceased spouse (i.e., debts for which the deceased spouse had personal liability, but not the debts of the surviving spouse for which the deceased spouse did not have personal liability), that construction suggests that a secured creditor of the surviving spouse that had a security interest in what was community property but what is not subject to administration (i.e., the surviving spouse’s sole management community property) does not have a claim against the deceased spouse’s estate, *if the deceased spouse did not otherwise have personal liability for the debt.*

Of course, the surviving spouse still has personal liability, the creditor still has its security interest, and her nonexempt separate property and undivided one-half interest in the couple’s former community property (plus whatever nonexempt property she inherits) can be reached to satisfy the debt in the event of a default.

The creditor’s security interest in the survivor’s former sole management property remains attached to the property. However,

except to the extent of the security interest in the secured property, is the deceased spouse’s one-half interest in the joint management community or the surviving spouse’s other sole management community) still reachable by the creditor like it was before the deceased spouse’s death?

### C. Unsecured Debt

If the creditor is an unsecured creditor of only the surviving spouse (i.e., the deceased spouse did not have any personal liability), obviously the surviving spouse’s nonexempt separate property and one-half interest in the former community property (plus whatever the surviving spouse inherits) remain liable for the debt. However, the statutory framework suggests that the decedent’s separate property and one-half interest in the former community property may not be reachable by the creditor unless (and to the extent) such property passes to the surviving spouse by reason of the deceased spouse’s death. Other distributees of the deceased spouse’s estate would appear to acquire their inheritance, free of the surviving spouse’s debts.

### D. The Rationale

The essential argument above is that the Texas Family Code’s liability rules only apply during the marriage. Once the marriage terminates by reason of the first spouse’s death, the rules change. Sometimes the changes work in favor of a creditor. For example, the deceased spouse’s contract creditors can reach the decedent’s one-half of the surviving spouse’s former sole management community property. During marriage, they could not.

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Sometimes the change works against the creditor. Under Section 101.052 only the decedent's one-half interest in the surviving spouse's former sole management community is still liable for the decedent's tort debts. During marriage, all of the community was liable for either spouse's tortious debts.

*Accordingly, the Legislature's failure to expressly address the debts of the surviving spouse suggests that the creditors of the surviving spouse do not have claims against the deceased spouse's estate. Such creditors were not creditors of the deceased spouse. The deceased spouse's estate (the decedent's separate property and one-half of the former community property) passes subject to the deceased spouse's debts, not the surviving spouse's debts.*

### **E. The Better Argument**

Even though the Texas Estates Code does not expressly address the debts of the surviving spouse for which the deceased spouse did not also have personal liability, the better argument is that, following the general policy aspects of Section 101.052, what was the couple's joint community property and what was the surviving spouse's sole management community property, as well as the surviving spouse's one-half interest in what was the deceased spouse's sole management community property should continue to be liable for the surviving spouse's tort and contract debts. *But the deceased spouse's separate property and one-half interest in the deceased spouse's sole management community property should not.*

### **F. Summary**

Using this rationale, following the death of the first spouse, the proper analysis

should begin with the answers to the following questions:

1. Whose debt was it? *Both spouses'? The deceased spouse's? Only the surviving spouse's?* If only the surviving spouse's debt. . .

2. Is the debt secured? *Yes or no? If yes, is the property securing the debt subject to administration (i.e., the deceased spouse's separate property, sole management community property or their joint management community property)?*

3. *Thus, if a creditor of the surviving spouse can pursue the claim against certain property being administered by the personal representative (i.e., the couple's joint community property and one-half of the deceased spouse's sole management community property), the creditor should be treated as a creditor of the estate (e.g., thereby triggering the notice requirements of Tex. Est. Code §§ 308.051 – 308.056 and the claims procedure of Tex. Est. Code Chapter 355) even if the creditor was not a creditor of the deceased spouse (i.e., the deceased spouse did not have personal liability).*

## **VIII. EFFECT OF SPOUSE'S DEATH ON DEBTS – HISTORY**

Borrowing a description in a different area of Texas law by the Fifth Circuit trying to explain Texas law, both “inarticulateness and over expression” and the failure to appreciate how the Texas marital property law changed in 1967 with the adoption of the Texas Family Code have created confusion for the practitioner advising a personal representative on how debts should be paid following the death of the first

spouse to die. For example, courts have frequently ignored clear legislative mandate with general statements of law that might have been more accurate before the changes in the 1960s that introduced the concept of divided management and liability of marital property. *See* III, A, *supra*.

### A. The Red Herring

For example, in *Estate of Herring*, 983 S.W.2d 61, 63 (Tex. App—Corpus Christi, 1998 no pet.), the court stated: “The community assets of an estate, although they may vest in the surviving spouse and heirs upon the decedent’s death, and held subject to the payment of community debts and subject to the right of a duly appointed and qualified personal representative to have possession and control during administration. . . . Moreover, while under the jurisdiction of the probate court, all community property, including the half interest of the surviving spouse, is subject to administration and sale by the probate court as part of the estate of the deceased spouse.” As its authority, for this explanation of Texas law, the court cited no case later than 1971.

The court also made a parenthetical reference to Section 177 of the now repealed Texas Probate Code (an executor is authorized to administer all community property subject to the sole or joint management of the deceased spouse) but the court ignored that reference in its inaccurate general statements of the law.

Of course, its general statements were accurate within the facts of the case, since the only property at issue was, in fact, joint community property prior to the first spouse’s death.

### B. 1971 Amendment to Sec. 156

Following the enactment of the original Texas Family Code in the late 1960s, with its revolutionary system of divided marital management and liability rules, the legislature in 1971 attempted to clarify what debts would be payable out of the community property after the death of a spouse by amending Sec. 156 of the now repealed Texas Probate Code. Prior to 1971, Section 156 simply stated: “Community property, except as is exempt from forced sale, shall be charged with all valid and enforceable debts existing at the time of the dissolution of marriage by death.”

#### 1. 1971 Language

“The community property subject to the sole or joint management, control, and disposition of a spouse during marriage continues to be subject to the liabilities of that spouse upon death. In addition, the interest that the deceased spouse owned in any other nonexempt community property (i.e., the surviving spouse’s sole management community property) passes to his or her heirs or devisees charged with the debts which were enforceable against such deceased spouse prior to his or her death.”

#### 2. The Controversy

A key issue before the legislature in 1971 was whether the exemption from the husband’s contractual debts that the wife’s sole management community property enjoyed should survive the husband’s death. The legislature adopted Professor M. K. Woodward’s recommendation: The exemption would continue with respect to the wife’s one-half of her sole management community property, but the husband’s one-half would be subject to the claims of his creditors. *See* Remy, “The Effect of the 1971 amendments to the Probate Code on

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Control of Community Property After the Death of a Spouse and for Payment of Community Debts,” 34 Tex. B.J. 685 (1971).

### 3. Lack of Guidance

Unfortunately, the legislature in 1971 did not provide clear statutory guidance for other related issues. For example, during marriage, the entire community estate was generally liable for any tortious debt of either spouse incurred during marriage. Does all of the community property remain liable for the tort debts of either spouse after the first spouse dies? If the spouse who committed the tort dies, it is clear that the 100% of the deceased spouse’s sole management community and joint community property, as well as the decedent’s one-half interest in the surviving spouse’s sole management community property, remain liable. But, now repealed Section 156 was silent as to liability of the surviving spouse’s one-half of the survivor’s sole management community property following the deceased tortfeasor’s death.

### 4. Tort Claims

In an analysis of the 1971 amendment to Section 156, one leading authority concluded: “Hence, all of the community that was liable for the debts of the deceased spouse during marriage [including tort debts] will continue to be liable for the same debts after death.” Woodward, Smith & Beyer, Texas Practice Series – Probate and Decedent’s Estates, § 542 (Thomson Reuters/West, 2008 ed).

*Note: However, it should be noted that Section 156 literally said only the decedent’s sole management community, the joint community and the decedent’s one-half of the survivor’s sole management community*

*are liable for the decedent’s debts. It does not list the survivor’s one-half of the survivor’s sole management community as being liable, suggesting it is exempt after the tortfeasor’s death. See VI, supra*

### 5. Surviving Spouse’s Debts

Section 156 also did not mention the debts of the surviving spouse. So, what procedure would the surviving spouse’s creditor follow if the deceased spouse was not personally liable for the debt? Was the personal representative obligated to pay such a debt? *See VII, supra*.

## C. **Community Debt - The Misnomer**

Section 156 of the Texas Probate Code was enacted in 1955, effective Jan. 1, 1956. It has been amended twice, in 1971 and 2007, and later repealed, but it is submitted that neither amendment adequately addressed the concept of divided liability described above.

*Note: Section 156 is now codified as Tex. Est. Code §§ 101.052.*

### 1. Annotations

Further, every decision listed in the annotations under Section 156 was decided prior to 1967. It is submitted that any pre-1967 case is questionable authority when applied to a post-1967 situation. In other words, the reference to “community debts” in Section 156’s second sentence is, in the author’s opinion, a misnomer under current law, and Section 156 should be interpreted in light of the 1967 changes to Texas marital property law.

### 2. Sections 160 and 168

Sections 160 and 168 were the only other sections of the Texas Probate Code that continued to make references to

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“community debts” or “community obligations.” *Sections 160 and 168 are now codified as Tex. Est. Code §§ 453.003 – 453.008. Of course, the term “community debt” has since then been explained by the Texas Supreme Court in Tedder. See IV, F, supra.*

a. If no one has qualified as the personal representative of the deceased spouse’s estate, the surviving spouse “as the surviving partner of the marital partnership” has the power to sue and be sued for the recovery of community property, to sell and otherwise dispose of community property for the purpose of “paying community debts,” as well as such other powers as are necessary to “discharge community obligations, and wind up community affairs.” Tex. Prob. Code § 168 (repealed).

b. “The surviving spouse shall keep an account of “all community debts and expenses” paid. Upon final partition, the surviving spouse shall deliver to the heirs or devisees of the deceased spouse their interest in the deceased spouse’s estate after deducting the proportion of the “community debts.” Tex. Prob. Code § 168. If the deceased spouse died intestate and the decedent’s interest in the community property passes to the surviving spouse, no administration of the community property is necessary. Tex. Prob. Code § 155 (repealed).

c. Sections 160 and 168 were enacted in 1955, to be effective Jan. 1, 1956, and they have been amended since the late 1960s, but it is submitted that their amendments did not adequately address the concept of divided liabilities referred to above. Again, it is submitted that any reference to “community debts” or

“community obligations” is a misnomer under current law and those sections should be interpreted in light of the 1967 changes to Texas marital property law. Every relevant decision listed in the annotations under Sections 160 and 168 was decided prior to 1967 or the facts in issue occurred prior to 1967.

### 3. Proper Terminology

The term “community debt” suggests that both spouses are personally liable on the debt and/or that all community property can be reached to satisfy the debt. However, neither statement may be accurate under the circumstances. Focus under current law should be on the “debts of a spouse,” not “community debts.” In other words, is the debt the husband’s debt, the wife’s debt, or the debt of both the husband and wife? See IV, F, *supra*.

### **D. 1971 Amendments to Sec. 177**

Prior to its 1971 amendment, the relevant parts of Section 177 provided: “...such executor or administrator, as the case may be, is authorized to administer, not only the separate property of the deceased spouse, but also the community property which was by law under the management of the deceased spouse during the continuance of the marriage; and the surviving spouse, as surviving partner of the marital partnership, is entitled to retain possession and control of all community property which was legally under the management of the surviving spouse during the continuance of the marriage...”

Incorporating the concepts of the then newly enacted Texas Family Code, the 1971 version stated: “...such executor is authorized to administer, not only the separate property of deceased spouse, but also the community property which was by

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law under the management of the deceased spouse during the continuance of the marriage and all of the community property that was by law under the joint control of the spouses during the continuance of the marriage. The surviving spouse, as surviving partner of the marital partnership, is entitled to retain possession and control of all community property which was legally under the sole management of the surviving spouse during the continuance of the marriage....”

*Note: Section 177 permitted the surviving spouse to waive his or her right to manage the survivor’s sole management community property, thereby permitting the personal representative to manage the entire community during administration. Does this waiver change the rules concerning liability? No statutory answer is given. It is the author’s opinion that it does not. Section 177 is now codified as Tex. Est. Code § 453.009.*

### **E. Listen to the Supreme Court**

In *Arnold v. Leonard*, the Texas Supreme Court approved the authority of the legislature to define the management and liability rules related to marital property. The legislature responded with Sections 3.101, 3.102 and 3.103 of the Texas Family Code and Sections 156 and 177 of the Texas Probate Code. The basic legislative mandate is straight forward –

- When the first spouse dies, the couple’s joint community property, the deceased spouse’s sole management community property and the deceased spouse’s separate property are the marital assets subject to administration and are

available to satisfy the deceased spouse’s debts.

- While the surviving spouse may allow the personal representative to administer the survivor’s sole management community property, the decedent’s separate property, the couple’s joint community property and the decedent’s sole management community property are the primary assets subject to the deceased spouse’s debts. In addition, the decedent’s interest in the survivor’s sole management community is subject to the decedent’s debts.

### **F. Testator Direction**

Notwithstanding the relevant provisions of the Texas Family Code and Texas Probate Code, the deceased spouse’s will may include specific instructions on how debts are to be paid. For example, a provision in the will that directs that “all of the testator’s debts are to be paid out of the residuary estate” could be interpreted to mean that any debt for which the testator had personal liability is to be paid out of the testator’s separate property or one-half of the community property passing as part of the residuary estate. Absent such a provision, some debts are to be paid out of both the testator’s and the surviving spouse’s halves of the community. The provision, therefore, benefits the surviving spouse to the detriment of the residuary beneficiaries.

A specific provision in a will could be interpreted as benefitting the residuary beneficiaries to the detriment of the surviving spouse, thereby putting the surviving spouse to an election to suffer the detriment as the price to pay for any benefits under the testator’s will.



### G. Compare Divorce

While the divorce court can impose on one spouse or the other the responsibility for satisfying a particular debt insofar as the relative rights of the divorcing couple are concerned, such allocation of responsibility does not insulate the "non-responsible" spouse from the debts for which such spouse was personally liable insofar as the creditor is concerned. Further, the assets which could be used to satisfy a creditor's claim prior to divorce can still be reached by that creditor after divorce. The net effect is to leave the "non-responsible" spouse with a claim for indemnification against the responsible spouse. See *Stewart Title Company v. Huddleston*, 598 S.W.2d 321 (Tex. App.—San Antonio 1980), aff'd, 608 S.W.2d 611 (Tex. 1980) (per curiam) and *Anderson v. Royce*, 624 S.W.2d 621 (Tex. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.).