CREDITORS' RIGHTS IN AND TO THE MARITAL ESTATE: WHAT PROPERTY IS LIABLE FOR WHICH DEBTS?

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Houston, TX
June 26, 2013

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I. INTRODUCTION

The Texas Legislature has enacted a logical liability system 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. That system 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. What type of debt is it? *It is either tortious or contractual in nature.*
3. Whose debt is it? *It is either the debt of the husband, the debt of the wife or both spouses' debt.*
4. Are there any other substantive rules of law which would make one spouse personally liable for the debts of the other spouse?

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

II. THE COMMUNITY DEBT MISNOMER

All too often, courts, lawyers and commentators make reference to the term "community debt." However, the Texas Family Code's liability rules do not support the notion of a "community debt." The use of that term implies that (i) both spouses have personal liability for the debt and/or (ii) all nonexempt community property can be reached to satisfy the debt. Neither statement is necessarily true. It also erroneously suggests that a spouse's separate property may not be liable! Continued use of that term, especially by the courts, is confusing and misleading for lawyers and the public.

A. *Gardner Aldrich, LLP v. Teddler*

Statements in a recent opinion, *Gardner Aldrich, LLP v. Teddler*, 2011 WL 3546589 (Tex. App.—Fort Worth, August 1, 2011), similar to language found in many other Texas cases involving marital property liability, illustrates the problem. In *Aldrich*, plaintiff, a law firm, filed suit against a husband and wife during their divorce proceedings, seeking to recover the legal fees for having represented the wife earlier in the proceedings. The divorce court awarded the firm a judgment solely against the wife and ordered the wife to pay the fees as part of the division of the marital estate.

The wife later filed for bankruptcy, and the law firm then filed suit to establish the now ex-husband's personal liability for the unpaid fees. The trial court held that he was not personally liable, but the court of appeals rendered judgment that the now divorced husband and wife were still jointly and severally liable for the fees.

B. The Real Issue

Specific authority for the end result exists. A spouse is personally liable for the "necessaries" of the other spouse. Tex. Fam. Code §§ 2:501, 3:201(a)(2). Case law also exists which suggests that the attorney's fees of a spouse incurred in good faith and with probable cause may be considered "necessaries." *Navarro v. Brannon*, 616 S.W.2d 262, 263 (Tex. Civ. App.—Houston [1st Div.] 1981, writ ref'd. n.r.e.); *Roberts v.*

Roberts, 193 S.W.2d 707, 709 (Tex. Civ. App.—Dallas 1945, no writ). If both spouses are personally liable, their nonexempt separate property and their nonexempt community property can be reached by the creditor to satisfy the debt. Tex. Fam. Code § 3.202. The subsequent divorce of the parties does not affect the rights of the creditor. *Blake v. Amoco Federal Credit Union*, 900 S.W.2d 108, 111-112 (Tex. App.—Houston [14th Dist] 1995, no writ).

<u>Note:</u> *Professor Paulsen, in his excellent article on post-divorce liability, challenges what most have assumed to be established Texas law; divorce cannot prejudice the rights of preexisting creditors. He argues that such a rule ". . . lacks any modern legal justification, and subverts the intent of the Texas Constitution and Family Code." He encourages the Texas Supreme Court to declare that ". . . an unsecured creditor . . . has no special rights against a former spouse or that spouse's property once the marriage ends." See James W. Paulsen, "The Unsecured Texas Creditor's Post-Divorce Claim to Former Community Property," 63 Baylor Law Review 781 (2011).*

C. The Court Said What??? . . .

Rather than focusing exclusively on what should be the real issue – whether the legal fees in question were "necessaries" under the Texas Family Code – in *Aldrich*, the court stated that the fees were a "community debt," thus triggering joint and several liability of both spouses. It is not surprising that, in its Petition for Review to the Texas Supreme Court, the Petitioner criticizes the Court's reliance on the "community debt theory." Petition for Review, p. 6. Surprisingly, the Respondent doesn't appear to really disagree with the Petitioner on the community debt argument. "The Court's holding on necessaries made superfluous its comment that debts contracted during the marriage are presumed to be community." Respondent Brief, p. 7. Petitioner then argues that the Court's reliance on the "community debt theory" is plain error and calls on the Texas Supreme Court to correct it. Petitioner's Response Brief, p. 7. This author agrees; it is time for Texas courts to consistently follow the legislative mandate found in the Texas Family Code addressing marital property liabilities.

D. *Arnold v. Leonard*

Years ago, the Supreme Court of Texas in *Arnold v. Leonard*, 114 Tex. 535, 273 S.W. 799 (1925) tried to make it clear to practitioners and the Legislature that it is the Texas Constitution which ultimately defines what is separate or community property. However, unlike characterization rules, the Court explained that ". . . the Legislature may rightfully place such portions of the community as it deems best under the wife's separate control, and . . . it may likewise exempt the same from payment of the husband's debts, without the exemption being open to successful constitutional attack by either the husband or his creditors."

E. Matrimonial Property Act of 1967

Early in Texas history, the husband managed not only the community property of the marriage but also the separate property of both spouses. Beginning in 1913, emancipation led to a gradual expansion of the wife's right to manage her own separate property and to participate in managing the community property.

1. The Old "New" Management Rules

Eventually, both spouses were granted separate but equal rights in the management of their respective separate properties in the Matrimonial Property Act of 1967. This landmark 1967 legislation 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, 1970, and are currently codified 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).

2. The Old "New" Liability Rules

Prior to the Matrimonial Property Act of 1967, Texas marital liability law was relatively simple. The husband was generally personally liable for all *community debts*, and the wife was not. *See Leatherwood v. Arnold*, 66 Tex. 414, 1 S.W. 173(1886). Further, all community property other than the wife's special community property was liable for the husband's debts. *Arnold v. Leonard*, *supra*. These rules also changed when the Legislature passed the Matrimonial Property Act of 1967 and codified its concepts into the Texas Family Code. The liability rules are currently found in Sections 3.202 and 3.203 of the Texas Family Code. *See* IV, *infra*.

F. No Community Debt

As a result, there no longer exists "community debt" in Texas. A debt is either the debt of the husband, or of the wife, or of the husband and the wife. The community is not an entity that can own property or incur debt. Nevertheless, too many cases still demonstrate that some courts "just don't get it." The Texas Legislature has prescribed a logical liability system that some courts continue to ignore. For example, in *Sprick v. Sprick*, 25 S.W.3d 7, 13 (Tex. App.—El Paso 1999, pet. denied), a case cited by the Court in *Aldrich*, that court states that debts contracted during the marriage are presumed to be "community debts" under Tex. Fam. Code § 3.003(a). *No, that section of the family code says property acquired during the marriage is presumed to be community property*. The court then goes on to say that the degree of proof required to rebut the presumption of community debt is clear and convincing evidence according to Tex. Fam. Code § 3.003(b). *No, that section clearly states that clear and convincing evidence is necessary to rebut the presumption that an item of property is community property! A debt owing by a spouse is not the property of the spouse!* Citing *Sprick*, *supra*, the opinion in *Viera v. Viera*, 331 S.W.3d 195 (Tex. App.—El Paso, 2011, no pet.) demonstrates how easy it is for a court to perpetuate a vicious cycle of misstatements of Texas law.

<u>Note</u>: Please also refer to this author's paper, 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.

III. MARITAL PROPERTY MANAGEMENT

An understanding of the Texas Family Code's marital liability system begins with the Texas marital property management rules. The Texas Family Code prescribes which spouse has management powers over the marital assets during the marriage.

A. Statutory Rules

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(c). This status can result from the "mixing" of his and her sole management community assets. Tex. Fam. Code § 3.102(b).

B. 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."

C. 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 special community property. However, the actual definition of "special 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.

D. Other Factors

1. Power of Attorney

The Texas Family Code's powers of management can be modified by the parties through a power of attorney or other agreement. Tex. Fam. Code § 3.102. There is authority that suggests that such an agreement can be oral. *LeBlanc v. Waller*, 603 S.W.2d 265 (Tex. App.—Houston 1980, no writ). A durable power of attorney continues the authority of the agent even if the principal later becomes incapacitated. *See* Tex. Prob. Code §§ 482 and 484.

2. Homestead

The Texas Family Code also prohibits the managing spouse from selling, conveying or encumbering the homestead without the joinder of the other spouse, even if the homestead is the managing spouse's separate property or special community property. Tex. Fam. Code § 5.001.

3. Incapacity

In the event of the incapacity of the managing spouse as to special community, or (one of the spouses as to joint community property) the competent spouse may petition the probate court pursuant to Sec. 883 of the Texas Probate Code for authority to manage the entire community estate without a guardianship. A guardianship may be needed for the incapacitated spouse's separate property.

IV. MARITAL PROPERTY LIABILITY

The Legislature's basic rules of marital property liability are found in Sec. 3.202 and Sec. 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 special 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 general rules apply unless both spouses are personally liable under "other rules of law." Tex. Fam. Code § 3.202(a) and (b).

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 special 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 either spouse. In addition, the nonexempt special community properties of both spouses are subject to the tortious liabilities of either spouse incurred during marriage. Tex. Fam. Code § 3.202 (c) and (d).

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. Record Title

Whether a nonexempt 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. Management Presumption

If the community presumption is not rebutted, 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 special community property and liable for that spouse's debts and the tort debts of the other spouse incurred during the marriage, but generally exempt from the other spouse's premarital debts and any non-tortious debts of the other spouse incurred during marriage.

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 and, therefore, liable for all debts of both spouses.

3. Mixing Special Community

If one spouse's special community is "mixed" with the other spouse's special 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. Prob. Code § 438(a).

C. Other Factors

The general rules described in IV, 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. 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. Stevision*, 514 S.W.2d 895 (Tex. 1974).

3. "Necessaries"

In addition, 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 are liable for such "necessaries."

4. Points of Clarification

Except as provided in IV(C)(1), (2) and (3), 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).

D. 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 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. Prob. Code § 322. 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.

E. 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 necessaries 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 necessaries doctrine. Tex. Fam. Code § 3.201(a)(2). A debt incurred for necessaries exposes the entire non-exempt marital estate to liability. Tex. Fam. Code § 3.202.

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

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 necessaries; husband and wife found to be jointly liable for the medical debt).

<u>Note:</u> *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.

G. Summary

Accordingly, absent a statutory exemption, a spouse's separate property and special 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 special 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 special 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 special 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 non-exempt marital estate (each spouse's separate property and their community property) is liable.

<u>Note:</u> *However, the rules change when the first spouse dies. See VI, VII* and *VIII, infra.*

V. CREDITORS' RIGHTS DURING THE MARRIAGE

If both spouses have joint and several liability, the entire non-exempt marital estate, his separate, her separate and their community estate, can be attached by the creditor. Generally, excluded from this grouping of marital assets would be those assets exempt from creditors' claims under the Texas Property Code §§ 41.001 – 42.0022 (the homestead, certain items of personal property and certain savings plans) and the Texas Insurance Code §§ 1108.51-1108.53 (insurance policies and proceeds).

A. Joint and Several Liability

The entire non-exempt marital estate is at risk if the debt is the debt of both spouses because (i) they both signed the contract; (ii) they both committed the tort; or (iii) they both signed the joint income tax return. Both spouses may have personal liability for the debt because the spouse who actually incurred the debt was acting as the agent of the other spouse – the Principal-Agent Rule. Even if the Principal-Agent Rule is not applicable, if the debt is owing to a creditor who provided goods or services deemed reasonable necessaries for the support of one spouse (or a minor child – see Tex. Fam. Code § 154.001), both spouses also have personal liability – the Necessaries Doctrine.

B. Tort Debt of One Spouse

If the debt is, in fact, the tort debt of only one spouse (i.e., the other spouse does not have personal liability pursuant to IV, A, *supra*), the non-exempt separate property of the spouse who committed the tort and the entire non-exempt community estate (their joint community property, his special community property and her special community) are at risk. A court is, however, directed to determine, as deemed just and equitable, the order in which particular assets are subject to execution. Only the other spouse's separate property is exempt. If the tort was actually committed prior to the marriage, all of the other spouse's special community property is also not subject to execution.

C. Contract Debt of One Spouse

If the debt is, in fact, a breach of contract by only one spouse and the other spouse does not have personal liability under IV, A, *supra*, the non-exempt separate property of the spouse who incurred the debt and the non-exempt special community property of that spouse and the joint community property are at risk. The other spouse's separate property and all of the other spouse's special community property are not at risk. Again, the court is directed to use equitable principles to determine which particular assets are subject to execution.

D. Observations

In many situations, the entire community estate is going to be at risk of execution because of either the nature of the debt itself or the type of community property owned by the spouses. Even if the debt was incurred during the marriage by only one spouse, the Principal-Agent Rule or the Necessaries Doctrine may be applicable, creating joint and several liability. Even if neither the Principal-Agent Rule nor the Necessaries Doctrine is applicable, most, if not all, of the community assets may be their joint community property, even if certain assets are held in one spouse's name. See III, C, and IV, B, *supra*. Perhaps more importantly, even the other spouse's separate property is at risk if that spouse cannot prove by clear and convincing evidence that a separate asset is separate property due to the community property presumption. Tex. Fam. Code § 3.003. Recall that creditors can rely on the community presumption.

VI. DEATH OF SPOUSE

When a married resident of Texas dies, the marriage terminates and community property ceases to exist. Nonprobate assets pass to their third party beneficiaries. Death works a legal partition of the *community probate assets*; the deceased spouse's undivided one-half interest passes to his heirs and/or devisees, and the surviving spouse retains 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. Prob. Code §320A.

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.

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. The Court's 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).

C. Probate v. Nonprobate

The "estate" 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. <u>Nonprobate Transfers</u>

Many nonprobate dispositions are contractual arrangements with third parties or the intended beneficiaries, and the terms of the contracts control the dispositions. Common examples of these types of contractual arrangements include three of the multiple-party bank accounts discussed in Chapter XI of the Texas Probate 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. Prob. Code § 450(a) and (b).

2. <u>Inter Vivos Gifts</u>

In other nonprobate dispositions addressed by Section 450(b), the ownership of a future interest in the property 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.

<u>Note</u>*: If the deceased spouse made a nonprobate disposition of his/her special community property to a third party, fraud on the community issues are raised.*

3. <u>Probate</u>

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 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.

D. Section 37

The deceased spouse's probate "estate" generally passes to the deceased spouse's heirs and/or devisees *subject to the deceased spouse's debts*. Thus, the deceased spouse's separate property and one-half interest in the community property are generally liable for the payment of the debts of the decedent. Tex. Prob. Code § 37. 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. Prob. Code § 37. "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).

E. Section 156

Section 156 of the Texas Probate 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. Prob. Code § 156. Section 156 does not refer to the surviving spouse's debts.

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* VII, *infra*.

<u>Note</u>*: Absent the opening of a formal administration, the surviving spouse can administer the community and can discharge the "community obligations." See Tex. Prob. Code Sec. 160.*

<u>Note</u>*: 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. Prob. Code Sec. 155.*

G. Intestate Death

1. <u>Community Probate Property</u>

If a spouse dies intestate, the surviving spouse continues to own (not inherits) an undivided one-half interest in 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 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 one-half interest in the community probate assets passes to the decedent's descendants per capita with right of representation. Tex. Prob. Code §§ 43, 45. 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. The rules relating to "representation" were modified to be effective September 1, 1991. Tex. Prob Code § 43.

2. <u>Separate Probate Property</u>

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. Prob. Code § 38.

H. Testate Death

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. Prob. Code §§ 57 and 58. 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).

<u>Note</u>: *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 the doctrine of election. But the surviving spouse's consent is required.*

I. 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. <u>Homestead</u>

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 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. 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. Prob. Code § 273.

2. <u>Exempt Personal Property</u>

Certain items of tangible personal property are exempt from creditors of the decedent if the decedent is survived by a spouse. Tex. Prob. Code Secs. 271 and 281.

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 $60,000. 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. Prob. Code § 278. There is also an allowance in lieu of exempt personal property. Tex. Prob. Code § 273.

3. <u>Family Allowance</u>

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. Prob. Code §§ 286 and 287. 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. Prob. Code Sec. 288; *Noble v. Noble*, 636 S.W.2d 551 (Tex. App.—San Antonio 1982, no writ).

J. Authority of Surviving Spouse – No Personal Representative

When there is no personal representative for the estate of the deceased spouse, Sec. 160(a) 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. Prob. Code §§ 156 & 168 and *Grebe v. First State Bank*, 150 S.W. 2d 64 (Tex. 1941).

<u>Note</u>: *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 directs the surviving spouse to "preserve the community property, discharge community obligations and wind up community affairs."*

VII. 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 177

During formal administration, the personal representative is granted authority to administer not only the deceased spouse's separate property but also the couple's joint community property and the decedent's special community property. The surviving spouse may retain possession of the survivor's special community property during administration or waive this right and allow the personal representative to administer the entire community probate estate. Tex. Prob. Code § 177.

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. 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.

C. Comparing Family Code and Probate Code Provisions

Section 177's division of authority dovetails with the contractual management and liability rules of the Texas Family Code and facilitates the personal representative's or ability to step into the decedent's shoes and satisfy the deceased spouse's debts in most situations. Tex. Fam. Code §§ 3.102 and 3.202.

1. <u>Contract Debts</u>

However, if the community assets in possession of the personal representative and available to satisfy the deceased spouse's contractual creditors are insufficient for that purpose, Tex. Prob. Code § 156 indicates that the deceased spouse's one-half interest in the surviving spouse's special community property can be reached to satisfy those creditors. *One hundred percent of these 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. <u>Tort Debts</u>

Prior to the deceased spouse's death, all nonexempt community property was liable for the tort debts of either spouse. Section 156 suggests that only the decedent's one-half interest in the surviving spouse's special community may continue to be liable for any tort debts of the deceased spouse. *In other words, an argument can be made that the surviving spouse's one-half interest in the survivor's special community may no longer be liable for any tort debts of the deceased spouse.*

D. Authority of the Surviving Spouse

When a personal representative is administering the estate of the deceased spouse, including the surviving spouse's one-half of the decedent's special community and the couple's joint community, the surviving spouse's fiduciary authority over the survivor's special community property enables the survivor to exercise all the powers granted to the surviving spouse where there is no administration pending. Tex. Prob. Code § 177. This statutory language suggests that the survivor can deduct from the special community being administered "necessary and reasonable expenses" and a "reasonable commission." The survivor shall keep a distinct account of "all community debts" allowed or paid. *See* Tex. Prob. Code § 156.

<u>Note</u>: Sections 156, 160 and 168 still refer to "community debts" and "community obligations" and carry 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. See III(E)(1), supra.

E. Allocation of Liabilities After Death

1. <u>Probate Assets</u>

As pointed out previously, the Texas Probate 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 issues related to which assets subject to administration are liable for which debts.

2. <u>Nonprobate Assets</u>

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, there is a growing body of statutory rules and common law which negates the application of that myth. See Tex. Prob. Code §§ 442, 450(b) and 461.

3. <u>General Power Theory</u>

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.

4. <u>Abatement Generally</u>

Despite the growing need for a comprehensive statute which would complement Sec. 450(b) of the Texas Probate 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. Prob. Code § 322B.

5. Abatement Among Community and Separate Assets

Sec. 320A 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. 322B fails to give direction on how to pay the decedent's debts. The potential conflict of interest is obvious; the expenditure of separate funds to satisfy the 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 decreased spouse. 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 funds 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.*

F. 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 one-half interests in each and every community probate asset. Tex. Prob. Code § 37.

VIII. 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 Probate 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 any 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! Borrowing a phrase from Professor Paulsen, an unsecured creditor of the surviving spouse may not have any special rights against the deceased spouse's estate. *See* Note II(B), *supra*.

A. Secured Debts

Section 156 of the Texas Probate Code suggests that a creditor of the surviving spouse who has a security interest in former community property which is not subject to administration (i.e., the surviving spouse's special community property) does not have a claim against the deceased spouse's estate, if the deceased spouse did not have personal liability for the debt. The surviving spouse still has personal liability; 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. The creditor's security interest in the survivor's former special community property remains attached to the property. However, except to the extent of the security interest, the decedent's property may not be reachable by the surviving spouse's creditors.

B. 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), the surviving spouse's nonexempt separate property and one-half interest in the former community property (plus whatever the surviving spouse inherited) 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 is not 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 appear to acquire their inheritance, free of the surviving spouse's debts.

C. The Rationale

Consistent with Professor Paulsen's approach (*see* Note II(B), *supra)*, the essential argument 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 or divorce, 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 special community property. During marriage, they could not.

Sometimes the change works against the creditor. Under Section 156 only the decedent's one-half interest in the surviving spouse's former special community is liable for the decedent's tort debts. During marriage, all of the community was liable for either spouse's tortious debts.

The Legislature's failure to expressly address the debts of the surviving spouse implies 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.

D. 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? *The deceased spouse's? The surviving spouse's? Or both spouses'?*

2. Is the debt secured? *Yes or no? If yes, is the property securing the debt subject to administration?*

3. If an unsecured debt was incurred by the deceased spouse, was it a debt for a "necessity"? Or, was the deceased spouse acting as the agent of the surviving spouse?

4. If an unsecured debt was incurred by the surviving spouse, was it a debt for a "necessity"? Or, was the surviving spouse acting as the agent of the deceased spouse?

5. If the debt was for a necessity of either spouse incurred before the first spouse's death, the surviving spouse is still personally liable to the creditor, and the creditor has a legitimate claim against the estate of the deceased spouse.

6. If a debt was incurred during the marriage while one spouse was acting as the agent of the other spouse, the surviving spouse is still personally liable to the creditor, and the creditor has a legitimate claim against the estate of the deceased spouse.

Recall, the marital relationship, in and to itself, does not make one spouse the agent of the other spouse.

IX. MARITAL AND PRE-MARITAL AGREEMENTS

In a valid pre-marital or marital agreement, a couple can create a "community-free marriage" – a marriage where the entire marital estate is his or her separate property. Assuming the marital agreement does not amount to a fraud on the pre-existing creditors (see Tex. Fam. Code § 4.106), the resulting separate property of each spouse is generally exempt from creditors' claims of the other spouse. However, if there is joint and several liability because they both sign the contract, or commit the tort, or sign the joint income tax return, or if the Principal-Agent Rule or Necessaries Doctrine is applicable, the non-exempt separate property of each spouse is at risk. The couple can be careful by their actions during marriage to avoid joint and several liability by not, for example, jointly signing contracts, having sufficient liability insurance and avoiding the Principal-Agent Rule. But what, if anything, can they do to avoid the Necessaries Doctrine?

A. The Necessaries Doctrine

The special rules that can result in joint and several liability of both spouses for a debt incurred for goods or services deemed reasonably necessary for either spouse's support depend, in part, on the spouses' mutual duty of support. Some commentators have suggested that a couple can, by agreement, avoid joint and several liability by waiving their mutual duty of support. The treatise *Texas Family Law:*

Practice and Procedure, VI, 130, Waiver of Spousal Support During Marriage (Matthew Bender & Company 2012), states that the parties to a premarital agreement can modify or eliminate "the duty of spousal support." It further states that, in the premarital agreement, the parties ". . . may waive the right of *spousal support*, limit it to a certain amount, or provide that the *duty of support* arises only if one spouse becomes disables or unemployed." Similar language is found in Matthew Bender's *Texas Transaction Guide – Legal Forms,* § 93.230 (2012). Unfortunately, the only authority cited for the assertions is Tex. Fam. Code § 4.003(a)(4).

B. Texas Premarital Agreement Act

Section 4.003(a)(4) of the Texas Family Code states that the parties to a premarital agreement may modify or eliminate *spousal support*. It does not state that the parties can modify or eliminate the *duty of support*. In addition, a review of the annotations under Section 4.003 does not reveal any real authority to support the argument that such an agreement can eliminate or modify a spouse's *duty of support* of the other spouse during the marriage, or a third party's rights under the necessaries doctrine. Section 4.003's laundry list of matters which can be addressed in a premarital agreement suggests that the parties can contract with each other concerning their mutual rights and obligations, and the contract is enforceable among themselves and their successors in interest as long as the agreement does not violate public policy.

A matter which extends beyond the parties' mutual rights and obligations and which affects third parties should be subject to a more stringent public policy examination prior to being enforceable against a third party, especially a third party creditor that provided services deemed reasonably necessary for either spouse's support.

<u>Note</u>: *It is important to note that Subchapter B of Title 1, Chapter 4 of the Texas Family Code, which relates to agreements between spouses during the marriage, does not contain similar language. This omission suggests that, once married, spouses may not be able to enter into a contract that modifies or eliminates spousal support.*

C. The Community-Free Marriage

Texas public policy does allow the parties to the premarital agreement to create a "community-free marriage" – a marriage where all assets are either the separate property of one spouse, or the other, or both spouses. Art. XVI, § 15, Texas Constitution. Even existing spouses can create a community-free marriage. Tex. Fam. Code § 4.102. Such a marital agreement cannot prejudice the rights of pre-existing creditors. Tex. Fam. Code § 4.106.

1. <u>The Separate Property Exemption</u>

Subject to the provisions of Section 4.106, creating a community-free marriage is a valid means of affecting the rights of third parties, including the spouses' creditors, since generally one spouse's separate property is not liable for the contract debts or tort debts of the other spouse. Tex. Fam. Code § 3.202(a).

2. <u>Vicarious Liability</u>

Even if the parties have a community-free marriage, each spouse is still personally liable for a debt of the other spouse if (i) the other spouse acted as the spouse's agent when incurring the debt or (ii) the other spouse incurred a debt for necessaries. Accordingly, that spouse's separate property is reachable by the creditor of the other spouse that provided services that are deemed to have been reasonably necessary for the other spouse's support. Tex. Fam. Code § 3.201.

D. Effect of Support Waiver

If the terms of an otherwise valid, enforceable premarital agreement purport to eliminate or modify the spouses' mutual obligation of support, its effectiveness should be limited to the relative rights and obligations between the parties themselves and their successors. Public policy considerations suggest that the agreement should not affect the rights of a third party who provided uncompensated services deemed reasonably necessary for the other spouse's support. Those same public policy considerations suggest that a spouse's *duty of support* during the marriage still exists notwithstanding the agreement; consequently, the agreement should be able to only affect "reimbursement" claims among the spouses upon termination of the marriage. Tex. Fam. Code §§ 3.401-3.410.

E. Reimbursement Between Spouses

Absent such an agreement, when the marriage terminates, a spouse is not entitled to reimbursement from the other spouse for expending separate funds during the marriage for the support of the other spouse because of the spouses' mutual duty of support. *Burney v. Burney*, 225 S.W.3d 208 (Tex. App.—El Paso 2006, no pet.); In re Marriage of Case, 28 S.W.3d 154 (Tex. App.—Texarkana 2000, no pet.). However, if a premarital agreement contains a "waiver of support," the spouse who is required to pay a third party under the necessaries doctrine should be able to seek reimbursement from the other spouse upon the termination of the marriage. Notwithstanding the terms of the agreement, the bottom line is each spouse still has a duty to support the other spouse during the marriage, even if they have agreed, in effect, that each spouse is primarily liable for his/her own necessities.

F. "Spousal Support"

Critics of this position will point out that both the Uniform Premarital Agreement Act and its Texas version specifically state that a premarital agreement can modify or eliminate *spousal support;* however, neither expressly states that the agreement can modify or eliminate the parties' mutual *duty of support* that attaches during their marriage. The *duty of support* is not the same concept as *spousal support.* The term "*spousal support*," as used in both the Uniform Premarital Agreement Act and the Texas version, was intended to refer to the more politically correct equivalence of "alimony" – *spousal support*. *Spousal support* is the generally accepted term used to describe payments required from one spouse to another after divorce. It is synonymous with the terms "alimony" and "maintenance."

G. But Texas Doesn't Have Alimony!

Accordingly, it is likely that a Texas court would interpret the term "*spousal support*" within the context of Section 4.003(a)(4) to be its generally accepted meaning – a legal obligation on a person to provide financial support to an ex-spouse after divorce. Critics of this interpretation will argue that Texas does not recognize alimony; thus, the Legislature must have retained that specific provision from the uniform act for a reason. The counter to that argument is that, while Texas (then and now) maintains its policy prohibiting court-ordered permanent alimony, (i) the parties to the agreement may marry and then move to a state that has more traditional spousal support statutes or (ii) the Legislature may in the future adopt a more traditional spousal support statute. Accordingly, it is likely that the Legislature retained Section 4.003(a)(4) anticipating that the parties intending to marry in Texas may wish to address those situations in their premarital agreements.

H. Texas Maintenance

In 1997, a limited form of post-divorce spousal support was enacted. See Chapter 8, Court-Ordered Maintenance, Title 1, Subchapter C, of the Texas Family Code. However, the Texas Family Code does not expressly address whether court-ordered maintenance can be waived in a premarital or marital agreement although Sec. 4.003 does refer to the waiver of spousal support in premarital agreements. Since court-ordered maintenance was created as part of a welfare reform package, such a waiver may be against Texas public policy, notwithstanding the language to the contrary in the premarital agreement act.

I. UPAA Comments

The official comment of the uniform act states:

> Paragraph (4) of subsection (a) specifically authorizes the parties to deal with *spousal support* obligations. There is a split in authority among the states as to whether a premarital agreement may control the issue of *spousal support*. Some few states do not permit a premarital agreement to control this issue (see, e.g., *In re Marriage of Winegard*, 278 N.W.2d 505 (Iowa 1979); *Fricke v. Fricke*, 42 N.W.2d 500 (Wis. 1950)). However, the better view and growing trend is to permit a premarital agreement to govern this matter if the agreement and the circumstances of its execution satisfy certain standards (see, e.g., *Newman v. Newman*, 653 P.2d 728 (Colo. Sup. Ct. 1982); *Parniawski v. Parniawski*, 359 A.2d 719 (Conn. 1976); *Volid v. Volid*, 286 N.E.2d 42 (Ill. 1972); *Osborne v. Osborne*, 428 N.E.2d 810 (Mass. 1981); *Hudson v. Hudson*, 350 P.2d 596 (Okla. 1960); *Unander v. Unander*, 506 P.2d 719 (Ore. 1973)).

All of the cases mentioned in this official comment involve post-divorce alimony, maintenance or support. It seems obvious that the relevant section of the uniform act was not intended to address the spouses' mutual duty of support or third party rights under the necessaries doctrine.

J. Other States' Laws

Surprisingly, there is very little authority in other jurisdictions addressing whether a "waiver of support" can eliminate the necessaries doctrine. Most of the cases that have discussed the waiver of spousal support were references to it in the context of post-divorce alimony and not in terms of the spouses' *duty of support* during marriage. In *Rathjen v. Rathjen*, No. 05-93-00846-CV, 1995 Tex. App. LEXIS 3759 (Tex. App.—Dallas May 30, 1995, no pet.), the Texas court, applying the law of Hawaii, refers to the Hawaiian Supreme Court decision of *Lewis v. Lewis/Reese v. Reese*, 60 Haw. 497, 748 P.2d 1362 (1988) and noted that other states have held that a premarital agreement is unenforceable if its application would result in public assistance. This rationale is sound public policy that should be followed absent clear statutory authority to the contrary.

K. UPAA – Texas Version

When the Legislature adopted the Uniform Premarital Agreement Act, deleted from the uniform act's "enforceability" provisions language stating that, even if the agreement eliminated or modified the *spousal support*, and if such a provision causes a spouse to be eligible for public assistance, a court, upon divorce, could still require the other spouse to provide support to the extent necessary to avoid that eligibility. In a comment, the author suggests that this change in the Texas statute suggests that a Texas court cannot change the terms of a premarital agreement just because it results in a souse's eligibility for public assistance. Amberlyn Curry, *The Uniform Premarital Agreement Act and Its Variations Throughout the State*, 23 J. Am. Acad. Matrimonial Law, 335 (2010). The more likely reason for the deletion was Texas' prohibition of post-divorce court-ordered permanent alimony.