

**THE *TEDDER* CASE AND ITS IMPACT ON THE
POST-DEATH ADMINISTRATION OF THE
DECEASED SPOUSE'S ESTATE**

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divorced husband and wife were still jointly and severally liable for the fees.

I. THE COMMUNITY DEBT MISNOMER

All too often, courts, lawyers and commentators have referred to the term “community debt.” However, the Texas Family Code’s marital liability rules do not support the notion of a “community debt” as a significant legal concept. 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 is confusing and misleading and should be avoided.

A. *Gardner Aldrich, LLP v. Tedder*

Statements in *Gardner Aldrich, LLP v. Tedder*, 2011 WL 3546589 (Tex. App.—Fort Worth, August 1, 2011), similar to language found in many other Texas cases involving marital property liability, illustrate the problem. In *Gardner Aldrich*, plaintiff, a law firm, intervened during a divorce proceeding, 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

B. The Real Issue

Specific authority for the end result existed. A spouse is personally liable for the “necessaries” of the other spouse. Tex. Fam. Code §§ 2:501, 3:201(a)(2). Case law suggested 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). Further, 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. Finally, the subsequent divorce of the parties has been assumed not to 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).

Note: 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 *Gardner Aldrich*, the Court of Appeals 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 criticized the Court’s reliance on the “community debt theory.” Petition for Review, p. 6. Surprisingly, the Respondent did not 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 argued that the Court’s reliance on the “community debt theory” was erroneous and called on the Texas Supreme Court to correct it. Petitioner’s Response Brief, p. 7. This author agreed; it was time for Texas courts to consistently follow the legislative mandate found in the Texas Family Code addressing marital property liabilities.

D. *Tedder v. Garner Aldrich, LLP*

Finally, the Texas Supreme Court has expressly addressed the issue. In *Tedder v. Garner Adrich, LLP*, 421 S.W.3d 651 (Tex. 2013), Justice Hecht explained:

It is high time that the community debt argument be put to rest. The phrase “community debt” has long been useful in characterizing borrowed money or property that a spouse buys on credit. If the lender or seller does not specifically look to the

borrower’s or buyer’s separate property for payment, it is clear that a community debt has been incurred, and thus that the money borrowed or property bought is community property. But to take the phrase out of this context, as well as to say that the designation of such a debt as “community” makes both spouses liable for it (when only one of them has contracted it), is clearly contrary to the express terms of section 5.61 [of the Family Code, currently Section 3.202]. Under Texas law as amended and recodified in 1969, a community debt means nothing more than that some community property is liable for its satisfaction.

Justice Hecht also explained that:

Much of the judicial discussion of “community debt” is based on the erroneous supposition that all “community debts” are equally shared by the spouses whether they are both makers of the debt or not. That supposition is not warranted by the basic principles of Texas law. Apart from the context of acquiring necessaries, debt incurred by only one spouse does not affect the other spouse at all except that it makes the nonobligated spouse’s share of community property liable for payment if the property

sought for payment is subject to the sole or joint management of the spouse who incurs the debt.

The bottom line is that marriage, in and to itself, does not create joint and several liability. One spouse's liability for debts incurred by or for the other is determined by the relevant statutes.

Note: The Texas Legislature quickly responded to *Tedder's* holding that the wife's legal fees were not "necessaries." See *Tex. Fam. Code* § 6.708(c). But, the Court's explanation of "community debt" still stands.

E. *Arnold v. Leonard*

Justice Hecht was correct. 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."

F. 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 III, *infra*.

G. 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 over the years demonstrated that some courts “just didn’t get it.” The Texas Legislature prescribed a logical liability system that some courts continued 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.

Note: 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.

H. Summary

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.). 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? Or 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.

II. 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.”

Note: In this outline, the terms “special community property” and “sole management community property” are used to refer to the same community assets.

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. Est. Code, Chap. 751.

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. 1353.002 of the Texas Estates Code for authority to manage the entire community estate without a guardianship. A guardianship may be needed for the incapacitated spouse's separate property.

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

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 and is liable for that spouse's debts and the tort debts of the other spouse incurred during the marriage, but is 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. Est. Code § 113.102.

C. 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, E, *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 III(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. 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.

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 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.

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 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 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.

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 nonexempt marital estate (each spouse's separate property and their community property) is liable.

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

IV. CREDITORS' RIGHTS DURING THE MARRIAGE

If both spouses have personal liability, the entire nonexempt 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 nonexempt marital estate is at risk if the debt is the debt of both spouses because (i) they both signed the contract; or (ii) they both committed the tort. In addition, both spouses may have personal liability for the debt incurred by one spouse 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 necessities for the support of one spouse (or a child under 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 III, A, *supra*), the nonexempt separate property of the spouse who committed the tort and the entire nonexempt community estate (their joint community property, his special community property and her special community) are at risk. 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 not subject to execution.

C. Contract Debt of One Spouse

If the debt is, in fact, a contract debt by only one spouse and the other spouse does not have personal liability under III, A, *supra*, the nonexempt separate property of

the spouse who incurred the debt and the nonexempt 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.

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 II, C, and III, 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.

E. Equitable Principles

A court is, however, directed to determine, as deemed just and equitable, the order in which particular assets are subject to execution. Tex. Fam. Code § 3.203.

V. 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 ends. The surviving spouse does not even have the legal duty to bury the deceased spouse. It's the obligation of the deceased spouse's estate. See Tex. Est. Code § 355.110.

Note: Tex. Est. Code § 101.051 states that the deceased spouse's estate (the decedent's separate property and one-half of the community property) vests in the deceased spouse's heirs and/or devisees subject to the deceased spouse's debts. In an intestate situation, Tex. Est. Code § 201.003(c), like its predecessor in the Texas Probate Code, Section 45, states that the community estate passes charged with the debts against the community estate. That language was included in Section 45 prior to the Matrimonial Property Act of 1967. Section 45 was never amended to reflect the changes brought about by that Act or the Texas Family Code. Section 156 of the Texas Probate Code, now Section 101.052, was amended to reflect the 1967 Act and the Texas Family Code changes and addresses the debts of the spouses after the first spouse's death. See also VI, *infra*. See VII, *infra*, for a discussion of the surviving spouse's debts.

A. Marital Liabilities

So, 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 recently confirmed that one spouse's liability for the debts incurred by the other spouse is determined by statute. *See Tedder, supra*. The Texas Supreme Court had earlier 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. 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 three of the multiple-party bank accounts discussed in 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.

2. Inter Vivos Gifts

In other nonprobate dispositions addressed by Section 111.052, 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.

Note: 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, possibly making the surviving spouse a creditor of the estate.

3. 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 interest in 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 101.001

A decedent'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 undivided one-half interest in the community property are

generally liable for the payment of the debts of the deceased spouse. Tex. Est. Code §§ 101.001, 101.051. 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).

E. Deceased Spouse's Debts

Section 101.052 of the Texas Estates Code specifically states that the one-hundred percent (100%) of the community property subject either to the sole management of the deceased spouse or to the 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 management of the surviving spouse passes to the deceased spouse's successors charged with the *deceased spouse's debts*. Tex. Est. Code § 101.052. **It is significant that Section 101.052 does not expressly refer to the surviving spouse's debts; Section 101.052(a) does refer to "a spouse's liabilities."** 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 subject to administration. While death may work a legal partition of the community probate

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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 discharge the "community obligations," "community debts." See Tex. Est. Prob. Code §§ 453.003, 453.006. That term traces its roots to the Texas Probate Code that was in effect prior to 1969. See I, supra.

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 § 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 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. Est. Code §§ 201.101, 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. The rules relating to "representation" were modified to be effective September 1, 1991. These changes are now incorporated in Tex. Est. Code § 201.001.

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 §§ 201.001, 201.002.

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. 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).

Note: 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. 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 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. Est. Code §§ 353.051, 353.052 and 353.053.

2. 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 and 353.155. 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. Est. Code § 353.152. There is also an allowance in lieu of exempt personal property. Tex. Est. Code § 353.053.

3. 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. 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; *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. 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

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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, 453.007, 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. Now, Section 453.003 simply directs the surviving spouse to "preserve the community property, discharge community obligations and wind up community affairs." But those terms trace their origins to the Texas Probate Code prior to 1967. *See I, supra.*

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 the decedent's 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 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.

B. Authority of Representative

The authority of the personal representative over the survivor's one-half of the community subject to administration 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 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 453.009'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. Contract Debts

However, if the decedent's separate property and the community assets subject to administration by 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 special community property can be reached to satisfy those creditors. *One hundred percent of the other spouse's sole management community assets had been generally exempt from the claims of the deceased spouse's nontortious creditors during the marriage (as well as any premarital 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 indicates that the joint community property, the decedent's special community property and only the decedent's one-half interest in the surviving spouse's special community continue to be liable for any tort debts of the deceased spouse. *In other words, the statute suggests 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.

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

Note: The predecessors to Sections 453.003, 453.006 and 453.007 – Sections 156, 160 and 168 of the Texas Probate Code – referred to "community debts" and "community obligations" and relate to 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 I, supra.

E. 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 issues related to 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, there is a growing body of statutory rules and common law which negates the application of that myth. See Tex. Est. Code § 111.053.

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.

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 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 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, relying on Tex. Fam. Code § 3.203, 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. 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 undivided one-half interests in each and every community probate asset. Tex. Est. Code § 101.001.

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 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! *See* VI, C, *supra*. 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 I(B), *supra*.

A. Secured Debts

Section 101.052(a) of the Texas Estates Code suggests that a contract 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 sole management community property), while not a creditor of the deceased spouse (and would appear, therefore, not to be subject to the secured creditor rules of Tex. Est. Code §§ 355.151-355.160), maintains its security interest in 100% of the surviving spouse's sole management community. Section 101.052(a) also indicates that 100% of surviving spouse's other nonexempt sole management community property continues to be subject to the surviving spouse's debts. It also indicates that 100% of any nonexempt joint community property is still liable for the surviving spouse's debts even if it is subject to administration in the deceased spouse's estate.

B. Practical Application

Because the deceased spouse did not have any personal liability for the surviving spouse's debts, the surviving spouse's creditors should perhaps not be considered creditors of the deceased spouse, even though the deceased spouse's one-half interest in the joint community property is subject to execution and sale to satisfy the surviving spouse's debt. The equitable principles of Tex. Fam. Code §3.203 suggest that the surviving spouse's separate property or sole management community property is what is initially subject to execution and sale to satisfy the surviving spouse's debt; and only if those assets are not sufficient to satisfy the debt should all or any part of any other community property be subject to execution and sale. However, the deceased spouse's one-half interest in the deceased spouse's sole management community property would appear not to be liable because the deceased spouse did not have personal liability. Of course, the surviving spouse's interest in any nonexempt community property is liable for such spouse's debts. Tex. Est. Code §101.052(a).

Note: Presumably, if the spouse's creditor has a security interest in the joint community property or the deceased spouse's sole management community, the deceased spouse also has personal liability.

C. Unsecured Debt

If the creditor is an unsecured contractual 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 nonexempt community property (plus whatever the surviving spouse inherited) obviously remain liable for the debt. However, the

statutory framework suggests that the decedent's separate property and one-half interest in the deceased spouse's sole management community property are 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. Section 101.052(a) indicates that all of the joint community property and all of the surviving spouse sole management community property (including the deceased spouse one-half interest) may be reached by the surviving spouse's creditor as described in VII, A and B, *supra*.

D. Tort Debt

Prior to the deceased spouse's death, the entire nonexempt community estate was subject to either spouse's tort debt. Tex. Fam. Code § 3.202 (d) If the debt was the tort liability of only the surviving spouse, Section 101.052(a) suggests that the surviving spouse's separate property and 100% of (i) the surviving spouse sole management community and (ii) the joint community property would be subject to execution and sale. Of course, while the surviving spouse's one-half interest in the deceased spouse's sole management community is reachable by the tort creditor, the deceased spouse's one-half interest in the deceased spouse's sole management community should not be liable for the surviving spouse's tort debt. See Tex. Est. Code § 101.052. Again, the equitable principles of Tex. Fam. Code § 3.203 should determine the order in which assets are used to satisfy the debt.

E. The Rationale

Consistent with Professor Paulsen's approach (*see* Note I(B), *supra*), the essential argument is that the Texas Family Code's liability rules apply during the

marriage. Once the marriage terminates by reason of the first spouse's death, the statutory rules change as reference is also made to the Texas Estates Code. 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. Tex. Fam. Code § 3.202. Tex. Est. Code § 101.052.

Sometimes the change works against the creditor. Under Section 101.052, the surviving spouse's one-half interest in the surviving spouse's former special community is not liable for the decedent's tort debts. During marriage, all of the community was liable for either spouse's tortious debts. Tex. Fam. Code § 3.202.

However, the Legislature's failure to expressly address the debts of the surviving spouse implies that the creditors of the surviving spouse may not have claims against the deceased spouse's estate. Such creditors were not creditors of the deceased spouse. Accordingly, under this interpretation, 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, except as provided in Section 101.052, and the author is offering an interpretation of that section in VII, A, B, C and D, *supra*.

Caution: A quick review of Tex. Est. Code §101.052 (a) and the first sentence of its predecessor, Tex. Prob. Code § 156, might suggest that the respective terms "liabilities of that spouse on death" and "liabilities of that spouse upon death" refer only to the debts of the deceased spouse. If that is the proper interpretation, Section 101.052 might be construed to exempt from any debt of the surviving spouse the deceased spouse's one-half interest in all nonexempt community

property. The author, however, has concluded that Section 101.052(a) should apply regardless of which spouse dies first. Section 156 of the Texas Probate Code was last amended in 1972 to reflect the changes to marital property management and liability rules by the Matrimonial Property Act of 1967. Its successor, Section 101.052, needs to be interpreted in light of the *Tedder* case.

VIII. 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 nonexempt 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 disabled 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 necessities 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.

Note: 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. The Separate Property Exemption

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. Vicarious Liability

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 necessities. 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 necessities 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. UPAAs 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 necessities doctrine.

J. Other States' Laws

Surprisingly, there is very little authority in other jurisdictions addressing whether a "waiver of support" can eliminate the necessities 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 spouse'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.

IX. OBSERVATIONS

Using the rationale of the *Tedder* case, following the death of the first spouse, the proper handling of debts by the personal representative of the deceased spouse's estate should begin with the answers to the following questions:

A. Whose debt was it?

The deceased spouse's? The surviving spouse's? Or both spouses'?

B. Is the debt secured?

Yes or no? If yes, is the property securing the debt subject to administration?

C. If deceased spouse's debt?

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?

D. If Surviving Spouse's Debt?

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 when the debt was incurred?

E. A Debt for "Necessity"?

If the debt was for a necessity of the marriage 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.

F. Vicarious Liability?

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.

G. "Equitable Principles in the Solvent/Taxable Estate"

1. Decedent's Tort Debt

If the debt was the tort debt of the deceased spouse (i.e., the surviving spouse has no liability), shouldn't the debt be paid out of what was the decedent's separate property and one-half of the decedent's sole management community or joint community property, if sufficient?

Note: If so, since the debt is payable out of property included in the decedent's gross estate, 100% of the debt should be deductible for estate tax purposes.

2. Decedent's Contract Debt

If the debt was the decedent's contract debt and incurring the debt did not benefit the community estate (and the surviving spouse has no

liability), shouldn't the debt be paid out of the decedent's separate property, or the decedent's one-half of what was the decedent's sole management community, or the joint community property.

Note: If so, since the debt is payable out of property included in the decedent's gross estate, 100% of the debt should be deductible for estate tax purposes.

3. Decedent's Debt Benefitting the Community.

If the decedent's contract debt benefitted the community estate (e.g., purchase money debt), shouldn't the debt be paid from the decedent's sole management community or the joint community (not just the decedent's one-half interest therein)?

Note: Consequently, only one-half of the debt should be deductible for estate tax purposes.

4. Debt of Both Spouses

If both spouses incurred the debt (i.e., the facts suggest that each spouse is equally responsible), shouldn't half of the debt be paid out of the decedent's estate (decedent's separate property and one-half of the community and one-half out of the surviving spouse's property)?

Note: Consequently, only one-half should be deductible for estate tax purposes.

5. Surviving Spouse's Debt

If the debt is the debt of the surviving spouse (i.e., the decedent was not personally liable), shouldn't it be paid out of the spouse's separate property or one-half of the community property.

Note: If payable only out of the surviving spouse's property, it is not deductible for estate tax purposes.

Note: But, if the spouse incurred the debt to benefit the community estate? In that event, shouldn't it be paid as described in IX, G, 4, supra?

X. REALITY CHECK

In many situations a couple's entire community estate is likely to be subject to their joint management and control under Tex. Fam. Code § 3.102(b) and (c), even if a particular community asset is held in one spouse's name or both of their names. See III B, 3, *supra*. In other situations, both spouses are likely to be jointly and severally liable for all of the debts outstanding at the first spouse's death. See III B, 4, *supra*.

In either situation, the entire nonexempt community estate is still subject to execution and sale following the first spouse's death. Tex. Est. Code § 101.052(a). Still, it seems Tex. Fam. Code § 3.703 is relevant, and equitable principles should dictate the actual order in which assets, community or separate, are subject to execution and sale to satisfy any particular debt.

RELEVANT STATUTORY PROVISIONS

I. TEXAS ESTATES CODE

Sec. 101.001. PASSAGE OF ESTATE ON DECEDENT'S DEATH.

(a) Subject to Section 101.051, if a person dies leaving a lawful will:

(1) All of the person's estate (*i.e., a deceased spouse's separate property and undivided one-half interest in any community property*) that is devised by the will vests immediately in the devisees;

(2) All powers of appointment granted in the will vest immediately in the donees of those powers; and

(3) All of the person's estate (*i.e., a deceased spouse's separate property and undivided one-half interest in any community property*) that is not devised by the will vests immediately in the person's heirs at law.

(b) Subject to Section 101.051, the estate of a person (*i.e., a deceased spouse's separate property and undivided one-half interest in any community property*) who dies intestate vests immediately in the person's heirs at law.

Sec. 101.051. LIABILITY OF ESTATE FOR DEBTS IN GENERAL.

(a) A decedent's estate (*i.e., a deceased spouse's separate property and undivided one-half interest in any community property*) vests in accordance with Section 101.001(a) subject to the payment of:

(1) The debts of the decedent, except as exempted by law; and

(2) Any court-ordered child support payments that are delinquent on the date of the decedent's death.

(b) A decedent's estate (*i.e., a deceased spouse's separate property and undivided one-half interest in any community property*) vests in accordance with Section 101.001(b) subject to the payment of, and is still liable for:

(1) The debts of the decedent, except as exempted by law; and

(2) Any court-ordered child support payments that are delinquent on the date of the decedent's death.

Sec. 101.052. LIABILITY OF COMMUNITY PROPERTY FOR DEBTS OF DECEASED SPOUSE.

(a) 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* on death. (*But, whose death? That spouse? Either spouse? See VII, supra.*)

(b) The interest that the deceased spouse owned in any other nonexempt community property passes (*i.e., the surviving spouse's sole management community*) to the deceased spouse's heirs or devisees charged with the debts that were enforceable against the deceased spouse before death.

(c) This section does not prohibit the administration of community property under other provisions of this title relating to the administration of an estate. (*See Sec. 101.053 and Sec. 453.009.*)

Sec. 101.003. POSSESSION OF ESTATE BY PERSONAL REPRESENTATIVE.

On the issuance of letters testamentary or of administration on an estate described by Section 101.001, the executor or administrator has the right to possession of the estate as the estate (*i.e., the probate estate*) existed at the death of the testator or intestate, subject to the exceptions provided by Section 101.051. The executor or administrator shall recover possession of the estate (*i.e., the probate estate*) and hold the estate in trust to be disposed of in accordance with the law (*including Sec. 453.009*).

Sec. 453.009. DISTRIBUTION OF POWERS BETWEEN PERSONAL REPRESENTATIVE AND SURVIVING SPOUSE.

(a) A qualified personal representative of a deceased spouse's estate may administer:

- (1) The separate property of the deceased spouse;
- (2) The community property that was by law under the management of the deceased spouse during the marriage (*See T.F.C. § 3.102(a)*); and
- (3) The community property that was by law under the joint control of the spouses during the marriage (*See T.F.C. § 3.102(a)*).

(b) The surviving spouse, as surviving partner of the marital partnership, is entitled to:

- (1) Retain possession and control of the community property that was legally under the sole management of the surviving spouse during the marriage (*See T.F.C. § 3.102(a)*); and

(2) Exercise over that property any power this chapter authorizes the surviving spouse to exercise if there is no administration pending on the deceased spouse's estate (*See Sec. 453.003*).

(a) The surviving spouse, by written instrument filed with the clerk, may waive any right to exercise powers as community survivor. If the surviving spouse files a waiver under this subsection, the deceased spouse's personal representative may administer the entire community estate.

II. TEXAS FAMILY CODE

Sec. 3.101. MANAGING SEPARATE PROPERTY

Each spouse has the sole management, control, and disposition of that spouse's separate property.

Sec. 3.102. MANAGING COMMUNITY PROPERTY

(a) During marriage, each spouse has the sole management, control, and disposition of the community property that the spouse would have owned if single, including:

- (1) Personal earnings;
- (2) Revenue from separate property;
- (3) Recoveries for personal injuries; and

(4) The increase and mutations of, and the revenue from, all property subject to the spouse's sole management, control, and disposition.

(b) If community property subject to the sole management, control, and disposition of one spouse is mixed or combined with community property subject to the sole management, control, and disposition of the other spouse, then the mixed or combined community property is subject to the joint management, control, and disposition of the spouses, unless the spouses provide otherwise by power of attorney in writing or other agreement.

(c) Except as provided by Subsection (a), community property is subject to the joint management, control, and disposition of the spouses unless the spouses provide otherwise by power of attorney in writing or other agreement.