ALTERNATIVES TO FORMAL ADMINISTRATION

[Does Not Reflect 1993? Legislative Changes!]

Noel C. Ice

Cantey & Hanger, L.L.P.
2100 Burnett Plaza
801 Cherry Street
Fort Worth, Texas 76102-6898
(817) 877-2800 (Main no.)
(817) 877-2885 (Ice)
(817) 877-2807 (FAX)

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ALTERNATIVES TO FORMAL ADMINISTRATION

[Does Not Reflect 1993 Legislative Changes!]

By Noel C. Ice

I. ALTERNATIVE FORMS OF ESTATE ADMINISTRATION AND PROCEDURES IN LIEU OF PROBATE--TESTAMENTARY ASSETS.

The most common means of settling a decedent's estate is to open an independent administration, if one is authorized under the will. If there is no will, it may be that a regular dependent administration is available. The outline serves primarily as an overview of the various statutory alternatives to the regular dependent or independent administration. Non-statutory alternatives, of which there are many, are covered in Article II. Independent and dependent administrations are covered in this outline, but not in detail. Brief treatment is necessary to describe when an independent or dependent administration may or may not be recommended or available, since this may have a bearing on the desirability or necessity of employing one of the alternate procedures.

There are a number of articles that have treated certain forms of administration *in depth*, and these will be cited where appropriate. Two classic works in the area are Woodward and Smith, Probate and Decedent's Estates, Vols. 17 and 18 TEXAS PRACTICE (1971), and Texas Estate Administration, published by the State Bar of Texas as part of the Professional Development Program, in 1975.

Few states could possibly offer as wide ranging a choice for settling decedent's estates as does Texas. After reviewing the alternatives listed below, one might be tempted to consider whether or not Texas has overdone it. Certainly we have a right to be proud of the independent administration and the muniment of title procedure, but, as we shall see, Texas has much more to choose from. Indeed, there are a plethora of alternatives to the regular dependent administration of a decedent's estate, as the following itemization suggests.

A. OVERVIEW OF ALTERNATIVE MEANS OF SETTLING A DECEDENT'S ESTATE.

In Texas, there are many procedures available for settling a decedent's estate. Among the various choices will be found the following, at least:

1. DEPENDENT ADMINISTRATION.

a. Dependent Intestate Administration. Tex. Prob. Code §82.

b. Dependent Testate Administration. Tex. Prob. Code §81.

2. INDEPENDENT ADMINISTRATION.

a. Independent Administration Established By Will. Tex. Prob. Code §145-154.

b. Court Appointed Independent Administration. Tex. Prob. Code §145(c)-(q).

c. Court Appointed Successor Independent Administration. Tex. Prob. Code §154A.

3. COMMUNITY PROPERTY ADMINISTRATION.

a. Dealing With Community Property Without The Necessity Of Administration. Tex. Prob. Code §155.

b. Nonqualified Community Administration. Tex. Prob. Code §160.

c. Qualified Community Administration. Tex. Prob. Code §§161-177.

d. Partition Of Community Property. Tex. Prob. Code §385.

4. SPECIAL STATUTORY PROCEDURES NOT INVOLVING ADMINISTRATION.

a. Probate Of Will as Muniment Of Title. Tex. Prob. Code §89.

b. Order Of No Necessity Of Administration. Tex. Prob. Code §180.

5. STATUTORY SMALL ESTATE PROCEEDINGS.

a. Collection Of Small Estate By Affidavit. Tex. Prob. Code §§137-138.

b. Order Of No Administration. Tex. Prob. Code §§139-142.

c. Summary Proceedings For Small Estates After Personal Representative Appointed. Tex. Prob. Code §143.

6. HEIRSHIP PROCEEDINGS.

a. Affidavit Of Heirship. Tex. Rev. Civ. Stat. arts. 6626, 3726 & 3726a.

b. Proceedings To Declare Heirship. Tex. Prob. Code §§48-56.

7. MISCELLANEOUS ALTERNATIVES TO FULL ADMINISTRATION.

a. Payment Of Debts And Funeral Expenses By Guardian Of Deceased Ward. Tex. Prob. Code §404A.

b. Temporary Administration. Tex. Prob. Code §§131-135.

c. Informal Family Settlements And Disclaimers.

d. Lifetime Arrangements To Avoid Probate.

(1) Inter-Vivos Trusts.

(2) Joint Tenancy With Right Of Survivorship.

(3) Survivorship Bank Accounts. Tex. Prob. Code Ch. 11 §§250-256.

(4) Survivorship Bank Accounts. Tex. Prob. Code Ch. 11 §§250-256.

(5) Life Insurance.

e. Preventing Administration By Creditors. Tex. Prob. Code §80.

8. PROCEDURES PERTAINING TO FOREIGN WILLS.

a. Summary Probate Of Foreign Will Probated In Domiciliary Jurisdiction. Tex. Prob. Code §95(b)(1) & (d)(1).

b. Summary Probate Of Foreign Will Probated In Non-Domiciliary Jurisdiction. Tex. Prob. Code §95(b)(2) & (d)(2).

c. Filing Foreign Will As A Muniment Of Title. Tex. Prob. Code §96-99.

d. Original Probate of Foreign Will In Texas. Tex. Prob. Code §103.

9. WITHDRAWING ESTATES FROM ADMINISTRATION.

a. Withdrawing Estates From Further Administration Under Tex. Prob. Code §§262-269.

b. Application For Partition And Distribution. Tex. Prob. Code §373.

10. ORDER STATING THAT AGREEMENT IS EFFECTIVE TO CREATE A RIGHT OF SURVIVORSHIP IN COMMUNITY PROPERTY. Tex. Prob. Code §456-459.

B. FRAMEWORK FOR ANALYZING APPROPRIATENESS OF MEANS CHOSEN FOR SETTLING A DECEDENT'S ESTATE.

1. WHAT IS SOUGHT TO BE ACCOMPLISHED?

The primary objective in settling a decedent's estate is to pay all of the decedent's legally enforceable debts that are chargeable against the decedent's property, and to get what remains of the decedent's property into the hands of the proper owners, in such a way that the owners can deal with and transfer the property freely.

The paramount issue in this area is whether or not the decedent died with a valid will in effect. This may be difficult to determine. Note that Probate Code §75 provides that "Upon receiving notice of the death of a testator, the person having custody of the testator's will shall deliver it to the clerk of the court which has jurisdiction of the estate." A person refusing to make such delivery shall be liable for damages sustained as a result of such refusal.[1]

[1] Prob. Code §75, last sentence.

2. <u>WHO ARE THE OWNERS OF THE DECEDENT'S PROPERTY-PROTECTING BANKS, TRANSFER AGENTS AND OTHER THIRD PARTIES HAVING POSSESSION OF THE DECEDENT'S PROPERTY</u>.

When a decedent dies, there will frequently be third parties who have custody over certain items of the decedent's property. These persons may be called upon to transfer custody of the property to the lawful owners of the property, the decedent's successors in interest. A transfer agent may likewise be called upon to register the transfer of the title to property from the decedent to his successors in interest. A bank account in the decedent's name may need to be transferred to the proper owner, following the prior owner's death. In such case it will become incumbent upon the third party to determine who the successors in interest to the decedent are, because if the property is transferred or if the title is registered to the wrong party, the transfer agent, bank or custodian may be liable to the true owner.

Perhaps determining who are the owners of the decedent's property at her death is the ultimate issue in the settlement of a decedent's estate. If the decedent died intestate, it means that the heirs must be ascertained. If the decedent died with a valid will, **and that will is admitted to probate,** then the owners will be the persons described in the decedent's will.

The problem that is always paramount where a decedent is thought to have died intestate, is that although the decedent's heirs at law may be vested with title at the moment of the decedent's death, if a will is subsequently admitted to probate, the title in the heirs at law will retroactively cease to exist. If a third party transferred the decedent's property to the heirs at law, and a will is subsequently probated, the third party may have given the decedent's property to someone to whom it did not belong.

Even if a will exists, it must be admitted to probate to be valid, and even then, the takers may be described by class, and thus, the members of the class must be determined. For example, if the decedent's property is to pass to the decedent's "children," someone will have to determine who these people are. More difficulty is certain to be encountered if it is necessary to determine more remote descendants, or worse yet, collaterals. The will may not adequately identify these people; indeed, specific identification may not be possible at the time the will is executed since the members of the class will change over time.

Persons in possession of the decedent's property, banks and transfer agents, will want to be able to assure themselves that the persons receiving the property are entitled thereto, **in order to protect themselves from claims by the true owners.** These parties need not necessarily insist upon a full blown administration in order to be protected from liability. Some of the alternative procedures described below address this problem very well, and others do not.[2]

3. WHO ARE THE OWNERS OF THE DECEDENT'S PROPERTY- UNDER WHAT CIRCUMSTANCES CAN PURCHASERS OF THE DECEDENT'S PROPERTY BE ASSURED OF RECEIVING GOOD TITLE?

Under what circumstances can persons in possession of the decedent's property pass good title to a third party, and how can the third party transferee be assured that the appropriate circumstances exist.

Note (as hereafter discussed in greater detail) that if the decedent's property is subject to the claims of third party creditors, even the true owners may not be able to give indefeasible title.

A buyer of property needs to be assured of *bona fide* purchaser status. If the buyer purchases property from one who did not own it, the buyer's right to retain the property or its proceeds may be in jeopardy. A purchaser from an heir at law may have paid the wrong person the consideration if a will naming a different beneficiary is later probated.

As was the situation in the case of persons transferring property **to** the persons thought to be the decedent's beneficiaries, persons purchasing property **from** such persons need not necessarily insist upon a full blown administration in order to be protected from liability. Some of the alternative procedures described below will give the third party purchaser protection, and others do not.

4. ASSUMING THE OWNERS ARE ESTABLISHED, IS THE DECEDENT'S PROPERTY SUBJECT TO A STATUTORY LIEN FOR UNSECURED DEBTS?

A person vested with property under the terms of a probated will or by virtue of the laws of intestacy, generally takes the property "subject . . . to the payment of the debts of the testator or intestate".[3] This is an important point to remember.

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[2] Query, for example: Does a muniment of title proceeding really offer complete protection to the transfer agent who does not know the family?

[3] Tex. Prob. Code §37.

5. ADVANTAGES OF AN ADMINISTRATION CONTRASTED WITH AN ALTERNATIVE PROCEEDING, FROM THE PERSPECTIVE OF THE TRANSFEREE OR TRANSFEROR.

In many cases the third party purchaser or transferor will insist upon an administration in order to come within the protection that an administration gives to third parties dealing with the executor or administrator. As is always the case, if reliance is to be placed upon the existence of a will, that will must be probated in order to be of any effect whatsoever.[4] (Of course, as will be further discussed below, one need not open an administration in order to probate a will.)

a. Administration.

If an administration has been opened, most persons will have a fair measure of protection in dealings with the executor:

(1) the buyer (the transferee for value) who purchases property from the estate will generally be protected, on both fronts, provided that the provisions of Probate Code §331 et. seq. (if applicable) are complied with; the seller has authority to sell and the property sold will be free of the decedent's debts,[5]

(2) presumably, persons having custody or possession or the decedent's property (the transferors) will be protected if they transfer the decedent's property to the executor or administrator of the estate duly appointed by a court order, or to the heirs or devisees following a judgment declaring heirship[6], and

(3) transfer and recording agents will be protected if they record a transfer authorized by a court order.[7]

b. No Administration.

If an administration has not been opened, then it depends:

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[4]Tex. Prob. Code §94.

[5]In the case of real estate, Tex. Prob. Code §356 may offer specific protection. See also *Daimwood v. Driscoll*, 151 S.W. 621 (Tex. Civ. App.- , 1912, writ ref'd).

[6]Prob. Code §55.

[7]*Cf.,* Prob. Code §55.

(1) the buyer purchasing property from the heirs (the transferee for value) will not necessarily be protected if the consideration is not paid to the persons ultimately determined to be the rightful owners,

(2) the buyer purchasing property from the heirs may be taking the proper subject to the statutory lien for the decedent's debts,

(3) persons having custody or possession or the decedent's property (the transferors) will not necessarily be protected if they transfer the decedent's property to persons ultimately determined not to be the rightful owners, and

(4) transfer and recording agents will not necessarily be protected if they record the transfer in favor of a person ultimately determined not to be the rightful owner.

c. Summary.

If one of the various alternatives to administration is employed, the purchaser, transfer agent or third party transferor must make some difficult determinations. **If the buyer, transferor or transfer agent, is uncertain as to the possible existence of a will, or of who are the heirs, such person must determine whether or not the law confers upon him the status of a bona fide purchaser for value or otherwise protects him.** In making a determination as to the procedure most appropriate to the situation, a primary consideration will be the nature and extent of the decedent's debts.

A purchaser may want to ask, has enough time passed so that, even if a creditor or a will turns up, the statute of limitations will bar a subsequent claim against the property?

These sundry concerns will likely affect the choice of an appropriate format for settling the decedent's affairs. The various probate procedures and alternatives address these concerns in various ways and to various extents. One procedure may address the question of the statutory lien for debts, another may address the issue of who are the decedent's heirs. Most alternatives to full administration are insufficient to address all of the issues, but may be sufficient to address the concerns that are relevant in any given case. Further, by making use of more than one alternative in conjunction with one another, more than one concern may be addressed effectively.

6. <u>POSSIBLE QUESTIONS TO BE ASKED BY THIRD PARTIES DEALING WITH THE DECEDENT'S PROPERTY</u>.

Possible questions to be asked by a third party purchaser, transferor, or transfer are

a. Is the Person Who Is Dealing With the Property Vested With the Statutory Authority to Pass Good Title (Executor, Administrator, Community Survivor)?

b. Does the Property Pass Under a Will or by Intestacy?

c. Is the Property Subject to the Decedent's Debts, and If So What Is the Extent of the Debts?

d. Who Are The People Who Make Up The Class of Takers Described Under the Will or By the Laws of Intestacy?

e. Are The Persons Claiming The Property Entitled Thereto Under All Circumstances, Such That If, For Example, A Subsequent Will Is Admitted To Probate, The Transferor Or Transfer Agent Will Be Protected From The Claims Of Those Subsequently Found To Be The True Owners?

C. <u>DEPENDENT ADMINISTRATION</u>.

1. <u>SUPERVISION OF PROBATE COURT</u>.

Of the various alternatives available for settling a decedent's estate, probably the most burdensome is the court supervised dependent administration. There is very little that the decedent's personal representative can undertake without the express approval of the court.[8]

2. <u>NECESSITY OF BOND AND ANNUAL AND FINAL ACCOUNTS</u>.

The personal representative must **post a bond**, Tex. Prob. Code **§194**, and **file detailed accountings** to be acted on by the court, Tex. Prob. Code **§§399-414**.

3. <u>CREDITORS CLAIMS</u>.

a. <u>Creditor's Claims As A Reason For Using The Court Supervised Dependent Administration</u>.

When would one choose this form of administration, given the expense and inconvenience? One instance will be when there are simply no other alternatives, and some form of administration is necessary to pay debts or clear title. Although, as we shall see, there will often be other choices, one being a court appointed independent administration.

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[8] See, for example, Tex. Prob. Code **§§230(a), 233-235, 239, 331-372**.

There may be one case, however, where a dependent administration might positively be preferred, even to the point of eschewing an independent administration that is otherwise available. This would occur when the estate is potentially insolvent, and the heirs want to use the Probate Court to run interference between the estate and its creditors, by forcing (read "daring") the creditors to properly comply with all the claims procedures required in a dependent administration.[9]

b. Nature Of Claims Procedure In A Texas Dependent Administration.

It is almost as if the claims procedures in Texas dependent administrations had been purposely fashioned in order to be obscure and esoteric, in order to insure a high degree of likelihood that the creditor --particularly the secured creditor-- will fail to adequately preserve her claim. For **a striking example** of what can happen to an unwary secured creditor, see *Cessna Finance Corp. v. Morrison*, 667 S.W.2d 580 (Tex. App.--Houston [1st Dist.] 1984, no writ). The creditor, who happened to hold a purchase money lien on a Piper aircraft, filed his claim within the proper time periods, and the claim was not rejected. However, because the creditor had the misfortune of having had his claim secured, and because he failed to affirmatively elect to have his claim treated as a matured secured claim to be paid in the due course of administration, he was, under an obscure precedent, *deemed* to have elected "preferred debt and lien" treatment. Meaning what? Meaning that his **sole recourse** was to his security, which in this case consisted of the wreckage of the airplane that crashed in the South American jungle! Moral: be advised that **claim procedure in a dependent administration is not a routine matter.**

c. Further Reading Regarding Claims Procedure.

For an in depth analysis of claims procedure in a dependent administration, see "Administration Of The Insolvent Estate--From The Creditor's Viewpoint," by C. Boone Schwartzel, "Administration Of The Insolvent Estate--From The Estate's Viewpoint," by Joseph S. Horrigan, both of which are found in the 1983 Advanced Estate Planning And Probate Course, sponsored by the State Bar of Texas, and "Planning For and Administering the Possibly or Potentially Insolvent Estate; Creditors' Rights Against Trust Assets; Creditors' Rights Generally," Southwest Legal Foundation 28th Annual Institute on Wills and Probate, Dallas, May 5, 1989, by Noel C. Ice.

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[9] See Tex. Prob. Code §294-322.

4. NECESSITY FOR ADMINISTRATION.

a. Before Letters Will Be Issued, The Applicant Must Affirmatively Show That There Is A Necessity For Administration.

It is important to note that before letters of administration are to be granted, the applicant must prove that there exists a necessity for an administration upon the estate.[10] However, "Such necessity shall be deemed to exist if two or more debts exist against the estate."[11]

It would appear that this rule does not apply if letters testamentary, rather than letters of administration are requested.[12]

b. Importance Of Rule Requiring Existence Of Necessity For Administration.

The requirement that there be a necessity for administration is important, since one of the alternatives to a full administration is to obtain an order of no necessity of administration, discussed elsewhere below.

5. FURTHER READING.

Woodward and Smith, Probate and Decedents' Estates, 17 & 18 TEXAS PRACTICE (1971), is probably the most complete and authoritative treatise on the subject of all aspects of administration, including dependent administrations. On the subject of the procedure for qualifying a personal representative of the estate, I recommend Allan Howeth's chapter entitled "Appointment and Qualification of Administrators and Executors" found in Texas Estate Administration, published by the State Bar of Texas under the Professional Development Program, in 1975.

D. INDEPENDENT ADMINISTRATION.

1. EASE OF ADMINISTRATION.

Ease of administration is the obvious primary reason for choosing an independent administration. An independent executor has the power to take all actions without a court order that an ordinary administrator could take under a court order.[13]

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[10] Tex. Prob. Code §§88(d) & 178(b).

[11] Tex. Prob. Code §178(b).

[12] *Cooke v. Smith,* 179 S.W.2d 954 (Tex. 1944) & *Boyles v. Gresham,* 263 S.W.2d 935 (Tex. 1954). Compare Prob. Code §88(c) with §88(d) and §178(a) with §178(b).

[13] *Roy v. Whitaker*, 92 Tex. 346, 48 S.W. 396 and 49 S.W. 367 (1899); *Griggs v. Brewster*, 122 Tex. 588, 62 S.W.2d 980 (1933); and *Long v. Long*, 169 S.W.2d 763 (Tex. Civ. App.--San Antonio 1943, writ ref'd).

2. APPLICATION OF THE PROBATE CODE TO INDEPENDENT EXECUTOR.

a. Explicit Provision Required.

When an independent administration has been created and the inventory has been filed and approved, further action of any nature shall not be had in the county court, except where the Probate Code "specifically and explicitly provides."[14]

b. Meaning Of Terms In Probate Code As Applied To Independent Executor.

Although Tex. Prob. Code §3(q) includes an independent executor within the term "representative," such inclusion "shall not be held to subject such representatives to control of the courts in probate matters with respect to settlement of estates except as expressly provided by law."[15] Furthermore, the definitions contained in Tex. Prob. Code §3 have the meaning assigned in that section "unless otherwise apparent from the context."[16] (Admittedly, reasonable minds have sometimes differed over what is "otherwise apparent" in interpreting the Probate Code's application to independent executors.)

An independent executor is entitled by Probate Code §146 to "receive presentation of claims"; nevertheless, the Supreme Court of Texas has held that the statutory procedures for presenting such claims do not apply to independent administrations.[17] Probate Code §146 is worth reading in full:

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[14]Tex. Prob. Code §145(h). *Corpus Christi Bank and Trust v. Alice National Bank,* 444 S.W.2d 632 (Tex. 1969).

[15]Tex. Prob. Code §3(aa).

[16]See *Bunting v. Pearson*, 430 S.W.2d 470 (Tex. 1968).

[17]*Bunting v. Pearson,* 430 S.W.2d 470 (Tex. 1968). See also *Collins v. State,* 506 S.W.2d 293 (Tex. Civ. App.-San Antonio 1973, no writ).

> An independent executor, in his administration of an estate, although free from the control of the court, shall nevertheless, independently of and without application to, or any action in or by the court, receive presentation of and classify, allow, and pay, or reject, claims against the estate in the same order of priority, classification, and proration prescribed in this Code, and set aside and deliver to those entitled thereto exempt property and allowances for support, and in lieu of homestead, as prescribed in this Code, to the same extent and result as if his actions had been accomplished in, and under orders of, the court.[18]

3. **AVAILABILITY OF INDEPENDENT ADMINISTRATION WHERE AUTHORIZED BY WILL.**

a. **The Statute.**

"Any person capable of making a will may provide in his will that no other action shall be had in the county court in relation to the settlement of his estate than the probating and recording of his will, and the return of an inventory, appraisement, and list of claims of his estate."[19]

b. **Typical Language In The Will.**

Tracking the statute, the typical Texas will appointing an independent executor will contain the language similar to the following:

> "I appoint my wife as Independent Executor of my estate, to serve without bond, and I direct that no action shall be had in the County Court in relation to the settlement of my estate other than the probating and recording of this, my will, and the return of the statutory inventory, appraisement and list of claims of my estate."

Here is another popular alternative:

> "I appoint my husband as my independent executor. To the extent permitted by law, no action shall be had in any court exercising probate jurisdiction in relation to the settlement of my estate other than the probating and recording of my will and the return of an inventory, appraisement and list of claims of my estate. No fiduciary shall be required to give bond in any jurisdiction, unless bond is required by law or court rule which cannot be waived, and in that event no surety shall be required."

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[18]Probate Code §146.

[19]Tex. Prob. Code §145(b).

c. <u>Untypical Language In The Will</u>.

(1) <u>No Special Language Required--Use Of The Word "Independent" May Be Enough</u>.

In general, the courts are very liberal in interpreting a will to authorize an independent administration. No special language is required. It has been held sufficient merely to denominate the representative as an "independent executor," without additional limiting language. "[T]he term 'Independent Executrix' has a clear, definite and well-settled meaning, in this State. It means an executrix, who is entitled to administer an estate free of the control of the probate court."[20]

(2) <u>Testator Need Not Use The Word "Independent</u>."

On the other hand, the testator need not use the word "independent" if the appointment is followed by words, however vague or inarticulate, that the executor is to be free of court control.[21]

(3) <u>Mere Waiver Of Bond Is Not Enough</u>.

It is not enough, however, merely to provide that a bond need not be posted.[22]

d. <u>Will Providing For Court Control Of The Independent Executor Will Fail To Create An Independent Administration</u>.

The will appointing an independent executor usually provides that the independent executor shall serve without bond, but the testator **may** require the independent executor to post a bond without defeating the independent administration.[23] On the other hand, **the courts generally will not allow a bifurcated administration**: part independent and part supervised. For example, if the will requires the court to examine and approve the accounts of the executor, an independent administration will not be created even if the testator otherwise sought to establish one.[24]

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[20]*In re Dulin's Estate,* 244 S.W.2d 242, 244 (Tex. Civ. App.--Galveston 1951, no writ).

[21]See *Boyles v. Gresham*, 153 Tex. 106, 263 S.W.2d 935 (1954); *Pierce v. Wallace*, 48 Tex. 399 (1877); *Long v. Long*, 169 S.W.2d 763 (Tex. Civ. App.--San Antonio 1943, writ ref'd); and *Stephens v. Dennis,* 72 S.W.2d 630 (Tex. Civ. App.-Eastland 1934, writ ref'd).

[22]*Smithwick v. Kelly*, 79 Tex. 564, 15 S.W. 486 (1944); *Pinkston v. Pinkston,* 270 S.W.2d 250 (Tex. Civ. App.--Waco 1954, writ ref'd n.r.e.).

[23]*Stephens v. Dennis,* 72 S.W.2d 630 (Tex. Civ. App.-Eastland 1934, writ ref'd.).

[24]*Hughes v. Mulanax*, 105 Tex. 576, 153 S.W.2d 299 (1913).

e. <u>The Appointment Of An Independent Executor Does Not Require A Necessity For Administration</u>.

If the will appoints an independent executor, then the court should issue letters of independent administration whether or not there exists a necessity for administration and whether or not the will disposes of any property.[25] This is to be contrasted with the usual rule requiring that a necessity for administration exist before letters will be issued, and is in spite of the injunction of §178(b) that "No administration of any estate shall be granted unless there exists a necessity therefor."

4. <u>AVAILABILITY OF INDEPENDENT ADMINISTRATION WHERE NOT AUTHORIZED BY WILL-COURT APPOINTED INDEPENDENT ADMINISTRATION</u>.

a. <u>The Decedent Fails To Appoint An Independent Executor</u>.

The Probate Code was amended in 1977 and again in 1979 to provide for an independent administration in cases where the decedent failed to appoint one. The failure could come about for a variety of reasons. The decedent may have died intestate; he may not have made his executor independent; he may have died with a will, but failed to appoint an executor, or the executor named may fail to qualify. If the testator intentionally did not appoint an independent executor, he may provide in his will that the court shall not appoint one.[26]

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[25] *Cooke v. Smith*, 142 Tex. 396, 179 S.W.2d 954 (1944) and *Boyles v. Gresham*, 153 Tex. 106, 263 S.W.2d 935 (1954).

[26] Tex. Prob. Code §145(o).

b. Requirements For A Court Appointed Independent Administration. The complete list of the various requirements for a court appointed independent administration are set forth in Tex. Prob. Code §145(c)-(q).

(1) The Distributees Must Agree To and Request The Independent Administration. Tex. Prob. Code §145(c)-(d).

(2) The Court Must Not Find That An Independent Administration Is Not In The Best Interest Of The Estate. Tex. Prob. Code §145(c)-(d).

(3) The Court Appointed Independent Executor Must Post A Bond Unless Waived By the Court. Tex. Prob. Code §145(p). The bond must be in an amount found by the judge to be adequate under all the circumstances. Contrast this provision (which allows for considerable discretion) with the detailed and specific bond required under Tex. Prob. Code §194 in a dependent administration.

c. Court Appointed Successor Independent Executor. Tex. Prob. Code §154A.
This provision is very similar to Tex. Prob. Code §145(c) et. seq. It applies where the decedent named an independent executor in her will but the independent executor dies or otherwise fails to qualify after serving.

d. Comment.
In any situation where it appears that an administration will be necessary, but an independent administration would not be available under the decedent's will, serious consideration should be given to the use of a court appointed independent administration. The main drawback is the posting of a bond (unless the court will waive it, and most won't), and the necessity of joining all the distributees in the application.

5. CLOSING INDEPENDENT ADMINISTRATIONS.
It may become important to know whether or not an independent administration has been closed, because if it has closed, a subsequent suit in the Probate Court may be void; whereas if the independent administration has not been closed, a subsequent suit in the District Court may be improper.[27] Unfortunately, if an independent administration has not been formally closed, it will often be difficult to determine if it has actually closed.

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[27]See *InterFirst Bank-Houston, N. A., Guardian of diPortanova, N.C.M. v. Quintana Petroleum Corporation,* 699 S.W.2d 684, 873 (Tex. App.-Houston [1st Dist.] 1985, writ ref'd n.r.e.) and *Pullen v. Swanson,* 667 S.W.2d 359 (Tex. App.-Houston [14th Dist.] 1984 writ ref'd n.r.e.).

Presumably, if all the property has been distributed and the debts paid, the estate will be closed as a matter of law.[28] There are a number of old cases holding that the estate is presumed closed after a certain period of time, such as one year; however, the application of these cases is uncertain.[29]

Prob. Code §151 allows an independent administration to be closed by affidavit, but this does not relieve the independent executor from liability for mismanagement."[30] Thus, Prob. Code §151 is not commonly availed of.

If the independent executor wants to be discharged, the executor may seek to obtain releases from the beneficiaries; however, a beneficiary is under no duty to release, much less indemnify, the personal representative in order to receive a distribution. In fact, it may be overreaching to condition a distribution upon the receipt of a release, although it is common practice to seek a release.

It might be possible that a discharge could be obtained under Prob. Code §149B if a beneficiary demands an accounting and a distribution.

Prob. Code §221(f) provides for a discharge if a personal representative resigns and has complied with all orders of the Court.

It may be that the Court may approve an independent executor's final account, and in the exercise of its equitable powers, discharge the independent executor.[31]

6. **FURTHER READING**.

One of the best in depth outlines on independent administrations is an article by Art Bayern, entitled "Texas Independent Administration," found in the first (1977) Advanced Estate Planning And Probate Course, sponsored by the State Bar of Texas. Two other articles that are also recommended are "Independent and Dependent Administration," by John L. Bell, Jr., found in the 1978 Advanced Estate Planning And Probate Course, sponsored by the State Bar of Texas, and "Independent Administration Including Recent Developments," by John Hopwood, found in the 1979 Advanced Estate Planning And Probate Course, sponsored by the State Bar of Texas.

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[28]*InterFirst Bank-Houston, N.A., Guardian of diPortanova, N.C.M. v. Quintana Petroleum Corporation,* 699 S.W.2d 864 (Tex. App.-Houston [1st Dist.] 1985, writ ref'd n.r.e.).

[29]See *Bradford v. Bradford,* 377 S.W.2d 747 (Tex. Civ. App.-Texarkana 1964 writ ref'd n.r.e.) and *Ford v. Roberts,* 478 S.W.2d 129 (Tex. Civ. App.-Dallas 1972 writ ref'd n.r.e.).

[30]*Burke v. Satterfield,* 525 S.W.2d 950 (Tex. 1975).

[31]But *Cf. Burke v. Satterfield,* 525 S.W.2d 950 (Tex. 1975).

E. AVAILABILITY OF REGULAR DEPENDENT OR INDEPENDENT ADMINISTRATION-THE FOUR YEAR RULES.

In order for a dependent or independent administration to be available, the application for letters must be made within four years of death:

> **§74. Time to File Application for Letters Testamentary or Administration**. All applications for the grant of letters testamentary or of administration upon an estate must be filed within four years after the death of the testator or intestate; provided, that this section shall not apply in any case where administration is necessary in order to receive or recover funds or other property due to the estate of the decedent.[32]

This is one of the four year rules (there is more than one). Here, as elsewhere in the Probate Code, the statutory language is repetitive, resulting in certain internal inconsistencies.

1. IS AN ADMINISTRATION AVAILABLE?-THE FIRST FOUR YEAR RULE.

An application for letters testamentary or of administration will not be granted unless filed within four years after the death of the testator or intestate.[33] There appears to be an exception if the administration is necessary in order to receive or recover funds or other property due to the estate of the decedent.[34]

However, the last clause of Tex. Prob. Code §73(a) states unequivocally that "**in no case** shall letters testamentary be issued where a will is admitted to probate after the lapse of four years from the death of the testator."

§73(a), last clause, is in possible conflict with §74. A harmonious reading of the statute would be that if an estate is to be opened after four years, in order to collect a claim, the will would have had to have been probated first. Probate and administration are distinctly different notions.

The rule is enunciated yet again in Tex. Prob. Code §88(a)(1) which states that in order to probate a will or obtain letters testamentary or of administration the applicant must prove that four years have not elapsed since the date of death of the decedent.

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[32]Tex. Prob. Code §74.

[33]Tex. Prob. Code §74, first clause.

[34]Tex. Prob. Code §74, last clause.

> (a) General Proof. Whenever an applicant seeks to probate a will or to obtain issuance of letters testamentary or of administration, he must first prove to the satisfaction of the court:
>
> > (1) That the person is dead, and that four years have not elapsed since his decease and prior to the application; . . . [35]

2. IS THE WILL ENTITLED TO PROBATE?-THE SECOND FOUR YEAR RULE.

As indicated above, Tex. Prob. Code §88(a)(1) provides that in order to probate a will the applicant must prove that four years have not elapsed since the date of death. There is a similar rule against *probating* a will more than four years after death. This rule is found in Tex. Prob. Code §73(a), first clause; however here there is an exception: "No will shall be admitted to probate after the lapse of four years from the death of the testator **unless it be shown by proof that the party applying for such probate was not in default in failing to present the same for probate within the four years.**" (Emphasis added.)

The statute in full reads as follows:

> §73. Period for Probate
>
> (a) No will shall be admitted to probate after the lapse of four years from the death of the testator unless it be shown by proof that the party applying for such probate was not in default in failing to present the same for probate within the four years aforesaid; and in no case shall letters testamentary be issued where a will is admitted to probate after the lapse of four years from the death of the testator.
>
> (b) If any person shall purchase real or personal property from the heirs of a decedent more than four years from the date of the death of the decedent, for value, in good faith, and without knowledge of the existence of a will, such purchaser shall be held to have good title to the interest which such heir or heirs would have had in the absence of a will, as against the claims of any devisees or legatees under any will which may thereafter be offered for probate.
>
> Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956. Amended by Acts 1971, 62nd Leg., p. 976, ch. 173, §8, eff. Jan. 1, 1972.[36]

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[35] Tex. Prob. Code §88(a)(1).

[36] Tex. Prob. Code §74.

3. IMPORTANCE OF THE FOUR YEAR RULES.

Purchasers of property from the heirs of a decedent will be interested in knowing whether or not four years have elapsed from the date of the decedent's death, because, if it has not, a subsequently probated will could vest title in persons other than the selling heirs, thereby jeopardizing the buyer's title. **If, however, four years have elapsed, the buyer can rely on Probate Code §73(b),** which provides:

> "If a person shall purchase real or personal property from the heirs of a decedent more than four years from the date of the death of the decedent, for value, in good faith, and without knowledge of the existence of a will, such purchaser shall be held to have good title to the interest which such heir or heirs would have had in the absence of a will, as against the claims of any devisees or legatees under any will which may thereafter be offered for probate."

4. COMMENT.

The point to be made is that one should be mindful of the distinction between the probate of a will (which does not necessarily imply an administration) and the grant of letters testamentary (which constitutes the opening of an administration).

F. IS A DEPENDENT ADMINISTRATION AVAILABLE?

1. NECESSITY FOR ADMINISTRATION.

It is important to note that before letters of administration in a court supervised administration will be granted, the applicant must prove that there exists a necessity for an administration upon the estate. Tex. Prob. Code §§88(d) & 178(b). However, **"[s]uch necessity shall be deemed to exist if two or more debts exist against the estate."**[37]

2. IMPORTANCE OF RULE REQUIRING EXISTENCE OF NECESSITY FOR ADMINISTRATION.

The requirement that there be a necessity for administration is important, since one of the alternatives to a full administration is to obtain an **order of no necessity of administration**, discussed elsewhere below.

G. COMMUNITY PROPERTY ADMINISTRATION.

1. IN GENERAL.

It may come as a surprise to many, but the surviving spouse has broad statutory rights over the community property in an estate which may obviate the need for opening a full administration.

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[37] Tex. Prob. Code §178(b).

a. The Right To Retain Control And Management Over The Spouse's Special Community.

The surviving spouse will retain control and management over that portion of the community over which he had sole control and management during the marriage, *even if a personal representative has been appointed.*[38] It is only if the surviving spouse files a written instrument with the clerk, waiving the right to exercise powers as community survivor, that the personal representative of the deceased spouse may administer the entire community.[39]

b. Right Of Partition.

In addition to the general powers of a surviving spouse, the spouse can compel a partition of the community property and thus, remove his community half from administration.[40]

c. Community Administrator.

As discussed below in greater detail, if no personal representative has been appointed, the spouse can continue to manage both halves of the community either as a nonqualified or as a qualified community administrator.

2. DEALING WITH COMMUNITY PROPERTY WITHOUT THE NECESSITY OF ADMINISTRATION. TEX. PROB. CODE §155.

a. When Available.

Probate Code §155 provides "**When a husband or wife dies intestate and the community property passes to the survivor, no administration thereon, community or otherwise, shall be necessary**." When will the community property pass to the surviving spouse under the Texas laws of intestate succession? When there are no children.

Since one of the requirements for opening an administration is that there be a necessity for an administration, query whether -as a matter of law- there can be a necessity for an administration where an intestate decedent is survived by a spouse, but has no children.

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[38] Tex. Prob. Code §177(b).

[39] Tex. Prob. Code §177(b), last sentence.

[40] Tex. Prob. Code §385(a).

The idea is that the surviving spouse may simply pay all the debts and continue in the possession of the property. However, if property is to be transferred, the transferees may want more protection than §155 has to offer

b. **<u>When Recommended</u>.**

A significant drawback to the use of Tex. Prob. Code §155 as the sole means of settling an estate, would be to prove to purchasers of the property that §155 applied. This would require a showing (1) that there were not any descendants floating around somewhere, (2) that the decedent was dead, (3) that the property was community property, and (4) that the decedent did not leave a will.

These facts could possibly be established by obtaining an **order of no necessity of administration**[41] under Tex. Prob. Code §180, together with a **judgment declaring heirship**[42] under Tex. Prob. Code §55, discussed later on in the outline.

3. <u>NONQUALIFIED COMMUNITY ADMINISTRATION</u>.[43] TEX. PROB. CODE §160.

a. **<u>When Available</u>.**

When no one has qualified as a personal representative of the estate of the deceased spouse, the surviving spouse has the **inherent power** to sue and be sued for the recovery of community property, to lease or dispose of community property **for the purpose of paying debts**, to collect claims due the community, **and has "*such other powers as shall be necessary* to preserve the community estate",** discharge community obligations, and wind up community affairs, all without qualifying as community administrator.

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[41] Meaning, presumably, that the buyer can rely that there are no debts attaching to the property and that there is no will.

[42] Meaning the buyer can rely that there are no descendants and that the seller is the decedent's surviving spouse.

[43] The author is aware that "nonqualified" is not a word, but as its meaning will be understood in the context, it was thought preferable to the more grammatically correct term. A nonqualified surviving spouse could be unqualified as well, but not necessarily so.

[44] The author is aware that "nonqualified" is not a word, but as its meaning will be understood in the context, it was thought preferable to the more grammatically correct term. A nonqualified surviving spouse could be unqualified as well, but not necessarily so.

Tex. Prob. Code §45 provides that upon the dissolution of a marriage by death, all property belonging to the community estate shall go to the survivor, if there be no child or children of the deceased or their descendants. §45 goes on to provide: "**In every case the community estate passes charged with the debts against it.**"[45]

It is important to note that **the purchaser is not required to look to the application of the proceeds of sale or to whether or not the sale was actually for the purpose of paying community debts.**[46] All the purchaser need establish is that there is a community debt.[47] Moreover, there are cases holding that even after a great deal of time, the existence of a debt will be presumed.[48]

A debt is a community debt for purposes of the rule even if barred by the statutes of limitations.[49] It will be a rare instance when there are no community debts at all, and the size of the debt is of no moment[50]. There will usually be a debt for taxes if nothing else. Property taxes may be a likely candidate.

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[45]It is interesting to note that the rule embodied in Probate Code §§45 and 156, imposes liability on a decedent's interest in community property at death, whether or not such property was subject to the decedent's management and control during lifetime. In some instances death may change the lifetime liability rules contained in Family Code §5.61(b) which, during the life of both spouses, protects a spouse's special community from nontortious liabilities that the other spouse incurs during marriage.

[46]*Griffin v. Stanolind Oil & Gas Co.,* 133 Tex. 45, 125 S.W.2d 545 (1939); *English v. Paschall,* 229 S.W.2d 645 (Tex. Civ. App.- 1950, writ ref'd); *Jones v. Harris,* 139 S.W. 69, 78 (Tex. Civ. App.- 1952, no writ).

[47]*Jones v. Harris,* 139 S.W. 69, 78 (Tex. Civ. App.- 1952, no writ).

[48]*Hensel v. Keagans,* 79 Tex, 347, 15 S.W. 275 (1891); *Crosby v Ardoin,* 145 S.W. 709 (Tex. Civ. App.- 1912, writ ref'd).

[49]*Stone v. Jackson,* 109 Tex. 385, 210 S.W. 953 (1919).

[50]*Griffin v. Stanolind Oil & Gas,* 133 Tex. 45, 125 S.W.2d 545 (1939); *Crawford v. Gibson,* 203 S.W. 375 (Tex. Civ. App.- 1918, writ ref'd).

For an extended discussion and citation of authorities of the various circumstances under which a purchaser of property from a community survivor will be afforded protection under Prob. Code §160, see Woodward and Smith, *Probate and Decedent's Estates,* Vols. 17 & 18 TEXAS PRACTICE (1971), §543. The authors seem to feel strongly that it will be an unusual case in which such a purchaser is not protected. Likewise, a bank paying out a decedent's bank account to the community survivor is thought to be protected in the absence of knowledge amounting to a breach of trust.[51]

b. When Recommended.

Nonqualified community administration under Tex. Prob. Code §160 is generally not subject to the same objections that are of concern under Tex. Prob. Code §155.[52] Although, a purchaser of estate property must still be convinced that the property is not separate, she need not worry about who the true heirs of the decedent are, and she need not be concerned about the subsequent probate of a will. Furthermore, on the question of whether or not the property being sold or conveyed is community or not, recall that "[p]roperty possessed by either spouse during or on dissolution of marriage is presumed to be community property."[53]

4. QUALIFIED COMMUNITY ADMINISTRATION. TEX. PROB. CODE §§161-177.

a. When Available.

When an interest in community property passes to someone other than the surviving spouse[54], the survivor may qualify as community administrator if:

(i) the decedent failed to name an executor; or

(ii) if a named executor is unable or unwilling to serve; or

(iii) if the deceased spouse died intestate.

The application must be filed within 4 years of death.

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[51] Woodward and Smith, *Probate and Decedent's Estates*, Vols. 17 & 18 TEXAS PRACTICE (1971), §544.

[52] §155, discussed above, applies when the decedent dies intestate under circumstances such that the community property passes entirely to the surviving spouse.

[53] Tex. Fam. Code §5.02.

[54] If it passed to the surviving spouse then §155 would apply.

b. Requirements Following Qualification.

(1) Inventory And Bond.

The community administrator must file an inventory within 90 days of qualification, and must post a bond in such sum as is found by the judge to be adequate under all the circumstances.

(2) Accountability.

After a year from the filing of the inventory, any creditor who has not been paid in full can require that the survivor file an accounting in the form of an exhibit, as specified in Tex. Prob. Code §171. Under appropriate circumstances, the creditor can obtain an order from the court requiring the payment of the debt, in an action by the court on the exhibit.[55]

In addition to the requirement to make an exhibit, Tex. Prob. Code §168 provides that the survivor, whether qualified or not, "shall keep a fair and full account and statement of all community debts and expenses paid by him, and of the disposition made of the community property."

c. Powers Of The Community Administrator.

The powers of the community administrator are quite broad. Tex. Prob. Code §167. After the order appointing the survivor as community administrator has been entered, the surviving spouse "without any further action in the court, shall have the power to control, manage, and dispose of the community property, as provided in this Code, **as fully and completely as if he or she were the sole owner thereof**, and to sue and be sued with regard to the same."[56]

d. Termination.

After 12 months from the filing of the bond, the community administration may be terminated if desired by either the survivor or the beneficiaries of the estate. Partition and distribution can be had as in the case of an independent administration or by proceedings in the district court. **When the community administration is closed the community administrator is to be discharged and her bondsmen released from further liability.**[57]

[55]Tex. Prob. Code §172.

[56]Tex. Prob. Code §167. (Emphasis added.)

[57]Tex. Prob. Code §175.

So long as the community administration continues (and it may continue until an interested party desires it closed) the community administrator serves, in effect, as a statutory trustee for the beneficiaries. Therefore, the statute of limitations will not run against the community administrator until there is a repudiation of the trust.[58] In this regard recall that Tex. Prob. Code §168 requires the survivor, whether qualified or not, to keep a full and fair account of the community estate.

e. **When Recommended.**
The qualified community administrator has much the same power as an independent executor. However, it is worth noting that qualified community administration is a procedure that is almost never used. Obviously, the qualified community administrator won't be able to deal with separate property. More important, perhaps, is the requirement of a bond. Since the procedure is uncommon, bonding companies may be reluctant to underwrite it.

5. PARTITION OF COMMUNITY PROPERTY. TEX. PROB. CODE §385.

a. **When Available.**
Tex. Prob. Code §385(a) gives the surviving spouse the right at any time after letters have been issued and an inventory returned to make application for a partition of community property. The survivor must execute a bond equal to the value of the survivor's community one-half interest, conditioned on the payment of one-half of all debts existing against the community estate, whereupon the court shall partition the community property into two equal moieties, one to be delivered to the survivor and the other to the personal representative.[59]

b. **Lien Of Creditors.**
After a partition is made, a lien shall exist upon the property to secure the payment of the bond and any creditor of the community may sue on the bond and have judgment for one-half of his debt, and shall be entitled to be paid the other half by the representative of the estate.[60]

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[58] See *Matter of Estate of Jackson*, 613 S.W.2d 80 (Tex. Civ. App.--Amarillo 1981, writ ref'd n.r.e.).

[59] Tex. Prob. Code §385(c).

[60] Tex. Prob. Code §385(c).

6. POWER OF NON-COMMUNITY ADMINISTRATOR OVER COMMUNITY PROPERTY.

In the absence of a partition, and where a personal representative has qualified, that representative "is authorized to administer, not only the separate property of the deceased spouse, but also the community property which was by law under the management of the deceased spouse during the continuance of the marriage and all of the community property that was by law under the joint control of the spouses during the continuance of the marriage."[61] **The surviving spouse is entitled to retain possession and control of all community property that was legally under the sole management of the surviving spouse during the marriage.** This right may be waived by the surviving spouse by instrument in writing filed with the clerk.

This inability of the administrator to administer the special community of the surviving spouse could result in awkward practical problems. Is the property not under administration liable for its pro rata share of debts and expenses? Does the fact that such property is not being administered affect the ultimate source of property used to pay debts, as between the decedent's community and separate property subject to administration? Is the decedent's interest in the surviving spouse's special community a form of nonprobate asset? Certainly the decedent's will governs the ownership of the decedent's interest in such property at death, but is the decedent's interest in the surviving spouse's special community a part of the decedent's residuary estate for purposes of paying debts, given that it is not subject to administration? What if the decedent directs that his separate property goes to A and his community property to B, and the residuary estate pays all the debts. What type of apportionment if any takes place here?

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[61] Tex. Prob. Code §177(b).

H. SPECIAL STATUTORY PROCEDURES NOT INVOLVING ADMINISTRATION.

1. PROBATE OF WILL AS MUNIMENT OF TITLE. TEX. PROB. CODE §89.

a. Effect.

It is fundamental to understand the difference between the probate of a will and the administration of an estate. A Muniment of Title proceeding is used to probate a will where there will be no administration. Unless and until a will is probated it has no effect on the title to property, and the property is owned by the decedent's heirs at law. In this context as elsewhere, it is important to note that Tex. Prob. Code §94 provides **no will shall be effectual to prove title to or the right to the possession of property disposed of by will until the will has been admitted to probate.** Administration is another matter and addresses different concerns.

Merely probating of a will in the absence of an administration ought to be sufficient under §94 to establish the owners of the decedent's property, much the same as the owners of the decedent's property will be established by the statutes of intestate descent and distribution if a will is not probated. However, the Texas Probate Code gives third parties additional protection if the Muniment of Title procedure is availed of.

Tex. Prob. Code §89 explicitly provides, in the third paragraph, that **the order admitting the will to probate as a Muniment of Title constitutes sufficient legal authority for persons owing money to the estate or having custody of estate property to pay or transfer it to the persons described in the will, and to persons purchasing from or otherwise dealing with the estate, to pay or transfer or receive the property without administration**.

b. When Available.

The court must first find that the will should be admitted to probate, and the application must meet all of the normal requirements for admitting a will to probate described in Tex. Prob. Code §81.

In addition, however, the proponent must demonstrate that there are no unpaid debts owing by the estate, **excluding debts secured by liens on real estate**, *or* that there are other reasons there is no necessity for administration upon such estate.[62]

[62] Tex. Prob. Code §89, second paragraph.

The proof required is the same as under Tex. Prob. Code §88(a) with one important exception. Tex. Prob. Code §§73(a) and 74 are clear that an administration may not be opened after four years have elapsed from the date of death of the decedent (except, perhaps, to recover funds due to the estate). However, **§73(a) states that the four year rule will not apply to the probate of a will if the applicant can show that he was not in default in failing to present the will for probate within the four year period**.

Again, a Muniment of Title proceeding is a probate proceeding only; an administration is not sought. Thus, if more that four years have elapsed, a Muniment of Title proceeding may still be available, even though an administration would be foreclosed, if the applicant can be shown not to have been in default in failing to offer the will for probate within the four year period.

c. Other Requirements.

A 1983 amendment to the Probate Code now requires that within 180 days of the admission of a will to probate as a Muniment of Title, the applicant shall file with the clerk a sworn affidavit stating specifically the terms of the will that have been fulfilled and the terms of the will that have been unfulfilled. This requirement may be waived by the court. Further, the failure to file the affidavit shall not affect the title to the property passing under the will.[63]

It appears to be common for the courts to waive the requirement of the filing of the affidavit if the surviving spouse is the sole beneficiary under the will.

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[63]Tex. Prob. Code §89, last paragraph.

d. When Recommended.

(1) Generally Recommended Where No Debts, If Independent Administration Is Unavailable.

Probating a will as a Muniment of Title is recommended whenever the will does not appoint an independent executor, and there are no debts (other than debts secured by real estate) remaining unpaid. In some cases one might use the Muniment of Title proceeding even if an independent administration was available. Occasionally difficulties are encountered with out of state transfer agents who are reluctant to recognize the proceeding as a true admission to probate. Usually firm insistence, strong letters, veiled threats and a copy of the statute will suffice to convince the transfer agents of the errors of their ways, but not always.

(2) Who Are The Persons Described In The Will? Does A Muniment Of Title Proceeding Protect Third Parties Against Paying Or Purchasing Property From The Wrong Persons?

A purchaser or transfer agent should be concerned with ascertaining the persons described in the will. If the persons are described by class (e.g., "my descendants, strict *per stirpes*), the class members will have to be identified.

Perhaps a declaratory judgment action could clarify who the persons composing the class. What about a judgment declaring heirship?

Judgments declaring heirship are discussed elsewhere below in greater detail, but for now, it may be important to note that the procedure to declare heirship provides:

> "When a person dies intestate . . . ; or when there has been a will probated in this State or elsewhere, or an administration in this State upon the estate of such decedent, and any real or personal property in this State has been omitted from such will or from such administration, or no final disposition thereof has been made in such administration, the court . . . may determine and declare . . . who are the heirs and the only heirs of such decedent, and their respective shares and interests, under the laws of this State."[64]

[64] Prob. Code §48(a).

§48(a) contains, in unabridged form, one of the world's longer sentences. The Probate Code contains many sections written in the archaic style of §48(a): a style where periods are to be avoided as much as possible, especially if a semicolon will do. In sentences of this nature, lining up the proper subject with the proper object and verb can be challenging. It is hoped that §48 is broad enough to be coupled with a Muniment of Title proceeding, because if so, such a coupling would protect virtually everyone, all around.

It is submitted that even if §48(a) does not cover this type of proceeding, the court would have jurisdiction to determine the heirs in the order admitting the will to probate, since this is within its general probate jurisdiction. Woodward and Smith suggest that such an order would be effective as part of an Order of No Necessity For Administration under §180.[65] The Order of No Necessity For Administration is the intestate counterpart of the Order Admitting a Will to Probate as a Muniment of Title. See discussion of §180 below.

(3) <u>Proceeding Constitutes An Admission To Probate</u>.

It may be important to note yet again that the Muniment of Title proceeding does constitute the admission of the will to probate within the meaning of Tex. Prob. Code §94. As indicated above, Tex. Prob. Code §94 provides that no will shall be effectual to prove title to or the right to the possession of property disposed of by will until the will has been admitted to probate. Certain of the other alternatives to administration (for example, the collection of a small estate by affidavit under Tex. Prob. Code §137-138) are defective in this regard, and thus, as a practical matter are only effective in an intestate situation, or where the beneficiaries under the will and the heirs at law are the same.

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[65]Woodward and Smith, *Probate and Decedent's Estates*, Vols. 17 & 18 TEXAS PRACTICE (1971), §628.

2. **ORDER OF NO NECESSITY OF ADMINISTRATION. TEX. PROB. CODE §180.**

a. **Procedure.**

This is the intestate counterpart to the Muniment of Title procedure. It appears to be aimed at an intestate situation because it refers to an application for letters of administration and not letters testamentary. §180 essentially calls for the applicant to offer the will for probate and apply for letters of administration, but to cause the application to be defective by affirmatively showing that there is no necessity for administration; for example, by showing that there are no debts owing by the estate. The court will then enter an order refusing the application and shall recite in the order that there exists no necessity for administration.

b. **Effect Of Order.**

This is the intestate counterpart to the Muniment of Title procedure. It appears to be aimed at an intestate situation because it refers to an application for letters of administration and not letters testamentary. §180 essentially calls for the applicant to apply for letters of administration, but to cause the application to be defective, by affirmatively showing that there is no necessity for administration; for example, by showing that there are no debts owing by the estate. The court will then enter an order refusing the application and shall recite in the order that there exists no necessity for administration.

Note the similarity between the protection granted under §180 and the protection granted third parties by §89 under the Muniment of Title procedure.

This procedure may be recommended as an effective alternative to administration. However, since there is no will identifying the heirs, third parties are going to have to assure themselves as to who the heirs at law are. This may involve some risk. The problem is similar to that encountered in a Muniment of Title proceeding where the beneficiaries are described as a class; however, here a proceeding to declare heirship under Tex. Prob. Code §§48-56 is clearly available.

If a judgment declaring heirship is entered, third parties are doubly protected: (1) they may rely that the parties named in the judgment are the persons legally entitled to the decedent's estate, and perhaps just as importantly, (2) they may rely that the property is not subject to the decedent's debts. See the discussion below on heirship proceedings.

I. STATUTORY SMALL ESTATE PROCEEDINGS.

1. COLLECTION OF SMALL ESTATE BY AFFIDAVIT. TEX. PROB. CODE §137-138.

The distributees of an estate are immediately entitled to the assets of the estate ***to the extent they exceed the known liabilities,*** without awaiting the appointment of a personal representative, provided the conditions of Tex. Prob. Code §137(a)-(d) are met.

a. When Available.

The conditions of Tex. Prob. Code §137(a)-(d) are met when no petition for the appointment of a personal representative is pending or has been granted and the value of the entire assets of the estate, not including homestead and exempt property, does not exceed **$50,000.**

(Since the homestead and other exempt assets are excluded, and since non-probate assets such as life insurance proceeds are not considered, the estate need not necessarily be *small* in the vernacular sense of the word.)

An affidavit, sworn to by two disinterested witnesses and the distributees, is then filed with the clerk. The affidavit should list the assets and liabilities of the estate, the names and addresses of the distributees, and their right to receive the property of the estate. The affidavit must be approved by the judge.[66]

b. Effect Of Affidavit. Tex. Prob. Code §138.

(1) Persons Dealing With The Distributees Are Released.

The person making payment, delivery, transfer or issuance pursuant to the affidavit shall be released to the same extent as if made to a personal representative and he is not required to see to the application of the property or to inquire into the truth of any statement in the affidavit.

(2) Distributees Can Bring Action To Force Delivery Of Property.

The distributees are entitled to bring an action against any person refusing to deliver estate property upon being presented with the affidavit.

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[66]Tex. Prob. Code §137(e).

(3) Liability Of Distributees.
The distributees will be liable to creditors or anyone else having a prior right, and shall be liable for any damages arising out of reliance on the affidavit.

(4) Statute Does Not Vest Title!
It should be noted, however, that Tex. Prob. Code **§137(e)** provides: "This section does not affect the disposition of property under the terms of a will or other testamentary document nor does it transfer title to real property."

c. When Recommended.
Because Tex. Prob. Code §137 does not vest title, but is merely a collection procedure, **its utility is somewhat limited**. Certainly, a muniment of title procedure would be preferable if the decedent died testate, particularly if the distributees were different from the heirs at law, since the failure to probate the will would mean an intestate heir would have superior title.[67] Where, however, the decedent died intestate, the small estate affidavit may prove to be an **inexpensive way to collect assets** such as bank accounts and wages.

It would appear that this procedure protects persons transferring property **to** the heirs, but **not** persons purchasing property **from** the heirs.

2. ORDER OF NO ADMINISTRATION. TEX. PROB. CODE §§139-142.

a. When Available.
If the value of the entire assets of an estate, not including homestead and exempt property, does not exceed the amount to which the surviving spouse and minor children are entitled as a family allowance, and if an administration has not been opened, then the spouse or children may request the court to make a family allowance and to enter an order that no administration shall be necessary. The family allowance is the amount necessary to maintain the spouse and children for one year.[68]

[67] See Tex. Prob. Code §94.

[68] Tex. Prob. Code §287.

b. **Effect of Order.**
The order that no administration be had on the estate shall constitute **sufficient legal authority** to all persons owing money or having possession of estate property, or acting as transfer agent, purchasers and persons dealing with the estate, **for payment or transfer to the persons described in the order.**[69]

c. **When Recommended.**
An order of no administration would not be recommended if the decedent left a will making a different disposition of the homestead than that provided on intestacy---again, because Tex. Prob. Code §94 provides that a will shall not be effective to prove or pass title to property until admitted to probate. **Consider, however, combining the no administration order with the Muniment of Title procedure.**

3. **SUMMARY PROCEEDINGS FOR SMALL ESTATES AFTER PERSONAL REPRESENTATIVE APPOINTED. TEX. PROB. CODE §143.**

a. **When Available.**
When a personal representative has already been appointed, Tex. Prob. Code §143 provides for a summary procedure for closing the estate, under much the same circumstances and with much the same effect as in the case of the order of no administration under Tex. Prob. Code §139.

b. **Procedure Following Application And Order.**
When the estate, exclusive of homestead, exempt property and family allowance, does not exceed the amount necessary to pay the remaining claims (classes one through four), the representative may apply for an order to pay the claims to the extent permitted by the assets subject to the claims, and thereafter present an account for final settlement, whereupon the court is to decree final distribution, discharge the representative, and close the administration.

c. **When Recommended.**
This is an effective way to close an insolvent estate. It applies in both testate and intestate estates, and will be effective where the value of the estate (not including homestead and exempt property and before reduction for valid claims) exceeds the family allowance, a circumstance that would not permit the use of the order of no administration.

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[69] Tex. Prob. Code §141.

J. HEIRSHIP PROCEEDINGS.

1. AFFIDAVIT OF HEIRSHIP. TEX. REV. CIV. STAT. ART. 6626, 3726 AND 3726A; TEX. PROB. CODE §52.

a. Instruments That May Be Recorded.
Tex. Rev. Civ. Stat. §6626 describes certain instruments that may be recorded. At least two cases decided under that statute authorize the recording of an affidavit of heirship.[70]

b. Admissibility.
Tex. Rev. Civ. Stat. §3726 provides that every instrument that is permitted or required by law to be recorded in the office of the Clerk of the County Court, and that has been recorded after being proved or acknowledged in the manner provided by law, shall be admissible in evidence without proof of execution.

c. Prima Facie Evidence In Suits Involving Real Estate.
Tex. Rev. Civ. Stat. §3726a provides that in proving title to **real property** in a pending suit, any statement concerning the marital status, genealogy, or showing who were the legal heirs of any deceased person, when contained in an affidavit, that has been **recorded for** at least **5 years** in the office of the County Clerk of the county where the real property is located, shall be received in such suit as *prima facie* evidence of the facts so stated.

d. Prima Facie Evidence Under The Probate Code.
Tex. Prob. Code §52 provides that any facts concerning the family history, genealogy, marital status, or the identity of the heirs of a decedent shall be received in a **proceeding to declare heirship**, or in **any other suit involving title to real or personal property,** as *prima facie* evidence of the facts therein stated, when contained in an affidavit or judgment on file for five years or more in the deed records of the decedent's county of domicile or fixed place of residence in Texas.

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[70] *Bashara v. Glasscock,* 289 S.W. 128 (Tex. Civ. App.--Austin 1927, writ ref'd) and *Turentine v. Lasane*, 389 S.W.2d 336 (Tex. Civ. App.--Waco 1965, no writ).

e. **When Recommended.**

The most that can be achieved from the mere filing of an affidavit is that it may constitute **some evidence** of heirship, which may be rebutted, but which may also be better than nothing. This method of evidencing the transfer of title under the intestacy laws is not uncommon; moreover, for reasons that I am unable to fathom, many title companies routinely issue title opinions based on little else. However, this procedure is generally **not recommended**.

2. PROCEEDINGS TO DECLARE HEIRSHIP. TEX. PROB. CODE §§48-56.

a. **When Available.**

This proceeding is most often utilized where a person dies without a will, and it is a normal part of a routine administration. However, it is also often combined with an order of no necessity for administration, as discussed below. To paraphrase the statute: When a person dies intestate owning property in Texas and there has been no administration or where an administration or will fails to dispose of all of the decedent's property or where no final disposition of the property has in been made in the administration, the court may declare who are the heirs and their respective shares of the estate in a proceeding to declare heirship.[71]

The declaration **need not take place within four years** of death, but if it does, the proceeding may be combined with an order of no necessity for administration.[72]

b. **Procedure.**

The proceeding may be instituted by any person claiming to be the owner of any portion of the estate, or by the qualified personal representative of the decedent. The application is to set forth the information specified in Tex. Prob. Code §49(a)(1)-(8), and shall be supported by an affidavit in the form described in Tex. Prob. Code §49(b).

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[71]Tex. Prob. Code §43(a).

[72]Tex. Prob. Code §48(b).

c. **Effect Of Judgment. Tex. Prob. Code §55.**

(1) **Bona Fide Purchasers Protected.**
Whether or not the judgment is later modified or set aside, **it shall be conclusive in any suit between an heir omitted from the judgment and a bona fide purchaser for value.** Any person who has delivered funds or property of the decedent to the persons declared to be heirs in the judgment, or who has in good faith entered into any other transaction with them after the judgment, shall be similarly protected.

(2) **Where There Is Also No Necessity For Administration.**
If the judgment states that there is no necessity for administration, this recital shall constitute authorization to all persons owing money or having custody of property belonging to the decedent, or acting as transfer agent, and to persons dealing with the heirs, to pay, deliver or transfer to or **purchase property from the heirs, without liability to any creditor.** Moreover, the heirs are entitled to enforce their right to payment or transfer by suit.[73]

(3) **Effect Of Recordation.**
Tex. Prob. Code §56 provides that a certified copy of the judgment can be filed for record in any county in which any of the real property described in the judgment is located, and shall constitute constructive notice of the facts set forth.

d. **When Recommended.**
A judgment declaring heirship is a viable alternative to probate where the decedent dies intestate and no administration is necessary. The heirship judgment is frequently combined with other probate procedures.

K. MISCELLANEOUS ALTERNATIVES TO FULL ADMINISTRATION.

1. PAYMENT OF DEBTS AND FUNERAL EXPENSES BY GUARDIAN OF DECEASED WARD. TEX. PROB. CODE §404A.

Tex. Prob. Code §404A provides that before a guardianship of a deceased ward shall be closed upon the ward's death, the guardian, subject to the approval of the court, may pay the funeral expenses and other debts of the decedent.

[73] Tex. Prob. Code §55(c).

2. TEMPORARY ADMINISTRATION. TEX. PROB. CODE §131-135.

Tex. Prob. Code §131-135 provides the framework for instituting a temporary administration pending contest of a will or administration. **A temporary administrator has only such powers as are specially conferred in the order fixing the appointment.**[74] It is important to note that the purpose of a temporary administration is to preserve the assets until a permanent administration can be implemented. Therefore, in theory, it should not be used as a means of summary administration.

Recently §§131 and 132(a) were amended and 131A was added to the Probate Code. It is believed that these changes correct the problem created when a prior legislative session inadvertently repealed the procedures for appointing a temporary administration.

3. INFORMAL FAMILY SETTLEMENTS AND DISCLAIMERS.

a. Informal Family Settlements.

(1) Family Settlements Are Favored.

Informal family settlements, varying the terms of a will, or allowing an estate to pass by intestacy by agreeing not to probate a will, are **favored in Texas**.[75]

(2) Can A Family Settlement Vary The Terms Of A Testamentary Trust?

There is some question as to whether a family settlement agreement would be effective if the will contained a trust. Contrary to the law in many states, the Texas Supreme Court has very clearly held that it is improper to enforce an agreement among all the parties to a trust to alter its terms where any of its principal purposes remain to be accomplished. *Frost National Bank v. Newton*, 554 S.W.2d 149 (Tex. 1977). And see also, §112.054 of the Texas Trust Code which sets similar limits to a court's power to modify a trust. On the other hand, in the family settlement, where there is no trustee who has accepted his office, it may be that there would be no one who would not be estopped to complain.

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[74] Tex. Prob. Code §132.

[75] *Estate of Morris*, 577 S.W.2d 748 (Tex. Civ. App.--Amarillo 1979 writ ref'd n.r.e.); *Stringfellow v. Early*, 40 S.W. 871 (Tex. Civ. App.--1897, no writ); *Wade v. Wade*, 167 S.W.2d 1008 (Tex. 1943); *Cook v. Hamer,* 309 S.W.2d 54 (Tex. 1958); *Cooke v. Smith*, 142 Tex. 396, 179 S.W.2d 954 (1944); *Salmon v. Salmon*, 395 S.W.2d 29 (Tex. 1965); *Franke v. Cheatam,* 303 S.W.2d 355 (Tex. 1957).

b. Some Tax Consequences.

Unless there is a bona fide dispute, a family settlement will not entitle the estate to a marital deduction which would not otherwise be available; moreover, there would most certainly be an adjusted taxable gift involved to the extent someone voluntarily took less than they were clearly entitled.[76]

c. Disclaimers.

A disclaimer under Tex. Prob. Code §37A will have different tax consequences than a family settlement. If a disclaimer is used, the estate might be entitled to a marital deduction and there would be no gift under the federal transfer tax statute. See IRC §2518.[77] The problem with disclaimers is that the disclaimant cannot direct where the disclaimed property will go. The property will pass as if the disclaimant predeceased the testator, or as directed by the will. (The will cannot, however, direct that the property will pass as determined by the disclaimant.)

4. LIFETIME ARRANGEMENTS TO AVOID PROBATE.

a. Some Non-Statutory Alternatives To Probate.

The emphasis in Article I of this outline is on statutory proceedings available to a personal representative post mortem, but it should at least be pointed out that there are a number of very effective non-statutory alternatives to probate, the most important of which is the intervivos revocable trust, which can even be in the form of a self-declaration of trust.[78] Other techniques include the use of joint tenancy with right of survivorship, survivorship bank accounts under Ch. 11 of the Probate Code, holding property in life estate form, and life insurance, to name a few. These and other alternatives are discussed in Article II below.

b. Further Reading.

One of the best in depth articles that treats the entire range of alternatives to a full administration, both statutory and non-statutory, including most of those enumerated above, is "Ancillary Probate Proceedings And Techniques To Avoid Guardianships And Dependent Administrations," by J. David Tracy, found in the 1982 Advanced Estate Planning And Probate Course, sponsored by the State Bar of Texas. It is highly recommended reading.

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[76]Treas. Reg. §20.2056(e)-2(d)(2).

[77]All references to the IRC are to the Internal Revenue Code of 1986 as amended, unless otherwise indicated.

[78]See *Westerfeld v. Huckaby,* 474 S.W.2d 189 (Tex. 1971) and the Texas Trust Code definition of beneficiary, found at §111.004(2).

5. PREVENTING ADMINISTRATION BY CREDITORS. TEX. PROB. CODE §80.

There may be an occasion where the heirs seek to thwart the opening of an administration by a creditor. This can easily be accomplished by either paying the debt, proving to the satisfaction of the court that the debt is invalid, or by posting a bond in an amount double in value to the claim.

L. PROPERTY INHERITED BY MINORS.

Theoretically, a minor can inherit property outright without having a guardianship appointed; the problem however is a practical one. The minor lacks legal capacity to transfer the property or otherwise deal with it. (Actually, a minor can transfer the property but such a transfer would be voidable.) This is the reason that most good wills provide that a gift to a minor will be held in trust or be given to a custodian under the Texas Uniform Gifts to Minors Act. However, if an alternative to probate is utilized, or if the will makes no special provision for gifts to minors, then consideration must be given to the problem of making delivery to someone who is legally incapacitated. Sometimes, a guardianship for the minor is the only recourse. Guardianships are expensive, cumbersome and impractical. Fortunately, there are some alternatives.

1. UNIFORM GIFTS TO MINORS ACT. TEXAS PROPERTY CODE CH. 114, SEC. 141.001 ET. SEQ.

Unless otherwise prohibited by the will, if any, a legal representative of a decedent's estate may transfer to a custodian for a minor, under either the Texas Uniform Gifts to Minors Act or a comparable Uniform Gifts to Minors Act in another jurisdiction, eligible property that is distributable to the minor if the representative considers the distribution to be in the best interest of the minor.[79] The representative shall appoint the custodian, who must be either a member of the minor's family or a guardian of the minor.[80]

2. SALE OF PROPERTY OF A MINOR BY A PARENT WITHOUT GUARDIANSHIP. TEX. PROB. CODE §339A.

Probate Code §339A provides "A natural or adoptive parent of a minor who is not a ward may apply to the court for an order to sell real or personal property of a minor in an estate without being appointed guardian, when the value of the minor's interest in the property does not exceed $25,000. A sale of property pursuant to an order of the court under this section is not subject to disaffirmance by the minor." The proceeds of the sale are paid into the registry of the court where they may be withdrawn under Prob. Code §144.

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[79]Texas Property Code Ch. 114, Sec. 141.003(c).

[80]Texas Property Code Ch. 114, Sec. 141.003(d).

3. PAYMENT OF CLAIMS WITHOUT GUARDIANSHIP AND ADMINISTRATION OF TERMINATED GUARDIANSHIP ASSETS. TEX. PROB. CODE §144.

If a minor is without a guardian, anyone owing the minor an amount of money not exceeding $25,000, the right to which is liquidated and is uncontested in any pending lawsuit, may pay the money to the County Clerk of the county in which such creditor resides. The clerk is to invest the money for the minor pursuant to court order. A parent or unestranged spouse of the minor may withdraw the money as custodian upon posting a bond in double the amount approved by the court, upon condition that the money will be used for the minor under direction of the court. This procedure should be available in the case of a minor who is a beneficiary of a decedent's estate.

4. TRUSTS UNDER §142.005 OF THE PROPERTY CODE-§142 TRUSTS.

It has been suggested that §142.005 of the Texas Property Code can be invoked to establish a trust for a minor or other incapacitated person who is a beneficiary of an estate, if the person does not have a legal guardian.

§142.005(a) provides:

> "In a suit in which a minor who has no legal guardian or an incapacitated person is represented by a next friend or an appointed guardian ad litem, the court may, on application by the next friend or the guardian ad litem and on a finding that the creation of a trust would be in the best interests of the minor or incapacitated person, enter a decree in the record directing the clerk to deliver any funds accruing to the minor or incapacitated person under the judgment to a trust company or a state or national bank having trust powers in this state."

There must be a judgment awarding damages or property to a minor or incapacitated person who does not have a guardian. The trust must terminate no later than the beneficiary's 25th birthday.[81]

For an extended discussion of §142 Trusts (with forms) see Sharon Gardner's outline on Guardianships in the 1989 Practice Skills Course: Wills and Probate, beginning at page E-74.

[81] Tex. Prob. Code §142.005(b)(4).

M. PROCEDURES PERTAINING TO FOREIGN WILLS. TEX. PROB. CODE §95-107.

There are three basic approaches available to the proponent of a foreign will, i.e., a will of a nondomicilary decedent: **(1)** The will can be probated without opening an administration (similar to a muniment of title proceeding). **(2)** An ancillary administration can be opened in Texas. **(3)** Or, the will can be probated in an original probate proceeding in Texas.

In considering these various alternatives, it is important to first address the question of whether or not the will has already been probated in a foreign jurisdiction, and if so, whether that jurisdiction was the domicile of the decedent. Next to be considered is whether or not it is necessary to open an administration in Texas. Often it won't be.

1. SUMMARY PROBATE OF FOREIGN WILL. TEX. PROB. CODE §§95 & 96.

a. Summary Ancillary Probate of Foreign Will Probated in Domiciliary Jurisdiction. Tex. Prob. Code §95(b)(1) and (d)(1).

(1) When Available.

If the will has been probated or established in the jurisdiction in which the testator was domiciled at the time of his death, the application to probate the will need state only that probate is requested on the basis of an authenticated copy of the foreign proceedings in which the will was probated or established. No citation or notice is required.[82] In such case, "no order of the court is [even] necessary." It shall be the ministerial duty of the clerk to record the will, whereupon **it shall be deemed admitted to probate**, and shall have the same effect for all purposes as if the original will had been probated by order of the court.[83]

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[82]Tex. Prob. Code §95(b)(1).

[83]Tex. Prob. Code §95(d)(1).

(2) Effect Of Admission To Probate.

If a foreign will has been admitted to probate in the jurisdiction of the testator's domicile, the will, when probated in Texas, shall be effective to dispose of both real and personal property in this state, irrespective of whether the will was executed with the formalities required of a domestic will.[84] Note that this is contrary to traditional conflicts of laws notions, in that it grants the domiciliary state the power to determine the requirements for passing Texas real estate at death.

(3) Bona Fide Purchasers Protected.

If a will has been probated under Tex. Prob. Code §95(b)(1) as a foreign will previously probated in the testator's domicile, and a later proceeding establishes that the foreign jurisdiction was not, in fact, the domicile of the testator, the Texas probate will be set aside, but a bona fide purchaser for value will be protected if the purchase was prior to the commencement of the proceeding.[85]

b. Summary Ancillary Probate of Foreign Will Probated in Non-Domiciliary Jurisdiction. Tex. Prob. Code §95(b)(2) and (d)(2).

(1) When Available.

If the will has been probated or established in a jurisdiction other than the jurisdiction in which the testator was domiciled at the time of his death, the application for probate in Texas must contain all of the information required in an application for the probate of a domestic will, and shall also set out the name and address of each devisee and each person who would be entitled to the estate in the absence of the will. Each heir and devisee is to be issued citation by certified mail.[86]

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[84] Tex. Prob. Code §95(e).

[85] Tex. Prob. Code §95(f).

[86] Tex. Prob. Code §95(b)(2).

(2) Effect Of Admission To Probate.
If no contest is filed, the will shall be admitted to probate without the necessity of an order, and shall have the same effect as if the original will had been probated by order of the court.[87] Since Tex. Prob. Code §95(e), discussed above, only applies to wills admitted to probate in the domiciliary jurisdiction, the general conflict of laws rule would probably apply and the law of the domiciliary jurisdiction would govern the passage of the personal property; the law of the situs would apply to the real estate.

2. ANCILLARY ADMINISTRATION. TEX. PROB. CODE §105.

When a foreign will has been admitted to summary ancillary probate under §95, the executor named in the will is entitled to apply for and receive letters testamentary upon proof that he has qualified in the jurisdiction in which the will was admitted to probate and that he is not disqualified to serve as executor in Texas.[88]

3. FILING FOREIGN WILL AS A MUNIMENT OF TITLE. TEX. PROB. CODE §96.

a. When Available.
When any will disposing of land in Texas has been probated in any state, a certified copy of the will and of its probate may be filed in the county in which the land lies.[89]

b. Effect Of Filing.
Such a filing shall be valid "as a deed of conveyance of all property in this State covered by said foreign will."[90]

4. AUTHORITY OF FOREIGN EXECUTOR TO SELL PROPERTY. TEX. PROB. CODE §107.

When a foreign will gives power to the executor to sell real or personal property situated in Texas, no order of a court shall be necessary to authorize the sale if the will is recorded in the deed records of any county in the manner provided in §96.[91]

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[87] Tex. Prob. Code §95(d)(2).

[88] Tex. Prob. Code §105.

[89] Tex. Prob. Code §98.

[90] Tex. Prob. Code §98.

[91] Tex. Prob. Code §107.

5. ORIGINAL PROBATE OF FOREIGN WILL IN TEXAS. TEX. PROB. CODE §103.

Original probate of the will of a testator who died domiciled outside Texas "may be granted in the same manner as the probate of other wills."[92] However, if the will has been probated in another jurisdiction, one of the summary proceedings described above should first be considered.

6. FURTHER READING.

For further reading, see "**Ancillary Probate**," by Marion R. McClanahan & Larry W. Gibbs, found in the 1979 Advanced Estate Planning And Probate Course, sponsored by the State Bar of Texas.

N. WITHDRAWING ESTATES FROM ADMINISTRATION.

1. WITHDRAWING ESTATES FROM FURTHER ADMINISTRATION UNDER TEX. PROB. CODE §§262-269.

a. When Available.

After the inventory has been filed, anyone entitled to a portion of the estate may cause the executor to appear and render an exhibit of the condition of the estate.[93] When the exhibit has been rendered, the persons entitled to the estate, or any of them, must execute a bond for double the value of the gross estate, conditioned on the payment by the persons executing the bond of all the debts of the estate.[94]

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[92] Tex. Prob. Code §103.

[93] Tex. Prob. Code §262.

[94] Tex. Prob. Code §263.

b. Effect.

After the bond has been posted the executor shall be ordered to deliver the estate to the persons entitled, Tex. Prob. Code §264, the executor shall be discharged, and the administration shall be closed.[95] A lien shall exist on all of the estate withdrawn from administration to secure the bond and the debts. Any person entitled to a portion of the estate withdrawn from administration shall be entitled to an order of partition and distribution.[96] Any creditor whose debt remains unpaid may sue on the bond or may sue the distributees, but if he sues the distributees or some of them, no one of the distributees shall be liable beyond his proportionate share of the claim.[97]

c. When Recommended.

Because of the requirement for a posting of a bond for twice the amount of the estate, and because of the liability of the persons executing the bond for all of the debts of the estate, a distributee might want to consider an application for partition and distribution under Tex. Prob. Code §373 (discussed below) as an alternative.

2. APPLICATION FOR PARTITION AND DISTRIBUTION. TEX. PROB. CODE §373.

Tex. Prob. Code §373 et. seq. offers an alternative to the procedure under Tex. Prob. Code §§262-269. Tex. Prob. Code §373 provides that at any time after the expiration of 12 months after the original grant of letters, the representative or any distributee may apply for the partition and distribution of the estate or any portion of it. In the event of a partial distribution, a refunding bond is required to be posted in an amount to be determined by the court. The procedure to be followed is quite detailed.[98]

O. CONCLUSION.

As is readily apparent from the laundry list of administration alternatives briefly surveyed above, Texas offers the potential estate representative a myriad, perhaps even a surfeit, of choices for handling the distribution of a decedent's estate and for the settling of her affairs. Somewhere within this array, there should be a procedure fit for the occasion.

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[95] Tex. Prob. Code §265.

[96] Tex. Prob. Code §267.

[97] Tex. Prob. Code §§268-269.

[98] See Tex. Prob. Code §373-382.

Familiarity with the various avenues available for settling a decedent's estate is certainly required of anyone practicing in this area. Armed with his arsenal of alternatives provided by our Probate Code, the attorney representing the estate can select the most appropriate weapon for the battle, whether the potential adversary is a recalcitrant title company, a petulant New York transfer agent, a grasping relative or a truculent creditor. If the concern is of a less hostile nature, for instance, if the object is to save time and unnecessary expense, our Texas Probate Code likewise offers a means suited for most every end.

II. NONPROBATE ASSETS AND PROBATE ASSETS NOT SUBJECT TO ADMINISTRATION.

A. **WHAT ARE NONPROBATE ASSETS- AN OVERVIEW.**

1. **DEFINITION.**

A definition that will serve as well as any is that nonprobate assets are assets that pass as a result of the death of a person, and yet are not subject to testamentary disposition, either by will or under the laws of descent or distribution.

2. **CHARACTERISTICS.**

Nonprobate assets have a number of other interesting characteristics. They may or may not be subject to estate taxation. Even if subject to estate taxation, they may or may not be reachable prior to the exhaustion of the probate estate. They may or may not be subject to creditor claims. The decedent may or may not have any control over who will receive the assets at death.

B. **PROBATE ASSETS NOT SUBJECT TO ADMINISTRATION**

There is another significant species of property that passes as a result of the death of a person, and that is subject to testamentary disposition, either by will or under the laws of descent or distribution, and yet is not subject to administration. I call such property *probate assets not subject to administration.* Unlike nonprobate assets, these assets will almost always be subject to estate taxation, and the decedent will generally have control over who will receive the assets at death. Like nonprobate assets, probate assets not subject to administration may or may not be subject to creditor claims, and even if subject to estate taxation, they may or may not be reachable prior to the exhaustion of the probate estate.

Because of the similarities between nonprobate assets and probate assets not subject to administration, I will make mention of both in this outline.

C. EXAMPLES OF NONPROBATE ASSETS.

The following represent some of the more common examples of nonprobate assets.

1. LIFE INSURANCE.

2. JOINT TENANCY WITH RIGHT OF SURVIVORSHIP PROPERTY.

3. COMMUNITY PROPERTY WITH RIGHT OF SURVIVORSHIP.

4. CERTAIN MULTIPLE PARTY BANK ACCOUNTS.

5. POWERS OF APPOINTMENT.

6. INTERESTS IN TRUST.

7. EMPLOYEE BENEFITS AND IRAs.

D. IMPORTANCE OF NONPROBATE ASSETS.

As mentioned above, the primary characteristic of a nonprobate asset is that it is not subject to testamentary disposition or to the laws of descent and distribution.

When one takes into account joint tenancy with right of survivorship property, survivorship bank accounts, employee death benefits, etc., it should become apparent that nonprobate assets are a primary, if not *the* primary, method of transmitting wealth from one generation to the next in this country. How many of us are worth more dead than alive as a result of life insurance? More than just a few. One might venture to speculate that in the 1990s, if not previously, nonprobate assets constitute on average a greater percentage in value of decedent's estates than probate assets. It is suggested that the attention devoted to probate assets and the comparative inattention devoted to nonprobate assets does not reflect the true significance of the latter. This is probably a result of the fact that the proportion of a person's estate consisting of nonprobate assets has been increasing over time, and our response is as usual more laggardly than the change.

E. BENEFICIARY DESIGNATIONS.

Because nonprobate assets are not subject to disposition by will, all of the contingencies usually provided for in a good will may be absent. For example, a good testamentary instrument will provide a specific order of alternative takers if a designated beneficiary predeceases the testator, and will generally establish trusts and other devices to protect the interests of the beneficiaries, particularly minors. The beneficiary designation forms prepared by insurance companies, banks, etc. are usually woefully inadequate for this purpose.

The ideal solution might appear to be to designate the personal representative of the probate estate as the beneficiary, "to be administered and distributed as a part of the probate estate." (Query whether an "estate" can be named as the beneficiary, since an "estate" is not a juridical entity.)

As all but those from out of state who make their living giving seminars to doctors know, a trust is only slightly less difficult to administer than an independent administration, and in fact, it is frequently administratively much simpler to make the probate estate the beneficiary of nonprobate assets than to make a third party the beneficiary, because nonprobate assets, being very liquid as a rule, are an ideal source for paying debts, expenses, and taxes. The problem is that some nonprobate assets are exempt from estate tax, and most nonprobate assets are exempt from creditor claims. If the probate estate is the beneficiary, both of these advantages will be lost. It is primarily for this reason, and certainly not for administrative convenience, that the probate estate is seldom named as the beneficiary of nonprobate assets.

One common solution is to designate a trust as the beneficiary of the nonprobate assets. The trust can then contain all of the normal dispositive provisions contained in a good will. If the nonprobate assets are exempt from estate tax or from creditor claims, care must be taken in the trust instrument to assure that these salutary characteristics are not lost. For example, if the trust provides that the assets can be used for the benefit of settlor's estate or shall be used for the payment of (or loaned for the purpose of paying) any taxes, liabilities, debts or any other claims or charges against settlor's estate, this may cause such assets to be includible in Settlor's estate for federal estate tax purposes. However, if the assets are subject to estate taxation anyway, the trust might very well provide that the assets will be so used. If the assets are estate tax exempt, they can be used to purchase assets from the probate estate, and any needed liquidity can be provided that way.

Contrast (1) the passing of property by beneficiary designations to a beneficiary who had no power or interest in the property during the lifetime of the decedent, with (2) the passing of property under a survivorship agreement, where both the survivor and the decedent had lifetime interests to which either party would succeed on the death of the other.

F. NONPROBATE ASSETS AND THE FEDERAL ESTATE TAX.

Nonprobate assets are more often than not subject to estate tax. In the case of life insurance, estate tax inclusion will result if the insured retained any incident of ownership in the policy under IRC §2042. In the case of a Grantor or revocable trust, estate tax inclusion will be required by IRC §2036. If the decedent didn't make a transfer with a retained power, but nevertheless had the power to benefit himself, his creditors, his estate, or the creditors of his estate, §2041 of the IRC will generally require inclusion (unless the power is limited to an ascertainable standard relating to health, education, maintenance or support, or is a "5&5" power). If a §2041 type power is released during life, there is §2514 and §2041(a)(2) (first sentence) to consider.

Because the nonprobate assets may be subject to estate tax, and yet are not subject to administration, special care must be taken to make sure that the estate tax burden is appropriately placed. If the probate residuary estate is intended to pay these taxes, the will should be explicit in this regard, rather than leaving the issue to conjecture.

G. ESTATE TAX APPORTIONMENT.

1. APPORTIONMENT UNDER FEDERAL LAW.

IRC §§2206 and 2207 contain the federal rule regarding the apportionment of estate taxes on life insurance and property over which the decedent had a general power of appointment under IRC §2041.

§2207 allows the executor to recover a prorata share of estate taxes from the beneficiary of property over which the decedent had a §2041 general power of appointment, unless the decedent directs otherwise in his will. This statute will not apply to property includible in the decedent's estate under IRC §2036 (certain transfers with a retained interest), in a situation where if §2036 didn't apply, §2041 would.

Note that "For purposes of §§20.2041-1 to 20.2041-3, the term 'power of appointment' does not include powers reserved by the decedent to himself within the concept of sections 2036 to 2038."[99]

§2207 does not address the situation where the decedent retained an interest under §§2036-2038 because such a transfer was under the decedent's control when he made it. New IRC §2207B now covers this situation.

Until recently, Texas did not have any implementing legislation, and so it was uncertain how §2207 would be enforced. Texas now has an apportionment statute.

2. APPORTIONMENT UNDER STATE LAW.

a. Texas Probate Code §322A.

Texas Probate Code §322A provides a comprehensive estate tax apportionment statute affecting Texas decedent's estates. In 1991 the statute was substantially rewritten. The statute does not apportion debts, only taxes and expenses incurred in connection with the determination or collection of estate taxes. Probate Code §322A is **not confined to probate assets**, but allows recovery against any person interested in the decedent's estate, including anyone who is entitled to receive property included in the decedent's taxable estate.

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[99]Treas. Reg. §20.2041-1(b)(2).

The personal representative is directed to charge each person interested in the estate a portion of the estate tax assessed against the estate. The portion of each estate tax that is charged to each person interested in the estate must represent the same ratio as the taxable value of that person's interest in the estate included in determining the amount of the tax bears to the total taxable value of all the interests of all persons interested in the estate included in determining the amount of the tax. The executor is charged with the duty to make recovery unless the cost would be economically impractical.

§322A(b)(2) states that the general apportionment rule does not apply to the extent the decedent in a written inter vivos or testamentary instrument disposing of or creating an interest in property specifically directs the manner of apportionment of estate tax or grants a discretionary power of apportionment to another person. If the directions for apportionment in two or more instruments conflict, §322A(b)(3) provides a method to resolve the conflict.

§322A(b)(2) (last sentence) provides that "A direction for the apportionment or nonapportionment of estate tax, whether contained in a will or in a nontestamentary instrument, is limited to the estate tax on the property passing under the instrument unless the instrument is a will that provides otherwise." (Under some circumstances, this may have the effect of allowing the settlor to amend an otherwise irrevocable unamendable trust.) It is believed that under this provision a will that states that all taxes shall be paid from the residuary estate (without more) is not sufficient to override the rule requiring apportionment of nonprobate assets under §322A.

No estate tax is charged to a gift qualifying for the marital or charitable deduction, nor is a charge made against a temporary interest such as a life estate or a term for years.

The law in Texas, prior to the enactment of Code §322A was somewhat uncertain. It is thought that the residuary estate would ordinarily be the primary source for payment of debts and expenses, including estate taxes, absent a contrary direction in the will, although inheritance taxes may have been apportionable. See *Sinnott v. Gidney,* 322 S.W.2d 507 (1959).

b. Clarification Needed.

There are two problems with §322A that need clarification in language, though the intent is clear enough.

§322A(b)(1) states that "the portion of each estate tax that is charged to each person interested in the estate must represent the same ratio as the **taxable value** of that person's interest in the estate included in determining the amount of the tax bears to the total taxable value of all the interests of all persons interested in the estate included in determining the amount of the tax." [Emphasis added.]

"Taxable value" is not defined. The taxable value of an interest ought to mean the **net** value for purposes of the estate tax involved, after taking into account any deductions with respect to or chargeable against the interest that are allowed in computing the tax.

The taxable value of an interest for which a full marital or charitable estate tax deduction is allowed with respect to the tax should be zero, both in the numerator and the denominators of the estate tax apportionment ratios. Further, if a debt or expense for which the estate is allowed an IRC §2053 deduction is charged against a person's interest, the taxable value of that interest (in both the numerator and denominators of the ratios) should reflect the charge (by reducing the taxable value of the interest).

The statute only makes sense if applied so that the sum of the ratios will equal one (and it won't if gross federal estate tax values are used).

H. EXEMPTION OF NONPROBATE ASSETS FROM CREDITOR CLAIMS.

An interesting question is the extent to which creditors can reach non-probate assets. Just because an asset is a non-probate asset does not mean that it is automatically exempt from the decedent's debts, but in many instances this may be the result. Recall that there is at least one significant species of property that is a probate asset in the sense that it is subject to testamentary disposition, and yet is not subject to administration without the consent of the surviving spouse, *viz.,* the decedent's interest in the surviving spouse's special community estate.

In this context it is important to remember that with respect to certain community debts, the survivor may be jointly liable with the decedent.

1. LIFE INSURANCE.

a. General Creditors Under The Common Law Exemption.

Death benefit proceeds under a life insurance policy have historically been held to be beyond the reach of the decedent's creditors unless paid to the estate, or unless there was an intent to defraud creditors (whatever that means).[100] The theory was that when the beneficiary is designated, the decedent has made a revocable gift that becomes irrevocable at death. Whether or not the transfer is in fraud on creditors was, therefore, generally to be made at the time the beneficiary is designated. If the decedent was insolvent at the time of the beneficiary designation, the fraudulent transfer rules were likely to operate to prevent the exemption.

b. Estate Taxes.

Unless the decedent directs otherwise in his will, the executor is entitled to recover from the beneficiary of life insurance proceeds, the pro rata share of Federal estate taxes attributable to such proceeds. Internal Revenue Code §2206. A similar rule applies under Internal Revenue Code §2207 with respect to property over which the decedent had a power of appointment under §2041. (Interestingly, there is no corresponding provision for property includable in the decedent's Federal gross estate (for Federal estate tax purposes) by virtue of a retained power under §2036.)

Texas now has an apportionment statute (Prob. Code §322A), which may serve as enabling legislation giving the executor the power under State law to enforce Internal Revenue Code §§2206 and 2207.

c. Article 21.22 Of The Texas Insurance Code.

This exemption described above has been incorporated in a much expanded form into the insurance code. The first broad exemption was added in 1987, but the courts limited its application. In 1991 the statute was amended again. It looks like the legislature really means it this time. The scope of the statutory exemption is nothing short of breathtaking. The exemption clearly appears to extend to the cash value of life insurance without a dollar limitation. The pertinent provisions of the statute are set forth verbatim below:

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[100] *Parker Square State Bank v. Huttash,* 484 S.W.2d 429 (Tex. Civ. App.-Ft. Worth 1972, writ ref'd); *Pope Photo Records, Inc. v. Malone,* 539 S.W.2d 224 (Tex. Civ. App.-Amarillo 1976, no writ); *Oden v. McAdams,* 108 S.W.2d 920 (Tex. Civ. App-Waco 1937, no writ); *San Jacinto Building, Inc. v. Brown,* 79 S.W.2d 164 (Tex. Civ. App.-Beaumont 1935, writ ref'd); and *Lane v. Kuehn,* 141 S.W.2d 363 (Tex. Civ. App.- Texarkana 1911 aff'd, 167 S.W. 804). See also Art. 21.22 of the Texas Insurance Code.

Art. 21.22. Exemption of Insurance Benefits from Seizure Under Process

Sec. 1. Notwithstanding any provision of this code other than this article, all money or benefits of any kind, **including policy proceeds and cash values**, to be paid or rendered to the **insured** or any **beneficiary** under any policy of insurance issued by a life, health or accident insurance company, including mutual and fraternal insurance, or under any plan or program of annuities and benefits in use by any employer, shall:

(1) inure exclusively to the benefit of **the person for whose use and benefit the insurance is designated in the policy**;

(2) **be fully exempt from execution**, attachment, garnishment or other process;

(3) be fully exempt from being or be seized, taken or appropriated or applied by any legal or equitable process or operation of law to pay any debt or liability **of the insured or of any beneficiary**, either before or after said money or benefits is or are paid or rendered, and

(4) be fully exempt from all demands in any bankruptcy proceeding of the insured or beneficiary.

Sec. 2. The exemptions provided by Section 1 of this article apply without regard to whether:

(1) the power to change the beneficiary is reserved to the **insured**; or

(2) the insured or the insured’s estate is a contingent beneficiary.

Sec. 3. The exemptions provided by Section 1 of this article do not apply to:

(1) premium payments made in fraud of creditors subject to the applicable statute of limitations for the recovery of the premium payments; or

(2) a debt of the insured or beneficiary secured by a pledge of the policy or its proceeds.

Sec. 4. This article does not prevent the proper assignment of any money or benefits to be paid or rendered under an insurance policy to which this article applies, or any rights under the policy, by the insured or owner in accordance with the terms of the policy.

Sec. 5. Wherever any policy of insurance or plan or program of annuities and benefits mentioned in Section 1 of this article shall contain a provision against assignment or commutation by any beneficiary thereunder of the money or benefits to be paid or rendered thereunder, or any rights therein, any assignment or commutation or any attempted assignment or commutation by such beneficiary of such money or benefits or rights in violation of such provision shall be wholly void. [Emphasis added.]

d. Limitation on Application of Statute.

It seems clear that the legislature intended by the amendment for the exemption to extend to the cash value of life insurance without a dollar limitation, in response to a case that had held that the prior version of the statute was limited by the overall exemption of $60,000 for personal property found in Property Code §42.001(a)(1). However, this question is still not free from doubt.

Article 21.22 was amended in 1991. When Section 1 was added in 1987 there was doubt as to whether it would be literally construed. At least one bankruptcy case held that Section 1 of Article 21.22 was limited by Property Code §42.001 which limits the exemption for personal property to $30,000 in the case of a family and $15,000 in the case of a single individual.[101] The 1991 amendment added the phrase "Notwithstanding any provision of this **code** other than this article" to the first sentence of section 1. My interpretation of this article is that it should be read literally without limitation; however, in the context where the statute is found, the "code" is the Insurance Code and not the Property Code. Therefore, it is possible that contrary to the apparent intent of the legislature, a court may once again seek to limit the application of the statute.

Note further that this exemption arguably does not apply to the owner as such, unless the owner is also the insured or a beneficiary. The exemption applies to "policy proceeds and cash values, to be paid or rendered to the *insured* or any *beneficiary.*"[102]

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[101] *In re Brothers,* Bkrtcy. N.D. Tex., 1988, 94 B.R. 82.

[102] *Cf. In re Gould (Gould v. Phillips,* 457 F.2d 393 (5th Cir. 1972); *Bartholow v. Garner,* 43 Bankr. 463 (N.D. Tex. 1984)

2. MULTIPLE PARTY ACCOUNTS.

The creditor can reach non-probate assets owned by the decedent in a multiple party account only if other probate assets are insufficient to pay the decedent's debts.[103]

3. IRAs.

Prior to the passage of Tex. Prop. Code §42.0021, effective September 1, 1987, a general creditor probably could reach assets held in an IRA, both during the decedent's lifetime and after death. The prohibition on alienation found in ERISA §206(d) and its IRC counterpart, §401(a)(13), does not apply to IRAs. However, at death, the analogy to life insurance would seem to have been apt.

Effective September 1, 1987, an IRA account was added to the list of items constituting property exempt from execution from creditors under State law.[104]

For a Texas case holding that IRA proceeds are not probate assets and do not belong to the estate beneficiaries in the absence of fraud, see *Ashmore v. Carter,* 716 S.W.2d 171 (Tex. App.-Beaumont 1986, no writ). Of course the problem in Texas continues to be what happens to the nonparticipant spouse's community property interest in the IRA when it is the nonparticipant spouse that dies first. If this interest passes under the nonparticipant spouse's will as a probate asset, it is somewhat ironic that if the participant had died it would have been a nonprobate asset. Perhaps, however, the irony is no different than when the noninsured spouse dies owning a community property interest in a life insurance policy standing in the name of the survivor.

4. QUALIFIED PLAN ASSETS.

ERISA §206(d) and Internal Revenue Code §401(a)(13) require that a qualified plan, as a condition of qualification, contain a prohibition against alienation. With the exception of bankruptcy, the courts have generally held qualified plan assets to be exempt from execution by creditors.[105]

Bankruptcy was thought for a while to be an exception to the rule, unless the trust would constitute a *spendthrift* trust under local law.[106] However, the United States Supreme Court has settled this issue in favor of the debtor.

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[103]Tex. Prob. Code §442.

[104]Tex. Prop. Code §42.0021.

[105]*Tenneco, Inc. v. First Virginia Bank (Tidewater),* 698 F.2d 688 (4th Cir. 1983); *Ellis National Bank v. Irving Trust Co.,* 786 F.2d 466 (2d Cir. 1986).

[106]*McLean v. Central States, Southeast and Southwest Areas Pension Fund,* 762 F.2d 1204 (4th Cir. 1985); *Goff v. Taylor,* 706 F.2d 574 (5th Cir. 1983); *Samore v. Graham,* 726 F.2d 1268 (8th Cir. 1984); *In re Lichstrahl,* 750 F.2d 1488 (11th Cir. 1985); and *In re Daniel,* 771 F.2d 1352 (9th Cir. 1985). *In the matter of Brooks,* 844 F.2d 258 (5th Cir. 1988).

In *Patterson v. Shumate* the Court held that the antialienation provision of ERISA is applicable nonbankruptcy law under §541(c)(2) of the Bankruptcy Code, and therefore, assets in a qualified plan are exempt even in bankruptcy.[107] The decision affects Texas plan participants, because even though Texas residents have the benefit of a state exemption for qualified plan benefits,[108] it had been argued (so far unsuccessfully) that this exemption was preempted under ERISA §514(a) because it "relates" to an employee benefit plan.[109]

However, this issue may have been mostly irrelevant to a decedent's estate (unless the decedent was in bankruptcy at the date of his death) because an estate is not subject to the Bankruptcy laws![110]

5. EMPLOYEE DEATH BENEFITS.

Property Code §§121.051 and 121.055 exempts certain employer sponsored death benefits, including nonqualified salary continuation arrangements, from execution by creditors.

6. JOINT TENANCY WITH RIGHT OF SURVIVORSHIP.

It may be the case that upon the death of one joint tenant, the other joint tenant takes the property free and clear of the claims of the deceased joint tenant.

I. PROBLEMS INVOLVING PROBATE ASSETS NOT SUBJECT TO ADMINISTRATION.

Very little attention has been given in the past to a species of property that I have termed "probate assets not subject to administration."[111] There are in fact many assets that are subject to testamentary disposition (and thus are technically probate assets) and yet are not subject to administration by the decedent's personal representative. The primary example of such a species of property would be the special community estate of a surviving spouse, and a graphic example of that would be the surviving spouse's rollover IRA. Because these assets are not subject to administration they are similar to nonprobate assets. Because they are similar to nonprobate assets they will be discussed herein.

Unfortunately, this is an area in which there are more questions than answers. With this in mind, recognizing the issues should be the first order of priority. It is submitted that with the proliferation of rollover IRAs, sooner or later we will all face these problems.

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[107] *Patterson v. Shumate* is at CCH PPG ¶23,853W.

[108] Tex. Prop. Code §42.0021.

[109] *In re Volpe,* ___ F.2d ___ (5th Cir. 1991); *In Re Dyke,* ___ F.2d ___ (5th Cir. 1991).

[110] Bankruptcy Code §109.

[111] The author recognizes that the term is at least an oxymoron, if not technically incorrect, but that is the nature of the beast.

1. PROPERTY SUBJECT TO THE SOLE MANAGEMENT OF THE SURVIVING SPOUSE.

In the absence of a partition, and where a personal representative has qualified, the representative "is authorized to administer, not only the separate property of the deceased spouse, but also the community property that was by law under the management of the deceased spouse during the continuance of the marriage and all of the community property that was by law under the joint control of the spouses during the continuance of the marriage."[112] **The surviving spouse is entitled to retain possession and control of all community property that was legally under the sole management of the surviving spouse during the marriage.** This right may be waived by the surviving spouse by instrument in writing filed with the clerk.[113]

This inability of the administrator to administer the special community of the surviving spouse could result in awkward practical problems. Is the property not under administration liable for its pro rata share of debts and expenses? Does the fact that such property is not being administered affect the ultimate source of property used to pay debts, as between the decedent's community and separate property subject to administration? Certainly the decedent's will governs the ownership of the decedent's interest in such property at death, but is the decedent's interest in the surviving spouse's special community a part of the decedent's residuary estate for purposes of paying debts, given that it is not subject to administration? What if the decedent directs that his separate property goes to A and his community property to B, and the residuary estate pays all the debts. What type of apportionment if any takes place here?

The fact that the special community property of the survivor is not subject to administration in the absence of a waiver does not for a moment mean that the property is not subject to testamentary disposition or that it is not liable for the decedent's debts. This is the anomaly.

2. THE LIABILITY OF THE SURVIVOR'S SPECIAL COMMUNITY FOR DEBTS.

During the lifetime of the decedent, creditors of the deceased spouse cannot ordinarily reach community assets subject to the sole control and management of the other spouse to satisfy claims against the decedent arising prior to marriage or any nontortious (contract) liabilities that the decedent may have incurred.[114]

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[112] Tex. Prob. Code §177(b).

[113] Tex. Prob. Code §177(b), last sentence.

[114] Tex. Fam. Code 5.61(b).

Probate Code §§45 and 156 appear to impose liability on *a decedent's interest* in community property at death, whether or not such property was subject to the decedent's management and control during lifetime. If so, then in some instances death may change the lifetime liability rules contained in Family Code §5.61(b). During the life of both spouses, Family Code §5.61(b) protects a spouse's special community from nontortious liabilities that the other spouse incurs during marriage. The last sentence of Probate Code §45 provides: "In every case, the community estate passes charged with the debts against it."

Probate Code §156 states in part:

> The community property subject to the sole or joint management, control, and disposition of a spouse during marriage continues to be subject to the liabilities of that spouse upon death. **In addition**, the interest that the deceased spouse owned in any other nonexempt community property passes to his or her heirs or devisees charged with the debts that were enforceable against such deceased spouse prior to his or her death. [Emphasis added.]

It could be argued that the interest that the deceased spouse owned in any other nonexempt community property (i.e, the special community of the survivor) is charged only with the debts that, *as to that property*, "were enforceable against such deceased spouse prior to his or her death." On the one hand, this reading seems to stretch the language of the statute in order to achieve a more reasonable interpretation. However, such a reading has a great deal of merit in that it would be much more consistent with the rules of liability set forth in the Family Code and would avoid the anomaly of having to apply different rules of marital property liability. It also resolves much of the need for administering the special community of the survivor, since in the ordinary case the decedent's debts will be nontortious and the survivor's special community will not be liable for them.[115] It does not, however, resolve the issue of how to pay estate taxes; but here, the Texas apportionment statute[116] may be of assistance. In case most of the community is under the sole control of the survivor, the executor may be entitled to contribution and reimbursement.

Care should be taken in drafting wills to avoid the argument that a "pay all debts clause" was intended to operate as a gift to the surviving spouse, such that reimbursement or contribution would not be applicable.

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[115]I am indebted to Prof. Thomas M. Featherston of Waco for suggesting this possible interpretation of the statutes. In most cases this interpretation would function as an elegant solution to the dilemma.

[116]Prob. Code §322A.

The most common example of a situation where the surviving spouse may be personally liable for the decedent's contractual debts, is where the debts were for necessaries.[117]

Is the probate estate that is under administration primarily responsible for payment of debts? If the probate estate that is under administration pays these debts, is it entitled to reimbursement?

3. **WHERE DO PROBATE ASSETS NOT SUBJECT TO ADMINISTRATION FIT IN THE ORDER OF ABATEMENT.**

Does the community property that is not being administered by the executor have a special priority over other assets subject to administration? For example if the decedent's residuary estate subject to administration is exhausted in the payment of debts, taxes and expenses, such that abatement of general or specific devises is called for, does the estate or the legatees have a claim against the survivor for reimbursement? Is the decedent's interest in the survivor's special community a part of the residuary estate for purposes of the order of abatement, even though such property is not subject to administration? If the survivor files a waiver with the clerk in order to allow his special community to be administered, could or should this affect the size and allocation of beneficial interests under the will?

4. **THE SURVIVOR'S IRA OR QUALIFIED PLAN INTEREST IS A GRAPHIC EXAMPLE OF THE SURVIVOR'S SPECIAL COMMUNITY.**

Allard v Frech, 754 S.W.2d (Tex. 1988) held that a nonparticipant spouse has a community property interest (a point that is not disputed) that is subject to testamentary disposition (a point that is disputable). Even if the decision is not upheld by the Federal courts, the nonparticipant spouse will probably have a power of testamentary disposition over the nonparticipant's community property interest in the participant's IRA, because an IRA is not subject to the same limitations and considerations as are present in the case of a qualified plan. If *Allard* is upheld, this power will extend to the nonparticipant's interest in the survivor's qualified plan as well. In the case of an IRA in particular, we may have a graphic example of what could be a very substantial species of community property subject to the sole control and management of the surviving spouse. Under Tex. Prob. Code §177(b), the executor has no power to administer this property, although under *Allard* it would pass pursuant to the decedent's will.

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[117]Family Code §4.02 and 4.031; *Daggett v. Neiman Marcus,* 348 S.W.2d 796 (Tex. Civ. App.--Houston 1961, n.w.h.); *Cooper v. Cooper,* 120 S.W.2d 269 (Tex. Civ. App.--Amarillo 1938, n.w.h.); *Wall v. Irick,* 83 S.W.2d 394 (Tex. Civ. App.-Amarillo 1935, no writ); *Stewart Title Co. v. Huddleston,* 598 S.W.2d 321 (Tex. Civ. App.-San Antonio 1980, writ ref'd n.r.e. in 608 S.W.2d 611); *In Re Marriage of Lang,* 542 S.W.2d 712 (Tex. Civ. App.- Texarkana 1976, no writ); *Inwood National Bank v. Hoppe,* 596 S.W.2d 183 (Tex. Civ. App.-Texarkana, writ ref'd n.r.e); and *Miller v. City National Bank,* 594 S.W.2d 823 (Tex. Civ. App.-Waco 1980, no writ).

(The 9th Circuit has squarely held that in a fact pattern virtually identical to *Allard* the California community property interest of the predeceasing nonparticipant spouse in the participant's plan was not a probate asset because ERISA preempted state law.[118] This case makes the *Allard* case very suspect, but until the 5th Circuit or the U.S. Supreme Court speaks to this issue we won't know what the law really is on the subject.)

5. CAN THE EXECUTOR FUND A PECUNIARY GIFT WITH THE DECEDENT'S INTEREST IN THE SURVIVOR'S SPECIAL COMMUNITY?

Marital deduction and bypass trust planning often result in large pecuniary gifts passing under the will. If a large part of the decedent's estate consists of the decedent's interest in the special community of the survivor (which is likely to be the case if the survivor has a large rollover IRA), does the executor have the authority to allocate this asset over which the executor has no administrative control? In the case of an IRA, does an attempted allocation, not accompanied by an actual distribution, constitute a taxable distribution from the IRA, such that the IRA or a part of it would thereafter cease to be qualified under Code §408?

J. FRAUD ON THE SPOUSE AND GIFTS OF NONPROBATE ASSETS.

The deceased spouse does not have the power to dispose of the survivor's half of the community by will, without his consent. However, she does have the power, with respect to community property under her management and control, to purchase insurance and make gifts with community property, within reason.

1. GIFTS OF COMMUNITY PROPERTY.

If, by reason of the size of the gift in relation to the total size of the community estate, the adequacy of the estate to support the other spouse, and the relationship of the donor to the donee, the gift constitutes constructive fraud, the burden will be on the donor to prove that the gifts of his share of the community property are fair, otherwise the gift will be set aside.[119]

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[118] *Ablamis v. Roper,* 937 F.2d 1450 (9th Cir. 1991).

[119] *Marshall v. Marshall,* 735 S.W.2d 587 (Tex. App.-Dallas 1987, no writ history to date); *Horlock v. Horlock,* 533 S.W.2d 52, 55 (Tex. Civ. App.-Houston [14th Dist.] 1975 writ ref'd n.r.e.); *Carnes v. Meador,* 533 S.W.2d 365 (Tex. Civ. App.-Dallas 1975, writ ref'd n.r.e.); and *Tabassi v. NBC Bank-San Antonio,* 737 S.W.2d 612 (Tex. App.-Austin 1987 no writ history to date). See also 29 Baylor Law Review 608.

2. <u>LIFE INSURANCE</u>.

Life insurance proceeds purchased with community property will ordinarily be paid to the beneficiary named in the policy, unless, under all the circumstances, this would constitute a fraud on the surviving spouse. The gift of life insurance cases are based upon equitable notions.[120] The line of analysis in the cases construing this principle employs reasoning similar to that used when a husband or wife makes gifts to third persons out of community assets. In most cases, but not always, if the donee is a related party, the disposition will be allowed to stand. If the donee is an unrelated party, the gift will usually be set aside.

> "Where the donee or beneficiary is related to the disposing spouse or decedent, the courts look to three factors in determining the fairness of the disposition: (1) the relationship of the beneficiary to the decedent; (2) whether special circumstances tend to justify the gift; and (3) whether the community funds used were reasonable in proportion to the remaining community assets. *Givens v. Girard Life Insurance Company,* 480 S.W.2d 421, 426, cited with approval in *Great American Reserve Insurance Code v. Sanders,* 525 S.W.2d 956, 958-59 (Tex. 1975); *Redfearn,* 579 S.W.2d at 297. We hold that the disposing spouse or his donee has the burden to prove these three factors in order to rebut the presumption of constructive fraud."[121]

Note that Business and Commerce Code §24.003 voids gratuitous transfers made at a time when the transferor is insolvent. In *Pope Photo Records, Inc. v. Malone,* 539 S.W.2d 224 (Tex. Civ. App.-Amarillo 1976, no writ), the court held that the determination of insolvency is made at the time of the beneficiary designation.

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[120] *Givens v. Girard Life Insurance Company,* 480 S.W.2d 421 (Tex. Civ. App.-Dallas 1972 writ ref'd n.r.e.); *Jackson v. Smith,* 703 S.W.2d 791 (Tex. App.-Dallas 1985, no writ history to date).

[121] *Jackson v. Smith,* 703 S.W.2d 791 (Tex. Civ. App.-Dallas 1985, no writ) pp. 795-796.

3. SPOUSE HAS MADE TAXABLE GIFT FOR GIFT TAX PURPOSES IF OTHER SPOUSE MAKES GIFT OF COMMUNITY PROPERTY OUTSIDE THE MARRIAGE. If one spouse makes a gift to a third person (say, to a paramour) of community property, and the other spouse either cannot or does not set the gift aside under state law, the IRS will treat the non-donor spouse as having made a gift for gift tax purposes.[122] This may be adding insult to injury, especially where the spouse has no control over the transfer, and in fact strenuously objects to it.

Where is this situation most graphic? In the case of a community property life insurance on the life of a predeceasing spouse where the transfer is not sufficiently egregious to amount to fraud on the spouse.[124]

4. INTER-VIVOS GIFTS IN TRUST-*LAND V. MARSHALL*.
There is another interesting doctrine that leads to a considerably different result than the constructive fraud cases involving gifts of life insurance. In the seminal case of *Land v. Marshall,* 426 S.W.2d 841 (Tex. 1968), the decedent placed a large portion of the community property under his management and control in an inter-vivos trust for the benefit of himself and his wife. The decedent retained the power to revoke and amend the trust. On the decedent's death, the wife challenged the conveyance. The Texas Supreme Court was not interested in the fraud issue. In fact, the Court opined that there was neither actual nor constructive fraud involved. However, the Court, nevertheless, set aside the entire trust on the grounds that the trust was "illusory." The Court would probably have allowed the decedent to dispose of his half of the community under the terms of the trust instrument had it not believed that the failure of the instrument to dispose the wife's half defeated the underlying purpose of the trust.

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[122]Treas. Reg. **§25.2511-1(h)(9)**. *Cox v. U.S. 286 F. Supp. 761 (W.D. La, 1968). Cf. Goodman v. Comm'r,* 156 F.2d 218 (2nd Cir. 1946), and Rev. Rul. 79-303, 1979-2 C.B. 332.

[123]Treas. Reg. **§25.2511-1(h)(9)**. *Cox v. U.S. 286 F. Supp. 761 (W.D. La, 1968). Cf. Goodman v. Comm'r,* 156 F.2d 218 (2nd Cir. 1946), and Rev. Rul. 79-303, 1979-2 C.B. 332.

[124]Treas. Reg. §25.2511-1(h)(9).

Although under ordinary circumstances, the power to revoke or amend would not render a trust ineffective, the Court held that where the wife's community share was involved in the transfer, the trust would be set aside, unless a more permanent disposition of the assets were made. This is a hard case to square with other analogous principles of law. It is to be contrasted that those cases in which the one spouse actually disposes of the other spouse's share of the community in an unalterable fashion. In such cases, the courts will apparently apply the constructive fraud doctrine to determine whether or not the transfer will stand. Also, if the spouse makes a disposition of life insurance proceeds, retaining the power to revoke, amend, sell, change the beneficiary designation, etc., the courts also apply the constructive fraud doctrine. Where however, the same thing is accomplished through use of a trust, the Texas Supreme Court has laid down the "illusory trust" doctrine as a means by which the conveyance may be set aside. The distinction is not easily reconciled.

The difference between a completed gift, which will be tested under constructive fraud principles, and "an illusory trust" which is apparently, invalid, even in the absence of constructive fraud, may be a public policy decision that the donor spouse should not be allowed to use an inter-vivos trust as a means of disposing of the other spouse's community one-half interest after the donor spouse's death, where the donor spouse did not part with anything during lifetime.

What if the manager of the community places the life insurance contract in a revocable trust? Which doctrine applies: *Land v. Marshall* or constructive fraud?

At least one eminent law professor has opined informally that the *Land* theory could be used to defeat any death time transfer of a spouse’s community property interest in assets over which the decedent retained the power of disposition during life. This would presumably include the transfer by an insured of a surviving spouse’s interest in life insurance proceeds payable as a result of the insured’s death, unless the insured relinquished control over the policy during life. It was suggested that the reason this hasn't happened to date is merely because no one has raised the issue.

K. NONTESTAMENTARY TRANSFERS UNDER CHAPTER XI AND §46 OF THE PROBATE CODE.

The surviving spouse may have a survivorship interest in jointly held property. In fact it is so common as to be probable that the surviving spouse and the decedent will have had common ownership in a multiple party bank account. The decedent may also have had a community property bank account where someone other than the spouse is a party or named beneficiary. For many reasons it is frequently the case that the determination of who succeeds to the property on the death of one of the joint owners will be unclear.

This whole area has been complicated by the fact that until recently, survivorship agreements in community property were not permitted by the Texas Constitutions.[125] This did not phase most banks who not only offered, but actually encouraged, their customers to enter into ineffective joint tenancy arrangements.

Chapter XI of the Probate Code was intended to clarify these ownership issues. It has not done so, but we are edging closer to an understanding.

Chapter XI of the Probate Code is divided into three parts: Part 1 treats multiple party accounts, including *inter alia* **survivorship** accounts. Part 2 is made up of one section (§450) which declares almost every conventional nonprobate arrangement to be nontestamentary and valid. Part 3 sets forth the rules governing community property with right of survivorship. Section 46 only covers certain **survivorship** arrangements in **jointly owned** property.

1. DISTINGUISH JOINT TENANCY FROM OTHER NONPROBATE ASSETS/ DISTINGUISH SURVIVORSHIP RIGHTS FROM RIGHTS UNDER A BENEFICIARY DESIGNATION.

Before exploring §46 and Chapter XI further, it may be worthwhile to note at the outset that joint tenancy is a special species of property that has a much older and much richer legal history than other forms of nonprobate assets. In many ways this is unfortunate for those outside academia, because it means that this form of property ownership is burdened with a number of special requirements and technicalities —recall (with fondness?) the "rule of the four unities"— that have posed obstacles to the courts, to the legislatures, and, not coincidentally, to the poor layperson who has not been schooled in the feudal and constitutional characteristics of this special species of property.

Joint tenancy with right of survivorship (JTWRS) used to be one of the only species of true survivorship tenancy. Now we have something called community property with right of survivorship (CPWRS). Among its other unique features, JTWRS property had to be separate property as a matter of Texas constitutional law. CPWRS is not joint tenancy property. These two species of property do, however, share the important characteristic of survivorship as a key feature.

By the term "true survivorship" I mean that either party will succeed to the interest of the other on death of the first to die. This necessarily presupposes that **both** parties have an interest of some sort in the property during life (which interest may be something less than an ownership interest); otherwise, one of the parties would not have anything to gain on the death of the other, in which case the property can't very well be true survivorship property.

[125] *Williams v. McKnight*, 402 S.W.2d 505 (Tex 1966); *Hilley v. Hilley,* 342 S.W.2d 565 (Tex. 1961). Contrast *Quilter v. Wendland,* 403 S.W.2d 335 (Tex. 1966), joint tenancy with third party in community property permissible.

Joint tenancy with right of survivorship is the classic example of true survivorship property. Community property with right of survivorship is a relatively new species of survivorship property. In fact, it is difficult (and may be impossible) to give examples of any other legally recognizable form of true survivorship property. Other forms of nonprobate assets do not share the reciprocity feature of true rights of survivorship. **That is, if the designated beneficiary dies, the other party does not succeed to anything.**

Unfortunately, the term "survivorship" is also loosely applied to nonprobate property subject to a beneficiary designation where the beneficiary who succeeds to the interest of the donor on the owner's death did not have an interest in the property during the donor's lifetime. This causes confusion. Perhaps this confusion cannot be avoided since there is no commonly used substitute term that both identifies and distinguishes this form of property (life insurance, P.O.D. accounts, etc.) from true survivorship (JTWRS and CPWRSP) property in which both the decedent and the surviving party had a jointly held interest during their joint lifetimes.

The problem is compounded by the fact that the "interest" of a party in the property may be merely a legal power over the property that is something less than outright ownership. §438 of the Probate Code is very explicit about this:

> §438. Ownership During Lifetime
>
> (a) **A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each** to the sums on deposit, unless there is clear and convincing evidence of a different intent.
>
> (b) A P.O.D. account belongs to the original payee during his lifetime and not to the P.O.D. payee or payees. If two or more parties are named as original payees, during their lifetimes rights as between them are governed by Subsection (a) of this section.
>
> (c) Unless a contrary intent is manifested by the terms of the account or the deposit agreement or there is other clear and convincing evidence of an irrevocable trust, a trust account belongs beneficially to the trustee during his lifetime, and if two or more parties are named as trustee on the account, during their lifetimes beneficial rights as between them are governed by Subsection (a) of this section. If there is an irrevocable trust, the account belongs beneficially to the beneficiary.

§438(a) clearly contemplates that a party who makes no contribution to a joint account will have no interest in the account during the lifetime of the contributing depositors, absent a clear agreement to the contrary.

It is important at the outset to understand the distinction between true survivorship property and other nonprobate probate property, in order to remove some of the mist that so thoroughly envelopes §46 and Chapter XI of the Probate Code (dealing with Nontestamentary Transfers) and the many confusing cases dealing with joint tenancy and survivorship bank accounts.

2. JOINT TENANCIES.

§46 of the Probate Code sets forth the rule as to joint tenancies:

> (a) **If two or more persons hold an interest in property jointly**, and one joint owner dies before severance, the interest of the decedent in the joint estate **shall not survive** to the remaining joint owner or owners, but shall pass by will or intestacy from the decedent as if the decedent's interest had been severed. **The joint owners may agree in writing, however, that the interest of any joint owner who dies shall survive** to the surviving joint owner or owners, but no such agreement shall be inferred from the mere fact that the property is held in joint ownership.
>
> (b) Subsection (a) does not apply to agreements between spouses regarding their community property. Agreements between spouses regarding rights of survivorship in community property are governed by Part 3 of Chapter XI of this code. [footnote 1]
>
> [footnote 1] Probate Code, § 451 et seq. [Emphasis added.]

Note that to be covered by §46, the property must be jointly held separate property. Note further that the statute does not by its terms provide that the written agreement must be signed.

3. JOINT TENANCY DEEDS ARE NOT SIGNED BY THE GRANTEES.

Consider the fact that a deed to real estate may say that the grantees are to hold title to the property as joint tenants with right of survivorship. If the property is separate property, does the deed constitute an agreement "in writing . . . that the interest of any joint owner who dies shall survive to the surviving joint owner or owners"[126]? Several prominent cases, each involving separate property only, have held that even though the grantees did not sign the deed, the deed nevertheless constituted the writing necessary to support the agreement.[127]

[126]Tex. Prob. Code §46(a), last sentence.

[127]*Whitis v. Whitis* , 549 S.W.2d 54 (Tex. Civ. App.— Waco 1977, writ ref'd n.r.e.); *Chandler v. Kountze*, 130 S.W.2d 327 (Tex. Civ. App.— Galveston 1939, writ ref.).

A relatively new provision to the Texas Probate Code provides: "At any time, spouses may agree between themselves that all or part of their community property, then existing or to be acquired, becomes the property of the surviving spouse on the death of a spouse."[128] However, Probate Code §452 goes on to require that an "agreement between spouses creating a right of survivorship in community property **must be** in writing and **signed by both spouses**."[129] [Emphasis added.] Since a deed ordinarily would not contain the signatures of the grantees, one must conclude that it ordinarily would not qualify.

4. WHAT IS A BANK ACCOUNT.

It is worth considering just what type of property interest a bank account represents. When money is deposited into a bank account, the bank doesn't put the depositor's name on a drawer and put the money in it. All the depositor has is a contract with the institution to pay to or to the order of the depositor an amount of money not exceeding the amount deposited.

If the bank account is a contract, then perhaps the inception of title doctrine ought to determine its separate or community property character, rather than examining the character of the funds that are deposited later on. However, this is not how the courts have analyzed the situation.

5. THE OLD §46(b) PROBLEM-SEPARATE PROPERTY BANK ACCOUNTS.

A question that I have as yet to see satisfactorily answered is whether the parties to a bank account, that was clearly a jointly held separate property account when established or partitioned, can agree that the account will continue to be a separate property bank account, no matter what the source of the funds subsequently deposited.

In this regard it is of more than passing interest that old Probate Code §46(b) provided that "a written agreement between spouses and a bank, . . . may provide that funds . . . to be deposited in the future and interest and income thereon shall by that agreement be partitioned into separate property . . ." Although there were questions as to how far this language could be taken, it was thought to probably mean (although we weren't entirely sure) that community property deposited into a jointly held separate property bank account, could, pursuant to a prior agreement, take on the separate property character of the account, without the need of further partition.

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[128]Tex. Prob. Code §451.

[129]Tex. Prob. Code §452, first sentence.

This language is no longer a part of §46, and so community property transferred into a jointly held separate property account might remain community property, notwithstanding a prior written agreement to the contrary. However, Property Code §5.52 still provides that spouses may agree to partition or exchange community property "then existing or to be acquired." Further, Article 16, §15 of the Texas Constitution (which surely is still good law) says much the same thing as the Property Code. So it is not clear whether the change to Probate Code §46 implies that such an agreement is no longer permissible with respect to bank accounts (if it ever was).

The issue, it seems to me, boils down to this, does the Constitution and the Family Code contemplate that parties can agree that community property to be acquired in the future can be *thereafter* partitioned unilaterally by depositing the property into an account or by other unilateral act? It is not at all clear to me that the Constitution authorizes what is in effect a unilateral partition after the property is acquired, although I hope that it does.

If the deposit agreement purports to turn everything that passes through it into separate property, and if, as is not uncommon, everything a married couple owns does pass through it, the effect could be quite dramatic. Think about it.

A determination of whether the account is community or not may make a difference if tort creditors of one spouse seek to execute on the account. The determination of this issue would affect the characterization of all property purchased out of the account. Further, it could also have a bearing in a divorce (a court cannot make a just and right division of separate property), or at death (a step up in basis is allowed for both halves of community property).

In fact, if the old §46(b) technique is still valid, a community free marriage could be achieved simply by signing a deposit agreement.

6. PART 1-MULTIPLE PARTY ACCOUNTS.

Chapter XI of the Texas Probate Code was enacted in 1979 in order, in part, to do away with the controversy surrounding the ownership of bank accounts at death. It is clear that this purpose has not been accomplished.

a. Some Important Definitions.

§436 contains the following important definitions:

(1) "**Account**" means a contract of deposit of funds between a depositor and a **financial institution . . .**

* * * *

(3) “**Financial institution**” means an organization authorized to do business under state or federal laws relating to financial institutions. . .

(4) **“Joint account”** means an account payable on request to one or more **of two or more *parties*** whether or not there is a right of survivorship.

(5) **“Multiple-party account”** means a joint account, a P.O.D. account, or a trust account. . . .

* * * *

(7) "**Party**" means a person who, by the terms of the account, **has a present right**, subject to request, to payment from a multiple-party account. **A P.O.D. payee or beneficiary of a trust account is a party only after the account becomes payable to him** by reason of his surviving the original payee or trustee. . . .**[I]t does not include a named beneficiary** unless the beneficiary has a present right of withdrawal.

* * * *

(10) “**P.O.D. account**” means an account payable on request to one person during lifetime and on his death to one or more P.O.D. payees, or to one or more persons during their lifetimes and on the death of all of them to one or more P.O.D. payees.

(11) “**P.O.D. payee**” means a person designated on a P.O.D. account as one to whom the account is payable on request after the death of one or more persons.

* * * *

(14) "**Trust account**" means an account in the name of one or more parties as trustee for one or more beneficiaries where the relationship is established by the form of the account and the deposit agreement with the financial institution and there is no subject of the trust other than the sums on deposit in the account. It is not essential that payment to the beneficiary be mentioned in the deposit agreement. A trust account does not include a regular trust account under a testamentary trust or a trust agreement which has significance apart from the account, or a fiduciary account arising from a fiduciary relation such as attorney/client. [Emphasis added.]

b. <u>Is a P.O.D. Account A Joint Account</u>?

A "'Multiple-party account' means a joint account, a P.O.D. account, or a trust account."[130] Thus, a P.O.D.account is a multiple party account, by definition. But is it a joint account?

The definition of multiple party account makes it clear that all joint accounts are multiple party accounts, but it implies that the reverse is not true; i.e., the implication is that some multiple party accounts are not joint accounts. This is crucial.

A "Joint account" means "an account payable on request to one or more **of two or more *parties*** whether or not there is a right of survivorship."[131] This is a strangely worded definition. By its terms, there must be two or more parties, but it also describes an account that is only payable to one of those parties. To be a "party" a person must, by the terms of the account, have a present right, subject to request, to payment from a *multiple-party account*.[132]

Again, to be a "joint account" the account must be payable to "two or more parties." "A P.O.D. payee or beneficiary of a trust account is a party only after the account becomes payable to him by reason of his surviving the original payee or trustee."[133] A P.O.D. account may be payable to "two or more parties" consecutively, but not concurrently. The account is payable only to the depositor during life and only to the P.O.D. payee at death. So is it a joint account?

Whether or not a P.O.D. or trust account is a joint account is critical, because §439(a) requires that the survivorship feature of a joint account be supported by the signature of the party who dies. See below.

A recent Federal District Court Decision interpreting Texas law held that the P.O.D. account involved in that case was not a "joint account" within the meaning of §439(a).[134] As a result of this interpretation, an **unsigned** bank card naming a third party as a P.O.D. payee was sufficient to pass title to the third party at the death of the depositor!

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[130]Tex. Prob. Code §436(5).

[131]Tex. Prob. Code §436(4).

[132]Tex. Prob. Code §436(7).

[133]Tex. Prob. Code §436(7).

[134]*The Union National Bank v. Ornelas-Gutierrez,*772 F. Supp. 962 (U.S.D.C., S.D. Texas, Laredo Division, 1991).

c. **<u>Who Owns the Money at the Death of the Depositor</u>.**

(1) **<u>Surviving Parties</u>. Tex. Prob. Code §439(a).**
§439(a) provides, in part:

> (a) Sums remaining on deposit at the death of a party to a ***joint account*** **belong to the surviving party or parties** against the estate of the decedent **if**, by a written agreement **signed by the party who dies**, the interest of such deceased party is made to survive to the surviving party or parties. [Emphasis added.]

Note that §439(a) is dealing with a **true survivorship agreement**. Whichever *party* lives the longest gets the other party's interest. Subsection (a) only applies to parties. Recall that to be a *party* under Chapter XI the person must have a "present right" of withdrawal during the lifetime of the decedent. **Neither a P.O.D. payee nor a beneficiary of a trust account** (as such?) **is a "party" during the life of the depositor**;[135] hence §439(a) may not apply to a P.O.D. payee or to the beneficiary of a trust account.

Accordingly, there is no explicit requirement that a P.O.D. or trust account be signed in order to be effective.[136] If this conclusion is correct, it is extremely significant, to say the least**.** The conclusion is consistent with distinction advocated earlier, between a true survivorship account (where each party stands to receive something from the other), and a mere death beneficiary designation (where the beneficiary is merely the recipient of the donor's bounty and doesn't stand to give up anything should the beneficiary die first).

(2) **<u>P.O.D. Payees</u>. Tex. Prob. Code §439(b).**
§439(b) provides, in part:

> (b) If the account is a P.O.D. account, on death of the original payee . . . any sums remaining on deposit belong to the P.O.D. payee or payees if surviving . . .

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[135] Tex. Prob. Code §436(7).

[136] *The Union National Bank v. Ornelas-Gutierrez,* 772 F. Supp. 962 (U.S.D.C., S.D. Texas, Laredo Division, 1991).

It would appear that a party cannot also be a P.O.D. payee, but this is not entirely free from doubt. Clearly, a P.O.D. payee, as such, is not a party; but can a P.O.D. payee be a party in his own right if so denominated in the deposit agreement?

(3) <u>Trust Accounts</u>. Tex. Prob. Code §439(c).
§439(c) provides, in part:

> (c) If the account is a trust account, on death of the trustee. . any sums remaining on deposit belong to the person or persons named as beneficiaries, **if surviving**, or to the survivor of them if one or more die before the trustee, unless there is clear and convincing evidence of a contrary intent. If two or more beneficiaries survive, there is no right of survivorship in event of death of any beneficiary thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them. [Emphasis added.]

(4) <u>All Other Cases</u>. Tex. Prob. Code §439(d).
§439(d) provides, in full:

> (d) In other cases, the death of any party to a multiple party account has no effect on beneficial ownership of the account other than to transfer the rights of the decedent as part of his estate.

d. <u>Some Representative Cases</u>.
The above exegesis might lead one to think that interpreting the statute would be a matter of course. Not so.

For examples of the issues that can arise, see the following cases.

(1) *Otto v. Klement,* 656 S.W.2d 628 (Tex. App.-Amarillo 1983, writ ref'd n.r.e.).

(2) *Sheffield v. Estate of Dozier,* 643 S.W.2d 197 (Tex. App.-El Paso 1982, writ ref'd n.r.e.).

(3) *Jameson v. Bain,* 693 S.W.2d 676 (Tex. App.-San Antonio, 1985, no writ).

(4) *Isbell v. Williams,* 705 S.W.2d 252 (Tex. App.- Texarkana 1986, writ ref'd n.r.e.).

(5) *Magee v. Westmoreland,* 693 S.W.2d 612 (Tex. Civ. App.-San Antonio 1985, writ ref'd n.r.e.).

(6) *Chopin v. InterFirst Bank Dallas, N. A.,* 694 S.W.2d 79 (Tex. App.-Dallas 1985, writ ref'd n.r.e.).

(7) *Sawyer v. Lancaster,* 719 S.W.2d 311 (Tex. App.-Houston [1st Dist.] 1986, n.r.e).

(8) *Stauffer v. Henderson,* 801 S.W.2d 858 (Tex. 1990).

(9) *Haynes v. Stripling*, 812 S.W.2d 397 (Tex. Civ. App.— Eastland 1991, no writ).

(10) *The Union National Bank v. Ornelas-Gutierrez,* 772 F. Supp. 962 (U.S.D.C., S.D. Texas, Laredo Division, 1991).

(11) *Martinez v. Martinez,* 805 S.W.2d 873 (Tex. App.— San Antonio, 1991, no writ.).

The cases cited above are not necessarily consistent with one another.

e. The *Chopin, Sawyer* and *Stauffer* Problem.

The problem addressed in *Chopin, Sawyer* and *Stauffer*[137] is **what to do with accounts that are payable to "A or B or the survivor."**

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[137]*Chopin v. InterFirst Bank Dallas, N. A.,* 694 S.W.2d 79 (Tex. App.-Dallas 1985, writ ref'd n.r.e.); *Sawyer v. Lancaster,* 719 S.W.2d 311 (Tex. App.-Houston [1st Dist.] 1986, n.r.e); and *Stauffer v. Henderson,* 801 S.W.2d 858 (Tex. 1990).

i. Is such an account payable to the survivor as a matter of law, regardless of extrinsic evidence of a contrary intent?

ii. Is such an account not payable to the survivor as a matter of law, regardless of extrinsic evidence of a contrary intent?

iii. Is such an account payable to the survivor in the absence of clear and convincing evidence of contrary intent?

iv. Etc.

Are the words "as joint tenants with right of survivorship" necessary in addition to the other requirements of Chapter XI? Such words are not mentioned anywhere in Chapter XI and yet the court in *Chopin* held that in the absence of these or similar words, the account is ineffective, as a matter of law, to pass title at death under 439(a), regardless of extrinsic evidence respecting intent.[138]

The *Sawyer*[139] court held that §439(a) did not prohibit a rebuttable presumption that the depositor intended to create a right of survivorship even though the language of the signature card did not express that intent. The Texas Supreme Court has since rejected the holding of *Sawyer*.[140]

Apparently, the account would also be ineffective as a "P.O.D." account, which §436(10) of the Probate Code defines as "an account payable on request to one person during lifetime and on his death to one or more P.O.D. payees." **Why?**

f. The Texas Supreme Court Speaks.

The Texas Supreme Court has recently grappled with this issue.[141]

In *Stauffer* the agreement stated:

[138] *Chopin v. InterFirst Bank Dallas, N. A.,* 694 S.W.2d 79 (Tex. App.-Dallas 1985, writ ref'd n.r.e.).

[139] *Sawyer v. Lancaster,* 719 S.W.2d 311 (Tex. App.-Houston [1st Dist.] 1986, n.r.e).

[140] *Stauffer v. Henderson,* 801 S.W.2d 858 at 864 (Tex. 1990).

[141] *Stauffer v. Henderson,* 801 S.W.2d 858 at 859 (Tex. 1990).

JOINT ACCOUNT- PAYABLE TO EITHER SURVIVOR

> . . . We agree and declare that all funds now or hereafter deposited in this account are and shall be our joint property, that either of us shall have power to act in all matters relating to such account, whether the other be living or dead, and that **upon the death of either of us, any balance in said account or any part thereof may be withdrawn by, or upon the order of the survivor**. It is especially agreed that **withdrawal of funds by the survivor shall be binding upon us and upon our heirs**, next of kin, legatees, assigns **and personal representatives** . . . [The depository] is hereby authorized to act without further inquiry in accordance with writings bearing any [signature of Marian or Mary], and any such payment or delivery or a receipt or acquittance signed by [Marian or Mary] shall be a valid and sufficient release and discharge of [the depository].[142] [Emphasis added.]

What do you think the depositors intended? Surely not that the survivor would get to keep the money, said the Supreme Court, *as a matter of law.*

The account was between the decedent and her sister. The signature card containing the agreement was signed by both of them. When Marian died, her sister withdrew the funds. Marian's husband and independent executor sued to recover the funds, claiming that half represented community property belonging to him individually, and the other half belonged to the estate.

The Texas Supreme Court held that "if the terms of an agreement pertaining to a joint account are clear, the parties may not introduce extrinsic evidence of the parties' intent. Section 439(a) effectively overrules prior case law to the contrary."[143]

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[142] *Stauffer v. Henderson,* 801 S.W.2d 858 at 859 (Tex. 1990).

[143] *Stauffer v. Henderson,* 801 S.W.2d 858 at 864 (Tex. 1990).

The Court specifically disapproved of the holding in *Sawyer*[144] that §439(a) did not prohibit a rebuttable presumption that the depositor intended to create a right of survivorship even though the language of the signature card did not express that intent. Probate Code "§439(a) allows neither extrinsic evidence nor a rebuttable presumption to create a right of survivorship which is not established by a written agreement signed by the deceased joint account party."[145]

The court found that the terms of the agreement in Stauffer were clear that no right of survivorship was created, and therefore extrinsic evidence was inadmissible. (Apparently, the extrinsic evidence was pretty strong that the decedent had intended for the property to go to her sister.) What if the agreement was not clear? Would extrinsic evidence be admissible then?

g. <u>Statutory Safe Harbor Language</u>.
Chapter XI of the Probate Code dealing with multiple party accounts has also been extensively amended recently. Prob. Code §439 now provides, in part:

> Notwithstanding any other law, an agreement is sufficient to confer an absolute right of survivorship on parties to a joint account under this subsection if the agreement states in substantially the following form: '**On the death of one party to a joint account, all sums in the account on the date of the death vest in and belong to the surviving party as his or her separate property and estate.**' [Emphasis added.][146]

It is a mouthful, but if this language is used, it is hoped that, unlike *Sawyer*, the courts will not feel compelled to determine whether or not the parties really meant it, or, unlike *Chopin,* whether the parties succeeded in saying it.

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[144]*Sawyer v. Lancaster,* 719 S.W.2d 311 (Tex. App.-Houston [1st Dist.] 1986, n.r.e).

[145]*Stauffer v. Henderson,* 801 S.W.2d 858 at 865 (Tex. 1990).

[146]My preference was to add "and I really mean it" after designating the death beneficiary.

h. <u>Notification of Financial Institution Under §440</u>.

It is frequently the case that the survivorship language in bank accounts is ineffective to accomplish its stated purpose. The very fact that the account purports to provide benefits that it does not provide may subject the bank to liability for misrepresentation of the terms of the contract. Often the signature card will not make sense in the context, or is ambiguous or inconsistent, in addition to failing the other tests required in Texas to have a valid survivorship agreement. Sometimes the bank will not have a signature card or deposit agreement covering the intended situation.

It is suggested that if a party is not sure about the survivorship rights in a bank account, the party's attorney, by certified letter to the bank, signed by the account holders, can effectively alter the survivorship provisions of the account. Prob. Code §440 provides:

> The provisions of **Section 439** of this code as to rights of survivorship are determined by the form of the account at the death of a party. Notwithstanding any other provision of the law, **this form** may be altered by written order given by a party to the financial institution to change the form of the account or to stop or vary payment under the terms of the account. **The order or request must be signed** by a party, received by the financial institution during the party's lifetime, and not countermanded by other written order of the same party during his lifetime. [Emphasis added.]

If a partition is desired, it can be done correctly, in the attorney's office, and the survivorship rights can be specified clearly and explicitly in whatever form is desired. However, even if a partition is successfully accomplished, query whether it will affect the community property character of community property subsequently deposited.

Note that §440 only applies to accounts described in §439. §439 describes survivorship agreements, P.O.D. accounts, and trust accounts. Although the term "survivorship" is used in §440, it would appear to cover ownership of trust and P.O.D. accounts by nonparty beneficiaries on the death of the depositor.

i. What Agreements Are Not Covered Under Part 1.

Part 1 only covers agreements with financial institutions. Brokerage accounts are not covered unless the brokerage firm is an "organization authorized to do business under state or federal laws relating to financial institutions."[147]

7. PART 2-PROVISIONS RELATING TO EFFECT OF DEATH.

Part 2 of Chapter XI does not appear on its face to be exclusive. Part 2 consists of one section, §450, which reads in part as follows: [Emphasis has been added.]

§450. Provisions for Payment or Transfer at Death

(a) Any of the following provisions in an insurance policy, contract of employment, bond, mortgage, promissory note, deposit agreement, employees' trust, retirement account, deferred compensation arrangement, custodial agreement, pension plan, trust agreement, conveyance of real or personal property, **or any other written instrument effective as a contract, gift, conveyance, or trust** is deemed to be nontestamentary, and this code does not invalidate the instrument or any provision:

(1) **that money or other benefits theretofore due to, controlled, or owned by a decedent shall be paid after his death to a person designated by the decedent in either the instrument** or a separate writing, including a will, executed at the same time as the instrument or subsequently;

(2) that any money due or to become due under the instrument shall cease to be payable in event of the death of the promisee or the promisor before payment or demand; or

(3) that any property which is the subject of the instrument shall pass to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently.

Note that there is no requirement in §450 that the written agreement be signed.

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[147] Tex. Prob. Code §§ 436(1) and (3).

8. **<u>CONTRAST THE STRINGENT REQUIREMENT APPLICABLE TO JOINT SURVIVORSHIP ACCOUNTS</u>.**

It may seem ironic that much more stingent requirements apply in the case of a survivorship agreement applicable to a joint account than to other forms of jointly held property.

Recall that if the property is P.O.D. property –which presumably means it is not owned in common with the beneficiary – the beneficiary designation apparently need not even be signed by the donor.[148] Further, the beneficiary designation needs merely to say "pay on death." But if the property is jointly owned, not only must the agreement be jointly signed, but special wording must be used. Simply saying "pay on death" to the survivor (sufficient in the case of an unsigned P.O.D. account) would not pass title.

Perhaps the public policy reason behind so dramatic a contrast is because jointly held accounts are often held in that form for the convenience of the owner only, and the survivorship feature is appended without consideration. In the case, say, of a P.O.D. account, there is no other reason for opening the account in that form, other than to pass title at death to the designated beneficiary.

9. **<u>PART 3-SURVIVORSHIP AGREEMENTS BETWEEN HUSBAND AND WIFE</u>.**

As a result of an amendment to the Texas Constitution, a partition of community property is no longer required in order to give effect to a survivorship agreement between spouses affecting community property. However, this doesn't mean all of the problems have been cured.

In 1987 Article 16, §15 of the Texas Constitution was amended to provide:

> "Spouses may agree in writing that all or part of their community property becomes the property of the surviving spouse on the death of a spouse."

Prob. Code §46 was amended to implement this provision. Prob. Code §46(b), as amended, at first provided:

> "Spouses may agree in writing that all or part of their community property which is titled or held with indicia of title becomes the property of the surviving spouse on the death of a spouse."

§46(b) was quickly amended, and now provides:

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[148] See *The Union National Bank v. Ornelas-Gutierrez,* 772 F. Supp. 962 (U.S.D.C., S.D. Texas, Laredo Division, 1991).

> "Subsection (a) does not apply to agreements between spouses regarding their community property. Agreements between spouses regarding rights of survivorship in community property are governed by Part 3 of Chapter XI of this code.[149]"

Probate Code §§451-461 (Part 3 of Chapter XI of the Probate Code) contain comprehensive rules regarding the establishment and revocation of community property survivorship accounts. Note that a survivorship agreement affecting community property does not technically create a joint tenancy.

A word of caution: With the advent of community property survivorship agreements, homemade will substitutes are beginning to appear in which parties, sitting down at the kitchen table after dinner, as it were, attempt to dispose of *all of their property* to each other without complying with any of the formalities required for a will. (Of course, they could have done this anyway under the holographic will rules.) This is certain to be a fertile field for contests and litigation, and will make life more complicated, instead of less so, in many instances.

The specific statutory scheme governing community property survivorship agreements follows:

a. <u>Right of Survivorship in Community Property</u>-Tex. Prob. Code §451.
"At any time, spouses may agree between themselves that all or part of their community property, then existing or to be acquired, becomes the property of the surviving spouse on the death of a spouse."[150]

b. <u>Agreement Must Be in Writing and Signed by Both Husband and Wife</u>-Tex. Prob. Code §452.
Unlike the Constitution, which merely provides that the agreement be written, the Texas Statute requires that the writing be signed by both parties. Ordinarily, a written agreement need not necessarily be signed by both parties in order to be enforceable.[151] The statute provides that the following phrases will be sufficient, but not necessary, to create a right of survivorship in the community property described in the agreement:[152]

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[149]Tex. Prob. Code §451 et seq.

[150]Tex. Prob. Code §451.

[151]*Augusta Dev. Co. v. Fish Oil Well Serv.,* 761 S.W.2d 538, 544 (Tex. App.—Corpus Christi, 1988, no writ); *Rubin v. Polunsky,* 366 S.W.2d 234, 236 (Tex. Civ. App.— San Antonio, 1963, writ ref'd n.r.e.); *Dowdell v. Ginsberg,* 244 S.W.2d 265, 266 (Tex. Civ. App. — Fort Worth, 1951, no writ).

[152]Tex. Prob. Code §452.

(1) "with right of survivorship";

(2) "will become the property of the survivor";

(3) "will vest in and belong to the surviving spouse"; or

(4) "shall pass to the surviving spouse."

c. **Control and Management-Tex. Prob. Code §453.**
An agreement creating a right of survivorship in community property does not affect management rights *unless the agreement provides otherwise*.[153]

d. **Transfers Nontestamentary-Tex. Prob. Code §454.**
§454 makes it clear that a transfer pursuant to an agreement creating a right of survivorship in community property is not a testamentary transfer.[154]

e. **Revocation-Tex. Prob. Code §455.**
The spouses are allowed to provide for the form of revocation in the agreement, but if they don't, the agreement **may** be revoked by a written instrument signed by both spouses **or** by a written instrument signed by one spouse and delivered to the other spouse. Further, "the agreement may be revoked with respect to specific property subject to the agreement by the disposition of such property by one or both of the spouses if such disposition is not inconsistent with specific terms of the agreement and applicable law."[155]

It bears emphasizing that revocation is a very important matter to consider before entering into one of these agreements.

f. **Proof of Agreement-Tex. Prob. Code §456.**
One of the perceived advantages of a community property survivorship agreement is that it avoids probate. But does it? In order for title to the transferred assets to stand up to the withering scrutiny of a title examiner, it may be necessary to go to court after all. §456 provides a procedure to accomplish this. The statute speaks for itself:

§456 Proof of Agreement

[153]Tex. Prob. Code §453.

[154]Tex. Prob. Code §454.

[155]Tex. Prob. Code §455.

(a) Application for Adjudication. An agreement between spouses creating a right of survivorship in community property that satisfies the requirements of this part is effective without an adjudication. After the death of a spouse, however, the surviving spouse or the personal representative of the surviving spouse may apply to the court for an order stating that the agreement satisfies the requirements of this code and is effective to create a right of survivorship in community property. The original agreement shall be filed with the application for an adjudication. An application for an adjudication under this section must include:

(1) the name and domicile of the surviving spouse;

(2) the name and former domicile of the decedent and the fact, time, and place of death;

(3) facts establishing venue in the court; and

(4) the social security number of the decedent, if known.

(b) Proof Required. An applicant for an adjudication under this section must prove to the satisfaction of the court:

(1) that the spouse whose community property interest is at issue is dead;

(2) that the court has jurisdiction and venue;

(3) that the agreement was executed with the formalities required by law;

(4) that the agreement was not revoked; and

(5) that citation has been served and returned in the manner and for the length of time required by this code.

(c) **Method of Proof.** The deceased spouse's signature to the agreement may be proved by the sworn testimony of one witness taken in open court, by the affidavit of one witness, or by the deposition of one witness, either written or oral, taken in the same manner and under the same rules as depositions in other civil actions. If the surviving spouse is competent to make an oath, the surviving spouse's signature to the agreement may be proved by the sworn testimony of the surviving spouse taken in open court, by the affidavit of the surviving spouse either written or oral, taken in the same manner and under the same rules as deposition in other civil actions. If the surviving spouse's signature to the agreement may be proved in the same manner provided above for the proof of the deceased spouse's estate.[156]

g. Effect of Order-Tex. Prob. Code §458.

An adjudicating order is not required for a community property survivorship agreement to be effective, but if an order is entered, it "shall constitute sufficient authority to all persons owing money, having custody of any property, or acting as registrar or transfer agent of any evidence of interest, indebtedness, property, or right, that is subject to the provisions of the agreement, and to persons purchasing from or otherwise dealing with the surviving spouse for payment or transfer to the surviving spouse, and the surviving spouse may enforce his or her right to such payment or transfer."[157]

h. Protection of Third Persons Not Having Notice-Tex. Prob. Code §460.

§460 gives third persons, including executors, transferors, transferees and recording agents, a great deal of protection in the event that they take action without knowledge or notice of a community property survivorship agreement or of its revocation. A purchaser from someone other than the executor is required to wait six months after death in order to be entitled to the protection of the statute.[158]

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[156] Tex. Prob. Code §456.

[157] Tex. Prob. Code §458.

[158] Tex. Prob. Code §460(b).

Third parties without notice of revocation may rely that the agreement has not been revoked, if, in the case of real property, the agreement is recorded, and in the case of real or personal property, "the purchaser has received an original or certified copy of an agreement purporting to create a right of survivorship in such property in the decedent's surviving spouse, purportedly [??] signed by the decedent and the surviving spouse."[159]

i. Rights of Creditors-Tex. Prob. Code §461.

A community property survivorship agreement does not affect the property liability rules. The rules in effect before death, continue to apply after death (unlike, perhaps, the case with probate assets). The order in which such assets are reached is the same as in multiple-party accounts.

In this regard, see §442, which generally provides that a multiple party account can be reached by the estate to pay debts, taxes, administration expenses, etc., "if other assets of the estate are insufficient."[160]

Even in cases where the other assets are insufficient, "No proceeding to assert such a liability shall be commended unless the personal representative has received a written demand by a creditor, and no proceeding shall be commenced later than two years following the death of the decedent."[161]

j. Community Property Survivorship Agreements Given Retroactive Effective Date.

What if a survivorship bank account were set up by husband and wife prior to the amendment of the Constitution allowing for such agreements. Under prior law, such an agreement would have been entirely ineffective when made.[162] Citing *Beck v. Beck,* 814 S.W.2d 745 (Tex. 1991), for the proposition that Texas has adopted the doctrine of *implied validation*, the court in *Haynes v. Stripling*, 812 S.W.2d 397 (Tex. Civ. App.— Eastland 1991, no writ) has held that the new law validates agreements that weren't valid when made. This doctrine of implied validation appears to be new to Texas law.

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[159] Tex. Prob. Code §460(c).

[160] Tex. Prob. Code §442.

[161] Tex. Prob. Code §461.

[162] *Williams v. McKnight*, 402 S.W.2d 505 (Tex 1966); *Hilley v. Hilley,* 342 S.W.2d 565 (Tex. 1961). Contrast *Quilter v. Wendland,* 403 S.W.2d 335 (Tex. 1966), joint tenancy with third party in community property permissible. For a truly procrustean application of the rule, see *Jameson v. Bain,* 693 S.W.2d 676 (Tex. App.-San Antonio, 1985, no writ).

Part 3 of the Probate Code, establishing the concept of community property with rights of survivorship, is effective for agreements entered into survivorship agreements entered into prior to November 7, 1987, and to agreements entered into prior to that date, if both spouses were living on November 7, 1987 and the property which was the subject of the agreement remained community proeprty after the date of the agreement.[163]

10. <u>DANGERS IN USE OF SURVIVORSHIP AGREEMENTS</u>.

There are many dangers posed by using survivorship agreements as will substitutes without the aid and supervision of an attorney. Utilization of the Unified Credit exemption equivalent through bypass trust planning and other devices can be thwarted by large survivorship gifts to the surviving spouse. In addition, because survivorship property will not ordinarily be available to pay the decedent's debts until the probate estate is first exhausted, the estate may suffer liquidity problems and the unintended abatement of testamentary gifts may also result. Further, as the above cases indicate, a construction suit is not infrequently the result of survivorship gifts where the language creating the survivorship is the least bit unclear.

If the property is real estate or titled personal property, a survivorship agreement, particularly one that has not been acknowledged, may, as a practical if not a legal matter, be ineffective as evidence of transfer. Third parties may understandably be reluctant to rely on an unrecorded survivorship agreement that doesn't have the backing of a court order with respect to its validity.

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[163]Acts 1989, 71st Leg., ch 655f, §3.

Finally, the account holders are usually unaware of the legal effect of what they are signing, and the bank personnel who advise and supervise these matters are only slightly less so. Since it has been held that extrinsic evidence of intent in these matters is often inadmissible, the ultimate recipient of the survivorship proceeds is often, in effect, determined by chance and the teller who hands out the signature card. This result may be the price we pay for living in a society where people are allowed to make mistakes and have the freedom to contract. Nevertheless, the courts have been understandably reluctant to let this happen if they could help it. As a result, in struggling to protect the depositors from themselves, a very technical body of law has arisen over the years as to what is necessary to implement a true survivorship provision. Ironically, this technical approach has frequently been used to thwart the depositor's intent, rather than to carry it out, as was apparently the case in *Jameson v. Bain,* 693 S.W.2d 676 (Tex. App.-San Antonio, 1985, no writ). Perhaps the fail safe language found in amended Probate Code §439 will resolve some of the problems. Nevertheless, with so much uncertainty historically surrounding the use of survivorship agreements, the best policy, in most instances, would seem to be not to use them.