PROBATE & FAMILY LAW - WHAT A FAMILY LAWYER CAN LEARN FROM THE TEXAS ESTATES CODE

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CHAPTER 35

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Education: Washington & Lee University, Lexington, Virginia (1968-70)
University of Texas (B.A., with Honors, 1972)
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Licensed: Texas Supreme Court (1975); U.S. District Court, Western District of Texas (1977-1992; 2000-present); U.S. District Court, Southern District of Texas (1979); U.S. Court of Appeals, Fifth Circuit (1979); U.S. Supreme Court (1981)

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Organizations and Committees:

Chair, Family Law Section, State Bar of Texas (1999-2000)
Chair, Appellate Practice & Advocacy Section, State Bar of Texas (1996-97)
Chair, Continuing Legal Education Committee, State Bar of Texas (2000-02)
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Member, Supreme Court Advisory Committee on Rules of Civil Procedure (1994-present);
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Member, Pattern Jury Charge Committee (Family Law), State Bar of Texas (1987-2000)
Supreme Court Liaison, Texas Judicial Committee on Information Technology (2001-2003)
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Member, Supreme Court Task Force on Jury Charges (1992-93)
Member, Supreme Court Advisory Committee on Child Support and Visitation Guidelines (1989, 1991; Co-Chair 1992-93; Chair 1994-98)
Member, Board of Directors, Texas Legal Resource Center on Child Abuse & Neglect, Inc. (1991-93)
President, Texas Academy of Family Law Specialists (1990-91)
President, San Antonio Family Lawyers Association (1989-90)
Associate, American Board of Trial Advocates
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Director, San Antonio Bar Association (1997-1998)
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Honors Received:

Texas Center for the Judiciary, Exemplary Non-Judicial Faculty Award (2014)
Texas Bar Foundation *Dan Rugeley Price Award* for "an unreserved commitment to clients and to the practice of our profession" (2014)
Recipient of the Franklin Jones, Jr. CLE Article Award for Outstanding Achievement in CLE (2013)
State Bar of Texas Family Law Section Best Family Law CLE Article (2009)
Recipient of the Franklin Jones, Jr. CLE Article Award for Outstanding Achievement in CLE (2009)
State Bar of Texas *Certificate of Merit*, June 2004
Texas Academy of Family Law Specialists' *Sam Emison Award* (2003)
Association for Continuing Legal Education's Award for Best Program (*Enron, The Legal Issues*) (Co-director, March, 2002)
State Bar of Texas *Presidential Citation* "for innovative leadership and relentless pursuit of excellence for continuing legal education" (June, 2001)
State Bar of Texas Family Law Section's *Dan R. Price Award* for outstanding contributions to family law (2001)
State Bar of Texas *Certificate of Merit*, June 1997
State Bar of Texas *Gene Cavin Award for Excellence in Continuing Legal Education* (1996)
State Bar of Texas *Certificate of Merit*, June 1996
State Bar of Texas *Certificate of Merit*, June 1995

Professional Recognition:

Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2014)
Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2013)
Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2012)

Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2010 - 3rd Top Point Getter)
Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2009)
Listed as Family Lawyer of the Year by BEST LAWYERS (2012)
Listed as Family Lawyer of the Year by BEST LAWYERS (2011)
Listed as Texas' Top Family Lawyer, Texas Lawyer's *Go-To-Guide* (2007)
Listed among Texas Lawyer newspaper's Top Five Family Law attorneys in 2002,2007 & 2012
Listed as one of Texas' Top 100 Lawyers, and Top 50 Lawyers in South Texas, *Texas Monthly* Super Lawyers Survey (2003-2013, 2015)
Listed in the BEST LAWYERS IN AMERICA: Family Law (1987-2015); Appellate Law (2007-2015)
Listed as San Antonio Scene's Best Lawyers in San Antonio (2014)
Listed in Martindale-Hubbell/ALM - Top Rated Lawyers in Texas (2014)

Books and Journal Articles:

—Editor-in-Chief of the State Bar of Texas' TEXAS SUPREME COURT PRACTICE MANUAL (2005)
—Chief Editor of the State Bar of Texas Family Law Section's EXPERT WITNESS MANUAL (Vols. II & III) (1999)
— Author of Vol. 6 of McDonald Texas Civil Practice, on Texas Civil Appellate Practice, published by Bancroft-Whitney Co. (1992) (900 + pages)
—*A Guide to Proceedings Under the Texas Parent Notification Statute and Rules,* SOUTH TEXAS LAW REVIEW (2000) (co-authored)
—*Obligations of the Trial Lawyer Under Texas Law Toward the Client Relating to an Appeal,* 41 SOUTH TEXAS LAW REVIEW 111 (1999)
—*Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress, in Connection With a Divorce*, 25 ST. MARY'S L.J. 1253 (1994), republished in the AMERICAN JOURNAL OF FAMILY LAW (Fall 1994) and Texas Family Law Service *NewsAlert* (Oct. & Dec., 1994 and Feb., 1995)
—Chapter 21 on *Business Interests* in Bancroft-Whitney's TEXAS FAMILY LAW SERVICE (Speer's 6th ed.)
—*Characterization of Marital Property*, 39 BAY. L. REV. 909 (1988) (co-authored)
—*Fitting a Round Peg Into A Square Hole: Section 3.63, Texas Family Code, and the Marriage That Crosses States Lines*, 13 ST. MARY'S L.J. 477 (1982)

Continuing Legal Education Administration:

Course Director, State Bar of Texas:
- Practice Before the Supreme Court of Texas Course (2002 - 2005, 2007, 2009, 2011 & 2013)
- *Enron, The Legal Issues* (Co-director, March, 2002) [Won national ACLEA Award]
- Advanced Expert Witness Course (2001, 2002, 2003, 2004)
- 1999 Impact of the New Rules of Discovery
- 1998 Advanced Civil Appellate Practice Course
- 1991 Advanced Evidence and Discovery
- Computer Workshop at Advanced Family Law (1990-94) and Advanced Civil Trial (1990-91) courses
- 1987 Advanced Family Law Course. Course Director, Texas Academy of Family Law Specialists First Annual Trial Institute, Las Vegas, Nevada (1987)

SELECTED CLE SPEECHES AND ARTICLES

State Bar of Texas' [SBOT] **Advanced Family Law Course**: Intra and Inter Family Transactions (1983); Handling the Appeal: Procedures and Pitfalls (1984); Methods and Tools of Discovery (1985); Characterization and Reimbursement (1986); Trusts and Family Law (1986); The Family Law Case in the Appellate Court (1987); Post-Divorce Division of Property (1988); Marital Agreements: Enforcement and Defense (1989); Marital Liabilities (1990); Rules of Procedure (1991); Valuation Overview (1992); Deposition Use in Trial: Cassette Tapes, Video, Audio, Reading and Editing (1993); The Great Debate: Dividing Goodwill on Divorce (1994); Characterization (1995); Ordinary Reimbursement and Creative Theories of Reimbursement (1996); Qualifying and Rejecting Expert Witnesses (1997); New Developments in Civil Procedure and Evidence (1998); The Expert Witness Manual (1999); Reimbursement in the 21st Century (2000); Personal Goodwill vs. Commercial Goodwill: A Case Study (2000); What Representing the Judge or Contributing to Her Campaign Can Mean to Your Client: Proposed New Disqualification and Recusal Rules (2001); Tax Workshop: The Fundamentals (2001); Blue Sky or Book Value? Complex Issues in Business Valuation (2001); Private Justice: Arbitration as an Alternative to the Courthouse (2002); International & Cross Border Issues (2002); Discovery Issues Facing Associate Judges and Title IV-D Masters (2002); Premarital and Marital Agreements: Representing the Non-Monied Spouse (2003); Those Other Texas Codes: Things the Family Lawyer Needs to Know About Codifications Outside the Family Code (2004); Pearls of Wisdom From Thirty Years of Practicing Family Law (2005); The Road Ahead: Long-Term Financial Planning in Connection With Divorce (2006); A New Approach to Distinguishing Enterprise Goodwill From Personal Goodwill (2007); The Law of Interpreting Contracts: How to Draft Contracts to Avoid or Win Litigation (2008); Effect of Choice of Entities: How Organizational Law, Accounting, and Tax Law for Entities Affect Marital Property Law (2008); Practicing Family Law in a Depressed Economy, Parts I & II (2009); Property Puzzles: 30 Characterization Rules, Explanations & Examples (2009); Troubling Issues of Characterization, Reimbursement, Valuation, and Division Upon Divorce (2010); Separate & Community Property: 30 Rules With Explanations & Examples (2010); The Role of Reasoning in Constructing a Persuasive Argument (2011); Negotiating a Family Law

Case (2012) New Appellate Rules for CPS Cases (2012); Court-Ordered Sanctions (2013); Different Ways to Trace Separate Property (2014)

UT School of Law: Trusts in Texas Law: What Are the Community Rights in Separately Created Trusts? (1985); Partnerships and Family Law (1986); Proving Up Separate and Community Property Claims Through Tracing (1987); Appealing Non-Jury Cases in State Court (1991); The New (Proposed) Texas Rules of Appellate Procedure (1995); The Effective Motion for Rehearing (1996); Intellectual Property (1997); Preservation of Error Update (1997); TRAPs Under the New T.R.A.P. (1998); Judicial Perspectives on Appellate Practice (2000)

SBOT's **Advanced Evidence & Discovery Course**: Successful Mandamus Approaches in Discovery (1988); Mandamus (1989); Preservation of Privileges, Exemptions and Objections (1990); Business and Public Records (1993); Grab Bag: Evidence & Discovery (1993); Common Evidence Problems (1994); Managing Documents--The Technology (1996); Evidence Grab Bag (1997); Evidence Grab Bag (1998); Making and Meeting Objections (1998-99); Evidentiary Issues Surrounding Expert Witnesses (1999); Predicates and Objections (2000); Predicates and Objections (2001); Building Blocks of Evidence (2002); Strategies in Making a Daubert Attack (2002); Predicates and Objections (2002); Building Blocks of Evidence (2003); Predicates & Objections (High Tech Emphasis) (2003); Court-Imposed Sanctions in Texas (2012)

SBOT's **Advanced Civil Appellate Practice Course**: Handling the Appeal from a Bench Trial in a Civil Case (1989); Appeal of Non-Jury Trials (1990); Successful Challenges to Legal/Factual Sufficiency (1991); In the Sup. Ct.: Reversing the Court of Appeals (1992); Brief Writing: Creatively Crafting for the Reader (1993); Interlocutory and Accelerated Appeals (1994); Non-Jury Appeals (1995); Technology and the Courtroom of the Future (1996); Are Non-Jury Trials Ever "Appealing"? (1998); Enforcing the Judgment, Including While on Appeal (1998); Judges vs. Juries: A Debate (2000); Appellate Squares (2000); Texas Supreme Court Trends (2002); New Appellate Rules and New Trial Rules (2003); *Supreme Court Trends* (2004); Recent Developments in the *Daubert* Swamp (2005); Hot Topics in Litigation: Restitution/Unjust Enrichment (2006); The Law of Interpreting Contracts (2007); Judicial Review of Arbitration Rulings: Problems and Possible Alternatives (2008); The Role of Reasoning and Persuasion in the Legal Process (2010); Sanctions on Review (Appeal and Mandamus) (2012)

Texas Center for the Judiciary: Lecture, *Applying the New Texas Rules of Discovery*, Texas Center for the Judiciary's College of Advanced Judicial Studies (1999); *Marital Property Issues: Tracing, Reimbursement, and Claims for Economic Contribution*, College for Judicial Studies Seminar (2002); *Family Law Updates*, Regional Conference (2004); *Important Topics in Family* Law, Regional Conference (2007); *Two Hot Topics in Family Law: Same-Sex Marriage; Mediated Settlement Agreements*, Judicial Conference (2014) ; *Same-Sex Marriage and Gender Identity Issues*, Family Justice Conference (2015);

Other CLE: SBOT Advanced Civil Trial Course: Judgment Enforcement, Turnover and Contempt (1990-1991), Offering and Excluding Evidence (1995), New Appellate Rules (1997), The Communications Revolution: Portability, The Internet and the Practice of Law (1998), Daubert With Emphasis on Commercial Litigation, Damages, and the NonScientific Expert (2000), Rules/Legislation Preview (State Perspective) (2002); College of Advanced Judicial Studies: Evidentiary Issues (2001); El Paso Family Law Bar Ass'n: Foreign Law and Foreign Evidence (2001); American Institute of Certified Public Accounts: Admissibility of Lay and Expert Testimony; General Acceptance Versus Daubert (2002); Texas and Louisiana Associations of Defense Counsel: Use of Fact Witnesses, Lay Opinion, and Expert Testimony; When and How to Raise a Daubert Challenge (2002); SBOT In-House Counsel Course: Marital Property Rights in Corporate Benefits for High-Level Employees (2002); SBOT 19th Annual Litigation Update Institute: Distinguishing Fact Testimony, Lay Opinion & Expert Testimony; Raising a Daubert Challenge (2003); State Bar College Spring Training: Current Events in Family Law (2003); SBOT Practice Before the Supreme Court: Texas Supreme Court Trends (2003); SBOT 26th Annual Advanced Civil Trial: Distinguishing Fact Testimony, Lay Opinion & Expert Testimony; Challenging Qualifications, Reliability, and Underlying Data (2003); SBOT New Frontiers in Marital Property: Busting Trusts Upon Divorce (2003); American Academy of Psychiatry and the Law: Daubert, Kumho Tire and the Forensic Child Expert (2003); AICPA-AAML National Conference on Divorce: Cutting Edge Issues–New Alimony Theories; Measuring Personal Goodwill (2006); New Frontiers` - Distinguishing Enterprise Goodwill from Personal Goodwill; Judicial Conference (2006); SBOT New Frontiers in Marital Property Law: Tracing, Reimbursement and Economic Contribution Claims In Brokerage Accounts (2007); SBOT In-House Counsel Course: When an Officer Divorces: How a Company can be Affected by an Officer's Divorce (2009); Fiduciary Litigation Trial Notebook Course: Family Law and Fiduciary Duty (2010); SBOT Handling Your First Civil Appeal The Role of Reasoning and Persuasion in Appeals (2011-2012); New Frontiers in Marital Property Law: A New Approach to Determining Enterprise and Personal Goodwill Upon Divorce (2011); AICPA-AAML National Conference on Divorce: Business Valuation Upon Divorce: How Theory and Practice Can Lead to Problems In Court & Goodwill Upon Divorce: Distinguishing Between Intangible Assets, Enterprise Goodwill, and Personal Goodwill (2012); SBOT Anatomy of Fiduciary Litigation: Voir Dire and Jury Questionnaires; History of Texas Supreme Court Jurisprudence, 170 Years of Texas Contract Law (2013); SBOT Exceptional Legal Writing: The Role of Reasoning and Persuasion in Legal Argumentation (2013); Family Law Update - 2013, Judicial Conference (2013); Family Law and Fiduciary Duty, Fiduciary Litigation Course (2013); SBOT Advanced Personal Injury Course, *Court-Ordered Sanctions* (2014); History of Texas Supreme Court Jurisprudence, *The Rise of Modern American Contract Law* (2015)

Continuing Legal Education Webinars: *Troubling Issues of Characterization, Reimbursement, Valuation, and Division Upon Divorce*; Texas Bar CLE, Live Webcast, April 20, 2012, MCLE No. 901244559 (2012); *Family Law Update - 2013*, Texas Center for the Judiciary Video

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Probate & Family Law - What a Family Lawyer Can Learn from the Texas Estates Code

by

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I. INTRODUCTION. Family Law, Probate Law, and Guardianship Law, can intersect in various ways. Probate of decedent's estates and guardianships of incapacitated persons are governed by the Texas Estates Code. The Estates Code also has chapters which govern powers of attorney, multi-party financial accounts, survivorship agreements, and other subjects that could impact a Family Law case. The purpose of this Article is to examine the provisions in the Texas Estates Code that impact Family Law practice.

II. THE PROBATE CODE: RIP. The Texas Probate Code was originally enacted back in 1955. It ceased to exist on January 1, 2014, and was replaced by the Texas Estates Code, which took effect on that date. The Estates Code is divided into three titles: Title 1 (General Provisions), Title 2 (Estates and Decedents; Durable Powers of Attorney), and Title 3 (Guardianship and Related Procedures).

III. GENERAL PROVISIONS OF THE TEXAS ESTATES CODE. The Estates Code begins with Chapter 21. Section 21.001 indicates that the Estates Code is part of the codification effort of the Texas Legislative Council which began in 1963. The avowed intent was to create "a topic-by-topic revision of the state's general and permanent statute law *without substantive change.*" [Emphasis added.] Thus, wording changes in the new Code are not intended to change substantive law, and cases interpreting the law that was replaced by the Estates Code should be applicable to the new Code language. However, there were changes made to the Probate Code in anticipation of its replacement by the Estates Code, and in those areas a lawyer must be careful of using older cases decided before substantive amendments were made to the Probate Code that were carried forward into the Estates Code.

A. STRUCTURE. The Estates Code is divided into titles, subtitles, chapters, subchapters, parts, subparts, sections, subsections, subdivisions, paragraphs and subparagraphs. The division of the Code into these subcategories "is for convenience and does not have any legal effect." Estates Code § 21.004. With such a large number of categories, it is difficult to find particular provisions using the Table of Contents, and some lawyers may find is more convenient to rely on an index to the Code, or Boulean word searches conducted on an electronic version of the Code.

IV. DEFINITIONS FOR DECEDENTS' ESTATES. Chapter 22 sets out definitions of terms used in the Estates Code. The definitions in this Chapter govern meaning unless a different meaning is apparent from the context. Estates Code § 22.001(a). However, Title 3 (guardianships) contains its own definitions which apply in that Title. *Id.* at § 22.001(2),

A. CHILD. "Child" is defined in Section 22.004 to include an adopted child, whether the adoption is by an existing or former statutory procedure, or by "acts of estoppel." However, the term "child" "does not include a child who does not have a presumed father," unless the Code provision expressly so provides. In probate litigation, the issue of what constitutes a child arises in connection with inheritance rights. In intestate succession, the statutory definition of "child," is determinative. When the word "child" is used in a testamentary document, it is a question of the testator's intent and the statutory definition is ordinarily not determinative. An adult can be adopted and become a child of the adopting parent, showing that the status of "child" in the probate world is a legal relationship that is not related to age and is not necessarily related to birth. Texas Probate Law recognizes what is called "equitable adoption." Equitable adoption is not really a true adoption. It is essentially an estoppel

against a person's heirs denying that someone is the decedent's adopted child. Under Texas law, the estoppel must either be based on a formal adoption process that is ineffective due to some defect of form, or else based on promises, acts, or conduct that a person had been or would be adopted and that was relied upon by the supposedly adopted child. Bona fide purchasers for value who acquire property in reliance on an affidavit of heirship are protected against claims of equitable adoption, unless a final court decree or judgment had established paternity prior to the transaction. Estates Code § 201.053.

B. ESTATE. Estates Code Section 22.12 defines an estate. An estate is the decedent's property, in its original form or as it may change during probate or administration. The estate is augmented by accretions and other additions, and it is diminished by decreases or distributions. Estates Code § 22.012. An estate is not an entity. *Price v. Estate of Anderson*, 522 S.W.2d 690, 691 (Tex. 1975). This comports with the idea that the title to the assets in the estate vest in the heirs at the moment of death. See Section VI of this Article. The Estate representative holds the assets in a statutorily-imposed trust relationship, certainly as to heirs and to some degree as to creditors. See Estates Code § 101.003. Suits on behalf of or against the decedent's estate must be brought by or against the independent executor or estate administrator.

C. INCAPACITATED PERSON. Estates Code Section 22.016 defines an incapacitated person as a minor or an adult who, due to physical or mental condition is "substantially unable" to provide for his or her food, clothing, shelter, physical health, or manage his or her financial affairs, or who must have a guardian appointed in order to receive government funds.

D. INTERESTED PERSON. In many instances, one must be an "interested person" in order to have the standing to bring a proceeding in a probate court. Estates Code Section 22.018 defines "interested person" as "an heir, devisee, spouse, creditor, or any other having a property right in or claim against an estate being administered," and "anyone interested in the welfare of an incapacitated person, including a minor." Note that the definition of "interested person" as applied to incapacitated persons is not really limiting, in that anyone can be interested in the welfare of an incapacitated person. In practice, virtually anyone, and perhaps literally anyone, is an interested person as to an incapacitated person, with the power to bring the incapacitated person to the attention of the probate court for purposes of establishing a guardianship. Note also that this definition does not apply to guardianships under Title 3. The definition of "incapacitated person" that applies to guardianship is set out in Estates Code Section 1002.017, in terms that are not identical to Section 22.018 but which are equivalent.

One court has held that a beneficiary of a testamentary trust is not an interested person, and cannot assert claims involving a will or an estate, unless the trustee is unable to or refuses to assert the claim. *InterFirst Bank-Houston v. Quintana Pet. Corp*, 639 S.W.2d 864, 874 (Tex. App.–Houston [1st Dist.] 1985, writ ref'd n.r.e.).

V. PROBATE COURT JURISDICTION. The Probate Court's jurisdiction is broad – surprisingly broad to those who have never encountered it.

A. PROBATE PROCEEDINGS. A "probate proceeding" includes probate of a will, an heirship determination, a claim arising from the administration of a decedent's estate, a settling of a representative's accounting, and a will construction suit. Estates Code § 31.001(a). All probate proceedings must be brought in the court exercising original probate jurisdiction. Estates Code § 32.001. The probate jurisdiction of a statutory probate court is exclusive as against other courts, Estates Code § 32.005(a), but there are certain types of suits where the probate court has concurrent jurisdiction with the district court. Estates Code § 32.007.

After a death, and once a probate proceeding has been initiated, the probate court has jurisdiction over all matters related to the estate until the estate is closed. *Graham v. Graham*, 733 S.W.2d 374, 376 (Tex. App.–Amarillo 1987, writ ref'd n.r.e.) ("Once jurisdiction attaches, it continues until the estate is closed"). The probate court's jurisdiction over matters incident to a pending estate is exclusive. *Bailey v. Cherokee County Appraisal District*, 862 S.W.2d 581 (Tex. 1993). The principle underlying the jurisdictional statutes relating to probate proceedings "is to allow a statutory probate court to consolidate all causes of action which are incident to an estate so that the estate can be efficiently administered. Judicial economy is thereby served." *Henry v. LaGrone*, 842 S.W.2d 324, 327 (Tex. App.–Amarillo 1992, orig. proceeding). This principle makes it important to understand what matters that could be brought, or have been brought, in other courts should be litigated in the probate court administering a decedent's estate.

Estates Code Section 31.002 describes matters related to a probate proceeding. Where the county has no statutory probate court or county court at law with probate jurisdiction, matters related to an estate include actions against a personal representative (or former personal representative) or his surety arising out of his/her performance of duties as representative, claims brought by the personal representative on behalf of the estate, claims brought against the personal representative in his/her capacity as personal representative (i.e., claims against the estate), and actions relating to property of the estate. Where the county has no statutory probate court but does have a county court at law with probate jurisdiction, matters relating to an estate include the foregoing, plus (i) the interpretation and administration of a testamentary trust under the will admitted to probate in the court; and (ii) the interpretation and administration of an inter vivos trust created by a decedent whose will has been admitted to probate in the court. In a county where there is a statutory county court, matters relating to an estate include both categories just listed, plus "any cause of action in which a personal representative of an estate pending in the statutory probate court is a party in the representative's capacity as personal representative." As a practical matter, the Texas counties with most of the population have statutory probate courts.

Over the years, probate court jurisdiction has been the subject of a number of statutory changes and many court decisions. One court of appeals summarized it this way: a lawsuit relates to an estate if "a review of the pleadings indicates it will have a direct impact on the assimilation, distribution and settlement of the estate." *In re Frank Schuster Farms, Inc.*, No. 13-10-00225-CV (Tex. App.--Corpus Christi 2010, orig. proceeding) (memorandum opinion).

B. LITIGATION INVOLVING EXPRESS TRUSTS. Under Estates Code Section 32.006, a statutory probate court has concurrent jurisdiction with the district court over (i) an action by or against a trustee; and (ii) an action involving an inter vivos trust, testamentary trust, or charitable trust. In any divorce where a party wants to dismantle a trust, or recover property from a trustee, Section 32.006 gives the probate court jurisdiction over that claim. Estates Code Section 32.007 directs that such jurisdiction of the probate court is concurrent with the district court. Thus, the party wishing to assert such a claim regarding an express trust is presented with the ability to choose the court in which to file. Where proceedings are filed in two different courts on the same claim, there is an issue of whether the court where the claim is first filed has dominant jurisdiction to litigate the claim to the exclusion of the other court. The issue can become complicated when the divorce is filed in a district court, and a trustee-related claim is later filed in the probate court, and the divorce pleadings are thereafter amended to include the trustee-related claim. If the trustee-related claim is first filed in the probate court, and a divorce is later filed, and the trustee-related claim is then filed in the divorce proceeding, does the divorce court have to wait for the trust-related claim to be resolved in the probate court before the divorce can be concluded? These are difficult questions. If the trustee is a trustee of a testamentary trust established in a last will and testament, then an issue arises whether the probate court that probated the will, and once had jurisdiction over matters relating to the will in connection with probate of the will, has a residual claim to exclusive jurisdiction. If the estate is still open when a claim is brought against a testamentary trustee, the question arises whether the claim falls within the probate court's exclusive jurisdiction, or pendent and ancillary jurisdiction. If the claim targets property of an estate then in probate, or requires the interpretation of a will, particular attention should be paid to exclusive jurisdiction in the probate court.

C. POWERS OF ATTORNEY. Estates Code Section 32.007(6) gives probate courts concurrent jurisdiction with district courts over "an action to determine the validity of a power of attorney or to determine an agent's rights, powers, or duties under a power of attorney."

D. APPELLATE JURISDICTION OF PROBATE COURT ORDERS. In the ordinary civil case, there is only one final judgment and only that judgment is appealable to the court of appeals. In a probate proceeding, whether of a decedent's estate or a guardianship, there are many orders that can be issued that are appealable to the court of appeals. Estates Code § 32.002(c) (as to decedent's estates); Estates Code § 1022.01(c) (as to guardianships). The reason for this was explained in *Logan v. McDaniel*, 21 S.W.3d 493, 500 (Tex. App.–Austin 2000, pet. denied): "[a] probate proceeding consists of a continuing series of events, in which the probate court may make decisions at various points in the administration of the estate on which later decisions will be based. The need to review controlling, intermediate decisions, before an error can harm later phases of the proceeding has been held to justify modifying the 'one judgment rule.' It has been held that an appealable order in a probate proceeding must adjudicate conclusively a controverted question or

substantial right." There are a number of appellate opinions discussing whether a particular order is or is not appealable, and determining whether an adjudication in a particular phase of a probate proceeding is an appealable final order can be a matter of concern for the appellate lawyer.

VI. PASSAGE OF ESTATE ON DECEDENT'S DEATH. Something as simple as the passage of title on death can create issues in a divorce.

A. IMMEDIATE VESTING. Estates Code Section 101.001(a)(1) provides that "all of the person's estate that is devised by the will vests immediately in the devisees." Section 101.001(a)(3) provides that "all of the person's estate that is not devised by the will vests immediately in the person's heirs at law." However, the property vests subject to Section 101.051(a), which says that the property is subject to the payment of the decedent's debts (except as exempted by law), and court ordered child-support payments that are delinquent on the date of death. Section 101.001(b) says: "Subject to Section 101.051, the estate of a person who dies intestate vests immediately in the person's heirs at law." Case law makes it clear that the heirs are not personally liable on the decedent's debts, but the non-exempt property they inherit is subject to those creditors' claims. Case law also makes it clear that the property is subject to claims against the estate, such as estate taxes, property taxes, and income taxes on estate income accruing during administration of the estate.

Estates Code Section 201.103 provides: "All of the estate to which an intestate had title at the time of death descends and vests in the intestate's heirs in the same manner as if the intestate had been the original purchaser." The effect of this provision is unclear.

In keeping with these statutory provisions, *Hurt v. Smith*, 744 S.W.2d 1, 6 (Tex. 1987), held that the beneficiaries were the owners of the income on inherited property from the moment of death.

B. INCOME EARNED ON INHERITED PROPERTY. Since income on separate property is community property, and since a married heir owns inherited property from the moment of death, it follows that community property earnings could be accumulating on a married heir's interest in inherited property while it is still in the hands of the executor or administrator. This presents unanswered questions about how marital property law applies, such as commingling of separate and community cash in the hands of the executor/administrator, the use of the married beneficiary's share of estate income to pay estate and inheritance taxes on the inherited separate property. Since the estate vests in the heirs subject to the testator's debts, the question is whether the income of the estate is likewise subject to creditors' claim, and the answer is would seem to be yes.

Section 101.003 says that the executor or administrator, upon issuance of letters testamentary or administration, must recover possession of the estate "and hold the estate in trust to be disposed of in accordance with the law." It has been argued that, since the heirs do not hold "legal" title from the moment of death, but rather an equitable interest of sorts until legal title is transferred by the executor or estate administrator, the income earned on the estate before distribution is like trust income and should not be characterized as community property of the married beneficiary. We need a court ruling on this contention. The situation is not exactly analogous to an express trust, since there is no statute saying that property held in trust vests in the beneficiary.

C. CREDITORS OF THE ESTATE. Estates Code Section 101.051 states that the decedent's property is subject to the decedent's debts. Section 101.052(a) says that community property subject to a spouse's sole management and disposition "continues to be subject to the liabilities of that spouse on death." Section 101.052(b) says that the "interest that the deceased spouse owned in any other nonexempt community property passes to the deceased spouse's heirs or devisees charged with the debts that were enforceable against the deceased spouse before death." When these Estates Code provisions are compared to the Texas Family Code provisions relating to marital property liability for living spouses, some issues emerge.

1. Under Family Code Section 3.202, premarital debt can be collected from the debtor/spouse's non-exempt separate property, sole management community property, and joint management community property but not from the other spouse's sole management community property or the other spouse's separate property.

2. Under Section 3.202, a spouse's non-tortious liabilities incurred during marriage can be collected from that spouse's separate property, sole management community property, and joint management community property, but not the other spouse's sole management community property or separate property.

3. Under Section 3.202, a spouse's tortious liabilities incurred during marriage can be collected from the debtor/spouse's non-exempt separate property, sole management community property, joint management community property, *and* the other spouse's sole management community property, but not the other spouse's separate property.

In re Estate of Herring, 983 S.W.2d 61, 63 (Tex. App.–Corpus Christi 1998, no pet.), held that, upon the death of a spouse and appointment of a representative of the estate, the executor or administrator acquires control over "the entire community property" which becomes subject to the jurisdiction of the Probate Court "for purposes of the administration and settlement of the estate." Thus, the surviving spouse's community property interest in community property can be sold as part of settling the estate.

Comparing the Estates Code to the Family Code, we see that Estates Code Section 101.052(a) is consistent with Family Code Section 3.202 in that a spouse's sole and joint management community property is subject to the spouse's debts both before and after death. However, under Estates Code Section 101.052(b), the deceased spouse's interest in "any other nonexempt community property" (i.e., one-half of the other spouse's sole management community property) passes to the decedent's heirs or devises "charged with the debts that were enforceable against the decedent spouse before death." Estates Code § 101.052(b). Thus, before death, Spouse No. 1's one-half community property interest in Spouse No. 2's sole management community property is *not* subject to Spouse No. 1's premarital debt or non-tortious liabilities incurred during marriage, but after death it may be. A court would have good reason to interpret the two Codes to be consistent.

VII. DISCLAIMERS OF INHERITANCE RIGHTS; ASSIGNMENTS. Estates Code Chapter 122 permits persons who would otherwise inherit property to "disclaim" their inheritance, in which event the property passes to whomever would have received it had the disclaiming party predeceased the decedent. Estates Code § 122.101. A written memorandum of disclaimer must be filed in the probate court that probated, or is in the process or probating, the decedent's will. Estates Code § 122.052. If there has been no probate or dependent administration, or if the estate is closed, or if one year has elapsed since letters testamentary were issued, the disclaimer must be filed with the county clerk deed record office of the county where the decedent resided on the date of death. Estates Code § 122.053. The disclaimer of a present interest must be filed within nine months of the decedent's death. A disclaimer of a future interest must be filed within nine months of when the interest indefeasibly vests. A different timetable is provided for charitable organizations or governmental agencies. Estates Code § 122.055. Notice must be given to the representative of the decedent's estate within certain time periods. Estates Code § 122122.056. Once the memorandum of disclaimer has been filed, and notice given, it becomes irrevocable. Estates Code § 122.004. The creditors of the disclaimant have no rights against the disclaimed property. Estates Code § 122.003. However, if the disclaiming party owes child support that has been administratively determined or confirmed and reduced to judgment, the disclaimer is not effective as to that child support claim. Estates Code § 122.107. Partial disclaimers are allowed. Estates Code §§ 122.151 - 153.

A person who is entitled to receive property or an interest in property under a will, intestacy, or under a life insurance contact, and who has not disclaimed the right to that property, can assign it "to any person." Estates Code § 122.201. An assignment must be filed and served under the same procedures as a disclaimer. Estates Code § 122.202 & 122.203. An assignment is a gift and not a disclaimer. Estates Code § 122.205.

VIII. THE EFFECT OF DIVORCE UPON DEATH-RELATED RIGHTS. Estates Code chapter 123 contains provisions nullifying upon divorce, testamentary and non-testamentary transfers to a former spouse. Estates Code Section 123.001(b) provides that a court-ordered dissolution of marriage (or declaration of voidness) revokes all provisions in a person's will involving the former spouse. This is accomplished by specifying that all provisions of the will, including fiduciary appointments, will be read as if the former spouse predeceased the person. Estates Code § 123.001(b). Estates Code Section 123.052 provides that provisions in an express trust instrument, executed before divorce, that confer rights or powers on the settlor's later-divorced spouse are nullified by a divorce. Similar provisions favoring relatives of the divorced spouse (that are not also relatives of the settlor) are nullified by divorce. Estates Code § 123.052(a). Estates Code Section 123.054 protects bona fide purchasers of property. If a suit by a spouse to declare a marriage void, due to lack of that person's mental capacity, is pending when a party dies, the court can make the necessary determination and declare the

marriage void, if warranted. Estates Code § 123.101. An interested person can initiate a suit to declare a marriage void for lack of mental capacity within three years of the date of the decedent's death. Estates Code §§ 123.102 & 123.103. If a marriage is declared void after death, the other party to the marriage is not considered to be a surviving spouse. Estates Code § 123.104.

IX. DEFAULT APPORTIONMENT OF TAXES. Estates Code Chapter 124 governs the default apportionment of estate taxes to various beneficiaries of an estate, when the apportionment is not specified in the will. Estates Code § 124.005(b) (saying that the default apportionment does not apply if the apportionment is specified in the trust or will). A "temporary interest," like an income interest, life estate, and estate for a term of years, are not assessed in the default apportionment. Estates Code § 124.008.

X. SAFE DEPOSIT BOXES. Estates Code Chapter 151 contains provisions for gaining access to a decedent's safe deposit box. A probate judge with jurisdiction of a decedent's estate can order a person to permit a court representative to examine the decedent's documents or safe deposit box upon a showing that this may lead to the decedent's will, deed to burial plot, or insurance policy on the decedent's life. Estates Code § 151.001(a). The examination must occur in the presence of the judge or a representative of the judge. Estates Code § 151.001(b). The court can authorize the delivery of the documents to the appropriate persons. Estates Code § 151.002. Independent from the court process, the person possessing or controlling documents can show them to the decedent's spouse, the decedent's parent, a descendant of the decedent who is at least 18 years old, or the person named as executor in a copy of the will. Estates Code § 151.003. The examination must be done in the presence of the custodian of the document. *Id.* The person who permits an examination under Section 151.003 *may* deliver the document to the clerk of the probate court (if a will), or the person named in the document as executor, or to the person conducting the examination (if a deed to a burial plot), or to the named beneficiary (if a life insurance policy). Estates Code § 151.004. Delivery is to occur only if the person inspecting requests delivery, and if the person in custody of the documents issues a receipt. Estates Code § 151.004(c). The person who has leased a safe deposit box must keep a copy of the documents delivered for four years. *Id.* Everyone is prohibited from removing the contents of a decedent's safe deposit box except as authorized under Chapter 151.

XI. INTESTATE SUCCESSION. Estates Code Chapter 201 governs intestate succession, or who inherits property when a person dies with assets but without a will. It should be noted that nontestamentary transfers, such as assets passing by survivorship agreement or by contract (like an insurance contract), are not subject to Chapter 201. Assets that are beneficially owned by the decedent but where legal title is held by a trustee (such a revocable trust) also do not pass under Chapter 201.

A. UNMARRIED PERSONS. When an unmarried person dies intestate, the decedent's estate passes to his/her children and their descendants. Estates Code § 201.001(b). If the unmarried decedent has no children or descendants of children, the estate passes in equal portions to the decedent's father and mother. Estates Code § 201.001(c). If only one parent survives, that parent receives half of the assets and the other half is divided among the decedent's siblings and their descendants. Estates Code § 201.001(d). If there are no siblings, the sole surviving parent gets all of the assets. Estates Code § 201.001(d)(2). If neither parent survives, all assets go to the decedent's siblings and their descendants. Estates Code § 201.001(e). If no parents or siblings or their descendants survive, the estate is divided into two "moeties," half of which passes to paternal kin and the other half to maternal kin. Estates Code § 201.001(f). If both grandparents survive, each gets half. If only one grandparent survives, s/he gets half and the other half goes to the deceased grandparent's descendants. Estates Code § 201.001(g). If there are no descendants of the deceased grandparent, then all of the estate goes to the surviving grandparent. If both grandparents are dead, their respective shares go to their descendants. Estates Code § 201.201.001.(g).

B. MARRIED PERSONS. When a married person dies intestate, the community and separate estates descend according to different rules. If the decedent has no children or descendants, the entire community estate passes to the surviving spouse. The entire community estate also passes to the surviving spouse if all surviving children and descendants of the decedent are also children and descendants of the surviving spouse. Estates Code § 201.003(b). If the decedent is survived by at least one child or other descendant who is not also a descendant of the surviving spouse, the decedent's share of the community estate passes to the decedent's child or descendants. Estates Code § 201.003(c). The decedent's share of the community estate is "charged with debts against the community estate." Estates Code § 201.003(c). The passage of ownership is subject to the right of the

estate representative to take control, pay debts, etc. during probate or administration. *Frazier v. Wynn*, 472 S.W.2d 750, 752 (Tex. 1971). The presumption of community property applies upon termination of the marriage by death. *Smith v. Lanier*, 998 S.W.2d 324, 331 (Tex. App.–Austin 1999, pet. denied).

If a married person dies and is survived by a spouse but no children or their descendants, then the surviving spouse takes all separate property personalty and one half of the separate property realty, while the other half of the separate property realty passes to the decedent's heirs. Estates Code § 201.002(c). If the decedent has no heirs, then the surviving spouse takes all the separate property realty. Estates Code § 201.002(d). If a married person dies and is survived by a spouse and also by children and their descendants, the surviving spouse takes 1/3 of the separate property personalty, with the other 2/3 passing to the decedent's children and descendants. The surviving spouse takes a life estate in 1/3 of the decedent's separate property land, and the other 2/3 of the life estate passes to the children and descendants, along with the remainder interest after the surviving spouse's 1/3 life estate. Estates Code § 201.002(b)(3). If the dying spouse has no children or descendants, the surviving spouse takes all of the separate property personalty and one-half of the separate property land (with no remainder to anyone). Estates Code § 201.002(c). The other half of the separate property land passes to the decedent's collateral heirs. Estates Code § 201.002(c). If there are no children and descendants, and no collateral heirs, then the surviving spouse takes everything. Estates Code § 201.002(d).

C. DETERMINING FATHER AND MOTHER. Estates Code Section 201.051 provides that, for purposes of intestate succession, the term "mother" includes a biological or adoptive mother, but not a gestational mother, unless the gestational mother is also the "intended mother." See Family Code ch. 160. The term "father" has the same meaning as "father" under various parts of the Family Code, including an "intended father" under a gestational agreement. Estates Code § 201.052. Section 201.052 provides a procedure to determine paternity for purposes of establishing a right to inherit from a deceased person. The burden of persuasion is clear and convincing evidence. *Id.* An adopted child is treated the same as a biological child, for these purposes. Estates Code § 201.054. Texas recognizes the principle of equitable adoption or adoption by estoppel, which applies to intestate succession. See Section IV.A of this Article.

D. WHOLE AND HALF BLOOD. For purposes of intestate succession, collateral kindred of the half-blood get half of what kindred of the whole blood receive, unless all collateral kindred are of the half-blood, in which each gets his or her full portion. Estates Code § 201.057.

E. TERMINATING RIGHT TO INHERIT THROUGH CHILD. Estates Code Section 201.062 empowers a probate court to issue an order declaring that the parent of a child under age 18 cannot inherit from or through the child under the law of intestate succession, if that parent has: (i) voluntarily abandoned and failed to support the child for at least three years prior to the child's death; (ii) knowingly and voluntarily abandoned the child's mother while pregnant with the child and failed to provide adequate support; (iii) been convicted (or held criminally responsible) for the death or serious injury of a child.

XII. HOMESTEAD ON DEATH. The homestead of the decedent "descends and vests" in the decedent's heirs, like any other real property. Tex. Const., art. XVI, § 52. Estates Code § 102.003. However, the surviving spouse and minor children have a homestead right (sometimes informally referred to as the "probate homestead") that survives the decedent's death. This probate homestead right exists whether the homestead was community property or was the decedent's separate property. Estates Code § 102.002.

A. THE HOMESTEAD RIGHTS OF SURVIVING SPOUSE AND CHILDREN. Under Estates Code Section 102.005, the homestead cannot be partitioned during the surviving spouse's lifetime, so long as s/he uses or occupies the property as a homestead. Tex. Const. art. XVI, § 52. If the decedent is survived by minor children, the homestead cannot be partitioned during the period that the children's guardian is permitted by court order to use and occupy the homestead. Tex. Const. art. XVI, § 52. Estates Code § 102.005(2). When the foregoing use ends, the homestead can be partitioned "among the respective owners." Estates Code § 102.006. One old case involved a surviving husband who remarried and then died. The court held that the second wife had a probate homestead in only the husband's half, and that the first wife's heirs could have partition of the homestead. *Murphy v. Murphy*, 131 S.W.2d 158, 161 (Tex. Civ. App.–Waco 1939, no writ.). This probate homestead right can be waived by agreement of the spouses, and in *Williams v. Williams*, 569 S.W.2d 867, 870 (Tex. 1978), a general waiver in a premarital agreement, of the wife's claims

against the husband's separate property, was taken to include the waiver of this probate homestead right. For purposes of determining homestead rights, a child is a child of his or her mother and of his or her father, as described in the provisions relating to intestate succession, Estates Code Sections 201.051, 201.052 & 201.053. See Estates Code § 102.001.

B. LIABILITY OF HOMESTEAD FOR DEBTS OF A DECEDENT. The probate homestead right of a surviving spouse or minor children is protected against creditors. The only claims that can be collected through probate from the homestead are: (1) a purchase money lien; (2) property taxes; (3) debt secured by a builder's and mechanic's lien; (4) an owelty of partition imposed by court order or agreement, including a debt to a spouse or former spouse from the division of property in a divorce; (5) the refinance of a lien against this homestead, including a tax debt; (6) a no-recourse home equity loan; and (7) a reverse mortgage. Estates Code § 102.004. The homestead can be sold to pay any of these permitted debts. *Cannon Bros. v. Williams*, 112 S.W.2d 709, 711 (Tex. 1938). Excess proceeds from such a sale go to the executor to use as provided by law. *Sutton v. Lewis*, 176 SW2d 765, 767 (Tex. App.–Fort Worth, 1943, writ ref'd).

XIII. SALE OF HOMESTEAD OF INCAPACITATED SPOUSE. Texas Family Code Chapter 5 controls the power of spouses to sell, convey or encumber homestead. Subchapter A sets out rules relating to the sale of a homestead. See Family Code § 5.001 Section 5.002 provides that, where the homestead is the separate property of a person whose spouse has been judicially declared to be incapacitated by a court pursuant to the Probate Code (now the Estates Code), the owning spouse is free to sell, convey, or encumber the homestead without the joinder of the incapacitated spouse. Section 5.003 applies a similar rule to a community property homestead, saying that the competent spouse can sell, convey or encumber the community property homestead without the joinder of the spouse who has been judicially declared to be incapacitated.

XIV. AGREEMENTS ESTABLISHING RIGHT OF SURVIVORSHIP. The Estates Code contains a number of provisions that govern rights of survivorship in property. Property that passes pursuant to a right of survivorship is not considered to be part of the decedent's estate, for purpose of the Estates Code. Property transferred upon death in this manner is called "nonprobate assets" and "nontestamentary transfers." See Estates Code ch. 111 & § 111.054.

A. NO SURVIVORSHIP ABSENT WRITTEN AGREEMENT. Under the common law of England, co-ownership of property presumptively included a right of survivorship. This is not the law in Texas. Estates Code § 101.002. Two or more persons who "hold' an interest in property jointly "can agree *in writing* that the interest of one joint owner, will on death, pass automatically to surviving joint owners. Estates Code § 111.001(a) (emphasis added). A survivorship agreement cannot be inferred from the mere fact of joint ownership. Estates Code § 111.001(b). It bears repeating that, under Texas law, an agreement to create a right of survivorship among co-owners must be *in writing* to be enforceable.

B. SPECIAL CHOICE-OF-LAW PROVISION. In *McKeehan v. McKeehan*, 355 S.W.3d 282 (Tex. App.–Austin 2011, pet. denied), the Texas court applied Michigan law to a financial account at a Michigan financial institution, finding a right of survivorship under Michigan law when it would not have existed under Texas law. In 2013, the Legislature enacted HB 2913, which added Estates Code Section 111.054, a choice-of-law provision, requiring a Texas court to apply Texas law of nontestamentary transfers if more than 50% of the money or property in an account or retirement account is owned by Texas domiciliaries. The same rule applies to insurance contracts, annuity contracts, beneficiary designations or similar arrangements of Texas domiciliaries. HB 2913, Section 62, stated:

> SECTION 62. (a) The changes in law made by Section 111.051, Estates Code, as amended by this Act, and Section 111.054, Estates Code, as added by this Act, represent the fundamental policy of this state for the protection of its residents and are intended to prevail over the laws of another state or jurisdiction, to the extent those laws are in conflict with Texas law.
>
> (b) The changes in law made by Section 111.051, Estates Code, as amended by this Act, and Section 111.054, Estates Code, as added by this Act, apply to an account at a financial institution, an insurance contract, an annuity contract, a retirement account, a beneficiary designation, or another similar arrangement of a person who dies on or after the effective date of this Act.

C. SURVIVORSHIP RIGHTS IN MULTIPARTY ACCOUNTS. The Estates Code contains provisions relating to rights of survivorship in multiparty accounts. Chapter 113 of the Estates Code sets out important provisions relating to multi-party accounts. These provisions were placed in the Probate Code years ago and thus are in the Estates Code although it might make better sense to put them in the Finance Code. Their inclusion in the Probate Code probably resulted from frequent litigation involving survivorship rights in multiparty accounts. Survivorship rights were, and still are, sometimes created matter-of-factly, perhaps even unknowingly, when financial accounts are opened. Rather than giving the same sober reflection that one would use in executing a last will and testament, persons opening a financial account can establish a survivorship right in a financial account merely by checking a box on an account card or depositor's agreement. There is no assurance that sufficient thought was given to the fact that the survivorship right thus created might alter, sometimes significantly alter, an ordered estate plan. Undoubtedly many best-laid plans have gone awry in this manner.

XV. COMMUNITY PROPERTY WITH RIGHT OF SURVIVORSHIP. Texas law long forbade spouses to create a right of survivorship in community property. Spouses could, however, first partition community property into separate property, and then the separate property interests could be made subject to a survivorship agreement. *See Hilley v. Hilley*, 342 S.W.2d 565 (Tex. 1961). Texas Constitution art. XVI, § 15 was amended on November 3, 1987, to allow spouses to create survivorship rights in community property. The Texas Legislature responded by enacted a law, effective August 28, 1989, governing the creation and enforcement of such agreements. The statute is carried forward in Chapter 112 of the Estates Code. However, multiparty depository accounts are governed by Chapter 113. Estates Code § 112.002.

Spouses can agree that community property will be held subject to a right of survivorship, so that the surviving spouse inherits the property without regard to a last will and testament or intestate succession. Estates Code § 112.0051. This right extends only to *spouses*, so that an effort to make this agreement in a premarital agreement is not authorized. The agreement can apply to property on hand or property to be acquired in the future. *Id.* Upon death, the transfer of ownership is under the survivorship agreement and is not a testamentary transfer. Estates Code § 112.152.

A survivorship agreement in community property must be in writing and signed by the parties. Estates Code § 112.052(a). Certain key phrases create a right to survivorship, but the use of these phrases is not required. The phrases are: "with right of survivorship," "will become the property of the survivor," "will vest in and belong to the surviving spouse," "shall pass to the surviving spouse." Estates Code § 112.052(b). Survivorship may *not* be inferred from the fact that "an account is a joint account or that an account is designated as JT TEN, Joint Tenancy, or joint, or with other similar language." Estates Code § 112.052(d).

A survivorship agreement can provide its own terms for revocation, but absent such provision, the agreement can be revoked by a written instrument that is signed by both spouses, or signed by one spouse and delivered to the other. Estates Code § 112.054. Note that the agreement can be revoked by the unilateral act of one spouse, as long as a signed written notice is provided to the other spouse. If the property held subject to survivorship rights is disposed of, by both or even one spouse, that terminates the survivorship right unless the agreement provides otherwise. Estates Code § 112.054(c).

There are no provisions in the Estates Code setting out defenses to the enforcement of survivorship agreements, in contrast to premarital agreements, marital partition agreements, spousal income agreements, and agreements to convert separate to community property, all of which have statutory defenses described in the Family Code. This is in keeping with the likelihood that a community property survivorship agreement will be reflected by a few words in a deed, car title, stock certificate, bond, etc. executed largely without the oversight of a lawyer.

A survivorship agreement is effective without a court adjudication of enforceability, but a surviving spouse can apply to the probate court for an order confirming the survivorship agreement. The contents of such an application, the proof required, and the issuance and effect of the order, are discussed in Estates Code Sections 112.101 - 112.106.

Community property held with right of survivorship remains community property prior to death. Estates Code § 112.151(a). Entering into a survivorship agreement does

not alter management rights over the property, unless the agreement provides otherwise. Estates Code § 112.151(b).

The Estates Code contains various provisions that protect third parties with regard to community property survivorship agreements. A third party is charged with "actual notice" of the agreement only if they have received written notice or the original, or a certified copy of the agreement (from a government office). Estates Codes §§ 112.201 - 112.202. An estate representative without actual notice of a survivorship agreement who disposes of such property is protected against claims under such agreement. Estates Code § 112.203. If at least six months have expired since the date of death, a purchaser without actual notice from an heir acquires good title against such an agreement. Estates Code § 112.204(a)(1). A purchaser without actual notice, who buys property from an estate representative, takes good title as against a survivorship agreement. Estates Code § 112.204(c). Debtors or custodians of the decedent's property, who are without actual notice of a survivorship agreement, are protected if they transfer property to the estate representative. There are BFP provisions relating to notice of revocation of survivorship agreements. Estates Code §§ 112.206 - 112.207. These provisions eliminate the doctrine of constructive notice in connection with community property survivorship agreements.

The rights of creditors in the property are not affected by survivorship, and the survivor "is liable to account to the deceased spouse's personal representative for property received by the surviving spouse under a right of survivorship to the extent necessary to discharge the deceased spouse's liabilities." Estates Code §112.252(b). Such a claim mut be brought within two years of the date of death. If successful, the property is administered as part of the deceased spouse's estate. Estates Code § 112.252(d).

XVI. MULTIPLE-PARTY ACCOUNTS.

A. WHAT ACCOUNTS ARE COVERED? The Estates Code has an entire chapter dedicated to multiple-party accounts. Estates Code Section 113.001(1) defines "account" as "a contract of deposit of funds between a depositor and a financial institution." This includes "a checking account, a savings account, a certificate of deposit, a share account, or other similar arrangement." A "financial institution" is defined as "an organization authorized to do business under state or federal laws relating to financial institutions." Specific examples are "a bank or trust company, savings bank, building and loan association, saving and loan company or association, credit union, and brokerage firm that deals in the sale and purchase of stocks, bonds, and other types of securities." Estates Code § 113.001(3).

B. DEFINITION OF THE TERM "PARTIES." A "party" is one with a present right to payment, upon request, from an account. Estates Code § 113.002.

C. TYPES OF ACCOUNTS. Estates Code Section 113.004(1) defines different types of accounts at financial institutions.

1. Multiple-Party Account. A "multiple-party account" is a "joint account," a "convenience account," a "P.O.D. Account," and a "trust account." Estates Code § 113.004(3).

2. Joint Account. A "joint account" is "an account payable on request to one or more of two or more parties, regardless of whether there is a right of survivorship." Estates Code § 113.004(2). Thus, a joint account can be between two or more than two "parties."

3. Convenience Account. A "convenience account" is an "account" at a "financial institution" established in the name of the party but with the authority to withdraw sums extending to other parties ("convenience signers"). Estates Code § 113.004(1). The account terms must provide that the "sums on deposit" are to be paid or delivered to the parties or the "convenience signers." "Sums on deposit" include the balance payable, including interest and dividends, and "any deposit of life insurance proceeds added to the account by reason of the death of a party." Estates Code § 113.001(8).

4. P.O.D. Account. A "P.O.D. Account" is an account that is payable to one person during his or her lifetime, and upon his or her death is payable to another person or persons, called "P.O.D. payees." A P.O.D. account can also be payable to several persons during their lifetimes, and payable on the death of all of those persons to one or more P.O.D. payees. Estates Code § 113.004(4).

5. Trust Account. A "trust account" is an account in the name of one or more parties as trustee for one or more beneficiaries. Estates Code § 113.004(5). The trust relationship is established by the form of the account and deposit agreement with the financial institution. *Id*. There can be no subject of the trust other than the sums on

deposit in the account. *Id*. The deposit agreement does not have to address payment to the beneficiary. The term "trust account" does not include a "regular trust account" under a testamentary trust or trust agreement that is separate from the trust account. Estates Code § 113.004(5)(A). The term also does not include a "fiduciary account" arising from a fiduciary relationship, such as the attorney-client relationship. Estates Code § 113.004(5)(B). Although the statute uses the term "fiduciary account," the term is not defined in the Estates Code. The State Bar of Texas has published a pdf file "A Lawyer's Guide to Client Trust Accounts," describing a lawyer's duties under Rule 1.14 of the Texas Disciplinary Rules of Professional Conduct for the safekeeping of a client's property. See https://www.texasbar.com/Content/NavigationMenu/ForLawyers/ResourceGuides1/TrustAccounts/GuidetoTrustAccounts.pdf

6. Type of Account Can Be a Fact Issue. Two cases reflect that the question of whether an account is a convenience account can be a fact issue for a jury. In *Dulak v. Dulak*, 513, S.W.2d 205, 208 (Tex. 1974), the Supreme Court upheld a jury's finding that an account established before death was a convenience joint account, and that the funds belonged to the decedent and, upon death, his heirs. In *Stogner v. Richeson*, 52. S.W.3d 903, 907 (Tex. App.--Fort Worth 2001, pet. denied), the appellate court upheld a jury's finding that a deposit agreement reflected a trust account.

7. Statutory Forms for Convenience Accounts. The variety of deposit agreements generated by financial institutions in the anarchy of the marketplace sometimes created difficult interpretation issues that required litigation to resolve. Estates Code Section 113.051 contains forms that clearly reflect the nature of a convenience account. Financial institutions are not required to use the forms, but it would help if they did. Estates Code Section 113.053 provides that using the statutory forms constitutes adequate disclosure of the information provided in the subchapter relating to uniform account forms. Estates Code § 113.053(a). If a financial institution varies from the statutory forms, it must make disclosures in the account agreement or in some other way that adequately discloses the information in the subchapter. Estates Code § 113.053(b). Financial institutions are authorized to combine the different types of accounts into one universal form, provided there is adequate disclosure. Estates Code § 113.05(c).

a. Notice to Depositor. The form provided in Estates Code Section 113.052 contains the following helpful notice to prospective depositors:

> UNIFORM SINGLE-PARTY OR MULTIPLE-PARTY ACCOUNT SELECTION FORM NOTICE: The type of account you select may determine how property passes on your death. Your will may not control the disposition of funds held in some of the following accounts. You may choose to designate one or more convenience signers on an account, even if the account is not a convenience account. A designated convenience signer may make transactions on your behalf during your lifetime, but does not own the account during your lifetime. The designated convenience signer owns the account on your death only if the convenience signer is also designated as a P.O.D. payee or trust account beneficiary.

b. Selecting Type of Account. The form in Estates Code Section 113.051 allows the depositor to select the type of convenience account by "placing your initials next to the account selected." Estates Code § 113.052(1).

(1) A "Single-Party Account Without 'P.O.D.' (Payable on Death) Designation" is described in this way:

> The party to the account owns the account. On the death of the party, ownership of the account passes as a part of the party's estate under the party's will or by intestacy.

There is a blank to name the party who owns the account and two blanks to enter the name(s) of convenience signers.

(2) A "Single-Party Account With 'P.O.D.' (Payable On Death) Designation" is described in this way:

> The party to the account owns the account. On the death of the party, ownership of the account passes to the P.O.D. beneficiaries of the account. The account is not a part of the party's estate.

There is a blank to enter the name(s) of the party, and two blanks to enter the name(s) of the P.O.D. beneficiaries, and two more blanks to enter the name(s) of convenience signers.

(3) A "Multiple-Party Account Without Right of Survivorship" is described in this way:

> The parties to the account own the account in proportion to the parties' net contributions to the account. The financial institution may pay any sum in the account to a party at any time. On the death of a party, the party's ownership of the account passes as a part of the party's estate under the party's will or by intestacy.

There are two blanks to enter the name(s) of the parties, and two more blanks to enter the name(s) of the convenience signers.

(4) A "Multiple-Party Account With Right of Survivorship" is described in this way:

> The parties to the account own the account in proportion to the parties' net contributions to the account. The financial institution may pay any sum in the account to a party at any time. On the death of a party, the party's ownership of the account passes to the surviving parties.

There are two blanks to enter the name(s) of the parties, and two blanks to enter the name(s) of convenience signers.

(5) A "Multiple-Party Account With Right of Survivorship and P.O.D. (Payable On Death Designation)" is described in this way:

> The parties to the account own the account in proportion to the parties' net contributions to the account. The financial institution may pay any sum in the account to a party at any time. On the death of the last surviving party, the ownership of the account passes to the P.O.D. beneficiaries.

There are two blanks to enter the name(s) of the parties, and two blanks to enter the name(s) of the P.O.D. beneficiaries, and two blanks to enter the name(s) of the convenience signers.

(6) A "Convenience Account" is described in this way:

> The parties to the account own the account. One or more convenience signers to the account may make account transactions for a party. A convenience signer does not own the account. On the death of the last surviving party, ownership of the account passes as a part of the last surviving party's estate under the last surviving party's will or by intestacy. The financial institution may pay funds in the account to a convenience signer before the financial institution receives notice of the death of the last surviving party. The payment to a convenience signer does not affect the parties' ownership of the account.

There are two blanks to enter the names of the parties, and two blanks to enter the name(s) of the convenience signer(s).

(7) A "Trust Account" is described in this way:

> The parties named as trustees to the account own the account in proportion to the parties' net contributions to the account. A trustee may withdraw funds from the account. A beneficiary may not withdraw funds from the account before all trustees are deceased. On the death of the last surviving trustee, the ownership of the account passes to the beneficiary. The trust account is not a part of a trustee's estate and does not pass under the trustee's will or by intestacy, unless the trustee survives all of the beneficiaries and all other trustees.

There are two blanks to enter the name or names of the trustees, and two blanks to enter the name or names of the beneficiaries, and two blanks to enter the name(s) of the convenience signer(s).

8. Parties Affected by Statutory Provisions. Estates Code Section 113.101 limits the relevancy of the rules in Subchapters B, C and D, regarding beneficial ownership of multiparty accounts, to controversies between the parties to the account, and P.O.D. beneficiaries, and their creditors and successors. Estates Code § 113.001(1). The provisions do not affect the withdrawal power of persons under the account contract. Estates Code § 113.001(2).

9. Ownership in Proportion to Contribution. Estates Code Section 113.102 provides the very important rule on ownership of a multi-party accounts:

> During the lifetime of all parties to a joint account, the account belongs to the parties in proportion to the net contributions by each party to the sums on deposit unless there is clear and convincing evidence of a different intent.

COMMENT: The statute says that funds in a multiparty account are owned by the party who contributed them, unless someone proves the contrary by clear and convincing evidence. The statute thus creates a rebuttable presumption of ownership, which can be overcome only by clear and convincing evidence. The presumption is not one that vanishes in the face of contrary evidence. The presumption carries through to the fact-finder's ultimate decision. This suggests that in a jury charge the burden should be cast as follows:

> Do you find, from clear and convincing evidence, that the funds in the account (were given to Party B when they were deposited/survived to Party B upon Party A's death/etc.)?

COMMENT: Merely placing funds in a multi-party account, and authorizing the financial institution to honor a withdrawal or payment request by any party, does not itself authorize the non-owning party to withdraw the funds. For example, in *Hicks v. State*, 419 S.W.3d 555, 558-59 (Tex. App.--Amarillo 2013, pet. denied), the appellate court upheld a conviction of a party to a multiparty account who made unauthorized expenditures from funds belonging to another party to the account. In other words, one party's authorizing the bank to allow make transfers on another party's request does not constitute authority for the other party to make withdrawals.

10. Ownership As Between Depositor and P.O.D. Payee. Estates Code Section 113.103 provides that, during the lifetime of the "original payee" of a P.O.D. account, the account belongs to the original payee and not the P.O.D. payee. In a P.O.D. account, if two or more parties are named as "original payees," then their respective rights in the funds are governed by Section 113.102, which means that the funds belong to the person who contributed them to the account.

11. Ownership of Trust Account. Estates Code Section 113.104 provides that the funds in a trust account, during the trustee's lifetime, belong beneficially to the trustee, unless the terms of the account or deposit agreement "manifest a contrary intent," or other clear and convincing evidence exists of "an irrevocable trust." Where there two or more trustees of such a trust account, their rights in the funds are governed by Section 113.102, meaning that the funds belong to the person who contributed them to the account. When the trust account is an irrevocable trust, the beneficial interest belongs to the beneficiary. Estates Code § 113.104(c). This statute bears further analysis. First, if the "trust" is revocable, the statute makes the trustee the true beneficiary during the trustee's lifetime. If the "trust" is irrevocable, the statute makes the account beneficiary the true beneficiary during the trustee's lifetime. Second, the "terms of the account or the deposit agreement" prevail over the statutory allocation of beneficial rights. Third, the statute creates a rebuttable presumption that the "trust" is revocable, unless "other clear and convincing evidence of an irrevocable trust exists." This suggests that the presumption of revocable trust does not vanish in the face of evidence of contrary intent, but instead carries through to the fact-finders' decision. Fourth, where there are multiple trustees, the rule that he who contributes owns will be applied.

12. No Gift When Party Makes a Deposit. Estates Code Section 113.105 addresses claims by third parties that deposits into a convenience account change ownership. Section 113.105(a) says that the making of a deposit in a convenience account "does not affect the title to the deposit." Section 113.015(b) says that "[a] party to a convenience account is not considered to have made a gift of the deposit, or any additions or accruals to the deposit, to a convenience signer." Section 113.015(c) says that deposits to a convenience account by a non-party "are considered to have been made by a party." The statute does not say how ownership should be allocated if there are multiple parties, but a deposit by a non-party could be prorated among the parties per capita or instead in proportion to each party's ownership of the funds in the account at the time of the non-party deposit.

Estates Code Section 113.106 provides that convenience signers can be added to an account even if it has not been designated as a convenience account. The normal rules apply to those accounts.

Estates Code Section 113.151 pertains to survivorship rights in joint accounts. Sums on deposit in an account, on the death of a party to the account, belong to the survivor(s) if so provided in a written agreement signed by the party who dies. Estates Code §113.151(a). The statute provides sample language creating a right of survivorship, and declares that an agreement confers an "absolute right of survivorship" if it is worded substantially as follows:

> On the death of one party to a joint account, all sums in the account on the date of death vest in and belong

to the surviving party as his or her separate property and estate.

Estates Code Section 113.151(c) provides that a right of survivorship cannot be inferred from the mere fact that the account is a joint account, or is designated as a joint tenancy or "other similar language." Section 113.151(d) explains rights if there are two or more surviving parties. During the lifetime of the surviving parties, each party owns what he contributed to the account, plus his share of the deceased party's interest in the account immediately prior to death. The account continues to be subject to a right of survivorship if the agreement signed by the decedent so provides.

XVII. MINIMUM SURVIVAL PERIOD. Under Estates Code Section 121.052, a person who does not survive a decedent by 120 hours is considered to have predeceased the decedent, "for purposes of the homestead allowance, exempt property, and intestate succession." If the sequence or the time interval between deaths cannot be established, the person is considered to have prede-ceased. Estates Code § 121.053. A similar rule applies to a beneficiary under a last will and testament, unless the will provides otherwise. Estates Code § 121.101.

If a beneficiary's "right to succeed to an interest in property" upon a decedent's death depends on survival of the decedent, a beneficiary must survive by 120 hours to receive that interest. Estates Code § 121.102(a). However, if there are two or more beneficiaries and the right of one beneficiary depends on surviving another beneficiary, and all of those beneficiaries die less than 120 hours apart, the property is divided into equal portions per stirpes.

XVIII. THE LAST WILL AND TESTAMENT. Estates Code Chapters 251 - 255 govern creating, amending, revoking, and interpreting a last will and testament.

A. FORMALITIES. A last will and testament must be in writing, and signed by the testator or someone acting on behalf of the testator at the testator's direction and in his presence, and it must be attested by two or more credible witnesses who sign the testator's will in his presence. Estates Code § 251.051. Once executed, the will cannot be altered unless the amendment is done in compliance with required formalities. *In re Estate of Flores*, 76 S.W.3d 624, 631 (Tex. App.--Corpus Christi 2002, no pet.). A will can be revoked by subsequent will, codicil or declaration in writing "executed with like formalities." Estates Code § 253.002. A will can also be revoked by "destroying or canceling the same," or causing it to be destroyed or canceled in the testator's presence. *Id*. A testator cannot revoke parts of a will by obliterating them. *Goode v. Estate of Hoover*, 828 S.W.l.2d 558, 560 (Tex. App.--El Paso 1992, writ denied). An exception to the rule requiring two subscribing witnesses is a will that is entirely in the testator's handwriting (a holographic will). A holographic requires no witnesses. Estates Code § 251.052. A holographic will can be altered or modified by the testator's handwriting, without formalities. *Hancock v. Krause*, 757 S.W.2d 117, 120-21 (Tex. App--Houston [1st Dist.] 1988, no writ).

B. COURT MAY NOT INTERFERE. No court can prohibit a person from executing a new will or codicil to an existing will. Estates Code 253.001(b). Such an order is a nullity and can be disregarded without penalty. Estates Code § 253.001(c).

C. CONTRACTS CONCERNING WILLS OR DEVISES; JOINT AND RECIPROCAL WILLS. Texas law recognizes the validity of contracts to make or not revoke a will or devise that were executed or entered on or after September 1, 1979. Estates Code § 254.004(a). Such a contract must be reflected by a "binding and enforceable" written agreement or a will stating that a contract exists and recites the material provisions of the contract. Estates Code § 254.004. The mere execution of joint wills or reciprocal wills is not alone "sufficient evidence" of such a contract. Estates Code § 254.004(b).

A contract to bequeath property owned at the time of death is not enforceable or actionable prior to death, since the assets owned at the time of death cannot be determined prior to death. *Meyer v. Shelley*, 34 S.W.3d 619, 623 (Tex. App.--Amarillo 2000, no. pet). However, a contract to bequeath specific assets should be enforceable even before death. The beneficiaries of such a contract can seek a declaratory judgment even before the party dies. *Meyer v. Shelley*, 34 S.W.3d 619, 623 (Tex. App.--Amarillo 2000, no pet.).

In *Stephens v. Stephens*, 877 S.W.2d 801, 805 (Tex. App.--Waco 1994, writ denied), a surviving spouse was allowed to repudiate a contractual will entered into with his spouse, where the surviving spouse established that, but for the untimely death, he would have pursued a divorce that would have nullified bequests to the other spouse. The court treated the divorce as accomplished

for this purpose, under an equitable maxim that "equity will treat as done that which by agreement is to be done."

XIX. DURABLE POWERS OF ATTORNEY. Durable powers of attorney are covered in Estates Code Chapters 751 and 752. The enactments set out the fundamental legal principles that govern durable powers of attorney, to exist side-by-side with common law principles and other statutory provisions that are not contrary to the Estates Code. Estates Code § 751.006. The power is "durable" when it does not lapse if and when the party becomes legally incapacitated.

A. DURABLE POWER OF ATTORNEY. A durable power of attorney does not lapse with the passage of time, unless the power of attorney so provides. Estates Code §751.004. The powers under the durable power of attorney terminate upon the appointment of a permanent guardian of the estate for a disabled person. Estates Code §751.052(a). Where the appointment is of a temporary guardian of the person, the power of attorney is suspended only to the extent ordered by the guardianship court. Estates Code §751.052(b). A divorce will annul a power of attorney naming one spouse as attorney in fact or agent for the other spouse, unless the power of attorney provides otherwise. The attorney in fact or agent must timely inform the principal of each action taken under the power of attorney. Estates Code §751.102. The attorney in fact or agent must maintain records of each action or decision. Estates Code §751.103. The principal can demand an accounting from the attorney in fact or agent at any time. Estates Code §751.104. Where the action taken pursuant to a durable power of attorney involves the execution and delivery of a recordable instrument relating to real estate, the durable power of attorney must be filed in the deed record office. Estates Code §751.151.

B. STATUTORY DURABLE POWER OF ATTORNEY. Estates Code chapter 752 relates to "statutory durable powers of attorney." The statutory durable power of attorney is form promulgated by the Texas Legislature in the Estates Code, designed to allow persons to create a durable power of attorney without involving a private attorney. The form is lengthy, has numerous disclosures and caveats, and allows the principal to specify the scope of the attorney in fact or agent's powers by checking off blanks. Blank lines are provided for the principal to "give special instructions limiting or extending the powers granted to [the] agent." Estates Code §752.051. The second part of the form consists of a list of instructions directed to attorneys in fact or agents on their powers and responsibilities as an attorney in fact or agent. The form states, consistent with Estates Code §751.053, that the power of attorney is terminated "if you are married to the principal, [upon] the dissolution of your marriage by court decree of divorce or annulment . . . ."

> **COMMENT:** This is important to note: a durable power of attorney is not terminated by the *filing* of a divorce proceeding. It is only the *granting* of a divorce (or annulment) that terminates the durable power of attorney by operation of law. Estates Code §751.053. Therefore, it would be wise for a family lawyer to have his/her divorce client revoke any durable power of attorney that may have been executed prior to the divorce arising. If the client holds the durable power of attorney for the other spouse, advise caution appropriate to a fiduciary duty in using it.

Although the statutory provisions do not explicitly say that the attorney in fact or agent is a fiduciary when acting under a durable power of attorney, that proposition is universally recognized in the case law and the statutory durable power of attorney explicitly says: "When you accept the authority granted under this power of attorney, you establish a 'fiduciary' relationship with the principal. This is a special legal relationship that imposes on you legal duties that continue until you resign or the power of attorney is terminated or revoked by the principal or by operation of law."

C. ALTERING MANAGEMENT RIGHTS OVER MARITAL PROPERTY. Management rights over separate and community property are governed by rules set out in Texas Family Code Sections 3.101, 3.103, and 3.104. Section 3.102(a) describes community property that is subject to the sole management, control and disposition of a spouse, and says that all other community property is subject to the joint management, control, and disposition of both spouses "unless the spouses provide otherwise by power of attorney in writing or other agreement." This provision makes sense only if the term "joint management, control, and disposition of both spouses" is taken to require the consent of both spouses to manage. Then the clause would say that the spouses can agree that community property that is subject to the joint management, control and disposition of both spouses can be made subject to the control of one spouse by written power of attorney or other written agreement. This aspect of Section 3.102 needs some clarification. It frequently happens that one spouse will deposit his/her salary into

a joint account where either spouse, acting alone, can withdraw funds. Are such funds deposited into the joint account still the depositor's sole management community property, and is the other spouse merely given the right (under the account agreement with the financial institution) to withdraw the funds but not the right to do so without the permission of the depositing spouse? Or does placing the funds into a joint account make the funds joint management community property requiring the consent of both spouses to transfer?

D. JURISDICTION TO LITIGATE VALIDITY OF A POWER OF ATTORNEY. Estates Code Section 32.007(6) provides that a statutory probate court has concurrent jurisdiction with the district court in "an action to determine the validity of a power of attorney or to determine an agent's right, powers, or duties under a power of attorney."

XX. DEFINITIONS FOR GUARDIANSHIPS.

Special definitions for the guardianship statutes are set out Estates Code Chapter 1002. These definitions apply to the entirety of Title 3 of the Estates Code. Estates Code § 1002.001.

A. ATTORNEY AD LITEM. "'Attorney ad litem' means an attorney appointed by a court to represent and advocate on behalf of a proposed ward, an incapacitated person, an unborn person, or another person described by Section 1054.007 in a guardianship proceeding." Estates Code Section 1054.007(a) authorizes the court to appoint an attorney ad litem for: an incapacitated person or person who has a legal disability, a proposed ward, a nonresident, an unborn child, an unascertained person, and an unknown or missing potential heir. The attorney ad litem is entitled to reasonable compensation for services provided, in an amount set by the court, to be taxed as costs in the proceeding.

B. CHILD. A "child" is "a biological child and an adopted child, regardless of whether the child was adopted by a parent under a statutory procedure or by acts of estoppel." Estates Code § 1002.004.

C. CLAIM. A "claim" is a liability of the estate or a debt due the estate of an incapacitated person. Estates Code § 1002.005.

D. COMMUNITY ADMINISTRATOR. A "community administrator" is "a spouse who, on the judicial declaration of incapacity of the other spouse, is authorized to manage, control, and dispose of the entire community estate, including the part of the community estate the incapacitated spouse legally has the power to manage in the absence of the incapacity. Estates Code § 1002.006. See Section XXIV of this Article.

E. ESTATE & GUARDIANSHIP ESTATE. The terms "estate" and "guardianship estate" are defined to mean "a ward's or deceased ward's property, as that property: (1) exists originally and changes in form by sale, reinvestment, or otherwise; (2) is augmented by any accretions and other additions to the property, including any property to be distributed to the deceased ward's representative by the trustee of a trust that terminates on the ward's death, or substitutions for the property; and (3) is diminished by any decreases in or distributions from the property." Estates Code § 1002.010.

F. GUARDIAN. The term "guardian" is defined as a person appointed as a guardian appointed in Estates Code Section 1101, and a successor guardian and a temporary guardian. Estates Code § 1002.012. There are two types of guardian: a guardian of the person and a guardian of the estate. Estates Code § 1151.051 (person) and § 1151.101 (estate). There can be only one person appointed as guardian of the person or as guardian of the estate, Estates Code § 1104.001, but the guardian of the person and guardian of the estate can be the same person or can be different persons, Estates Code § 1104.001.

G. GUARDIAN AD LITEM. A guardian ad litem is "a person appointed by a court to represent the best interests of an incapacitated person in a guardianship proceeding." Estates Code § 1002.013. The guardian ad litem is different from a court-appointed guardian of the person or guardian of the estate. Typically a guardian ad litem is discharged when a temporary or permanent guardian is appointed.

H. GUARDIANSHIP PROCEEDING. A "guardianship proceeding" is "a matter or proceeding related to a guardianship or any other matter covered by this title, including: (1) the appointment of a guardian of a minor or other incapacitated person, including an incapacitated adult for whom another court obtained continuing, exclusive jurisdiction in a suit affecting the parent-child relationship when the person was a child; (2) an application, petition, or motion regarding guardianship or an alternative to guardianship under this title; (3) a mental health action; and (4) an application, petition, or motion regarding a trust created under Chapter 1301." Estates

Code § 1002.015. Chapter 1301 relates to court-created "management trusts."

I. INCAPACITATED PERSON. An "incapacitated person" is "(1) a minor; (2) an adult who, because of a physical or mental condition, is substantially unable to: (A) provide food, clothing, or shelter for himself or herself; (B) care for the person's own physical health; or (C) manage the person's own financial affairs; or (3) a person who must have a guardian appointed for the person to receive funds due the person from a governmental source." Estates Code § 1002.017. This definition is the same as the definition of s"incapacitated person" given in Estates Code Section 22.016 for probate purposes.

J. INTERESTED PERSON. An "interested person" or "person interested" means "(1) an heir, devisee, spouse, creditor, or any other person having a property right in or claim against an estate being administered; or (2) a person interested in the welfare of an incapacitated person." Estates Code § 1002.018.

K. MINOR. A "minor" is a person under 18 years of age who has never married or had the disabilities of minority removed for general purposes. Estates Code § 1002.019.

L. PARENT. A "parent" means "the mother of a child, a man presumed to be the biological father of a child, a man who has been adjudicated to be the biological father of a child by a court of competent jurisdiction, or an adoptive mother or father of a child, but does not include a parent as to whom the parent-child relationship has been terminated." Estates Code § 1002.022. Note there is no reference adoption by estoppel, due to the fact that that doctrine only applies to matters involving inheritance.

M. PROPOSED WARD. A "proposed ward" is "a person alleged in a guardianship proceeding to be incapacitated." Estates Code § 1002.026.

N. WARD. A "ward" is "a person for whom a guardian has been appointed." Estates Code § 1002.030.

XXI. JURISDICTION OVER GUARDIANSHIP PROCEEDINGS. Prior to the Estates Code, probate court jurisdiction in guardianship proceedings was treated as being analogous to jurisdiction in proceedings involving a decedent's estate. Guardianship proceedings now have their own jurisdictional statute, in Estates Code Chapter 1022. Estates Code Section 1022.001(a) says that "[a]ll guardianship proceedings must be filed and heard in a court exercising original probate jurisdiction." Section 1022.001(b) says: "A probate court may exercise pendent and ancillary jurisdiction as necessary to promote judicial efficiency and economy." Section 1022.001(c) says: "The court exercising original probate jurisdiction also has jurisdiction in all matters related to the guardianship proceeding as specified in Section 1022.01 for that type of court."

Estates Code Section 1021.001 describes matters related to a guardianship proceeding in terms analogous to the terms that were used to described matters incident to the probate of a decedent's estate. In this instance, however, there are only two lists, the first for courts in counties without a statutory probate court, and the second for counties with a statutory probate court. The first list, where there is no statutory probate court, includes in matters relating to a guardianship proceeding: (i) granting of letters of guardianship; (ii) the settling of a guardian's account and all other matters relating to the settlement, partition, or distribution of a ward's estate; (iii) a claim brought by or against a guardianship estate; (iv) a trial of title or right to guardianship estate property; (v) an accounting upon closing the guardianship; and (vi) after a guardianship has been closed, litigation relating to the misconduct of the guardian or a guardian's claim for compensation. In a county where there is a statutory probate court, matters related to a guardianship proceeding include the foregoing, plus claims for or against a guardianship or a trustee of a court-created "management trust" under Section 1301.054, and a cause of action in which a presently-serving guardian is a party.

XXII. GUARDIANSHIP PROCEEDINGS. Title 3 of the Estates Code contains nearly 200 pages of statutes pertaining to guardianship proceedings, and the rights and duties of guardians and the rights of wards. The number of provisions is too extensive to be discussed in this Article. Generally speaking, however, the purpose of a guardianship proceeding is to determine when the personal welfare or property of a child need to be brought under the control of a probate court, or when an adult is partially or totally incapacitated and the adult's personal welfare and property need to be brought under a probate court's supervision. A probate court can transfer a guardianship proceeding pertaining to a minor child to a court in which a suit affecting the parent-child relationship is pending. Estates Code § 1022.008.

A. INITIATING GUARDIANSHIP PROCEEDING. A guardianship proceeding can be initiated by anyone at all, except someone with an interest adverse to the proposed ward or incapacitated person. Estates Code § 1055.001. In *Franks v. Roades*, 310 S.W.3d 615, 627 (Tex. App.–Corpus Christi 2010, no pet.), the court held that it was proper for an attorney who believed his client was incapacitated to file an application for guardianship for the client.

B. WHAT MUST BE PROVED. Before appointing a guardian, the court must find by clear and convincing evidence that the proposed ward "is an incapacitated person" and that it is in the proposed ward's best interest to have a guardian appointed and that the proposed ward's rights or property will be protected by the appointment of a guardian. Estates Code § 1101.101. The court must also find on a preponderance of the evidence that it has venue, that the person to be appointed guardian is eligible, and that the proposed ward is either totally or partially without capacity to care for himself and to manage his or her property. Estates Code § 1101.101(a)(2). Proof of incapacity of an adult must be based on recurring acts or occurrences in the preceding six months, not isolated instances of negligence or bad judgment. Estates Code § 1101.102. The court cannot create a guardianship for an adult unless the applicant presents a written letter or certificate from a licensed physician that is not more than 120 days old, based on physical examination that was done not more than 120 before the application was filed, describing the nature, degree, and severity of functional deficiencies: to handle business, managerial, financial matters; to drive a vehicle; to make personal decisions about residence, voting and marriage; and to consent to medical, dental, psychological, or psychiatric treatment. If the incapacity is total, the court can appoint a guardian of the person or of the estate, or both, with full authority over the incapacitated person. Estates Code § 1101.151. If the incapacity is partial, the court can appoint a guardian with limited powers. Estates Code § 1101.152.

C. SELECTION OF GUARDIAN. Estates Code Chapter 1104 governs the selection of a guardian. If the proposed ward is a minor, and the parents live together, "both parents are the natural guardians of the person of the minor children by the marriage." Estates Code § 1104.051(a). Only one parent can be appointed guardian of a child's estate, and if the parents disagree on who that shall be, the court must appoint the parent that is "better qualified to serve in that capacity." Estates Code § 1104.051(a). If the parents do not live together, their right to be appointed is equal, and the court must appoint a guardian based on the best interest of the children. Estates Code § 1104.051(b). If only one parent is living, that parent is the natural guardian of the child. Estates Code § 1104.051(c). A sole surviving parent of a minor child can "appoint" any eligible person to be guardian of the person of a minor child after both parents have died, and the court should appoint that person unless that person is (i) disqualified, (ii) deceased, (iii) refuses to serve, or (iv) it would not serve the minor child's best interests. Estates Code § 1104.053. A statutory form is provided for that purpose. Estates Code § 1104.151. If the child is at least 12 years of age, s/he can file a writing with the clerk of the court selecting the guardian, which the court is to approve if it is in the minor's best interest. Estates Code § 1104.054.

For an incapacitated adult, the standard for selection of a guardian is "according to the circumstances and considering the incapacitated person's best interest." Estates Code § 1104.101. The Estates Code sets out an order of preferences for who is appointed guardian. The incapacitated person's spouse has preference over all others, if the spouse is eligible. Estates Code § 1104.102(1). After that comes the nearest of kin. Estates Code § 1104.102(2). Failing that, the court must select the eligible person who is best qualified to serve as guardian. Estates Code § 1104.102(3).

A person cannot be appointed guardian if s/he is party to a lawsuit concerning or affecting the welfare of the proposed ward. Estates Code § 1104.354. An exception exists if the court determines that the proposed guardian's position in the lawsuit does not conflict with that of the ward, or if the court appoints a guardian ad litem to represent the interests of the ward in the lawsuit. Another disqualifier is if the proposed guardian is indebted to the ward, or asserts a claim adverse to the proposed ward or his/her property. Estates Code § 1104.354(2) & (3). In *Dobrowolski v. Wyman*, 397 S.W.2d 930, 932 (Tex. App.–San Antonio 1965, no writ), the court held the husband disqualified to serve as his wife's guardian where separate and community property had been commingled and would have to be sorted out. In *Phillips v. Phillips*, 511 S.W.2d 748 (Tex. Civ. App. – San Antonio 1974, no writ), the court held that a mother was disqualified from serving as guardian of her children because she had taken conflicting positions on what was the deceased husband's separate property and what was community property, and because she would have a claim for

reimbursement against her deceased spouse's separate estate, in which the children had an interest.

D. POWERS AND DUTIES OF A GUARDIAN. The ward retains all powers not allocated to the guardian by the court. Estates Code § 1151.001.

1. Guardian of the Person. A guardian of the person "is entitled to take charge of the person of the ward." Estates Code § 1151.051(a). More specifically, a guardian of the person has:

(1) the right to have physical possession of the ward and to establish the ward's legal domicile;
(2) the duty to provide care, supervision, and protection for the ward;
(3) the duty to provide the ward with clothing, food, medical care, and shelter;
(4) the power to consent to medical, psychiatric, and surgical treatment other than the inpatient psychiatric commitment of the ward;
(5) on application to and order of the court, the power to establish a trust in accordance with 42 U.S.C. Section 1396p(d)(4)(B) and direct that the income of the ward as defined by that section be paid directly to the trust, solely for the purpose of the ward's eligibility for medical assistance under Chapter 32, Human Resources Code; and
(6) the power to sign documents necessary or appropriate to facilitate employment of the ward if:
(A) the guardian was appointed with full authority over the person of the ward under Section 1101.151; or
(B) the power is specified in the court order appointing the guardian with limited powers over the person of the ward under Section 1101.152.

Estates Code § 1151.051(c).

2. Guardian of the Estate. A guardian of the estate is entitled to:

(1) possess and manage all property belonging to the ward;
(2) collect all debts, rentals, or claims that are due to the ward;
(3) enforce all obligations in favor of the ward; and
(4) bring and defend suits by or against the ward.

Estates Code § 1151.101. The Supreme Court in *Weatherly v. Byrd*, 566 S.W.2d 292, 293 (Tex. 1978), held that the right to revoke a revocable trust was personal to the ward and could not be done by the guardian of the estate, except with the prior permission of the probate court. The Court in *Baumann v. Willis*, 721 S.W.2d 535, 537 (Tex. App.–Austin 1996, no writ), held that neither a guardian nor the probate court could revoke a prior last will and testament of the ward. The court went so far as to say that the guardian had no right to even look at the will.

The guardian of the estate has the duty "to take care of and manage the estate as a prudent person would manage the person's own property." Estates Code § 1151.151. The guardian of the estate is entitled to possession of the ward's property. Estates Code § 1151.153. The guardian of the estate has a duty to invest the ward's assets, except those immediately necessary for the education, support, and maintenance of the ward or allowed for the ward's spouse or dependents. Estates Code § 1161.001. In managing the ward's estate, the guardian must "exercise the judgment and care under the circumstances then prevailing that a person of ordinary prudence, discretion, and intelligence exercises in the management of the person's own affairs, considering the probable income from, probable increase in value, and safety of the person's capital. Estates Code § 1161.002(a). Estates Code Section 1161.003 lists investments that meet the standard for investment: they are all bonds, or money on deposit that is insured by the FDIC. That would not be considered a well-diversified portfolio under prevailing standards in portfolio management. There is a reduced risk of loss of capital when investing in bonds compared to investing in the stock market, but interest rates are so low that estates below a certain size cannot meet expenditures from income alone. That means liquidating capital to pay expenses, which is perhaps more damaging to the ward's estate that investing in stocks which can experience growth even when interest rates are low. Estates Code Section 1161.051 provides for a guardian of the estate to apply for the court's permission to make investments other than as prescribed in Estates Code § 1161.003. Investment in real estate is authorized with prior approval of the court. Estates Code § 1161.151.

The guardian can, with prior approval of the court, engage in estate planning and make gifts. Estates Code §§ 1162.001 - 1162.004.

E. COMPENSATION OF GUARDIAN. The court sets the compensation of the guardian of the person up to but not exceeding 5% of the ward's gross income. Estates Code § 1155.002. The court sets the compensation of the guardian of the estate at "reasonable compensation." Estates Code § 1155.003. Five percent of the gross income and five percent of the money paid out is considered "reasonable," plus an additional amount if the guardian has "taken care of and managed the estate in compliance with the standards" of the Estates Code. Estates Code § 1155.003(b). The Estates Code sets the maximum aggregate compensation of both guardians as five percent of gross income plus five percent of all money paid out. Estates Code § 1155.005. However, that is a presumptively reasonable fee for the guardian of the estate alone, under Estates Code § 1155.003(b). The Court can exceed the maximum stated in Section 1155.005. Estates Code § 1155.006.

F. MAINTENANCE OF THE WARD. The court is supposed to set a monthly allowance for the ward. Estates Code § 1156, Estates Code §§ 1156.001 - 1156.003. A parent guardian of a child 17 years or younger cannot use income or corpus of the ward's estate for the ward's support, education, or maintenance. Estates Code § 1156.051(a). The court can make an exception upon clear and convincing evidence of need. Estates Code § 1156.051(b). The court can order the guardian of the estate to expend money for the education and maintenance of the ward's spouse or dependents. Estates Code § 1156.052.

G. INITIAL AND ANNUAL ACCOUNTS. The guardian of the estate must file an inventory and appraisement of all the ward's property located in Texas, indicating what is separate and what is community property, and what is owned in common with third parties. Estates Code § 1154.051. The guardian must attach to the inventory a list of claims. Estates Code § 1154.052. And the guardian must swear to the accuracy of the inventory, appraisement, and list of claims. Estates Code § 1154.053. The inventory is due no later than the 30th day after the guardian of the estate is appointed, unless the court extends the deadline. Estates Code § 1154.051. The court must either approve the inventory, appraisement, and list of claims, or reject it and order another filed. Estates Code § 1154.054.

The guardian of the estate must file annual accounts supported by exhibits and other reports. Estates Code ch. 1163. The initial annual account must show claims presented, claims paid, claims rejected, property in the guardian's possession, changes in property, an account of receipts and disbursements, etc. Estates Code § 1163.001. Subsequent annual accounts must show the changes during the preceding year. Estates Code § 1163.002. The guardian of the person must file annual accounts relating to receipt and disbursements for support, maintenance, education, etc. Estates Code § 1163.101.

H. TERMINATION OF GUARDIANSHIP. A guardian remains in place until the estate is closed. Estates Code § 1202.001. A guardianship shall be settled and closed when: the ward dies; or if married, when the ward dies and the ward's spouse qualifies as "survivor in community"; when the ward recovers full capacity; when the ward ceases to be a minor; and when there is no longer a need for a guardian to receive government funds. Estates Code § 1202.001.

XXIII. MANAGEMENT TRUSTS. Estates Code Chapter 1301 authorizes the court to create a "management trust." The trust is for the benefit of an incapacitated person, most probably a minor who recovered a personal injury award. The standard for creation of such a trust is "that the creation of the trust is in the person's best interest." Estates Code § 1301.053. The trust is operated along the lines outlined for guardianships of the estate, such as the use of funds for health, education, maintenance or support of the ward or incapacitated person. Estates Code § 1301.101(2). An initial and subsequent annual accountings are required, but not as detailed as what is required for a guardianship of the estate. Estates Code §§ 1301.1535 & 1301.054. The management trust for a minor must terminate when the child dies, turns age 18, or reaches an age specified by court order not later than age 25. The management trust for an adult must terminate according to the terms of the trust, or when the court determines the continuation of the trust is no longer in the person's best interests, or on the person's death. Estates Code § 1301.203.

XXIV. ADMINISTRATOR OF COMMUNITY PROPERTY. Estates Code Chapter 1353 contains provisions for one spouse to manage the community estate when the other spouse is judicially declared to be incapacitated.

A. APPOINTMENT AND POWERS OF COMMUNITY ADMINISTRATOR. Under Estates Code Section 1353.002(a), when one spouse is judicially declared to be incapacitated, the other spouse "acquires full power

to manage, control, and dispose of the entire community estate," including the part that would normally be the incapacitated spouses' sole management community property under Texas Family Code Section 3.102. Section 1353.002(b) establishes a presumption that the non-incapacitated spouse is "suitable and qualified to serve as community administrator." Where the incapacitated spouse has separate property, that property cannot be managed by a community administrator and must be managed through a court-appointed guardian of the estate. The non-incapacitated spouse is entitled to first priority to be appointed guardian of the estate, under Estates Code Section 1104.102. In such an instance, the appointment as guardian of the estate is for the incapacitated spouse's separate property only, not the community property. See Estates Code § 1353.003(a) & (b). The right to manage the income from property follows the management rights over the property giving rise to the income. Estates Code § 1353.005(a)(4). If the incapacitated spouse is found by the court to have recovered capacity, the special management powers of the community administrator terminate.

B. DUTIES OF ADMINISTRATORS AND GUARDIANS MANAGING COMMUNITY PROPERTY. A probate court, on its own motion or the motion of an interested person, for good cause shown, can order a community administrator to file a "verified, full, and detailed inventory and appraisement" of community property subject to the incapacitated spouse's sole management, control and disposition, joint management community property, and income earned thereon. Estates Code § 1353.051(a). The format must conform to the form required of a guardian under Estates Code § 1154.051, and is due no later than 90 days after the order is issued. Estates Code § 1353.051(b). Any time more than 15 months after the declaration of incapacity, the court can order the community administrator to file an account similar to what is required of a guardian under Estates Code ch. 1163 ("Annual Account & Other Exhibits & Reports"). Estates Code § 1353.052. The account must cover the incapacitated' spouse's sole management community property, and joint management community property, and income thereon. Estates Code § 1353.052(a). Estates Code Section 1163.001 requires the account to list all claims presented against the "estate" during the period covered by the account, specifying which claims were allowed, paid or rejected, and which claims became lawsuits. Estates Code § 1163.001(a). The account must also show all property that has come into the hands of the guardian (in this instance community administrator), changes in the property not previously reported, a complete account of receipts and disbursements, differentiated principal and income receipts, as well as a "complete, accurate, and detailed description" of property being administered, it condition and use, rental terms if rented, cash on deposit, personal property, and specified details for bonds, notes and other securities. Estates Code § 1163.001(b). There is also a requirement of filing supporting vouchers and other documentation to verify the account. Estates Code § 1163.003 - 1163.005. Unlike guardians of the estate under chapter 1163, the community administrator is not automatically required to file such reports annually. Estates Code § 1353.052(b)(1). However, the court can order the filing of subsequent accounts at intervals of not less than 12 months. Estates Code § 1353.052(c). The community administrator must inform the court in writing if a suit for divorce is filed, or if the incapacitated spouse is named as defendant in a lawsuit. Estates Code § 1353.053.

C. REMOVAL OF COMMUNITY ADMINISTRATOR. A probate court can for any reason remove a spouse as community administrator, or appoint a non-spouse as community administrator. Estates Code § 1353.102(a). Removal can be done on the court's own motion, or on the motion of an interested person. *Id.* The removal order must state the cause of removal and direct the disposition of assets remaining in the name of, or under the control of, the removed administrator. Estates Code § 1353.102(b). If this occurs, the court must appoint a guardian of the estate for the incapacitated spouse, and this guardian of the estate is to be given control over the incapacitated spouse's: separate property; sole management community property; and "not more than one-half of the community property that is subject to the spouses' joint management, control, and disposition" that the court orders must be turned over to the guardian of the estate. Estates Code § 1353.004. The management powers of a guardian of the estate over community property under such circumstances is the same as is described in Family Code Section 3.102 for community property under the incapacitated spouse's sole management, control, and disposition. Estates Code § 1353.004(e). The rights of the non-incapacitated spouse who is not community administrator, to manage his or her own separate property or sole management community property is not affected. Estates Code § 1353.005(a). The non-incapacitated spouse has the right to manage joint management community property, unless the probate court orders delivery of not more than half to the guardian of the estate, in which case the non-incapacitated spouse can manage only the portion of the joint management community property remaining in his

or her possession. Estates Code § 1353.005(a)(3)(B). An order of removal does not affect the rights of creditors as to claims "existing on the date the court renders the order." Estates Code § 1353.006.

D. TRANSFERRING CONTROL OF PROPERTY TO A GUARDIAN OF THE ESTATE. If a court removes a spouse as community administrator, or finds that the non-incapacitated spouse would be disqualified to serve as guardian, of the estate of the incapacitate spouse, or "is not suitable to serve as the community administrator for any other reason, the court must appoint a guardian of the estate for the incapacitated spouse and must direct that the community administrator turn over part of the community property to a court-appointed guardian of the estate. Estates Code § 1353.004. The community property subject to this provision is (i) the incapacitated spouse's sole management community property and (ii) up to one-half of the community property that is subject to joint management, control and disposition. Estates Code §1353.004 (c) & (d)(2). The court must also authorize the guardian of the estate to manage the incapacitated spouse's separate property. Estates Code §1353.004(d)(1). The provisions extend to income earned on any of this property. Estates Code §1353.004(d)(4).

E. HOMESTEAD. The provisions of Estates Code Chapter 1353 overlap with the provisions in Family Code chapter 5, subchapter A, governing the sale of a family homestead when one spouse is incapacitated spouse. See Section XIII of this Article. Because the Family Code provisions are narrower in focus, they should prevail the more general provisions in Chapter 1353 when it comes to selling the homestead. However, the reporting requirements in Estates Code chapter 1353 are not inconsistent with the Family Code provisions. And if a dispute arises over the sale of a homestead under the powers in Family Code Chapter 5, the matter could be brought to the probate court's attention in a guardianship proceeding.