

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

RICHARD R. ORSINGER
Tower Life Building, 26th Floor
San Antonio, Texas 78205

5950 Sherry Lane, Suite 800
Dallas, Texas 75225
www.orsingerlaw.com

Advanced Family Law Course
August 3-6, 2015
Marriott Rivercenter
San Antonio, Texas

THE TEXAS PROBATE CODE

- Enacted 1955
- Expired 12-31-2013



THE TEXAS ESTATES CODE

- Effective 1-1-2014
- Title 1 (General Provisions)
- Title 2 (Decedent's Estates; Safety Deposit Boxes; Right of Survivorship; Multi-Party Financial Accounts; Durable Powers of Attorney)
- Title 3 (Guardianship and Related Procedures)
- 1,305 pages
- Hundreds of subparts

PROBATE COURT JURISDICTION

JURISDICTION OF STATUTORY PROBATE COURT

- Probate Proceedings
- Litigation over Express Trusts
- Litigation over Powers of Attorney
- Guardianships

STATUTORY PROBATE COURT JURISDICTION (Decedents' Estates)

- After a death, and once a probate proceeding has been initiated, the probate court has exclusive jurisdiction over the **probate proceeding** and **all matters related to the estate** until the estate is closed.
- Purpose 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.

WHAT IS A PROBATE PROCEEDING?

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
- A will construction suit

PROBATE COURT JURISDICTION

(Statutory Probate Court)

- “A probate court may exercise pendent and ancillary jurisdiction as necessary to promote judicial efficiency and economy.” Estates Code § 32.001(b)
- “Pendent jurisdiction” is defined as jurisdiction over parties not named in claims properly before the court when there is no independent basis for the court’s jurisdiction. *Eagle Properties, Ltd. v. Scharbauer*, 807 S.W. 2d 714 (Tex. 1990)
- “Ancillary jurisdiction” involves claims that are asserted defensively, like counterclaims. *Eagle Properties*, at 714, 719 n. 3.

MATTERS RELATED TO A PROBATE PROCEEDING

Estates Code § 31.002 describes matters related to a probate proceeding:

- 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 or against the personal representative in his/her capacity as personal representative (i.e., claims for or against the estate).

MATTERS RELATED TO A PROBATE PROCEEDING

- The interpretation and administration of a testamentary trust under a will admitted to probate in the court.
- The interpretation and administration of an inter vivos trust created by a decedent whose will has been admitted to probate.

APPELLATE JURISDICTION OF PROBATE COURT ORDERS

- *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.**”

LITIGATION INVOLVING EXPRESS TRUSTS

Under Estates Code § 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.

- Choice of forum (the early bird gets the worm)
- Dominant jurisdiction of court where first filed

JURISDICTION OVER POWERS OF ATTORNEY

Estates Code § 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.”

- Choice of forum (the early bird gets the worm)
- Dominant jurisdiction of court where first-filed

VESTING & CREDITOR'S CLAIMS

PASSING OF ESTATE ON DECEDENT'S DEATH

- Estates Code § 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.”
- 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.”

PASSING OF ESTATE ON DECEDENT'S DEATH

- Estates Code § 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.”
- Whether by will or intestacy, heirs own the income on inherited property from the moment of death. Can create commingling issues.

PASSING OF ESTATE ON DECEDENT'S DEATH

- Section 101.051(a) says that the decedent's 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**.
- Estates Code § 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."

CREDITORS OF THE ESTATE

- *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.

CREDITORS OF THE ESTATE

- Under Family Code § 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.
- Under Family Code § 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.

CREDITORS OF THE ESTATE

- Under Family Code § 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.
- Under Estates Code § 101.052 the decedent's estate passes "charged with the debts that were enforceable against the decedent before death."

DISCLAIMERS OF INHERITANCE RIGHTS

- Under Estates Code Chapter 122, persons who would otherwise inherit property can “disclaim” their inheritance, in which event the property passes to whomever would have received it had the disclaiming party predeceased the decedent
- 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

DISCLAIMERS OF INHERITANCE RIGHTS

- A memorandum of disclaimer of a **present interest** must be filed within nine months of the decedent's death.
- A memorandum of 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.
- Notice must be given to the representative of the decedent's estate within certain time periods.

DISCLAIMERS OF INHERITANCE RIGHTS

- Once the memorandum of disclaimer has been filed, and notice given, it becomes irrevocable.
- The creditors of the disclaimant have no rights against the disclaimed property.
- But, if the disclaimant 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.
- Partial disclaimers are allowed.

ASSIGNMENTS OF INHERITED PROPERTY

- A person who is entitled to receive property or an interest in property under a will, intestacy, or under a life insurance contract, and who has not disclaimed the right to that property, can assign it “to any person.”
- An assignment must be filed and served under the same procedures as a disclaimer.
- An assignment is a gift and not a disclaimer.

DEATH & DIVORCE

DEATH DURING PENDING DIVORCE ANNULMENT & SUIT TO DECLARE MARRIAGE VOID

- When a spouse dies while a suit for divorce or annulment is pending, the court loses jurisdiction over the suit. *Garrison v. Tex. Commerce Bank*, 560 S.W.2d 451 (Tex. App.–Houston [1st Dist.1977], writ ref'd n.r.e.).
- When a spouse dies during the pendency of a suit by a spouse to declare a marriage void, based on lack of that person's mental capacity, the court continues to have jurisdiction to declare the marriage void.
- 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.

DEATH OF A PARTY DURING A SAPCR

- The effect of the death of a parent during a SAPCR is not stated in the Estates Code. But case law and general principles suggest what effect the death will have.
- For a custody/visitation dispute between two parents, jurisdiction terminates and the surviving parent has all rights of a parent.
- Where the dying party is a nonparent in a custody or visitation suit, that party “drops out of the case.”

DEATH OF A PARTY DURING A SAPCR

- Monetary claims for or against the dying party become matters incident to the estate and would likely have to be transferred to the probate court.

THE EFFECT OF DIVORCE UPON DEATH-RELATED RIGHTS

Estates Code ch. 123 nullifies, upon divorce, testamentary and non-testamentary transfers to a former spouse contained in:

- A will;
- An express trust.

DEATH & SAFE DEPOSIT BOX

SAFE DEPOSIT BOX UPON DEATH

- 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.

SAFE DEPOSIT BOX UPON DEATH

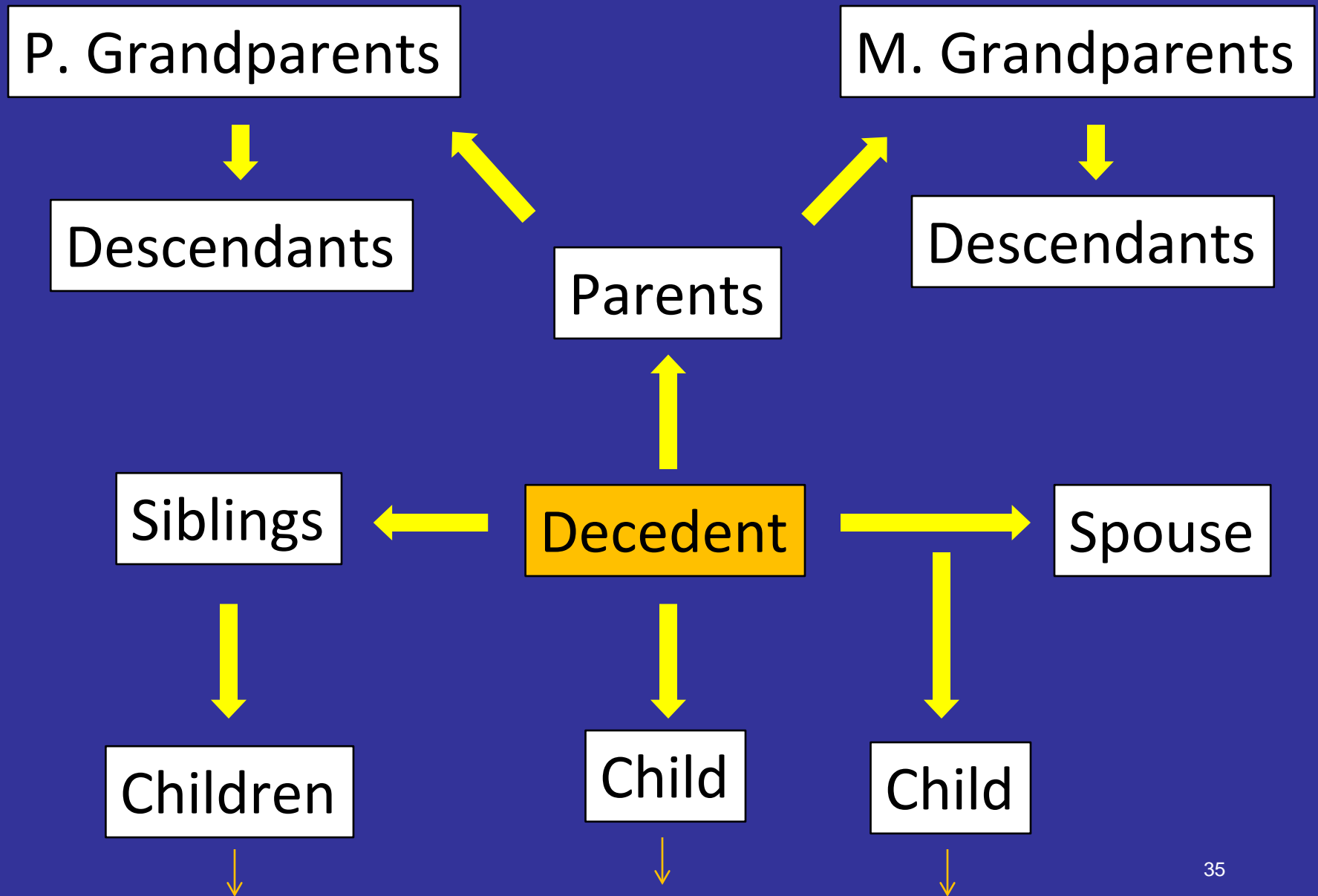
- The court-ordered examination must occur in the presence of the judge or a representative of the judge.
- The examination must be done in the presence of the custodian of the document.
- The person possessing or controlling documents can show them to the decedent's spouse, the decedent's parent, a descendant of the decedent who is at least 18 years old, or the person named as executor in a copy of the will.

SAFE DEPOSIT BOX UPON DEATH

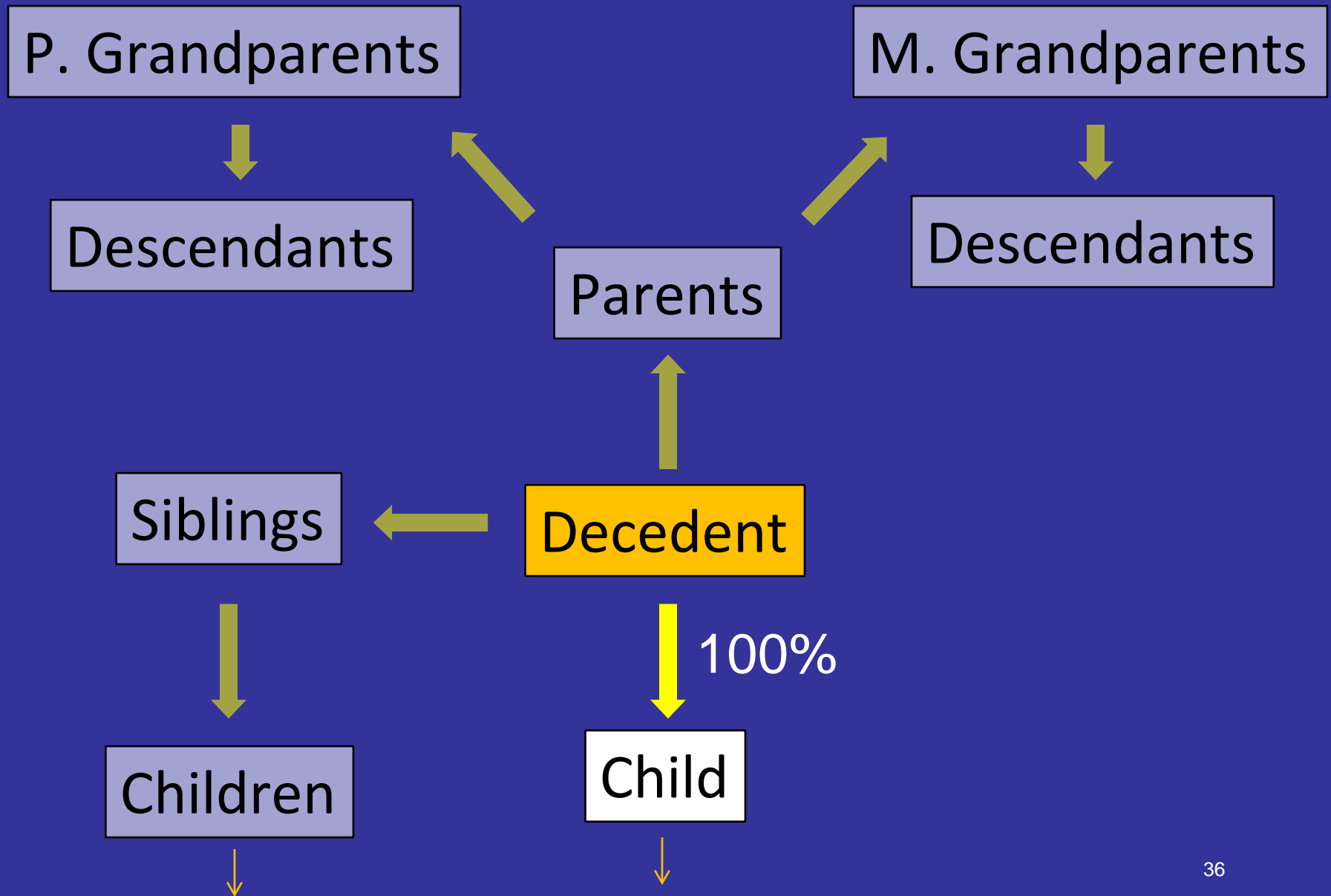
- The custodian may deliver the document to the clerk of the probate court (if a will), or the person named in the document as executor, or to the person conducting the examination (if a deed to a burial plot), or to the named beneficiary (if a life insurance policy).
- Everyone is prohibited from removing the contents of a decedent's safe deposit box except as authorized under Chapter 151.

INTESTATE SUCCESSION

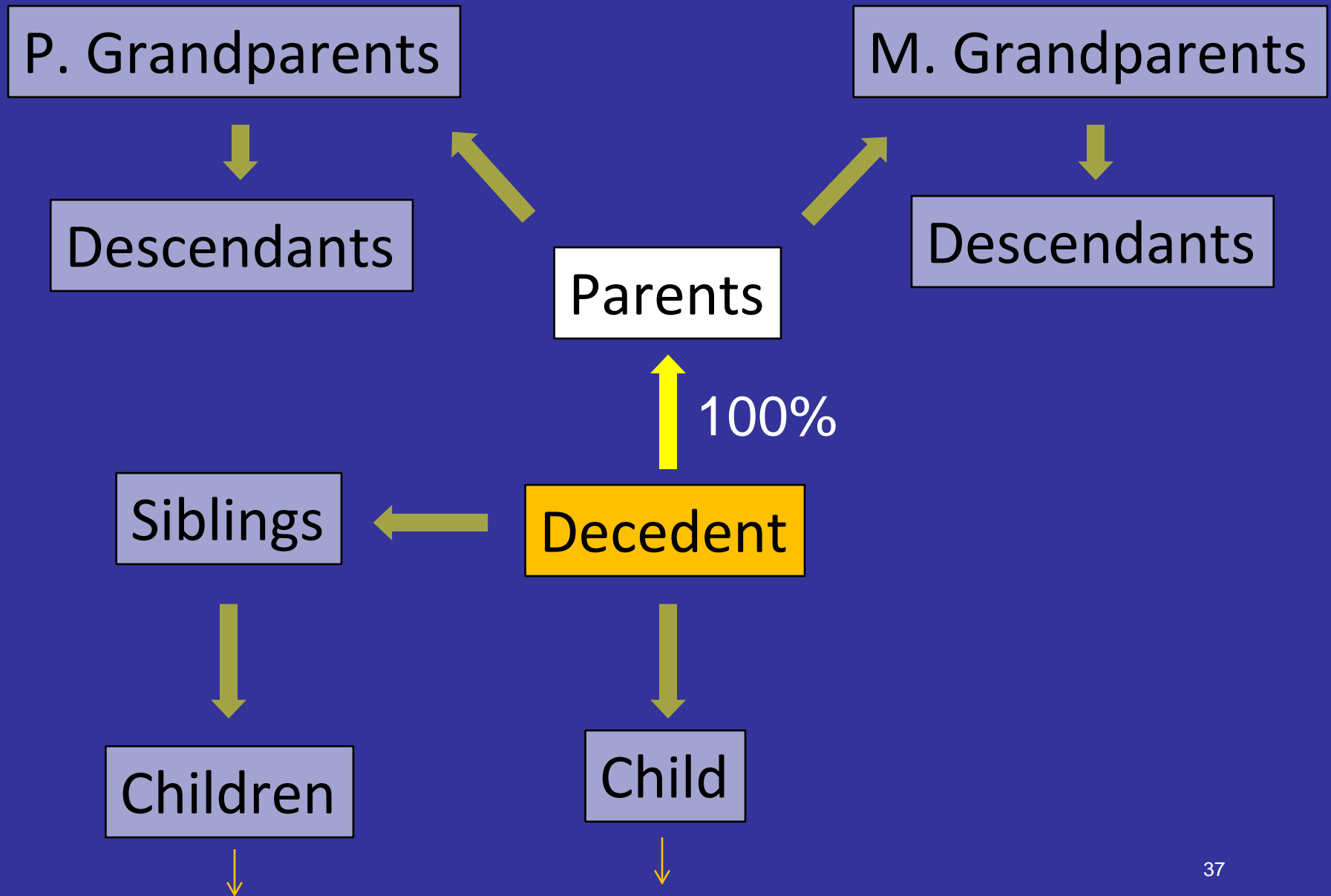
HEIRS AT LAW



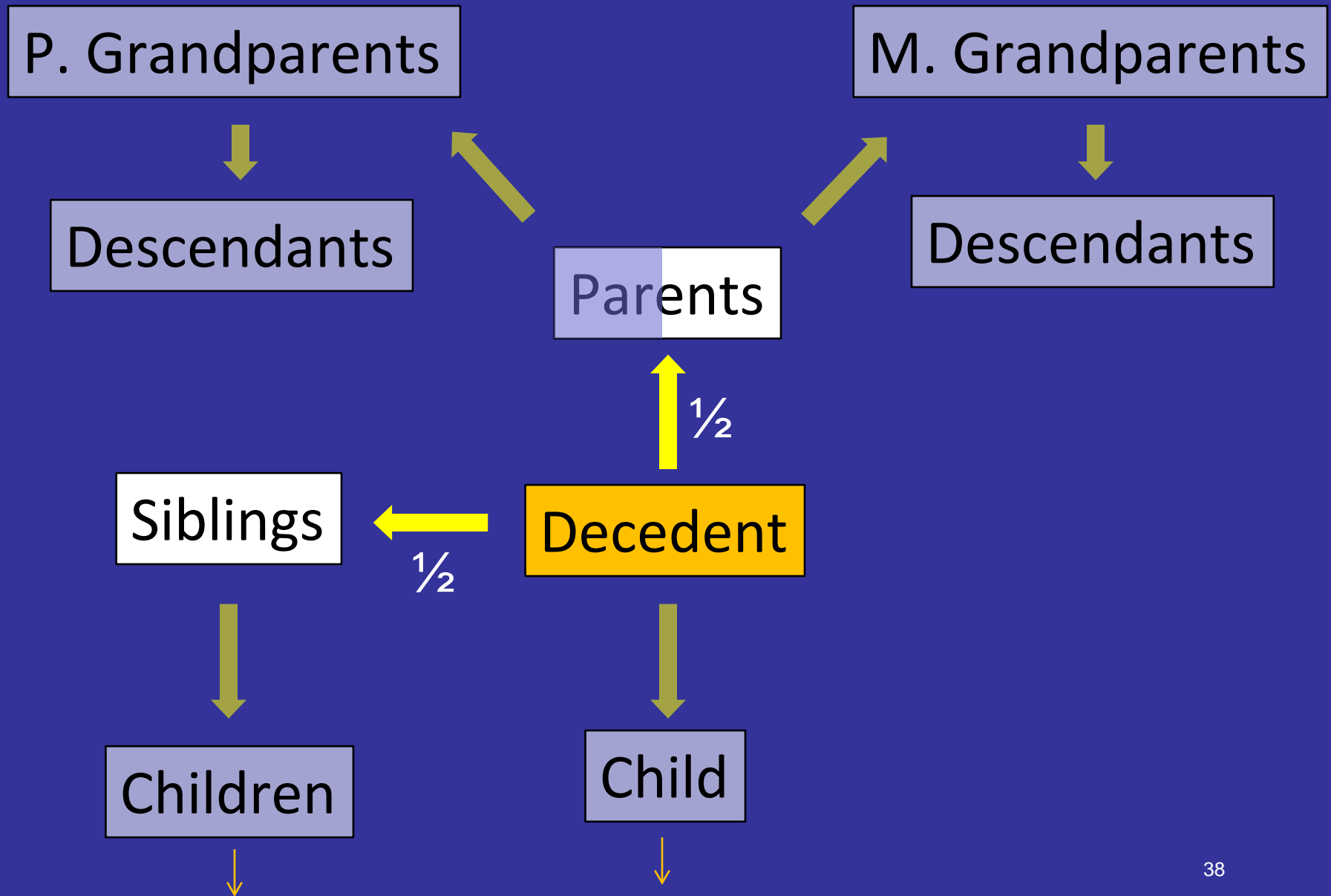
HEIRS AT LAW (w/o spouse)



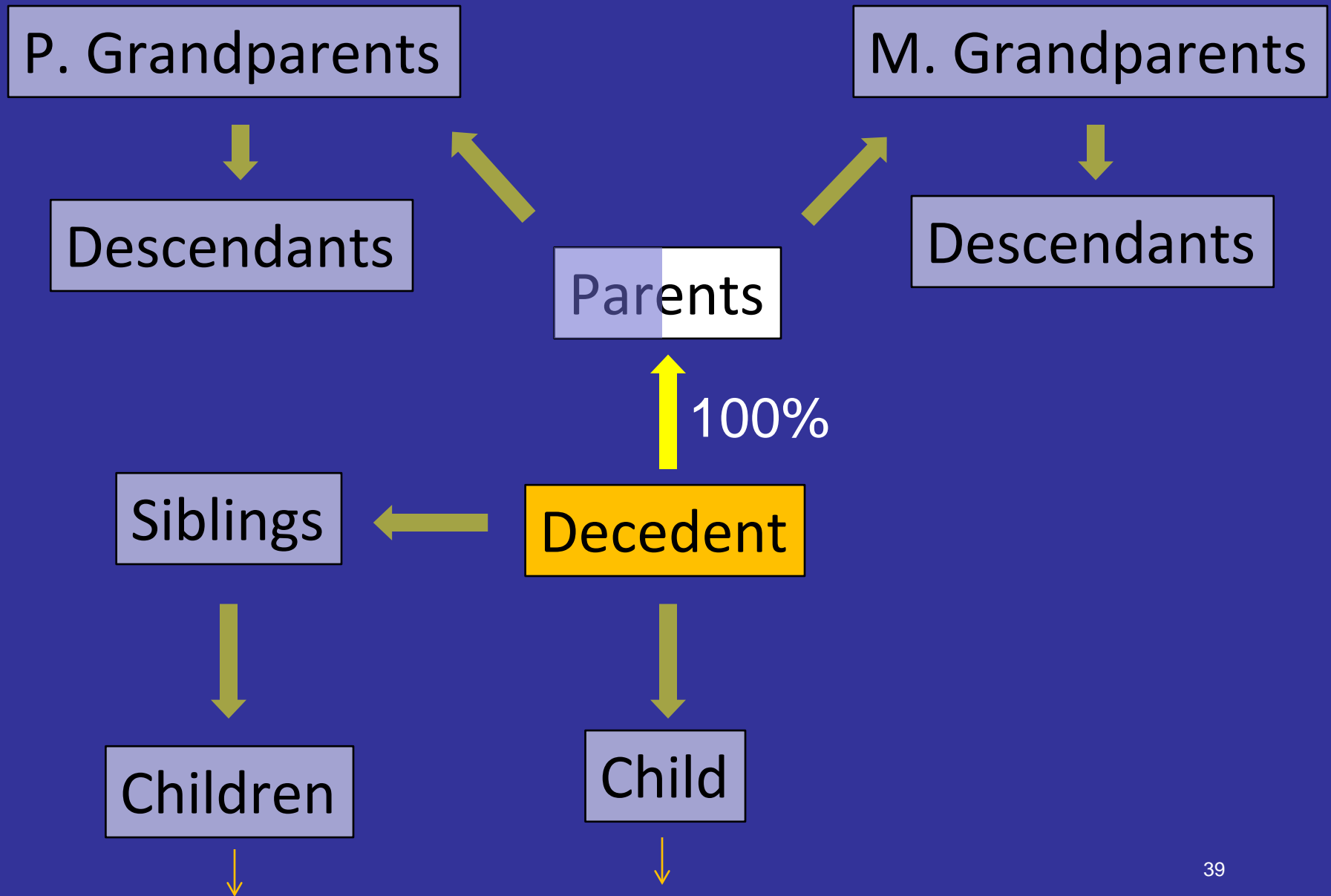
HEIRS AT LAW (w/o spouse)



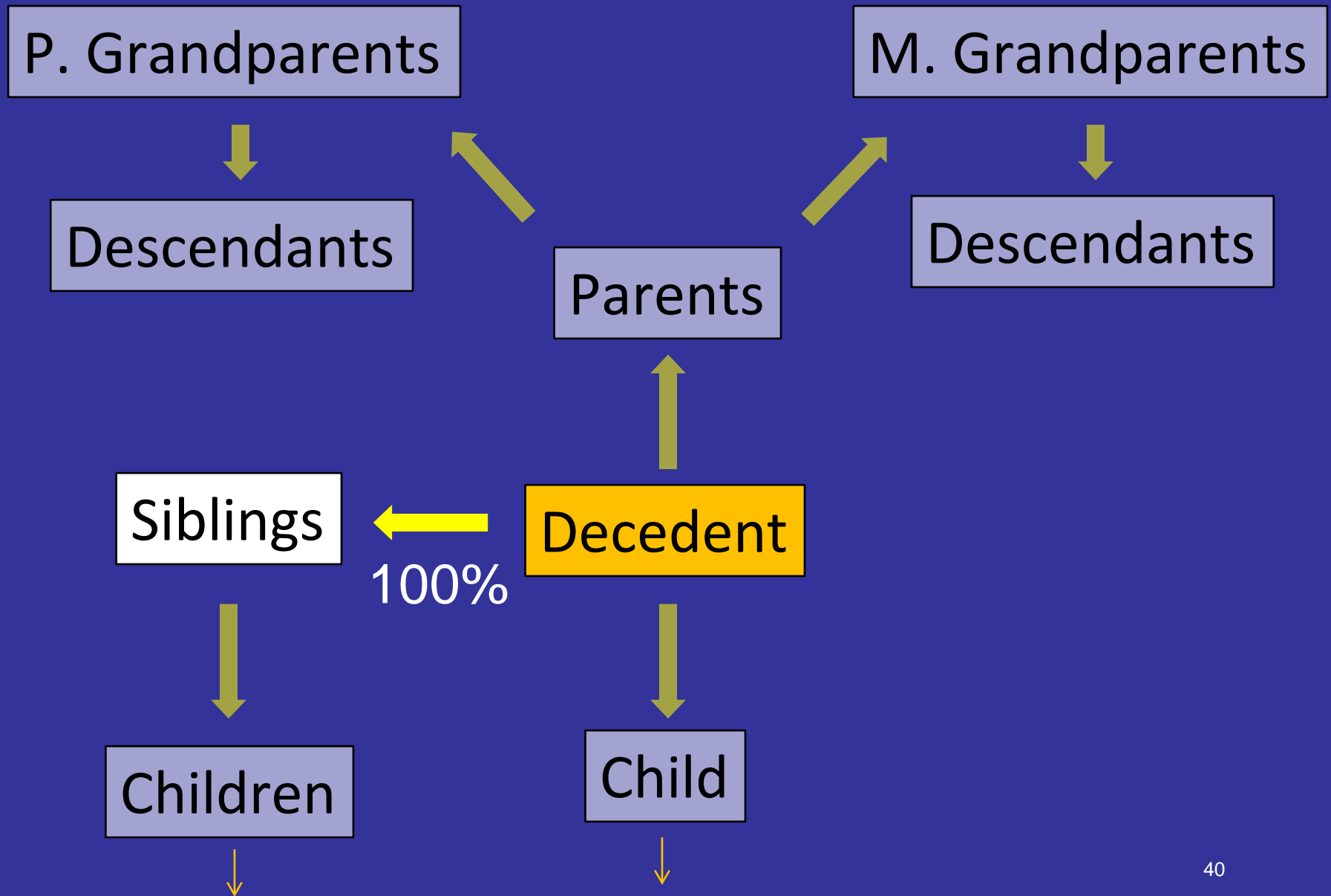
HEIRS AT LAW (w/o spouse)



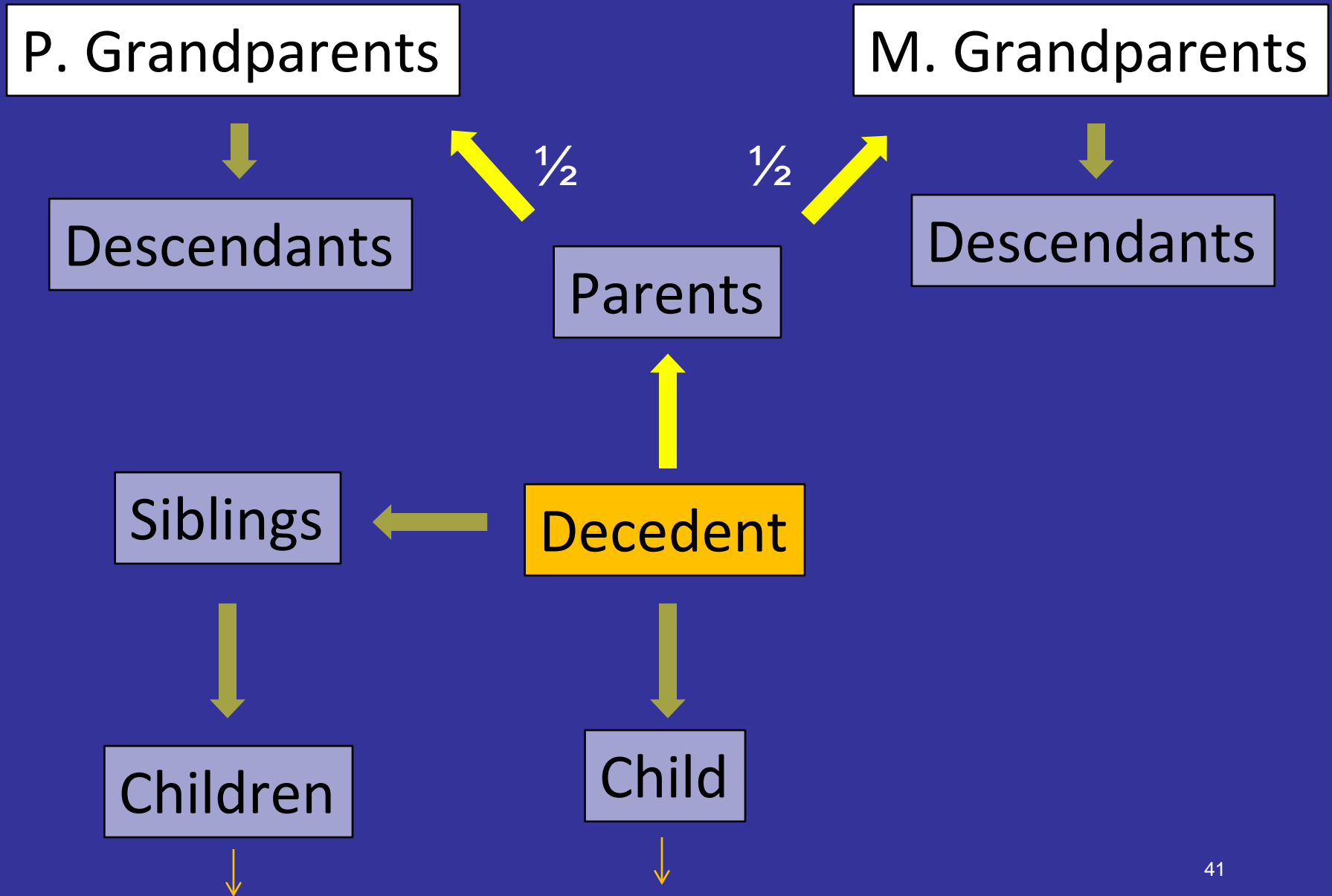
HEIRS AT LAW (w/o spouse)



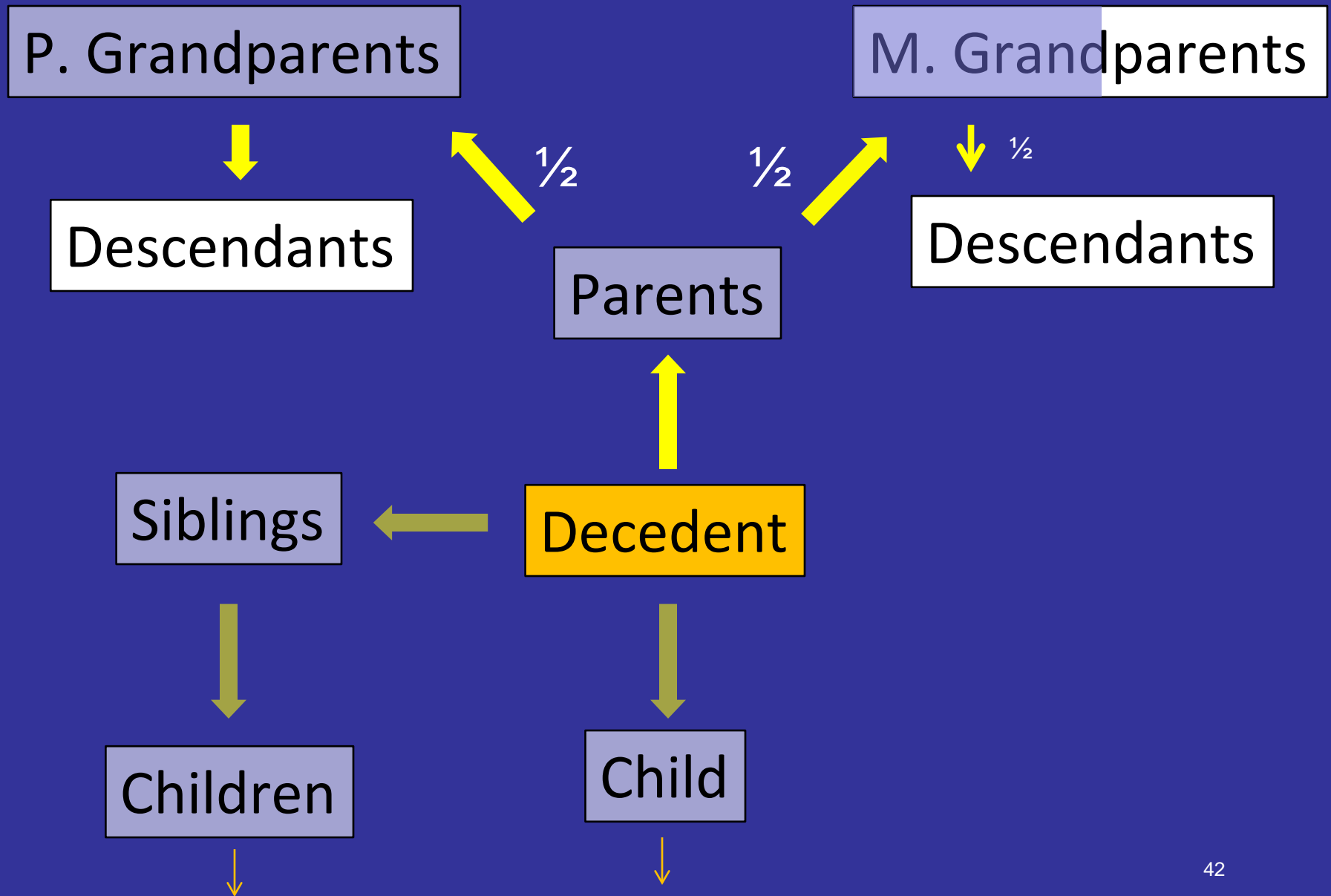
HEIRS AT LAW (w/o spouse)



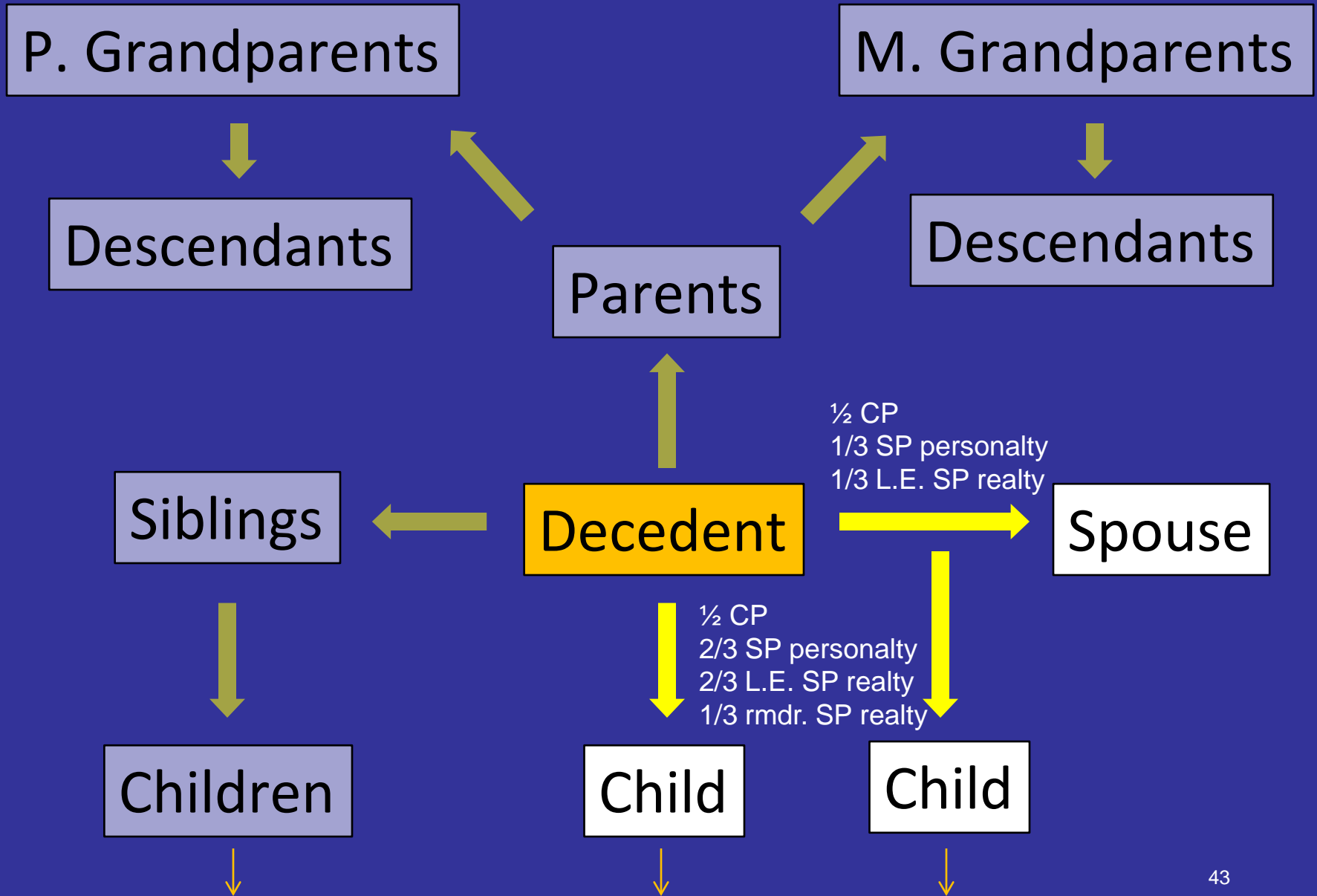
HEIRS AT LAW (w/o spouse)



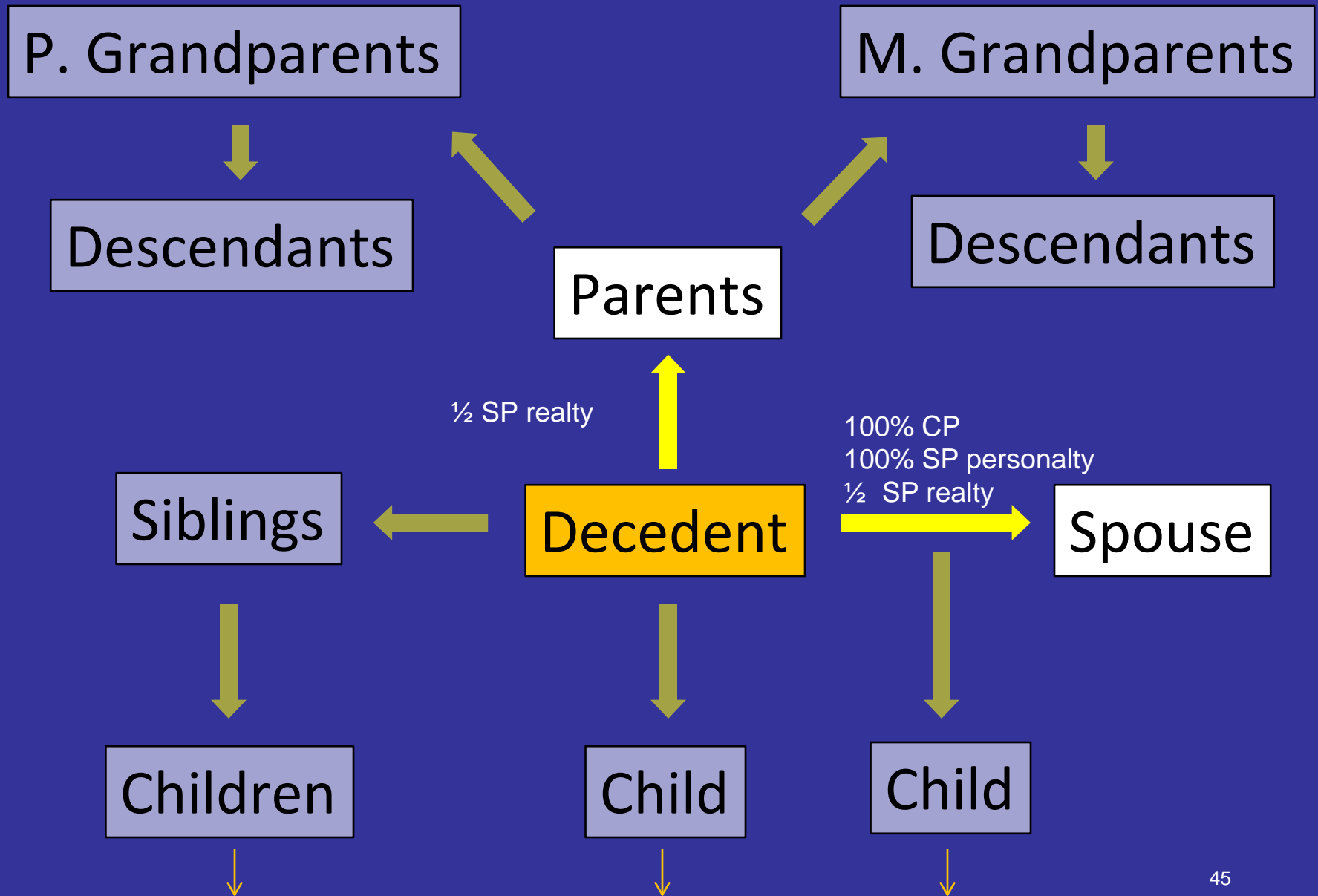
HEIRS AT LAW (w/o spouse)



HEIRS AT LAW



HEIRS AT LAW



DEATH & HOMESTEAD

DEATH & HOMESTEAD

- Surviving spouse has homestead right until death or abandonment.
- Surviving minor children have homestead right so long as their guardian is permitted by court order to occupy the home.
- Homestead right of surviving spouse can be waived in prenup.
- Homestead can be liquidated to pay the 7 debts allowed against a homestead.

AGREEMENT FOR RIGHT OF SURVIVORSHIP

RIGHT OF SURVIVORSHIP

- Joint ownership does not entail survivorship.
- Survivorship right created only by written agreement.
- By statute, Texas law must be applied to survivorship provisions involving foreign institutions if >50% owned by Texans.
- Statute applies to financial accounts, insurance, annuities, and beneficiary designations.
- Survivorship rights in multi-party accounts are governed by Estates Code ch. 113.
- Property acquired through survivorship does not pass through the estate

Estates Code § 111.054

SURVIVORSHIP IN COMMUNITY PROPERTY

- Constitutional Amendment 11-3-1987.
- Probate Code amendment 8-28-1989, now Estates Code Ch. 112.
 - Only spouses can agree (not in a prenup).
 - Must be in writing and signed by spouses.
 - No magic words.
 - No stated statutory defenses.
 - For property on hand or to be acquired.

SURVIVORSHIP IN COMMUNITY PROPERTY

- Survivorship agreement can provide manner of revocation; otherwise the agreement can be revoked by written instrument signed by both spouses or signed by one spouse and delivered to the other.
- Survivorship terminates when property is conveyed unless the agreement provides otherwise.

MULTIPLE-PARTY ACCOUNTS

FINANCIAL ACCOUNTS--DEFINITIONS

Estates Code Ch. 113 governs aspects of accounts of financial institutions.

- An “**account**” is “a contract of deposit of funds between a depositor and a **financial institution**.” Estates Code § 113.001(1).
- “Financial institution” is “an organization authorized to do business under state or federal laws relating to financial institutions.”
- Examples are a bank, trust company, savings bank, bldg. & loan ass’n, S&L, credit union, and brokerage firm.
- Estates Code § 113.002 defines a “**party**” to an “account” as “one with a present right of payment, upon request, from an account.”

TYPES OF FINANCIAL ACCOUNTS

1. Single Party Account (with or without P.O.D. Designation)
2. Multiple-Party Accounts
3. Joint Account
4. Convenience Account
5. Multiple-Party P.O.D Account
6. Trust Account

1. SINGLE PARTY ACCOUNT

➤ Without a P.O.D. Designation

“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.” Estates Code § 113.052.

➤ With a P.O.D. Designation

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.

2. MULTIPLE-PARTY ACCOUNT

- A “multiple-party account” is a:
 - “joint account”
 - “convenience account”
 - “multiple-party P.O.D. Account”
 - “trust account”

Estates Code § 113.004(3)

3. 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.” Thus, a joint account has two or more “parties.” Estates Code § 113.004(2).
- “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.*” Estates Code § 113.102.

4. 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”).
- The account terms must provide that the “sums on deposit” are to be paid or delivered to the parties or the “convenience signers.” Estates Code § 113.004(1).
- “The parties to the account own the account: . . . A convenience signer does not own the account.”

CONVENIENCE ACCOUNT

The making of a deposit into a convenience account “does not affect the title to the deposit.” Estates Code § 113.105(a). “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.” Estates Code § 113.105(b).

5. MULTIPLE-PARTY 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).
- 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. Estates Code § 113.103.

6. TRUST ACCOUNT

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

TRUST ACCOUNT

- 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.

TRUST ACCOUNT

- 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.” Estates Code § 113.104.
- There is a *rebuttable presumption* that trust is revocable unless “other clear and convincing evidence of an irrevocable trust exists.” Estates Code § 113.104

TYPE OF ACCOUNT IS A FACT ISSUE

- In *Dulak v. Dulak*, 513, S.W.2d 205 (Tex. 1974), the Supreme Court upheld a jury finding that the account established before death was a convenience joint account, and that the funds belonged to the decedent and, upon death, his heirs.
- *Stogner v. Richeson*, 52. S.W.3d 903 (Tex. App.--Fort Worth 2001, pet. denied), the appellate court upheld a jury's finding that a deposit agreement reflected a trust account.

SPECIFIC TERMS OF ACCOUNT PREVAIL

“Terms of the account or the deposit agreement” prevail over the statutory allocation of beneficial rights. Estates Code § 113.104.

LAST WILL & TESTAMENT

LAST WILL AND TESTAMENT

Estates Code Chapters 251 - 255 govern creating, amending, revoking, and interpreting a last will and testament.

Under Estates Code § 251.051 - .052, a will:

- must be in writing, and
- must be signed by the testator or someone acting on behalf of the testator at the testator's direction and in his presence.
- if typed, the will must be attested by two or more credible witnesses who sign the will in the testator's presence.
- if holographic, the will need not be witnessed but must be entirely in the testator's handwriting.

LAST WILL AND TESTAMENT

- A typed will can be modified only with the same formalities required of a will.
- A holographic will can be modified holographically.
- A will can be revoked (in totality but not in part) by destruction.

FREEDOM TO CREATE OR ALTER WILL

- 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).

CONTRACTUAL WILLS; JOINT AND RECIPROCAL WILLS

- Texas contracts to make or not revoke a will or devise are valid if executed on or after 9-1-1979. Estates Code § 254.004(a).
- Must be reflected by a “binding and enforceable” written agreement or a will stating that a contract exists and reciting 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 to make a will. Estates Code § 254.004(b).
- A contract to bequeath property owned at the time of death is not enforceable prior to death, since the assets owned at the time of death cannot be determined prior to death. *Meyer v. Shelley* (Tex. App.--Amarillo 2000, no. pet).
- 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. See *Meyer v. Shelley* (Tex. App.--Amarillo 2000, no. pet).

DURABLE POWERS OF ATTORNEY

DURABLE POWERS OF ATTORNEY

- A power of attorney is “durable” when it does not lapse when the party becomes legally incapacitated.
- Covered in Estates Code Chapters 751 and 752.
- Estates Code provisions co-exist with common law principles and other statutory provisions that are not contrary to the Estates Code.
- Upon appointment of *temporary* guardian of the person, any power of attorney is suspended to the extent ordered by the guardianship court.

DURABLE POWERS OF ATTORNEY

- Upon appointment of *permanent* guardian of the estate, power of attorney terminates.
- A divorce decree (not a divorce petition) annuls a power of attorney that names the other spouse as attorney-in-fact, unless the power of attorney provides otherwise.

DURABLE POWERS OF ATTORNEY

- The attorney in fact or agent must timely inform the principal of each action taken under the power of attorney.
- The attorney in fact or agent must maintain records of each action or decision.
- The principal can demand an accounting from the attorney in fact or agent at any time.
- Where the action taken 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.

DURABLE POWERS OF ATTORNEY

- The power of attorney establishes a fiduciary relationship.
- 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.”

Remember: the early bird gets the worm.

GUARDIANSHIPS

GUARDIANSHIP PROCEEDING

Under Estates Code § 1002.015, a “guardianship proceeding” is “a matter or proceeding related to a guardianship or any other matter covered by Estates Code Title 3, 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.”

GUARDIAN

- The term “guardian” includes a person appointed as a guardian, 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*.
- There can be only one person appointed as guardian of the person or as guardian of the estate, but the guardian of the person and guardian of the estate can be the same person or can be different persons.

Estates Code ch. 1002.

WARD

- A “ward” is a person for whom a guardian has been appointed. Estates Code § 1002.030.
- A “proposed ward” is “a person alleged in a guardianship proceeding to be incapacitated.” Estates Code § 1002.026.

GUARDIANSHIP ESTATE

“Estate” and “guardianship estate” 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.

INTERESTED PERSON

With regards to a guardianship, 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.

COURT JURISDICTION

- “All guardianship proceedings must be filed and heard in a court exercising original probate jurisdiction.”
- “A probate court may exercise pendent and ancillary jurisdiction as necessary to promote judicial efficiency and economy.”
- “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.”

INITIATING GUARDIANSHIP PROCEEDING

- A guardianship proceeding can be initiated by any “interested person,” except someone with an interest adverse to the proposed ward or incapacitated person.
- In *Franks v. Rodes*, 310 S.W.3d 615 (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 respecting the client.

WHAT MUST BE PROVED

To appoint 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;
- by 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.

WHAT MUST BE PROVED

- 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.

PHYSICIAN'S CERTIFICATE

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.

SELECTION OF GUARDIAN (FOR A MINOR)

- For a minor ward, if parents live together they are both "natural guardians."
- If parents cohabit but disagree, court picks the parent "better qualified to serve."
- If parents are separated, the court selects a guardian based on best interest of the child.
- Last surviving parent can designate guardian in will, which "should" be followed unless designed is (i) disqualified, (ii) deceased, (iii) refuses to serve, or (iv) would not be in child's best interest.
- Child age 12+ can file written designation.

SELECTION OF GUARDIAN (FOR INCAPACITATED ADULT)

- Order of preference for appointment as guardian of an adult:
 - spouse
 - nearest of kin
 - best qualified
- A person cannot be appointed if s/he:
 - is in litigation with ward (unless guardian ad litem is appointed)
 - owes debt to ward
 - asserts a claim adverse to the ward or his/her estate

GUARDIAN OF THE PERSON

- “entitled to take charge of the person of the ward.”
- right to have physical possession and to establish legal domicile;
- duty to provide care, supervision, and protection;
- duty to provide clothing, food, medical care, and shelter;
- power to consent to medical, psychiatric, and surgical treatment other than inpatient psychiatric commitment;

GUARDIAN OF THE PERSON

- power to seek court-created trust, to qualify for medical assistance under Ch. 32, Human Resources Code; and
- power to sign documents necessary or appropriate to facilitate employment of the ward.

Estates Code § 1151.051(a)

GUARDIAN OF THE ESTATE

Is entitled to:

- possess and manage all property belonging to the ward;
- collect all debts, rentals, or claims due to the ward;
- enforce all obligations in favor of the ward; and
- bring and defend suits by or against the ward.

Has the duty to manage the estate "as a prudent person would manage the person's own property."

Estates Code Ch. 1151.

TERMINATION OF GUARDIANSHIP

Court must terminate guardianship when:

- a minor ward attains majority;
- the ward recovers full capacity;
- the need for a guardian to receive government funds ends; or
- the ward dies.

The End