

PROTECTING THE SURVIVING SPOUSE’S RIGHTS: A TOOLKIT

BRANDY BAXTER-THOMPSON, *Dallas*
Lan Smith Sosolik Baxter-Thompson & Johnston

State Bar of Texas
31ST ANNUAL
ESTATE PLANNING AND PROBATE DRAFTING
October 8-9, 2020

CHAPTER 6

BRANDY BAXTER-THOMPSON
Lan Smith Sosolik Baxter-Thompson & Johnston, PLLC
12221 Merit Drive, Suite 825
Dallas, Texas 75251
brandy@lss.legal
Direct: 214-217-2427 Fax: 972-701-0307

AREAS OF PRACTICE

Probate, Trust and Fiduciary Litigation; Heirship and Estate Administration proceedings; Trust Administration; Guardianships; Court-Appointed Guardian, Guardian Ad Litem, Attorney Ad Litem, and Administrator of Estates

EDUCATION

Texas Wesleyan University School of Law, Juris Doctor, 2005
Law Review Article Editor; Legal Intern for Chief Justice John Cayce;
Eldon B. Mahon Inns of Court, Pupil

Austin College, Bachelor of Arts, January 1999
Concentration: International Relations

CERTIFICATIONS, PROFESSIONAL ACTIVITIES & AFFILIATIONS

- Licensed by the Texas Bar Association and Northern District of Texas, Federal Courts
- Estate Planning and Probate Law, Texas Board of Legal Specialization, 2012 – Present
- Dallas Bar Association, Probate, Trusts & Estates Section
 - Program Chair 2020-2021
 - Council Member 2017-2019
- State Bar of Texas, Real Estate, Probate & Trust Law (REPTL) Section
 - Member, Planning Committee of the Estate Planning and Probate Drafting Course 2020
 - Member, Planning Committee of the Advanced Estate Planning and Probate Course 2019
- REPTL Guardianship Committee 2017-2019
- Certified by the State Bar of Texas Under Probate Code Section 646 to serve as an Ad Litem in Guardianship Proceedings
- Member, College of the State Bar
- Austin College “L” Association, President 2020-2021

ARTICLES & SPEAKING ENGAGEMENTS

Speaker, *Basics of Drafting Wills and Powers of Attorney*, Dallas Volunteer Attorney Program (DVAP), May 2020

Speaker & Co-Author, *Handbook for the Fiduciary*
Advanced Estate Planning and Probate Seminar, State Bar of Texas, 2019
Amarillo Bar Association Seminar, September 2019

Speaker, *Current Trends in Estate Administration*, Trust, Estate, and Portfolio Management Forum, Texas Bankers Association, Federal Reserve of Dallas, 2019

Speaker, *Estate Administration A-Z*, Texas Trust School, Texas Bankers Association, 2018, 2019

Speaker & Co-Author, *Fiduciary Compensation*
Advanced Estate Planning and Probate Seminar, State Bar of Texas, 2018

DAYL Elder Law Seminar, 2018
Dallas Probate Section Meeting, 2019

Speaker & Co-Author, *To Probate or Not to Probate*
State Bar of Texas - Intermediate Estate Planning and Probate 2013
Tarrant County Probate Bar Association – Nuts & Bolts Seminar, 2013
Collin County Probate Section Meeting, 2018

Panelist, Personal Property Issues in Estate Administration, Dallas Volunteer Attorney Program (DVAP), 2017

Speaker, The Interaction of Powers of Attorney in Guardianships, Advanced Guardianship Seminar, State Bar of Texas, 2017

Speaker, *Probate Basics*, Probate Mini-Seminar: Probate 101 and 102, Dallas Volunteer Attorney Program (DVAP), December 2016

Speaker & Author, *Capacity Issues in Estate Planning*, Tarrant County Probate Bar Association – Nuts & Bolts Seminar, 2015

Speaker & Author, *Standing Issues in Probate and Guardianship*, Tarrant County Probate Bar Association – Fiduciary Litigation Seminar, 2014

Speaker, *Litigation in Probate Court*, Friday Clinic, Dallas Bar Association, March 2013

Author, *Considerations When Choosing a Power of Attorney or Guardianship*, Dallas Bar Association, Headnotes, April 2013

Co-Author, *Preservation of Error in Offering and Excluding Evidence* - University of Houston CLE 2006

AWARDS

2019 Recipient, Hon. Nikki DeShazo Pro Bono Award, Dallas Bar Association, Probate, Trusts & Estates Section

2018 Recipient, Ken Fuller Outstanding Mentor Attorney, Dallas Volunteer Attorney Program (DVAP)

DAPA / DVAP Wills Clinic, Mentor Attorney, 2014

2007 Recipient, Outstanding Clinic Attorney Volunteer for East Dallas Clinic, Dallas Volunteer Attorney Program (DVAP)

Texas Super Lawyer – 2017, 2018, 2019, 2020
Texas Rising Star – 2014, 2015

TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. CHARACTERIZATION OF PROPERTY 1

 A. Texas Constitution Defines Community Property and Separate Property 1

 B. Inception of Title Rule 1

 C. Is it Separate? 2

 D. Is it Community? 2

 E. Management Presumption 2

 F. Character of Certain Property 3

 G. Premarital and Partition Agreements..... 5

III. NO ADMINISTRATION 5

 A. Passage of Title at Death 5

 B. “Informal” Administration Toolkit..... 5

IV. FORMAL ADMINISTRATION..... 8

 A. Necessity of Administration 9

 B. The Personal Representative 9

 C. The Inventory 11

 D. Partition of Community Property & Withdrawal of Survivor’s Portion 12

 E. Debts and Creditors’ Claims 12

 F. The Homestead..... 13

 G. Exempt Personal Property 15

 H. Family Allowance 15

V. NONPROBATE ASSETS..... 16

 A. Retirement Benefits 16

 B. Life Insurance 17

 C. Trusts 17

 D. Multiple-Party Accounts 17

 E. Remedies 19

VI. EFFECT OF DISSOLUTION OF (PRIOR) MARRIAGE 20

 A. Will Provisions after Divorce 20

 B. Nonprobate Transfers after Divorce 20

VII. CONCLUSION 21

ATTACHMENTS.....23

PROTECTING THE SURVIVING SPOUSE'S RIGHTS: A TOOLKIT

I. INTRODUCTION

The goal of this article is to assist the attorney representing the surviving spouse in a variety of circumstances. You may find yourself representing a surviving spouse in a very simple matter where the spouse is the sole beneficiary and named executor under an original will. No administration may be necessary and your job is simply to assist in making sure assets are properly transferred. You may also find yourself in a very complicated situation where the surviving spouse is not the sole beneficiary or named executor or the decedent may have left a significant amount of debt behind. No matter the situation, the surviving spouse will need careful guidance to protect his or her rights under the law.

In preparing this article, it became quickly apparent that the first topic that needed addressing is the characterization of property. The character of decedent's assets will inform your choices and help counsel determine the best path for the surviving spouse. The next sections address the variety of paths to take: probate without a formal administration, probate with an administration, and nonprobate assets. The final section covers the effect of divorce (from a prior spouse) on decedent's estate plan. Lastly, a variety of forms are included in the appendix.

II. CHARACTERIZATION OF PROPERTY

Death terminates the marriage and works a legal partition of the decedent's community property assets subject to probate. The decedent's one-half community property interest passes to the heirs (if intestate) or beneficiaries under a will, and the surviving spouse retains her one-half community property interest. Thus, determining whether decedent's assets are community property or separate property at the time of death is a threshold question.

In the initial meeting with the surviving spouse, it will be important to compile a list of assets, confirm how each asset is titled, whether it passes outside of probate, and whether it is community or separate property. Once this information is gathered, counsel can analyze the various options available to the surviving spouse, such as whether an estate administration is necessary or if the assets can be transferred without one.

A. Texas Constitution Defines Community Property and Separate Property

The Texas Constitution is the primary source in defining community property and separate property in a marital estate. *See* Tex. Const. Art. XVI, Sec.15. Separate and Community Property of Husband and Wife. Interestingly, the Texas Constitution does not

define community property; that definition is found in the Texas Family Code. *See* Section II.D, Is it Community?, *infra*. The text of the Texas Constitution definition is as follows:

All property, both real and personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of that spouse; and laws shall be passed more clearly defining the rights of the spouses, in relation to separate and community property; provided that persons about to marry and spouses, without the intention to defraud pre-existing creditors, may by written instrument from time to time partition between themselves all or part of their property, then existing or to be acquired, or exchange between themselves the community interest of one spouse or future spouse in any property for the community interest of the other spouse or future spouse in other community property then existing or to be acquired, whereupon the portion or interest set aside to each spouse shall be and constitute a part of the separate property and estate of such spouse or future spouse; spouses also may from time to time, by written instrument, agree between themselves that the income or property from all or part of the separate property then owned or which thereafter might be acquired by only one of them, shall be the separate property of that spouse; if one spouse makes a gift of property to the other that gift is presumed to include all the income or property which might arise from that gift of property; spouses may agree in writing that all or part of their community property becomes the property of the surviving spouse on the death of a spouse; and spouses may agree in writing that all or part of the separate property owned by either or both of them shall be the spouses' community property.

B. Inception of Title Rule

Property is characterized as either "separate" or "community" at the time title is taken in the property, otherwise known as the "inception of title" Rule. *See* TEX. FAM. CODE § 3.006; *Howe v. Howe*, 551 S.W.3d 236 (Tex. App.—El Paso 2018, no pet.); *Camp v. Camp*, 972 S.W.2d 906 (Tex. App.—Corpus Christi 1998, pet. denied). Inception of title occurs when a party first has the right of claim to the property by virtue of which title is finally vested. *Strong v. Garrett*, 148 Tex. 265, 224 S.W.2d 471 (1949); *Wilkerson v. Wilkerson*, 992 S.W.2d 719 (Tex. App.—Austin 1999, no pet.); *see also, Smith v. Smith*, 22 S.W.3d 140 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (lawsuit proceeds

were husband's when he was defrauded by a third party prior to the marriage and filed suit and recovered a judgment after the marriage).

When both the community estate and separate estate have an ownership interest in an asset, the respective ownership interests are determined under the inception of title rule. TEX. FAM. CODE § 3.006.

C. Is it Separate?

The Family Code defines separate property simply as any property owned by the spouse prior to the marriage and any property received during the marriage by gift or inheritance. TEX. FAM. CODE § 3.001(1)-(2). Separate property also includes any recovery for personal injuries except for loss of earning capacity. TEX. FAM. CODE § 3.001(3). Clear and convincing evidence is required to establish that an asset is separate property. TEX. FAM. CODE § 3.003.

If property is purchased during the marriage with separate property assets, then the purchased property is separate property. The party asserting the separate property character will need to trace the source of the funds for the purchase. *Lewis v. Lewis*, 944 S.W.2d 630, 631 (Tex. 1997).

D. Is it Community?

Community property is defined as all property acquired during the marriage other than separate property. TEX. FAM. CODE § 3.002. However, even if an asset is characterized as decedent's separate property, any income derived from this asset is community property. *Mortenson v. Trammell*, 604 S.W.2d 269 (Tex. App.—Corpus Christi 1980, writ refused n.r.e.). An exception to this rule applies to gifts between spouses. If spouses make gifts between each other, it is presumed to include any income and property that may arise from the gift. TEX. FAM. CODE § 3.005.

Wages or income of any kind that is acquired during the marriage by talent, toil, or other measure of productivity of either spouse is community property. See TEX. FAM. CODE § 3.002; *McClary v. Thompson*, 65 S.W.3d 829 (Tex. App.—Fort Worth 2002, pet denied). This would include bonuses earned during the marriage.

1. Community Presumption

All property owned by a married decedent at death is presumed community property. TEX. FAM. CODE § 3.003. The presumption can be overcome with clear and convincing evidence. *Id.* The burden of overcoming the community presumption rests on the party asserting otherwise. *Id.* The party must identify the property clearly and trace the origin of the property through evidence showing the time and means by which the property was acquired. TEX. FAM. CODE § 3.003(a); *In the Matter of the Marriage of Stegall*, 519 S.W.3d 668 (Tex. App.—Amarillo 2017, no pet.). In the instance where the property is impossible to segregate and

identify because it has been “hopelessly” commingled, the community presumption prevails, and the property is deemed community property. *Id.*

2. Quasi-Community Property

“Quasi-community property” is property acquired by spouses while residents of another state that would be considered community property under Texas law. See TEX. FAM. CODE § 7.002. The rule characterizes property acquired outside of Texas using the rules of characterization under the Texas Family Code, even though the property may be treated otherwise in the state of acquisition.

The treatment of “quasi-community property” under the Family Code does not apply in the probate context. See *Hanau v. Hanau*, 730 S.W.2d 663 (Tex. 1987)(holding that the rule in family law that property acquired in another state is characterized as if acquired in Texas does not apply in probate matters). At death, the decedent's property acquired in another state is characterized under the law of that state, not under Texas law. In a concurring opinion, Justice Spears acknowledged that the rule pronounced in *Hanau* is correct, but invited the Legislature to adopt a rule in the Estates Code similar to Section 7.002 in the Family Code to “eliminate this illogical and potentially inequitable difference in the characterization of marital property.” *Id.* at 667. To date, the Legislature has not accepted this invitation.

E. Management Presumption

The management presumption rules are derived from the Family Code. See TEX. FAM. CODE §§ 3.101–3.104. They are relevant in the context of probate in determining which assets the surviving spouse is entitled to possess and control. TEX. ESTATES CODE § 453.009. It also affects which assets can be held liable for decedent's debts. See IV.E, Debts and Creditors' Claims, *infra*.

Each spouse has the sole management and control of his or her separate property. TEX. FAM. CODE § 3.101. Likewise, each spouse has sole management and control of his or her personal earnings, revenue from separate property, personal injury recoveries, and the increases and mutations of assets under the spouse's sole control. TEX. FAM. CODE § 3.102(a). If property is titled in one spouse's name, then that spouse is presumed to have sole management and control of the property. TEX. FAM. CODE § 3.104.

All community property, other than that identified in 3.102(a), is subject to joint management of the spouses. TEX. FAM. CODE § 3.102(c). When this joint management ends at death, the personal representative has authority over the decedent's separate property, sole management community property, and the joint community. See TEX. ESTATES CODE § 453.009. The surviving spouse can maintain possession and control of

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Protecting the Surviving Spouse's Rights: A Toolkit

Also available as part of the eCourse

[2022 Estate Planning, Guardianship and Elder Law eConference](#)

First appeared as part of the conference materials for the
24th Annual Estate Planning, Guardianship and Elder Law Conference session
"What the Surviving Spouse Needs to Do, and What to Do if They Don't"