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I. Introduction

The Texas Probate Code, excluding guardianship provisions, is as comprehensible to the non-probate practitioner as is finite mathematics to a history scholar. The code has been repeatedly amended by the legislature with the continued insertion of new material without resort to logical organization. Special proceedings, informational statutes and alternatives to formal probate are interspersed among formal probate code provisions. Hence, the non-probate practitioner is continually confused regarding the application of specific probate statutes to the solution of the problem.

Succinctly stated, the Texas Probate Code is divisible by half, i.e. estate administration, sections 1 through 506 and guardianship, sections 601 through 905. The estate administration sections are divisible into six (6) general sub-sections. An understanding of this division will aid the probate practitioner and jurist to expeditiously locate material of interest and better understand same absent confusion with other statutory provisions.

- A. Independent Administration, §145, et. seq.**
- B. Dependent Administration, §178, et. seq.**
- C. Alternatives to Formal Probate, i.e. independent and dependent administration.**
 - 1. Proceedings to Declare Heirship, §48, et. seq.
 - 2. The Affidavit of Heirship, §52
 - 3. Prevention of Administration, §80
 - 4. Muniment of Title, §89A, et. seq.
 - 5. The Small Estate Affidavit, §137, et. seq.
 - 6. Application for Order of No Administration, §139, et. seq.
 - 7. Summary Proceedings for Small Estates, §143
 - 8. Independent Administration, §145
 - 9. The Unqualified Community Administration, §§155, 160, 177b
 - 10. The Qualified Community Administration, §161, et. seq.
- D. The Durable Power of Attorney Act, §481, et. seq.**
- E. Special Proceedings In Probate**
 - 1. Examination of Documents or Safe Deposit Box *with* Court Order, §36B,C,F.
 - 2. Proceedings Before Death, §72
 - 3. Probate of Will Not Produced, §85
 - 4. Probate of Holographic Will, §§60,84

5. Proving Will By Deposition On Written Question, §§22,84,90
6. Procedures Pertaining to Foreign Wills. §95, et. seq.
7. Emergency Intervention Proceedings; Funeral and Burial Expenses, §108, et. seq.
8. Appointment of Temporary Administrators, §131A
9. Temporary Administration Pending Contest, §132
10. Dependent Administration With Will Annexed, §154
11. Court Appointed Successor Independent Executor, §154A
12. Withdrawing Estates From Administration, §262, et. seq.
13. Setting Aside Exempt Property, §271, et. seq.
14. Establishing The Family Allowance, §286, et. seq.
15. Sale of Burdensome Property §333
16. Partition and Distribution of Estates, §373, et. seq.
17. Partition of Community Property, §385, et. seq.
18. Payment of Estates Into State Treasury, §427, et. seq.
19. Community Property With Right of Survivorship, §451, et. seq.

F. Informational Statutes

II. Specific Relief

Special proceedings require the estate's attorney to petition the court to seek specific relief within or without a formal administration. The relief sought is generally ancillary to formal probate, i.e. ancillary to an independent or dependent administration. I have identified nineteen (19) special proceedings that are noteworthy to this author. Many of these special proceedings appear regularly on the court's docket and some are rarely heard but are of importance to the probate practitioner and process.

III. Probate of Will Not Produced

A. Purpose

The purpose of this procedure is to allow an applicant to probate a decedent's Last Will and Testament that has for some acceptable reason to the court become lost.

B. Application

The application must contain answers to the nine (9) questions raised in T.P.C. §81, i.e. applicant's and decedent's name, domicile, venue, existence of real or personal property, date of will, children born or adopted, executor's disqualification and charitable gifts, or why such answers cannot be made. See, Marrs v. Marquis, 927 S.W.2d 304 (Tex. App. - El Paso 1996) holding that court was without jurisdiction because of insufficient answers to the nine statutory requirements of T.P.C. §81.

See, In Re Estate of Foster, 3 S.W.2d 49 (Tex. App.-Amarillo 1999, no pet. h.) holding two wills may be filed for probate; and, George v. George, 813 S.W.2d 236 (Tex. App.-Tyler 1991, no writ) holding that application by decedents brother for letters of administration was denied because it fails to identify surviving spouse who has superior right to be appointed.

1. Additional Application Requirements

T.P.C.§81(b) requires the applicant to furnish the court with the following additional information:

- a) The reason why the will can not be produced;
- b) The known contents of the will;
- c) The will's date and named executor, if known; and,
- d) The known name, age, relationship to decedent, marital status and address of every testate and intestate distributee.

C. Citation

The citation shall be personally served on all known heirs residing in Texas and by publication upon non-resident heirs, or heirs whose residence is unknown. T.P.C.§128(b). Watson v. Dingler, 831 S.W.2d 834 (Tex. App. - Houston [14th Dist.]1992) holding will's probate reversed due to improper service of citation and Neil v. Yett, 746 S.W.2d 32 (Tex. App. -Houston [14th Dist.]1992, writ denied.) holding that due process does not require personal service upon decedent's granddaughter.

D. Proof At Hearing

The applicant must evidence to the court the elements of proof required of an attested written will or holographic will pursuant to T.P.C.§84(b), i.e. the sworn testimony of a/the subscribing witness(es) (attested will) or two (2) witnesses to the decedent's signature, (holographic will), in open court or by deposition on written questions and proof for issuance of letters testamentary pursuant to T.P.C.§88. See, Hunter v. Palmer, 998 S.W.2d 471 (Tex. App.-Houston [1st Dist.]1999, no pet. h.) wherein attorney's testimony raised fact issue on whether will and codicil not found at decedent's death was revoked.

E. Additional Proof Requirements

The applicant's attorney will initially prove up the formal requisites of an attested will pursuant to T.P.C. §59, i.e. *signed by the testator*. See, Orozco v. Orozco, 917 S.W.2d 70 (Tex. App. - San Antonio, 1996) finding that any mark by the testator satisfies a signature requirement, and Zaruba v. Schumaker, 178 S.W.2d 542 (Tex. Civ. App. 1944) dubiously holding a typewritten signature was sufficient; *two (2) witnesses over the age of fourteen attested the will*. See, Saathoff v. Saathoff, 101 S.W.2d 910 (Tex. Civ. App. 1937) finding that notary public signing as witness was acceptable; and, *the witnesses signed in the testator's presence*. See, Venner v. Layton, 244 S.W.2d 852 (Tex. Civ. App. 1951) defining how testator must sign in witnesses presence, Morris v. Estate of West, 643 S.W.2d 204 (Tex. App.-Eastland 1982, writ ref'd. n.r.e.) wherein witness was found not to have signed will in testator's presence when execution occurred in an adjoining room, Nichols v. Rowan, 422 S.W.2d 21 (Tex. Civ. App. - San Antonio 1967) favoring the conscious presence test over the line of sight test, In Re Estate of McDrew, 906 S.W.2d 53 (Tex. App-Tyler 1995, writ denied), discussing time limitation for probating lost will, legibility of document and, reiterating rule that a testator may sign either before or after witnesses; and, Estate of Livingston v. Nacum, 999 S.W.2d 874 (Tex. App.-El Paso 1999, no. pet. h.) holding witnesses' signatures on a self proving affidavit considered signatures to the will and will allowed to probate although one witness was also a devisee.

1. The applicant's attorney must thereafter prove to the court's satisfaction the will's contents, its execution, and the cause for its non-production. T.P.C. §85.
 - a) The will's contents must be substantially proven by a credible witness who earlier read the original or heard it read. See, Harris v. Robbins, 302 S.W.2d 225 (Tex. Civ. App.-Amarillo 1957) holding that testimony must not leave any confusion as to will's contents.
 - b) The execution of the will requires a credible witness to identify the will's witnesses which element of proof is often extremely difficult.
 - c) The cause for the will's non-production must overcome the presumption of revocation. See, Estate of Glover, 744 S.W.2d 197 (Tex. 1988) determining the evidentiary standard to be a preponderance of the evidence.

F. Written Testimony

The witness's testimony shall be reduced to writing, subscribed and sworn to in open court and filed with the clerk. T.P.C.§87.

1. The pre-printed forms that the clerk's office supplies for this purpose are not complete for a will not producible because they do not contain an explanation for non-production of the will. The attorney must prepare this written testimony for submission before the hearing. The testimony must be specifically tailored to the specific case and it must encompass all of the elements that must be proved.

G. Court Action On Probated Will

The court will enter the order probating will upon satisfactory proof and the order obtainable in preprinted form from the clerk's office must be amended to indicate that the will that is being admitted to probate is a will not producible in court.

IV. Probate Of Holographic Will

A. Purpose

The purpose of this special proceeding is to allow the applicant to probate a non-attested will which is wholly in the handwriting of the testator with the consequent benefits of an independent administration or muniment of title action. Texas is one of about twenty states that recognizes this procedure. T.P.C.§60.

B. Application

The application must contain answers to the nine (9) questions raised in T.P.C.§81, i.e. applicant's and decedent's name, domicile, venue, existence of real or personal property, date of will, children born or adopted, executor's disqualification and charitable gifts, or why such answers cannot be made. See, Marrs v. Marquis, 927 S.W.2d 304 (Tex. App. -El Paso 1996) holding that court was without jurisdiction because of insufficient answers to the nine statutory requirements of T.P.C.§81; and, Watson v. Dingler, 831 S.W.2d 834 (Tex. App. -Houston [14th Dist.]1992) holding will's probate reversed due to improper service of citation.

C. Proof At Hearing

The applicant must prove the wording of the will is wholly in the handwriting of the decedent by the testimony of two (2) witnesses to his handwriting in open court or by deposition on written questions. T.P.C. §84(b). See, Gunn v. Phillips, 410 S.W.2d 202 (Tex. Civ. App. - Houston 1966) requiring two witnesses to testator's handwriting; Trim v. Daniels, 862 S.W.2d (Tex. App. -Houston [1st Dist.] 1992) finding initials of attorney/testator sufficient and will without date valid; In Re Estate of Johnson, 886 S.W.2d 869 (Tex. App. -Beaumont 1994) regarding role of trial court as fact finder; Lopez v. Hansen, 947 S.W.2d 587 (Tex. App. - Houston [1st Dist.] 1997) holding will proponent has the burden of proving holographic will is wholly in testator's handwriting, and, Luker v. Youngmeyer, 36 S.W.2d 628 (Tex. App.-Tyler 2000, no writ) holding that whether decedent customarily printed her name is unimportant in light of the fact that her name appeared as part of a title and not as the necessary signature on her holographic will.

D. Written Testimony

The witness's testimony shall be reduced to writing, subscribed and sworn to in open court and filed with the clerk. T.P.C. §87.

The clerk's office can supply the applicant's attorney with a pre-printed form for this purpose which should be prepared for submission before the hearing.

E. Court Action On Probated Will

The court will enter the order probating will upon satisfactory proof and the order is obtainable in preprinted form from the clerk's office.

V. Proving Will By Deposition On Written Questions

A. Purpose

The purpose of this procedure is to allow an applicant to prove up the decedent's will when the witnesses to same or the decedent's signature are unavailable to testify in open court.

1. Proof Of Written Will Produced In Court

The applicant can produce the testimony of the witness(es) to the decedent's will or the testimony of two (2) disinterested persons to

his signature when they are non-residents of the county or unable to attend court by deposition, written or oral, taken in the same manner and under the same rules as depositions in other civil actions. T.P.C. §84(c); T.R.C.P. 166(b), 200. See, O'Connor's Texas Rules Civil Trials 2002, Justice Michol O'Connor, at page 371 for general discussion of depositions and at page 391 for general discussion of interrogatories.

2. Custody Of Probated Wills

The original of a decedent's will is maintained in the custody of the county clerk except when the court allows its removal for inspection. T.P.C. §90.

- a) The applicant with a court order allowing its removal shall give the court's clerk a receipt therefor and the clerk shall retain a copy of the original will. T.P.C. §90.

3. Evidence At Hearing

When there is no opposing party or attorney of record upon whom notice and copies of interrogatories may be served, service may be had by posting for ten (10) days and at the expiration thereof the commission may issue for taking the deposition.

- a) The original of the removed will from the clerk's office along with the written interrogatories may be served upon the witness and thereafter returned to the court to be introduced as evidence at the hearing. T.P.C. §22.

VI. Examination of Documents or Safe Deposit Box With Court Order

A. Purpose

This special proceeding is found in §36B T.P.C. and is very useful to the determination of whether to institute a formal or alternative to formal probate proceeding. The process is both simple and straightforward.

- 1. An interested party makes application to examine the decedent's documents in the possession of a third party or the decedent's safe deposit box. T.P.C. §36B(a).

2. The applicant's attorney will allege that the documents or the safe deposit box may contain a will, a burial plot deed or an insurance policy payable to a named beneficiary. T.P.C. §36B(a)(2).
3. The application should request that the examination be made in the presence of an agent of the judge, the person in possession or control of the documents, or an officer of the bank. T.P.C. §36B(b).

B. The Court's Order

The court's order should allow the court's representative to take possession of the decedent's will, burial plot deed and/or insurance policy payable to a named beneficiary. T.P.C. §36C.

1. The order must direct the Court's representative to deliver the will to the court's clerk, who shall issue a receipt thereon; the burial plot deed to a person designated in the order; and, the insurance policy to a named beneficiary therein.

C. Benefit

The retrieved documentation, e.g. that Last Will and Testament or its non-existence, will allow the estate's representative to choose between a formal or alternative to formal probate procedure.

VII. Proceedings Before Death; Administration in Absence of Direct Evidence of Death; Limitation of Liability; Restoration of Estate; Violation of Proceedings

A. Purpose

This unique proceeding allowing for the administration of a person's estate in the absence of direct evidence of death is found in T.P.C. §72.

B. Application

The application should provide sufficient circumstantial evidence of the fact, time and place of death. The application should state that a minimum of seven (7) years have elapsed since the presumption of death date. §-133.001 Civ. Prac. Rem. Code.

C. Notice

The court should on its own motion or at the request of any interested person order that citation be issued to the person presumed dead by publication and posting.

1. After letters testamentary or of administration have been issued the court may also direct the personal representative to make a search for the person supposed to be dead by notifying law enforcement agencies and public welfare agencies and by engaging the services of an investigative agency to make a search for the person.

I suggest that the language "...and by such additional means as the court may by its order direct" allows the court to require the product of these inquiries to be placed in evidence at the hearing. The expenses of search and notices are taxed as costs to the estate. T.P.C. §72(b).

D. Distribution

The court's order should reflect that the personal representative shall make no distribution of estate property until after the expiration of three (3) years from the issuance of letters. T.P.C. §72(a).

E. Liability

In the event the person presumed dead is alive, no liability attaches to the personal representative or others for distributing the estate under orders of the court. The surety has no liability and a surcharge action will fail if the personal representative acted in compliance with court orders. T.P.C. §72(a).

F. Restoration

The non-decedent person shall be entitled to the restoration of his estate or its residue along with any rents and profits, except real or personal property sold by the personal representative or any distributee, his successors or assigns, to bona fide purchasers for value, in which case the right of such person to the restoration shall be limited to the proceeds of such sale or the residue thereof with any increase thereon. T.P.C. §72(a).

VIII. Procedures Pertaining To Foreign Wills

A. Purpose

The purpose of this procedure is to allow an applicant three (3) methods for giving effect to the will of a non-domiciliary of Texas. Texas Probate Code sections 95 and 105 relate to the ancillary probate of a foreign will already probated in another jurisdiction; sections 96 through 99 relate to the probate of a foreign will as a muniment of title; and, sections 103 and 104 relate to the original probate of a foreign will in Texas.

B. Ancillary Probate

T.P.C. §95 allows for the probate of a foreign will to be accomplished by its filing and recordation in Texas upon proof of its prior probate in another state, the District of Columbia, or any foreign nation. See, Reyes de Martinez Ayata v. Martinez, 883 S.W.2d 270 (Tex. App. –Corpus Christi: 1994, writ denied) wherein a will from Mexico probated with a holographic will written in the United States and holographic will given precedence when discrepancies between the two wills occurred.

1. Application and Citation

The application should simply request that Texas court to allow the probate of the foreign will based upon submitted authenticated copies of the foreign proceeding when it was probated in the domiciliary jurisdiction. No citation or notice is required. T.P.C. §95(b)(1). Conversely, if the foreign will was probated in a non-domiciliary jurisdiction, i.e. someplace other than where decedent lived, the application must contain all the information required of T.P.C. §81 and state the name and address of every distributee. Citation must be served by certified or registered mail on each distributee. T.P.C. §95(b)(2).

2. Proof

The applicant's attorney must file a copy of the will and the judgment admitting same attested by the court's clerk together with a certificate of the presiding judge that said attestation is in due form with the application. T.P.C. §95(c). The judge's and clerk's signatures must be original and affixed to the will and judgment. Seals or other mechanical reproductions of these signatures are not acceptable.

3. Probate Accomplished by Recording

- a) The court's clerk should simply record the foreign will and the evidence of its probate in the decedent's domiciliary jurisdiction to accomplish its Texas probate. No order of the court is necessary and thereafter the will has the same force and effect as if the will had been originally probated in Texas. T.P.C. §95(d)(1). See, Chamberlain v. Witts, 696 S.W. 2d 204 (Tex-App. –Dallas 1985, writ ref'd n.r.e.) holding executor under foreign will probated in Texas may file suit in that state for an accounting in probate court.
- b) When a decedent's will was probated in a non-domiciliary jurisdiction, i.e. someplace other than where he resided, the same rule applies as above stated for a will admitted in a domiciliary jurisdiction, except that the will is subject to contest as if originally probated in Texas. T.P.C. §95(d)(2).
- c) A contest to a will earlier probated in the decedent's domiciliary state may be contested by any interested person but only upon the following grounds:
 - (1) That the foreign proceedings were not authenticated in the manner required for ancillary probate or recording in the deed records.
 - (2) That the will has been finally rejected for probate in this State in another proceeding.
 - (3) That the probate of the will has been set aside in the jurisdiction in which that testator died domiciled. T.P.C. §100(a).

4. **Effect of Foreign Will On Local Property**

- a) The effect of a properly probated foreign will in the decedent's domiciliary state shall allow it to be effectual to dispose of both real and personal property in Texas. T.P.C. §95(e).

5. **Protection of Purchasers**

- a) The Texas courts shall set aside the probate of a foreign will in Texas upon a preponderance of the evidence that the will was not probated in the decedent's domiciliary state.

- b) A bona fide purchaser for value who purchased estate property in good faith is protected to the extent that his title or rights shall not be affected by the will being subsequently set aside. T.P.C.§95(f).

6. Executors of Will Probated In Another Jurisdiction

- a) When a foreign will earlier probated in the decedent's domiciliary jurisdiction is recorded in Texas pursuant to T.P.C.§95, the will's named executor is entitled to receive letters testamentary upon proof of his qualification in the domiciliary jurisdiction and that he is not disqualified pursuant to T.P.C.§78.
- b) Ancillary letters testamentary shall be issued upon proof of qualification and any previously granted letters of administration shall be revoked after personal service upon the personal representative. T.P.C.§105.
- c) A foreign corporate fiduciary may only be appointed if a Texas financial institution can be appointed under the laws of the state of that foreign fiduciary. Additionally, the court may require the foreign fiduciary to deposit all cash and safekeep all other assets in financial institutions which have their main office or a branch office in this state.

C. Probating A Foreign Will As A Muniment of Title

T.P.C.§§96-99 involve what amounts to a muniment of title procedure for wills of non-domiciliaries that have been admitted to probate in another jurisdiction. This procedure can be employed if there is no need for an ancillary administration or letters testamentary, and the only concern is to have the Texas land records reflect the title and ownership of the testator's successors.

- a) Succinctly stated, certified copies of the will and the order admitting it to probate in the other jurisdiction are recorded in any county in which the decedent's land is located. If the foreign will grants the executor a power of sale, under T.P.C.§107 the executor has the power to sell estate property without the necessity of a court order. See, Sun Operating Ltd. Partnership v. Oatman, 911 S.W.2d 749 (Tex. App. –San Antonio 1995, writ denied) holding inception of title into a devisee relates back to testator's death and this rule applies to a foreign will. T.P.C. §95

If the foreign will did not grant a power of sale, the foreign executor cannot convey title. Leggett v. Church of St. Pins, 619 S.W.2d 191 (Tex. Civ. App. Houston [1st Dist.]1981, writ ref'd n.r.e.). See, Bruni v. Viadurri, 166 S.W.2d 81 (Tex. 1942).

D. The Original Probate of A Foreign Will in Texas

T.P.C. §§103 and 104 allow the will of a non-domiciliary of Texas to be admitted to probate in the same manner of the will of a Texas resident. This procedure, which is the only procedure available if the will has not been probated elsewhere, can also be employed even if the will was admitted to probate in another jurisdiction.

- a. This proceeding can be employed even if the will was not admissible to probate in the other jurisdiction, if the ground for its rejection in the other state *is not* a ground for rejection in Texas.

1. Proof of Foreign Will in Original Probate Proceeding

The applicant's attorney should prove that the decedent died outside the State of Texas; that a copy of the foreign will is admissible and that no objection has been made to the will. T.P.C.§104. See, Manfield v. Terry, 885 S.W.2d 216 (Tex. App. – Dallas 1994, writ denied) holding that nonsuit of Florida will contest thus allowing wills probate was barred by full faith and credit clause of U.S. Constitution from litigating the issue of decedent's domicile in Texas; and, McAdams v. Capital Products Corp., 810 S.W.2d 290 (Tex. App.- Fort Worth 1991, writ denied) holding a P.R. has authority to administer assets only in the jurisdiction wherein appointed and that an administrator appointed in another court cannot be sued or act as a P.R. in Texas.

IX. Emergency Intervention Proceedings; Funeral and Burial Expenses

A. Purpose

T.P.C. §§108-115 allow immediate action to be taken to secure funds for the decedent's funeral and burial or to allow access to the decedent's apartment, the personal property therein and/or its storage elsewhere. The application can be filed after the lapse of three (3) days from death and not later than ninety (90) days from the date of death if no application for the appointment of a personal representative is pending nor an application for a small estate administration pursuant to §137 of the Texas Probate Code. T.P.C. §108.

1. Person Eligible To Apply

Any person qualified to serve as an administrator under T.P.C. §77 may make application. T.P.C. §109.

2. Requirements for Emergency Intervention

No prior application pursuant to T.P.C. §§81,82,137 or 145 has been filed and there is an immediate need to accomplish the following:

- a) A need to obtain funds for the decedent's funeral or burial; or,
- b) A need to gain access to the decedent's rental unit wherein the decedent's personal property is located and access has been previously denied. T.P.C. §110.

3. Contents of Emergency Intervention Application for Funeral and Burial Expenses

- a) **Application Contents** - The application must be sworn to, i.e. verified, and contain the following pursuant to T.P.C. §111:
 - (1) The applicant's name, address, social security number, and interest;

- (2) Facts showing an immediate necessity for an intervention order;
 - (3) The decedent's date and place of death, residential address and the name and address of the funeral holding his remains;
 - (4) Any known distributees and the reason why they cannot be contacted or refuse to assist in the decedent's burial;
 - (5) A description of funeral and burial procedures necessary and a funeral home statement itemizing the costs of the funeral and burial procedures; and,
 - (6) The name and address of an individual, entity, or financial institution in possession of any funds of or due the decedent and any related account numbers and balances thereon, if known by the applicant.
- b) **Cremation** - The application should attach any specific written instructions by the decedent concerning his funeral or burial wishes and his directive(s) shall be fully complied with. No cremation of the decedent's remains is allowed unless expressly permitted in the decedent's instructions or by court order. T.P.C. §111(b).

4. **Contents For Emergency Intervention Application For Access To Personal Property**

- a) The application must be sworn to, i.e. verified and contain the following pursuant to T.P.C. §112:
 - (1) The applicant's name, address, social security number, and interest;
 - (2) Facts showing an immediate necessity for an intervention order;
 - (3) The decedent's date and place of death, residential address and the name and address of the funeral holding his remains;

- (4) Any known distributees and the reason why they cannot be contacted or refuse to assist in the protection of the decedent's personal property;
- (5) The type and location of the decedent's personal property and the name of the person in possession of same; and,
- (6) The name and address of the owner and manager of the rental unit and whether access to same is necessary.

5. **Emergency Intervention Orders**

a) **Funeral and Burial Expenses**

- (1) The court may order the decedent's funds held by an employer, individual or financial institution to be paid directly to a funeral home in an amount not to exceed \$5,000.00 and an amount representing reasonable and necessary attorney fees and court costs. T.P.C.§113(a). See, In Re Estate of Ortiz, 815 S.W.2d 858 (Tex. App. – Corpus Christi 1991, no writ) allowing for court ordered payment of attorney and funeral home fees).

b) **Personal Property Access** - The court may order:

- (1) The owner or agent of the rental unit to allow the applicant access at a *reasonable time* and in their *presence*;
- (2) That they jointly prepare and file with the court a *list* generally describing the personal property therein;
- (3) That the applicant, owner or agent may *remove* and *store* the personal property at another location until claimed by the distributees;
- (4) That the applicant has only those powers granted in the order and the clerk may issue certified copies of the order for a period of 90 days unless shortened by the appointment of a personal representative.

- (5) That any employer, individual or entity may disperse those sums ordered as reasonable and necessary attorney fees and court costs.

6. **Termination of Powers**

a) **Funeral and Burial Expenses**

- (1) The applicant's powers and authority under an emergency intervention order cease to be effective or enforceable on the 90th day after the issuance of the order or upon the appointment of a personal representative, whichever occurs first. T.P.C.§114(a).

b) **Personal Property Access**

- (1) In the event a personal representative has not been appointed when the order expires, any person in possession of the decedent's personal property may release the property to the heirs or dispose of the property pursuant to a Landlord's Lien, Subchapter C, Chapter 54, Texas Property Code, or a Warehouseman's Lien, Section 7.209, 7.210, Business & Commerce Code. T.P.C.§114(b).

7. **A Surviving Spouse's Limited Right To Control Decedent's Burial or Cremation**

- a) **Verified Application** - the verified application may be filed by an executor or a person considered the decedent's next of kin which establishes a testate or intestate estate; that the surviving spouse is alleged to be a principal or accomplice in a willful act which resulted in the decedent's death; and, good cause exists to limit the surviving spouse's right to control the burial, internment or cremation of the decedent. T.P.C.§115(a),(b).
- b) **Notice and Hearing** - After notice and hearing on the application the court may limit the surviving spouse's right to control the burial, internment or cremation upon finding of good cause that the surviving spouse is the principal or an accomplice to the willful act resulting in the decedent's death and appoint a person to make such arrangements. T.P.C.§115(c).

X. Appointment of Temporary Administrators

A. Purpose

T.P.C.§131A allows the court to make the immediate appointment of a personal representative with limited powers dictated by the circumstances of the case for a period not to exceed 180 days unless in the estate's interest it should be made permanent.

B. The Application

1. The application must be verified and include the information required by T.P.C. §§81,82 if the decedent died testate or intestate, respectively, and attached thereto by affidavit the following information:
 - a) The applicant's name, address and interest;
 - b) Facts evidencing the need for an immediate appointment of a temporary administrator;
 - c) The requested powers and duties of the temporary administrator;
 - d) A statement that the applicant is entitled to letters of temporary administration and is not disqualified; and,
 - e) A description of the decedent's real and personal property. T.P.C.§131A(b)(5). See, Nelson v. Neal, 787 S.W.2d 343 (Tex. 1990) discussing the sufficiency of contents of application and nature of evidentiary hearing on the application.

C. The Order

The court's order must include a designation that the appointee is a "temporary administrator" for the specific periods ordered which shall not exceed 180 days; the defined powers of the appointee; and, the amount of the bond. T.P.C.§131A(c). See, Ex Parte Lindley, 163 Tex. 301, 354 S.W.2d 364 (1962), reh'g of cause overruled (March 14, 1962) holding that the principal object of the appointee is to preserve the estate until it can pass into the hands of a personal representative for the benefit of

distributees and creditors, Estate of Vigen, 970 S.W.2d 597 (Tex. App-Corpus Christi 1998, no writ) wherein court ordered administration with will annexed and appointed an administrator after temporary administrator appointed and named executor was disqualified; and, Barrett v. Parchman, 765 S.W.2d 289 (Tex. App.- Dallas 1984, no writ) holding that temporary administrator could not be reimbursed for attorney fees relating to action beyond scope of powers and duties delineated in order.

D. Qualification and Notice

1. The appointee must file his bond on the date of the court's order and within three (3) days therefrom the clerk shall issue letters which evidence the specific powers granted by the court. See, Bandy v. First State Bank, 835 S.W.2d 609 (Tex. 1992) discussing issue of bond requirement. T.P.C. §131A(e).
2. Notice shall be given to all interested persons that a hearing may be requested to contest the appointment not later than the 15th day from the date letters were issued by posting and by certified mail to all known heirs by the appointee. T.P.C. §131A(h).

E. Contest

1. The court shall schedule a hearing on the contest not later than the 10th day after a timely request is made. The appointee shall serve for the period stated in the order if the request is made after the 15th day from the date letters were issued.
2. The appointee shall serve during the pendency of the contest to his appointment. See, Hawkins v. Estate of Volkmann, 898 S.W.2d 334, (Tex. App. -San Antonio 1994) discussing issue that tardy hearing did not invalidate appointment of temporary administrator. T.P.C. §131A(i).

XI. Temporary Administration Pending Will or Administration Contest

A. Purpose

This procedure applies only if no administration is pending, i.e. the contest is made before the will is admitted and a personal representative, e.g. executor, is appointed. Conversely, if an executor has been appointed the contest to a will should be filed pursuant to T.P.C. §93. See, Corpus Christi Bank & Trust v. Alice Nat'l. Bank, 444 S.W.2d 632 (Tex. 1969), Cravey v. Henning, 705 S.W.2d 368 (Tex. App. -San Antonio 1986) and

D'ynger v. DePena, 931 S.W.2d 533 (Tex. 1996) holding probate court has no authority to withhold estate funds in court registry from successor independent executor after accepting resignation of original court appointed dependent administrator.

B. Temporary Administrator's Powers

1. The temporary administrator shall have and exercise only those powers expressly set forth in the court's order and any acts performed in contradiction to said order are void. T.P.C. §§132,133. See, Lawyers Surety Corp. v. Snell, 617 S.W.2d 750 (Tex. Civ. App. -Houston [1st Dist.] 1981) holding temporary administrator to a prudent man standard and Richardson v. Lake, 966 S.W.2d 750 (Tex. App.-San Antonio 1998, no petition) relating to statute of limitations issues.
2. The court may confer all the power and authority of a permanent administrator with respect to claims against the estate. The temporary administrator must thereafter comply with all relevant statutory authority regarding claim approval/disapproval, payment thereon and give bond in the full amount as would be required a permanent administrator. T.P.C. §132(b).

C. Accounting

The temporary administrator must file with the clerk a sworn list of all estate property which came into his hands, a return of all sales made by him, and a full exhibit of all his acts at the expiration of the temporary administration. T.P.C. §134.

D. Closing Temporary Administration

The court shall immediately order the temporary administrator to deliver estate assets to the persons legally entitled thereto upon approval of the list, return, exhibit and account of the appointee. Thereafter, the appointee shall be discharged and the sureties on his bond released as to any future liability. T.P.C. §135. See, Gulf Insurance Co. v. Blair, 589 S.W.2d 786 (Tex. Civ. App. - Dallas 1979) regarding surety liability.

XII. Administrator Powers Who Succeed Independent Executor (Dependent Administration With Will Annexed)

A. Purpose

The court is empowered to appoint an administrator when the named executor(s) have died, shall die, resigned, failed to qualify or are removed from office leaving unexecuted portions of the will allowing the named executor the power to raise or borrow money and to mortgage estate property. This procedure often occurs when a contest has been filed over the appointment of a named executor. T.P.C.§154(a).

1. The court may only grant the administrator those powers granted to the executor under the terms of the probated will. T.P.C.§154(c).
2. The court may upon application, citation and hearing authorize the administrator to raise or borrow money, renew and extend a debt obligation, secure a debt obligation by pledge or mortgage upon terms and conditions it deems in the estate's best interest. T.P.C.§154(b).

B. Other Powers

The court may upon application of the administrator enlarge the administrator's powers only to the extent allowed by the decedent's will. T.P.C.§154(d).

C. Citation and Hearing

The citation shall be by posting and a hearing must be had on the application. T.P.C.§154(f),(g).

XIII. Court Appointed Successor Independent Executor

A. Purpose

This procedure allows the court to appoint a successor independent executor when the qualified executor fails to serve or is removed from office and the will does not name a successor independent executor. All the distributees must agree to the appointment of the successor independent executor. The successor independent executor acts with all the powers and privileges granted to the predecessor independent executor. T.P.C.§154A(a).

B. Who May Make Application

The application may be made by an interested party and executed by the guardian of an incapacitated distributee; a person first eligible to receive income from any testamentary trust; a life estate holder in an asset bequeathed by the will; or the personal representative of a deceased distributee. T.P.C.§154A(b),(c),(d),(g).

XIV. Withdrawing Decedent's Estate From Administration

A. Purpose

This procedure allows a distributee of a decedent's estate to make application to the court to withdraw the estate from further administration upon executing a sufficient bond to protect estate creditors.

B. Application

The applicant may petition the court at any time after the return of the Inventory, Appraisal and List of Claims to cause the personal representative to render under oath an exhibit of the estate's condition. T.P.C.§262. See, Rowe v. Dyess, 177 S.W. 521 (Tex. Civ. App. 1915) allowing an assignee of heir to withdraw estate from administration.

C. Required Bond

The court should require the applicant to deliver a bond at least double the gross appraised value of the estate conditioned that the applicant shall pay all the court approved estate claims not paid and any judgments or suits that shall be established by judgment. T.P.C.§263.

D. Court's Order

The court's order shall direct the personal representative to deliver the estate's assets to the distributees that portion to which they are entitled upon the court's approval of the bond. T.P.C.§264.

E. Discharge Order

When an estate has been withdrawn from further administration the court shall enter its order discharging the personal representative and declaring the administration closed. T.P.C.§265. See, Wallace v. Collins, 988 S.W.2d 258 (Tex. App. – Texarkana 1999, writ denied) involving a statute of limitations question on whether estate was opened or closed to compel executrix to produce an inventory, require an accounting and distribution.

F. Lien on Property

A lien exists on all property transferred to a distributee and those claiming under them with notice of the lien, to secure the bond and estate debts and claims secured thereby. T.P.C. §266.

G. Estate Partition

Any distributee may petition the court to cause the partition and distribution of estate property withdrawn from administration. The applicant for partition should pursue T.P.C. §373 et. seq. to accomplish the partition. T.P.C. §267.

H. Creditor Relief

Any estate creditor whose debt or claim is unpaid and not barred by limitations may sue on the bond of any distributee, individually or collectively, who has received estate property and any distributee's liability is limited to the proportion received. T.P.C. §§268,269. See, Wallace v. Republic Nat'l. Bank & Trust Co., 80 F.2d 787 (5th Cir. Tex. 1936) discussing creditor priority over claims against beneficiaries which arose after distribution.

XV. Setting Apart The Homestead

A. Purpose

This procedure allows the court to set aside all estate property as is exempt from execution or forced sale by the constitution and statutes immediately after the return of the Inventory, Appraisement and List of Claims or before the return of same when application has been made supported by a verified affidavit listing all the claimed exempt property. T.P.C. §271. See, Cornell v. Chandler, 11 Tex. 249 (1853), McGowen v. Zimpelman, 53 Tex. 479 (1880) concerning a court's acting sui sponte to set aside exempt property; and, Hunter v. NCNB Tex. Nat'l. Bank, 857 S.W.2d 722 (Tex. App. - Houston [14th Dist.]1993) holding child of incompetent homestead owner has no homestead protection until owner dies; and, Ward v. Braun, 417 S.W.2d 888 (Tex. Civ. App. - Corpus Christi 1967) holding spouses separate property does not affect exempt property entitlement.

1. The Rural Homestead

The court can set aside a family rural homestead not to exceed 200 acres and a single person's rural homestead not to exceed 100 acres. Tex. Prop. Code Ann. §41.002(b). A homestead is considered rural if at the time of its designation, the property is not served by municipal utilities and fire and police protection. Tex. Prop. Code Ann. §41.002(c). See, Spence v. Spence, 455 S.W.2d 365 (Tex. Civ. App. - Houston [14th Dist.]1970) holding that any married couple constitutes a family.

- a) Any acreage in excess of the designated 100 or 200 acre rural homestead constitutes an ordinary asset of the decedent's estate and may be partitioned by the distributees subject to creditor claims. See, Hough v. Shippey, 40 S.W. 332 (Tex. Civ. App. 1898) allowing the spouse to select the homestead acreage from the whole; King v. Summerville, 84 S.W. 643 (Tex. 1905) determining that court has no power to make rural homestead acreage selection; Whiteman v. Burkey, 282 S.W. 788 (Tex. 1926), Hudgins v. Sansom, 10 S.W. 104 (Tex. 1888) regarding partition of excess acreage, Riley v. Riley, 972 S.W.2d 149 (Tex. App. -Texarkana 1998, no writ) holding that a surviving a spouse may claim part of the homestead acreage if said part is shown to support the family; and, Fajkus v. First National Bank of Giddings, 735 S. W.2d 882 (Tex. App.-Austin 1987, writ denied) holding that a residence built on urban land usually precludes establishment of a rural homestead.

2. **The Urban Homestead**

The court can set aside to any person a ten acre urban homestead regardless of status, i.e. family or single person. This homestead includes any improvements thereon. Tex. Prop. Code §41.002(a). See, Person v. Levenson, 143 S.W.2d 419 (Tex. Civ. App. -El Paso 1940) and Farrington v. First National Bank, 753 S.W.2d 248 (Tex. App. - Houston [1st Dist] 1988, writ denied) holding rural and urban homesteads may not coexist. *Note, §41.002(a) changed the one acre urban homestead to a ten acre exemption. Texas voters approved the related constitutional amendment at the November 2, 1999 election.*

3. **The Residential Homestead**

The court can set aside to a claimant a residential and business homestead that may consist of one or more lots that need not be contiguous but not exceed an aggregate of ten acres. The court

may allow a surviving spouse to select a business homestead as part of the urban homestead exemption. See, Wingfield v. Hackney, 69 S.W. 446 (Tex. Civ. App. 1902) and, Farrington v. First National Bank, supra, determining that a homestead generally means the house constituting the family residence together with the land on which it stands.

4. **The Business Homestead**

Before the amendment in 1999, the urban and business homesteads could be on separate parcels, as long as these parcels were not more than one acre. A person could have a business homestead without a residence homestead. After the amendment, the urban homestead can be up to ten acres and be comprised on one or more lots as long as they are contiguous. The property must be either a home or be used as *both* a home and business. See, Stanley M. Johanson, Johanson's Texas Probate Code Annotated 288 (West 2002). Ford v. Aetna Ins. Co., 424 S.W.2d 612 (Tex. 1968); Shryock & Rowland v. Latimer, 57 Tex. 674 (Tex. 1882); and, Vistron Corp. v. Winstead, 521 S.W.2d 754 (Tex. Civ. App. - Eastland 1975) holding that a business homestead must be in the same city, town or village as the urban homestead.

B. To Whom Delivered

The court should order the homestead to be delivered to the qualified applicant but the surviving spouse has priority against all other claimants. T.P.C. §272. See, Franklin v. Woods, 598 S.W.2d 946 (Tex. Civ. App. - Corpus Christi 1980).

C. Homesteader's Responsibilities

The court should find the surviving spouse or other homestead claimant in possession responsible for the satisfaction of property taxes, maintenance and repairs and mortgage interest. See, Daken v. Daken, 83 S.W.2d 620 (Tex. 1935), Sargeant v. Sargeant, 19 S.W.2d 382 (Tex. Civ. App. 1928) and, Cornerstone Bank, N.A. v. Randle, ___ S.W.2d 580 (Tex. App. - Dallas 1993, writ ref'd) holding that a surviving spouse was not personally liable for taxes and a lien did not attach to possessory homesteaders interest.

1. **Remainderman's Obligations**

The surviving spouse *is not* responsible to insure the homestead for the benefit of the remainderman or to satisfy the mortgage principal. See, Copeland v. Tarrant Appraisal Dist., 906 S.W.2d

148 (Tex. App.- Fort Worth, 1995, writ denied) holding that a life tenant rather than the remainderman will pay taxes on property.

D. Homestead Liability For Debt

The court should order the homestead to be delivered exempt from creditor claims except for the purchase money mortgage, taxes, work and material used in the construction of improvements on the property, an owelty of partition imposed against the entirety of the property by court order or by a written agreement of the parties to the partition, the refinancing of a lien against the homestead, an extension of credit on the homestead if same meet the requirements of Section 50 (a) (6), Article XVI, Texas Constitution, and reverse mortgages. T.P.C.§270; Tex. Const. Art. XVI, §50; Tex. Prop. Code Ann. §41.001.

1. Mechanic's and Materialman's Lien

The court should construe a mechanic's and materialman's lien on a homestead to be valid when it was contracted for in writing *before* any material or labor is furnished and made in the manner required for the sale and conveyance of the homestead. T.P.C.§270; Tex. Prop. Code 53.254(a)(b)(c); Hruska v. First State Bank of Deanville, 747 S.W.2d 783 (Tex.1988); Boyle v. Paul, 86 S.W.2d 744 (Tex. 1935); Sutton v. Lewis, 176 S.W.2d 765 (Tex. Civ. App. 1943); Connor Bros. V. Williams, 112 S.W.2d 709 (1938) holding generally that the homestead may be sold to satisfy a valid lien thereon.

E. Homestead Partition

1. When Not Partitionable

The court must not partition the homestead among the decedent's heirs during the lifetime of the surviving spouse, during the period occupied as a homestead or during the period it is occupied by the decedent's minor children. T.P.C.§284.

2. When Partitionable

The court may allow the partition of the homestead when the surviving spouse dies, sells the homestead interest or elects to no longer use or occupy the homestead, or when the proper court no longer permits the guardian of the minor children to use or occupy the homestead. T.P.C.§285. See, Sparks v. Robertson, 203 S.W.2d

622, (Tex. Civ. App. 1947); Rancho Oil Co. v. Powell, 175 S.W.2d 960 (Tex. 1943) regarding homestead abandonment.

3. **Unmarried Adult Child**

The court should not allow an unmarried adult child to claim a right of occupancy that would prevent the partition of the homestead among the heirs. T.P.C. §§271,284,285. See, Patton v. Byrd, 75 S.W.2d 456 (Tex. Civ. App. 1934); Cline v. Niblo, 8 S.W.2d 633 (Tex. 1928); Lindsey v. Lindsey, 163 S.W.2d 633 (Tex. 1942) holding that homestead right of surviving spouse cannot be defeated by testamentary disposition, Estate of Casida, 13 S.W.2d 519 (Tex. App. –Beaumont 2000, no writ) holding, inter alia, that adult child may not reside in homestead if devisee moves to partition the property, Hunter v. NCNB Tex. Nat'l Bank, 857 S.W.2d 722 (Tex. App. – Houston [14th Dist] 1993, writ denied) holding a homestead owner's child has no homestead protection until owner dies.

XVI. Setting Apart Exempt Property

A. Certain Personal Property

The court should set aside certain personal property for the benefit of the surviving spouse upon proper application. T.P.C. §271. See, Connell v. Chandler, 11 Tex. 249 (1853) allowing a set aside upon application by the surviving spouse or on the court's own motion; Ward v. Braun, 417 S.W.2d 888 (Tex. Civ. App. - Corpus Christi 1967) explaining that fact of surviving spouse's separate property does not affect entitlement to exempt personal property.

1. **Exempt Property Defined**

The court should exempt from execution or forced sale that personal property protected by the Texas Constitution and statutes to be set aside to the family, e.g. furniture, tools of a trade, automobile, wearing apparel, etc. Tex. Const. Art. XVI, §49; Tex. Prop. Code §§42.002, 42.0021

2. **Dollar Limitations**

The court should grant a family a personal property exemption of not more than \$60,000.00 and not more than \$30,000.00 to a single adult who is not a member of the constituent family. The respective exemptions do not apply to encumbrances properly

established, e.g. liens, security interests. Tex. Prop. Code §42.001(a)(1)(2).

- a) The court may also exempt a decedent's current wages, professionally prescribed health aids, alimony, support or separate maintenance and unpaid commissions for personal services not to exceed 25% of the statutory aggregate limitations from the dollar limitations above stated. Tex. Prop. Code §42.001(b)(d).

3. **Creditor Claims**

The court shall hold the exempt personal property liable for only the payment of Class I claims, i.e. funeral and last sickness expenses not to exceed \$15,000.00. T.P.C. §§281, 320, 322. See, Bunting v. Pearson, 430 S.W.2d 470 (Tex. 1968) stating that T.P.C. §§320, 321 and 322 apply to independent administrations.

4. **Allowance In Lieu of Exempt Property**

The court must make a reasonable allowance of not more than \$15,000.00 when there is no homestead to set aside; and, not more than \$5,000.00 for non-existent exempt personal property. T.P.C. §273. See, Kennedy v. Draper, 575 S.W.2d 627 (Tex. Civ. App. 1978) and San Angelo Nat'l. Bank v. Wright, 66 S.W.2d 804 (Tex. Civ. App. 1933).

- a) The allowance may be paid in cash from assets reflected in the inventory. T.P.C. §274.
- b) The sale of estate assets may be required if there are insufficient funds to pay the allowances. T.P.C. §§276 & 293. See, Barnett v. Barnett, 206 S.W.2d 273 (Tex. Civ. App. 1947) holding that a surviving spouse who abandons the decedent before death forfeits rights to allowances in lieu of the homestead, exempt property and a family allowance.
- c) The executor or independent administrator should deliver exempt personal property or its substituted money allowances in the following priority.

<u>Exempt Personal Property</u> T.P.C. §272	<u>Allowance</u> T.P.C. §275
Surviving spouse with no children	same
Surviving spouse and decendent's children	same
No surviving spouse but equal surviving adult children shares and/or guardian of minor children	same and in money
Surviving step-parent spouse takes ½ and ½ to children of decedent living at home or minors	½ to surviving spouse; and, ½ equally divided among all children, i.e. step and natural

XVII. The Family Allowance

A. No Means of Financial Support

This special procedure allows the court to provide the surviving spouse an allowance to furnish a remedy where the survivor has no means of financial support the year following the decedent's death. T.P.C. §286. See, Noble v. Noble, 636 S.W.2d 551 (Tex. App. - San Antonio 1982) Ward v. Braun, 417 S.W.2d 888 (Tex. Civ. App. - Corpus Christi 1967), and Orvalle v. Ovalle, 604 S.W.2d 526 (Tex. App. -Waco 1980, no writ) holding that a widow convicted of murdering the decedent is not entitled to a family allowance.

1. Determination of Amount

The independent executor determines the amount of the family allowance in an independent administration and the court determines it in a dependent administration. See, Gonzalez v.

Guafardo de Gonzalez, 541 S.W.2d 865 (Tex. App. –Waco 1976, no writ) holding that the amount of family allowance is determined on a case by case basis and is subject to discretion of court.

2. **Separate Estate**

The court should not approve the allowance if the surviving spouse has adequate separate property for her maintenance. T.P.C. §288. See, Churchill v. Churchill, 780 S.W.2d 913, (Tex. App. -Fort Worth 1989).

3. **How Paid**

The court should order the allowance be paid in a lump sum or in installments. T.P.C. §287. See, Pace v. Eoff, 48 S.W.2d 956 (Tex. Comm. App. 1932) holding the allowance is paid from the entire community estate.

4. **Creditor Claims**

The law prefers the family allowance be paid in preference to all debts except last illness and funeral expenses to a maximum amount of \$15,000.00. T.P.C. §§290, 322. See, Blair v. State, 640 S.W.2d 867 (Tex. 1982) holding state had valid judgment against estate and administrator who failed to list its lien in final accounting, Bailey v. Cherokee Appraisal Dist., 862 S.W.2d 581 (Tex. 1993), holding estate taxes represent claims against the estate and heirs are not personally liable thereon; and, Walton v. First Nat'l Bank of Trenton, 956 S.W.2d 647 (Tex. App.-Texarkana 1997, writ denied) holding an express vendor's lien is superior to class 1 and 2 claims.

5. **Priority of Payment**

The priority of payment is outlined in T.P.C. §291 and step children are excluded.

6. **Sale of Estate Assets**

The court may order the sale of estate assets to raise funds for the family allowance. The court may not order the sale of assets specifically bequeathed to another unless there is no other property available. T.P.C. §§292,293. See, Allen v. Ramey, 226 S.W. 489 (Tex. Civ. App. 1921) holding that in no event may the court order the sale of the homestead to satisfy the family allowance.

Conversely, if excess acreage exceeding the rural or urban homestead is sold the net sales proceeds can be used to pay the family allowance. Groos Nat'l. Bank of San Antonio v. Merchant, 459 S.W.2d 483 (Tex. Civ. App. -San Antonio 1970); George v. First Nat'l. Bank of Tulia, 67 S.W.2d 324 (Tex. Civ. App. 1933); Brooks v. San Antonio Joint Stock Land Bank, 154 S.W.2d 952 (Tex. Civ. App. 1941).

7. **Solvent Estate**

If the estate is solvent the court may order the personal property set aside to the surviving widow, excepting the homestead or any allowance in lieu thereof, shall be subject to partition and distribution upon final settlement. See, Kelly v. Shields, 448 S.W.2d 135 (Tex. App. -San Antonio 1969), and Bolton v. Bolton, 977 S.W.2d 157 (Tex. App.-Tyler 1998, no pet. h.). Conversely, the exempt property shall vest entirely with the surviving spouse and children, subject only to expenses of last illness and the funeral, if the estate is insolvent. T.P.C. §§279, 281.

Caveat: The 75th Texas Legislature has amended T.P.C. §§281, 290 by deleting the references to funeral expenses and expenses of last illness. The phrase Class I claims has been substituted therefor. A class I claim is a claim for funeral expenses and expenses of last illness T.P.C. §322. The legislature has amended this section to allow a total of \$15,000.00 for these expenses.

XVIII. Certain Personal Property to Be Sold (A.K.A. Burdensome or Worthless Property)

A. Purpose

This section requires a personal representative to dispose of estate assets that are burdensome to the estate. T.P.C. §234(a)(6).

1. Application

The representative of an estate, after the approval of inventory and appraisal, shall promptly apply for an order of the court to sell all of the estate that is liable to perish, waste or deteriorate in value or that will be an expense or disadvantage to the estate if kept. Property exempt from forced sale, specific legacies, and personal property necessary to carry on a farm, ranch, factory, or any other

business which the representative feels that it is best to continue shall not be included in such sales.

2. Hearing

The court shall consider the representative's duty to take care of and manage the estate as a person of ordinary prudence, discretion, and intelligence would exercise in the management of the person's own affairs and whether the asset constitutes an asset that a trustee is authorized to invest under § 113.056 of the Texas Property Code in determining whether to order the sale of an asset under this section. For example, a low-yielding stock subject to rapid fluctuation in value could be sold by an independent executor under this provision. See, McInnis v. Corpus Christi Nat'l Bank, 621 S.W.2d 451 (Tex. Civ. App. Corpus Christi 1981, writ ref'd n.r.e.)

XIX. Procedure When Estate Representative Neglects To Apply For Authority (Mineral Interests)

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A. Purpose

The purpose of this procedure is to allow the court to remedy a situation wherein a personal representative fails to apply to the court for authority to enter into a mineral development, pooling, unitization or royalty lease agreement affecting the decedent's real property. T.P.C. §371.

1. **Application**

The application may be made by any interested person to show cause why the personal representative should not enter into a lease.

- a) The court shall establish the date and time of the hearing after citation has been returned on the personal representative.

2. **Hearing**

The court shall enter its order requiring the personal representative to immediately file an application to enter a mineral development lease if same is in the estate's *best interest*.

- a) The personal representative will thereafter follow the application process for mineral development leases and pooling or unitization agreements pursuant to T.P.C. §§367, et. seq.

XX. Partition And Distribution of Estate

A. Purpose

The purpose of this procedure is to allow the court to grant the distributees a complete or partial distribution of estate assets contingent upon a statutory time period. T.P.C. §373. See, In Re Estate of Minnick, 653 S.W.2d 503 (Tex. App.- Amarillo, no writ).

1. Application for Complete Partition

The court may hear an application for the complete partition of the decedent's estate any time after the expiration of twelve months from the original grant of letters. T.P.C. §373(a).

2. Application Contents

The application must state the person's estate sought to be partitioned and distributed; the names and residences of all persons entitled to a share of the decedent's estate; whether they are adults or minors; why these facts are unknown, if unknown; and, why the court should order the partition and distribution of the estate. T.P.C. §373(b).

3. Citation

Each distributee residing in the state shall be personally served and those distributees whose identities or addresses are unknown or non-residents shall be served by publication. T.P.C. §374.

- a) The personal representative shall be personally served when the application is filed by a distributee. T.P.C. §375.
- b) The court shall appoint an attorney ad litem to represent the interest of any heir(s) whose names or whereabouts are unknown or in the event the defendant is an incapacitated person. T.P.C. §53(c). *Note, the wording of this section changed from discretionary to mandatory following passage of HB 2731 during the 77th Legislative session.*

4. **Hearing**

The court shall ascertain at the hearing the residue of the estate subject to partition and distribution; the persons who are by law entitled to receive a portion of the decedent's estate and their respective share; and, whether any advancements have been made, their value, and order any paid advancement placed in hotchpotch per the laws of intestate succession. T.P.C. §377.

5. **Partial Distribution**

The applicant may petition the court for a partial distribution at any time after the original grant of letters and the filing of the inventory, appraisal and list of claims. T.P.C. §373(c).

- a) **Citation** - All interested parties must be personally cited *including known creditors*. T.P.C. §373(c).
- b) **Hearing** - The court may distribute any portion of the estate it deems advisable. T.P.C. §373(c).
- c) **Refunding Bond** - The court may require a refunding bond if less than all the distributees are to receive a distribution in an amount to be determined by the court. T.P.C. §373(c).
- d) **Distribution** - The court should order a partial distribution of the estate after its approval of the bond, unless the bond requirement is waived in writing by all interested parties. T.P.C. §373(c).

6. **Partitioning Estate of Money or Debts Only**

The court shall fix the amount to which each distributee is entitled and shall order the payment and delivery thereof by the personal representative if the estate consists only of money or debts due the estate. T.P.C. §379.

7. **Partition When Property Capable of Division**

The court shall appoint three (3) or more disinterested persons as commissioners to make a partition and distribution when the estate consists, in whole or in part, of real property.

- a) **Waiver** - The court may waive the appointment of commissioners if it has earlier determined that the estate is incapable of partition. T.P.C. §380(a). See, Parkins v. Martin, 395 S.W.2d 862 (Tex. Civ. App. - Amarillo 1965) regarding court's failure to appoint commissioners.
- b) **Service** - The appointed commissioners shall be served with a writ of partition commanding them to partition the property in accordance with the court's order by mail or personal delivery on any one of the appointed commissioners; and, notifying the others verbally or otherwise. T.P.C. §380(b).
- c) **Court Action** - The court shall hear all objections to the commissioners report and if the recommended division has been fairly made according to law the court shall approve the report and enter a judgment vesting title in the distributees to their proportional interest. T.P.C. §380(e). See, Estate of Querner, 974 S.W.2d 159 (Tex. App. -San Antonio 1998, writ denied) finding sufficient evidence to support jury verdict of unequal partition not being fair; and, Yturria v. Kimbro, 921 S.W.2d 338 (Tex. App. -Corpus Christi 1996, no writ) regarding right to jury trial or division of realty.

8. **Partition When Property Incapable of Division**

The court shall make a written finding when in its opinion the decedent's property is incapable of division. The order shall provide that the personal representative sell the property pursuant to the real property sale statutes, i.e. T.P.C. §§342 et. seq. [T.P.C. §381(a),(b)].

- a) The court must require that any distributee who purchases estate property pay or secure only that amount of the purchase price that exceeds his proportional interest in the decedent's estate. T.P.C. §381(c).
- b) The court may require a mirror proceeding in another county wherein a portion of the decedent's estate is located and appoint additional commissioners to fairly determine its partition. T.P.C. §382.

9. **Damages For Neglect To Deliver Property**

The court may assess damages against a personal representative who neglects to deliver to a distributee any portion of the decedent's estate earlier ordered partitioned and distributed. T.P.C. §384.

- a) **Application** - Any distributee who has not had his proportional interest delivered to him may petition the court by written complaint alleging the fact of such neglect, the date of his demand and other relevant facts.
- b) **Citation** - The citation shall be personally served upon the personal representative.
- c) **Hearing and Damages** - The court, upon satisfactory evidence, shall enter an order that the personal representative is guilty of neglect and assess damages at the rate of ten percent (10%) of the amount or appraised value of the share so withheld, *per month*, for each month or fraction thereof *from the date of demand*.

10. **Partition of Community Property**

The surviving spouse to a community estate may petition the court to partition the community property at any time after letters have been issued and the inventory, appraisal and list of claims have been returned. T.P.C. §385(a).

- a) **Required Bond** - The court shall require the applicant to post a bond in an amount equal to the value of the survivor's one-half (1/2) community interest *conditioned* upon the payment of one-half (1/2) of all community property debts. T.P.C. §385(b).
- b) **Court Order** - The court shall partition the community property into two (2) moieties, one to be delivered to the surviving spouse and the other to the personal representative. The code provisions appertaining to the partition of property, i.e. T.P.C. §§380,381, shall apply. T.P.C. §385(b). See, In re Estate of Furr, 553 S.W.2d 676 (Tex. Civ. App. -Amarillo 1977) regarding partition of closely held corporate stock.
- c) **Lien Upon Property Delivered** - A lien shall exist upon the one-half (1/2) interest partitioned to the surviving spouse to secure the bond. T.P.C. §385(c).

11. **Partition of Jointly Owned Property -**

The court may allow the partition of jointly owned property of a decedent upon the same terms and conditions applicable to the partition of community property pursuant to T.P.C. §385. [T.P.C. §386]. See, Deviney v. Nations Bank, 993 S.W.2d 443 (Tex. App. –Waco 1999, writ denied) respecting restraint on cotenant’s power to partition.

12. **Partition Expenses -**

The court shall order that the expenses of partitioning a decedent’s estate shall be paid by the distributee’s pro rata, and each distributee’s property is liable to the extent of his proportional interest. T.P.C. §387.

XXI. Payment Of Estates Into State Treasury

A. Purpose

The purpose of T.P.C. §427 is to allow the court to order a distributee’s portion of a decedent’s estate to be paid to the Comptroller if after six (6) months from the court’s partition order or approval of the final account the distributee has not made demand for his proportional share of the estate.

1. **Court Action -**

The court upon written application, e.g. estate’s attorney, may order a distributee’s share of money to be paid directly to the comptroller and the sale of other property upon terms determined by the court with all net cash proceeds paid to the comptroller allowing reasonable compensation to the personal representative for executing the order. T.P.C. §427.

2. **Comptroller As Indispensable Party**

The comptroller is an indispensable party under T.P.C. §427 and the court’s clerk shall serve the comptroller within five (5) days by personal service a certified copy of the court’s order. T.P.C. §428.

3. **Penalty For Neglect To Notify Comptroller**

The clerk shall be liable in a penalty of one hundred dollars (\$100.00) for failure to notify the comptroller and the penalty may be recovered in an action instituted by the State of Texas which judgment shall be equally divided with the informer. T.P.C.§429.

4. **Comptroller's Receipt**

The comptroller shall give the personal representative a receipt for funds received and the receipt shall be filed in the minutes of the court. T.P.C.§430.

5. **Penalty For Failure To Make Payment**

The court shall order the personal representative, after 30 days from the original order and upon personal service and a hearing with proof thereof, to pay damages at the rate of five percent (5%) per month, for each month or fraction thereof, that the payment was not made. T.P.C.§431.

6. **Comptroller's Suit To Collect Damages**

The comptroller may petition the court to show cause the personal representative why he should not be held in contempt for non payment, or institute suit against his sureties through the county or district attorney or the attorney general's office. T.P.C.§432.

7. **Distributee's Action To Recover Funds**

A distributee may institute suit to recover funds paid to the comptroller within four (4) years of the court's order requiring payment to the comptroller. T.P.C.§433(a).

- a) **Venue** - The suit must be instituted in a Travis County District Court. T.P.C. §433(a).
- b) **Citation** - The comptroller shall be served by personal service and may be defended by the county or criminal district attorney or the attorney general's office. T.P.C.§433(b).
- c) **Judgment** - The distributee is entitled to payment of his funds from the comptroller's office upon presentment of a certified copy of a judgment in his favor. T.P.C.§433(c).

- d) **Costs** - The costs of any suit shall in all cases be adjudged against the plaintiff and he may be required to secure his costs. T.P.C.§433(d).

XXII. Community Property With Right of Survivorship

A. Purpose

The purpose of this procedure under T.P.C.§451 is to allow spouses to agree between themselves that all or part of their community property becomes the property of the survivor upon the death of the other. See, Haas v. Voigt, 940 S.W.2d 198 (Tex. App. - San Antonio 1996) holding that right of survivorship can be created in community property; and, Evans v. First Nat'l Bank of Bellville, 946 S.W.2d 367 (Tex. App.-Houston [14th Dist.] 1997, writ denied) discussing admissibility of extrinsic evidence concerning funds subject to a survivorship account.

B. Formalities

Per T.P.C.§452, the agreement must be in writing and signed by both spouses and include any of the following phrases:

1. "with right of survivorship";
2. "will become the property of the survivor";
3. "will vest in and belong to the surviving spouse"; or,
4. "shall pass to the surviving spouse."

C. Ownership and Management During Marriage

The agreement to create a right of survivorship in community property does not affect a spouse's management, control or disposition during the marriage unless it otherwise provides. T.P.C.§453.

D. Transfers Non-Testamentary

Any transfers of property by virtue of the agreement are not testamentary transfers unless otherwise expressly provided by the Texas Probate Code. T.P.C.§454.

E. Revocation

The agreement may be revoked by its terms and if no written method of revocation exists it may be revoked by a written instrument signed by both spouses or by one spouse and delivered to the other spouse.

1. The agreement may be revoked as to specific property, unless otherwise provided in the agreement, by disposition of same by one or both spouses, e.g. sale or gift of specific property during life. T.P.C.§455. See, Haas v. Voigt, 940 S.W.2d 198 (Tex. App. - San Antonio 1996) holding survivorship agreements were not revoked by execution of new account agreements.

F. Proof of Agreement

The agreement to create a right of survivorship in community property is effective without an adjudication. T.P.C.§456(a).

1. Application For Adjudication

A surviving spouse or her personal representative may file an application with the court for an order stating that the agreement satisfied code requirements and is effective to create a right of survivorship. T.P.C.§456(a).

2. Application Contents

Per T.P.C.§456(a), the application must include the following:

- a) The name and domicile of the surviving spouse;
- b) The decedent's name, domicile and fact, time and place of death;
- c) Facts establishing venue; and,
- d) The decedent's social security number, if known.

3. Proof Required

The applicant must prove to the satisfaction of the court the following:

- a) The death of a spouse to the agreement;
- b) The court has jurisdiction and venue;

- c) The agreement was executed with the formalities required by law;
- d) The agreement was not revoked; and,
- e) Citation is returned in the manner and time required by the code. T.P.C.§456(b).

4. **Method of Proof**

- a) The decedent's signature may be proven by the sworn testimony of one (1) witness in open court or by the witness's affidavit or deposition.
- b) The surviving spouse' signature may be proven by her sworn testimony in open court or by her affidavit, deposition, or if she is incompetent, in the manner provided for the decedent's signature. T.P.C.§456(c).

5. **Court Action**

The court, upon satisfactory evidence at the hearing, shall enter an order adjudging the agreement valid. T.P.C.§457.

6. **Effect of Order**

The court's order "...shall constitute sufficient authority to all persons owing money, having custody of property or acting as registrar or transfer agent...and to persons purchasing from or otherwise dealing with the surviving spouse for payment or transfer to the surviving spouse, and the surviving spouse may enforce his or her right to such payment or transfer." T.P.C.§458.

7. **Custody Of Adjudicated Agreements**

The original of the adjudicated agreement remains in the custody of the county clerk unless by court order its removal is ordered whereupon the applicant will give the clerk a receipt therefor. T.P.C.§§459,90.

8. **Protection Of Others Acting Without Knowledge**

A personal representative who sells, exchanges, distributes or otherwise disposes of the decedent's property without knowledge of the agreement has no liability therefor. T.P.C.§460.

- a) Any person or entity who purchases real or personal property from a distributee after the lapse of six (6) months from the decedent's death, for value without notice shall have good title to the interest purchased. T.P.C.§460(b)(1).
- b) Any person or entity who purchases real or personal property from the decedent's personal representative shall have good title to the interest purchased. T.P.C.§460(b)(2).

9. **Purchasers Without Notice Of Agreement Revocation**

A bona fide purchaser for value, without notice, who purchases an interest in the decedent's estate from the surviving spouse based on the agreement after six (6) months from the decedent's death has good title as against the decedent's personal representative or his distributees. T.P.C.§460(c).

XXIII. Last Thoughts

I have found from twenty three (23) years of active practice, fifteen (15) years of teaching and eight (8) years as a statutory probate court judge that I can generally convince anyone that I know what I am talking about if I have the following five (5) books at my disposal:

1. Johanson's Texas Probate Code Ann. 2002, Professor Stanley M. Johanson. West Group, 800-344-5009. This book has become the probate practitioner's bible and is a "must have" book for your chambers and from which much material for this article was used.
2. O'Connor's Texas Rules - Civil Trials, 2002, Justice Michael M. O'Connor. Jones McClure Publishing, Inc., P.O. Box 540546, Houston, Texas 77254, telephone number 1-800-OCONNOR. This wonderful softbound desk reference gives you all the Texas Rules of Civil Procedure, Evidence and Appellate Procedure. Most importantly, the rules are accompanied by commentaries that make otherwise difficult material really, really simple to understand.
3. O'Connor's Annotated C.P.R.C. Plus, 2002, same author and publisher as item A. above. Again, Justice O'Connor makes the Civil Practice and Remedies Code so simple to understand you will want to take it as light reading on your next vacation.
4. Courtroom Handbook On Texas Evidence - 2002, Goode, Wellborn & Sharlot, West Publishing Co., 610 Opperman Drive, St. Paul, MN 55164, telephone number 1-800-328-9352. Do you remember that this softbound desk reference on evidence was given to you at "*baby judges school!*" Chapter 7 - "*Common*

Objections And Responses” is an excellent quick reference guide to objections and what your response should be. Give it a try and I promise the local bar will eventually think you are related to Clarence Darrow.

5. Texas Evidentiary Foundations - Civil and Criminal, Schlueter, Onion, Barrow & Imwinketried, 1992, The Miche Company - Law Publishers, Charlottesville, Virginia. This is an excellent hardback reference book on evidence in the event you do a great deal of trial work. Excerpts from trials are presented so you can get a true, first hand feeling for the objection and the court’s ruling.

XXIV.Conclusion

I have diligently attempted to present special procedures material that you should encounter in your day to day role as a Constitutional County Court Judge. I have tried to present matters that require *your* thought process and action thereon and not necessarily that of a court clerk or staff member. I have made every effort to rid my presentation and this article of the ever present and admittedly boring legalese/verbiage.

The use of references to code sections and case law was de-minimis in my presentation. However, this article abounds with references for your future use. I have steadfastly refused to recite complete code provisions for (i) I am not particularly interested in padding this article, (ii) the recitation of whole code provisions without any analysis doesn’t help anyone, (iii) to do so is an insult to your intelligence as you can read them in the Texas Probate Code as well as I can, and, (iv) this article is intended as a quick reference guide for over worked, understaffed, intellectually and emotionally taxed judges awaiting the economic largesse of our exalted county commissioners.