DEATH AFTER DIVORCE

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CHAPTER 32

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DEATH AFTER DIVORCE:

I. INTRODUCTION

Issues can arise upon the death of one party to a final divorce decree where there are unsatisfied payments, unfulfilled obligations, obligations to be performed at death, child support arrearages, and future child support payments owed. In general, the Texas Family Code governs circumstances affecting family relationships and property prior to death, and the Texas Probate Code addresses such issues after death. However, these worlds may collide when, after a divorce, one of the former spouses dies, and unanticipated consequences may result. This paper identifies some of the issues that may arise and discusses applicable rules and principles in an effort to assist family law attorneys in planning and drafting agreements incident to a divorce and decrees, estate planning attorneys in advising and drafting estate planning documents, and probate attorneys in administering estates involving these issues.

II. JURISDICTION OVER ACTIONS AFTER DEATH OF PARTY TO DIVORCE

A. Family Courts

1. Divorce Pending at Death.

The death of a party to a pending divorce proceeding abates the divorce action because a divorce action is a purely personal matter. Dohrn v. Delgado, 941 S.W.2d 244, 248 (Tex.App.- Corpus Christi 1996, no writ). The proper procedural disposition of a divorce action when one of the parties dies is dismissal. The family court lacks jurisdiction to consider the matter further, including the pendent property and child custody issues. Whatley v. Bacon, 649 S.W.2d 297, 299 (Tex. 1983); Smelscer v. Smelscer, 901 S.W. 2d 708, 709-10 (Tex. App. - El Paso 1995, no writ) (grandmother’s intervention in a divorce case that was dismissed when husband died was ineffective because there was no action in which to intervene, and grandmother must seek relief by filing an original custody action); Parr v. White, 543 S.W.2d 445 (Tex. Civ. App.–Corpus Christi 1976, writ ref’d n.r.e.) Jurisdiction over property issues then shifts to the probate court, which determines the disposition of the deceased spouse’s property. The surviving spouse retains spousal status regarding provisions under a will or the intestacy clause.

PLANNING TIP: To avoid extremely unpalatable results (including corpses rolling over in graves), it is critical that a party to a divorce action immediately revise his or her will to exclude their soon-to-be former spouse. However, the Dallas County Standing Order prevents changing life insurance beneficiaries during the pendency of the divorce.

When temporary orders have been issued regarding minor children, they are not affected by the dismissal of the divorce action. The family court does not retain jurisdiction over the child pursuant to the divorce action, but pursuant to its continuing authority to act in the best interest of the child until a court with permanent jurisdiction makes a final determination. In Dohrn, the court stated that the death of a conservator does not terminate the continuing jurisdiction of the court that rendered the decree over the children because they are still subject to further orders and supervision by the court as long as they are minors. Dohrn, 941 S.W.2d at 248. There generally is no custody determination to be made if only one parent dies because the other parent is the natural guardian of his or her children. Upon the death of the managing conservator, the divorce decree no longer constitutes a valid order governing possession, and the surviving parent then becomes entitled to physical possession of the children. Id. at 247; citing Greene v. Schuble, 654 S.W.2d 436 (Tex. 1983).

If the parties to a pending divorce have entered into a Mediation Settlement Agreement and one party dies before entry of the final divorce decree, the Mediated Settlement Agreement is immediately binding and will be enforced under section 154.071 of the Texas Civil Practice and Remedies code and Rule 11 of the Texas Rules of Civil Procedure. See Spiegel v. KLRU Endowment Fund, 228 S.W.3d 237 (Tex. App.–Austin 2007) review denied (Sept. 28, 2007) rehearing of petition for review denied (Feb. 15, 2008) discussed below.

2. Post-Death Proceedings

If a former spouse dies after entry of the final divorce decree and provisions in the decree have been violated or remain to be fulfilled, the other spouse has basically two procedural options: 1) bring a proceeding to enforce the obligations in the divorce decree under the Family Code through specific performance, to reduce the award to a money judgment, or any other specified remedies, or; 2) file suit for breach of contract, constructive fraud, and other common law claims and seek damages and/or imposition of a constructive trust. The personal representative of the decedent’s estate, if there is one, must be named as a defendant. Any person holding funds outside of the decedent’s estate over which a constructive trust is sought also should be named as a party.
a. Property Division and Other Obligations

The family court that issued the final divorce decree has continuing jurisdiction to enforce the property division specified in the divorce decree. *Tex. Fam. Code §§ 9.001 & 9.002.* A suit to enforce the division of tangible personal property in existence at the time of the decree must be filed before the second anniversary of the date the right to the property matures or accrues or the decree becomes final, whichever date is later, or the suit is barred. *Tex. Fam. Code § 9.003(a).* A suit to enforce the division of future property in existence at the time of the original decree must be filed before the second anniversary of the date the right to the property matures or accrues or the decree become final, whichever date is later, or the suit is barred. *Tex. Fam. Code § 9.003(b).* The family court may not amend, modify, alter or change the division of property made or approved in the final divorce decree. The order to enforce the property division is limited to an order to assist in the implementation of or to clarify the prior order and may not alter or change the substantive division of property. *Tex. Fam. Code § 9.007.* Under the Family Code, the family court has the following options to enforce property division and other obligations in the divorce decree:

4. Reduce an award to a money judgment for failure to comply or for delinquent payments (*Tex. Fam. Code § 9.010*); and

The family court also has jurisdiction over a breach of contract suit (under common law) for violation of the property settlement agreement (“PSA”) or other Agreement Incident to a Divorce (“AID”) and/or terms of the divorce decree. *Binkley v. Wade, 703 S.W.2d 321 (Tex. App.–Waco 1985, writ ref’d n.r.e).* However, the court which granted the divorce does not have exclusive jurisdiction to hear a suit brought to enforce the PSA entered into upon divorce. *Underhill v. Underhill, 614 S.W.2d 178, 180 (Tex. App.– Houston [14th], 1981, writ ref’d n.r.e).* In Underhill, the court stated that the action to enforce a contract to make monthly payments provided for in a property settlement agreement is an independent action on a contract and is not a matter incident to divorce. *Id.*

b. Child Support (“Suit Affecting Parent/Child Relationship”)

The family court that issued the final order in a “Suit Affecting a Parent/Child Relationship” (“SAPCR”) has continuing, exclusive jurisdiction to modify the order relating to conservatorship, possession and access to the child, and child support. *Tex. Fam. Code §§ 155.001-155.003; 157.269; Fleming v. Easton, 998 S.W.2d 252 (Tex. App.–Dallas 1999, no pet.); Curtis v. Gibbs, 511 S.W. 2d 263, 266 (Tex. 1974).* The family court’s continuing jurisdiction relating to child support matters is exclusive. *Fleming v. Easton, 998 S.W.2d at 252; Williams v. Patton, 821 S.W. 2d 141 (Tex. 1991).* Family Code Section 157.269 was amended in 2007 to clarify that the court which renders the support order retains jurisdiction to enforce that order until the support obligation has been fully satisfied and that the amounts of periodic payments on current support and/or arrearages may be “adjusted” in subsequent enforcement actions. A SAPCR, over which the court rendering the original decree has continuing and exclusive jurisdiction, includes (1) collection of delinquent child support and modification of support orders, and (2) a suit to enforce or modify a child support obligation order. *Tex. Fam. Code §§ 156.001-157.001.* However, a suit to enforce the terms of a support agreement as contract terms is not a SAPCR; it is brought under the common law, and is not within the issuing court’s continuing, exclusive jurisdiction. *Carson v. Korus, 575 S.W.2d 326, 328 (Tex. App.–San Antonio 1979, no writ).*

In *Williams v. Patton, 821 S.W. 2d 141 (Tex. 1991),* the Texas Supreme Court held that a family court retains exclusive jurisdiction to enforce its child support orders, but once child support arrearages are reduced to a money judgment, the judgment may be presented to the deceased obligor’s estate for payment like any other debt. Absent a money judgment, a probate court lacks jurisdiction to consider the obligee’s claims. *Fleming at 255.* The legislature intended the court ordering the child support obligation to continue to supervise payments. *Williams at 143.* Because it is a duty and not a debt until it is reduced to judgment or the court with continuing jurisdiction loses jurisdiction, the parties are prohibited from contracting for payment of arrearages. *Id.* At 146. The Court states that “[r]equiring that the trial court to reduce arrearages to a final judgment before such agreements can be entered into protects the interests of the child by encouraging payment of child support and protects the interests of the custodial parent by equalizing the bargaining positions of the parties.” *Id.* At 146. Therefore, a family court retains jurisdiction to enforce its prior orders for child support, even though
it might not have jurisdiction over the conservatorship-guardianship any longer. However, if a proceeding is brought to enforce child support as a contract action, it is not a SAPCR, so the family court does not have exclusive jurisdiction. Carson, 575 S.W. 2d 326.

The death of the child support obligor under the divorce decree does not affect the family court’s continuing, exclusive jurisdiction unless the probate court, where the decedent’s estate is pending, “divests” the family court of its continuing, exclusive jurisdiction. Fleming @ 255. It is not clear how a probate court can “divest” the continuing, exclusive jurisdiction of a family court. Such jurisdiction is not automatically divested by the death of the obligor. The death of one of the parties to a divorce decree does not terminate the continuing jurisdiction of the court which appointed the conservator and any minor children are still subject to further orders and supervision by the court as long as they are minors. Dohrn, 941 S.W.2d at 248. Query whether a probate court could “divest” the family court of its continuing jurisdiction by transferring the case once filed in the family court to the probate court pursuant to its transfer power under Probate Code Section 5B (discussed infra).

Continuing, exclusive jurisdiction is acquired and retained by the district court when it enters a final order in an original SAPCR. Tex. Fam. Code §§ 155.001(a) & 155.002. Once a court has this continuing, exclusive jurisdiction, no other court can obtain jurisdiction unless the case is appropriately transferred or there is an emergency. Tex. Fam. Code §§ 155.001(a) & 155.201-207 (transfer provisions), 262.002-207 (judisdiction for emergency proceedings). The Family Code gives the district court continuing jurisdiction to modify its support orders. Tex. Fam. Code § 155.003(a). The Family Code liberally provides for joinder of claims in a suit affecting the parent-child relationship. Tex. Fam. Code §§ 157.003(a); Dohrn v. Delgado, 941 S.W.2d at 248.

B. Statutory Probate Courts

1. Statutory Jurisdiction.

Generally, the probate court administering the deceased spouse’s estate will have dominant or concurrent jurisdiction with the family court over all suits relating to the divorce decree to which the decedent was a party except for suits to reduce child support obligations to a money judgment. A probate court is a creature of statute and obtains its jurisdiction based solely upon statutory authority.

   a. Exclusive Jurisdiction.

   All applications, petitions, and motions regarding probate or administrations shall be filed and heard in the probate court. Tex. Prob. Code § 5(d).

   b. Concurrent Jurisdiction.

   A probate court has concurrent jurisdiction with the District Court in all personal injury, survival, or wrongful death actions by or against a personal representative, in all actions by or against a trustee, and in all actions involving an inter vivos trust, testamentary trust, or charitable trust. Tex. Prob. Code § 5(e).

   Either court can hear these types of cases and the court where the lawsuit is first filed, has dominant jurisdiction over the action, unless the statutory probate court transfers the case to itself from the district court under Tex. Prob. Code §§ 5B, 608.

   c. Suits “Appertaining and Incident to” an Estate.

   A probate court has jurisdiction over any “matter appertaining to an estate or incident to an estate” and over any cause of action in which a personal representative of an estate pending in the statutory probate court is a party. Tex. Prob. Code § 5(h).

   Matters “appertaining to” or “incident to” an estate include all claims by or against an estate, all actions to construe wills, the interpretation and administration of testamentary trusts, constructive trusts, and all matters relating to the collection, settlement, partition, and distribution of estates of deceased persons. Except where jurisdiction of a statutory probate court is concurrent with the district court, “any cause of action appertaining to estates or incident to an estate shall be brought in a statutory probate court.” Tex. Prob. Code § 5A(b). See also English v. Cobb, 593 S.W.2d 674 (Tex. 1979); Pullen v. Swanson, 667 S.W.2d 359 (Tex. App.—Houston [14th Dist.] 1984, writ ref’d n.r.e.).

   d. Transfer Power.

   Probate courts have the power to transfer or “reach out and grab” cases from other courts that are appertaining or incident to a decedent’s estate or guardianship, including any case in which one involving a personal representative is a party. Tex. Prob. Code §§ 5B & 608. Probate courts may hear any matter that involves a personal representative, including contract cases, personal injury and wrongful death cases, medical malpractice cases, premises liability, etc.

   **PLANNING TIP:** If a personal representative is a party, the case can be

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1 This paper is limited to estates pending in a statutory probate court. Constitutional county courts and county courts at law also may exercise probate jurisdiction in counties where there is no statutory probate court, but there are variations in the jurisdiction of each court. Tex. Prob. Code §§ 5 & 5A. Jurisdiction for courts in counties without a statutory probate court is set forth in Tex. Prob. Code § 5 (b)-(c), but that analysis is beyond the scope of this paper.
filed in or transferred into a statutory probate court on the motion of a party, usually the personal representative, regardless of subject matter (unless prevented by the venue provisions of CIV. PRAC. & REM. CODE §15.007). See TEX. PROB. CODE §§ 5B & 607.

2. Divorce Pending at Death.
   A divorce may be pending in the probate court at the time of the death of one of the parties. In In Re Graham, 971 S.W. 2d 56 (Tex. 1998), the Texas Supreme Court approved the transfer of a divorce action from a district court to a probate court where one of the spouses was incapacitated and the subject of a guardianship administration in the probate court under the Section 608 transfer power.
   The Supreme Court analyzed the narrowing of the district court’s exclusive jurisdiction over divorces, by amendment to TEXAS GOV’T CODE §24.007, which now gives the district court the jurisdiction granted it in Article V, Section 8 of the Texas Constitution. The Constitution at Article V, Section 8 “bridles” the district court’s jurisdiction so that district courts now have exclusive, appellate and original jurisdiction over all actions proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court.” (Emphasis added). In Re Graham, 971 S.W. 2d at 59. The Texas Supreme Court found that the statutory probate court had the power to hear all matters that involved the administration of estate property and that all matters concerning a guardianship “shall be filed and heard in those courts.” Id.; See also TEX. PROB. CODE 606(e). The Texas Supreme Court held that “current Texas law does not impede a probate court from providing all necessary relief in a divorce action when it properly transfers to itself a cause of action appertaining or incident to a guardianship estate. In Re Graham, 971 S.W. 2d at 59. The “outcome of this divorce proceeding . . . necessarily appertains to the estate because it directly impacts the assimilation, distribution and settlement of the estate.” Id.

   a. Property Division and Other Obligations.
      The probate court where the deceased obligor spouse’s estate is pending would have jurisdiction over claims relating to obligations in the decedent’s divorce decree or PSA (other than a SAPCR.) See, e.g., Long v. Long, 196 S.W.3d 460 (Tex. App.–Dallas 2006, no pet.) (probate court had jurisdiction over claim by former spouse for property under divorce decree); Spiegel, 228 S.W.3d 237(court administering deceased spouse’s estate has jurisdiction over the effect of a mediated settlement agreement between spouses in the process of divorce on non-probate assets). If a claim, lawsuit or dispute will affect the efficiency, amount or method of marshalling, assimilating, administering or distributing assets of an estate, then a probate court has jurisdiction to hear the matter.

      If a suit is filed in the family court or other district court after the death of a party to a divorce decree relating to obligations thereunder, the probate court in which the decedent’s estate is pending may transfer such suit to the probate court is the claim would affect the assets of the estate.

      The probate court does not have jurisdiction over child support issues unless and until the obligations have been reduced to judgment. The family court issuing the final divorce decree ordering child support has continuing, exclusive jurisdiction over such matters. In Fleming v. Easton, 998 S.W.2d 252, 253 (Tex. App.–Dallas 1999, no pet.), the court addressed the following issues: 1) whether the probate court had jurisdiction to sign a judgment for child support arrearages that were allegedly owed by the deceased father’s estate; and 2) whether the probate court had jurisdiction to modify a divorce decree to provide for a lump sum payment of future child support purportedly made an obligation of the father’s estate by the divorce decree. The appellate court held that the probate court did not have jurisdiction over these matters. Fleming did not bring her claims for child support as a contract action but as a motion to enforce the divorce decree and modify the decree to make all future child support immediately collectible. These claims involve matters pertaining to the parent-child relationship and because the family court entered a final order, the family court retains continuing and exclusive jurisdiction to decide these issues. The Court indicated that if Fleming had obtained judgment in her favor in the district court, she could have presented it to the estate for payment. See also Williams v. Patton, 821 S.W. 2d 141 (Tex. 1991) discussed supra; and Martin v. Adair, 601 S.W.2d 543, 545 (Tex. Civ. App.–Beaumont, 1980, no writ). Also, a child support order entered by a foreign court may be enforceable by the probate court after the death of the obligor. See Lake v. Lake, 899 S.W.2d 737 (Tex.–Dallas 1995, no writ)(suit to recover future child support obligations in an Arkansas divorce decree was filed in the deceased obligor’s estate pending in the probate court).

III. PROCEEDINGS AFTER DEATH OF DIVORCED PARTY
A. Child Support

Unpaid child support is a debt that survives the death of the obligor and is payable by the decedent’s estate. Smith v. Bramhall, 556 S.W.2d 112 (Tex. App.—Waco 1977, writ ref’d n.r.e); TEX. PROB. CODE § 37.


After a child support obligor dies, the obligee must first file suit in the family court to reduce the child support arrearages or future child support obligations to a money judgment before the probate court has jurisdiction to enforce the obligation. The personal representative of the decedent’s estate is a necessary party. Once judgment has been rendered by the family court with continuing, exclusive jurisdiction, the judgment may be presented as a claim against the decedent’s estate. Adair v. Martin, 595 S.W. 2d 513 (Tex. 1980).

2. Future Child Support Obligations.

In 2007, the Texas legislature reversed the prior rule regarding termination of child support on the death of the obligor. Under new TEX. FAM. CODE § 154.006(a), child support obligations do not terminate on the obligor’s death and are an obligation of the decedent’s estate even if the divorce decree is silent. In addition, new TEX. FAM. CODE § 154.015 was added to provide for the acceleration of future child support obligations on the death of the obligor and payment in a lump sum amount by the decedent’s estate. The family court determines the amount, taking into account various factors described in the statute. The amount determined by the family court is a claim against the decedent’s estate to be presented to the personal representative in accordance with the claims procedures provided by the Texas Probate Code (described below). TEX. FAM. CODE § 154.015(e). A lump sum future child support obligation is now a Class 4 Claim under TEX. PROB. CODE § 322. Thus, these claims have priority over all debts other than funeral expenses and expenses of last illness not to exceed $15,000, expenses of administration, and secured claims.

Note that effective September 1, 2007, new TEX. FAM. CODE § 154.016 was added to provide that the court may order a child support obligor to obtain and maintain a life insurance policy that will establish an insurance-funded trust or an annuity payable to the obligee for the benefit of the child that will satisfy the obligor’s child support obligation in the event of death.

B. Other Obligations Under Divorce Decree at Death

A former spouse may die having failed to fully perform non-child support obligations ordered under the final divorce decree and/or as set forth in a PSA or other AID, including unpaid installments relating to the property division, unpaid contractual alimony, unpaid joint debts assumed by the deceased former spouse, and unfulfilled obligations regarding life insurance, to devise or will property, regarding payment of education expenses, and to leave funds “in trust” for children. If the deceased former spouse had remarried and/or had other children or his estate is financially unable to meet his obligations, contested estate matters regarding these unfulfilled obligations are likely to arise.

1. Property Division.

In Hutchings v. Bates, 393 S.W.2d 338 (Tex. Civ. App.—Corpus Christi 1965), aff’d 406 S.W.2d 419 (Tex. 1966), the deceased former spouse and his first wife had entered into a PSA that was confirmed and adopted by the court in a decree divorce. Under the PSA and decree, the former husband was obligated to pay his former wife a monthly sum until their youngest child reached age 18 in exchange for her renunciation of homestead and other property rights. The PSA did not specifically state that it was binding after the death of either party and did not state that it was “binding on the heirs, personal representatives, executors and administrators.” The former husband died while his two children were still minors, but the Executor of his Estate (surprise-surprise, the second wife) refused to make any payments after his death. The Court of Appeals construed the PSA to require the payments to continue until the youngest child reached age 18 based on the specified age and the “absence” of any specific provision to terminate the obligation at this death. Thus, the obligation was “a legal charge against the estate the same as any other unfulfilled contractual obligation of decedent’s at the time of death.”

In Pitts v. Ashcraft, 586 S.W.2d 685 (Tex. App.—Corpus Christi 1979, writ refused n.r.e.), the divorced wife filed a claim against the deceased divorced husband’s estate to enforce certain provisions in the PSA: i) an agreement that wife would receive the proceeds of a life insurance policy insuring husband’s life; and ii) an agreement to provide former wife with a life estate in certain stock with a liquidated damages provision in the event of husband’s failure to comply. The Independent Executor refused to allow the claims, and the divorced wife file suit against the estate. The district court awarded former wife judgment and the Court of Appeals affirmed the lower court’s judgment.

2. Contractual Alimony.

Contractual alimony, as opposed to statutory maintenance, is enforceable as a claim against the decedent’s estate unless the PSA provides that the obligation terminates upon the death of the obligor. Note that pursuant to Family Code Section 8.056, court-ordered maintenance awarded by a court terminates
upon the death of either party. In Cardwell v. Sicola-Cardwell, 978 S.W.2d 722 (Tex.App.-Austin, 1998, pet. denied), a former wife sued deceased former husband’s estate to enforce a claim for contractual alimony. The PSA provided that the support obligation would terminate either on the death of wife or when 300 payments had been made, whichever occurred first. Former husband died after making 148 payments. On appeal, the court noted that courts of appeals have consistently applied contract principles and rules of construction in interpreting agreements providing for spousal support. Under principles of contract law, the court noted that contractual obligations generally survive the death of a party and bind his estate if the contract is capable of being performed by the estate representative. Contractual obligations generally survive the death of one of the parties, unless death is specifically provided as a terminating factor. The Estate advanced the argument that because the obligation was “unassignable and nontransferable”, the parties intended that it was a personal contract that would terminate upon former husband’s death. The court rejected this argument as well as the argument that the contract was ambiguous and rendered judgment for the present value of the remaining payments.

3. Life Insurance.

It is well-settled under Texas law that a suit may be maintained to recover the proceeds of a life insurance policy based on the insured’s violation of a provision in a PSA and/or divorce decree to maintain life insurance and designate specified beneficiaries. Any person required under the PSA and/or divorce decree to receive life insurance proceeds, usually the decedent’s former spouse or children, may bring the action. A person specifically designated to receive insurance proceeds in the AID or decree, other than the former spouses, is a third party beneficiary of the agreement and may file suit to enforce it. Wunsch v. Equitable Life Assurance Society of the United States, 551 S.W.2d 84 (Tex. App.–Beaumont 1977, no writ); Tomlinson v. Lackey, 555 S.W.2d 810 (Tex. App.–El Paso 1977, no writ). Often, the life insurance company that issued the policy, faced with competing claims, will interplead the proceeds. See, e.g., Roberts v. Roberts, 560 S.W.2d 438, 440 (Tex. App.–Beaumont 1977, writ ref’d n.r.e.).

A cause of action to recover the life insurance proceeds is an equitable action. The person designated in the divorce decree to receive the life insurance obtains a vested equitable interest in the proceeds of the policy. Box v. Southern Farm Bureau Life Ins. Co., 526 S.W.2d 787 (Tex. App.–Corpus Christi 1975, writ ref’d n.r.e.) (father obligated in divorce decree to maintain life insurance policies designating his children as beneficiaries named his new wife as beneficiary, and

the court awarded the proceeds to the children).

A constructive trust may be imposed on the proceeds either in the possession of the insurance company or in the hands of any person to whom the proceeds were paid. A constructive trust is an equitable remedy created to prevent unjust enrichment. Hudspeth v. Stoker, 644 S.W.2d 92, 94 (Tex. App.–San Antonio 1982, no writ). The court in Hudspeth expressed the following reasoning for imposition of a constructive trust:

It would be manifestly unfair if this change in carriers permitted Hudspeth to avoid his obligations and defeat the equitable rights of the children. Hudspeth agreed to designate certain beneficiaries and thus surrendered his right to change beneficiaries under this policy as part of his consideration in executing the property settlement agreement. Hudspeth’s actions were in direct conflict with his signed agreement and with the decree of the court. By designating a new beneficiary on his group life insurance policy he thwarted the terms of the property settlement agreement incorporated into the divorce decree relating to the life insurance proceeds. Hudspeth’s action was a violation of his legal duty under the decree, and the court was justified in imposing a constructive trust upon the proceeds.

Hudspeth v. Stoker, 644 S.W. 2d at 95-96. See also Fitz-Gerald v. Hull, 237 S.W.2d 256 (Tex. 1951); Alexander v. Alexander, 701 S.W.2d 48 (Tex. App.–Dallas 1985, writ ref’d n.r.e.); Roberts v. Roberts, 560 S.W.2d 438, 440 (Tex. App.–Beaumont 1977, writ ref’d n.r.e.). The wrongful beneficiary designation in violation of the divorce decree or AID constitutes constructive fraud. To prevent unjust enrichment at the expense of the child’s rights under the agreement and/or decree, “equity regards as done that which ought to have been done. The imposition of a constructive trust on the insurance proceeds for the benefit of the minor children is necessary to place the parties in the position they would be in had [the insured] not violated the divorce decree.” Gutierrez v. Madero, 564 S.W.2d 185, 190 (Tex. App.–Eastland 1978, writ ref’d n.r.e.). Damages also may be sought against the decedent’s estate for violation of his obligation in a divorce decree to designate a specific beneficiary of life insurance. Dickey v. Dickey, 908 S.W.2d 311 (Tex. App.–San Antonio 1995, no writ).

4. Contract to Devise or Will

A provision in an AID obligating either party to leave property by will or otherwise at death
to the other party or a third person is binding and enforceable. Mitchell v. Lawson, 444 S.W.2d 192, 196 (Tex. App. — San Antonio 1969, no writ). A third person entitled to receive property by will is a third party beneficiary of the agreement and may sue to enforce it. Stine v. Stewart, 80 S.W.3d 586 (Tex. 2002); Stegall v. Stegall, 571 S.W.2d 564 (Tex. Civ. App. — Fort Worth 1978)(a property settlement agreement under which the husband promises the wife that he will provide financial assistance for the college education of their sons is a third-party beneficiary contract, and the wife, as the promisee, has a justiciable interest and the right to sue to enforce the agreement); and Republic Nat’l Bank v. Nat’l Bankers Life Ins. Co., 427 S.W.2d 76 (Tex.App. — Dallas 1968)(donee and creditor beneficiaries may enforce contracts made for their benefit). The contract to will may be enforced through the imposition of a constructive trust on property received by others or seek damages for breach of contract. Smith v. State, 493 S.W. 2d 650 (Tex. Civ. App. — Eastland 1973, writ ref’d n.r.e.).

5. Funds to Former Spouse “In Trust” for Benefit of Children.

Divorce decrees and AIDs may provide for one spouse at death to leave property to another “in trust” for the children. This type of provision raises questions as to whether an express trust is created, and if so, what are the terms and provisions, such as distribution rights and termination date.

An “express trust” is a fiduciary relationship with respect to property which arises as a manifestation by the settlor of an intention to create the relationship and which subjects the person holding title to the property to equitable duties to deal with the property for the benefit of another person. TEX. PROP. CODE ANN. § 111.004(4). Technical words of expression are not essential for the creation of a trust. Perfect Union Lodge No. 10 v. Interfirst Bank, 748 S.W.2d 218, 220 (Tex. 1988). A trust is a method used to transfer property. Jameson v. Bain, 693 S.W.2d 676, 680 (Tex. App. — San Antonio 1985, no writ). Thus, the trustee holds legal title and possession for the benefit of the beneficiaries. Faulkner v. Bost, 137 S.W.3d 254, 258 (Tex. App. — Tyler 2004, no pet.). “To create a trust by a written instrument, the beneficiary, the res, and the trust purpose must be identified.” Perfect Union, 748 S.W.2d at 220. “It is not absolute necessary that legal title be granted to the trust in specific terms.” Id. Therefore, a trust by implication may arise, notwithstanding the trustors failure to convey legal title to the trustee, when the intent to create a trust appears reasonably clear from the terms of the will, construed in light of the surrounding circumstances.” Id.

These issues were considered in a divorce context in Barrientos v. Nava, 94 S.W.3d 270 (Tex. App.—Houston [14th Dist.] 2002, no pet.). The issue in this case involved a life insurance beneficiary designation stating only the name of decedent’s sister followed by “Trustee for minor children” A and B. The court first considered whether a trust was created by this language. Citing the Restatement (Second) of Property § 32.4 (1990) and Tomlinson v. Tomlinson, 960 S.W.2d 337, 338 (Tex.App.—Corpus Christi 1997, pet. denied), the court held that the beneficiary designation was a valid inter vivos transfer to the sister as trustee of a contractual right to receive the death benefits, even though it was revocable. Thus, the designation constituted one of the five methods for creating a trust allowed under the Texas Trust Code: by “a property owner’s inter vivos transfer of the property to another person as trustee for the transferor or a third person. TEX. PROP. CODE ANN. § 112.001(2).

Next, the court concluded that the trust did not fail for vagueness because (1) the designation was clear that the children were the intended beneficiaries, and (2) that, in this context, the intended purpose of the trust for the trustee to use the money for the general welfare of the children, including regular maintenance and special expenditures, was sufficiently clear. The intention to benefit the minor children of the divorced couple appears critical to the court’s holding and its rejection of other cases striking down trusts for vagueness because “none of these cases involve a trust for minor children.” Id. at 282. The court found that “we know the corpus, we know the beneficiaries, and we know with reasonable certainty the purpose of the trust—the care and welfare of the minor children.” The court provided the following additional rationale for its holding:

We see no reason why this sort of transaction should not create a trust; especially in the case of a divorced parent who may not want an ex-spouse to have complete control over money. Moreover, for someone who is unsophisticated or does not have the financial resources to pay a lawyer to set up a trust, this provides a relatively straightforward way of providing for minor children without court involvement. Id. at 283. The court also found that under specific provisions of the Texas Trust Code, “the trustee is authorized to manage the property and to distribute funds to the minors, and must exercise judgment in fulfilling her duties.” Id. at 282, citing TEX. PROP. CODE ANN. §§ 113.006 (authority to manage trust property and invest funds); 113.021 (distribution of funds to minors); 113.056 (duty of trustee to exercise requisite judgment and care); and 114.001 (providing trustee accountability to the beneficiary for the trust
property).\(^2\)

To avoid these trust issues, if a legal trust is intended by the parties, the AID and the Divorce Decree should provide more details identifying the trust beneficiaries and their current and future rights and interests in the funds and the duties and responsibilities of the trustee. A separate trust instrument attached to and incorporated in the AID would be ideal.

6. Decedent’s Assumption of Community Debts.

A divorce decree that allocates to one spouse liability for a community debt does not limit a creditor's right to proceed against either or both spouses for payment. *Mussina v. Mussina*, 657 S.W.2d 871 (Tex.App.–Houston [1st Dist.] 1983); *Goren v. Goren*, 531 S.W.2d 897 (Tex.App.–Houston [1st Dist.] 1975; *Rush v. Ward*, 757 S.W.2d 521 (Tex.App.–Houston [14th Dist.] 1988, writ ref’d); 39A Tex. Jur.3d Family Law § 776. Debts incurred during a marriage are presumed to be community debts, absent some agreement by the creditor to look only to the separate property of one of the spouses. *Id.* If the deceased spouse’s estate is solvent, the creditor should file a claim against the estate for payment solely from the estate. However, if the estate is insolvent, the creditor may also pursue collection of the debt against the surviving spouse. If the creditor files suit only against the surviving spouse on the debt, the surviving spouse may file a third-party claim against the personal representative of the deceased spouse’s estate related to the joint liability and the deceased spouse’s obligation to satisfy the debt in full and, often, to indemnify and hold the surviving spouse harmless. *Smith v. Smith*, 595 S.W.2d 631 (Tex.App.–Fort Worth 1980(holding that the trial court properly awarded a former wife damages for her former husband’s violation of a property settlement agreement requiring him to hold her harmless from liability on al debits); *Pitts v. Ashcraft*, 586 S.W.2d 685 (Tex.App–Corpus Christi 1979, writ ref’d n.r.e.)(action by former wife against the executrix of her former husband’s estate).

IV. CREDITOR'S CLAIMS IN PROBATE

A creditor having a liquidated claim (claims for a specified amount of money) against a decedent may present the claim to the personal representative for approval and payment if allowed. The procedures differ substantially depending on whether the estate is an “independent” or “dependent” administration. Further, if the decedent’s estate is insolvent, the claims procedures and process provided in the Texas Probate Code will determine the amount each creditor, secured and unsecured, will receive. Claims that are not allowed by the personal representative and unliquidated claims against a decedent must first be reduced to judgment before they may be considered for payment.

A. Independent Administrations

1. Presentment of Claims By Secured Creditors.

A major difference between a dependent administration and an independent administration is the form in which a claim must be presented by a creditor. Pursuant to Probate Code Section 146(b), a secured claim for money must be presented within six (6) months after the date letters are granted, or within four (4) months after the date notice is received if the notice was sent more than two (2) months after the date letters were issued, whichever is later. A creditor with a claim for money secured by real or personal property must give notice to the independent representative of the creditor’s election to have the creditor’s claim approved as a matured secured claim to be paid in the due course of administration. If this election is not timely made, the claim is classified as a preferred debt and lien against the specific properties securing the indebtedness and shall be paid according to the terms of the contract that secured the lien, and a claim may not be asserted against other assets of the estate. The independent representative may pay the claim before the claim matures if paying the claim before maturity is in the best interest of the estate. If a secured creditor’s claim is considered a preferred debt and lien, then the creditor may not seek any deficiency against the other assets of the estate.

2. Presentment of Unsecured Claim.

An unsecured creditor who has a claim for money against the estate and who has received the permissive four (4) month notice, shall give notice to the independent representative of the nature and amount of the claim no later than the 120th day after the date on which notice is received, or the claim is barred. Probate Code Section 146(e) provides that the notice given by either a secured creditor or an unsecured creditor responding to a permissive four (4) month letter must be contained in: (a) a written instrument that is hand delivered with proof of receipt or mailed by certified mail, return receipt requested, to the independent executor or the executor’s attorney; (b) a pleading filed in a lawsuit with respect to the claim; or © a written instrument or pleading filed in the court in which the administration of the estate is pending. The claim does not have to meet the formal requirements applicable to creditors’ claims in dependent administrations. *Ditto Investment Co. v. Ditto*, 293 S.W. 2d 267 (Tex. Civ.

\(^2\) It is noted that this simple phrase “in trust” is used in Tex. Fam. Code Ann. §157.005, providing some indication of an approval of the adequacy of this language.
App.—Fort Worth 1956, no writ), but delivery of the notice by the creditor to the Independent Executor must meet the requirements of Probate Code Section 146(e), or the claim is barred.

3. Enforcement of Claims by Suit.

Pursuant to Probate Code Section 147, any person having a debt or claim against the estate in an independent administration may enforce the payment of same by suit against the independent executor; and when judgment is recovered against the independent executor, execution shall run against the estate of the decedent in the hands of the independent executor which is subject to such debt. However, if the estate is insolvent, a creditor who secures judgment against the independent executor cannot have estate property sold under execution and applied to his debt to the exclusion of other creditors. Woods v. Bradford, 284 S.W. 673 (Tex. Civ. App. 1926, no writ). An independent executor is not required to plead to any suit brought against him for money until after six (6) months from the date the independent administration was created and the order appointing an independent executor was entered. TEX. PROB. CODE § 147. Consequently, unlike a dependent administration, a claimant may file suit against the executor on its claim at any time provided the statute of limitations has not expired or four (4) months have not lapsed since the claimant received any permissive four (4) month letter.

4. Liability of Independent Executor.

An independent executor, in the administration of an estate, may pay at any time, without personal liability, a claim for money against the estate to the extent approved and classified by the personal representative if: (a) the claim is not barred by limitations; and (b) at the time of payment, the independent executor believes the estate has sufficient assets to pay all claims against the estate. TEX. PROB. CODE § 146©.

5. Unliquidated Claims.

Probate Code Sections 146 and 294 provide for permissive notice only to unsecured creditors having a claim for money. Consequently, an unliquidated claim may not be presented and is not subject to a four (4) month bar if a letter under Probate Code Section 146(a)(2) is sent. Case law has construed “all claims for money” to require presentment of a claim if the amount can be ascertained with certainty. Examples of unliquidated claims are tort claims (See Wilder v. Mossler, 583 S.W. 2d 664 (Tex. Civ. App.—Houston 1964, no writ)) and quantum meruit claims for services rendered (See Wells v. Hobbs, 122 S.W. 451 (Tex. Civ. App.—1909, no writ); and Moore v. Rice, 80 S.W. 2d 451 (Tex. Civ. App.—Eastland 1915, no writ)). Most claims for unfulfilled obligations under a divorce decree and/or AID would be unliquidated claims.

B. Dependent Administration.

1. Notices.

The same notices as set forth above for an independent administration are required under Probate Code Sections 294 and 295 for a dependent administration; therefore, a published notice and notice to secured creditors are required. In addition, the permissive four (4) month notice may be given to unsecured creditors.

2. Presentment of Claims.

In a dependent administration, the creditor is required to formally “present” its claim. The Probate Code authorizes two different methods by which a claim may be presented: (a) the creditor may present the claim directly to the executor or administrator as authorized by Probate Code Section 298(a); or (b) claims may also be presented by depositing, or filing, same with the Clerk pursuant to Section 308 of the Probate Code. If a claim is deposited with the Clerk, then the Clerk is directed to notify the “representative” of the estate of the deposit of the claim with the Clerk, but Section 308 goes on to provide that failure of the Clerk to give that notice does not affect the validity of the presentment or the presumption of rejection if the claim is not acted upon within thirty (30) days after it is filed with the clerk.

3. Exceptions to Presentment.

There are a few exceptions to the requirement of presentment of claims in a dependent administration: (a) as discussed in independent administrations above, unliquidated claims need not be presented because Probate Code Section 298 requires only that “claims for money” be presented to the administrator; and (b) Section 317© eliminates presentment as a requirement with respect to: (1) claims of any heir, devisee, or legatee who claims in such capacity; (2) claims that accrue against the estate after the granting of letters for which the representative of the estate has contracted, such as attorneys’ fees, accounting fees, or other administration expenses (3) claims for delinquent taxes against the decedent’s estate that is being administered in probate in: (a) a county other than the county where the taxes were imposed or (b) the same county in which the taxes were imposed if the probate of the decedent’s estate has been pending for more than four (4) years.

4. Action by Personal Representative with Respect to Claims.
a. Form of Claim.

Probate Code Section 301 of the Code prohibits an administrator from allowing, and the Court from approving, any claim that is not supported by an affidavit that the claim is just and that all legal offsets, payments and credits known to the affiant have been allowed. Any time a claim is received in a dependent administration, it should be checked for these magic words. In addition, Section 304 of the Probate Code contains the requirement that if the claim is made on behalf of a corporation, it must provide that the “cashier, treasurer or managing official” of the corporation made the affidavit authenticating the claim and that it is sufficient to state in such affidavit that the person making it “has made diligent inquiry and examination, and that he believes that the claim is just and all legal offsets, payments and credits known to the affiant have been allowed”. A corporate representative signing in his or her individual capacity, or simply signing the name of the corporation, with nothing else, is not proper, and the claim should be rejected.

b. Objections to the Form of Claims.

Under Probate Code Section 302, an administrator is deemed to have waived “any defect of form, or claim of insufficiency of exhibits or vouchers presented” in a claim, unless he files a written objection thereto within thirty (30) days after presentment. The dilemma facing the administrator on this subject is whether a defect in a claim is one of form only, or is a fatal defect, rendering the claim a nullity. In City of Austin v. Aguilar, 607 S.W. 2d 310 (Tex. Civ. App.—Austin 1980, no writ), the creditor filed two claims in which the authenticating affidavit was not properly executed by a representative of the corporation. The Administratrix rejected both of those claims although the Administratrix made no written objections to either claim. More than ninety days passed after the rejection of the claims. The Administratrix took the position that the claims were barred under Probate Code Section 313 of the Code. The claimant argued that the claims were null because of its own failure to comply with Probate Code Section 304. The Court of Appeals disagreed with the claimant and held that the defects in the claims were defects in form only, which were waived by the Administratrix because she filed no written objection as to the form of the claim. The claims were barred because the claimant failed to file suit ninety days after rejection.

However, in Boney v. Harris, 557 S.W. 2d 376 (Tex. Civ. App.—Houston 1977, no writ), the affidavit filed by the claimant did not comply with Probate Code Section 301 because the affidavit stated that all legal offsets, payments and credits were allowed, but the affidavit was filed four months after the stated date. No representation was made in the claim concerning any offsets, payments or credits after the date set forth in the claim. The Administrator rejected the claim and the claimant failed to file suit within ninety days thereafter. The Court of Appeals, in reversing the trial court, held that the rejection of the improperly verified claim did not set in motion the ninety day statute of limitation. The Court stated that: “A claimant may sue for the establishment of his claim only after rejection of it by the personal representative and only if the claim was legally presented.” The Court found the claim at issue to be void and held that the ninety-day limitation period could not run against a void claim.

c. Endorsement of Claim.

Under Probate Code Sections 309 and 310 of the Code, the administrator must endorse on or annex to every claim presented to him, within thirty (30) days after presentment, a memorandum signed by him, stating the time of presentation or filing, and whether he allows or rejects it, or what portion thereof he allows or rejects. The administrator’s failure to take any action constitutes a rejection of the claim; and, under Probate Code Section 310, if the claim is thereafter established by suit, the costs shall be taxed against the estate representative, individually, or he may be removed on the written complaint of any person interested in the claim, after citation and hearing.

d. Limitations on Claims.

The administrator is expressly prohibited by Probate Code Section 298(b) from allowing any claim that is barred by limitations. If the administrator allows such a claim, and if the Court is satisfied that limitations has run, Section 298(b) directs the probate court to disapprove the claim. Under Probate Code Section 299 of the Code, the general statutes of limitations are tolled: (1) by filing a claim which is legally allowed and approved; or (2) by bringing a suit on a rejected claim within ninety (90) days after rejection. Also, under Section 16.062 of the Texas Civil Practice and Remedies Code, the general statute of limitation which would otherwise apply, is tolled for a period of twelve (12) months after a decedent’s death or until “an executor or administrator of a decedent’s estate qualifies”, whichever occurs first. The running of the statute of limitations is not tolled by filing a suit to establish a claim which has not been properly presented. See Furr v. Young, 607 S.W. 2d 532, 536 (Tex. Civ. App. - Fort Worth 1975, no writ).

e. Rejected Claims.

An administrator may reject a claim at any time during the 30-day period following presentation. TEX.
PROB. CODE § 309. No actual notice of rejection must be given to the creditor. See Russell v. Dobbs, 163 Tex. 282, 354 S.W. 2d 373 (1962); Cessna Finance Corp. v. Morrison, 667 S.W. 2d 580 (Tex. App. - Houston [1st Dist.] 1984, no writ). The administrator is under a duty to reject any claim barred by the statute of limitation. TEX. PROB. CODE § 298(b). If an administrator in a dependent administration rejects a claim, the Court cannot override the rejection unless the rejected claim is established by suit. See, e.g., Smith v. State, 493 S.W. 2d 660 (Tex. Civ. App. - Eastland 1973, writ ref’d n.r.e.); Small v. Small, 434 S.W.2d 940 (Tex. Civ. App. - Waco 1968, writ ref’d n.r.e.). Similarly, the court cannot approve a claim that has not been presented to the administrator. TEX. PROB. CODE § 314; Butler v. Summers, 151 Tex. 618, 253 S.W.2d 418 (1952); Clements v. Chajkowski 146 Tex. 408, 208 S.W.2d 841 (1948). When that occurs, the Court may then render a judgment granting the claim and classifying it. Under Probate Code Section 314, a creditor cannot obtain a valid judgment against an administrator unless he goes through the claims process, including presentment, rejection by the administrator, and obtaining a judgment in a suit on the rejected claim. If an administrator rejects a claim in a dependent administration, then the creditor must, within ninety (90) days of rejection, file suit or the claim is barred Probate Code Section 313.

f. Classification of Claims.

(1) Duty of Personal Representative.

In both an independent and dependent administration, a personal representative is required to classify claims; however, Probate Code Section 146 provides that the independent executor classify the claims free from the control of the Court in the same order of priority, classification, and proration described in the sections of the Code dealing with dependent administration. In a dependent administration, whenever a claim is allowed by the personal representative, the Court classifies the claim. Under Section 312(b) of the Probate Code, the Court classifies a claim within ten (10) days after the administrator has allowed it and the claim has been placed on the claims docket. The Court can approve the claim in whole, in part or reject it.

(2) Classification of Claims

Section 322 of the Probate Code sets forth the eight classes in which the creditor’s claim may be classified:

Class 1: Funeral expenses and expenses of last sickness for a reasonable amount to be approved by the Court, not to exceed a total of $15,000.00, with any excess to be classified and paid as any other unsecured claim;

Class 2: Expenses of administration and expenses incurred in the preservation, safekeeping and management of the estate including fees and expenses awarded under Section 243 of this code, and unpaid expenses of administration awarded in a guardianship of the decedent.

Class 3: Secured claims for money under Section 306(a)(1), including tax liens, so far as the same can be paid out of the proceeds of the property subject to such mortgage or other lien, and when more than one mortgage, lien, or security interest shall exist upon the same property, they shall be paid in order of their priority.

Class 4: Claims for the principal amount of and accrued interest on delinquent child support and child support arrearages that have been confirmed and reduced to money judgment as determined under Subchapter F, Chapter 157, Texas Family Code, and claims for unpaid child support obligations under Section 154.015, Family Code.

Class 5: Claims for taxes, penalties and interest owed to the State of Texas.

Class 6: Claims for cost of confinement established by the institutional division of the Texas Department of Criminal Justice.

Class 7: Claims for repayment of medical assistance payments made by the State under Chapter 32, Human Resources Code, to or for the benefit of the decedent.

Class 8: All other claims.

If there is a deficiency of assets to pay all claims of the same class, then such claims shall be paid pro rata. TEX. PROB. CODE § 321. This applies in both independent and dependent administrations. Bunting v. Pearson, 430 S.W.2d 470 (Tex. 1968).


If a parent who is obligated to make child support obligations is in arrears at the time of such parent’s death, the party to whom the child support was owed may obtain a judgment for the arrearages. The judgment must be obtained from the court which retained jurisdiction over the minor child, commonly the family court which handled the divorce. Tex. Fam. Code Ann. §157.005 (Vernon Supp. 1999) Texas TEX. PROB. CODE § 322; Martin v. Adair, 601 S.W.2d. 543 (Tex. Civ. App.—Beaumont 1980, on remand); Fleming
b. Child Support Accrued After Death.

Prior to 2007, the estate of a deceased person subject to a child support order was not liable for child support accruing after death unless agreed to in writing or expressly provided in the Divorce Decree or Child Support Order. Tex. Fam. Code Ann. §154.006. However, in 2007, the Texas legislature reversed the prior rule regarding termination of child support on the death of the obligor. Under new Tex. Fam. Code § 154.006(a), child support obligations do not terminate on the obligor’s death and are an obligation of the decedent’s estate even if the divorce decree is silent. In addition, new Tex. Fam. Code § 154.015 was added to provide for the acceleration of future child support obligations on the death of the obligor and payment in a lump sum amount by the decedent’s estate. The family court determines the amount, taking into account various factors described in the statute. The amount determined by the family court is a claim against the decedent’s estate to be presented to the personal representative in accordance with the claims procedures provided by the Texas Probate Code (described below). Tex. Fam. Code § 154.015(e). A lump sum future child support obligation is now a Class 4 Claim under Tex. Prob. Code § 322. Thus, these claims have priority over all debts other than funeral expenses and expenses of last illness not to exceed $15,000, expenses of administration, and secured claims.


Prior to the enactment of Tex. Fam. Code § 154.015, there was a split of authority among Texas courts as to whether a judgment against a decedent’s estate for child support payments should be reduced by the amount of social security or other governmental death benefits paid to the same claimant as a result of the decedent’s death. Compare Estate of Gorski v. Welch, 993 S.W.2d 298 (Tex. App-San Antonio 1999, pet. denied) (credit allowed even though agreement silent); and Lake v. Lake, 899 S.W.2d 737 (Tex. App-Dallas, 1995, no writ) (no credit allowed because agreement did not expressly provide for the credit). Effective September 1, 2007, the Family Code was amended to provide that the court of continuing jurisdiction shall determine the amount of the unpaid child support obligation for each child of the deceased obligor considering all relevant factors, including: life insurance proceeds, annuity payments, trust distributions, social security death benefits, and retirement survivor benefits paid to or for the benefit of the child. Tex. Fam. Code § 154.015 (c)(4).

d. Priority of claims for child support, family allowance.

Section 322 of the Probate Code classifies claims against the estate of a decedent. Claims for the principal amount of and accrued interest on delinquent child support and child support arrearages that have been confirmed and reduced to money judgment, as determined under Subchapter F, Chapter 157, Family Code, and claims for unpaid child support obligations under Section 154.015 of the Family Code are Class 4 claims. Therefore, claims with higher priority (Class 1-3 claims) will be paid out of the estate prior to child support obligations.

6. Debts Due to the United States.

Amounts owed to the United States Government must be addressed before the representative can pay any of the claims which are classified under §322 of the Code. The Probate Code does not mention amounts which may be owing to the United States Government. Under 31 U.S.C.A. §3713(a), a claim of the United States Government must be paid before other claims against the estate. The cases have interpreted Section 3713 to require payment to the IRS above other debts of the estate; however, family allowances, administration expenses and funeral expenses have been determined not to be “debts” and therefore not subject to the superior priority of the United States’ claims. United States v. Weisburn 48 F.Supp. 393 (E.D.Pa.1943); Rev. Rul. 80-112, 1980-1 C.B. 306.; PLR 8341018 (1983); Schwartz v. Commissioner, 560 F.2d 311 (8th Cir.1977). Note that only administration expenses have a priority over federal tax claims which are secured by a lien. However, not all cases are consistent on this matter and care should be taken in insolvent estates in determining payment of expenses, debts and claims due to the Federal Government so as not to make the personal representative personally liable for such amounts if assets of the estate were distributed to creditors, family members or beneficiaries instead.
7. Order of Payment of Claims.

Although Probate Code Section 322 provides for the classification of claims, Section 320 provides the order of payment of claims and when claims can be paid. Basically, the order for payment of claims is as follows: (a) funeral expenses and expenses of last illness not to exceed $15,000.00; (b) allowances made to surviving spouse and/or children; © expenses of administration and expenses incurred in preservation, safekeeping and management of the estate; and (d) other claims against the estate in order of their classification.

After the date letters are granted and on application by the personal representative stating that the personal representative has no actual knowledge of any outstanding or enforceable claims against the estate, other than those claims that have already been approved and classified by the Court, the Court may order the personal representative to pay any claim that is allowed and approved. No claims for money against the estate of a decedent shall be allowed by the personal representative, and no suit shall be instituted against the personal representative on any such claim after an order for the final partition and distribution is made; but after such an order has been made, the owner of the claim, if it is not barred by limitations, shall have an action thereon against the heirs, devisees, legatees or creditors of the estate limited to the value of the property received by them in distribution from the estate. TEX. PROB. CODE § 318.

8. Secured Creditors.

a. Election by Secured Creditor.

When a secured creditor files a claim for money against an estate, the creditor must specify, in addition to the other matters required in a claim: (1) whether it desires to have the claim allowed and approved as a matured secured claim that may be paid in the due course of administration, in which event, it shall paid if allowed and approved; or (2) whether it is desired to have the claim allowed, approved and fixed as a preferred debt and lien against a specific property securing the indebtedness and paid according to the terms of the contract, in which event it shall be so allowed and approved if it is a valid lien; provided, however, the personal representative may pay said claim prior to maturity if it is in the best interest of the estate to do so. TEX. PROB. CODE § 306(a).

b. Time for Election.

A secured creditor must make the election described above within six months after the date letters are granted, or within four months after the date notice is received under Section 295 of the Code, whichever is later. The secured creditor may present its claim and specify whether the claim is to be allowed and approved either as a matured secured claim or a preferred debt and lien. If the secured claim is not timely presented, or if the claim is presented without specifying how the claim is to be paid, it will be treated as a claim being paid as a preferred debt and lien, and no deficiency may be allowed against any other assets of the estate. TEX. PROB. CODE § 306(b).

c. Matured Secured Claims.

If a secured claim is allowed as a matured secured claim, the claim shall be paid in the due course of administration, and the secured creditor is not entitled to exercise any other remedies, including foreclosure, in a manner that prevents the preferential payment of claims and allowances as described in the Code. TEX. PROB. CODE § 360©.

d. Preferred Debt and Lien.

When an indebtedness is allowed as a preferred debt and lien, no further claim shall be made against the other assets of the estate by reason of the claim, but the claim shall remain a preferred lien against the property securing the same, and the property shall remain as security for the debt in any distribution or sale thereof prior to final maturity or payment of the debt. If property securing a claim that is allowed as a preferred debt and lien is not sold or distributed within six months from the date letters are granted, the representative of the estate shall promptly pay all maturities which have accrued on the debt according to the terms of the contract and shall perform all of the terms of any contract securing the same. If the representative defaults in such payment or performance, on application of the claimant, the Court shall require the sale of the property or authorize a foreclosure. The procedures for a foreclosure and sale of the property are set forth in Probate Code Section 306.

V. FAMILY RIGHTS AND ASSETS

A. Exempt Assets

In both a dependent and independent administration, the personal representative is required to set aside exempt assets for the use and benefit of the surviving spouse, minor children and unmarried children remaining with the family of the deceased. Exempt property is considered any property of the estate that is exempt from execution of forced sale by the Constitution and laws of the State of Texas. This includes the homestead and any property exempt from execution as set forth in the Texas Property Code.

1. Action by Personal Representative.

Probate Code Section 271 provides that the
occupied by a single adult person, it may not be more
the home is occupied by a family; or if the rural home is
consists of not more than 200 acres which may be in
home and a place of business. A rural homestead
homestead is also considered urban if it is both an urban
and includes the improvements thereupon. A
than ten acres of land in one or more contiguous lots,
protection, fire protection, and at least three of the
municipality or subdivision, and is served by police
or rural. A urban homestead is located within a
in the lifetime of the surviving spouse, as long as the survivor elects to
use and occupy the same as the homestead, or so long as
the guardian of the minor children of the deceased is
point determined to be
only as to one hundred acres of the rural homestead, as
the spouse and child are at that point determined to be
270. Constituent family members include the spouse,
the homestead generally retains its prior
definition either as urban or rural; however, in the case
of a rural homestead, the homestead rights of the
decedent’s surviving spouse and children continue, but
only as to one hundred acres of the rural homestead, as
the spouse and child are at that point determined to be
2. Delivery of Exempt Assets.
The exempt property set apart to the surviving
spouse and children shall be delivered by the executor
or the administrator without delay as follows: (a) if
there be a surviving spouse and no children, or if the
children be the children of the surviving spouse, the
whole of such property shall be delivered to the
surviving spouse; (b) if there be children and no
surviving spouse, such property, except the homestead,
shall be delivered to such children if they be of lawful
age or to their guardian if they be minors; © if there be
children of the deceased of whom the surviving spouse
is not the parent, the shares of such children in such
exempt property, except the homestead, shall be
delivered to such children if they be of lawful age or to
their guardian if they be minors; and (d) in all cases,
homestead shall be delivered to the surviving spouse if
there be one, and if there be no surviving spouse, to the
guardian of the minor children or to the unmarried adult
children, if any, living with the family. TEX. PROB.
CODE § 272.

B. Homestead Rights

1. General.
A homestead can be defined as being either urban
or rural. An urban homestead is located within a
municipality or subdivision, and is served by police
protection, fire protection, and at least three of the
following: electricity, natural gas, sewer, storm sewer
and water. An urban homestead can consist of no more
than ten acres of land in one or more contiguous lots,
and includes the improvements thereupon. A
homestead is also considered urban if it is both an urban
home and a place of business. A rural homestead
consists of not more than 200 acres which may be in
one or more parcels and the improvements thereupon if
the home is occupied by a family; or if the rural home is
occupied by a single adult person, it may not be more
than 100 acres.

The homestead rights of the surviving spouse and
children of the deceased are the same whether the
homestead be separate property of the deceased or the
community property between the surviving spouse and
the deceased, and the respective interest of the surviving
spouse and children shall be the same in one case as in
the other. TEX. PROB. CODE § 282. Upon the death of a
spouse, the homestead generally retains its prior
definition either as urban or rural; however, in the case
of a rural homestead, the homestead rights of the
decedent’s surviving spouse and children continue, but
only as to one hundred acres of the rural homestead, as
the spouse and child are at that point determined to be
270. Constituent family members include the spouse,
the homestead generally retains its prior
definition either as urban or rural; however, in the case
of a rural homestead, the homestead rights of the
decedent’s surviving spouse and children continue, but
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definition either as urban or rural; however, in the case
of a rural homestead, the homestead rights of the
decedent’s surviving spouse and children continue, but
only as to one hundred acres of the rural homestead, as
the spouse and child are at that point determined to be
270. Constituent family members include the spouse,
with the family. In George v. Taylor, 296 S.W.2d 620 (Tex. Civ. App—Fort Worth 1956, writ refused n.r.e.), the homestead is not liable for the decedent’s debts following the death of the widow. Anyone who inherits the property receives it free from debt. Further, the homestead passes free from debt if the decedent is survived by a constituent family member whether or not such family member inherits the house. Consequently, if the decedent is survived by a minor child, but such minor child’s guardian does not elect to exercise the minor child’s homestead rights to live in the home, the homestead passes free from the claims of creditors to the ultimate beneficiaries of the homestead. Nat’l Union Fire Ins. Co. v. Olson, 920 S.W.2d 458 (Tex. App. -- Austin 1996, no writ).

C. Title to Exempt Assets

The exempt personal property to be set aside by the personal representative shall include any property that is exempt from execution or forced sale by the Constitution and the laws of the State of Texas. This includes any property described in Sections 42.001, et seq. of the Texas Property Code. A traditional list of exempt assets is found in Section 42.002, and certain retirement plans, annuity contracts and life insurance are described in Section 42.0021. The definition of exempt property is important because the personal representative has to determine whether or not the estate is insolvent. An estate is considered insolvent if the debts exceed the assets; however, in ascertaining whether an estate is insolvent, the exempt property set apart to the surviving spouse or children, or the allowance in lieu thereof and family allowance shall not be considered as assets of the estate. TEX. PROB. CODE § 280.

If an estate is insolvent, then upon final settlement of the estate, the title of the surviving spouse and children to the exempt properties and allowances in lieu of exempt property shall become absolute and are not liable for any of the debts of the estate except for Class 1 claims. TEX. PROB. CODE § 279. If the estate is solvent, then the exempt property, except for the homestead and any allowance in lieu thereof, shall be subject to partition and distribution among the heirs and distributees of the estate in like manner as the other property of the estate. This can be a very powerful tool in an insolvent estate for setting aside automobiles, household furnishings, jewelry and other valuable exempt assets for the benefit of the surviving spouse, minor children and unmarried children remaining with the family.

D. Setting Allowances

In both independent and dependent administrations, the personal representative of the estate is required to set certain allowances as required by the Code. In a dependent administration, such allowances are set by application and order of the Court. In an independent administration, the personal representative of the estate sets the allowances without approval of the Court. Allowances such as the family allowance, allowance in lieu of exempt assets and allowance in lieu of homestead can allow the surviving spouse and children to retain more assets of the estate. Consequently, personal representatives must always be aware of the necessity for setting such allowances.

1. Family Allowance.

Time For Setting. Probate Code Section 286 provides that immediately after the inventory, appraisement and list of claims has been approved, the Court shall fix the family allowance for the support of the surviving spouse and minor children of the deceased. However, before approval of the inventory, a surviving spouse and any person who is authorized to act on behalf of the minor child of the deceased, may apply to the Court for the family allowance by filing an application and a verified affidavit describing the amount necessary for the maintenance of the surviving spouse and minor children for one year after the date of death of the decedent, and describing the spouse’s separate property and any property the minor children have in their own right. The applicant bears the burden of proof by a preponderance of the evidence at any hearing on the application. The Court shall fix the family allowance for the support of the surviving spouse and minor children of the deceased.

Amount of Allowance. Probate Code Section 287 provides that the amount of the allowance shall be sufficient for the maintenance of the surviving spouse and minor children for one year from the time of death of the testator or intestate. The allowance shall be fixed with regard to the facts and circumstances then existing and those anticipated to exist during the first year. The allowance may either be paid in a lump sum or in installments as the Court shall order. The family allowance is a community debt and therefore will be satisfied in part out of the surviving spouse’s half of the community assets under administration. Miller v. Miller, 235 S.W.2d 624 (Tex. 1951). No allowance shall be made for the surviving spouse when the survivor has separate property adequate for the survivor’s maintenance, nor shall such allowance be made to the minor children when they have property in their own right adequate for their maintenance. TEX. PROB. CODE § 288. However, it appears that at least one court does not consider property inherited by the surviving spouse, or non-probate assets such as life insurance received by the surviving spouse as a result of the death of the decedent, when setting the allowance, although there was no holding to this effect by the
2. Allowances in Lieu of Exempt Property

Setting Allowances. Probate Code Section 273 provides for allowances in lieu of exempt property if such exempt property is not on hand in the decedent’s estate. If there should not be among the effects of the deceased all or any of the specific articles exempted from execution or forced sale by the Constitution and the laws of the State, the Court may make a reasonable allowance in lieu thereof to be paid to such surviving spouse, minor children, and unmarried children remaining with the family. An allowance in lieu of a homestead cannot exceed $15,000.00 and the allowance in lieu of other exempted property shall not exceed $5,000.00, exclusive of the allowance for support of the surviving spouse and minor children. Instances where an allowance in lieu of homestead might be appropriate is when the decedent and the family were living in rented property or if the mortgage on the homestead is so high that the surviving spouse or minor children cannot reasonably be expected to pay the mortgage and therefore, the home is unavailable for their occupancy. *Ward v. Braun*, 417 S.W.2d 888 (Tex. Civ. App.—Corpus Christi 1967, no writ). The exempt property other than the homestead or an allowance made in lieu thereof, shall be liable for payment of Class 1 claims, but such property shall not be liable for any other debts of the estate, as provided in Probate Code Section 281. Consequently, an allowance in lieu of homestead is paid before any other claims. An allowance in lieu of exempt property may be liable for payment of Class 1 claims but has priority over all other claims. Further, if the estate is determined to be insolvent under Probate Code Section 280, then the allowance in lieu of exempt property shall be set aside for the surviving spouse, minor children and unmarried children remaining with the family above any other debts of the estate, except in Class 1 claims.

Delivery of Allowances. Probate Code Section 275 provides that the allowance in lieu of exempt property shall be paid as follows: (1) if there be a surviving spouse and no children, or if all of the children are the children of the surviving spouse, the whole shall be paid to the surviving spouse; (2) if there be children and no surviving spouse, the whole shall be paid to and equally divided among them if they be of lawful age, but if any of such children are minors, their share shall be paid to their guardian; and (3) if there be a surviving spouse and children of the deceased, some of whom are not the children of the surviving spouse, then the surviving spouse shall receive one-half (½) of the whole plus the shares of the children of whom the survivor is the parent, and the remaining share shall be paid to the children of whom the survivor is not the parent, or if they are minors, to their guardian.

Timely Setting Allowance. By properly setting a family allowance and allowances in lieu of exempt property, the personal representative of the estate can have more non-exempt assets set aside for the benefit of the spouse and children over other claimants against the estate. Consequently, this is an important part of the duties of the personal representative, and a personal representative can be held liable for failure to properly set such allowances. Further, many courts will not set a family allowance if the request is made more than one year after the date of death, the reason being that if the surviving spouse or minor children have managed for more than one year, there is not a need to set allowances to support them for that year.

VI. NON-PROBATE ASSETS

Generally, creditors of the decedent cannot reach non-probate assets. Non-probate assets such as life insurance, IRA’s and qualified plan assets pass pursuant to the beneficiary designations and are outside the reach of the decedent’s creditors unless paid to the estate. *Parker Square State Bank v. Huttash* 484 S.W.2d 429 (Tex. Civ. App.—Fort Worth 1972, writ refused); *Pope Photo Records, Inc. v. Malone* 539 S.W.2d 224 (Tex. Civ. App.—Amarillo 1976, no writ). However, some non-probate assets, such as multi-party bank accounts and joint tenancy with rights of survivorship may be subject to the claims of creditors. Probate Code Section 442 of the Code provides that any multi-party bank accounts, including right of survivorship accounts, may be made available as necessary to pay the decedent’s debts, taxes and expenses of the administration, including statutory allowances to the surviving spouse and children if other assets of the decedent’s estate are insufficient. Further, any party receiving payment from...
VII. EFFECT OF DIVORCE DECREES ON FORMER SPOUSE DESIGNATIONS

A. Wills.

Probate Code Section 69 provides that, if after making a will, a testator’s marriage is dissolved, whether by divorce, annulment or a declaration that the marriage is void, all of the provisions of the will, including the fiduciary appointments, shall be read as if the former spouse and each relative of the former spouse who is not a relative of the testator failed to survive the testator, unless the will provides otherwise. HB 391 amended Section 69 of the Probate Code to comply with the result reached by the Texas Supreme Court in In re Estate of Nash, 2007 WL 1163925, 50 Tex. Sup. Ct. J. 649 (Tex. Apr 20, 2007). Instead of the divorce only voiding all provision “in favor of the testator’s former spouse,” as Section 69 read before the amendment, the amendment treats “each relative of the former spouse who is not a relative of the testator” as having failed to survive the testator, thus voiding gifts to and fiduciary appointments of the former spouses’ relatives.

Thus, if a divorced testator wishes for the provisions in his will regarding his former spouse and the former spouse’s relatives to remain in effect, the divorced testator must expressly provide that in the will.

B. Life Insurance.

Family Code Section 9.301 addresses a pre-decree designation of an ex-spouse as a beneficiary of life insurance. Where, at the time of a divorce decree, one spouse has designated the other as beneficiary under a life insurance policy, the designation is thereafter rendered ineffective unless 1) the decree designates the former spouse as beneficiary; 2) the designating spouse redesignates the former spouse as the beneficiary after rendition of the decree; or 3) the former spouse is designated to receive the proceeds or benefits in trust for, on behalf of, or for the benefit of a child or dependent or either former spouse. Tex. Fam. Code § 9.301. Where a specific designation is rendered ineffective, the benefits or proceeds are payable to the named alternative beneficiary, or if there is not a named beneficiary, to the estate of the insured. Tex. Fam. Code § 9.301(b). Where a spouse changes the beneficiary on a life insurance policy in contravention of a property settlement, the court will impress a constructive trust on funds paid to the newly-named beneficiary for the benefit of the correct beneficiary. Oak v. Oak, 814 S.W.2d 834 (Tex. App.–Houston 14th Dist.) 1991, writ denied; Towne v. Towne, 707 S.W.2d 745 (Tex. App.–Ft. Worth 1986). This section was added in 1997 in an attempt to correct an anomaly in Texas law regarding disposition of certain property rights in insurance policies. Formerly, if a party was awarded an interest in a life insurance policy but did not change the designation of the ex-spouse as the beneficiary following the parties’ divorce, the policy benefits would be paid to the ex-spouse on death of the insured. This was inconsistent with the Texas Probate Code rule that a beneficial designation of an ex-spouse in a will was voided by an intervening divorce. Except in rare cases, the former rule would result in an unintended disposition of benefits from a life insurance policy (a non-probate asset). However, federal ERISA preempts state law governing insurance plans directly related to the employment of the insured. Tex. Fam. Code § 9.301 comment.

C. IRA and Retirement Plans.

Family Code Section 9.302 addresses pre-decree designation of an ex-spouse as a beneficiary in retirement benefits and other financial plans. Where, at the time of a divorce decree, one spouse has designated the other as beneficiary under a pension, retirement plan, annuity, individual retirement account, employee stock option plan, stock option, or other form of savings, bonus, profit-sharing, or other employer plan or financial plan the designation is thereafter rendered ineffective unless 1) the decree designates the former spouse as beneficiary; 2) the designating spouse redesignates the former spouse as the beneficiary after rendition of the decree; or 3) the former spouse is designated to receive the proceeds or benefits in trust for, on behalf of, or for the benefit of a child or dependent or either former spouse. Tex. Fam. Code § 9.302. Where a specific designation is rendered ineffective, the benefits or proceeds are payable to the named alternative beneficiary, or if there is not a named beneficiary, to the estate of the insured. Tex. Fam. Code § 9.302(b). As with Family Code Section 9.301, this addition to the family code in 1997 was an attempt to correct the inconsistency with the probate code.
However, this attempt at reform is only partially successful; the vast majority of retirement plans are directly derived from employment and thus, ERISA applies. See Weaver. Keen, 43 S.W.3d 537 (Tex. App.–Waco 2001, aff’d on other grounds, 121 S.W.3d 721 (Tex. 2003), cert. denied, 540 U.S. 1047 (2003).

VIII. WHO SHOULD BE THE PERSONAL REPRESENTATIVE?

A. Will have to work with mother of minor children.