

**ADMINISTRATION OF COMMUNITY PROPERTY AFTER A SPOUSE'S  
DEATH**

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**1. INTRODUCTION**

Texas divides the community estate into three component parts -- the husband's sole management community property, the wife's sole management community property and the joint community property. When a spouse dies the administration of the community estate is a complex and often misunderstood process.

In situations where a decedent leaves his or her entire estate to the surviving spouse and where the surviving spouse is the personal representative of such estate, the problems incident to the administration of community property are minimal. In most other situations, including a disposition to the spouse where a third party is the personal representative, these problems are complex.

This paper deals with the administration of the various component parts of the community estate after a spouse's death. Tex. Prob. Code Ann. §177(b) is the primary statute that governs the administration of these estates. It is, in many cases, merely a starting point. There are numerous other provisions of the Probate Code and the Family Code that deal with this issue.

This paper does not purport to deal, in depth, with the classification of separate or community property, the tracing of separate or community property, or the classification of sole management or joint community property.

**2. BACKGROUND**

**a. Family Code Provisions**

**i. SOLE MANAGEMENT COMMUNITY PROPERTY**

Tex. Family Code §5.22 (a) provides that:

- (a) During marriage, each spouse has the sole management, control, and disposition of the community property that he or she
- (a) If (1) a spouse is unable to manage, control, or dispose of the community property subject to his or her sole or joint management, control, and disposition, (2) a spouse disappears and his or her location remains unknown to the other spouse, except under circumstances in which Section 5.26 [dealing with a spouse missing on public service] of this code is applicable, (3) a spouse permanently abandons to other, or (4) the spouses are

would have owned if single, including but not limited to:

- (1) personal earnings;
- (2) revenue from separate property;
- (3) recoveries for personal injuries; and
- (4) the increase and mutations of, and the revenue from, all property subject to his or her sole management, control, and disposition.

**ii. THE JOINT COMMUNITY PROPERTY**

Tex. Family Code § 5.22 (b) and (c) provide that;

- (b) If community property subject to the sole management, control, and disposition of one spouse is mixed or combined with community property subject to the sole management, control, and disposition of the other spouse, then the mixed or combined community property is subject to the joint management, control, and disposition of the spouses, unless the spouses provide otherwise by power of attorney in writing or other agreement.
- (c) Except as provided in Subsection (a) of this section, the community property is subject to the joint management, control, and disposition of the husband and wife, unless the spouses provide otherwise by power of attorney in writing or other agreement.

**iii. UNUSUAL CIRCUMSTANCES**

Tex. Family Code §5.25 provides that:

permanently separated, then not less than 60 days thereafter the capable spouse, or the remaining spouse, or the abandoned spouse, or either spouse in the case of permanent separation, may file a sworn petition stating the facts that make it desirable for the petitioning spouse to manage, control, and dispose of community property (described or defined in the petition) that would otherwise be

subject to the sole or joint management, control, and disposition of the other.

This section of the Family Code contains other procedural provisions dealing with the process of obtaining a Court order relating to the management of the community estate.

iv. MARITAL PROPERTY LIABILITY

Sec. 5.61. Rules of Marital Property Liability

(a) A spouse's separate property is not subject to liabilities of the other spouse unless both spouses are liable by other rules of law.

(b) Unless both spouses are personally liable as provided by Section 4.031 of this code, the community property subject to a spouse's sole management, control, and disposition is not subject to:

(1) any liabilities that the other spouse incurred before marriage; or

(2) any nontortious liabilities that the other spouse incurs during marriage.

(c) The community property subject to a spouse's sole or joint management, control, and disposition is subject to the liabilities incurred by him or her before or during marriage.

(d) All the community property is subject to tortious liability of either spouse incurred during marriage.

b. **Probate Code Provisions:**

i. TEX. PROB. CODE ANN. § 155

Sec. 155 Administration of Community Property

When a husband or wife dies intestate and the community property passes to the survivor, no administration thereon, community or otherwise, shall be necessary. (emphasis supplied)

ii. TEX. PROB. CODE ANN. §177(b)

Sec. 177(b). Distribution of Powers Among Personal Representatives and Surviving Spouse

(b) When No Community Administrator Has Qualified. When an executor of the estate of a deceased spouse has duly qualified, such executor is authorized to administer, not only the separate property of the deceased spouse, but also the community property which was by law

(a) When no one has qualified as executor or administrator of the estate of a deceased spouse, the surviving spouse, whether the husband or wife, as the surviving partner of the marital partnership, without qualifying as community administrator, as

under the management of the deceased spouse during the continuance of the marriage and all of the community property that was by law under the joint control of the spouses during the continuance of the marriage. The surviving spouse, as surviving partner of the marital partnership, is entitled to retain possession and control of all community property, which was legally under the sole management of the surviving spouse during the continuance of the marriage, and to exercise over that property, all the powers elsewhere in this part of this Code authorized to be exercised by the surviving spouse when there is no administration pending on the estate of the deceased spouse. The surviving spouse may by written instrument filed with the clerk waive any right to exercise powers as community survivor, and in such event, the executor or administrator of the deceased spouse shall be authorized to administer upon the entire community estate.

iii. TEX. PROB. CODE ANN. §156

Sec. 156. Liability of Community Property for Debts

The community property subject to the sole or joint management, control and disposition of a spouse during marriage continues to be subject to the liabilities of that spouse upon death. In addition, the interest that the deceased spouse owned in any other nonexempt community property passes to his or her heirs or devisees charged with the debts, which were enforceable against such deceased spouse prior to his or her death. In the administration of community estates, the survivor or personal representative shall keep a separate, distinct account of all community debts allowed or paid in the administration and settlement of such estate.

iv. TEX. PROB. CODE ANN. §160

Sec. 160. Powers of Surviving Spouse When no Administration is Pending

hereinafter provided, has power to sue and be sued for the recovery of community property; to sell, mortgage, lease, and otherwise dispose of community property for the purpose of paying community debts; to collect claims due to the

community estate; and has such other powers as shall be necessary to preserve the community property, discharge community obligations and wind up community affairs.

(b) If an affidavit stating that the affiant is the surviving spouse and that no one has qualified as executor or administrator of the estate of the deceased spouse is furnished to a person owing money to the community estate for current wages at the time of the death of the deceased spouse, the person making payment or delivering to the affiant the deceased spouse's final paycheck for wages, including unpaid sick pay or vacation pay, if any, is released from liability to the same extent as if the payment or delivery was made to a personal representative of the deceased spouse. The person is not required to inquire into the truth of the affidavit. The affiant, to whom the payment or delivery is made, is answerable to any person having a prior right and is accountable to any personal representative who is appointed. The affiant is liable for any damage or loss to any person that arises from a payment or delivery made in reliance on the affidavit.

(c) This section does not affect the disposition of the property of the deceased spouse.

v. TEX PROB. CODE ANN. §168

Sec. 168. Accounting by Survivor

The survivor, whether qualified as community administrator or not, shall keep a fair and full account and statement of all community debts and expenses paid by him, and of the disposition made of the community property; and, upon final partition of such estate, shall deliver to the heirs, devisees, or legatees of the deceased spouse their interest in such estate, and the increase and profits of the same, after deducting therefrom the proportion of the community debts chargeable thereto, unavoidable losses, necessary and reasonable expenses, and a reasonable commission for the management of the same. Neither the survivor nor his

Historically this section was of limited applicability because Tex. Prob. Code Ann. §45 provided that, if the deceased spouse had descendants, the community property did not pass to

bondsmen shall be liable for losses sustained by the estate, except when the survivor has been guilty of gross negligence or bad faith.

**3. DEFINITIONS.**

**a. “§177(b) Property,”** as used in this paper, refers to the community property of one spouse that is being administered by either the other spouse or the personal representative of the other spouse pursuant to Tex. Prob. Code Ann. §177(b). This term may refer either to the community property of a surviving spouse administered by the personal representative of a deceased spouse or to the community property of a deceased spouse administered by the surviving spouse.

**b. “§177(b) Estate,”** as used in this paper, refers to the estate administered by a person who administers §177(b) property. This term may refer to either the community property of a surviving spouse administered by the personal representative of a deceased spouse or to the community property of a deceased spouse administered by the surviving spouse.

**c. “Community Estate,”** as used in this paper, refers to the total combined community estate of both spouses. This term includes each spouse's sole management community property and the joint management community property.

**d. “Probate Estate,”** as used in this paper, refers to the estate administered by a person who administers a decedent's estate pursuant to the Texas Probate Code. This term may refer to either an independent or dependent administration.

**4. ADMINISTRATION OF SURVIVOR'S COMMUNITY PROPERTY WHEN ONE SPOUSE DIES INTESTATE AND THE COMMUNITY PROPERTY PASSES TO THE SURVIVOR.**

Tex. Prob. Code Ann. §155 provides that when a husband or wife dies intestate and the community property passes to the survivor, no administration thereon, community or otherwise, shall be necessary.

Does this mean that administration of this type of an estate is legally precluded? See Tex. Prob. Code Ann. §178 (b) which provides in part that “no administration of any estate shall be granted unless there exists a necessity therefor”. (emphasis supplied)

the survivor. In 1993 Tex. Prob. Code Ann. §45 was amended in a manner that increased the likelihood of a surviving spouse inheriting the community property of his or her spouse. As a result of this

amendment Tex. Prob. Code Ann. §155 will be applicable to more estates than was the case prior to 1993.

## **5. ADMINISTRATION OF THE SURVIVOR'S COMMUNITY PROPERTY BY THE PERSONAL REPRESENTATIVE OF THE DECEASED SPOUSE.**

### **a. Property Subject to Administration.**

The community property of the Surviving Spouse that is subject to administration by the personal representative of the Deceased spouse's estate is set forth in Tex. Prob. Code Ann. §177(b). This section provides that the personal representative of the deceased spouse administers:

a. the surviving spouse's community interest in the decedent's sole management community property, and

b. the surviving spouse's community interest in the joint community property.

#### **i. WAIVER BY SURVIVING SPOUSE.**

Tex. Prob. Code Ann. §177(b) provides that the surviving spouse may continue to manage his or her special community property. The surviving spouse may elect to waive his or her right to continue to administer such property by filing a written notice of such waiver with the clerk. If such waiver occurs then all of the community estate is administered by the personal representative of the deceased spouse.

#### **ii. POWERS OF THE PERSONAL REPRESENTATIVE OF THE DECEASED SPOUSE WHEN ADMINISTERING THE COMMUNITY PROPERTY OF THE SURVIVING SPOUSE.**

The issue here is whether the personal representative of the deceased spouse derives his power to administer the surviving spouse's interest in the community estate from the decedent's will or from the Probate Code. *Parr v. White*, 543 S.W.2d 440 (Tex. App.-Corpus Christi 1976, writ ref'd n.r.e., 559 S.W.2d 344) holds that "under section 177 (b) of the Probate Code . . . the surviving spouse is entitled to possession and control of his or her special community property . . ."

Wills often grant personal representatives very broad administrative powers. The Probate Code grants much more limited powers to a personal representative. For example, many wills allow a personal representative expansive power to sell and reinvest estate assets, while generally, the personal representative of an estate may only sell assets for the purpose of paying debts, taxes and expenses of

As with compensation, the personal representative of the decedent's estate is entitled to

administration. Tex. Prob. Code Ann. §§ 333, 334, and 341.

While no Texas case resolves this issue, the answer seems clearly to be that, with respect to the administration of the surviving spouse's interest in community estate, the personal representative's powers are governed by the Probate Code rather than by the decedent's will.

The personal representative of an estate may be faced with the difficult problem of having different administrative powers over each half of the community estate. This can cause complex (and sometimes insurmountable) problems in the administration of the probate estate.

#### **iii. COMPENSATION OF THE PERSONAL REPRESENTATIVE OF THE DECEASED SPOUSE WHEN ADMINISTERING THE COMMUNITY PROPERTY OF THE SURVIVING SPOUSE.**

Absent a contrary provision in the decedent's will, compensation for the personal representative of the decedent's estate is determined under Tex. Prob. Code Ann. §241(a). This section provides for 5% on all sums actually received in cash and 5% on all disbursements, with a cap of 5% of the "gross fair market value of the estate subject to administration" (emphasis added). Thus, it would seem clear that the statutory compensation would be applicable to the survivor's interest in the community estate being administered by the decedent's personal representative.

Even if the will provides for a different compensation, its terms should not affect the compensation of the personal representative with respect to §177(b) property. For example, if the will provides that a corporate personal representative is to be compensated in accordance with its published fee schedule (putting aside the problems with the incorporation by reference of a document that does not yet exist), the §177(b) property is subject only to the statutory commission.

#### **iv. PAYMENT OF EXPENSES OF ADMINISTRATION OF THE PERSONAL REPRESENTATIVE OF THE DECEASED SPOUSE INCURRED WHEN ADMINISTERING THE COMMUNITY PROPERTY OF THE SURVIVING SPOUSE.**

recover expenses of administration applicable to the §177(b) property in the same manner as from the

decedent's interest in the community property under administration.

v. PAYMENT OF CREDITORS' CLAIMS BY THE PERSONAL REPRESENTATIVE OF THE DECEASED SPOUSE WHEN ADMINISTERING THE COMMUNITY PROPERTY OF THE SURVIVING SPOUSE.

The general provisions of the Probate Code governing creditors' claims in a decedent's estate also govern claims and payment of creditors from §177(b) property. Special problems may arise, however, with respect to the procedures for handling creditors' claims by the surviving spouse in the administration of community property. These problems are addressed below. It should be noted, however, that these procedures (as well as whether specific types of community property are subject to creditors' claims) may be very different.

vi. FIDUCIARY DUTIES TO THE SURVIVING SPOUSE BY THE PERSONAL REPRESENTATIVE OF THE DECEASED SPOUSE WHEN ADMINISTERING THE COMMUNITY PROPERTY OF THE SURVIVING SPOUSE.

The personal representative of a decedent's estate has the same fiduciary duties as the trustee of a trust. Tex. Prob. Code Ann. §37; *Bailey v. Cherokee Cty. Appraisal Dist*, 862 S.W.2d 581 (Tex. 1993); *Ertel v. O'Brien*, 825 S.W.2d 17 (Tex. App. - Waco 1993, writ denied); *McLendon v. Mandel*, 862 S.W.2d 662 (Tex. App. - Dallas 1993).

The personal representative of a decedent's estate has the fiduciary duties of a trustee in connection with his or administration of all of the community estate that he or she is administering (subject, however, to any limitations contained in the decedent's will with respect to the decedent's interest in the community estate).

A special problem involves distributions for the health, support and maintenance of the surviving spouse during the period of administration. This problem usually arises when the personal representative of the deceased spouse's estate is administering all of the community estate and the surviving spouse has no separate property. The issue is whether the personal representative of the

While this is probably the law, it may be advisable to put some form of disclaimer in an inventory stating that, "THIS INVENTORY REFLECTS THE DECEDENT'S ONE-HALF INTEREST IN THE ENTIRE COMMUNITY ESTATE. THIS INVENTORY DOES NOT NECESSARILY REFLECT WHICH COMMUNITY PROPERTY WAS SUBJECT TO

deceased spouse has a fiduciary duty to support the surviving spouse during the period of administration (at least to the extent of the surviving spouse's community interest in the estate being administered). Subject to creditors' claims against the community estate, such duty probably exists.

Tex. Prob. Code Ann. §§286-296 provides for a family allowance. Pursuant to Tex. Prob. Code Ann. §288, no allowance is available to a surviving spouse if he or she has "separate property adequate to the survivor's maintenance." Even if the surviving spouse does not have separate property adequate to provide for his or her maintenance, the allowance is limited to "an amount sufficient for the maintenance of such surviving spouse and minor children for one year from the time of the death of the testator or intestate" (emphasis supplied). Tex. Prob. Code Ann. §287. Most complex estates are under administration for a period longer than one year. Even if a family allowance is awarded, in complex estates, the problem of providing for the health, support and maintenance of the surviving spouse (and the fiduciary duties of the personal representative of the decedent's estate who administers a portion of the surviving spouse's community property) remains.

vii. PREPARATION OF THE INVENTORY.

Preparation of the inventory in an estate involving §177(b) property is not nearly so simple as it might appear. Tex. Prob. Code Ann. §250 is less than clear when it directs the personal representative to file an inventory of "all the property of such estate which has come to his possession and knowledge." Does "Such estate" refer to the decedent's one-half interest in the entire community (as well as his or her separate property, of course), or does it refer only to the property under administration? The answer can best be found in Tex. Prob. Code Ann. §3(1) which defines "estate" as including "the real and personal property of a decedent." Thus, the Inventory and Appraisal should show all of the decedent's community one-half interest without regard to the right of the personal representative to administer such property. This would also be true of the List of Claims under Tex. Prob. Code Ann. §251.

THE SOLE MANAGEMENT, CONTROL, AND DISPOSITION OF THE SURVIVING SPOUSE AT THE TIME OF THE DECEDENT'S DEATH, WHICH COMMUNITY PROPERTY WAS SUBJECT TO THE JOINT MANAGEMENT OF BOTH SPOUSES AT THE TIME OF THE DECEDENT'S DEATH, OR WHICH PROPERTY WAS SUBJECT TO THE SOLE

MANAGEMENT, CONTROL, AND DISPOSITION OF THE DECEDENT AT THE TIME OF HIS DEATH. CONSEQUENTLY, THIS INVENTORY DOES NOT DISCLOSE OR REFLECT WHAT PROPERTY, IF ANY, IS UNDER THE ADMINISTRATION OF THE PERSONAL REPRESENTATIVE OF THIS ESTATE.”

The real issue gets down to the purpose of the Inventory. If it is to list all the assets of the decedent’s estate, as the Probate Code definition would seem to imply, then the decedent’s one-half community interest, whether or not subject to administration, should be listed on the Inventory. If the purpose, as suggested by some courts, is to list property subject to claims of creditors, then, depending upon the resolution of the creditor’s claims issues discussed below, only property subject to administration perhaps ought to be listed. See the discussion of this issue in Woodward and Smith, *Probate and Decedent’s Estate* §813.

It is the authors’ conclusion that the decedent’s one-half community interest should be listed on the Inventory, since that is ultimately the property that will pass under the will or by intestacy.

viii. ACCOUNTING FOR THE ADMINISTRATION OF THE SURVIVING SPOUSE’S COMMUNITY PROPERTY BY THE PERSONAL REPRESENTATIVE OF THE DECEASED SPOUSE WHEN ADMINISTERING THE COMMUNITY PROPERTY OF THE SURVIVING SPOUSE.

The personal representative of a decedent’s estate has a fiduciary duty to account. Should the personal representative of a decedent’s estate maintain two separate accountings for the property that he or she is administering, one for the decedent’s property and another for the surviving spouses property?

The answer to this question is probably “yes.” See Tex. Prob. Code Ann. §156 which provides that: “In the administration of community estates, the ..... personal representative shall keep a separate, distinct account of all community debts allowed or paid in the administration and settlement of such estate.”

This is especially true in situations in which:

a. the debts of the estate are not allocated equally between the decedent’s property and the §177(b) property. For example, if a decedent had separate

There are some interesting problems that arise in connection with the obligation to file federal estate tax returns and the payment of the federal estate tax due. The executor of the estate is required by §6018(a) of the Internal Revenue Code of 1986

property assets or debts, which would not be subject to the same creditor’s claims as community property,

b. the compensation taken by the personal representative was different for the decedent’s property than for the §177(b) property,

c. payments are being made from the §177(b) property for the health, support and maintenance of the surviving spouse,

d. there are sales and/or reinvestments of the community property being administered,

e. the expenses of administration are not allocated equally between the decedent’s property and the §177(b) estate, or

f. if the estate being administered is taxable (all federal estate and state inheritance taxes are paid out of the decedent’s property).

If the administration of an estate is an independent administration, then an accounting may be compelled pursuant to Tex. Prob. Code Ann. §149A. This section requires an independent executor to account for “the property belonging to the estate which has come into his hands as executor” (emphasis supplied). This section would require accounting only for the community property that is actually being administered by the personal representative as a part of the probate estate.

If the administration is a dependent administration, then the accounting problems become very complex.

Tex. Prob. Code Ann. §399(a)(1) (dealing with annual accounts) provides that the accounting shall reflect “all property that has come to his (the personal representative’s) knowledge or into his possession” (emphasis supplied). This section would require accounting for the decedent’s property, even if it is not a part of the probate estate, if the personal representative has “knowledge” of the facts.

Tex. Prob. Code Ann. §405 1 (dealing with final accountings) provides that the accounting shall reflect “the property belonging to the estate, which has come into the hands of the personal representative (emphasis supplied). This section would require accounting only for the community property that is a part of the probate estate.

ix. FEDERAL TAX PROBLEMS.

(hereinafter “IRC”). The executor, as defined by §2203 IRC, is the duly appointed personal representative, or if none is appointed, then the person in possession of the property. In a situation involving §177(b) property, the personal

representative may not be able to find out all the necessary information regarding the property being administered by the surviving spouse. The IRC does provide some relief in §6018(b), which provides that if the personal representative is unable to make a complete return as to any property, then he is to list that property and identify any person holding a “legal or equitable” interest therein. Such person will then be required to file a return as to that property upon notice from the District Director. See Treas. Regs. §20.6018-2. (Although §6018, IRC, is captioned “Returns by Beneficiaries,” its language is much broader.) As discussed earlier, the personal representative holds the property as a trustee, and therefore, for §6018(b) purposes, has a legal interest in the property.

As to payment, §2002 IRC, imposes the duty to pay the tax on the personal representative. The regulations under that section are even more stringent, requiring the personal representative to pay the tax on the entire estate, “regardless of the fact that the gross estate consists in part of property which does not come within the possession of the executor or administrator.” Treas. Regs. §20.2002-1. The truth of liability is a little less harsh than it would appear. The personal representative cannot be liable for more assets than came into his possession, and is liable only to the extent the personal representative paid debts, which the regulations under the Internal Revenue Code define to include distributions to beneficiaries. 31 U.S.C. §3713. However, in an estate in which the decedent had little or no joint management or sole management community property, would you want to qualify as personal representative?

## **6. ADMINISTRATION OF THE DECEASED SPOUSE’S COMMUNITY PROPERTY BY THE SURVIVING SPOUSE.**

The provisions of the Texas Probate Code dealing with the administration of community property by the surviving spouse (Tex. Prob. Code Ann. §§ 155 - §177(b)) are very confusing. These sections deal with administration of community property by both a nonqualified community survivor

Tex. Prob. Code Ann. §160 (a) is the section of the Texas Probate Code that deals with the powers of the surviving spouse when no administration is pending. This section provides that “when no one has qualified as executor or administrator of the estate of a deceased spouse, the surviving spouse, whether husband or wife, as the surviving partner in the marital partnership, without qualifying as community administrator as hereinafter provided,

(the surviving spouse acting as surviving partner of the marital partnership) and a community administrator. Part of the confusion stems from the fact that the terms “surviving spouse” and “community administrator” are intermingled throughout these sections in a manner that does not reflect the legal distinction between each of these different capacities.

### **a. Property Subject to Administration.**

The community property of the deceased spouse that is subject to administration by the surviving spouse is set forth in Tex. Prob. Code Ann. §177(b). This section provides that the surviving spouse administers the deceased spouse’s community interest in the survivor’s sole management community property.

### **b. Waiver by Surviving Spouse.**

The surviving spouse may waive his or her right to administer his or her sole management community property. If such waiver occurs, then all of the community estate is administered by the personal representative of the deceased spouse. If this happens, the complex legal issues with respect to the payment of community debts will arise. The rules relating to the payment of creditors claims in the Probate Code are phrased differently than the rules relating to the payment of community creditors under the Family Code. The liability of the surviving spouse’s sole management community property is probably governed by the Family Code rather than the Probate Code. This distinction is often overlooked in situations where the entire community estate is administered by the personal representative of the deceased spouse’s estate.

### **c. Powers of the Surviving Spouse When Administering the Community Property of the Deceased Spouse.**

Tex. Prob. Code Ann. §177(b) provides that the surviving spouse “as surviving partner of the marital partnership, is entitled . . . to exercise over that property all of the powers elsewhere in this part of this Code authorized to be exercised by the surviving spouse when there is no administration pending on the estate of the deceased spouse” (emphasis supplied).

has power to sue and be sued for the recovery of community property; to sell, mortgage, lease and otherwise dispose of community property for the purpose of paying community debts; to collect claims due to the community estate; and has such other powers as shall be necessary to preserve the community property, discharge community obligations, and wind up community affairs” (emphasis supplied).

**d. Compensation of the Surviving Spouse When Administering the Community Property of the Deceased Spouse.**

Tex. Prob. Code Ann. §168 deals with the compensation that the surviving spouse is entitled to receive for administering the community estate of the deceased spouse. This section provides that he or she may receive “a reasonable compensation” for administering the property.

While there is no case authority on the point, the compensation allowed personal representatives under Tex. Prob. Code Ann. §241 is probably “reasonable compensation.”

**e. Payment of Expenses of Administration by the Surviving Spouse When Administering the Community Property of the Deceased Spouse.**

Tex. Prob. Code Ann. §168 allows the surviving spouse to deduct from the §177(b) property “necessary and reasonable expenses.”

**f. Payment of Creditors’ Claims by the Surviving Spouse When Administering the Community Property of the Deceased Spouse.**

Tex. Family Code Ann. §5.61 provides that, subject to certain exceptions, “the community property subject to a spouse's sole management, control, and disposition is not subject to:

- (1) any liabilities that the other spouse incurred before marriage; or
- (2) any nontortious liabilities that the other spouse incurs during marriage.
- (c) The community property subject to a spouse's sole or joint management, control, and disposition is subject to the liabilities incurred by him or her before or during marriage.”

It can be argued that one spouse’s sole management community property is “exempt” from the debts of the other spouse pursuant to the terms of this section.

Tex. Prob. Code Ann. §156 provides that the “community property subject to the sole or joint management, control and disposition of a spouse during marriage continues to be subject to the liabilities of that spouse upon death”. This section also provides that, “(t)he interest that the deceased spouse owned in any other nonexempt community property passes to his or her heirs or devisees charged with the debts, which were enforceable against such deceased spouse prior to his or her death.” (emphasis supplied)

As noted, §5.61 of the Texas Family Code sets out the rules concerning the payment of community

Tex. Prob. Code Ann. §§ 170 - 174 deal with multiple aspects of the claims procedure. While the

debts. Basically, the sole management community of one spouse is not liable for the contractual debts of the other spouse (except for necessities). Does this same regime continue after death? In other words, if the surviving spouse administers the §177(b) property, can such surviving spouse require the creditors of the decedent to look solely to the property being administered by the decedent’s personal representative? There are two competing policies at work here. One view would hold that the creditors of the deceased spouse can reach that property passing to his or her beneficiaries since there is no reason that the beneficiaries should inherit their interest in the surviving spouse’s sole management community property in preference to the creditors of the decedent, and the second sentence of Tex. Prob. Code Ann. § 156 causing such property to pass subject to claims enforceable against the “deceased spouse” rather than the deceased spouse’s community property. The other view is that the creditors could not reach that property during the deceased spouse’s life, why should they be able to reach it at death, and that the second sentence should be read as if it referred to the deceased spouse’s property. The authors are not in agreement as to the better view.

All of this raises some interesting questions as to how creditors should proceed if the property being administered by the deceased spouse’s personal representative is not sufficient to meet debts incurred by that spouse during marriage. It would seem clear that creditors should proceed first against the estate being administered. Even if creditors of the deceased spouse can reach the sole management community property of the surviving spouse, they should not be able to proceed against the survivor until the property was distributed to the decedent’s beneficiaries since the statute provides that it passes to those beneficiaries “charged” with the debts.

Tex. Prob. Code Ann. §168 allows the surviving spouse to deduct from the §177(b) property “the proportion of the community debts chargeable thereto.” This process appears to be independent of any form of court supervision or formal claims procedure.

terminology in these sections refers to both “community administrators” and to “the survivor,”

these sections probably relate only to formal community administration (because of the repeated references to the inventory and the bond).

**g. Fiduciary Duties of the Surviving Spouse When Administering the Community Property of the Deceased Spouse.**

The surviving spouse holds the deceased spouse's one half of the community estate in trust for the heirs or distributees who are entitled to receive such property after the community debts have been satisfied. *Grebe v. First State of Bishop*, 150 S.W.2d 64 (Tex. 1941). After the community estate has been fully administered and all debts paid, the survivor is not entitled to use the decedent's interest in such community estate for his or her own use or benefit. *Grebe, supra*.

Note that Tex. Prob. Code Ann. §168 contains an exculpatory clause protecting the surviving spouse from liability for the administration of the §177(b) Property. This section provides that the surviving spouse not be liable for "losses sustained by the estate, except when the survivor has been guilty of gross negligence or bad faith." Even though this provision applies to both the survivor and "his bondsmen" it probably applies to a nonqualified community survivor even if he or she is not bonded. Tex. Prob. Code Ann. §168 applies to "the survivor, whether qualified as community administrator, or not."

**h. Accounting for the Administration of the Deceased Spouse's Community Property by the Surviving Spouse.**

Tex. Prob. Code Ann. §156 provides that the surviving spouse "shall keep a separate, distinct account of all community debts allowed or paid" in the administration of §177(b) property.

Tex. Prob. Code Ann. §168 provides that the surviving spouse shall keep a "fair and full account and statement of all community debts and expenses paid by him."

**i. Rights of the Heirs or Distributees to the Deceased Spouse's Estate.**

Tex. Prob. Code Ann. §168 provides that the surviving spouse:

shall keep a fair and full account and statement of all community debts and expenses paid by him, and of the disposition made of the community property; and, upon final partition of such estate, shall deliver to the heirs, devisees, or legatees of the deceased spouse their interest in such estate, and the increase and profits of the same, after deducting therefrom the proportion of the

community debts chargeable thereto, unavoidable losses, necessary and reasonable expenses, and a reasonable commission for the management of the same.

While there is no procedure in the statute for the heirs, devisees, or legatees to compel distribution, such persons can probably petition the probate court for a forced distribution of the estate.

**j. Tax Problems.**

There are both income tax problems and estate tax problems in the situation in which there are both a surviving spouse and a personal representative administering the community estate. The problems are not really related to the amount of tax, but rather to the practicalities of reporting and payment.

The estate tax attributable to the surviving spouse's sole management community is clearly collectible from such property. Tex. Prob. Code Ann. § 322A apportions the tax based upon the gross estate for federal estate tax purposes and not upon the estate under administration. And it really does not make any difference in a solvent estate unless certain portions of the community are specifically bequeathed.

Income taxes present a different type of problem. While it is clear that the income collected by the surviving spouse with respect to § 177(b) property is reportable one-half on the spouse's return and one-half on the estate's return, how does the personal representative get the information necessary to complete the return? Also, presentation is very important since the Form 1099's probably show all the income as belonging to the surviving spouse.