

CHAPTER 1

Texas Elder Rights and Protections

1-1 Elder Rights in Texas

Elder rights in Texas are provided for in a variety of legal sources. Some of these rights are provided by federal law; others are provided by state statute. Some are provided specifically to the elderly; others are provided to all patients in medical institutions—hospitals, nursing homes, assisted living facilities, and hospice care facilities. However, because the majority of patients in these institutions are the elderly, the elderly, as a group, benefit the most from these rights.

The rights break down into three main types. First, some rights pertain strictly to the elderly. These rights protect elderly people because of their age. A second set of rights attaches to the elderly and other patients in institutional settings—that is, patients in hospitals, nursing homes, assisted living facilities, mental health institutions, and hospice care facilities. Third are the rights that protect the elderly when they need health insurance coverage or benefits from their health insurance carriers, be these policies from regular health insurance carriers or Medicare and/or Medicaid.

1-1:1 Sources of Texas Elder Rights

Just as the State of Texas does not exist in a vacuum, Texas Elder Rights do not exist in a vacuum. Rather, Texas Elder Rights, first and foremost, flow out of rights given to all Americans by the U.S. government. Thus, it is there that a Texas lawyer must begin to search for Texas Elder Rights.

1-1:1.1 Federal Rights

Beginning in the mid-1960s, Congress began enacting statutes designed to protect the rights of all American citizens. The first set of statutes was enacted during the Civil Rights era; to this day, Congress is enacting more statutes aimed at protecting the rights of the elderly. It would do well to begin our study of the rights of the elderly in Texas by tracing the history of the federal statutes and their provisions.

1-1:1.1.a The Early Statutes

The Civil Rights Era statutes were not primarily designed to protect the elderly. Yet, the elderly, like many other groups of people in the United States of America, benefited

from this wave of new statutes. As regards Elder Rights, these early statutes included the following:

- **The Older Americans Act (OAA) of 1965.**¹ This statute established authority for the federal government to award grants to the states for research and development projects, community planning and social services, and personnel training in the field of aging. Currently, the OAA is a primary vehicle for the efficient delivery of nutritious meals to older individuals. The passage of the act was instrumental in encouraging state laws to address the needs and concerns of the elderly.
- **The Age Discrimination in Employment Act (ADEA) of 1967,**² and its periodic amendments designed to broaden its scope. In many ways, the original statute is different to what it is now. For example, as originally enacted, the statute prohibited various forms of age discrimination in employment, including the discharge of workers on the basis of their age.³ However, the protection provided by the 1967 statute was limited to workers between the ages of 40 and 65.⁴ Moreover, to ensure that employers were permitted to use neutral criteria not directly dependent on age, and in recognition of the fact that even criteria that are based on age are occasionally justified, the Act provided that certain otherwise prohibited employment practices would not be unlawful "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age."⁵ We note that the 1967 ADEA did not apply to the federal government, to the states or to their political subdivisions, or to employers of fewer than 25 employees.

All these limitations were changed by subsequent amendments to the ADEA:

- **The Fair Labor Standards Act of 1974**⁶ expanded coverage of the ADEA to federal, state, and local government employees, and made the provisions of the statute applicable to employers with 20 or more employees.
- **The Age Discrimination in Employment Act Amendments of 1978**⁷ expanded the protected age from 40-65 to 40-70, outlawed all mandatory retirement for federal employees, and permitted plaintiffs in age discrimination cases to request a jury trial.
- **The Older Americans Act Amendments of 1984**⁸ switched the enforcement of the ADEA from the Department of Labor to the Equal Employment Opportunity Commission (EEOC). It also provided ADEA coverage to Americans working overseas for American firms and narrowed the exclusion for executive policyholders.

¹ Pub. L. No. 89-73, 79 Stat. 218 (July 14, 1965) (codified at 42 U.S.C. ch. 35 § 3001 et seq.).

² Pub. L. No. 90-202, § 1, 81 Stat. 602 (Dec. 15, 1967) (codified as amended at 29 U.S.C. § 621 et seq.).

³ Pub. L. No. 90-202, § 4(a), 29 U.S.C. § 623(a).

⁴ Pub. L. No. 90-202, § 12(a), 29 U.S.C. § 631.

⁵ Pub. L. No. 90-202, § 4(f)(1) 29 U.S.C. § 623(f)(1).

⁶ Pub. L. No. 93-259, § 28(b)(1) 88 Stat. 74 (April 8, 1974).

⁷ Pub. L. No. 95-256, § 1, 92 Stat. 189-93 (April 6, 1978).

⁸ Pub. L. No. 98-459, 98 Stat. 1767 (Oct. 9, 1984).

- **The Age Discrimination in Employment Amendments of 1986⁹** removed the age 70 coverage limit and prohibited discrimination against employees past normal retirement age in health and pension rights.
- **The Age Discrimination Claims Assistance Act of 1988¹⁰** extended the statute of limitations on the right to sue if the employee's complaint would otherwise be barred by failure of the EEOC to act in a timely fashion.
- **The Older Workers Benefit Protection Act of 1990 (OWBPA)¹¹** prohibited employers from refusing to hire older workers because of the costs associated with the employee benefit plan as a result of having these older workers on the payroll.
- **The Age Discrimination in Employment Act Amendments of 1996¹²** permitted public employers to discriminate on the basis of age in the hiring and mandatory retirement of firefighters or law enforcement officers.

1-1:1.1.b Nursing Home Reform Legislation

Toward the end of the 1980s, Congress turned its attention toward protecting Americans residing in nursing homes and assisted living facilities. The result was a series of statutes aimed at nursing home reform:

- **The Nursing Home Reform Act (NHRA) of 1987¹³** was the first major "modern" Elder Law piece of legislation enacted by Congress. The Act established the respective standards of care for assisted living facilities and nursing homes in the United States. Its main purpose was to ensure quality care in nursing homes by protecting elders from neglect, abuse, and mistreatment.

Yet, as a federal law, the NHRA cannot compel states to act. What it can do—and has done—is making compliance with the Act mandatory for facilities seeking funding for Medicare and Medicaid services. The various states—including Texas—are responsible for certifying that the facilities receiving Medicare and Medicaid funding within their borders are substantially compliant with the Act's standards.

In light of these requirements, some states have incorporated some or all of the NHRA's requirements into their state laws regulating long-term care facilities operating within their borders. Where state law has incorporated the NHRA's provisions, the law's coverage extends to all nursing homes in the state (not just those seeking Medicare or Medicaid funds). Later in this chapter, we shall discuss how Texas has incorporated the NHRA into its laws on nursing home abuse.

⁹ Pub. L. No. 99-592, 100 Stat. 3342 (Oct. 31, 1986).

¹⁰ Pub. L. No. 100-283 (Apr. 7, 1998).

¹¹ Pub. L. No. 101-433, § 1, 104 Stat. 978 (Oct. 16, 1990) (codified as amended at 29 U.S.C. § 623(f)(2)).

¹² Pub. L. No. 104-208, div. A, tit. 1, § 101(a) [tit. 1, § 119], 110 Stat. 3009, 3009-23 (Sept. 30, 1996) (codified as amended at 29 U.S.C. § 623).

¹³ Pub. L. No. 100-203, 101 Stat. 1330 (Dec. 22, 1987).

- **Nursing Home Residents' Bill of Rights.**¹⁴ To qualify for Medicaid funds, long-term care facilities that qualify as "skilled nursing facilities" must meet certain federal, statutory, and regulatory requirements. Most nursing homes today fall in this category and, therefore, must meet federal standards. One federal requirement is that such facilities comply with a "Residents' Bill of Rights," which provides that residents have the right to be free from verbal, sexual, physical, and mental abuse, corporal punishment, and involuntary seclusion.

The creation of this Bill of Rights was one of the most important protections of the NHRA. In summary, it established basic rights for those covered facilities, including:

- the right to be treated with dignity and respect;
- the right to be informed in writing about services and fees prior to admission;
- the right to manage one's own finances or designate someone of one's choice to do so;
- the right to privacy, personal belongings, and property, to the extent this does not interfere with the rights, health, or safety of others;
- the right to be informed of one's medical conditions and to consult a doctor of one's choice;
- the right to refuse medications and treatments;
- the right to a choice as to schedule and activities; and
- the right to an environment that provides the maximum comfort and independence possible.

The Bill of Rights contains other important protections, including the right to complain and the right to be free of abuse and neglect. How these rights are meant to be protected is indicated by the NHRA's requirements relating to standards of care.¹⁵

1-1:1.1.c Elder Abuse Legislation

The federal government has also focused attention on elder abuse. The government's most significant attempt to deal with this crime has come in the enactment of the Elder Abuse Prevention and Prosecution Act of 2017.¹⁶ The statute enhances the federal government's response to elder abuse and financial exploitation of elderly individuals. It improves the protection of the elderly by:

- increasing data collection and information sharing of abuse and fraud cases;
- increasing training of federal prosecutors and investigators;
- establishing an elder justice coordinator position in both the Federal Trade Commission (FTC) and the Department of Justice; and
- increasing penalties for criminals who target seniors.

¹⁴ 42 USC § 1396r.

¹⁵ 42 USC § 1395i-3.

¹⁶ Pub. L. No. 115-70, 131 Stat. 1208 (Oct. 18, 2017).

1-1:1.2 Elder Rights Created by Texas

In addition to the rights provided by the federal government, elderly Texans are protected by rights created by the Texas legislature. The most prominent of these are enunciated in Chapter 102 of the Texas Human Resources Code.¹⁷ The statute and the rights flowing out of it are generally known as the Texas Bill of Rights for the Elderly. The statute begins by warning all individuals providing services to the elderly that they may not deny any elderly individual the rights guaranteed by Chapter 102.¹⁸ It then goes on to place a burden upon all agencies who license, certify, or register people who provide services to the elderly to require them to implement and enforce the rights provided by the chapter.¹⁹ Thereafter, the statute lays out the general rights afforded to Texans in both institutionalized and non-institutionalized settings.

1-1:1.3 Rights of Elderly Texans in Institutionalized Settings

In addition to the general rights afforded to all elderly Texans in the Bill of Rights, those Texans who are institutionalized are also afforded additional rights. Because Texans—young and old—can be institutionalized in different types of facilities, various sources other than the Bill of Rights exist for the rights provided to patients in those settings.

1-1:1.4 Rights of Elderly Texans in the Hospital Setting

Elderly Texans in the hospital setting are protected by rights contained in a document called the American Hospital Association's (AHA's) Patient Care Relationship. This 2003 document (sometimes referred to as "an initiative") replaced the AHA's Patient's Bill of Rights, which had been adopted by the AHA Board of Trustees on October 21, 1992.

1-1:1.5 Rights of Elderly Patients in Hospice Care

For the elderly in hospice care, the operative document is the Hospice Patient's Bill of Rights promulgated by the Hospice Association of America.

1-1:1.6 Mental Health Bill of Rights

The elderly suffering from mental health diseases are protected on the federal level by the Mental Health Bill of Rights.²⁰ Elderly Texans suffering from mental diseases receive additional protection. The most general form of protection flows out of the Texas Mental Health Bill of Rights enunciated in both Title 25 of the Texas Administrative Code²¹ and Chapter 576 of the Texas Health and Safety Code.²² Other Texas statutes enacted both prior and subsequent to the Texas Mental Health Bill of Rights

¹⁷ Tex. Hum. Res. Code § 102 et seq.

¹⁸ Tex. Hum. Res. Code § 102(a).

¹⁹ Tex. Hum. Res. Code § 102(b).

²⁰ 42 U.S.C. § 9501.

²¹ 25 Tex. Admin. Code §§ 404.151–404.169.

²² Tex. Health & Safety Code § 576.

provide additional rights to the mentally ill. These rights require state officials to ensure that (1) the mentally ill are cared for in the least restrictive appropriate setting,²³ (2) they receive a sufficient supply of medication upon their discharge from the mental health facility in which they were cared for,²⁴ (3) following their discharge, the mentally ill receive proper disease management,²⁵ and (4) upon discharge, the mentally ill receive supplies of psychoactive medication as needed.²⁶

In situations where the patient is under a guardianship, Texas law provides that to the extent transportation is necessary, the patient's guardian of the person has the power to personally transport the ward to ensure that the patient is transferred by emergency transportation services or some other means to an inpatient facility where he or she can be examined and cared for.²⁷

Other statutes address issues such as restraints and seclusion²⁸ and the necessary protocol to be followed before governmental authorities may detain a mentally ill individual.²⁹

1-2 Durability of Rights

The rights granted to an elderly person are durable. An elderly person cannot lose these rights unless, after a guardianship hearing, a court of competent jurisdiction finds that he or she is an "incapacitated person" pursuant to Texas law.³⁰ Having made such an adjudication, the court may issue an order appointing a guardian with either "full or limited authority" over this person as indicated by the incapacitated person's "actual mental or physical limitations and only as necessary to promote and protect the person's well-being."³¹ Until such time that a court of competent jurisdiction has removed the person's civil rights, the person may represent himself or herself, enter or leave any medical facility at will, manage his or her financial affairs, and choose whether to participate in religious and social activities.³²

1-3 Protection of Elderly Texans

The elder rights we have discussed thus far are rights that were not carved out specifically for the elderly. Rather, they are rights designed to protect all people who are institutionalized in these institutions. But Texas takes the protection of the elderly one step further: Texas has created a Bill of Rights for the Elderly,³³ which provides several rights and protections for all elderly Texans.

²³ Tex. Health & Safety Code § 571.004.

²⁴ Tex. Health & Safety Code § 574.081(c).

²⁵ Tex. Health & Safety Code § 574.081(c).

²⁶ Tex. Health & Safety Code §§ 574.004 and 574.102.

²⁷ Tex. Est. Code § 1151.051(d).

²⁸ Tex. Health & Safety Code § 322.

²⁹ Tex. Health & Safety Code § 573.021.

³⁰ *See, e.g.*, Tex. Estates Code § 1002.017.

³¹ Tex. Est. Code § 10001.001.

³² Tex. Hum. Res. Code § 102.003.

³³ Tex. Hum. Res. Code § 102.

1-3:1 Texas Definition of Elderly

The Texas statute defines an “elderly individual” as a person who is 60 years of age or older.³⁴

1-3:2 General Rights

The statute bestows certain general rights upon the elderly citizens and residents of Texas.³⁵

1. An elderly individual has all the rights, benefits, responsibilities, and privileges granted by the Constitution and laws of Texas and the United States, except where lawfully restricted. Each elderly individual has the right to be free of interference, coercion, discrimination, and reprisal in exercising these civil rights.
2. An elderly individual has the right to be treated with dignity and respect, without regard to race, religion, national origin, sex, age, disability, marital status, or source of payment. This means that the individual has the right to the following:
 - (a) Make choices regarding personal affairs, care, benefits, and services.
 - (b) Be free from abuse, neglect, and exploitation.
 - (c) Designate a guardian or a representative—if the person requires protective measures—to ensure the right to quality stewardship of his or her affairs.
 - (d) Complain about his or her treatment. Upon receiving a complaint, the service provider shall promptly respond to resolve the problem. The service provider may not discriminate or take other punitive action against an elderly individual who files a complaint.
 - (e) Refuse to perform services for the service provider.

1-3:3 Privacy Rights

The statute also provides the elderly with certain privacy rights.³⁶ These are best described as follows:

1. An elderly individual is entitled to privacy while attending to personal needs and to a private place for receiving visitors or associating with other individuals unless providing privacy would infringe on the rights of other individuals. This right applies to medical treatments, written communications, telephone communications, telephone conversations, meeting with family members, and access to resident counsel.
2. An elderly person may send and receive unopened mail, and the service provider shall ensure that the person’s mail is sent and delivered promptly. If an

³⁴ Tex. Hum. Res. Code § 102.001(5).

³⁵ Tex. Hum. Res. Code § 102.003.

³⁶ Tex. Hum. Res. Code § 102.003(g).

elderly individual is married and the spouse is receiving similar services, the couple may share a room.

3. An elderly individual may participate in activities of social, religious, or community groups unless the participation interferes with the rights of other persons.
4. An elderly person is entitled to access his or her personal and clinical records. Also, these records are confidential and may not be released without the elderly person's consent. However, the records may be released:
 - (a) to another service provider at the time the elderly person is transferred to another residential care facility; or
 - (b) if the release is required by another law.

1-3:4 Financial Management

Being elderly does not rob someone of the ability to manage his or her finances. Accordingly, the Texas Bill of Rights for the Elderly provides that elderly Texans shall have the right to either manage their finances themselves or appoint a surrogate decision maker to manage in their stead.³⁷ Pursuant to the statute:

1. An elderly individual may manage his or her personal affairs and may in writing authorize another person to manage his or her money.
2. The elderly individual may choose the manner in which his or her money is managed, including a money management program, a representative payee program, a financial durable power of attorney, a trust, or some other method. Indeed, the elderly individual is free to choose the least restrictive of these methods.
3. When the elderly principal (or his or her representative) so requests, the money manager shall make available the related financial records and provide an accounting of the money.
4. An elderly individual's designation of another person to manage his or her money does not affect such individual's ability to exercise another right described in the law. If an elderly individual is unable to designate another person to manage his or her affairs, a court of competent jurisdiction will designate a guardian to do so.³⁸ The guardian is then required to manage the elderly individual's money in accordance with the provisions of the Texas Estates Code and other applicable laws.
5. An elderly individual may retain and use personal possessions, including clothing and furnishings, as space permits. The number of personal possessions may be limited based on the health and safety of other individuals.

³⁷ Tex. Hum. Res. Code § 102.003(6).

³⁸ Tex. Est. Code § 682.

1-3:5 Medical Decisions

Just as the elderly individual can manage his or her financial decisions, the elderly individual can make his or her own medical decisions. The Bill of Rights contains several provisions ensuring that the elderly have control of their medical decisions.³⁹ Pursuant to the Bill of Rights, then:

1. A service provider must fully inform an elderly individual, in language the individual can understand, of his or her total medical condition, and shall notify the patient whenever a significant change in his or her medical condition occurs.
2. An elderly individual may choose and retain a personal physician and is entitled to be fully informed in advance about treatment or care that may affect the individual's well-being.
3. An elderly individual may refuse medical treatment after the elderly individual:
 - (a) is advised by the service provider of the possible consequences of refusing treatment; and
 - (b) the elderly individual acknowledges that he or she clearly understands the consequences of refusing treatment.
4. An elderly individual has the right to be free from physical and mental abuse, including corporal punishment or physical or chemical restraints that are administered for the purpose of discipline or convenience and not required to treat the individual's medical symptoms.⁴⁰
5. Not later than the 30th day after the date the elderly individual is admitted for service, a service provider shall inform the individual:
 - (a) whether the individual is entitled to benefits under Medicare or Medicaid; and
 - (b) which items and services are covered by these benefits, including items or services for which the elderly individual may not be charged.⁴¹

1-3:6 Transfer and Discharge

Texas law also protects the elderly from sudden and unreasonable discharge from a residential facility. Hence, except in an emergency, a service provider may not transfer or discharge an elderly individual from a residential facility unless the provider has given 30 days' notice to the elderly individual, his or her legal representative, or a member of the individual's family stating:

1. that the service provider intends to transfer or discharge the elderly individual;
2. the reason for the transfer or discharge;
3. the effective date of the transfer or discharge;

³⁹ See Tex. Hum. Res. Code § 102.003(j), (k), (l), (m), (n), (o).

⁴⁰ Tex. Hum. Res. Code § 102.003(c).

⁴¹ Tex. Hum. Res. Code § 102.003(q).

4. if the individual is to be transferred, the location to which the individual will be transferred; and
5. the elderly individual's right to appeal the action and the person to whom the appeal should be directed.⁴²

1-3:7 Right to Execute Legal Documents

Of course, if elderly people are to have control over various aspects of their lives, they must have the authority to execute legally binding documents. Accordingly, the Bill of Rights provides each elderly person with the rights to:

1. make a Directive to Physicians by executing a document under the Advance Directives Act;
2. execute a medical power of attorney; and
3. designate a guardian in advance of need to make decisions regarding the person's medical care should he or she become incapacitated.⁴³

1-4 Enforcement of Legal Rights of the Elderly

Violations of an elderly person's rights can be reported to, and acted upon by, one of several Texas agencies. Among these are the following:

1. U.S. Department of Health and Human Services, Office for Civil Rights. Telephone number: 1-800-368-1019; TTD number: 1-800-537-7697.
2. Texas Department of Health and Human Services. Telephone number: 1-800-458-9858.
3. Texas Department of Family and Protective Services. Texas Abuse Hotline: 1-800-252-5400.

Individuals can also report abuse online at <https://hhsportal.hhs.state.tx.us/dfps/portal/ereport>.
4. Long-Term Care Ombudsman. Telephone number: 1-800-252-2412.
5. Texas Attorney General. Telephone numbers: 1-800-252-8011; 1-512-463-2100.

1-5 Rights of Elderly Texans in Medical Institutions

The rights we have been discussing follow elderly Texans wherever they go. Accordingly, these elderly Texans do not lose their rights when they enter medical institutions. If anything, their rights are brought more sharply into focus. The following sections will bring that focus to bear on the rights of elderly Texans institutionalized in hospitals, nursing homes, assisted living facilities, mental health facilities, and hospices.

⁴² Tex. Hum. Res. Code § 102.003(r), (s).

⁴³ Tex. Hum. Res. Code § 102.003(t)(1), (2), (3).

1-5:1 Rights of Elderly Texans in Hospitals

Section 1-1:1.4 introduced us to the concept that elderly Texans in hospitals are afforded certain rights. These rights are enunciated in the AHA's Patient Care Partnership brochure. The AHA offers brochures for sale to all hospitals that they may inform patients of their rights. The brochures advise patients that they should expect:

1. high-quality care;
2. a clean and safe environment;
3. involvement in their own care;
4. protection of their privacy;
5. help when they are leaving the hospital; and
6. help with their billing claims.⁴⁴

1-5:2 Rights of Nursing Home Residents

Texans living in nursing homes are protected by several rights. As an initial matter, certain state laws govern the manner in which the nursing homes conduct themselves as regards resident rights, quality of life, and quality of care.

1-5:2.1 Resident Rights

The resident has a right to a dignified existence, self-determination, and communication with and access to persons and services inside and outside the facility. Indeed, a facility must protect and promote the rights of each resident.⁴⁵

1-5:2.2 Quality of Life

Pursuant to the Texas Administrative Code, a facility must care for its residents in a manner and in an environment that promotes maintenance or enhancement of each resident's quality of life.⁴⁶

1-5:2.3 Quality of Care

The Code also provides that each resident must receive, and the facility must provide, the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, as defined by and in accordance with the comprehensive assessment and plan of care.⁴⁷

1-5:2.4 Specific Residents' Rights

In addition to these rights, Texas also provides a list of specific rights for nursing home residents. One can obtain detailed information about these rights by calling

⁴⁴ See Appendix 1 for a copy of the AHA's Patient Care Partnership Brochure.

⁴⁵ 19 Tex. Admin. Code §§ 401-421.

⁴⁶ 19 Tex. Admin. Code §§ 701-705.

⁴⁷ 19 Tex. Admin. Code § 901.

the Long-Term Care Ombudsman Program at 1-800-252-2412. The program publishes brochures in English, Spanish, and Braille.

Shrouded with this protection, Texan nursing home residents have the right to:

1. be treated with respect, dignity, and consideration;
2. exercise their rights and civil liberties as residents of Texas and citizens of the United States, and observe their religious beliefs;
3. confidentiality of personal and clinical records;
4. be informed of their medical condition and participate in treatment planning;
5. plan activities in the facility;
6. choose their own attending physician and the source of pharmacy service;
7. be free from mental, physical, or verbal abuse and chemical and physical restraints;
8. associate and communicate in privacy, including visits with anyone of their choice in or outside of the facility;
9. be afforded mail and telephone services;
10. participate in resident council activities;
11. have access to their records and access to state inspection reports;
12. be told of services provided by Medicaid or Medicare and informed of other items or services and their respective costs for which they may be charged;
13. not be transferred or discharged without cause or notice;
14. be treated without discrimination regardless of the source of payment;
15. make complaints and express grievances without fear of discrimination or reprisal;
16. manage personal and financial affairs and make choices and independent decisions; and
17. issue advance directives, including directives to physician, medical powers of attorney, and out-of-hospital do-not-resuscitate orders.

1-5:3 Rights of Elderly Texans in Assisted Living Facilities

Texas also provides rights for its citizens and residents living in assisted living facilities. Although these rights are somewhat similar to those granted to individuals living in nursing homes, they display some differences unique to life in assisted living facilities. These rights are commonly known as the Residents' Bill of Rights.⁴⁸ Among its provisions, the Residents' Bill of Rights provides the following:

1. Each assisted living facility must post the Residents' Bill of Rights in a prominent place.⁴⁹ The Bill of Rights must be written in the primary language of

⁴⁸ Tex. Health & Safety Code § 247.064.

⁴⁹ Tex. Health & Safety Code § 247.064(a).

each resident of the facility.⁵⁰ Moreover, the facility must give a copy of the Residents' Bill of Rights to each resident.⁵¹

2. Each resident is guaranteed:

- (a) the right to privacy, to access a telephone, to have visitors at reasonable times, and to receive and send mail privately;
- (b) the right to freedom of religion and to exercise other civil rights, to make complaints without retribution, and to have a safe and decent living environment; and
- (c) the right to manage his or her financial affairs, the right to use his or her own personal items in his or her living quarters, and the right to have a locking storage cabinet.

1-5:4 Mental Health Patient's Bill of Rights

Chapter 4 will address the issue of Alzheimer's disease and other forms of dementia. This section addresses the narrow issue of the rights of (elderly) Texans receiving mental health services. These rights emanate out of various provisions of the Texas Administrative Code commonly referred to as the Mental Health Patient's Bill of Rights.⁵² This Bill of Rights can be divided into various parts. The following sections will discuss these rights.

1-5:4.1 Basic Rights for All Mental Health Patients

The statute begins by stating that all persons who receive mental health services from Texas Department of State Health Services facilities, community centers, and psychiatric hospitals have all rights, benefits, responsibilities, and privileges guaranteed by both the U.S. and Texas Constitutions—unless these rights have been restricted by certain specific provisions of the law.⁵³ These rights include, but are not limited to, the right to impartial access to and provision of treatment regardless of race, nationality, religion, sex, ethnicity, sexual orientation, age, or disability; the right to petition for habeas corpus; the right to register and vote at elections; the right to acquire, use, and dispose of property including contractual rights; the right to sue and be sued; all rights relating to the granting, use, and revocation of licenses, permits, privileges, and benefits under law; the right to religious freedom; and rights concerning domestic relations.⁵⁴ Additionally, these patients have the right to be presumed mentally competent unless a court has ruled otherwise.⁵⁵

1-5:4.2 Personal Rights

The rights contained in the Texas Administrative Code are illuminated and expanded upon in the Texas Health and Safety Code. The Code divides these rights into general

⁵⁰ Tex. Health & Safety Code § 247.064(c).

⁵¹ 40 Tex. Admin. Code § 92.125.

⁵² 25 Tex. Admin. Code § 404.154.

⁵³ 25 Tex. Admin. Code § 404.154(1).

⁵⁴ 25 Tex. Admin. Code § 404.154(1).

⁵⁵ 25 Tex. Admin. Code § 404.154(2).

rights⁵⁶ and rights relating to treatment.⁵⁷ The general rights include several personal rights—essentially all the personal rights individuals normally possess.⁵⁸ These are also covered by the Texas Administrative Code. Some of these personal rights are subject to limitations. They can be limited by a patient's doctor on an individual basis to the extent the limitation is necessary for the patient's welfare or to protect another person. The patient's doctor must include in the patient's medical record the reasons for and duration of the limitation, and must sign and date the entry. Additionally, the doctor must fully explain the reasons for and duration of the limitation to the patient or the patient's guardian or managing conservator.⁵⁹

1-5:4.3 Right to Communicate With Others

The statute also provides patients with the right to talk with and write to people outside the hospital, including their legal counsel.⁶⁰ This right is subject to the general rules of the facility, and may be limited by the patient's treating physician if the physician believes that the restriction is necessary to the patient's welfare or to protect another person.⁶¹ However, the physician may not, under any condition, restrict the patient's rights to contact or be contacted by his or her attorney, the courts, the Department of Mental Health Services, or the state attorney general.⁶²

1-5:4.4 Opportunity for Physical Exercise and Limitation Thereof

The statute also provides the patient with the right to have an opportunity for physical exercise and for going outdoors with or without supervision at least daily. A physician's order limiting this right must be reviewed and renewed at least every 3 days. The findings of the review must be written into the patient's medical record.⁶³

1-5:4.5 Confidentiality

The Bill of Rights also provides for the confidentiality of all records that directly or indirectly identify former, present, or proposed mental health patients, unless disclosure is permitted by other state law.⁶⁴

1-5:4.6 Consent

The Bill of Rights also gives the patient the right to refuse to take part in research without losing any other rights as a result.⁶⁵ In fact, the patient has the right to refuse to undergo various procedures and treatments unless a judge or jury finds, after a

⁵⁶ Tex. Health & Safety Code § 576.001-.010.

⁵⁷ Tex. Health & Safety Code § 576.021-.027.

⁵⁸ Tex. Health & Safety Code § 576.001(b).

⁵⁹ Tex. Health & Safety Code § 576.006.

⁶⁰ Tex. Health & Safety Code § 576.006(a).

⁶¹ Tex. Health & Safety Code § 576.006(b).

⁶² Tex. Health & Safety Code § 576.006(b).

⁶³ Tex. Health & Safety Code § 576.006(c).

⁶⁴ Tex. Health & Safety Code § 576.005.

⁶⁵ Tex. Health & Safety Code § 576.021(b).

hearing, that clear and convincing evidence exists that (1) the person suffers from a mental illness and (2) as a result of that mental illness, the person (a) is likely to cause serious harm to himself or herself, (b) is likely to cause serious harm to others, or (c) is suffering severe and abnormal mental, emotional, or physical distress; is experiencing substantial mental or physical deterioration of his or her ability to function independently; or is unable to make a rational and informed decision as to whether to submit to treatment.⁶⁶

If the elderly person is under a guardianship, the person's right to refuse treatment extends to the guardian.⁶⁷

1-5:4.7 Care and Treatment

The Bill of Rights also provides for mental health patients to have, and to be informed of, their treatment plans.⁶⁸ The law is also specific about the ways in which caregivers should care for their patients.⁶⁹

1-5:4.7a Treatment Plan

The patient has the right to a treatment plan for his or her stay at the hospital and to participate in developing that plan, as well as the treatment plan for his or her care after leaving the hospital.⁷⁰ This right may not be waived by the patient's guardian, attorney, or other representative, if any of these exist.⁷¹

1-5:4.7b Medications

A mental health patient has the right to request—and receive—information about the prescription medications doctors order for him or her. This request can be made in writing by the patient, a person designated by him or her, or the patient's guardian.⁷² The facility administrator of the inpatient facility where the patient is located must then, within 4 hours of the patient making such request, provide the patient with a list that includes for each medication (1) the name of the medication, (2) the dosage and schedule prescribed for the administration of the medication, and (3) the name of the physician who prescribed the medication.⁷³

Notwithstanding these provisions, a patient may be given appropriate medication without his or her consent if:

1. the patient's condition or behavior places him or her or others in immediate danger, or

⁶⁶ Tex. Health & Safety Code § 574.034(a).

⁶⁷ Tex. Health & Safety Code § 576.004.

⁶⁸ Tex. Health & Safety Code § 576.021.

⁶⁹ Tex. Health & Safety Code § 576 Subchapter B.

⁷⁰ Tex. Health & Safety Code § 576.021(a)(4).

⁷¹ Tex. Health & Safety Code § 576.021(c).

⁷² Tex. Health & Safety Code § 576.027(b).

⁷³ Tex. Health & Safety Code § 576.027(a).

2. the patient has been admitted by the court and his or her doctor determines that medication is required for the patient's treatment and the hospital has obtained a judicial order authorizing administration of the medication.⁷⁴

As a final matter, we note that a patient or a patient's guardian may waive the patient's right to receive the list of medications while the patient is participating in a research project if release of the list would jeopardize the results of such project.⁷⁵

1-5:4.7c Use of Physical Restraints

A patient has the right not to be physically restrained (such as having movement of parts of the body restricted by a person or device or being placed in a locked room alone) unless his or her doctor orders it and writes it in the patient's medical record.⁷⁶ However, the patient may be restrained or secluded in an emergency situation.⁷⁷ If a patient is restrained or secluded, the facility must inform him or her of the reason for the medical order, the length of time for which the restraint or duration has been ordered, and what he or she must do to be removed from the restraint.⁷⁸

1-5:4.7d Risks and Side Effects

The patient also has the right to be told about the care, procedures, and treatment he or she will be given, as well as the risks, side effects, and benefits of all medications and treatments the patient will receive (including those that are unusual or experimental), the other treatments that are available, and the potential results of refusing treatment.⁷⁹

1-5:4.7e Transportation

The patient has the right to be transported to, from, and between psychiatric hospitals in a way that protects his or her dignity and safety. The patient has the right not to be transported in a marked police or sheriff's car or to be accompanied by a uniformed police officer unless other means are not available.⁸⁰

1-5:4.7f Information From Staff

The patient has the right to meet with the staff responsible for his or her care and to be told of their professional discipline, job title, and responsibilities. In addition, the patient has the right to know about any proposed change in the appointment of professional staff responsible for his or her care.⁸¹

⁷⁴ Tex. Health & Safety Code § 574.034(a).

⁷⁵ Tex. Health & Safety Code § 576.027(c).

⁷⁶ Tex. Health & Safety Code § 576.024.

⁷⁷ 25 Tex. Admin. Code § 404.154(26).

⁷⁸ 25 Tex. Admin. Code § 404.154(26).

⁷⁹ 25 Tex. Admin. Code § 404.154(8).

⁸⁰ 25 Tex. Admin. Code § 404.154(80).

⁸¹ 25 Tex. Admin. Code § 404.154(10).

1-5:4.7g Right to Request Second Opinion

The patient has the right to request the opinion of another doctor at his or her own expense. With this in mind, the patient has the right to be granted a review of the hospital's treatment plan. If the patient is under a guardianship, this right extends to the patient's guardian of the person.⁸²

1-5:5 Rights of Voluntary Patients

Voluntary patients are those who show up at a mental health institution and say, "I believe I am in need of your services, please help me" or something to that effect. The law provides special rights to these patients.

1-5:5.1 Right to Request Discharge

As an initial matter, voluntary patients have the right to request discharge from the hospital. If they want to leave, they simply need to say so in writing or tell a member of staff. The staff member is obligated to write down the request.⁸³

A voluntary patient who requests discharge has the right to be discharged from the hospital within 4 hours of making the request unless the individual's treating physician (or another physician if the treating physician is not available) determines that there is cause to believe that the individual might meet the criteria for court-ordered mental health services or emergency detention.⁸⁴

If the patient's doctor believes that he or she meets the criteria for court-ordered services or emergency detention, the doctor must examine the patient within 24 hours of the person filing the discharge request.⁸⁵ The person must be allowed to leave the hospital upon completion of the in-person examination unless the doctor confirms that he or she meets the criteria for court-ordered services and files an application therefor and a court order is obtained authorizing these services no later than 4:00 P.M. the next succeeding business day following the day on which the doctor examined the individual.⁸⁶ The application must ask a judge to issue a court order requiring the person to stay at the facility for services. The judge will issue the order only if he or she decides that the person is (1) likely to cause serious harm to himself or herself, (2) likely to cause serious harm to others, or (3) suffering from a condition that will continue to deteriorate and he or she will be unable to make an informed decision as to whether to stay for treatment.⁸⁷

1-5:5.2 Right to Block Court-Ordered Services

A person has the right not to have an application for court-ordered services filed while he or she is receiving voluntary inpatient services for treatment of mental health or chemical dependency unless the person's physician determines that he or she meets

⁸² 25 Tex. Admin. Code § 404.154(11).

⁸³ 25 Tex. Admin. Code § 404.157(a).

⁸⁴ 25 Tex. Admin. Code § 404.157(a)(3)(b).

⁸⁵ 25 Tex. Admin. Code § 404.157(a)(3)(b)(1).

⁸⁶ 25 Tex. Admin. Code § 404.157(a)(3)(b)(1)(B).

⁸⁷ Texas Health & Safety Code § 574.034(a).

the criteria for court-ordered services as outlined in Texas Health and Safety Code § 573.022 and the person (1) requests discharge, (2) is absent without authorization, (3) is unable to consent to necessary and appropriate psychiatric or chemical dependency treatment, or (4) refuses to consent to necessary and appropriate treatment recommended by the physician responsible for his or her treatment and the physician completes a certificate of medical examination for medical illness that, in addition to the information required by Texas Health and Safety Code § 574.011, includes the opinion of the physician that: (a) no reasonable alternative to the treatment recommended by the physician exists and (b) the individual will not benefit from continued inpatient care without the recommended treatment.⁸⁸

1-5:5.3 Doctor to Reveal Treatment Plans

The voluntary patient's doctor must note in his or her medical record and tell him or her about any plans to file an application for court-ordered treatment or for detaining the person for any other clinical reasons.⁸⁹ If the doctor finds that the patient is ready to be discharged, the hospital should discharge him or her without further delay, and without threatening or coercing the individual in any manner whatsoever.⁹⁰

1-5:6 Special Rights of People Apprehended for Emergency Detention for Inpatient Mental Health Services (Other Than Chemical Dependency)

Some people—even elderly people—are apprehended and brought against their wills to facilities that provide inpatient mental health services. The law provides some protections for these people.

1-5:6.1 Right to Basic Information

As an initial matter, the law provides that the hospital authorities must tell these proposed patients where they are, why they are being held there, and that they might be kept at the facility for a longer period if a judge decides that they need treatment.⁹¹

1-5:6.2 Right to Counsel

These proposed patients have a right to counsel. They have a right to call a lawyer. The hospital staff members they are talking to are legally obligated to help them call a lawyer if they ask to.⁹²

1-5:6.3 Right to be Examined by a Doctor

The proposed patient has a right to be seen by a doctor immediately upon arriving at the detention facility. This preliminary examination by a physician will determine whether the person meets the criteria for emergency detention. If a physician is not

⁸⁸ 25 Tex. Admin. Code § 404.157(c).

⁸⁹ 25 Tex. Admin. Code § 404.157(d).

⁹⁰ 25 Tex. Admin. Code § 404.157(e).

⁹¹ 25 Tex. Admin. Code § 404.158(1)(A).

⁹² 25 Tex. Admin. Code § 404.158(1)(B).

immediately available to conduct an examination, steps must be taken to have one conducted within 24 hours of the individual's apprehension.⁹³ If, upon conducting the examination, the doctor determines that (1) the person may seriously harm himself or herself or others, (2) the risk of this happening is likely to happen unless the person is restrained, and (3) emergency detention is the least restrictive means of restraint, the doctor will submit a written statement to that effect, and will recommend that the person be admitted to the facility for emergency detention.⁹⁴

If the doctor decides that the person does not meet all of these criteria, the facility must allow the person to leave.⁹⁵ In such a case, the facility must arrange for the person to be taken back to where he or she was picked up, if that is the person's choice, or to his or her home in Texas, or to another suitable place within a reasonable distance.⁹⁶

1-5:6.4 Right to be Warned

The proposed patient has the right to be informed that anything he or she says to the personnel of the department facility, community center, or psychiatric hospital may be used in the proceeding for further detention.⁹⁷

1-5:6.5 Order of Protective Custody—Special Rights

On some occasions, a county or district attorney or other adult may file a sworn written application for court-ordered mental health services for someone else.⁹⁸ Except in the case of applications filed by the district or county attorney, an application must be accompanied by a certificate of medical examination. The application must be filed with the County Clerk in the county in which the proposed patient resides, is found, or is receiving mental health services by court order or pursuant to Texas Health and Safety Code Subchapter A, Chapter 573.⁹⁹

The law provides that while this application is pending, the county or district attorney, or the Court on its own motion, can file a motion for an order of protective custody against the proposed patient. The motion must allege that the movant believes that the proposed patient meets the criteria authorizing the court to order protective custody, and the belief is derived from (1) the representations of a credible person, (2) the proposed patient's conduct, or (3) the circumstances under which the proposed patient is found.¹⁰⁰

The motion must be accompanied by a certificate of medical examination for mental illness prepared by a physician who has examined the proposed patient not earlier than the third day before the motion is filed.¹⁰¹

⁹³ 25 Tex. Admin. Code § 404.158(1)(F).

⁹⁴ Tex. Health & Safety Code § 573.022.

⁹⁵ 25 Tex. Admin. Code § 404.158(2)(B).

⁹⁶ 25 Tex. Admin. Code § 404.158(2)(B).

⁹⁷ 25 Tex. Admin. Code § 404.158(1)(E).

⁹⁸ Tex. Health & Safety Code § 574.001(a).

⁹⁹ Tex. Health & Safety Code § 574.001(b).

¹⁰⁰ Tex. Health & Safety Code § 574.021(c).

¹⁰¹ Tex. Health & Safety Code § 574.021.

When informed that someone has filed a motion for an order of protective custody against him or her, the proposed patient has certain special rights. First, he or she has the right to retain a lawyer or to have a lawyer appointed to represent him or her in a hearing to determine whether he or she must remain in custody until a hearing on court-ordered mental health services is held.¹⁰²

Then, before the probable cause hearing is held to determine whether he or she needs court-ordered mental health services, the proposed patient has the right to be told in writing (1) that he or she has been placed under an order of protective custody, (2) why the order was issued, and (3) the time and place of a hearing to determine whether he or she must remain in custody until a hearing on court-ordered mental health services can be held. This notice must be given to the proposed patient's attorney.¹⁰³

1-5:6.6 Right to a Speedy Hearing

The proposed patient has the right to a speedy hearing—typically 72 hours after his or her detention, except that on weekends and legal holidays, the hearing may be delayed until 4:00 in the afternoon on the first regular workday thereafter. However, the hearing may be delayed in cases of emergency, and the court may grant continuances if both parties agree. Notwithstanding these exceptions, however, the hearing must be held no later than 30 days after the original application is filed.¹⁰⁴

1-5:6.7 Right to be Released From Custody

The proposed patient has the right to be released from custody if:

1. except in the case of weather emergencies and extensions for weekends and legal holidays, 72 hours have passed and he or she has not had a hearing;
2. an order for court-ordered mental health services has not been issued within 14 days of the filing of an application (30 days if a delay was granted); or
3. the proposed patient's doctor finds that the proposed patient no longer needs court-ordered mental health services.¹⁰⁵

1-5:6.8 The Next Steps

This text concerns elderly persons. Consider the following: An elderly person is told that he or she no longer needs court-ordered mental health services. What happens next? The elder could return home and never need mental health services for the rest of his or her life. Or the elder could return home and discover that he or she needs extended outpatient mental health services for a significant part of the rest of his or her life. Or maybe the person finds that he or she needs inpatient mental health services for a significant part of his or her life. This text will address these eventualities at a later stage, but what we need to emphasize now is simply the following: The State of Texas provides rights to the elderly to protect them if and when they suffer from

¹⁰² Tex. Health & Safety Code § 574.024.

¹⁰³ Tex. Health & Safety Code § 574.024(a), (b).

¹⁰⁴ Tex. Health & Safety Code § 574.005.

¹⁰⁵ Tex. Health & Safety Code § 574.028(c).

mental health diseases. At times like these, also, they need their attorneys to be familiar with the laws that they can turn to in order to help their elderly clients.

1-5:7 Hospice Patient's Bill of Rights

Texas Health and Human Services (HHS) oversees the provision of palliative care in the state. According to the agency's website, hospice is a program of palliative care consisting of medical, social, and support services to terminally ill patients when curative treatment is no longer possible.¹⁰⁶ Through its website, the agency seeks to provide educational resources and tools for patients, families, and providers about palliative care services. The website includes information on the benefits of palliative care and toolkits for patients and families seeking an additional layer of support.¹⁰⁷

All palliative care providers must extend certain rights to their patients and must inform the patients of these rights.¹⁰⁸ Accordingly, even in Texas, palliative care providers have adopted a Hospice Patient's Bill of Rights similar to the Home Health and Hospice Patient Rights promulgated by the National Association for Home Care & Hospice.¹⁰⁹ This statement of rights begins by stating that patients have a right to be notified in writing of their rights and obligations before hospice care begins. Consistent with state laws, the patient's family or guardian may exercise the patient's rights when the patient is unable to do so. The statement of rights then places upon hospice organizations an obligation to protect and promote the rights of their patients in several ways.

1-5:7.1 Dignity and Respect

Patients and their hospice caregivers have a right to mutual respect and dignity. Caregivers are prohibited from accepting personal gifts and borrowing from patients/families/primary caregivers. In addition, patients have the right to (1) have relationships with hospice organizations that are based on honesty and ethical standards of conduct, (2) be informed of procedures they can follow to lodge complaints with the hospice organization about the care that is (or fails to be) furnished and regarding a lack of respect for property, (3) know about the disposition of such complaints, and (4) voice their grievances without fear of discrimination or reprisal for having done so.

1-5:7.2 Decision Making

Patients have the right to be notified in writing of the care that is to be furnished, the types (disciplines) of caregivers who will furnish the care, and the frequency of the services that are proposed to be furnished. They also have the right to participate in the planning of the care, be advised of any changes in the care, and be advised that they have the right to do so. Patients may also refuse services, but must be informed

¹⁰⁶ Tex. Health and Human Services website, Hospice Care, *available at* <https://www.hhs.texas.gov/services/health/palliative-care/hospice-care> (last visited May 7, 2020).

¹⁰⁷ Tex. Health and Human Services website, Palliative Care, *available at* <https://hhs.texas.gov/services/health/palliative-care> (last visited May 7, 2020).

¹⁰⁸ 42 C.F.R. § 418.52.

¹⁰⁹ See Appendix 2 for a full copy of the National Association for Home Care & Hospice's Home Health and Hospice Patient Rights.

of the consequences of their doing so. Finally, patients may request a change in caregiver without fear of reprisal or discrimination.

1-5:7.3 Privacy

Patients have the right to confidentiality with regard to information about their health, social, and financial circumstances and about what takes place in the home. They should also expect the hospice organization to release only that information which is consistent with its internal policy, required by law, or authorized by the client.

1-5:7.4 Financial

Patients have the right to be informed of the extent to which payment may be expected from Medicare, Medicaid, or any other payer known to the hospice organization. They also have the right to be informed of any charges that will not be covered by Medicare. In the same manner, they must be informed of the charges for which they may be liable. Patients should receive this information, orally and in writing, within 15 working days of the date the hospice organization becomes aware of any changes in charges. Patients must also have access, on request, to all bills for service received, regardless of whether they are paid out of pocket or by another party. As a final but important matter, the patient must be informed of the hospice's ownership status and its affiliation with any entities to which the patient is referred.

1-5:7.5 Quality of Care

Patients have the right to receive care of the highest quality. They also have the right to be admitted by a hospice organization only if it is assured that all necessary palliative and supportive services will be provided to promote the physical, psychological, social, and spiritual well-being of the dying patient. An organization with less than optimal resources may, however, admit the patient if a more appropriate hospice organization is not available—but only after fully informing the client of its limitations and the lack of suitable alternative arrangements. The patient must also be told what to do in the case of an emergency.

The hospice organization must also play its part in providing quality care. According to the Bill of Rights, the hospice organization shall assure that all medically related hospice care is provided in accordance with the physician's orders and that a plan of care, which is developed by the patient's physician and the hospice interdisciplinary group in conjunction with the patient, specifies the services to be provided and their frequency and duration. The organization shall also assure that all medically related personal care is provided by an appropriately trained home care aide who is supervised by a registered nurse.

1-5:7.6 Patient and/or Caregiver Responsibilities

The Bill of Rights is not a one-way street. While the hospice has certain responsibilities, the patient and/or his or her caregiver has responsibilities also. Accordingly, the patient and/or his or her caregiver has the responsibility to, first, show respect and consideration for hospice staff and equipment. He or she must also notify the hospice in advance of any treatment, testing, or medications not provided or arranged by the

hospice; notify the hospice of changes in condition (e.g., pain or need of emergency care); follow the hospice plan of care and work as a partner with the hospice team in the provision of care; notify the hospice if the visit schedule needs to be changed; inform the hospice of any changes made to advance directives; provide a safe environment for care to be provided; and assume responsibility for any charges for which the patient has been notified of responsibility and/or incurred for services outside of the hospice plan of care.

1-6 Patients' Rights and Health Insurance

In 2003, Texas enacted a statute that limited recovery from physicians or health care providers—other than health care institutions—for non-economic damages (such as pain and suffering) on each claim in a medical malpractice lawsuit to \$250,000.¹¹⁰ The statute also provides that the limit of civil liability for non-economic damages for all health care institutions named as defendants in the lawsuit, inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed \$500,000 for each claimant.¹¹¹ In 2012, a Dallas Appeals Court held that the statute did not violate the Texas Constitution.¹¹²

Meanwhile, for years, Texans have had the right to sue their medical insurance carriers. The Civil Practice and Remedies Code has long provided that a health insurance carrier, health maintenance organization, or other managed care entity for a health care plan has the duty to exercise ordinary care when making health care treatment decisions and is liable for damages for harm to an insured proximately caused by its failure to exercise that ordinary care.¹¹³

The statute was subsequently held unconstitutional by the U.S. Supreme Court on grounds that it was preempted by ERISA.¹¹⁴ As preempted and amended, the statute allows the medical insurance carriers to raise two defenses to a lawsuit: (1) neither the health insurance carrier, health maintenance organization, or other managed care entity being sued, nor any employee, agent, ostensible agent, or representative for whose conduct the entity is deemed liable under the statute, controlled, influenced, or participated in the health care treatment decision; and (2) the health insurance carrier, health maintenance organization, or other managed care entity did not deny or delay payment for any treatment prescribed or recommended by a provider to the insured or enrollee.¹¹⁵

In late February 2015, this aspect of the law took an interesting turn when the Texas Supreme Court held that the Texas Department of Insurance has exclusive jurisdiction over complaints within the workers' compensation system wherein injured workers accuse their medical insurance companies of intentionally misrepresenting policies or even using the criminal justice system to maliciously punish the worker.¹¹⁶

¹¹⁰ Tex. Civ. Prac. & Rem. Code § 74.301.

¹¹¹ Tex. Civ. Prac. & Rem. Code § 74.301.

¹¹² See *Prabhakar v. Fritzgerald*, No. 05-10-00126-CV, 2012 WL3667400 (Tex. App.—Dallas Aug. 24, 2012).

¹¹³ Tex. Civ. Prac. & Rem. Code § 88.002.

¹¹⁴ *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004).

¹¹⁵ Tex. Civ. Prac. & Rem. Code § 88.002.

¹¹⁶ *In re Crawford & Co.*, 458 S.W.3d 920 (Tex. 2015).

According to the court, while state regulators can use their administrative powers to sanction insurers who inflict such harm, the workers cannot sue for damages.¹¹⁷

1-7 Commercial Protections

Texas law allows Texas citizens and residents to make claims against commercial enterprises that use deceptive practices to garner business and thus harm others.

1-7:1 Texas Deceptive Trade Practices Act

This statute defines a wide variety of prohibited schemes as “deceptive.”¹¹⁸ Among these are:

1. taking advantage of a customer’s lack of knowledge, experience, or capacity to an unfair degree;¹¹⁹
2. telling a customer that work has been performed on or parts replaced in goods when the work was not performed or the parts not replaced;¹²⁰
3. making misleading statements concerning the need for parts, replacement, or repair service¹²¹; and
4. telling a customer that goods are original or new if they are deteriorated, reconditioned, reclaimed, used, or second hand.¹²²

Before taking legal action against the business enterprise, the law requires that the aggrieved party (in our case, the elderly person) give the business at least 30 days’ notice of his or her complaint and the amount of damages. The business then has a chance to offer a settlement. If it does not make an offer—or the elderly person rejects the offer—the person may then file suit after the 30 days have passed.

1-7:2 Texas Attorney General’s Office, Complaint Division

If the elderly person is not ready to proceed with the lawsuit, he or she can contact the Texas Attorney General’s Office, Complaint Division, at 1-800-621-0508. The Consumer Protection Division could then take direct action against the business enterprise if it believes that the enterprise has preyed upon an elderly person.

1-7:3 Protection Against Home Solicitations

Texas law also protects the elderly from home solicitations. The statute on point is commonly known as the Texas Home Solicitation Act.¹²³ Pursuant to the statute, a consumer is legally able to cancel most in-home sales within 3 business days of making the purchase. The purchase can be of real property, personal property, or services,

¹¹⁷ *In re Crawford & Co.*, 458 S.W.3d 920 (Tex. 2015).

¹¹⁸ Tex. Bus. Com. Code § 17.46.

¹¹⁹ Tex. Bus. Com. Code § 17.46(b)(24).

¹²⁰ Tex. Bus. Com. Code § 17.46(b)(22).

¹²¹ Tex. Bus. Com. Code § 17.46(b)(14).

¹²² Tex. Bus. Com. Code § 17.46(b)(6).

¹²³ Tex. Bus. Com. Code § 601.001 et seq.

but it must have been sold to the consumer for personal, family, or household purposes. (The law does not cover business-to-business transactions.)

How does this work? So long as the individual consumer is in his or her home, he or she can cancel an in-home sale until midnight of the third business day after he or she agreed to purchase the item(s).¹²⁴

For his or her part, the salesperson must provide the consumer with a pre-printed "notice of cancellation" so that the consumer can more easily exercise his or her rights.¹²⁵ The salesperson's failure to give the pre-printed form to the consumer is a deceptive trade practice.¹²⁶

Some significant exceptions exist to the home-sales law. First, a sale of farm equipment is not covered by the law.¹²⁷ Any sale of insurance is also exempt.¹²⁸ Third, any sale made under a pre-existing revolving charge account or retail charge agreement, or after negotiations between the parties at the seller's place of business is exempt.¹²⁹ Finally, any at-home transaction for the sale of real property is not covered by the law if the purchaser is represented by an attorney, the transaction is negotiated by a licensed real estate broker, or the transaction is negotiated at a place other than the consumer's home by the person who owns the property.¹³⁰

1-7:4 Protection From Telephone Solicitations

Texas law also regulates computerized telephone calls. The statute on point is commonly known as the Texas Telephone Solicitations Act.¹³¹ Pursuant to this law, it is illegal for any business to use a machine to solicit a consumer unless:

1. the machine immediately identifies the caller by name, tells what business is being represented, tells the purpose of the call, and gives a phone number where the consumer can contact the company making the call;¹³²
2. the call is made between the hours of 9 A.M. and 9 P.M., except on Sundays when calls must be between noon and 9 P.M.;¹³³ and
3. the machine releases the consumer's phone within 30 seconds after he or she hangs up.¹³⁴

A consumer who gets repeat calls, or who observes that the calls continue after the legal hours, should call the business and instruct officials there to stop the calls. If the business does not stop, the consumer should complain to the Texas Attorney General's office, which can file suit on the consumer's behalf.¹³⁵

¹²⁴ Tex. Bus. Com. Code § 601.051.

¹²⁵ Tex. Bus. Com. Code § 601.052.

¹²⁶ Tex. Bus. Com. Code § 601.204.

¹²⁷ Tex. Bus. Com. Code § 601.002(b) (1).

¹²⁸ Tex. Bus. Com. Code § 601.002(b) (2).

¹²⁹ Tex. Bus. Com. Code § 601.002(b) (3).

¹³⁰ Tex. Bus. Com. Code § 601.002(b) (4).

¹³¹ Tex. Bus. Com. Code § 37.01 et seq.

¹³² Tex. Bus. Com. Code § 37.02(a) (1).

¹³³ Tex. Bus. Com. Code § 37.02(a) (2).

¹³⁴ Tex. Bus. Com. Code § 37.02(a) (3).

¹³⁵ Tex. Bus. Com. Code § 37.04.

1-7:5 Illegal Debt Collection Practices

While it is legal for a creditor to hire a collection agency to contact a debtor to collect a debt, such agencies are limited in what they can do. Pursuant to these limits, it is illegal for the debt collector, in attempting to collect on a debt, to:

1. threaten or use violence;¹³⁶
2. falsely accuse the debtor of fraud or other crimes;¹³⁷
3. threaten the debtor that he or she will be arrested for failure to pay the debt;¹³⁸ or
4. harass or abuse the debtor.¹³⁹

A debt collector who violates these laws has committed a misdemeanor.¹⁴⁰ Consumers should report these violations to the Office of the Attorney General. A consumer can also sue the collector for committing a deceptive trade practice.¹⁴¹ As another alternative, the consumer could also report the matter to the FTC.¹⁴²

1-7:6 The Lemon Law for Auto Purchases

Elderly people sometimes purchase automobiles. Unfortunately, some automobile dealers tend to prey on these individuals and sell them vehicles that are no good. To protect the elderly—and others—Texas enacted the Texas Lemon Law.¹⁴³

The Texas Lemon Law imposes obligations on the manufacturers, converters, and distributors (all collectively referred to as "Warrantors") of automobiles sold with a Warrantor's express warranty.¹⁴⁴ The Lemon Law basically requires that Warrantors repair automobile defects during the terms of their express warranties.

Warrantors also have a duty to repair defects *after* the expiration of their warranties if (1) the owner (or person entitled to enforce the warranty) reported the defect to the Warrantor while the express warranty was still in force and (2) one of the Lemon Law's presumptions regarding what constitutes a reasonable number of repairs is satisfied.¹⁴⁵

Just as importantly, Warrantors have an obligation to perform effective repairs. If a Warrantor cannot properly repair a covered defect within a "reasonable number" of attempts, then it must either replace the automobile with a comparable one or take it back and refund the purchase price, less an allowance for the use that the consumer had of the vehicle. Warrantors must also reimburse owners for all incidental expenses that they paid because of their loss of use of their automobiles, such as rental car costs, taxis, and towing.¹⁴⁶

¹³⁶ Tex. Fin. Code § 392.301(a)(1).

¹³⁷ Tex. Fin. Code § 392.301(a)(2).

¹³⁸ Tex. Fin. Code § 392.301(a)(6).

¹³⁹ Tex. Fin. Code § 392.302.

¹⁴⁰ Tex. Fin. Code § 392.402.

¹⁴¹ Tex. Fin. Code § 392.403.

¹⁴² See Fair Debt Collection Practices Act §§ 1692(a)–1692(p).

¹⁴³ Tex. Occ. Code § 2301.001 et seq.

¹⁴⁴ Tex. Occ. Code § 2301.001.

¹⁴⁵ Tex. Occ. Code § 2301.603.

¹⁴⁶ Tex. Occ. Code § 2301.604.

However, notwithstanding the above-listed rules, the Texas Lemon Law also includes several enumerated defenses that Warrantors can assert in Lemon Law cases. Specifically, a Warrantor cannot be forced to offer a Lemon Law buyback if an automobile's defects were caused by abuse of the vehicle, neglect by the owner, or an unauthorized modification or alteration of the vehicle. It is also a defense if a Warrantor proves that the defect is not one of the types of defects covered by the Texas Lemon Law.

1-8 Conclusion

We see, then, that Texas makes several efforts to protect its elderly citizens and residents. As we go deeper into this text, we shall discover whether—and to what extent—Texas has succeeded.

CHAPTER 2

Family and Marital Issues

2-1 Community Property

Texas has been a community property state ever since its inception. This system of community property originated in Continental Europe. It was brought to the Americas by the early French and Spanish settlers who came from that part of Europe. When Texas adopted its Constitution in 1876, the state adopted the community property system to govern marital and family property issues.¹ Today, eight other states use the system: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Washington, and Wisconsin. Two other states, Alaska and Tennessee, offer a community property option.²

2-1:1 Definition and Fundamental Principle

The fundamental principle of community property is that *during marriage* all earnings of the spouses, and property acquired from those earnings, are community property, belonging equally to both spouses.³ Unless the spouses agree to separate ownership or some other ownership arrangement exists, a presumption exists that the spouses own the community property together, with each spouse owning an undivided one-half interest in the community estate.⁴ The death of one spouse dissolves the community. If the deceased spouse dies testate, this half of the community estate will pass pursuant to the terms of the decedent's Last Will and Testament; if he or she dies intestate, this half of the community estate will descend pursuant to the provisions of the Texas intestacy statute.⁵

2-1:2 Separate Property

Property that is not community property is the separate property of one spouse or another. This includes any items (such as income or property) the individual spouses

¹ Tex. Const. art. 16, § 15; Tex. Fam. Code § 3.002.

² See Alaska Stat. § 34.77.100–160 (2012); Tenn. Code Ann. §§ 35-6-108 to -109 (2012); *see also* J. Paul Singleton, Yes, Virginia, Tax Loopholes Still Exist: An Examination of the Tennessee Community Property Trust Act of 2010, 42 U. Mem. L. Rev. 369 (2011).

³ Tex. Const. art. 16, § 15; Tex. Fam. Code § 3.002.

⁴ Tex. Fam. Code § 3.003.

⁵ Tex. Est. Code § 201.001.

owned before they got married and which they kept separate during the marriage.⁶ Additionally, each spouse is entitled to have and to hold the following as his or her separate property:

1. any items he or she acquires after marriage through gift or inheritance;⁷
2. any recovery he or she is awarded for personal injuries sustained during the marriage (except for any recovery for loss of earning capacity during the marriage);⁸ and
3. any appreciation of separate property, such as appreciated stock.⁹

2-1:2.1 Exception: Investment Income Earned on Separate Property

Notwithstanding the treatment given to the aforementioned examples of property, any investment income earned on separate property is, by definition, community property.¹⁰

For example, suppose Thomas, married to Jane, has a certificate of deposit (CD) he owned before he was married. The CD is separate property. However, the interest income earned on the CD—the capital gain—is community property. As the CD continues to earn more interest income and the separate property (the original investment) continues to be commingled with the community property (the capital gains income), it will at some point become difficult to know just where the separate property component ends and the community property component begins. It is then that a written agreement between the spouses to change the rules—either as a premarital agreement or as a spousal partition agreement—would be useful. Fortunately, Texas law provides for that. We shall discuss the provision in Section 2-1:4.

2-1:2.2 Capital Growth of Separate Assets: Separate Property

When a married person owns a separate asset that grows in *intrinsic* value, the growth usually remains separate property.¹¹ This capital growth is distinguishable from income produced by the separate asset.

For example, assume that a spouse has some shares of stock she owned before she was married. The stock is separate property. Growth of the stock is intimately part of the separate stock, and under most circumstances, that growth remains separate property.

⁶ Tex. Const. art. 16, § 15 (1876); Tex. Fam. Code § 3.002(1).

⁷ Tex. Const. art. 16, § 15; Tex. Fam. Code § 3.002(2).

⁸ Tex. Const. art. 16, § 15; Tex. Fam. Code § 3.002(3).

⁹ Tex. Const. art. 16, § 15.

¹⁰ Internal Revenue Service, Publication 555—Community Property.

¹¹ Tex. Fam. Code § 3.102(a)(4).

2-1:2.3 Growth in Asset Value Not Intrinsic to Asset: Value Increase is Community Property

In circumstances where the growth in the asset's value is not intrinsic to the asset, the result is different. Consider the following: If the value of the separate property increases because of the owner's personal efforts—such as repairs or improvements—the value increase is community property.¹²

Consider the following: Marcus, married to Elza, owns a separate property house valued at \$175,000. The house increases in value to \$200,000. Is the \$25,000 increase in value community property, or separate property? We do not know; it all depends on the cause of the increase. If the value increased simply because the market was good, then the increase is separate property. If, on the other hand, the value increased because Marcus repaired the house or improved it in some way, using his time and earnings, the value increase is community property.

2-1:3 “Equitable Interest” Property

Texas Marital Property Law also recognizes a third type of property interest: the equitable interest. The legislature devised this property interest primarily as a method to divide values in a divorce.¹³ The enabling statutes explicitly address two situations: where funds of one marital estate are expended to reduce the principal amount of secured debt on another marital estate and where funds are expended to make improvements on property of another marital estate. However, Family Code § 3.406 recognizes that an equitable claim for reimbursement based on case-developed principles can arise in other situations.¹⁴

The statutes also provide that the inception of title rule applies to the characterization of assets as separate or community property, and that a claim for economic contribution—which matures on dissolution of the marriage or the death of either spouse—does not create an ownership interest and does not affect the rules governing the management of marital property.¹⁵ Either party can waive a claim for economic contribution under a premarital or marital property agreement.¹⁶ Consider the following example wherein a court would favorably consider a request for economic contribution:

While he is young and unmarried, David takes out a mortgage and purchases a house. Subsequently, he marries Bathsheba. Over the next 5 years, both David and Bathsheba work outside the home, and use their joint earnings to pay the mortgage, each one contributing 50% of the payments made.

Thereafter, love turns cold for David and Bathsheba and they get divorced. The house is still David's separate property, but Bathsheba has an “equitable interest” equal to the contributions she made to the mortgage—plus interest. She can be compensated for that contribution.¹⁷

¹² Internal Revenue Manual 25.18.1.2.23 and 25.18.1.2.21 (Mar. 10, 2017).

¹³ Tex. Fam. Code §§ 3.006, 3.401, 3.402, 3.404, 3.405, 3.406, 3.410.

¹⁴ Tex. Fam. Code § 3.406.

¹⁵ Tex. Fam. Code §§ 3.404, 3.405.

¹⁶ Tex. Fam. Code § 3.410.

¹⁷ See Tex. Fam. Code § 3.402(a)(5).

2-1:4 Partition or Exchange of Community Property

Texas spouses may, at any time, partition between themselves all or part of their separate property, or exchange between themselves the community interest of one spouse or future spouse in any property for the community interest of the other spouse or future spouse in other community property.¹⁸ This option is open to “persons who are about to marry” as well as those who are already married.¹⁹ The property interest partitioned or exchanged could already be owned by the parties, or could be an interest to be acquired in the future.²⁰

To achieve this partitioning or exchange, the spouses or future spouses must execute a written agreement—be it a premarital or marital property agreement, depending on their marital status.²¹ Among other things, the agreement must clarify whether the partition or exchange includes future earnings and income arising from the property as the separate property of the owning spouse or whether such future earnings and income will be community property after the partition and exchange.²²

2-1:5 Conversion to Community Property

Effective January 1, 2000, the Texas Constitution has allowed Texas spouses to convert their separate property into community property.²³ This option is open only to spouses.²⁴

2-1:5.1 Written Agreement Necessary

To convert their property, the spouses must execute a written agreement, signed by both spouses, which must clearly identify the property that is being converted.²⁵ The agreement is enforceable even in the absence of consideration for the property converted.²⁶

2-1:5.2 Mere Transfer Insufficient

However, the mere transfer of a spouse’s separate property to the name of the other spouse or to the name of both spouses is not sufficient to convert the separate property to community property.²⁷ Instead, the conversion will not be enforceable against the spouse against whom enforcement is sought if that spouse can prove that he or she did not (1) execute the agreement voluntarily or (2) receive a fair and reasonable disclosure of the legal effect of converting the (separate) property to community property.²⁸ In fact, the Texas legislature has prepared a sample agreement that contains

¹⁸ Tex. Const. art. 16, § 15.

¹⁹ Tex. Const. art. 16, § 15.

²⁰ Tex. Const. art. 16, § 15; Tex. Fam. Code § 4.102.

²¹ Tex. Const. art. 16, § 15.

²² Tex. Fam. Code § 4.102.

²³ Tex. Const. art. 16, § 15; Tex. Fam. Code § 4.202.

²⁴ Tex. Fam. Code § 4.202.

²⁵ Tex. Fam. Code § 4.203(a)(1).

²⁶ Tex. Fam. Code § 4.203(a)(2).

²⁷ Tex. Fam. Code § 4.203(b).

²⁸ Tex. Fam. Code § 4.205(a).

the required statement, or substantially similar language, which it advises spouses to use as they prepare their agreements converting separate property to community property.²⁹ The full text of this proposed language is included herein as Appendix 3A. Inclusion of this statement in the agreement results in a presumption that in signing the agreement, both spouses understood the legal effect of their actions. Appendix 3B presents a sample agreement to convert separate property to community property.

2-1:6 Management of Assets

Texas property law provides some asset management features that are quite different from those of other jurisdictions. Although each spouse jointly owns all earnings and assets acquired from earnings after marriage, the spouses cannot practically jointly manage all assets at all times. That is more so as the spouses become elderly. Recognizing that fact, the law provides for “joint” and “sole” management of community assets.

2-1:6.1 Sole Management

During marriage, each spouse has the sole management, control, and disposition authority of the community property such spouse would have owned if single. This includes:

1. personal earnings;
2. revenue from separate property;
3. recoveries from personal injuries; and
4. the increase and mutations of, and the revenue from, all property subject to the spouse’s sole management, control, and disposition.³⁰

If a spouse has sole management of an asset, the other spouse has no control over it. However, if the spouses get divorced or a court annuls their marriage, the court would award items of separate property to the respective former spouses who own the items and would divide the community property—regardless of which spouse was managing it during the marriage—in a manner that the court deemed just and right after examining the rights of both spouses and any children of the marriage.³¹ If the marriage ends upon the death of one spouse, the decedent’s separate property and share of the community property would be distributed either in keeping with the Texas rules of intestate succession or pursuant to the terms of the decedent’s Last Will and Testament.³² The surviving spouse would retain his or her separate property and one-half of the community estate.

2-1:6.2 Joint Management

Barring circumstances wherein one or the other of the spouses has sole management of marital property, such property—properly described as community property—is

²⁹ Tex. Fam. Code § 4.205(b).

³⁰ Tex. Fam. Code § 3.102(a).

³¹ See Tex. Fam. Code § 7.002(a).

³² See Tex. Est. Code § 101.001(a)(1).

subject to the joint management, control, and disposition of both spouses, unless the spouses provide otherwise by power of attorney in writing or some other agreement.³³ That having been said, 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 they agree otherwise in a written power of attorney or by some other agreement.³⁴

2-1:7 Community Property and Migrating Couples

Because Americans move as often as we do (on average, we move every 5–7 years), it is quite possible that by the time a couple becomes “elderly,” the spouses have migrated to Texas from a separate property jurisdiction. How does the move affect their assets?

2-1:7.1 Traditional Conflict of Laws Rules

As an initial matter, we take notice of the traditional conflict of laws rules used to determine which state law governs marital property:

1. The law of the situs governs questions related to land.³⁵
2. The law of the marital domicile at the time that personal property is acquired controls the characterization of the property as separate or community.
3. The law of the marital domicile at the death of one spouse controls the survivor's rights.

2-1:7.2 No Quasi-Community Property Protection for Testamentary Transfers

Pursuant to these rules, if a married couple acquires property in a separate property state and moves to a community property state, serious fairness problems could arise for the spouse who dies last. As we just saw, under traditional law, the law of the state where the couple is domiciled when movable property is acquired determines the ownership of the property. Hence, if the husband is the wage owner, in a separate property state, all of the couple's property may be titled in the husband's name; the wife's rights as a surviving spouse may be protected by the elective share.

Upon moving to a community property state, though, the wife loses the protection of the elective share and has no ownership rights in the husband's property. Essentially, she owns nothing! If the couple moves to Texas and the husband dies intestate survived by his wife, the Texas intestacy statute will determine the wife's share of the moveable assets included in the estate she and her husband built together in that

³³ Tex. Fam. Code § 3.102(c).

³⁴ Tex. Fam. Code § 3.102(b).

³⁵ Note that although the state of the situs has the power to control its land, it may choose to apply the law of the marital domicile in settling a dispute that arises over ownership of real property.

other jurisdiction. If her husband had children from an earlier marriage who are not on friendly terms with her, the results could be catastrophic.

While Texas has a quasi-community property provision to provide for such spouses in the event of divorce,³⁶ no such provision exists to protect spouses impoverished in the event of the death of the spouse who “owned” the family’s assets brought into Texas from a separate property state. To date, neither the Texas legislature nor any Texas court has seen it fit to extend the quasi-community property provision to at-death transfers. In fact, given the opportunity to do so, one Texas court firmly rejected an effort to extend the divorce rules to the devolution of property at death.³⁷ It would appear, therefore, that the only means available to elderly spouses to ensure that they receive a fair share of the estates they helped their spouses build in separate property states before moving to Texas is to have new wills and estate plans executed soon after they move into the state.

2-2 Common Law Marriage: Informal Marriage

What people call a common law marriage is under the law referred to as an “informal marriage.”³⁸

2-2:1 Requirement of Proof

A fact of life is that anyone who claims to be married to someone else must provide proof of such marriage. The proof normally consists of a marriage license and having a wedding ceremony.³⁹ In the absence of these, the public does not know the legal status of the person’s marriage relationship.

2-2:2 Proof of Marriage

Parties to a common law or informal marriage in Texas do not have a marriage license and have not participated in a wedding ceremony. To prove the existence of their marriage, the parties must establish that they have (1) both agreed to be married, (2) lived together in Texas as husband and wife, and (3) told other people that they are married.⁴⁰ The law does not impose a minimum time requirement for cohabitation that would qualify the couple’s union as an informal marriage. However, the parties may obtain some measure of formal recognition of their marriage by filing a “Declaration of Informal Marriage” with the County Clerk for the county in which they live.⁴¹ The declaration is actually a form prepared by the authorities that is signed by both parties and notarized by an appropriate official. A copy is included in Appendix 4.

³⁶ See Tex. Fam. Code § 7.002(a)(1). The statute provides that when a couple that was married in another state and which acquired property in that other state is divorcing in Texas, property acquired while domiciled in that other state is considered community property *if* that property would have been community property had the parties lived in Texas when it was acquired. In distributing the property among the spouses, the court then subjects it to Texas community property rules.

³⁷ *Estate of Hanau v. Hanau*, 730 S.W.2d 663 (Tex. 1987).

³⁸ Tex. Fam. Code §§ 2.401–2.402.

³⁹ See, e.g., Tex. Fam. Code § 2.209.

⁴⁰ Tex. Fam. Code § 2.401(a)(2).

⁴¹ See Tex. Fam. Code § 2.402.

2-2:3 Informal Marriage and Divorce

If the parties start living together but break up within 2 years and do not reconcile, a rebuttable presumption arises that the parties did not enter into an agreement to be married.⁴² If, on the other hand, a couple lives together for more than 2 years and then walk away and remain separated for at least 2 years, a rebuttable presumption arises that they were never married.⁴³ In either of these cases, if the couples had no children or joint assets, they need not take any further court action. However, if the spouses enter into the common law marriage by filing a Declaration of Informal Marriage, upon terminating their relationship, they must obtain a formal divorce just as spouses of formal marriages do.

2-3 Premarital Agreements

In most cases, the elderly person who marries is going through his or her second or third marriage—if not fourth or fifth. Any marriage beyond the first raises many concerns. When such a marriage involves an elderly individual, the number of issues the parties must consider is greatly multiplied. Unlike young adults who are just starting out in life, elders have commitments to honor—children from previous marriages and relationships, maybe grandchildren, perhaps significant savings and investments, friends and social groupings and clubs of which they are members, and, of course, treasured memories. While the love and companionship that can be found in a new spouse and a new marriage are of great and immeasurable value, so, too, is devotion to one's former family—children, grandchildren, even ex-spouses, if any. The senior citizen must go into that next marriage with her eyes wide open, aware that she is empowered to address the issues and find the solutions before marrying. Should she seek the advice of an attorney to prepare for marriage, the attorney should carefully consider the contents of the next few sections of this chapter as he or she counsels the senior on moving forward.

2-3:1 Consider Financial Issues

While it is true that the senior's significant other—particularly if she is much younger than the senior—may consider a discussion of financial issues as disconcerting, offensive, or “tacky,” it is essential that the couple discusses them before they get married. It is better to discover the parties' respective attitudes toward money and family before they get married—even if this means they might not get married at all—than to get married and then find out that they are polar opposites as far as these issues are concerned. While such a discussion would not be a romantic one, it would be a vital one to have.

What, then, should the discussion include? Certainly, it should include the following topics:

1. Where will the couple live?
2. Who will pay the living expenses?
3. What debts does each party have?

⁴² Tex. Fam. Code § 2.401(b).

⁴³ Tex. Fam. Code § 2.401(b).

4. When will the married couple take a vacation? Who will pay for it? Will the expenses be split down the middle?
5. Will each party pay for each other's nursing home bills if that day arrives?

This discussion—or rather these discussions—should be had outside the presence of the attorney. After the couple has discussed them to the fullest, if they still want to be married, the party who has retained the attorney's services may return for further legal counsel.

2-3:2 Consider Legal Issues

A discussion of financial issues should lead to a discussion of related legal issues. Among these should necessarily be:

1. whether the spouses will create a community estate out of their current separate estates;
2. whether their investment income will be community or separate property; and
3. whether each other's estate will be taxable.

Full resolution of these legal issues and a mutual understanding of these questions will lead the couple either into a closer marriage or to teach them that it is better that they not marry. If, however, they feel that they should marry, they should retain the services of an attorney to help them draw up a premarital agreement. While they may be tempted to settle upon a loving, trusting *verbal* understanding, they should not do any such thing. Such an understanding would not be binding and would crumble after the honeymoon ends. What the couple needs is a loving, trusting, written contract that will be legally binding.

2-3:3 Important Terms of the Premarital Agreement

While all terms of the premarital agreement are important, some are more important than others. In this section, we cover maybe the two most important of these: the manner of holding property and the payment of nursing home bills.

2-3:3.1 Separate Versus Community Property

Texas spouses could choose to keep their property owned before marriage as separate property, or to convert said property into community property.⁴⁴ They can also choose to convert their community property earned after marriage into separate property.⁴⁵ That way, before they get married, they would know just what they would be getting into and what they should expect.

Of course, spouses could decide to convert all their separate property into community property⁴⁶ and then to keep their property acquired after marriage as community

⁴⁴ Tex. Fam. Code § 4.202.

⁴⁵ Tex. Fam. Code § 4.102.

⁴⁶ Tex. Fam. Code § 4.202.

property. Regardless of what they decide, however, their decisions and various arrangements could be included in the premarital agreement.⁴⁷

Yet, spouses who fail to make a premarital agreement are not without hope. They can convert community property into separate property through a tool called a “partition agreement.”⁴⁸ Pursuant to the provisions of the Family Code, the spouses may, in a signed written agreement (preferably recorded with the County Clerk), convert some, or all, of their community property into separate property.⁴⁹ Of course, it is important to ensure that the wills of the spouses conform to the new property arrangements; if they do not, it will be necessary to prepare new wills.

2-3:3.2 Payment of Long-Term Care Bills

Long-term care is very costly. This is so whether the care is provided at a nursing home, an assisted living facility, or home. If two senior citizens—or one senior and one younger person—are contemplating marriage, they should consider the potential cost of long-term care for one or both of them, and the effect such care and the related expenses would have on their future happiness and well-being. The attorney who counsels these clients should also be well aware of the laws that govern these matters and the effects the costs will have on the couple's finances and happiness.

The American Elder Care Research Organization publishes data on the cost of nursing home care in America. According to the organization's website, in 2019—the most recent year for which the organization has complete data—the national, daily average for nursing home care for a shared room was \$245. The least expensive states were located in the Southeastern United States, South Central Region, and Mid-West, where the daily cost was closer to \$153–178. The most expensive area of the country—excluding Alaska and Hawaii—was the Northeast and New England, where the average daily cost was in the \$350–415 range. The average daily cost in Texas was \$158.⁵⁰ Genworth Financials projects cost increases in nursing home and assisted living facility care of 3.07% per annum across the country for the 5-year period beginning January 1, 2019.⁵¹ If Genworth's projections hold true, the cost increases in nursing home and assisted living facility care in Texas over the next 5 years will outpace the rate of inflation. These costs are astronomical. With these costs in mind, we return to our hypothetical couple from earlier in this section: How will their consideration of these rising costs of long-term care affect their thinking—individually and collectively—as they prepare their premarital agreement?

Let us assume that the couple signs a premarital agreement. Let us further assume that the spouses agree that the assets they owned prior to marriage would remain separate property and that they would individually bear no liability to pay for each other's

⁴⁷ See Tex. Fam. Code § 3.410.

⁴⁸ Tex. Fam. Code § 4.102.

⁴⁹ Tex. Fam. Code § 4.203.

⁵⁰ PayingforSeniorCare.com, How to Pay for Nursing Home Care/Convalescent Care, *available at* <https://www.payingforseniorcare.com/longtermcare/paying-for-nursing-homes.html#title2> (last visited May 7, 2020).

⁵¹ Genworth Financials, Cost of Care Survey 2019, *available at* <https://www.genworth.com/aging-and-you/finances/cost-of-care/cost-of-care-trends-and-insights.html> (last visited May 7, 2020).

health care. Can either spouse—the husband, for example—rely on the premarital agreement to shelter his assets from paying for his wife’s medical needs?

The answer is “No.” A Texas premarital agreement operates under Texas law.⁵² The agreement will most likely state that neither spouse can demand that the other pays his or her medical bills. Pursuant to the premarital agreement, neither spouse has the right to receive support from the other’s separate property.

On the other hand, the Medicaid program—to which the spouses will most likely turn to pay their nursing home and other medical bills—is a federal program. Accordingly, its rules can—and do—ignore various state laws, including the laws that give protection to assets under premarital and postnuptial agreements.

As an initial matter, under federal Medicaid law and regulations, marital assets—regardless of which spouse owns them—are considered “available” to pay for the medical care of either spouse.⁵³ No doubt Congress assumes that married people will take care of each other rather than turn to the country’s taxpayers to do so. If Congress only knew how humans behaved!

Meanwhile, Medicaid law and regulations also require that notwithstanding their having executed a premarital agreement, a husband and wife must report all of their countable resources to the Medicaid program, even if only one partner applies for Medicaid assistance.⁵⁴ If the couple’s combined resources exceed the minimum—after taking the spousal allowance into consideration—Medicaid will not provide any assistance.

With no assistance from Medicaid, it will be necessary for the elderly couple to look elsewhere for paying for care. We shall address the question of paying for long-term care in Chapter 6.

⁵² See, e.g., Tex. Fam. Code § 4.101, et seq., Premarital and Marital Agreements.

⁵³ 42 U.S.C. § 1396r-5(c). The statute provides in relevant part:

(1) (B) At the request of an institutionalized spouse or community spouse, at the beginning of the first continuous period of institutionalization (beginning on or after September 30, 1989) of the institutionalized spouse and upon the receipt of relevant documentation of resources, the state shall promptly assess and document the total value [of the resources to the extent either the institutionalized spouse or the community spouse has an ownership interest] and shall provide a copy of such assessment and documentation to each spouse and shall retain a copy of the assessment for use under this section. If the request is not part of an application for medical assistance under this subchapter, the State may, at its option as a condition of providing the assessment, require payment of a fee not exceeding the reasonable expenses of providing and documenting the assessment. At the time of providing the copy of the assessment, the State shall include a notice indicating that the spouse will have a right to a fair hearing under subsection (e) (2) of this section. (2) In determining the resources of an institutionalized spouse at the time of application for benefits under this subchapter, regardless of any State laws relating to community property or the division of marital property—(A) except as provided in subparagraph (B), all the resources held by either the institutionalized spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse, and (B) resources shall be considered to be available to an institutionalized spouse, but only to the extent that the amount of such resources exceeds the amount computed under subsection (f) (2) (A) of this section (as of the time of application for benefits).

⁵⁴ 42 U.S.C. § 1382(a)–(c).

2-3:4 Partition a Fallback Measure

If a couple fails to execute a premarital agreement, all is not lost. As we discussed in Section 2-1:4, Texas law allows even a couple that has been married for several years to use a legal tool known as a "partition agreement" to exchange or convert some or all of their community property into separate property.⁵⁵ The property interests partitioned or exchanged could be limited to those interests already owned by the couple, or could be expanded to include property interests to be acquired in the future.⁵⁶ Also, the partition agreement should clarify whether the partition or exchange would include future earnings and income arising from the property as the separate property of the owning spouse or whether such future earnings and income would be community property after the partition and exchange.⁵⁷ While the partitioning may not resolve the Medicaid eligibility issue, it would most likely provide some level of relief and comfort in other areas such as heirship, creditors' rights, and estate administration.

2-4 Divorce

Not all marriages are "made in heaven." And even if the elderly may believe they are closer to heaven than they were when they were younger, their late-in-life marriages may not have been made in heaven. By the same token, elderly people who spent many years as married couples may find that in old age they have become incompatible and their marriages end. How does divorce interact with Elder Law?

2-4:1 Divorce and the Elderly: The Last Will and Testament

In Texas, divorce alters a married person's Last Will and Testament. Immediately upon the signing of the divorce decree, unless the Last Will and Testament expressly states otherwise, any provision naming a now-former spouse as a beneficiary or fiduciary is revoked; so, too, is any gift to, or appointment of, any relative of the former spouse who is not a relative of the testator.⁵⁸

Good lawyering dictates that the attorney representing the elderly client would lead him or her to execute a new Last Will and Testament prior to filing the divorce petition.

2-4:2 Divorce and the Elderly: Non-Testamentary Transfers

The same rule regarding revocability applies to non-testamentary transfers in favor of a now-former spouse. Such transfers include transfers made pursuant to regular and revocable living trusts, general and special powers of appointment, conservatorships, agencies, and contracts.⁵⁹ Among the contracts wherein divorce renders the naming of a now-former spouse as a beneficiary as null and void are life insurance policies⁶⁰ and retirement plans.⁶¹

⁵⁵ Tex. Fam. Code § 4.102.

⁵⁶ Tex. Const. art. 16, § 15; Tex. Fam. Code § 4.102.

⁵⁷ Tex. Fam. Code § 4.102.

⁵⁸ Tex. Est. Code § 123.001.

⁵⁹ Tex. Est. Code § 123.052.

⁶⁰ Tex. Fam. Code § 9.301.

⁶¹ Tex. Fam. Code § 9.302.

Good lawyering dictates that the attorney assists his or her client in changing the beneficiary under any of these policies, contracts, and non-testamentary transfers prior to filing the divorce petition.

2-4:3 Divorce and the Elderly: When a Spouse is Incapacitated

Divorce is not limited to spouses who are young, in good health, or have mental capacity. Even spouses who are incapacitated can be parties to a divorce.⁶² The question we wish to explore here takes this case one step further: Can a divorce occur in Texas when one of the spouses is incapacitated and under a guardianship?

The answer is “Yes.” Under Texas’s “no-fault” divorce law, people with mental impairment can divorce. All that is necessary is for one spouse to allege—and prove—that discord or conflict of personalities has destroyed the legitimate ends of the marriage and that no reasonable expectation of reconciliation exists.⁶³

That being said, divorce signals not only the end of the marriage but also the end of the financial partnership between the parties. When one spouse is incapacitated, the real problem is whether he or she can adequately defend his or her property interests. If a court of competent jurisdiction has already appointed a guardian for that spouse, the guardian normally has a duty to protect the spouse’s interests.⁶⁴ In 1998, one Texas court paved the way for significant changes in Texas law. The court held that not only can a guardian protect the spouse’s property interests, but such guardian can, in pursuit of his or her duty to protect the spouse and his or her interests, also commence and successfully pursue a divorce action against the other spouse.⁶⁵

Three years later, the legislature substantially revised the community property administration provisions of the then-Probate Code by incorporating some safeguards into a statutory scheme that previously had none. Prior to 2001, upon a judicial declaration of incapacity of one spouse, the other spouse—if he or she had

⁶² For an interesting account of a case wherein a man brought a divorce action against his wife who was suffering from Alzheimer’s disease, see Vaughn E. James, No Help for the Helpless: How the Law Has Failed to Serve and Protect Persons Suffering From Alzheimer’s Disease, 7 J. Health Biomed. L. 407, 438–41 (2012).

⁶³ Tex. Fam. Code § 6.001.

⁶⁴ See Tex. Est. Code § 1101.151, .152, .153.

⁶⁵ See *Stubbs v. Ortega*, 977 S.W.2d 718 (Tex. App.—Fort Worth 1998). In *Stubbs*, Marcella Tabor had been married to her husband, Clyde, for over 50 years. She was in the end stages of Alzheimer’s disease, and could not see, speak, or hear. The Probate Court, Tarrant County, appointed the patient’s daughter as Guardian of her Estate and Person. Claiming that Clyde (her father, and her mother’s husband) was verbally abusive to the ward, the Guardian sought the Probate Court’s permission to sue him for divorce on the ward’s behalf. The husband opposed the motion, claiming that it was against public policy to allow an incapacitated person to get divorced. The Probate Court denied his motion. On appeal, the Court of Appeals in Fort Worth held that although it had been Texas public policy to “foster and protect marriage and discourage divorce,” such public policy did not bar an incapacitated person from obtaining a divorce. *Stubbs v. Ortega*, 977 S.W.2d 718, 722 (Tex. App.—Fort Worth 1998). The court went on to point out that under Texas law, a person with mental illness has all the rights, benefits, responsibilities, and privileges guaranteed under the law, including domestic rights. So saying, the court allowed Mrs. Tabor’s daughter to petition for divorce on her behalf. Said divorce was granted.

capacity—automatically became the community administrator of the community property, with the power to manage, control, and dispose of the entire community estate.⁶⁶ Among other things, the 2001 amendments provided for the appointment of an attorney *ad litem* to represent the interests of an incapacitated spouse not only in a proceeding to remove a community administrator but also in any proceeding bearing on the management and control of an incapacitated spouse's property.⁶⁷ The amendments also provided for the community administrator spouse to, upon the court's order, submit an inventory and appraisal⁶⁸ or an accounting to the court,⁶⁹ and identified certain conditions under which the court could remove the well spouse as community administrator.⁷⁰ Essentially, the amendments took steps to protect Texas spouses who were incapacitated. As a result, today, pursuant to the Estates Code, if one spouse is incapacitated and the healthy spouse is serving as the community property administrator, that healthy spouse has specific duties and responsibilities, and must inform the court in writing of any divorce suit he or she brings against the incapacitated spouse.⁷¹

2-5 Grandparents' Rights

Most elderly people have one thing in common other than age: They are grandparents. For them, the issue of grandparents' rights rises to the fore after one or more of their children get a divorce. Sometimes their children, and at other times their former children-in-law, forbid them from having relationships with their grandchildren. What recourse do they have under the law?

In a sense, the law offers little comfort to these grandparents. In a 2000 ruling, the U.S. Supreme Court held that "the interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court."⁷² Citing to precedence established in cases such as *Meyer v. Nebraska*,⁷³ *Pierce v. Society of Sisters*,⁷⁴ and *Prince v. Massachusetts*,⁷⁵ Justice O'Connor, writing for the Court, stated that it cannot be doubted that the Due Process Clause protects the fundamental right of parents to make decisions concerning the care,

⁶⁶ Tex. Est. Code § 1002.006.

⁶⁷ Tex. Est. Code § 1353.151.

⁶⁸ Tex. Est. Code § 1353.051.

⁶⁹ Tex. Est. Code § 1353.052.

⁷⁰ Tex. Est. Code § 1353.101.

⁷¹ Tex. Est. Code § 1353.053.

⁷² *Troxell v. Granville*, 530 U.S. 57 (2000).

⁷³ 262 U.S. 390, 399, 401 (1923) ["... the 'liberty' protected by the Due Process Clause includes the right of parents to 'establish a home and bring up children' and 'to control the education of their own.'"].

⁷⁴ 268 U.S. 510, 534-535 (1925) ["... the 'liberty of parents and guardians' includes the right 'to direct the upbringing and education of children under their control;' 'The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.'"].

⁷⁵ 321 U.S. 158 (1944) ["... there is a constitutional dimension to the right of parents to direct the upbringing of their children. 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.'"]

custody, and control of their children. The Supreme Court has spoken clearly: The parent-child relationship cannot be interfered with lightly, not even by a grandparent.

In Texas, what little hope grandparents have lies with the divorce judge. In a divorce, the judge decides who gets custody and visitation of the children. Increasingly, Texas courts have been naming both parents as joint managing conservators, letting the parents work out a pattern for sharing the children.

If the elderly grandparent's child has adequate time and is willing to share the grandchildren with him or her, then his or her need to spend time with the grandchildren would be satisfied. However, if the grandparent fears that neither parent will allow him or her access to the grandchildren, the Texas Family Code allows grandparents to petition a court of competent jurisdiction for "reasonable access" to the grandchildren.⁷⁶ The grandparent would have to show the court that:

1. at the time relief is being requested, at least one of the child's parents or adoptive parents has not had his or her parental rights terminated;
2. his or her child is still the parent or adoptive parent of the grandchild or grandchildren in question (the statute's relief does not extend to stepchildren), and that parent or adoptive parent is incarcerated, is dead, has been found by a court to be an incompetent parent, or somehow does not have actual or court-ordered possession of the child; and
3. denial of access would significantly impair the grandchild's physical health or emotional well-being.⁷⁷

The judge will grant the petition if he or she believes that granting the grandparent access to the grandchild would be in the child's best interest.⁷⁸

2-6 Conclusion

These, then, are the family life and marital issues that face elderly Texans. An attorney wishing to offer his or her services to assist the elderly must be able to address these issues and to counsel the elderly client who may not understand them.

⁷⁶ Tex. Fam. Code § 153.433.

⁷⁷ Tex. Fam. Code § 153.433.

⁷⁸ Tex. Fam. Code § 153.002.

CHAPTER 3

Texas Homestead Rights

3-1 What is a Homestead?

Simply put, a homestead is the dwelling house and adjoining land where a family resides. Technically, and pursuant to the modern homestead exemption laws, the homestead is an artificial estate in land, created to protect the possession and enjoyment of the owner against the claims of creditors by preventing the sale of the property for payment of the owner's debts so long as the land is occupied as a home.

Laws exempting the homestead from liability for debts of the owner are strictly of U.S. origin. They did not exist under the English Common Law. Accordingly, today, homestead rights exist only through the constitutional and statutory provisions that create them. Nearly every state has created such provisions; the earliest such provisions in what is today the United States were enacted in 1839 in what was then the Republic of Texas.

3-1:1 The Texas Homestead

The Texas homestead laws are unique. Truly, no other state affords homeowners similar protection and benefits—although, as in any other state, a person can claim only one homestead.

3-1:1.1 Texas Homestead Defined

Texas homesteads are classified by property type as being either urban or rural.¹ If urban, the homestead is limited to 10 acres of land, “which may be in one or more contiguous lots, [along] with any improvements thereon.”² A rural homestead, on the other hand, comes in two types. If claimed by a family, the homestead could consist of 200 acres of land, whether in one or more parcels, along with the improvements thereon.³ If claimed by a single adult, the rural homestead is limited to 100 acres.⁴ Essentially, a homestead is considered urban if, at the time the designation is made, the property is located within a municipality or any of its subdivisions and is served by the municipality's police and fire departments, and receives at least three of the

¹ Tex. Prop. Code § 41.002.

² Tex. Prop. Code § 41.002(a).

³ Tex. Prop. Code § 41.002(b)(1).

⁴ Tex. Prop. Code § 41.002(b)(2).

following five services from the municipality: electricity, natural gas, sewerage, storm sewerage, and water.⁵

3-1:1.2 Texas Homestead Benefits

Texans derive many benefits from the state's homestead laws. Among these are the homestead tax reductions, capital gain exemption, and exemption from judgment. The homestead rules also affect the way Texans negotiate and take home equity loans, and the involvement of Texans in the reverse mortgage market.

3-2 Homestead Tax Reductions

Texas law grants several tax reductions and exemptions that benefit homestead owners. Some of these tax benefits specifically benefit homeowners aged 65 and older.

3-2:1 The General Exemption

For many years, Texas has allowed an exemption from county property taxes of \$3,000 of the assessed value of a residence homestead.⁶

3-2:2 The School Tax Exemption

An adult is entitled to an exemption from school taxes of \$25,000.⁷

3-2:3 Exemptions for the Elderly

In addition to the other exemptions to which they are entitled, elderly citizens (those 65 years of age and older) are allowed an additional \$10,000 homestead exemption on the home's value against school taxes.⁸ Also, a taxing unit—including a school district—can, at its discretion, offer an additional exemption of at least \$3,000 for taxpayers who are 65 years old and older.⁹ To qualify for the age 65 or older local option exemption, the owner must be of age 65 or older and live in the house.¹⁰ If the 65-years-of-age-or-older homeowner dies, the surviving spouse may continue to receive the local option exemption if the surviving spouse is aged 55 or older at the time of the decedent's death and the surviving spouse owns and lives in the home and applies for the exemption.¹¹

Taxpayers who qualify for the school tax exemption also have a school tax ceiling applied to their homesteads.¹² Essentially, the appraisal district freezes the school taxes at the taxpayer's age-65 level and does not increase the figure unless the home is significantly improved (such as by adding an art studio). However, the tax ceiling changes if the house is sold and the taxpayer purchases a replacement. In such a

⁵ Tex. Prop. Code § 41.002(c).

⁶ Tex. Const. art. 8, § 1-b; Tex. Tax Code § 11.13(b).

⁷ Tex. Const. art. 8, § 1-b; Tex. Tax Code § 11.13(b).

⁸ Tex. Tax Code § 11.13(c).

⁹ Tex. Tax Code § 11.13(n).

¹⁰ Tex. Tax Code § 11.13(h), (i).

¹¹ Tex. Tax Code § 11.13(q).

¹² Tex. Tax Code § 11.13(n)(1).

case, the appraisal district bases the new ceiling on a formula keyed to the original tax freeze.

The school tax ceiling transfers to the surviving spouse if he or she is 55 or older and continues to use the home as his or her homestead following the death of the spouse.¹³ However, the survivor must apply to the appraisal district for the tax ceiling to transfer.¹⁴

The 65-plus exemptions are not automatic.¹⁵ The elderly person—or someone acting on his or her behalf—must apply for them. Appendix 5 contains a sample Application for Exemption form that is used for applying for the exemption.

3-2:4 Death of the 65-Plus Homeowner

Sometimes, one spouse is 65 or older, and the other is younger than 65. The homestead qualifies for the general exemption, school tax exemption, and 65-plus exemption. If the older spouse applies for and receives all three exemptions, the family's property tax bill would be appreciably decreased. The homestead would also receive the school tax ceiling freeze.

Assume that the older spouse dies, leaving behind the younger spouse who is 55 or older. For the surviving spouse to continue to benefit from the homestead exemption, 65-plus exemption, and school tax ceiling freeze, he or she will need to be or become the owner of the homestead, and must continue to use the homestead as his or her residence.¹⁶ It is essential, therefore, that the elderly spouse keeps his or her Last Will and Testament updated so that the homestead will transfer smoothly from the decedent to the surviving spouse. In the alternative, the spouses could take advantage of a recently enacted Texas statute and execute and record a Transfer on Death Deed. Such a deed allows real property owners to name a beneficiary (or beneficiaries) to own that real property after the owner dies.¹⁷ With a properly recorded Transfer on Death Deed, upon the decedent's death, no probate will be necessary to transfer the real property to any designated beneficiary who survives the transferor by at least 120 hours.¹⁸ We shall discuss the Transfer on Death Deed in more detail in Chapter 8. Appendix 6 contains a sample Transfer on Death Deed form.

3-2:5 Tax Deferral

For various reasons, taxpayers sometimes fall behind on their property tax payments. The consequences can be severe. After the taxing authorities lose their patience with the errant and delinquent taxpayers, they seize the properties and sell them to recover the amounts owed.¹⁹

The consequence is less drastic when the property owner is aged 65 or older. In such a case, the taxpayer can defer payments of the property taxes imposed by the

¹³ Tex. Tax Code § 11.13(q).

¹⁴ Tex. Tax Code § 11.43.

¹⁵ Tex. Tax Code § 11.43.

¹⁶ Tex. Tax Code § 11.13(q).

¹⁷ Tex. Est. Code § 114.051.

¹⁸ Tex. Est. Code § 114.103.

¹⁹ See Tex. Tax Code § 33.91.

school district, county, or city.²⁰ This deferral does not extend to federal income tax or other taxes collected by the Internal Revenue Service.

To obtain the deferral, a taxpayer must file an affidavit (Form 33.06) with the appraisal district. The affidavit must recite the legal description of the taxpayer's home. The taxpayer must then go on to swear that he or she is 65 years of age or older, and that he or she occupies the property described as his or her homestead.²¹

No penalty is imposed during the period of tax deferral. While the taxing authorities may still perfect a lien against the property and interest may still continue to accrue on the tax debt, the authorities will impose no penalty during the deferral period.²²

The deferral does not serve as a tax reduction. The taxpayer or his or her estate is still expected to pay the tax owed. In short, the payment is deferred for a while, but the authorities expect it to be paid at some point.

3-2:6 Tax Abatement

If the taxing authority has already commenced collection activity—such as having filed a collection suit or attempted to foreclose a tax lien—a taxpayer who is 65 years old or older is entitled to petition a court of competent jurisdiction for a tax abatement.²³

3-2:6.1 Abatement of Collection Suit

To petition for an abatement of a collection suit, the taxpayer must file Form 33.06 with the court that has jurisdiction over the tax collection lawsuit. The affidavit must attest to the fact that the taxpayer is at least 65 years of age and that he or she owns the residence upon which the tax has been imposed and occupies it as a homestead.²⁴ The tax authority can submit a controverting affidavit, whereupon the judge would decide the matter. If the tax authority raises no objection and does not file a controverting affidavit, the judge will suspend the collection lawsuit until the taxpayer no longer owns and occupies the homestead property.²⁵

3-2:6.2 Abatement of Pending Sale to Foreclose Tax Lien

To obtain an abatement of a pending sale to foreclose a tax lien, the 65-plus taxpayer must file Form 33.06 with the tax authority or authorities that perfected the lien, the tax collector for the tax authority that requested the order of sale, or the attorney representing that unit for the collection of delinquent taxes, and the individual charged with selling the property, no later than the fifth day before the date of the sale.²⁶ Once this is done, the tax authority cannot proceed with its plan to sell the homestead. Instead, the authority must abate the sale. The tax lien will remain on the property, interest will continue to accrue, but no penalties will be imposed or assessed, and

²⁰ Tex. Tax Code § 33.06.

²¹ Tex. Tax Code § 33.06(a).

²² Tex. Tax Code § 33.06(d).

²³ Tex. Tax Code § 33.06(a).

²⁴ Tex. Tax Code § 33.06(c).

²⁵ Tex. Tax Code § 33.06(c).

²⁶ Tex. Tax Code § 33.06(c-1).

no further collection action will be taken until such time that the 65-plus taxpayer no longer owns the homestead.²⁷ Should the 65-plus taxpayer die while still owning the property and using it as his or her homestead, the abatement will continue until the 181st day after the death of the decedent's surviving spouse if (1) the surviving spouse was 55 years of age or older at the time the decedent died and (2) at the time of the decedent's death, the property was the surviving spouse's homestead.²⁸ On the 181st day, the entire amount becomes delinquent and the taxing units may pursue foreclosure.²⁹

3-3 Capital Gains Exemption

Someone's house, like any other investment, is a capital asset. For most people aged 65 and older, their home is their most valuable capital asset. Now, when one sells a capital asset—or any other asset—he or she pays federal income tax on the gain, that is, the difference between the amount realized and the adjusted basis of the asset.³⁰ When the asset is a capital asset—such as a house—the gain is called a “capital gain.” The tax rate on capital gains is lower than the rate on ordinary income.³¹

3-3:1 Special Tax Treatment for the Home

Unlike other capital assets, Congress has granted the home special tax treatment. Married couples may sell their home and exclude from their capital gain income for the year of the sale up to \$500,000 of the profit earned on the sale of the homestead.³² An unmarried person may exclude up to \$250,000 of the capital gain.³³

3-3:2 Conditions for the Exemption

To qualify for the exemption, the homeowner or homeowners must satisfy certain conditions. These are as follows:

1. If the exemption is being claimed by a couple, for a total of at least 2 of the 5 years ending on the date of the sale, at least one of the homeowners must have owned and used the homestead as his or her principal residence. If only one homeowner is claiming the exemption, then that homeowner must satisfy the test on his or her own.
2. If the exemption is being claimed by a married couple, the couple must file a joint federal income tax return for the year of the sale.
3. The seller or sellers must not have used the exemption rules to sell another home during the past 2 years.³⁴

²⁷ Tex. Tax Code § 33.06(c-1), (d).

²⁸ Tex. Tax Code § 33.06(f).

²⁹ Tex. Tax Code § 33.06(d).

³⁰ 26 U.S.C. § 1001(a).

³¹ 26 U.S.C. § 1(a)–(h).

³² 26 U.S.C. § 121(b)(2).

³³ 26 U.S.C. § 121(b)(1).

³⁴ 26 U.S.C. § 121.

3-3:3 Possibility for Prorated Exemption

People 65 years old and older may be concerned about two life changes that might be relevant to the capital gains exemption: retirement (and its attendant job changes) and health issues (which might result in a move to a nursing home). The occurrence of either of these two situations is covered by the prorated exemptions provided for in the Internal Revenue Code. Essentially, if the homeowner fails to occupy the house as his or her homestead for the requisite 2-year period because either (1) he or she has to move early because of a change in place of employment or (2) his or her health precipitates the move (such as his or her having to move into a licensed nursing home), he or she can claim a prorated exclusion of the amount of capital gains earned on the sale of the home.³⁵

The proration is calculated by dividing the number of months the homeowner occupied the home during the past 5 years by 24 months.³⁶

3-4 Exemptions From Judgment

States that have enacted homestead laws have done so to protect homesteads from judgments in favor of creditors to the detriment of homeowners. Texas law takes these exemptions further, exempting from judgment homesteads, personal property, and even some insurance and retirement funds.

3-4:1 The Homestead Exemption From Judgment

Perhaps the biggest advantage of the homestead laws found in the Texas Constitution and the Texas Property Code is the protection they give to homesteads—urban and rural—from the claims of most creditors. Hence, if, for example, a homeowner gets into a dispute with a creditor over a large bill and the creditor obtains a court judgment requiring the homeowner to pay, except in certain circumstances discussed below, the creditor can collect against anything owned by the homeowner, but not against the homestead.³⁷ Accordingly, the creditor is not allowed to leave the homeowner homeless.

3-4:1.1 Valid Liens Against the Homestead

Still, protection of one's homestead is not universal. Texas law allows eight reasons whereby encumbrances may be properly fixed on homestead property and the homestead may be seized for non-payment thereof. These eight situations are as follows:³⁸

1. Failure to repay a mortgage or home improvement loan. The Texas Property Code allows a lender to foreclose on a homestead for failure to pay back purchase money or money a homeowner borrowed for home improvements.
2. Failure to pay taxes. The federal or local government can seize one's homestead for failure to pay taxes. As regards Texas property taxes, as we have already discovered, homeowners aged 65 and older have some protection in

³⁵ 26 U.S.C. § 121(c).

³⁶ 26 U.S.C. § 121(c).

³⁷ Tex. Prop. Code § 41.001(a).

³⁸ Tex. Prop. Code § 41.001(b).

that their homesteads cannot be seized for failure to pay Texas property taxes if they file for a deferral of tax or an abatement of collection.³⁹ However, pursuant to the Supremacy Clause of the U.S. Constitution,⁴⁰ a federal tax lien perfected by the Internal Revenue Service is not affected by the Texas deferral or abatement procedure.

3. Imposition of an “owelty of partition.” An “owelty of partition” may be imposed against the entirety of the homestead by a court order or by a written agreement of the parties to the partition, including a debt of one spouse in favor of the other resulting from a division of, or an award of, a family homestead in a divorce proceeding.
4. Refinance of a lien. A lien may be refinanced against the homestead, including a federal tax lien resulting from the tax debt of both spouses, if the homestead is a family homestead, or from the tax debt of the owner.
5. Failure to pay a contractor for home improvements. Should the homeowner fail to make said payments, the contractor can file a “mechanics and materialmen’s lien” against the homestead.⁴¹ In fact, even before the contractor commences work on the project, both the homeowner and his or her spouse (if married) must agree to the lien in writing. The law also provides that the contractor must give the homeowner a specific written warning in the contract that failure to follow the terms of the contract could result in the homeowner’s loss of the homestead.⁴²
6. Abandonment of the homestead. If the homeowner surrenders his or her rights by walking away from the homestead, pre-existing creditors can take it. However, someone does not surrender his or her rights merely because of a prolonged absence (especially if the homeowner expresses an intent to return to his or her home). Several Texas courts have held that even a lengthy absence from home due to illness is not considered abandonment of one’s homestead.⁴³
7. Filing of a Medicaid Estate Recovery lien. Federal law mandates that states recover from the assets of deceased Medicaid recipients the costs of certain services paid by Medicaid on their behalf.⁴⁴ The Texas law enacted to implement the federal mandate says that the state may file a claim against the estate of a deceased Medicaid recipient aged 55 and above who applied for certain long-term care services on or after March 1, 2005.⁴⁵ The claim for Medicaid recovery can include the cost of services, hospital care, and prescription drugs supported by Medicaid under the following programs: a nursing facility, intermediate care facility for persons with mental retardation, Medicaid Waiver

³⁹ Tex. Tax Code § 33.06.

⁴⁰ U.S. Const. art. VI, cl 2.

⁴¹ Tex. Prop. Code § 53.052.

⁴² Tex. Prop. Code § 53.255(b).

⁴³ See *Churchill v. Mayo*, 224 S.W.3d 340, 347–48 (Tex. App.—Houston [1st Dist.] 2006); *Panhandle Construction Co. v. Head*, 134 S.W.2d 779 (Tex. Civ. App.—Amarillo, 1939); *Aman v. Cox*, 164 S.W.2d 744 (Tex. Civ. App.—Eastland, 1942).

⁴⁴ 42 U.S.C. § 1396k.

⁴⁵ 1 Tex. Admin. Code § 373.103(a) (1), (2).

Programs, or certain Community Attendant Services.⁴⁶ We shall return to a more detailed study of the workings of the Medicaid Estate Recovery Lien in Chapter 6.

8. A properly constituted reverse mortgage.⁴⁷ Such a reverse mortgage would have to be in keeping with the requirements of Sections 50(k)–(p), Article XVI of the Texas Constitution. Accordingly, if the property is community property, then the youngest borrower on title—that is, the younger of the two spouses—must be 62 years old or older and must have sufficient home equity in the property. The couple must also meet the financial eligibility criteria as established by the Department of Housing and Urban Development (HUD). If the elderly couple qualifies for the reverse mortgage, they will be able to liquidate the equity in their home in return for cash without selling their home or taking a loan and thereby incurring a monthly loan payment.⁴⁸

3-4:2 Personal Property Exemption

Texas law also provides for a personal property exemption. The exemption shelters personal necessities by forbidding the authorities from seizing, garnishing, attaching, or executing against a very specific list of items—even to satisfy a court judgment.⁴⁹

3-4:2.1 Exempt Amount

Under current law, a family is allowed to shelter assets with a fair market value of not more than \$100,000, exclusive of any liens, security interests, or charges encumbering the property.⁵⁰ A single adult is limited to \$50,000, also exclusive of any liens, security interests, or charges encumbering the property.⁵¹

3-4:2.2 Items Forbidden From Seizure

Over and above these limits, the law forbids the authorities from seizing the following items:⁵²

1. current wages for personal services, except for the enforcement of court-ordered child support payments;
2. alimony, support, or separate maintenance received or to be received by the taxpayer for the taxpayer or one of his or her dependents;
3. the taxpayer's professionally prescribed health aids, or the professionally prescribed health aids of the taxpayer's dependent; and
4. a religious Bible or other book containing sacred writings of a religion that is seized by a creditor other than a lessor of real property who is exercising the

⁴⁶ 1 Tex. Admin. Code § 373.103(c).

⁴⁷ Tex. Prop. Code § 41.001(b)(7).

⁴⁸ Tex. Const. art. XVI, § 50(k)–(p).

⁴⁹ Tex. Prop. Code § 42.001(a).

⁵⁰ Tex. Prop. Code § 42.001(a)(1).

⁵¹ Tex. Prop. Code § 42.001(a)(2).

⁵² Tex. Prop. Code § 42.001(b).

lessor's contractual or statutory right to seize personal property after a tenant breaches a lease agreement for or abandons the real property.

3-4:2.3 Personal Property Set Aside

If a judgment is entered against an elderly person's personal property, before the creditor can begin seizing property, the elderly person must be given the opportunity to set aside assets valued up to the value limits set by law (i.e., \$100,000 for a married couple, \$50,000 for a single adult). The elderly person is allowed to choose any combination from the following items:⁵³

1. home furnishings and family heirlooms;
2. food;
3. tools, equipment, books, and vehicles used in one's trade;
4. farm or ranch vehicles, implements, and some livestock;
5. clothing;
6. jewelry (so long as it does not exceed 25% of the total limit);
7. two guns;
8. athletic and sporting equipment, including bicycles; and
9. a car for each driving member of the family.

3-5 The Net Result

In the final analysis, the homestead and personal property exemptions ensure that although courts face no limits on the size of judgment they can impose upon Texans, these Texans shall never be stripped of the bare necessities of life.

3-6 Insurance and Retirement Funds

Texas law also shelters insurance benefits from seizure by creditors to satisfy a judgment.⁵⁴ According to the Texas Insurance Code, all benefits that flow from insurance policies—including cash values and policy proceeds—are exempt from seizure.⁵⁵ The Code's exemption covers policies issued by life, health, and accident insurance companies, including mutual companies and fraternal benefit societies.⁵⁶ The law also protects annuities and benefit plans provided by employers for the benefit of their employees.⁵⁷ Because of this protection, an elderly person's retirement annuity is exempt and cannot be seized by a creditor to pay a judgment lien or bankruptcy claim.

In addition to insurance and retirement funds, Texas law also protects—although only to a large degree and not absolutely—assets someone (including an elderly

⁵³ Tex. Prop. Code § 42.0021(a).

⁵⁴ Tex. Ins. Code § 1108.051.

⁵⁵ Tex. Ins. Code § 1108.051.

⁵⁶ Tex. Ins. Code § 1108.051(a)(1).

⁵⁷ Tex. Ins. Code § 1108.051(a)(2).

person) holds in, and can take as withdrawals from, any plan, contract, or account that qualifies under the Internal Revenue Code of 1986 as:⁵⁸

1. a stock bonus, pension, deferred compensation, profit-sharing, or similar plan, including a retirement plan for self-employed individuals;
2. a Roth individual retirement annuity (IRA), an inherited Roth IRA, or a health savings account;
3. a retirement annuity or account that is qualified under Section 403(b) of the Internal Revenue Code; and
4. any individual retirement account or any IRA, including a simplified employee pension plan (SEP).

3-7 Home Equity Loans

This chapter has already discussed the great protection Texas law gives to Texas homesteads. Essentially, except for limited circumstances, a Texas homestead is protected from forced sale for payment of debt.⁵⁹ In the November 1997 election, Texas voters approved the first of two constitutional amendments that enabled one of those limited circumstances—home equity lending—to come into being.

3-7:1 Texas Home Equity Loans Consumer Protections

Inasmuch as Texas homesteads had the highest level of protection in the nation prior to the 1997 constitutional amendment, the legislature sought to design home equity lending law with some strict consumer protection mechanisms. The highlights include the following:⁶⁰

1. If the homestead is owned by a married couple, both spouses must agree in writing to voluntarily place the lien against the homestead.
2. The homeowner(s) can put only one equity loan at a time on the homestead.
3. The loan and the existing mortgage cannot exceed 80% of the home's market value. Any existing loan must be factored in.
4. Installment payments must be handled like they would for a mortgage.
5. The loan cannot include personal liability for the homeowner(s)—that is, it can be collected only by foreclosing on the house. The homeowner's other assets cannot be put at risk.
6. A period of 12 days must pass between the time of loan application and loan funding.
7. Closing costs cannot be more than 3% of the loan amount.
8. Following loan approval, the borrower (or borrowers, if the home is owned by a couple) has (or have) 3 days to rescind the contract without penalty.

⁵⁸ Tex. Prop. Code § 42.0021(a).

⁵⁹ Tex. Const. art. 16, § 50.

⁶⁰ Tex. Const. art. 16, § 50(a)(6)(A)–(Q).

9. The loan cannot be treated like a revolving line of credit; rather, the entire amount of the loan must be disbursed at the same time.

A good source of information on Texas home equity loans is the Finance Commission of Texas's website, available at <https://www.fc.texas.gov/home-equity/disclosures>.

3-8 Reverse Mortgages

We shall cover reverse mortgages in more detail in Chapter 6, when we look at paying for long-term care. Here, we need to mention that reverse mortgages are a form of home equity loan.

The Texas Constitutional Amendment of 1997 was faulty in that it did not match federal underwriting regulations. Although the Amendment allowed Texas to move ahead with home equity lending, it did not create a resale market for Texas reverse mortgages. To address that problem, in November 1999, the voters were asked to revise the Constitution again—this time to let it match the federal regulations. With the proper amendments in place,⁶¹ reverse mortgages began to appear on the Texas market in mid-2011.

Reverse mortgages are of greatest interest to elderly citizens who have acquired extensive equity in their homes. These mortgages allow monthly payments to be made from the lender to the homeowner. The owner can spend the money for any purpose. Of course, the loan must be repaid—but not until any one of the following conditions is met:⁶²

1. All of the borrowers have died.
2. The homestead property securing the loan is sold or otherwise transferred.
3. All borrowers cease occupying the homestead property as a principal residence for more than 12 consecutive months without prior written approval of the lender.
4. The borrower defaults on the loans by failing to pay property taxes or by failing to keep the property insured or otherwise failing to maintain the security of the lender's lien.

3-8:1 Age Restriction

Reverse mortgages are available only to people aged 62 and above, or whose spouses are 62 and above.⁶³ The law also requires that before signing a reverse mortgage, the homeowner must attest in writing that he or she received counseling on the advisability and availability of reverse mortgages and other financial alternatives.⁶⁴

⁶¹ See Tex. Const. art. 16, § 50(a)(7).

⁶² Tex. Const. art. 16, § 50(b)(k)(6).

⁶³ Tex. Const. art. 16, § 50(k)(2).

⁶⁴ Tex. Const. art. 16, § 50(k)(8).

3-8:2 Rules Regarding Reverse Mortgages

Just as it did with home equity lending, the Texas legislature sought to protect Texas homeowners and their homesteads in the new environment of reverse mortgages. Accordingly, the legislature devised a number of rules for the conducting of the program. Among these are the following:

1. The lien must be voluntary, and created by a written agreement with the consent of each owner and each owner's spouse.⁶⁵
2. The loan must be without recourse for personal liability against each owner and each owner's spouse.⁶⁶
3. If periodic advances are to be made, the lender is not allowed to reduce the number of advances because of an adjustment in the interest rate.⁶⁷
4. If the lender fails to make the loan advances as contracted and does not cure its default as required in the loan contract, the lender forfeits all principal and interest of the reverse mortgage.⁶⁸

3-9 Conclusion

In many ways, Texas law seeks to protect the homesteads of Texans. Whether through the homestead laws, the laws authorizing home equity loans, or the laws authorizing reverse mortgages, Texas is vigilant with homestead protection.

Texas also seeks to give extra protection to homesteads owned by its senior citizens. Accordingly, within the homestead laws and the laws authorizing home equity loans and reverse mortgages, the elderly in Texas enjoy various rights and protections not enjoyed by their younger counterparts.

⁶⁵ Tex. Const. art. 16, § 50(k)(1).

⁶⁶ Tex. Const. art. 16, § 50(k)(3).

⁶⁷ Tex. Const. art. 16, § 50(k)(5).

⁶⁸ Tex. Const. art. 16, § 50(k)(7).

CHAPTER 4

Dementia, Alzheimer's Disease, and the Elderly

4-1 What is Dementia?

Dementia is the name given to a group of symptoms including memory loss, reduced ability to reason, impaired judgment, and progressive loss of the ability to understand either spoken or written language.¹ One could liken dementia to a fever: A “fever” is not a disease; it is merely a symptom that someone is suffering from a thus-far unidentified disease. In the same manner, dementia serves as an indication that someone is suffering from some form of impaired judgment.

This, though, is where the similarities end. In the final analysis, fevers and dementia manifest themselves in quite dissimilar ways. If we consider the manifestations as points along a spectrum, on one end of the spectrum, we find someone who may be “burning up with a fever.” The person may be delirious and may say things he or she does not mean or does not remember after the fever has abated. On the other end of the spectrum, we find someone suffering from dementia. Generally, the person behaves in ways others may find irrational.² He or she suffers from severe mood or personality changes, is physically aggressive, becomes easily agitated, and suffers from altered perceptions such as hallucinations, misperceptions, and delusions.³ As time passes by and the disease settles in “for the long haul,” the person may become disoriented in time (i.e., not knowing what day of the week, day of the month, or month of the year it is), place (not knowing where he or she is), and person (not knowing who he or she is—or who anybody else is, for that matter).⁴

4-1:1 Diagnosing Dementia

The Alzheimer's Association reports that disorders grouped under the general term “dementia” are caused by abnormal brain changes. These changes trigger a decline in thinking skills, also known as cognitive abilities, severe enough to impair daily life and

¹ Vaughn E. James, *The Alzheimer's Advisor: A Caregiver's Guide to Dealing With the Tough Legal and Practical Issues*, 8 (AMACOM Books 2009).

² Vaughn E. James, *The Alzheimer's Advisor: A Caregiver's Guide to Dealing With the Tough Legal and Practical Issues*, 8 (AMACOM Books 2009).

³ Vaughn E. James, *The Alzheimer's Advisor: A Caregiver's Guide to Dealing With the Tough Legal and Practical Issues*, 8 (AMACOM Books 2009).

⁴ Vaughn E. James, *The Alzheimer's Advisor: A Caregiver's Guide to Dealing With the Tough Legal and Practical Issues*, 8 (AMACOM Books 2009).