PROPERLY PERFORMING ANNUAL ACCOUNTS IN GUARDIANSHIPS OR MANAGEMENT TRUSTS WHERE ONE OR BOTH SPOUSES ARE INCOMPETENT

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More and more frequently, Texas courts are creating dual guardianships or management trusts, where one or more third parties act as guardian or trustee for: (1) spouses who are both incompetent; or (2) for one incompetent spouse, while the other spouse is unable to serve as community administrator. Often, the spouses have had a lengthy marriage and have managed the bulk of their marital property as "joint management community property" through joint accounts or jointly titled assets. Texas Estates Code §§ 1301.053, 1353.003, 1353.004, and 1353.005 effectively bifurcate the marital estate in this instance, as a guardianship estate can have only one ward and a court-created management trust can only have one beneficiary.[1] Sections 1353.003 to 1353.005 create exclusive rights to possess and administer separate sole management community property estates.[2]

The Texas Estates Code, though, is clear. Where one spouse is incompetent and subject to either a community administration or a guardianship of the estate, assets are divided, but no partition of the marital community property occurs.[3] Because the marital estate remains intact, but divided and subject to liability for necessaries, it is important to understand the general legal principles of community property to properly access resources the guardian does not control, avoid unnecessary damage to existing estate plans, and properly prepare inventories and annual accounts in the guardianship estate(s) or management trust(s).

1. Start With the Community Administration Rules Governing Who Gets to Manage What.

The general rules relating to community administration provide a helpful starting point to understanding many of the rights and obligations of spouses during incapacity. Normally, when one spouse has been declared incompetent, the competent spouse, as the surviving partner of the marital partnership, acquires full power to manage, control, and dispose of the *entire* community estate, including the part of the community estate that the incapacitated spouse legally had the power to manage in the absence of incapacity. The competent spouse exercises these powers as "community administrator" without an administration.[4] This, however, can sometimes create problems. For example, where funds are held in a bank or brokerage account solely in the incompetent spouse's name and the bank or brokerage firm takes the position that it is prohibited by contract from releasing the funds to the competent, but nonsignatory, spouse. In this case, courts will sometimes "formalize" the community administrator's powers.

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[1] *See* TEX. EST. CODE § 1301.053.

[2] *See id.* at § 1301.053-.054.

[3] *Id.* at § 1353.001.

[4] *Id.* at § 1353.002.

There are exceptions to the community administrator arrangement, the most common being where the incompetent spouse owns separate property. Generally, the court must appoint a guardian of the estate to manage the separate property (and only the separate property) of the incompetent spouse.[5] Such a guardian could be the other competent spouse or another suitable person or entity. The competent spouse is presumed to be suitable to serve as community administrator.[6] When a guardian is appointed to manage the incompetent spouse's separate property, the other spouse is *not* deprived of the right to manage, control, and dispose of the *entire* community estate as provided by §§ 1353.001 to 1353.006.[7] The incompetent spouse is not without protection, as the court may require the community administrator to file an inventory and accounting.[8] In fact, in situations where the competent spouse is (1) in possession of all of the community property, (2) acting as community administrator under § 1353.003, and then (3) later appointed as guardian of the estate for the incompetent spouse's separate property, the competent spouse has a fiduciary duty to care for the incapacitated spouse out of the community, the competent spouse's separate property, or both.

If the competent spouse is either removed as community administrator, disqualified, or not otherwise suitable to serve as guardian, for example, for breaching his or her fiduciary duty of support, then the incompetent spouse can trigger § 1353.004, which can operate to divide the community property for management purposes (even though the property retains its marital character for existing debt and liabilities for necessaries).

The spouses' duty of support remains unaffected. Under § 1353.004, the court, after considering the financial circumstances of the spouses and any other relevant factors, may order the competent spouse to deliver to the guardian of the estate of the incompetent spouse *not more than one-half* of the community property that is subject to the spouses' *joint management*, control, and disposition under Texas Family Code § 3.102.[9] The guardian of the estate (or trustee) acquires administration powers over:

(a) Any separate property of the incapacitated spouse;

(b) Any community property that is subject to the incapacitated spouse's sole management, control, and disposition under Texas Family Code § 3.102 (i.e., the incapacitated spouse's sole management community property);

(c) Any joint management community property delivered to the guardian of the estate by court order (i.e., not more than one-half of the joint management community property); and

(d) Any income earned on such property.[10]

Similarly, upon the qualification of the guardian of the estate, the competent spouse continues to administer:

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[5] *Id.* at § 1353.003.

[6] *Id.*

[7] *Id.*

[8] *Id.* at §§ 1353.051-.052.

[9] *Id.* at § 1353.004. If a single spouse has had sole management of all of the community property for a period before, the statute as currently written may present problems in putting any community property under the administration of a third-party guardian.

[10] *Id.*

(a) That spouse's separate property;

(b) Any community property that is subject to that spouse's sole management, control, and disposition under Texas Family Code § 3.102 (i.e., the competent spouse's sole management community property); and

(c) Either:

(1) any community property subject to the spouse's joint management, control, and disposition; or

(2) if the person is required to deliver a portion of that community property described above to the guardian of the estate of the person's incapacitated spouse, only the portion of the community property remaining after delivery; and

(d) Any income earned on such property.[11]

In these circumstances, community property administered by a guardian of the estate becomes the incapacitated spouse's sole management community property[12] and property the competent spouse administers is similarly the competent spouse's sole management community property.[13] It stands to reason that in dual guardianships or management trusts for incompetent spouses, any former joint management community property becomes sole management community property in the hands of each guardian or trustee. Effectively, these rules eliminate joint management community property.[14]

2. Characterize Each Spouse's Marital Property.

In addition to understanding the general framework of the community administration rules found in Texas Estates Code Chapter 1353, it is critical to understand the basic community property rules to properly account for: (1) spouses who are both incompetent; or (2) for one incompetent spouse, while the other spouse is unable to serve as community administrator. Each spouse's inventory and annual account must identify that spouse's separate and community property.[15] Income and property received during the accounting period should also be characterized as separate or community property.

(a) Texas Family Code § 3.002 defines "community property" as "property, other than separate property, acquired by either spouse *during marriage*."

(b) Conversely, Texas Family Code § 3.001 defines "separate property" as all property, real and personal, owned by a spouse:

(1) *Before marriage*;

(2) Any property acquired *during marriage* by

(a) gifts from third parties;

[11] *Id.* at § 1353.005.

[12] *Id.*

[13] *Id.* at § 1353.005(b).

[14] *Id.* at §§ 1353.004(e), .005(b).

[15] *See id.* at § 1301.154 (requiring trustee to file accounting in the same manner and form as guardian of the estate); *see id.* at § 1154.051(a)(2) (requiring an inventory of a guardian of the estate to specify what portion of the ward's estate is separate and what portion is community); *see generally also id.* at § 1163.001 (requiring update of inventory if necessary, nature of receipts and disbursements).

(b) devise; or

(c) descent; and

(3) The "recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage."

(c) In Texas, *income from separate property is community property*.[16]

Therefore, in performing an accounting it is helpful, when analyzing income or additional property received during the accounting period, to identify items that might constitute separate property, such as gifts or inheritances. All income would be considered community property, unless before marriage or after marriage but before incapacity, the spouses executed a written agreement agreeing to characterize income from separate or community property as separate property.[17] To preserve the separate property character of the underlying income-producing asset, and to avoid commingling of separate and community property, any income from separate property should be maintained in a separate "income" account. For example, major problems can occur where separate property is used to purchase investments, and the dividend income (which is the community property) is reinvested and maintained in the pool of separate property investments.

3. Determine the Marital Liability of All Property to Pay Debts.

In addition to characterizing property as separate or community, extra attention should be given to identifying what marital property under each guardian's or trustee's control is liable for tortious and nontortious debts incurred by each spouse (whether one or both are incompetent). As Professor Featherston reminds us, there is no such thing as community debt in Texas.[18]

Whether a debt or expense is for necessaries or not affects what property can be reached to pay the debt or expense. Analyzing what kind of marital property can be liable to satisfy obligations for necessaries also provides a helpful framework for discussing those assets that could be available to use from one spouse's guardianship or trust for contribution purposes in favor of the other spouse's guardianship or trust.

Each spouse is personally liable for the other spouse's contracts for necessaries (e.g., medicine, food, rent, etc.).[19] Due to this liability, all forms of marital property can be reached to satisfy either spouse's contracts for necessaries: joint management community property, the wife's separate property, the wife's sole management community property (i.e., her guardianship estate or management trust), the husband's separate property, and the husband's sole management community property (i.e., his guardianship estate or management trust).[20]

For contracts that do not involve necessaries, only the property over which the contracting spouse had management powers can be reached. In other words, a creditor can reach only the contracting

[16] Colden v. Alexander, 171 S.W.2d 328, 334 (Tex. 1943).

[17] For premarital agreements, *see* TEX. FAM. CODE § 4.001, .003; for marital agreements, *see* TEX. FAM. CODE § 4.103.

[18] *See* Thomas M. Featherston, *Representing the Surviving Spouse: A Handbook for the Lawyer and the Decedent Spouse*, 34th ANNUAL ADVANCED ESTATE PLANNING AND PROBATE COURSE, June 2010, at 8.

[19] TEX. FAM. CODE § 3.201.

[20] *See* TEX. EST. CODE § 1353.004.

spouse's:

(a) Separate property;

(b) Sole management community property (i.e., his guardianship estate or management trust); and

(c) Joint management community property.[21]

Different rules apply to tort liabilities. In addition, a special rule applies for funeral and burial expenses, which are properly charged against the deceased spouse's share of the community property *only*.[22] It is common for a guardian of the estate to consider purchasing a prepaid funeral benefits contract.[23]

4. Prepare the Inventory or Initial Report.

Not later than the thirtieth day after the date the guardian of the estate qualifies, the guardian must file an inventory of all the ward's property that has come into the guardian's possession or of which the guardian has knowledge. The inventory must specify which portion of the property is separate property and which is community property.[24] The inventory must delineate between separate and community property, but it is not a snapshot of the marital estate. Instead, it is a snapshot of the portion of the ward's estate under the guardian's control. The inventory typically lists values as of date of qualification.

Similarly, where a guardianship proceeding is pending on the date a court creates a management trust, not later than the thirtieth day *after the date a trustee receives property into the trust*, the trustee must file a report describing all property held in the trust *on the date of the report* and specifying the value of the property on that date.[25] This often occurs in contested guardianship proceedings that result in a management trust. Unlike the guardianship inventory, the Estates Code does not set a hard and fast deadline for the initial report, but simply states, the report is due on the "30th day after the date a trustee . . . receives property into the trust." For this reason, the initial report can be filed much later than the date the trustee is appointed (in fact, sometimes much later than the thirtieth day after appointment) and it does not usually list values as of the date of appointment.

Courts typically require the section in the annual accounting dealing with "assets on hand at the beginning of the period" to match the inventory or initial report. Problems can arise when defining the assets the guardian or trustee initially takes control over for purposes of completing the inventory or initial report. In a decedent's estate, the inventory, appraisement, and list of claims of the deceased spouse usually lists *full values* of all community property, then reduces the total value by the one-half community interest of the surviving spouse to arrive at the actual value of the decedent's community property estate. With the exception of the deceased spouse's separate property, the inventory for the deceased spouse's estate provides an accurate portrayal of the marital estate.

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[21] TEX. FAM. CODE § 3.202.

[22] TEX. EST. CODE § 355.110.

[23] *Id.* at § 1151.102.

[24] *Id.* at § 1154.051.

[25] *Id.* at § 1301.1535.

By contrast, a guardianship inventory or management trust initial report (where both spouses are incompetent or where one spouse is unable to serve as community administrator), requires the guardian or trustee to provide an accurate reflection of the property under the fiduciary's control—not a snapshot of the marital estate. In other words, if all of the ward's or trust beneficiary's community property (including cash under the fiduciary's control) is listed at its full value, and then a one-half community interest deduction is applied, the inventory or initial report will actually reflect less cash than is actually under the control of the guardian or trustee. One approach to resolve this issue is to list all cash at its full value with the remaining community property co-owned with the other spouse at its half value. A claim "in the remainder of the community property" is then listed at a bookkeeping value of one dollar, to avoid confusion about the scope of the property reported.

5. What to Do With Income Received, and Expenditures Made, by Each Spouse's Estate or Trust During the Accounting Period.

Income from property, like other income payable to a specific spouse, must be managed by the spouse, guardian, or trustee managing the property that produced it. If the guardian or trustee does not have enough community property under its management or control to provide for the support of a ward or beneficiary, then expenditures for a spouse's necessaries can come from other community property. The interactions among the Texas Estates Code, the Texas Family Code, and common law interpreting the duty of support dictate when community property can be transferred between spouses or their management trusts or guardianship estates. A close look at the applicable concepts suggests it is imprudent for a guardian or a management trustee of one spouse (1) to transfer income to the other spouse, except to satisfy a duty of support; or (2) to deplete separate property before seeking contribution for necessaries from community assets under the sole management, control, and disposition of the other spouse.

The analysis begins with the way the Texas Estates Code requires community property to be divided when there is a guardianship or management trust for one or both spouses. No partition of the marital community property occurs.[26] When courts create separate guardianships or management trusts for spouses who are both incompetent, or for one incompetent spouse while the other spouse is unable to serve as community administrator, Texas Estates Code §§ 1353.004 to 1353.005 effectively divide the community estate into two sole management community property estates. Income attributable to property subject to each spouse's sole management, control, and disposition remains sole management community property.[27] Income from separate property is also sole management community property.[28] When a court either removes a spouse as community administrator, finds the spouse is not suitable to serve as community administrator, or finds the spouse would be disqualified to serve as guardian of the estate, § 1353.004 requires that spouse to deliver the ward's sole management community property and up to half of the joint management community property to the other spouse's guardian of the estate. That section also authorizes the guardian to manage all of that community property as the ward's sole management community property. Section 1353.005 mandates that a spouse who is not incapacitated shall administer the rest of the community property as sole management community property. This would appear to prevent either spouse from requiring the other to transfer community property.

[26] *Id.* at § 1353.001.

[27] TEX. FAM. CODE § 3.102(a)(4).

[28] *Id.* at § 3.102(a)(2).

There are, however, valid grounds to require transfer of assets between estates, based upon the duty to support a spouse by paying for necessaries. Texas law provides that each spouse has a legal duty to support the other spouse.[29] The duty of support arises from the parties' status as spouses.[30]

Under this duty, *if needed,* each spouse must use his or her separate property to provide support (i.e., necessaries) to the other spouse.[31] When there is community property, the spouse has discretion whether to use his or her separate property instead of community property to satisfy the duty of support.[32] Any separate property used for community living expenses is then deemed a gift for the benefit of the community estate.[33] Thus, a spouse who uses separate property to provide support to the community is *not entitled to reimbursement* from the community estate.[34]

It follows that a spouse has a right to have community property applied to pay for the spouse's necessaries instead of using one's own separate property. This remains true regardless of which spouse has the sole power of management, control, and disposition. It then becomes very important to determine what constitutes necessaries.

What constitutes necessaries depends upon the facts and circumstances of the particular case.[35] Moreover, whether particular items are necessaries depends on whether they are reasonable and proper, given the spouses' condition and station in life.[36] Necessaries typically include food, clothing, and shelter—in other words, sustenance.[37] Depending on the circumstances, other items that may also qualify as necessaries can range far beyond medical payments,[38] such as automobiles,[39] airline tickets,[40] pianos,[41] cosmetics,[42] and luxury clothes from Neiman Marcus.[43]

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[29] *Id.* at § 2.501.

[30] *In re* Green, 221 S.W.3d 645, 647 (Tex. 2007).

[31] Graham v. Graham, 836 S.W.2d 308, 310 (Tex. App.—Texarkana 1992, no writ).

[32] Henderson v. Henderson, 425 S.W.2d 363 (Tex. Civ. App.—San Antonio 1968, writ dism'd).

[33] *Graham*, 836 S.W.2d at 310.

[34] Norris v. Vaughan, 260 S.W.2d 676, 683 (Tex. 1953).

[35] Wadkins v. Dillingham, 59 S.W.2d 1099 (Tex. Civ. App.—Austin 1933, no writ); 39 TEX. JUR. 3D *Family Law* § 101.

[36] Daggett v. Neiman-Marcus Co., 348 S.W.2d 796, 799 (Tex. Civ. App.—Houston 1961, no writ) (ruling that shopping at Neiman Marcus was for necessaries).

[37] Tedder v. Gardner Aldrich, LLP., 431 S.W.3d 651 (Tex. 2013).

[38] Black v. Bryan, 18 Tex. 453 (Tex. 1857). In *Black v. Bryan*, a dentist had sued a husband for dental services after marital separation. The court held these services were a necessary, and stated that necessaries can include whatever is suitable for the means of the husband and to the station of him and his wife. Therefore, the husband was liable. *See also* BLACK'S LAW DICTIONARY 927 (5th ed. 1979). According to *Black's*, "necessaries consist of food, drink, clothing, medical attention, and a suitable place of residence . . . However, liability for necessaries is not limited to articles required to sustain life; it extends to articles which would ordinarily be necessary and suitable, rank, position, fortune, earning capacity, and mode of living in view of the husband or father." *See* 38 Aloysius Leopold, *Texas Practice Series: Marital Property And Homesteads* § 3.7.

[39] Fallin v. Williamson Cadillac Co., 40 S.W.2d 243, 244 (Tex. Civ. App.—San Antonio 1931, no writ).

[40] Jarvis v. Jenkins, 417 S.W.2d 383, 384 (Tex. Civ. App.—Waco 1967, no writ).

[41] Oliver H. Ross Piano Co. v. Walker, 111 S.W.2d 1165, 1166 (Tex. Civ. App.—Fort Worth 1937, no writ).

[42] *See* Gabel v. Blackburn Operating Corp., 442 S.W.2d 818, 819-20 (Tex. Civ. App.—Amarillo 1968, no writ).

[43] Daggett v. Neiman-Marcus Co., 348 S.W.2d 796, 799 (Tex. Civ. App.—Houston 1961, no writ) (ruling that

The guardian/trustee and competent spouse (or other guardian/trustee) each have a statutory right to administer the community property in each's possession. Texas Family Code § 2.501 makes both sole management community property estates liable for debts for either spouse's necessaries. Most expenses in a guardianship or management trust will be for necessaries.

Intuitively, it might appear that the duty of support would entitle the spouse who made less income in any particular year to a contribution from the other spouse's estate or trust. For example, where a wife received annual income in the amount of $30,000 and a husband received annual income in the amount of $25,000, after adding these funds together, it might appear that each spouse would be entitled to $27,500, or that a "compensating adjustment" should be made from the wife's estate of $2,500 to the husband's estate.

However, the statutory right to possess and to administer each sole management community estate restricts a guardian's or trustee's request to costs for necessaries. For example, assume that the wife's guardianship or trust paid $20,000 for necessaries for the wife's benefit. The husband, or his guardianship or trust, paid $30,000 for necessaries for the husband's benefit. Adding these expenses together, the husband, or his guardianship (or his trust) might argue he should receive a $5,000 reimbursement from the wife's guardianship or trust because his care costs were higher than his wife's.

While transferring assets between estates or trusts to pay for necessaries may be valid (especially where court approval is sought and obtained), there is no legal requirement for a spouse to contribute sole management community property if the spouse requesting contribution still has community property to pay for necessaries. Nothing requires the community property in each spouse's trust or guardianship to be equal or proportionate at the outset. When a guardianship estate or trust lacks sufficient community property to pay for necessaries, an order to pay a specific debt or expense (and even an allowance for recurring necessaries) seems appropriate. Each spouse still owns one-half of the community property in the other spouse's control. Accordingly, it might be argued that a spouse does not have to exhaust his or her separate property before requesting contribution. Exhausting separate property first may wreak havoc upon an estate plan. Conversely, for example, where each spouse has an estate plan that leaves the entire estate to the surviving spouse, and neither spouse owns significant separate property, annual adjustments may not be needed to protect estate plans.

Where separate property is not an important component of either spouse's estate or estate plan, it makes little difference after death who consumed or controlled more community property while both spouses were alive. After all, the community estate terminates upon death.[44] Therefore, any imbalances in income or expenditures between sole management community estates become inconsequential in the due course of administering the deceased spouse's estate—particularly when cross-demands result in each estate receiving its portion of the community estate.

In certain situations, however, depleting either sole management community property estate to the extent a spouse's separate property is spent upon support can be very consequential. This can happen in second marriages, where one spouse has substantially more separate property than the other, or where the spouses had almost no "joint management" community property. It is easy to envision estate plans or the laws of intestacy passing separate property to persons other than the surviving spouse. A disgruntled heir or beneficiary then claims the guardian or trustee should not have

shopping at Neiman Marcus was for necessaries).

[44] *See, e.g.*, *In re* Bielefeld, 143 S.W.3d 924, 930 (Tex. App.—Fort Worth 2004, no pet.).

forced one of the spouses to dip into his or her separate property to pay for necessaries when community property was still available. Under Texas law, both spouses have an absolute right to dispose of one's property in a will. Unnecessarily depleting separate property can seriously impact estate plans.

If separate property is expended, instead of seeking support from the other spouse's sole management community property, income, or expenditure, imbalances may not always be effectively equalized after a spouse dies. This is especially true when (1) unique separate property was sold to pay necessaries or (2) all or a portion of the deceased spouse's community property passes to the surviving spouse, which could potentially extinguish all or a portion of a potential claim for contribution.

Consider, for example, a situation in which the wife's guardianship estate consists of $200,000 in community property cash and $400,000 worth of separate real property. The wife's will bequeaths her separate real property to her children from a previous relationship and leaves her residuary estate to her husband. The husband's guardianship estate consists of $200,000 in community property cash and $800,000 in separate real property. During the guardianship, the wife's guardian does not make claims for her share of income or for contribution for necessaries and spends all of her community property to pay her costs of care. The real property is then sold to raise funds to pay for her care costs. When she dies, $200,000 in separate property remains in her guardianship estate and $100,000 in community property remains in the husband's guardianship estate.

Had the wife's guardian requested contribution from the husband's estate annually, the separate property may have been preserved. Upon the wife's death, the personal representative of her estate might have a legally cognizable claim against the husband's estate for up to $200,000 (the separate funds that her guardianship estate spent on necessaries), and perhaps the income the real property in the specific bequests would have produced on a regular basis after the wife's death. The wife's executor can demand one-half of the sole management community property in the husband's guardianship estate ($50,000) at the end of the probate administration to distribute under the terms of the will. The wife's executor will argue that because the husband inherits the wife's community property under the terms of her will, the wife's claim to community property is substantially extinguished, leaving the wife's children with approximately $200,000 less than they would have inherited (not to mention the loss of unique real property).

On the other hand, if Texas courts decide that a spouse who pays for her necessaries out of her own separate property made a gift to the community, then the voluntary nature of that payment might extinguish any claim for contribution that she may have against the other spouse. It also remains unclear and unsettled under Texas law whether the duty of support dies with a spouse, so that death extinguishes the deceased spouse's estate's claim for reimbursement or contribution for necessaries. If the claim is extinguished, and separate property has been consumed, there might instead be a claim against the guardian personally for breaching a duty of care or grossly mismanaging the guardianship estate. It seems prudent that guardians and management trustees should not transfer income except to satisfy a duty of support, and should seek contribution for necessaries from community assets before depleting separate property.

6. Identify the Assets on Hand at the End of the Period.

The accounting in a management trust must be in the same form as an accounting in a guardianship.[45] In an annual account of a guardianship, the guardian must specify the assets on hand at

[45] TEX. EST. CODE § 1301.154.

the end of the period.[46] The same problems that arise in trying to define the assets the guardian or trustee initially takes control over for purposes of completing the inventory or initial report also apply when specifying the "assets on hand at the end of the period." Again, one approach is to list all cash in the guardianship or management trust at its full value and then all remaining community property co-owned with the other spouse at its half value. A claim "in the remainder of the community property" can then be listed at a bookkeeping value. There might even be an appendix or exhibit reflecting the entire community estate. Whatever approach is ultimately used, it should be consistently employed for the inventory/initial report and the accounting.

Conclusion

As outlined above, great care and consideration must be given when establishing a guardianship or court-created management trust for (1) spouses who are both incompetent; or (2) for one incompetent spouse, while the other spouse is unable to serve as community administrator. Although somewhat cumbersome, the well-established rules relating to community property provide a framework from which annual adjustments for community income and expenses for necessaries can be made, if needed. While such adjustments may not be important in the case of mirror wills, where claims for contribution or income are effectively extinguished, they can be critical in cases where one spouse's estate plan includes beneficiaries other than the surviving spouse. The better practice may be to account annually for these marital property realities.

[46] *See id.* at § 1163.001.