

# TEXAS ELDER LAW



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**Vaughn E. James**

**2022**

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# *Dedication*

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*To Vihay, Etienne, and Maëlys-Claire:*

*“I have been young, and now I’m old, yet I have not seen the righteous forsaken,  
nor his children begging for bread.”*

*(Psalm 37:25, WEB)*

and

*My Dad, Leo B. James of Poughkeepsie, New York,  
who passed from this life June 18, 2020 (aged 92), and*

*My Aunt, Olive LeCointe of Catherine’s Rest, St. Croix, Virgin Islands,  
who passed from this life June 18, 2021 (aged 100):*

*“You taught me well. You are gone,  
but not forgotten.”*



# Summary of Contents

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<i>Table of Contents</i>	ix	
<i>Foreword</i>	xxxi	
<i>Preface</i>	xxxiii	
<i>Acknowledgments</i>	xxxv	
<i>About the Author</i>	xxxvii	
<b>Chapter 1</b>	<b>TEXAS ELDER RIGHTS AND PROTECTIONS</b>	<b>1</b>
<b>Chapter 2</b>	<b>FAMILY AND MARITAL ISSUES</b>	<b>31</b>
<b>Chapter 3</b>	<b>TEXAS HOMESTEAD RIGHTS</b>	<b>47</b>
<b>Chapter 4</b>	<b>DEMENTIA, ALZHEIMER'S DISEASE, AND THE ELDERLY</b>	<b>59</b>
<b>Chapter 5</b>	<b>MANAGING RESOURCES OF THE ELDERLY</b>	<b>83</b>
<b>Chapter 6</b>	<b>PAYING FOR LONG-TERM CARE</b>	<b>117</b>
<b>Chapter 7</b>	<b>TEXAS ADVANCE DIRECTIVES</b>	<b>157</b>
<b>Chapter 8</b>	<b>WILLS</b>	<b>177</b>
<b>Chapter 9</b>	<b>TRUSTS</b>	<b>191</b>
<b>Chapter 10</b>	<b>WHEN DEATH STRIKES</b>	<b>215</b>
<b>Chapter 11</b>	<b>PROBATE</b>	<b>259</b>
<i>Appendix: Sample Documents and Forms</i>	279	
<i>Table of Cases</i>	339	
<i>Index</i>	343	





# Table of Contents

---

<i>Foreword</i>	xxxi
<i>Preface</i>	xxxiii
<i>Acknowledgments</i>	xxxv
<i>About the Author</i>	xxxvii

<b>Chapter 1</b>	<b>TEXAS ELDER RIGHTS AND PROTECTIONS</b>	<b>1</b>
1-1	Elder Rights in Texas	1
1-1:1	Sources of Texas Elder Rights	1
1-1:1.1	Federal Rights	1
1-1:1.1a	The Early Statutes	2
1-1:1.1b	Nursing Home Reform Legislation	3
1-1:1.1c	Elder Abuse Legislation	5
1-1:1.2	Elder Rights Created by Texas	5
1-1:1.3	Rights of Elderly Texans in Institutionalized Settings	5
1-1:1.4	Rights of Elderly Texans in the Hospital Setting	5
1-1:1.5	Rights of Elderly Patients in Hospice Care	6
1-1:1.6	Mental Health Bill of Rights	6
1-2	Durability of Rights	6
1-3	Protection of Elderly Texans	7
1-3:1	Texas Definition of Elderly	7
1-3:2	General Rights	7
1-3:3	Privacy Rights	8
1-3:4	Financial Management	8
1-3:5	Medical Decisions	9
1-3:6	Transfer and Discharge	10
1-3:7	Right to Execute Legal Documents	10
1-4	Enforcement of Legal Rights of the Elderly	10
1-5	Rights of Elderly Texans in Medical Institutions	11
1-5:1	Rights of Elderly Texans in Hospitals	11
1-5:2	Rights of Nursing Home Residents	11
1-5:2.1	Resident Rights	11
1-5:2.2	Quality of Life	11
1-5:2.3	Quality of Care	12
1-5:2.4	Specific Residents' Rights	12

1-5:3	Rights of Elderly Texans in Assisted Living Facilities	13
1-5:4	Mental Health Patient’s Bill of Rights	13
1-5:4.1	Basic Rights for All Mental Health Patients	13
1-5:4.2	Personal Rights	14
1-5:4.3	Right to Communicate with Others	14
1-5:4.4	Opportunity for Physical Exercise and Limitation Thereof	14
1-5:4.5	Confidentiality	15
1-5:4.6	Consent	15
1-5:4.7	Care and Treatment	15
	1-5:4.7a Treatment Plan	15
	1-5:4.7b Medications	15
	1-5:4.7c Use of Physical Restraints	16
	1-5:4.7d Risks and Side Effects	16
	1-5:4.7e Transportation	16
	1-5:4.7f Information from Staff	17
	1-5:4.7g Right to Request Second Opinion	17
1-5:5	Rights of Voluntary Patients	17
1-5:5.1	Right to Request Discharge	17
1-5:5.2	Right to Block Court-Ordered Services	18
1-5:5.3	Doctor to Reveal Treatment Plans	18
1-5:6	Special Rights of People Apprehended for Emergency Detention for Inpatient Mental Health Services (Other Than Chemical Dependency)	18
1-5:6.1	Right to Basic Information	18
1-5:6.2	Right to Counsel	18
1-5:6.3	Right to be Examined by a Doctor	19
1-5:6.4	Right to be Warned	19
1-5:6.5	Order of Protective Custody—Special Rights	19
1-5:6.6	Right to a Speedy Hearing	20
1-5:6.7	Right to be Released from Custody	20
1-5:6.8	The Next Steps	20
1-5:7	Hospice Patient’s Bill of Rights	21
1-5:7.1	Dignity and Respect	21
1-5:7.2	Decision-making	21
1-5:7.3	Privacy	22
1-5:7.4	Financial	22
1-5:7.5	Quality of Care	22
1-5:7.6	Patient and/or Caregiver Responsibilities	22
1-6	Patients’ Rights and Health Insurance	23

1-7	Commercial Protections	24
1-7:1	Texas Deceptive Trade Practices Act	24
1-7:2	Texas Attorney General's Office, Complaint Division	24
1-7:3	Protection Against Home Solicitations	24
1-7:4	Protection from Telephone Solicitations	25
1-7:5	Illegal Debt Collection Practices	26
1-7:6	The Lemon Law for Auto Purchases	26
1-8	Protections from Financial Crimes	27
1-8:1	Protection from Financial Exploitation	27
1-8:1.1	The Texas Elder Financial Protection Act of 2017	27
1-8:1.2	The 2021 Amendments	28
1-8:1.2a	The New Role of Financial Institutions	28
1-8:1.2b	Financial Dealers and Investment Advisers	28
1-8:1.2c	Financial Dealers and Investment Advisers Dealing in Securities on Behalf of Elderly Clients	28
1-8:2	Protection from Financial Abuse	28
1-8:2.1	Definition of Financial Abuse	29
1-8:2.1a	Financial Exploitation Defined	29
1-8:2.1b	Requisite Relationship for Finding of Financial Exploitation	29
1-8:2.2	Requisite <i>Mens Rea</i> for Finding of Financial Abuse	30
1-8:2.3	Classes of Crimes and Penalties	30
1-9	Conclusion	30

---

## **Chapter 2 FAMILY AND MARITAL ISSUES 31**

2-1	Community Property	31
2-1:1	Definition and Fundamental Principle	31
2-1:2	Separate Property	31
2-1:2.1	Exception: Investment Income Earned on Separate Property	32
2-1:2.2	Capital Growth of Separate Assets: Separate Property	32
2-1:2.3	Growth in Asset Value Not Intrinsic to Asset: Value Increase Is Community Property	32
2-1:3	"Equitable Interest" Property	33
2-1:4	Partition or Exchange of Community Property	33
2-1:5	Conversion to Community Property	34

	2-1:5.1	Written Agreement Necessary	34
	2-1:5.2	Mere Transfer Insufficient	34
	2-1:6	Management of Assets	35
	2-1:6.1	Sole Management	35
	2-1:6.2	Joint Management	35
	2-1:7	Community Property and Migrating Couples	36
	2-1:7.1	Traditional Conflict of Laws Rules	36
	2-1:7.2	No Quasi-Community Property Protection for Testamentary Transfers	36
2-2		Common Law Marriage: Informal Marriage	37
	2-2:1	Requirement of Proof	37
	2-2:2	Proof of Marriage	37
	2-2:3	Informal Marriage and Divorce	38
2-3		Premarital Agreements	38
	2-3:1	Consider Financial Issues	38
	2-3:2	Consider Legal Issues	39
	2-3:3	Important Terms of the Premarital Agreement	39
	2-3:3.1	Separate vs. Community Property	39
	2-3:3.2	Payment of Long-Term Care Bills	40
	2-3:4	Partition a Fallback Measure	41
2-4		Divorce	42
	2-4:1	Divorce and the Elderly: The Last Will and Testament	42
	2-4:2	Divorce and the Elderly: Nontestamentary Transfers	42
	2-4:3	Divorce and the Elderly: When a Spouse Is Incapacitated	43
2-5		Grandparents' Rights	44
2-6		Conclusion	45
<b>Chapter 3 TEXAS HOMESTEAD RIGHTS</b>			<b>47</b>
3-1		What Is a Homestead?	47
	3-1:1	The Texas Homestead	47
	3-1:1.1	Texas Homestead Defined	47
	3-1:1.2	Texas Homestead Benefits	48
3-2		Homestead Tax Reductions	48
	3-2:1	The General Exemption	48
	3-2:2	The School Tax Exemption	48
	3-2:3	Exemptions for the Elderly	48
	3-2:4	Death of the 65-Plus Homeowner	49
	3-2:5	Tax Deferral	49
	3-2:6	Tax Abatement	50

	3-2:6.1	Abatement of Collection Suit	50
	3-2:6.2	Abatement of Pending Sale to Foreclose Tax Lien	50
3-3		Capital Gains Exemption	51
	3-3:1	Special Tax Treatment for the Home	51
	3-3:2	Conditions for the Exemption	51
	3-3:3	Possibility for Prorated Exemption	52
3-4		Exemptions from Judgment	52
	3-4:1	The Homestead Exemption from Judgment	52
	3-4:1.1	Valid Liens Against the Homestead	52
	3-4:2	Personal Property Exemption	54
	3-4:2.1	Exempt Amount	54
	3-4:2.2	Items Forbidden from Seizure	54
	3-4:2.3	Personal Property Set-Aside	54
3-5		The Net Result	55
3-6		Insurance and Retirement Funds	55
3-7		Home Equity Loans	55
	3-7:1	Texas Home Equity Loans Consumer Protections	56
3-8		Reverse Mortgages	56
	3-8:1	Age Restriction	57
	3-8:2	Rules Regarding Reverse Mortgages	57
3-9		Conclusion	58
 <b>Chapter 4 DEMENTIA, ALZHEIMER'S DISEASE, AND THE ELDERLY</b>			 <b>59</b>
4-1		What Is Dementia?	59
	4-1:1	Diagnosing Dementia	59
	4-1:2	Relationship Between Dementia and Age	60
	4-1:3	Types of Dementia	61
4-2		Alzheimer's Disease	62
	4-2:1	Causes and Prevalence of Alzheimer's Disease	62
	4-2:1.1	Prevalence and Incidence of Alzheimer's Disease in Texas	63
	4-2:2	Risk Factors for Alzheimer's Disease	64
	4-2:2.1	Age	64
	4-2:2.2	Family History	65
	4-2:2.3	Genetics	65
	4-2:2.4	History of Head Trauma	65
	4-2:2.5	Poor Heart Health (The Heart-Head Connection)	65

4-3	Stages of Alzheimer's Disease	66
	4-3:1 Overview of Disease Progression	66
	4-3:2 Mild Alzheimer's Disease (Early Stage)	66
	4-3:3 Moderate Alzheimer's Disease (Middle Stage)	67
	4-3:4 Severe Alzheimer's Disease (Late Stage)	67
4-4	Legal Implications of Dementia and Alzheimer's Disease	68
	4-4:1 Capacity to Contract	68
	4-4:2 Testamentary Capacity	69
	4-4:3 Donative Capacity	70
	4-4:4 Capacity to Consent to Medical Treatment	70
	4-4:4.1 Exceptions to the Doctrine of Informed Consent	71
	4-4:4.2 The Doctrine of Informed Consent and the Alzheimer's Patient	71
	4-4:5 Power of Attorney	71
4-5	Estate Planning for Patients with Alzheimer's Disease and Other Forms of Dementia	72
	4-5:1 The Texas Durable Power of Attorney	72
	4-5:1.1 Forms of the Power of Attorney	72
	4-5:1.2 The Agent of the Durable Power of Attorney	73
	4-5:1.3 Termination of the Power of Attorney	73
	4-5:1.4 Termination of the Agent's Authority	74
	4-5:2 The Last Will and Testament	74
	4-5:2.1 Legal Capacity	75
	4-5:2.2 Testamentary Capacity	75
	4-5:2.3 Testamentary Intent	75
	4-5:2.4 Formalities	75
	4-5:2.4a Attested Will	75
	4-5:2.4b Holographic Will	76
	4-5:2.4c Self-Proving Affidavit	76
	4-5:2.4d Simultaneous Execution, Attestation, and Self-Proving	76
	4-5:2.5 Application to Alzheimer's Disease and Other Forms of Dementia	76
	4-5:2.6 Potential for Undue Influence	77
	4-5:3 Texas Advance Directives	77
	4-5:3.1 Patient Self-Determination and Informed Consent	77
	4-5:3.1a The Patient Self Determination Act	78
	4-5:3.1b The Doctrine of Informed Consent	78
	4-5:3.2 Texas Law on Advance Directives	78

	4-5:3.2a	Texas Consent to Medical Treatment Act	79
	4-5:3.2a1	Texas Responds to the Patient Self Determination Act	79
	4-5:3.2a2	State-Provided Surrogates	79
	4-5:3.2a3	Decisions Withheld from the Surrogate	80
	4-5:3.2a4	Summary of the Texas Consent to Medical Treatment Act	80
	4-5:3.2b	Texas Advance Directives Act	81
4-6		Conclusion	81
<b>Chapter 5 MANAGING RESOURCES OF THE ELDERLY</b>			<b>83</b>
5-1		Introduction	83
5-2		The Power of Attorney	83
	5-2:1	Types of Powers of Attorney	84
	5-2:1.1	Regular Power of Attorney	84
	5-2:1.2	Durable Power of Attorney	84
	5-2:2	Fundamental Requirements of the Durable Power of Attorney	85
	5-2:3	Springing Durable Power of Attorney	85
	5-2:4	Revocation of the Power of Attorney	86
	5-2:5	The Agent's Fiduciary Responsibilities	86
	5-2:6	Capacity to Execute a Power of Attorney	87
5-3		Guardianship	87
	5-3:1	Avoiding Guardianship	87
	5-3:2	Declaration of Guardian	88
	5-3:2.1	Filing of Declaration and Self-Proving Affidavit	88
	5-3:2.2	Revocation of the Declaration of Guardian	89
	5-3:2.3	Effect of Divorce	89
	5-3:2.4	Alternate or Other Court-Appointed Guardian	89
	5-3:2.5	Private Professional Guardians	89
	5-3:2.5a	Application Requirements	89
	5-3:2.5b	Registration Renewal	90
	5-3:2.5c	Certification and Registration of Other Individuals	90
	5-3:2.5d	JBCC Requirements for Certification of Guardians	90

	5-3:2.5e	JBCC Requirements for Provisional Certification	91
	5-3:2.5f	JBCC Requirements for Certification of Military Spouses, Military Service Members, and Military Veterans	92
	5-3:2-5g	Criminal History	92
	5-3:2-5h	Expiration	93
	5-3:2-5i	Fees	93
5-3:3		Mental Health Commitment	93
5-3:4		Temporary Guardianship	94
	5-3:4.1	Application for Temporary Guardianship	94
	5-3:4.2	The Hearing	95
	5-3:4.3	Order Appointing Temporary Guardian	95
	5-3:4.4	Duration of Temporary Guardianship	96
	5-3:4.5	Termination of Temporary Guardianship, Delivery of Estate, Filing of Final Report, and Discharge of Temporary Guardian	96
5-3:5		Permanent Guardianship	96
	5-3:5.1	Notifications	97
	5-3:5.2	The Court Investigator	98
	5-3:5.3	The Attorney <i>Ad Litem</i>	98
	5-3:5.4	The Interpreter	99
	5-3:5.5	The Guardian <i>Ad Litem</i>	99
	5-3:5.6	Proof of Need for Guardianship	99
	5-3:5.7	Choice of Guardian	100
	5-3:5.7a	Appointment According to Circumstances and Best Interests	101
	5-3:5.7b	Appointment Preferences	101
	5-3:5.7c	Designation of Guardian by Surviving Parent	101
	5-3:5.8	Disqualification of Guardian	101
	5-3:5.9	Guardianship in Action	102
	5-3:5.10	Terminating Guardianship	104
	5-3:5.10a	Termination or Modification of Guardianship Because the Ward Has Regained Partial or Full Capacity	104
	5-3:5.10b	Termination of Guardianship Because the Ward Has Died	105
	5-3:5.10c	Termination of Guardianship if the Court Finds that the Ward's Incapacity Needs Can Be Managed Without Guardianship	106



	5-3:5.11	Transfer of Guardianship to Another County	106
	5-3:5.11a	Continuation of Guardianship After Transfer	107
	5-3:5.12	Mediation of Contested Guardianships	107
	5-3:5.12a	Rules for Mediation of Contested Guardianships	107
	5-3:5.12b	Mediated Settlement Agreement	108
	5-3:5.12c	Guardianship Mediation Training	108
	5-3:6	Certification of Guardianship Attorneys	108
5-4		Community Administration	109
	5-4:1	Duties of the Community Administrator	109
	5-4:2	Disclosure of Lawsuits by Community Administrator	110
	5-4:3	Removal of Community Administrator	110
	5-4:4	Appointment of Guardian of the Estate to Replace Community Administrator	111
	5-4:5	Incapacitated Spouse's Separate Property	111
5-5		Social Security Representative Payee	112
	5-5:1	Becoming a Representative Payee	112
	5-5:2	Duties of the Representative Payee	113
5-6		Account Management	113
	5-6:1	Types of Accounts	113
	5-6:1.1	Single Party Account Without Pay on Death (POD) Beneficiary	113
	5-6:1.2	Single Party Account with Pay on Death (POD) Beneficiary	114
	5-6:1.3	Multiple Party Accounts	114
	5-6:1.3a	Multiple Party Account Without Right of Survivorship	114
	5-6:1.3b	Multiple Party Account with Right of Survivorship	115
	5-6:1.3c	Multiple Party Account with Right of Survivorship and Payable on Death Provision	115
	5-6:1.3d	Convenience Account	115
	5-6:1.3e	Trust Account	116
5-7		Conclusion	116
<b>Chapter 6 PAYING FOR LONG-TERM CARE</b>			<b>117</b>
6-1		Introduction	117
6-2		Government Programs	118
	6-2:1	Medicare	118
	6-2:1.1	Medicare's Programs	119

	6-2:1.1a	Medicare Part A	120
	6-2:1.1b	Medicare Part B	120
	6-2:1.1c	Medicare Part D	121
	6-2:1.1d	Medicare Part C—Medicare Advantage	121
	6-2:1.1e	Medicare’s Skilled Nursing Facility (SNF) Care Coverage	122
6-3		Medicare’s Home Health Care Coverage	123
	6-3:1	Eligibility for Home Health Care Coverage	124
	6-3:2	Costs of Care	124
	6-3:2.1	Durable Medical Equipment (DME)	125
	6-3:2.2	Payment for Durable Medical Equipment	125
	6-3:2.3	Advance Determination of Medicare Coverage	126
6-4		Hospice and Respite Care	126
	6-4:1	Medicare Coverage of Hospice and Respite Care	126
	6-4:2	Eligibility	128
6-5		Medicaid, CHIP, and the Affordable Care Act	128
	6-5:1	Texas Medicaid	129
	6-5:1.1	Texas Medicaid for the Elderly	130
	6-5:1.1a	Long-Term Care	130
	6-5:1.1b	Specific Texas Medicaid Programs	131
	6-5:2	Eligibility for Texas Medicaid	131
	6-5:2.1	Aged, Blind, or Disabled	131
	6-5:2.2	Citizenship and Residency	132
	6-5:2.3	Level of Care	132
	6-5:3	Monthly Income Amount	133
	6-5:3.1	The Qualified Income Trust (Miller Trust)	133
	6-5:3.2	Characteristics of the Qualified Income Trust	133
	6-5:3.2a	Treatment of Trust Income	135
	6-5:3.2b	Establishing a Bank or Other Financial Account as the QIT Account	136
	6-5:3.2c	Effective Date of the QIT	136
	6-5:4	Transfer of Assets	136
	6-5:4.1	Asset Amount	137
	6-5:4.2	Co-Owned Resources	138
	6-5:4.3	The Homestead Exemption	139
	6-5:4.3a	Rental of the Homestead	140

6-6	Medicaid Planning	141
	6-6:1 Transfer of Assets for Medicaid Planning	141
	6-6:1.1 Look-Back Period	141
	6-6:1.2 Homestead Transfer Exceptions	141
6-7	Medicaid Estate Recovery Program (MERP)	142
	6-7:1 Programs and Services Affected by MERP	142
	6-7:2 MERP Notice	143
	6-7:3 The Estate	143
6-8	No Recovery by the State	143
	6-8:1 Undue Hardship	144
	6-8:1.1 Undue Hardship Applicable to Homesteads	144
	6-8:2 Reduction of Amount Owed	145
6-9	Medicaid Benefits	145
	6-9:1 Nursing Home Daily Care	145
	6-9:2 Medical Needs and Prescriptions in the Nursing Home	146
	6-9:3 Home and Community-based Services (HCS)	146
6-10	Qualified Medicare Beneficiary (QMB) Program	147
	6-10:1 QMB Income and Resource Limits	147
	6-10:2 Medicaid Buy-In Program	148
	6-10:3 VA Benefits	148
	6-10:3.1 VA Health Care for Elderly Veterans	149
6-11	Long-Term Care Insurance	150
	6-11:1 Availability of Benefits	150
	6-11:1.1 Benefit Period and Benefit Amounts	151
	6-11:1.2 How Benefits Are Paid	151
	6-11:2 Services Not Covered by Long-Term Care Insurance	151
	6-11:2.1 Policy Exclusions	152
	6-11:3 Qualified and Non-Tax-Qualified Policies	152
	6-11:3.1 Tax-Qualified Policies	152
	6-11:3.2 Non-Tax Qualified Policies	153
	6-11:4 Long-Term Care Partnership Program	153
	6-11:5 Shopping for Long-Term Care Insurance	154
6-12	Medigap Policies	155
6-13	Conclusion	156
<b>Chapter 7</b>	<b>TEXAS ADVANCE DIRECTIVES</b>	<b>157</b>
7-1	Introduction	157
7-2	Patient Self Determination Act	157
7-3	Doctrine of Informed Consent	158

	7-3:1	Texas Exceptions to the Doctrine of Informed Consent	159
	7-3:1.1	The Emergency Care Exception	159
	7-3:1.2	The Therapeutic Exception	159
	7-3:2	Overcoming the Exceptions	159
7-4		Texas Consent to Medical Treatment Act	160
	7-4:1	State-Designated Surrogates	160
	7-4:2	Decisions Withheld from the Surrogate	160
	7-4:3	Summary of Texas Consent to Medical Treatment Act	161
7-5		Texas Advance Directives Act	161
	7-5:1	Directive to Physicians, Family, or Surrogate	161
	7-5:1.1	Formal Requirements	161
	7-5:1.2	Notice to Physician	162
	7-5:1.3	Form of Written Directive	162
	7-5:1.4	Issuance of Nonwritten Directive by Competent Adult	162
	7-5:1.5	Institutional Policies	162
	7-5:1.6	Definitions	163
	7-5:1.6a	Artificially Administered Nutrition and Hydration	163
	7-5:1.6b	Life-Sustaining Treatment	164
	7-5:1.6c	Terminal Condition	164
	7-5:1.6d	Irreversible Condition	164
	7-5:1.6e	Imminent Death	164
	7-5:1.7	Witness Requirements	164
	7-5:1.8	Patient Desire Supersedes Directive	165
	7-5:1.9	Revocation	165
7-6		Limitation of Liability for Withholding or Withdrawing Life-Sustaining Procedures	166
	7-6:1	Liability for Failure to Effectuate Directive	166
	7-6:1.1	Review and Discipline	166
	7-6:1.2	Review Procedure of Texas Health and Safety Code § 166.046	166
	7-6:2	The Final Word: The Right to Transfer	167
	7-6:2.1	Statements Explaining Patient's Right to Transfer	167
	7-6:2.2	Registry to Assist Transfers	167
7-7		Medical Power of Attorney	168
	7-7:1	Revocation of Medical Power of Attorney	168
	7-7:2	Disclosure and Form	169
	7-7:3	Potential Conflicts	169
	7-7:4	Appointment of a Guardian	169

	7-7:5	Conflict Between Advance Directives	169
	7-7:6	Duty of Health or Residential Care Provider	170
	7-7:7	Limitations on Liability	170
	7-7:8	Liability for Health Care Costs	170
7-8		Out-of-Hospital Do-Not-Resuscitate Order	170
	7-8.1	Life-Sustaining Procedures Covered by the Out-of-Hospital DNR Order	171
	7-8:2	Requirements for the Out-of-Hospital DNR Order	171
	7-8:3	Rules Governing Execution	171
	7-8:4	Out-of-Hospital DNR Order for Incompetent Person with Previously Executed Directive to Physicians	171
	7-8:5	Out-of-Hospital DNR Order for Incompetent Person with Previously Executed Directive to Physicians Designating a Proxy	172
	7-8:6	Out of Hospital DNR Order for Incompetent Person with Previously Executed Medical Power of Attorney Designating Agent	172
	7-8:7	Effectiveness of Out-of-Hospital Order	172
	7-8:8	Form of Out-of-Hospital DNR Order	172
	7-8:9	Issuance of Out-of-Hospital DNR Order by Nonwritten Communication	172
	7-8:10	DNR Identification Device	172
	7-8:11	Duration of Out-of-Hospital DNR Order	174
	7-8:12	Revocation of Out-of-Hospital DNR Order	174
	7-8:13	Liability Shield	175
7-9		Health Care Facility Do-Not-Resuscitate Order	175
7-10		Conclusion	176

---

## **Chapter 8 WILLS 177**

8-1		Introduction	177
8-2		Intestacy—An Estate Plan By-Default (and Something to Avoid)	178
	8-2:1	Individual Property Distribution (Unmarried Intestate)	178
		8-2:1.1 Descendants Survive	178
		8-2:1.2 No Descendants Survive But a Parent Survives	178
		8-2:1.2a Both Parents Survive	178
		8-2:1.2b One Parent Survives Along with a Sibling or a Sibling's Descendants	179
		8-2:1.2c One Parent Survives but No Sibling or Descendant Survives	179
	8-2:1.3	No Surviving Parents or Descendants	179

	8-2:1.4	No Surviving Descendants, Parents, Siblings, or Their Descendants	179
	8-2:1.5	No Surviving Heir	179
8-2:2		Distribution of Community Property of a Married Intestate	179
	8-2:2.1	No Surviving Descendants	179
	8-2:2.2	If Surviving Children or Their Descendants	180
	8-2:2.2a	No Non-Spousal Descendants	180
	8-2:2.2b	Non-Spousal Descendants	180
8-2:3		Distribution of Separate Property of a Married Intestate	180
	8-2:3.1	Surviving Descendants	180
	8-2:3.1a	Personal Property	180
	8-2:3.1b	Real Property	181
	8-2:3.2	No Surviving Descendants	181
	8-2:3.2a	Personal Property	181
	8-2:3.2b	Real Property	181
		8-2:3.2b1 Inheritance to Surviving Parents, Siblings, or Descendants of Siblings	181
		8-2:3.2b2 No Surviving Parents, Siblings, or Descendants of Siblings	181
	8-2:4	Avoiding Intestacy	181
8-3		Fundamental Requirements and Provisions Relating to Texas Wills	181
	8-3:1	Will Formation	182
	8-3:2	Will Requirements	182
	8-3:2.1	Attested Wills	182
	8-3:2.1a	In Writing	182
	8-3:2.1b	Signed by the Testator	183
	8-3:2.1c	Attested by at Least Two Witnesses	183
	8-3:2.2	Exception for Holographic Wills	184
	8-3:2.3	Exception for Foreign and Certain Other Wills	184
	8-3:3	Self-Proved Wills	184
8-4		Valuable Options	185
	8-4:1	Independent Administration	185
	8-4:2	Waiver of Bond	185
	8-4:3	Carefully Identify Beneficiaries	186
	8-4:4	Excluding People from the Will	186

	8-4:4.1	Disinheritance	186
	8-4:4.2	Illegal Beneficiaries	187
	8-4:4.2a	Devises to Certain Attorneys and Other Persons	187
	8-4:4.2b	Bequests to Certain Subscribing Witnesses	187
	8-4:4.2c	Pre-Emptive Strikes Against Undue Influence	187
8-5		Testamentary Trusts	188
8-6		Safeguarding the Will	189
8-7		Conclusion	189
<b>Chapter 9 TRUSTS</b>			<b>191</b>
9-1		Introduction	191
9-2		Creation and Validity of Texas Trusts	191
	9-2:1	Creation of Trusts	192
	9-2:1.1	<i>Inter Vivos</i> or Living Trusts	192
	9-2:1.2	Testamentary Trusts	192
	9-2:1.3	Intent to Create a Trust	192
	9-2:1.4	Consideration Not Required	193
	9-2:1.5	Satisfying the Statute of Frauds	193
	9-2:1.6	Trust Property	193
	9-2:1.7	Additions to Trust Property	194
	9-2:1.8	Capacity of the Settlor	194
	9-2:1.9	Capacity of the Trustee	195
	9-2:1.10	Acceptance by the Trustee	195
	9-2:2	Validity of Trusts	196
	9-2:2.1	Trust Purposes	196
	9-2:2.2	Active and Passive Trusts: Statute of Uses	196
	9-2:2.3	Reservation of Interests and Powers by the Settlor	197
	9-2:2.4	Doctrine of Merger	197
9-3		Types of Trusts of Interest to the Elderly	198
	9-3:1	The Revocable Living Trust	198
	9-3:1.1	Parties to the Revocable Living Trust	199
	9-3:1.1a	The Grantor	199
	9-3:1.1b	The Trustee	199
	9-3:1.1c	The Successor or Contingent Trustee	199
	9-3:1.1d	The Primary Beneficiary	200
	9-3:1.1e	The Remainder Beneficiaries	200

	9-3:1.2	Funding the Living Trust	200
	9-3:1.3	The Pour-Over Will	200
	9-3:1.4	Functions of the Revocable Living Trust	200
	9-3:1.4a	Minimizing Probate	201
	9-3:1.4b	Avoiding Probate of the Homestead	201
		9-3:1.4b1 Creating the Trust	202
		9-3:1.4b2 Preserving the Homestead Tax Exemption	202
	9-3:1.4c	Protecting the Grantor and His or Her Assets	202
	9-3:1.4d	Providing for the Grantor's Beneficiaries	203
	9-3:1.5	Negative Aspects of the Revocable Living Trust	203
	9-3:1.5a	Cost	203
	9-3:1.5b	Constant Attention	203
	9-3:1.5c	Probate Still Possible	203
	9-3:1.5d	No Transfer Tax Savings	204
	9-3:1.6	Revoking a Revocable Living Trust	204
9-3:2		Charitable Trusts	204
	9-3:2.1	The Pooled Income Fund	205
	9-3:2.2	Charitable Remainder Trust	206
	9-3:2.2a	Definition	206
	9-3:2.2b	Establishing the Charitable Remainder Trust	206
	9-3:2.2c	Tax Advantages of the Charitable Remainder Trust	207
	9-3:2.2d	Types of Income from the Charitable Remainder Trust	207
		9-3:2.2d1 Charitable Remainder Annuity Trust	207
		9-3:2.2d2 Charitable Remainder Unitrust	208
	9-3:2.3	The Charitable Lead Trust	208
	9-3:2.3a	Definition	208
		9-3:2.3a1 Qualified Reversionary Grantor Charitable Lead Trust	209
		9-3:2.3a2 Qualified Nonreversionary Grantor Charitable Lead Trust	209



	9-3:2.3a3	Qualified Nonreversionary Nongrantor Charitable Lead Trust	209
	9-3:2.3a4	Nonqualified Nongrantor Reversionary Charitable Lead Trust	210
	9-3:2.4	Texas Law on Charitable Trusts	210
	9-3:3	Trusts for the Care of Animals	211
	9-3:4	Spendthrift Trusts	212
	9-3:4.1	Definition	212
9-4		Conclusion	213

---

## **Chapter 10 WHEN DEATH STRIKES 215**

---

10-1		Introduction	215
10-2		Emotional Issues	215
	10-2:1	Mourning a Loved One	215
	10-2:2	Experiencing Grief	216
	10-2:3	Dealing with a Major Loss	216
	10-2:4	Living with Grief	216
10-3		Location of Death	217
	10-3:1	Home Death	217
		10-3:1.1 Necessary Legal Documents	218
		10-3:1.2 Informing the Authorities	218
	10-3:2	Nursing Home Death	219
	10-3:3	Hospital Death	220
10-4		The Autopsy	220
	10-4:1	Elective Autopsy	220
	10-4:2	Legally Required Autopsy	221
10-5		Organ Donation Issues	222
	10-5:1	Making the Anatomical Gift	222
	10-5:2	In the Absence of a Declaration	222
10-6		Funeral Issues	223
	10-6:1	Funeral Costs	223
	10-6:2	Government Assistance	225
		10-6:2.1 Social Security Benefits	225
		10-6:2.2 Veterans Administration Benefits	225
	10-6:3	Cremation Issues	226
	10-6:4	Death Certificates	227
		10-6:4.1 Obtaining Copies of the Death Certificate	227

	10-6:4.2	Uses of the Death Certificate	228
10-7		Administrative Issues	228
	10-7:1	Gather the Documents	228
	10-7:2	Secure the Computer	229
	10-7:3	Notifications	230
	10-7:3.1	Family Members	230
	10-7:3.2	Obituary	230
	10-7:3.3	Power of Attorney	230
	10-7:3.4	Clergy	230
	10-7:3.5	Social Security	230
	10-7:3.6	Office of Personnel Management	231
	10-7:3.7	Other Pension Administrators	233
	10-7:3.8	Life Insurance Companies	233
	10-7:3.9	Tax Appraisal District	234
10-8		Assets and Accounts That Pass Outside Probate	234
	10-8:1	Bank Accounts	234
	10-8:1.1	Single Party Account with Pay on Death (POD) Beneficiary	234
	10-8:1.2	Multiple Party Account Without Right of Survivorship	235
	10-8:1.3	Multiple Party Account with Right of Survivorship	235
	10-8:1.4	Multiple Party Account with Right of Survivorship and Payable on Death Provision	235
	10-8:1.5	Trust Account	236
	10-8:2	Brokerage Accounts and Dividend Reinvestment Plans	236
	10-8:3	Automobiles	236
	10-8:4	Community Property Survivorship Agreement	237
	10-8:5	Receipt of Dividend Checks or Other Payments Made Out to Decedent	237
	10-8:6	IRA Funds	238
	10-8:7	Trust Assets	238
10-9		Homestead Occupancy	239
	10-9:1	The Texas Homestead	240
	10-9:2	Texas Homestead Benefits	240
	10-9:3	Homestead Occupancy	240
10-10		Tax Issues	240
	10-10:1	Determining Tax Issues Facing Decedent's Estate	240
	10-10:2	Filing Requirements and Forms Needed	241
	10-10:2.1	Establishing the Estate—Form SS-4	241

	10-10:2.2	Form 56—Notice Concerning Fiduciary Relationship	242
	10-10:2.3	Decedent's Final Form 1040 (or Intermediate Form 1040, if Necessary)	242
	10-10:2.3a	Name, Address, and Signature	245
	10-10:2.3b	Mandatory Filing Requirements	245
	10-10:2.4	Form 1310: Claiming a Refund for a Decedent	246
	10-10:2.5	Form 1041: U.S. Income Tax Return for Estates and Trusts	246
	10-10:2.6	Form 8822: Change of Address	246
10-11		Income Tax Issues for the Estate, Fiduciaries, Survivors, and Heirs	246
	10-11:1	Income Tax Issues of Survivors and Heirs	247
	10-11:2	Income Tax Issues of the Estate and Its Fiduciaries	247
	10-11:2.1	Estate Basics	248
	10-11:2.2	The Role of the Personal Representative	248
	10-11:2.3	The Governing Instrument	248
	10-11:2.4	Income of an Estate	249
	10-11:2.5	Income Reported—or Not Reported—by the Beneficiaries	249
10-12		Income, Deductions, and Exemptions	250
	10-12:1	Actual or Constructive Receipt and Disbursement	250
	10-12:2	Income in Respect of a Decedent (IRD)	250
	10-12:3	Character of Income	250
	10-12:4	Deductions in Respect of a Decedent	251
	10-12:5	Income and Expenses After Death	251
	10-12:6	Wages	251
	10-12:7	Interest and Dividends	252
	10-12:8	Treatment of Self-Employment Income	252
	10-12:9	Treatment of Rental Income, Expenses, and Depreciation	252
	10-12:10	Partnership Income or Loss: Partnership Closes Books on Decedent's Date of Death	253
	10-12:11	IRA and Pension Distributions: Decedent's Distributions Prior to Death	253
	10-12:12	Post Death Required Minimum Distribution (RMD) Rules	254
	10-12:13	Estate and Administration Expenses on Form 1041	254
	10-12:14	Funeral Expenses	255
	10-12:15	Interest Expenses	255
	10-12:16	Charitable Contributions	255
10-13		Texas Tax Issues	256

10-13:1	Property Tax Issues	256
10-13:2	Taxes Administered by Texas Comptroller of Public Accounts	256
10-14	Federal Wealth Transfer Taxes	256
10-15	Conclusion	257
<b>Chapter 11 PROBATE</b>		<b>259</b>
11-1	Introduction	259
11-2	Probate: A Definition	259
11-3	Types of Texas Probate	260
11-3:1	Dependent Administration	260
11-3:2	Independent Administration	260
11-3:2.1	Circumstances Under Which Independent Administration Is Possible	260
11-3:2.2	Circumstances Where Independent Administration May Not Be Advisable	261
11-3:2.2a	Estates with High Debt Levels	261
11-3:2.2b	Warring Beneficiaries	261
11-3:2.3	Role of the Executor (or Administrator)	261
11-3:3	Probate of Will as Muniment of Title	262
11-3:4	Small Estate Affidavit	262
11-3:5	Small Estate Procedures	263
11-3:5.1	Summary Proceedings for Certain Small Estates	263
11-3:5.2	Order of No Administration	263
11-3:6	Determination of Heirship	263
11-3:6.1	Purpose of Determination	264
11-3:6.2	Procedural Issues	264
11-3:6.3	Affidavit of Heirship	264
11-3:6.4	Making Use of the Affidavit of Heirship	265
11-3:6.4a	Step One: The Affidavit of Heirship	265
11-3:6.4b	Step Two: The Deed of Transfer	265
11-4	The Probate Proceeding	266
11-4:1	Jurisdiction	266
11-4:2	Venue	267
11-4:3	Starting the Probate Process	268
11-4:3.1	Notices and Process in Probate Proceedings	268
11-4:3.1a	Citation on Application for Probate of Will Produced in Court	269

	11-4:3.1b	Citation on Application for Issuance of Letters of Administration	269
	11-4:3.2	Contents of the Application for Probate	270
	11-4:3.2a	Contents of Application When Decedent Dies Testate	270
	11-4:3.2b	Contents of Application When Decedent Dies Intestate	271
	11-4:4	Will Contests	272
	11-4:5	Proving the Will's Authenticity	272
	11-4:5.1	General Proof Requirements	273
	11-4:5.2	Additional Proof for Probate of a Will Physically Produced in Court	273
	11-4:5.3	Proof of Execution of Attested Will Produced in Court	273
	11-4:5.4	Proof of Execution of Holographic Will	274
	11-4:5.5	Proof of Will Not Produced in Court	274
	11-4:5.6	The Court's Order	274
	11-4:6	Bond and Oath	274
	11-4:7	Notice to Beneficiaries	274
	11-4:8	Notice to Claimants	275
	11-4:8.1	Notice to Comptroller of Public Accounts	275
	11-4:8.2	General Notice to Creditors	275
	11-4:8.3	Notice to Unsecured Creditors	275
	11-4:8.4	Notice to Secured Creditors	275
11-5		Avoiding Probate	276
	11-5:1	Preplanning—the Key to Probate Avoidance	276
	11-5:2	Value of the Last Will and Testament	276
	11-5:3	Other Probate Avoidance Tools	276
	11-5:3.1	Community Property Survivorship Agreement	276
	11-5:3.1a	Who Should Use a CPSA?	277
11-6		Conclusion	278
<b>Appendix</b>		<b>SAMPLE DOCUMENTS AND FORMS</b>	<b>279</b>
1		American Hospital Association Patient Care Partnership Brochure	283
2		National Association for Home Care & Hospice, Home Care and Hospice Patient Rights	291
3A		Statutory Language for Agreement Converting Separate Property to Community Property	293

3B	Agreement to Convert Separate Property to Community Property	294
4	Declaration and Registration of Informal Marriage	296
5A	Texas Homestead Exemptions for Persons 65 or Older or Disabled	297
5B	Residence Homestead Exemption Application	298
6	Sample Transfer on Death Deed Form	301
7	Texas Statutory Durable Power of Attorney Form	303
8	Sample Texas Revocation of Durable Power of Attorney Form	309
9A	Self-Proving Affidavit	311
9B	Sample Will Article for Simultaneous Execution, Attestation, and Self-Proving	312
10	Sample Declaration of Guardian Form and Self-Proving Affidavit	314
11	Declaration of Guardian – Sample Alternative to Self-Proving Affidavit	316
12	Qualified Income Trust	317
13	Advance Beneficiary Notice of Non-coverage	320
14	Texas Directive to Physicians and Family or Surrogates	321
15A	Statement Explaining Patient’s Right to Transfer – Physician Recommends Against Certain Life-Sustaining Treatment the Patient Wishes to Continue	324
15B	Statement Explaining Patient’s Right to Transfer – Physician Recommends Life Sustaining Treatment the Patient Wishes to Stop	326
16	Medical Power of Attorney, Designation of Health Care Agent	328
17	Out-of-Hospital Do-Not-Resuscitate (OOH-DNR) Order	332
18	Residence Homestead Exemption Application	334
19	Texas Affidavit of Heirship	337
	<i>Table of Cases</i>	339
	<i>Index</i>	343

# Foreword

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This primer on Texas Elder Law cannot be more well-timed as America faces its growing elderly population. This book may serve as a desk reference to a lawyer in law practice who seeks to understand the operation of Texas law in the field of Elder Law, fiduciary administration, patient protection, government benefits, property ownership, advance directives, and estate planning. It also serves as a supplement for law school courses in Elder Law. Inasmuch as the majority of Texas law schools offer a course in Elder Law, this reader is an essential companion to any casebook on the subject.

Elder Law encompasses a variety of disciplines that address the legal needs of America's growing elderly population. According to the Census Bureau, the U.S. older proportion of 16.5% in 2021 will rise to 22.1% in 2050. This will be a significant increase from 1950 when only 8% of the population was 65 or over. Over the past century, Americans have lived longer and are projected to do so into the future. According to the National Institute on Aging, the number of centenarians in the United States increased by 68% between 1980 and 2010. But in 1980, law schools did not have courses in Elder Law. Meeting the challenges of caring for elderly persons was the work of gerontologists and psychologists; however, when adult children began contacting lawyers regarding the care of their disabled adult relatives, it became a matter of Health Law. Thus, the law of long-term care was created.

Today, Elder Law includes many of the following disciplines: legal protection of patients, asset protection, wills, trusts, guardianships, advance directives, retirement planning, Medicare benefits and Medicaid benefits, nursing homes and in-home care, homestead rights, real estate and mortgage assistance, various levels of advice, and tax matters. Indeed, lawyers who previously catered to the wealthy now also address government benefits for the needy.

The lawyer can also be expected to advise clients on Medicare. Given that people who are 65 and over are enrolled in Medicare, the question is often whether Medicare pays for the care of the elderly. How does a lawyer advise a family member who seeks to understand the payments for care in cases of hospice care? In-patient hospital care? Home health? Short-term institution? Physician/medical? Outpatient hospital? Prescription drugs? Dental? Long-term care facility? Which of these costs are paid by Medicaid, out-of-pocket, or other insurance arrangements?

Early Elder Law practitioners focused primarily on Medicaid planning to secure a client's eligibility for nursing home care, and it remains a critical part of Elder Law. In Chapter 6, Professor James takes the reader through each step the lawyer must follow to qualify the client for Medicare benefits.

Further, Professor James expands Elder Law into the sub-specialty of Dementia Law. It is a field that prior scholars have not explored. After considering the medical aspects of dementia, Professor James addresses the need for advance directives, wills, and trusts.

The material in the book is organized in discrete topics with multiple sub-topics. This facilitates reading comprehension for all readers: lawyer, law student, or non-lawyer.

The legal terms come with plain language definitions as well as background information on each subject matter.

The utility of this book cannot be overemphasized. It is a service to the lawyer, the student, the elder law community in Texas, and beyond. Most people who have family members with Elder Law needs value the advice of good counsel. Professor James has enabled the profession with this primer.

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# Preface

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On January 1, 2014, the codification of Texas law underwent a tremendous change: The Texas Estates Code replaced the Texas Probate Code. A code that had been in existence for more than 60 years came to an end. Lawyers who practice in this area of the law, courts who adjudicate therein, professors who teach these subjects, and members of the general public seeking relevant information now had to learn the new chapters and section numbers of the new Texas Estates Code. While the new code and its new numbering system did not make many changes to the substantive law, to a lawyer, a judge, a law professor, or a law student, every change in the law is significant.

Less than 2 years after this big change, Texas commenced another project: This time, the Texas Health and Human Services Commission—an agency with much bearing on the practice of Elder Law—began, in its own words, to transform itself “to be a more functional, efficient, effective and responsive organization.” The Commission’s new website—now titled “Texas Health and Human Services”—set forth its new motto: “Making a positive difference in the lives of the people we serve.” The transformational project was expected to take 2 years; in reality, it took 4, and culminated with the launching of the 2020 Inaugural Business Plan, *Blueprint for a Healthy Texas*. According to the HHS’s website, the blueprint is “more than a framework that prioritizes and guides HHS work. Beyond outlining key priorities and initiatives, it sets forth strategies for how HHS divisions will accomplish the initiatives’ respective goals. The plan also identifies the measures that will be used to determine how each initiative improves HHS and positively impacts the lives of Texans.”

In particular, the HHS recognizes the impact that it and its policies will have on the elderly population in Texas. The HHS website acknowledges that:

Almost 12 percent of Texans—3.2 million people—are 65 and older and the number is growing. By 2050 that figure is expected to increase to almost 20 percent. This increase of the older adult population will likely mean an increase in the need for all types of health and human services such as health care, home care, personal care, and long-term care.

Texas Health and Human Services provides a range of services for older Texans that help ensure their well-being, dignity, and choice. Programs also are in place to support family caregivers.

Meanwhile, other aspects of Texas law with a bearing on Elder Law are also changing. Maybe the most significant is the law as it relates to same-sex marriage. A brief history is warranted here. In 1997, the Texas Legislature prohibited the issuance of marriage licenses to same-sex couples. Six years later, in 2003, the Legislature enacted a statute that made void in Texas any same-sex marriage or civil union. That statute also prohibited the state, any agency, or political sub-division of the state from giving effect to same-sex marriages or civil unions performed in other jurisdictions. Then, on November 8, 2005, Texas voters approved Texas Proposition 2, which amended the Texas Constitution to define marriage as consisting “only of the union of one man and one woman.”

On June 26, 2015, the U.S. Supreme Court issued its decision in *Obergefell v. Hodges*. The Court struck down all state bans on same-sex marriage, legalized same-sex marriage in all 50 states, and required states to honor out-of-state same-sex marriage licenses. Texas has been reluctant to comply with federal law on this issue. Two days after the *Obergefell* ruling, Texas Attorney General Ken Paxton issued an opinion advising county clerks, magistrates, and others who have religious objections to same-sex marriage that they could opt out of providing services to same-sex couples seeking marriage licenses. Then, on June 30, 2017, the Texas Supreme Court threw out a lower court ruling that said spouses of gay and lesbian public employees are entitled to government-subsidized same-sex marriage benefits. In a unanimous opinion, the court ordered a Houston trial court to reconsider the case. In February 2019, the lower court reconsidered the matter and ruled that the City of Houston can indeed pay the spousal benefits. On April 29, 2021, the Fourteenth Court of Appeals affirmed the trial court's February 2019 ruling that the City of Houston could indeed pay the spousal benefits to same-sex spouses. Writing for the majority, Justice Margaret Poissant held that the challengers' "attempt to prevent the city from offering employment benefits to married same-sex couples on the same terms and conditions as married different-sex couples cannot be reconciled with the requirements of the U.S. Constitution."

These changes to Texas law are of great significance for Elder Law practitioners. We are well aware of the importance of the Texas Estates Code (formerly the Texas Probate Code) in the estate planning, guardianship, and probate aspects of Elder Law. By the same token, the HHS and its website provide us with much valuable information and templates and samples of forms that make our practice better. As to the final outcome in *Pidgeon v. Houston* and its implications for same-sex marriage, we must await any further appeal of the April 2021 decision by the Fourteenth Court of Appeals. One thing we do know is the following: These are exciting times for Elder Law practitioners in Texas.

It is with this understanding that we present the 2021–2023 edition of *Texas Elder Law*. This new edition covers the same ground as the 2020 edition, then goes on to present amendments made to Texas law during the 2021 session of the Texas Legislature, relevant federal law enacted between 2020 and July 1, 2021, and relevant state and federal case law from cases decided prior to July 1, 2021. The book covers various topics, including advance directives, guardianship, the homestead exemption, Medicaid, Medicare, probate, revocable living trusts, Social Security benefits, trusts, Veteran Administration benefits, and wills. The material is supported by a slew of footnotes pointing readers to the law or other primary sources that could help them learn the rudiments of Elder Law (if they are students); acquire knowledge of the statutes, regulations, case law, and policies that make up that body known as "Elder Law" that they may use in practice (if they are already lawyers); or adjudicate controversies (if they are judges).

It is my hope that the book will be helpful to many of its readers, be they law students, Elder Law practitioners, judges, or members of the general public seeking information.

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# *About the Author*

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**Vaughn E. James** is the Judge Robert H. Bean Professor at Texas Tech University School of Law in Lubbock, Texas. He teaches—or has taught—various courses, including Elder Law, Estate and Gift Taxation, Estate Planning, Federal Income Taxation, Gratuitous Transfers, Taxation of International Transactions, Law and Religion, and Wills and Trusts. He practices law in New York and Texas, and before the Federal District Court for the Northern District of Texas and the United States Tax Court. An avid believer in the notion of Equal Justice for All, Professor James has been a member of the Texas State Bar *Pro Bono* College for several years. Notwithstanding his hectic teaching, research, and writing schedule, Professor James manages to clock at least 100 hours of *pro bono* work each year. In October 2016, the Texas State Bar named him the Access to Justice (ATJ) *Pro Bono* champion. His other books include *The Alzheimer's Advisor: A Caregiver's Guide to Dealing With the Tough Legal and Ethical Issues* (Amacom Books, 2008); *Current Conflicts in Law and Religion: Cases and Materials* (Vandeplas Publishing, 2015); *Texas Elder Law*, 2017 Edition (ALM, 2016); *Texas Elder Law*, 2018 Edition (ALM, 2017); *Elder Law: Cases and Materials* (Esquire Books, 2019); *Texas Elder Law*, 2020 Edition (Fastcase, 2020); and *Contemporary Issues in Law and Religion, First Edition* (Esquire Books, 2021).

