FORCED OWNERSHIP: ENOUGH TO MAKE A TEXAS "LAUGHING HEIR" CRY

*Bradford E. Yock**

I. INTRODUCTION

As the title implies, in the intestacy situation and under some circumstances, the mood of a Texas "laughing heir" (referencing a remote

* Attorney (Licensed by State Bar of Texas - Emeritus Status), J.D., University of Houston Bates College of Law, 1980; BA with Honors, University of Texas, Austin 1973; MA University of Houston, 2001; MPA (Accounting), West Texas A&M University, 2019; Enrolled Agent (admitted to practice before the Internal Revenue Service).

heir) might change from pleased, to incredulous, and then to truly unhappy.[1] The reaction would likely proceed to unhappy if the laughing heir was faced with forced ownership (i.e., ownership without assent) or any of the incidents of ownership of unwanted property from the estate of a remote and, for all practical purposes, unknown relative who died intestate.[2] The reaction would be in contrast to one of happiness usually thought to occur on receipt of an unexpected but welcomed and valuable inheritance.[3] The inheritance by a remote heir and the problems which arise in an inheritance from a distant, intestate relative has previously been the subject of scholarly inquiry.[4] As will be shown, the facts and issues explored in the referenced law review article are useful today in demonstrating the core concern of this discussion, even though in this Article the laughing heir is used to illustrate a different problem than described in the referenced scholarly work.[5]

Before explaining the origin and role the concept of a laughing heir will play in this discussion, it is helpful to initially and briefly state the objective of this Article.[6] This analysis is directed at exposing the deficiencies in the current-day "orthodox" interpretation of the "passage of title upon intestacy" law found in the 1981 court of appeals decision *Welder v. Hitchcock*.[7] The statements and findings about the Texas passage of title upon intestacy law, including the disclaimer law in the *Welder* opinion, are the current orthodoxy in interpreting Texas Estates Code subsection 101.001(b) (previously Section 37 of the Texas Probate Code).[8] In short, a chief deficiency in the orthodox interpretation is that *Welder*'s claim that the statute at issue is a codification of the common law is unsubstantiated.[9] The statutory interpretation advocated by *Welder*, along with the statutory text, creates uncertainty in any

1. Author's original hypothetical.
2. *Id.*
3. *Id.*
4. *See* David F. Cavers, *Change in the American Family and the "Laughing Heir,"* 20 IOWA L. REV. 203, 203 (1935).
5. *See* discussion *infra* Part II.
6. Author's original thought.
7. Welder v. Hitchcock, 617 S.W.2d 294, 297–98 (Tex. App.—Corpus Christi–Edinburg 1981, writ ref'd n.r.e.); TEX. EST. CODE ANN. §§ 101.001(b), 101.051(b). "Passage of title upon intestacy" law to refers to EST. §§ 101.001(b), 101.051(b), both derived from TEX. PROB. CODE ANN. § 37 (repealed 2009), and EST. § 101.001(a)(3). The author recognizes that EST. § 101.001(a)(3) also references immediate vesting of an estate not devised by a will. However, because of the clear reference to intestacy in §101.001(b), the usual citation made is to this statute. Although, the author has not researched this thoroughly as is not the scope of this article, the claims made in this discussion are likely to be applicable to an interpretation of § 101.001(a)(3). It contains similar flaws as the primary statutes under discussion. Estates Code § 201.103 provides further clarification concerning vesting and indicates that title held by the intestate at death vests in the intestate's heirs "as if the intestate had been the original purchaser." The *Welder* case was primarily concerned with the interpretation and application of the original disclaimer statute, PROB. § 37A (repealed 2009), but this does not affect the claim made herein that *Welder* is the current orthodox interpretation in the area of law under discussion.
8. *See Welder*, 617 S.W.2d at 297–98; EST. § 101.001(b).
9. *See Welder*, 617 S.W.2d at 297–98. Although the *Welder* opinion does not specifically state this, it is assumed throughout that the opinion was referring to the common law of England.

heir (but with greater potential negative impact on a Texas laughing heir) as to when and how one becomes an heir, what rights and obligations are imposed, and the procedure for a potential, undeclared heir to avoid the burden of being named an heir.[10]

In addition to the unwarranted incorporation of the common law into the passage of title upon intestacy law, the superimposition (*Welder*'s term) of the disclaimer statute on the passage of title upon intestacy law, which *Welder* also connects with the common law, has a potential negative impact on the Texas laughing heir.[11] The incorporation of the common law potentially exposes an intestate heir to the possibility of being deemed an owner or being saddled with the burden of ownership of the intestate estate without assent.[12] Under the current orthodoxy, one result is the possibility that a laughing heir may be "brought to tears" by forced ownership—or the burdens normally connected with ownership—of unwanted and burdensome property or the expense of defeating a claim that one is an heir.[13] In order to bring solace to the laughing heir who is frustrated to tears, and incidentally to "regular heirs," an alternative interpretation of the statute and the need for a legislative remedy will be recommended to provide greater certainty and a fairer outcome for the Texas laughing heir.[14]

A. The Protagonist: Potentially Sad Texas Laughing Heir

In choosing to use the phrase laughing heir as a vehicle to pique interest in the subject of this Article, I realize it may seem to some estate-planning practitioners a somewhat antiquated reference to an idea describing an infrequently encountered, but potentially difficult, estate situation.[15] In addition, I recognize that for those unaware of the origin of laughing heir it could provoke an unintended response, i.e., that it is somewhat irreverent and appears to mock the normal somber response to an individual's death.[16] However, in the context of this Article, laughing heir refers to a truly remote

10. *Id.*; EST. § 101.001(b).

11. *See Welder*, 617 S.W.2d at 297–98*; see* discussion *infra* Part V.

12. *See Welder*, 617 S.W.2d at 297–98 (dealing with PROB. §§ 37, 37A (repealed 2009)). As will be shown, the text of the derivative statutes in Estates Code § 101.001(b), § 101.051(b) is sufficiently similar so that their enactment or modification does not affect the validity of the basic arguments made in this article. The same is true in the case of the disclaimer statute derived from Probate Code § 37A (now EST. §§ 101.001(b), 101.051(b) and TEX. PROP. CODE ANN. Ch. 240). The concept of ownership without assent is claimed by legal scholars, federal courts, and other state courts to be a firmly established principle of English common law. Briefly stated, it holds that an intestate heir, as opposed to a will devisee, is immediately vested with ownership or title to the intestate's assets upon the intestate's passing and may not renounce ownership.

13. *Id.* (explaining "forced ownership" includes any burden that is usually associated with ownership of property even the obligation to dispute or disclaim an "accusation" that one owns or has responsibility for property).

14. *See* discussion *infra* Part VII.

15. Author's original thought.

16. *Id.*

intestate descendant who has little or no emotional ties, personal feelings, or sense of loss regarding the intestate decedent.[17] In fact, the heir may not have known the deceased existed until years after the ancestor's passing.[18]

In Professor Caver's article, use of the phrase laughing heir was originally intended to highlight the different personal impact of an inheritance by a remote intestate heir who was ignorant of the deceased's life and estate and that of a close relative who receives the estate of an intestate of whom they had personal knowledge and a personal relationship.[19] Professor Caver's significant contribution to this area of probate or succession law has been recognized for decades, so resurrecting the idea in its original context beyond footnote status would be unlikely to interest anyone.[20] Hopefully, the use of the word "crying" will arouse academic and practitioner interest in the potential current usefulness of retrofitting an old concept to discuss the curious plight of the Texas laughing heir.[21]

Despite the attenuated relationship and an unexpected potential inheritance, a Texas laughing heir may find herself or himself subject to a claim that title to the intestate's assets has immediately vested in her or him, regardless of whether she or he desires the assets or that she or he will have to respond to a lawsuit when an ancestor or descendent dies intestate.[22] Furthermore, he or she may learn that effectively renouncing title and the burdens of ownership may be a significant, and perhaps impossible, challenge.[23] Thus, our Texas laughing heir may be faced with potential sadness resulting from the uncertain meaning of the text of the passage of title upon intestacy law combined with questionable, but often cited, *Welder* interpretation.[24]

In a succession scheme designed to account for the absence of close or semi-close family members with the customary personal ties to the deceased,

17. *See* Cavers, *supra* note 4, at 208.

18. *Id.*

19. *Id.*

20. Author's original thought.

21. *Id.*

22. TEX. EST. CODE ANN. §§ 101.001(b), 201.001; *see* Welder v. Hitchcock, 617 S.W.2d 294, 297–98 (Tex. App.—Corpus Christi–Edinburg 1981, writ ref'd n.r.e.). For example, Rule 152 of the Texas Rules of Civil Procedure requires that an heir of a defendant who dies intestate during the pendency of a lawsuit must "appear and defend the suit" in response to service of a *scire facias*. Apparently, the suit proceeds against the heir without a clear definition of who is an heir and how the named heir may avoid being a party to a lawsuit.

23. *See* Drye v. U.S., 528 U.S. 49, 52 (1999) (finding that under applicable federal tax law the right to disclaim ownership of the intestate's assets was a property right). Given that the intestate heir under Arkansas law had a right to disclaim, it is possible that our Texas "laughing heir" with a similar right may also effectively have an incidence of ownership imposed without assent.

24. EST. § 101.001(b); *Welder*, 617 S.W.2d at 297–98. The author notes he may have been too impressed with his "clever" play on words by using the customary meaning of "laughing" referring to the mood of happiness and the contrasting mood of sadness in the laughing heir who cries and at the same time employing it in the Cavers technical-definition sense to describe a remote heir. He apologizes if this created any unnecessary distraction.

describing the nature of an extremely remote heir's interest resulting solely from legislative decree is somewhat challenging.[25] As discussed above, in a somewhat gallows-humor manner, the remote heir has been caricatured as a laughing heir.[26] As alluded to previously, the use of laughing heir was originally intended to contrast the different responses of persons to an intestate inheritance, i.e., the imagined joyful response of the remote heir who has received an unexpected yet valuable gift and the indignation of those who believe the deceased never would have intended this disposition.[27] This distant relationship between an intestate heir (the laughing heir) and the deceased, and the potential for a perceived incongruity with the close connection customarily thought to exist between a decedent and his or her heirs, is also a long-time feature of Texas law.[28] To be clear, a laughing heir exists under current Texas law because it is possible for a truly remote heir (the laughing heir) to inherit an intestate's estate.[29]

While it may seem somewhat unusual on such a sad occasion to refer to a deceased person's remote heirs as "laughing," the phrase may also accurately illuminate a somewhat absurd, laughable outcome in some cases when an individual not survived by any close relatives dies intestate.[30] One potential absurd outcome is hinted at in that part of this Article's title which references a laughing heir who is caused to cry.[31] This may sound rather hyperbolic; however, from the laughing heir's perspective, one could imagine that receiving an unexpected and valuable inheritance might be sufficient to cause the heir to laugh, or at least smile.[32] On the other hand, depending upon the nature of the inherited assets and the heir's personal circumstances, the inheritance, while laughable in the above-discussed Professor Cavers's description, may not be a laughing matter to the remote, intestate heir.[33]

One cause of this potential sadness can be related to the undeniable proposition that there are many situations when owning or having title to assets is much more of a burden than a benefit.[34] Therefore, a joyless and truly unhappy occasion could arise if our laughing heir is forced to be the owner of the intestate's assets and shoulder the unwanted burden.[35] As previously stated, this Article seeks to explore in greater detail the legal

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25. Author's original thought.
26. *See* Cavers, *supra* note 4, at 208.
27. *Id.*
28. EST. §§ 201.001–.003; *see* H.P.N. GAMMEL, THE LAWS OF TEXAS, 1822–1897, at 277 (Austin, Gammel Book Co. 1898).
29. EST. §§ 201.001–.003.
30. *See* Cavers, *supra* note 4, at 208.
31. Author's original thought.
32. *Id.*
33. *See* Rebecca Lake, *How to Disclaim an Inheritance (And Why You Would)*, SMARTASSET (Mar. 24, 2023), https://smartasset.com/financial-advisor/disclaim-inheritance [https://perma.cc/E25L-6DZJ].
34. *See* discussion *infra* Part III.
35. Author's original thought.

theories and historical legal developments in Texas law which could bring sadness to our laughing heir.[36]

Before going forward, a brief summary of the legal sources of the Texas laughing heir's potential woe may be useful.[37] The laughing heir is initially confronted with statutory language that appears to hold that he or she is immediately vested with the remote intestate's estate.[38] According to the statutory language, the intestate decedent's estate "**vests immediately in the person's heirs at law**."[39] The meaning of "vests immediately" in the text, which has been part of Texas probate law since 1848, is not clear as to how and when the specific person in whom this immediate vesting occurs is determined and what steps one may effectively take to avoid being identified as an heir and suffering from immediate vesting of assets.[40]

When this initial lack of clarity is combined with the orthodox interpretation (*Welder*) that this statutory language is a codification of the common law, and a common law connection is mixed with the disclaimer statute, our Texas laughing heir can be placed in an undesirable position.[41] Our Texas laughing heir, in addition to experiencing uncertainty about whether she or he has been properly identified as an heir, may not be entirely confident that a disclaimer is a true safeguard to an undesired connection with burdensome aspects of an intestate's property or liabilities.[42] Even though Texas affords the laughing heir an opportunity to disclaim, linking the immediate vesting upon intestacy and the disclaimer statutes with the common law as the *Welder* opinion does (as will be discussed more thoroughly) can create more problems than it solves.[43]

The core problem that lurks throughout this discussion is that there has been long-standing federal and case law from other states, recognized legal treatises, and scholarly law review articles which embrace, or at least give

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36. *Id.*
37. *See* TEX. EST. CODE ANN. § 101.001(b).
38. *Id.*
39. *Id.*
40. *See id.*; GAMMEL, *supra* note 28, at 277.
41. *See* Welder v. Hitchcock, 617 S.W.2d 294, 298 (Tex. App.—Corpus Christi–Edinburg 1981, writ ref'd n.r.e.); EST. § 201.103.
42. *See Welder*, 617 S.W.2d at 297; *see* Watson v. Watson, 13 Conn. 83, 85–86 (1839); Coomes v. Finegan, 7 N.W.2d 729, 732 (Iowa 1943); Bostian v. Milens, 193 S.W.2d 797, 804 (Mo. Ct. App.1946); Bradley v. State, 123 A.2d 148, 150 (N.H. 1956); *In re* Est. of Christian, 652 P.2d 1137, 1141 (Haw. 1982); Hardenbergh v. Comm'r., 198 F.2d 63, 67 (8th Cir. 1952); Christian Marius Lauritzen, II, *Only God Can Make an Heir*, 48 NW. UNIV. L. REV. 568, 573 (1953); *but see* Edward T. Roehner & Sheila M. Roehner, *Renunciation as Taxable Gift, An Unconscionable Federal Tax Decision*, 8 TAX. L. REV. 289 289–315 (1953); *see generally* Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 CORNELL L. REV. 587, 591–96 (1989) (discussing, referencing, and evaluating the authority and policies connected with the prohibition on the intestate heir's ability to renounce ownership); Drye v. U.S., 528 U.S. 49, 52, 61 (1999) (noting another issue that reasonably arises as the result of enacting a disclaimer state is whether this implies the heir is immediately vested with title and is required to disclaim to avoid ownership). The heir might prefer a presumption that title does not immediately vest until they take affirmative steps demonstrating their assent; satisfying this desire would likely require legislation.
43. Author's original thought.

favorable treatment to, the proposition that at common law the intestate heir was vested with title immediately by operation of law and could not renounce.[44] Although not the focus of this discussion, it is claimed that at common law, a beneficiary or devisee under a will did have the right to renounce ownership because this inheritance was a gift and could, like any offer of gift, be rejected.[45] Thus, ironically, a laughing heir may, upon learning of his or her remote, intestate relative's death, express the opposite sentiment from the usual happy one, i.e., frustration or sorrow at being forced to deal with unwanted property or any aspect of the intestate's estate (including liability claims).[46]

B. The Antagonist: The Welder *Common Law Claim*

We now have our protagonist, the laughing heir who cries, who faces potential obstacles generated by the interpretation of the text of the pertinent statutes.[47] As the above explanation of these obstacles implied, the antagonist, in the sense of the chief culprit behind the Texas laughing heir's possible woes, takes the form of a legal theory that, at common law, title to the intestate's estate was immediately vested in the heirs at law who could not renounce ownership.[48] The not often recognized influence of this common law legal theory on the application of Texas statutory and case law may be reasonably seen (as previously discussed) as having the potential to cause the laughing heir to cry.[49]

It is appropriate to make this alleged theory of common law the "bad guy" for at least two reasons.[50] First, the *Welder* opinion that the common law is codified by the enactment of the then Texas Probate Code Section 37, and now Texas Estates Code subsection 101.001(b), is a bare, unsupported assertion which does not helpfully clarify the statute's meaning.[51] Therefore, it is an unnecessary obstacle to proper interpretation and application of the law by intestate heirs, especially when Texas laughing heirs are concerned.[52]

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44. *Welder*, 617 S.W.2d at 297; *see Watson*, 13 Conn. at 85–86; *Coomes*, 7 N.W.2d at 732; *Bostian*, 193 S.W.2d at 804; *Bradley*, 123 A.2d at 150; *In re Est. of Christian,* 652 P.2d at 1141; *Hardenbergh*, 198 F.2d at 67; Lauritzen, II, *supra* note 42, at 573; *but see* Roehner & Roehner, *supra* note 42, 289–315 ; *see* Hirsch, *supra* note 42, at 591–96.

45. *See Welder*, 617 S.W.2d at 297; *Hardenbergh*, 198 F.2d at 66; *Drye*, 528 U.S. at 61.

46. Author's original thought.

47. TEX. EST. CODE ANN. § 101.001(b) (deriving from TEX. PROB. CODE ANN. § 37 (repealed 2009)); EST. §§ 122.01–.002; PROP. ch. 240 (deriving from TEX. PROB. CODE ANN. § 37A (repealed 2009)).

48. *See Welder*, 617 S.W.2d at 297; *see Watson*, 13 Conn. at 85–86; *Coomes*, 7 N.W.2d at 732; *Bostian*, 193 S.W.2d at 804; *Bradley*, 123 A.2d at 150; *In re Est. of Christian,* 652 P.2d at 1141; *Hardenbergh*, 198 F.2d at 67; Lauritzen, II, *supra* note 42, at 573; *but see* Roehner & Roehner, *supra* note 42, 289–315; *see* Hirsch, *supra* note 42, at 591–96.; EST. §§ 101.001(b), 122.001–.002; PROP. ch. 240.

49. *See* discussion *supra* Section I.A.

50. Author's original thought.

51. *See Welder*, 617 S.W.2d at 297; EST. § 101.001(b).

52. *See* discussion *supra* Section I.A.

Second, the 1981 *Welder* claim that the common law concept of immediate vesting was codified by the above-referenced statutes and the connection with the somewhat obscure principle—which raises its head more often than one might anticipate—that an intestate heir at common law could not renounce ownership has never (before *Welder*) been adopted or recognized by Texas courts.[53] Thus, the presence of *Welder*'s common law claim in connection with the passage of title upon intestacy law appears to be an unnecessary distraction.[54]

Subsequent sections of this Article will document, discuss, and critique Texas jurisprudence in this area of law and the impact of the above-referenced application of the common law to the relevant statutes.[55] En route to a more complete understanding of the laughing heir's legal predicament, it may be helpful to explore the origin of the laughing heir concept and the reasoning behind its current usefulness in explaining why some observers might think the reference to a Texas laughing heir from the literal, "non-Cavers's" perspective is a misnomer.[56]

II. LAUGHING HEIR: ORIGINAL MEANING AND IRONIC TWIST

While it is clear an extremely remote or laughing heir may exist under Texas law, skeptics may question whether there are sufficient demonstrable consequences to justify the attention this Article bestows.[57] A more detailed discussion of the origin and current-day application of the laughing heir concept is offered to support and justify exploring the plight of the Texas laughing heir faced with an unwanted inheritance.[58]

Over eighty-five years ago, Duke University Law Professor David Cavers published an article discussing the relationship between changes in the family structure and their impact upon inheritance laws.[59] He posited that it had been shown by "abundant" proof that there was an "intimate" relationship between a society's family organization and the law governing succession of property at death.[60] He used the intestate laughing heir (a concept derived from an old German saying) to illustrate the issues raised by applying intestate succession statutes to the statutory intestate succession

53. *See* discussion *infra* Part IV; Dyer v. Eckols, 808 S.W.2d 531, 533–34 (Tex. App.—Houston [14th Dist.] 1991, writ dism'd by agr.) (relying heavily on the *Welder* reasoning to find that a disclaimer by a *devisee* is not a transfer of property for purposes of fraudulent transfer law). However, the disclaimer is necessary to avoid ownership which might otherwise vest. Thus, under the *Welder/Dyer* common law driven approach, it appears an heir may own unless he or she disclaims.; *see also* Leggett v. U.S., 120 F.3d 592, 594–97 (5th Cir. 1997).

54. Author's original thought.

55. *See supra* text accompanying note 47.

56. Author's original thought.

57. *See* TEX. EST. CODE ANN. §§ 201.001–.003.

58. Author's original thought.

59. Cavers, *supra* note 4, at 203.

60. *Id*.

schemes common at that time.[61] He defined the laughing heir as one who succeeds to a valuable and desired estate but whose connection to the deceased intestate ancestor is so distant and impersonal as to feel no usual sense of bereavement.[62] For Professor Cavers, a significant problem posed by the laughing heir was that the law of intestate succession common in many states had not kept pace with the dramatic changes in family structure.[63] As a result, a valuable inheritance received by a remote heir was likely to encourage unnecessary legal hurdles to passage of title upon intestacy and arouse resentment in the rest of society, specifically other excluded relatives and close, personal friends of the deceased.[64]

The use of the laughing heir concept was intended to highlight the social friction that might arise from the perceived undeserved, good fortune of the remote or laughing heir.[65] Professor Cavers cited major societal changes occurring at that time, such as the change from rural to urban living, from which other changes in the family structure appeared to result.[66] These changes included a declining birthrate resulting in smaller family size, more attenuated family ties through greater population dispersion, and differences in marriage and divorce customs.[67] In summary, he argued these changes increased the likelihood of the existence of remote heirs.[68] This, in turn, could increase the potential for family and societal friction caused by the fact that an individual (laughing heir) received what Professor Cavers termed a "resented windfall."[69]

He predicted that the perceived social injustice from the laughing heir's good fortune might be a catalyst for movements to reform intestate succession laws and reduce the number of eligible heirs.[70] One reason for this prediction was Professor Cavers's belief that the laws of intestate descent are usually thought to reflect the customary desires of the deceased; therefore, a laughing heir's receipt of an intestate estate might be reasonably seen as inconsistent with the intestate decedent's wishes.[71] Professor Cavers questioned the social benefit of legally permitting a laughing heir to exist by asking "to what degree of kinship should the right to succeed to the property of an intestate extend?"[72]

61. *Id.*
62. *Id*. at 208.
63. *Id*. at 203.
64. *Id.*
65. *Id.*
66. *Id*. at 205–09.
67. *Id.* at 207.
68. *Id.*
69. *Id.* at 258.
70. *Id.* at 215.
71. *Id.* at 203.
72. *Id*. at 204.

In addition to tensions and uncertainties associated with perceived social injustice and inconsistency between the intestate's desires and the receipt of a resented windfall, Professor Cavers supported his advocacy for change by exposing problems that could arise by allowing extremely remote heirs a stake in the estate.[73] For example, the potential remote heirs might be incentivized to assert claims that could delay the retitling process (probate) and the efficient alienability of assets.[74] Costly investigations to locate heirs could be required, along with many other undesirable obstacles to finalizing the succession process.[75] Ultimately, Professor Cavers suggested that states reduce the levels of kinship eligible for heirship to avoid the various problems associated with remote or laughing heirs.[76] The objective would be to prevent someone from receiving, what by customary standards, would be seen as an undeserved gain, which was responsible for the above-identified social and legal complications.[77] Professor Cavers's recommended changes were not flawless because reducing the number of eligible heirs may make it more likely that unclaimed assets would escheat to the state.[78]

The consistent assumption of Professor Cavers's analysis and reform proposal was that the laughing heir welcomed and desired to own the inherited assets regardless of whether they constituted an undeserved gain in the eyes of some.[79] However, Professor Cavers did not consider the implications of an inheritance which might result in an undeserved "loss."[80]

The trends Professor Cavers identified so many years ago in family structure and relations have likely continued to present day Texas.[81] Texas has definitely become a more urbanized state.[82] It is likely that family life is more of the nuclear family type in urban areas, thus, connection with extended family members who have remote heirs is likely to be reduced.[83] In addition, the pace of urbanization and of urban life may weaken extended family ties.[84] The declining birthrate has resulted in fewer close relatives alive to inherit.[85] The impact of an increase in out-of-wedlock births that give

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73. *Id*. at 209.
74. *Id*. at 209–12.
75. *Id.*
76. *Id.* at 205.
77. *Id.* at 208.
78. *Id.* at 312–14.
79. *Id.* at *passim*.
80. Author's original thought.
81. Daniel A. Cox, *Emerging Trends and Enduring Patterns in American Family Life*, SURV. CTR. ON AM. LIFE (Feb. 9, 2022), https://www.americansurveycenter.org/research/emerging-trends-and-enduring-patterns-in-american-family-life/ [https://perma.cc/P5YW-RBX8].
82. David G. McComb, *Urbanization*, TEX. STATE HIST. ASS'N, http://www.tshaonline.org/handbook/entries/urbanization (Aug. 25, 2023) [https://perma.cc/4S4L-EHZY].
83. *Id.*
84. *Id.*
85. James Lee et al., *Texas birth-rate decline complicates economic growth prospects*, FED. RSRV. BANK OF DALL. (Oct. 12, 2022), https://www.dallasfed.org/research/economics/2021/1012 [https://perma.cc/D3F3-EHSZ].

rise to previously unknown heirs should be added to the mix of factors.[86] Because of these societal changes and others, it is not unusual now for there to be remote ancestors and potential heirs who are strangers.[87]

Given the ongoing significant changes in family structure and society generally, as well as the increase in inheritable wealth, the problem of the laughing heir will likely continue, and if above trends continue, perhaps increase.[88] The value of assets inherited by remote relatives could in fact increase given the substantial wealth transfer at this period in our nation's history.[89] If the value of inheritance by a laughing heir is perceived as unusually high, then the societal friction and incentives to complicate the succession process, which concerned Professor Cavers, might also increase.[90] While an increase in asset value generates one set of issues, a decline in value creates a not previously examined reason for reforming succession laws to protect laughing heirs from a burdensome inheritance.[91]

It is reasonable to recognize that rapid and significant macroeconomic trends that may lead to asset obsolescence, increased regulations (e.g., environmental), restrictions on land use, and other economic changes over the last few decades may render formerly valuable assets more of a burden.[92] Furthermore, the introduction into the stream of commerce of new forms of assets with "not-well-understood" characteristics, such as digital assets or cryptocurrency, increase the potential heir's risk of being confronted with ownership of assets of questionable value to him or her.[93] Therefore, as suggested in the immediately preceding paragraphs, inherited ownership or title to property owned by a remote relative may not always be a welcomed "windfall."[94] In some circumstances, the laughing heir may be one who resents the windfall of an unexpected inheritance because there are often a multitude of undesirable obligations and problems associated with property ownership.[95]

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86. *Percent of Babies Born to Unmarried Mothers by State*, CTR. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/nchs/pressroom/sosmap/unmarried/unmarried.htm (Feb. 24, 2022) [https://permac.cc/CMY9-2F75].

87. Author's original thought.

88. Allison Fox, *Breaking the silence on the inheritance boom*, WASH. POST, https://www.washingtonpost.com/sf/brand-connect/prudential/wp/enterprise/breaking-the-silence-on-the-inheritance-boom/ (last visited Aug. 16, 2023) [https://perma.cc/VUQ2-VUFW].

89. *Id.*

90. Cavers, *supra* note 4, at 215.

91. William K. Jaeger, *The Effects of Land-Use Regulations on Property Values*, NISKANEN CTR. (Jan. 1, 2018), http://capturedeconomy.com/the-effects-of-land-use-regulations-on-property-values/ [https://perma.cc/F96A-SW7E].

92. *Id.*

93. *See* Adam Blumberg, *Estate and Legacy Planning for Crypto Assets*, COINDESK, https://www.coindesk.com/business/2023/05/04/estate-and-legacy-planning-for-crypto-assets/ (May 8, 2023, 11:13 PM) [https://perma.cc/5B7B-L4YR].

94. *See* Jaeger, *supra* note 91.

95. *See* discussion *infra* Part III.

Consequently, an ironic twist (which is the focus of this Article) is that a potential problem of some laughing heirs is the opposite of the one which motivated Professor Cavers to write about the social resentment generated when a laughing heir receives a valuable inheritance (a resented windfall).[96] In the case of the Texas laughing heir, the challenges of unwanted ownership could cause a laughing heir to cry for relief from a burden that, as contended herein, could be forced upon her or him by law.[97] As will be discussed, the Texas laughing heir might benefit from a more accurate and clear interpretation of the applicable statutory law or legislative amendment clarifying the meaning of immediate vesting of title in intestate heirs or reducing the number of remote heirs.[98]

III. ARE THERE POTENTIAL REAL-WORLD EVENTS TO JUSTIFY TEXAS LAUGHING HEIR'S TEARS?

It may not be entirely unreasonable for a knowledgeable lawyer to suggest that the laughing heir who cries should stop whining and find a solution in the text of applicable Estates Code or Property Code provisions, relevant case law, disclaimer statutes, and the circumstances of actual practice.[99] Before presenting the argument for much greater sympathy for the crying laughing heir and attempting to persuade readers to postpone embracing a "tough love" approach, an initial attempt will be made to show that being required to face potential forced ownership of unwanted assets is connected to real-world issues.[100] In other words, the laughing heir who cries is not a hypothetical victim because there are demonstrable reasons for him or her to be apprehensive and even frustrated.[101] While the concept of a laughing heir is used here to illustrate the extreme outcome of a remote heir being vested with title to unwanted property from an unknown relative, it should be recognized that a non-remote heir could also be adversely affected by the current state of Texas law.[102] Given the potential of forced ownership, unwanted exposure and entanglement with an intestate's estate could be a headache for any heir.[103]

A "fact of life" that enhances this discussion's practical usefulness is that title or ownership unexpectedly imposed on an individual can cause the owner to encounter liabilities such as taxes (state and federal), potential

96. Author's original thought.
97. *See* discussion *supra* Section I.A.
98. *See* discussion *infra* Part III.
99. Author's original thought.
100. Author's original thought.
101. *Id.*
102. TEX. EST. CODE ANN. § 101.001(b).
103. *Id.*

personal liability, and other unwelcome costs and burdens.[104] For example, if an heir is a non-resident of Texas and the estate consists of real property located in Texas, it is possible that this heir, who has not assented to ownership, could be personally sued in Texas based solely on the claim that the heir owns the property.[105] This could mean the Texas courts have personal jurisdiction over the heir, or, if no personal jurisdiction is alleged, the heir must pay the costs of responding to an in rem lawsuit concerning the intestate estate to avoid adverse legal consequences.[106] Forced ownership may also result in federal income tax consequences, even in the event of an uncontested foreclosure.[107]

Rule 152 of the Texas Rules of Civil Procedure presents another possible cost for an heir forced to deal with a claim of ownership.[108] According to this rule, if a defendant in a civil lawsuit dies, upon the filing of a suggestion of death, a scire facias shall issue to an heir when there is no administrator or executor.[109] The defendant's heir, however remote, must appear and defend the suit.[110] The plaintiff's suit may proceed against the heir.[111] Thus, the undeclared and non-consenting heir could, as an owner, be liable for taxes, lawsuit costs and expenses, environmental claims, or injuries sustained by others on the land or caused by the condition of the land after the intestate's death.[112]

Another unwelcome cost and burden is the possibility a disclaimer might not always be recognized and, therefore, ownership may not be avoided.[113] For example, a disclaimer recorded by an intestate heir after a

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104. *See* Gerry W. Beyer, *Intestate Succession: What Every Texas Estate Planer Needs to Know*, SOC. SCI. RSCH. NETWORK 1, 14, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1711484 (Feb 9, 2018) [https://perma.cc/5KZM-3RF9] (discussing a general discussion of this possibility); Dyer v. Eckols, 808 S.W.2d 531, 533–34 (Tex. App.—Houston [14th Dist.] 1991, writ dism'd by agr.) (displaying a specific example); *see also The Biggest Problems Caused By An Inheritance: Unexpected Consequences Of An Inherited Fortune*, MEIER L. FIRM, https://meierfirm.com/problems-caused-by-an-inheritance/ (last visited Nov. 9, 2023) [https://perma.cc/3F4Y-XLZL].

105. *Shaffer v. Heitner*, 433 U.S. 186, 190 (1977) (discussing that the case law interpreting the Due Process Clause as it relates to the suing nonresidents in local state courts may not be all that familiar to usual intestate heirs). A claim that a potential heir automatically is vested with ownership, may force them to litigate the matter. *See* Bradford E. Yock, *May Local Taxing Authorities Force Property Ownership on Undeclared Nonconsenting Intestate Heirs*, 60 REAL EST., PROB. & TR. L. REP. 48 , 48–53(2022) (stating that the Texas Tax Code places the burden of proving one does not own the property upon the defendant by requiring pleading and proof of non-ownership as an affirmative defense).

106. *Shaffer*, 433 U.S. at 190.

107. *See* Bradford E. Yock*, "Taxation Without Consent",* 60 REAL EST., PROB. & TR. L. REP. 68, 68–74 (2022).

108. TEX. R. CIV. P. 152.

109. *Id.*

110. *Id.*

111. *Id.*; *see* Welder v. Hitchcock, 617 S.W.2d 294, 297–98 (Tex. App.—Corpus Christi–Edinburg 1981, writ ref'd n.r.e.).

112. *See* Beyer, *supra* note 104, at 14; Dyer v. Eckols, 808 S.W.2d 531, 533–34 (Tex. App.—Houston [14th Dist.] 1991, writ dism'd by agr.); *see also The Biggest Problems Caused By An Inheritance: Unexpected Consequences Of An Inherited Fortune, supra* note 104.

113. *See* Glenn M. Karisch et al., *Disclaimers Under the New Texas Uniform Disclaimer of Property*

bankruptcy petition is filed will not protect the disclaimed assets from creditors.[114] Medicaid benefits may be denied to a potential recipient who disclaims assets the recipient inherited by intestacy.[115] If an heir is subject to a federal income tax lien, then a state law disclaimer may be ineffective.[116] Even under Texas law, an heir who owes child support may, under certain circumstances, not be able to disclaim.[117] As the child support issue shows, some creditors have a strong policy argument for not allowing the heirs to renounce which might bedevil future Texas laughing heirs.[118] Although Texas law has changed, there may be instances when an untimely disclaimer might result in unwanted ownership.[119]

If the previous contention that the language of the Texas Estates Code subsection 101.001(b) creates uncertainty about precisely how, when, and specifically in whom title vests, and a disclaimer may not be effective is accepted, then the risks for an undeclared laughing heir faced with unwanted ownership may be greater.[120] Our Texas laughing heir may have no knowledge of the remote relative's death and no opportunity to avoid a costly connection with the intestate's estate by disclaimer.[121] On the other hand, if the laughing heir receives notice, then the law is not clear whether title has immediately vested simply by notice from an opposing party claiming he or she is the heir, or precisely what the heir should do to avoid the cost and expense of dealing with an unwanted inheritance and related claims.[122]

There is no doubt there are other examples of serious risk of loss that may arise when the statute and court interpretations are unclear as to how, whether, and when an heir owns the intestate's assets.[123] For example, the

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Interests Act, 8 EST. PLAN. & CMTY. PROP. L. J. 179, 189 (2015) (discussing requirements for a disclaimer to be recognized).

114. *In re* Schmidt, 362 B.R. 318, 320 (Bankr. W.D. Tex. 2007).

115. *See* Karisch et al., *supra* note 113, at 219.

116. Drye v. U.S., 528 U.S. 49, 52 (1999).

117. TEX. PROP. CODE ANN. § 240.151(g).

118. Author's original thought.

119. PROP. §§ 240.151, 240.101(b); *see* Karisch et al., *supra* note 113, at 195 (providing a discussion of untimely disclaimer). Assuming a timely disclaimer, a Texas insolvent heir may be saved. In Texas, a will devisee can disclaim in spite of a judgment creditor's opposition—the relation back doctrine. Dyer v. Eckols, 808 S.W.2d 531, 532 (Tex. App.—Houston [14th Dist.] 1991, writ dism'd by agr.). However, no Texas cases have addressed the case of the insolvent intestate heir, but the Texas Uniform Fraudulent Transfer Act has been amended to state disclaimers are not transfers. TEX. UNIF. FRAUD. TRANS. ACT § 24.002(12); Hirsch, *supra* note 42, at 610 (discussing creditor rights versus the insolvent heir's desire not to own property).

120. *See* TEX. EST. CODE ANN. § 101.001(b).

121. Author's original thought.

122. *Id.* (noting the issue of whether a Texas statutory disclaimer or Texas legislation designed to provide greater protection for the intestate heir may even avoid any of the unwanted burdens of ownership that might arise under federal law or the laws of other states is recognized as an important issue, but not discussed in this Article).

123. *See* Rania Combs, *What Happens If You Die Without A Will in Texas,* RANIA COMBS L. PLLC (July 29, 2023), https://raniacombslaw.com/resources/dying-without-a-will-the-texas-intestacy-statutes. [https://perma.cc/EU4E-VBSF].

ignorance that many people have regarding new assets, like digital or cryptocurrency, or a dilapidated building may cause some laughing heirs to want to "run the other way" when confronted by possible ownership.[124] When the possibility that the heir could be "stuck" with defective assets is included, the heir may, in circumstances involving forced ownership, think the idiom derived from the popular old song *Rain on Your Parade* describes their experience—especially if it refers to a pre-flood drencher rather than a brief summer shower.[125] The above examples are likely to be sufficient to cause the laughing heir to hesitate (perhaps even before cracking a smile at potential good fortune) and grasp for ways to avoid having to accept her or his resented windfall.[126] Before engaging in a more in-depth analysis and critique of our Texas laughing heir's quandary, it is useful to describe the basic law that will be the object of critical analysis.[127]

IV. BRIEF SUMMARY: THE *WELDER* INTERPRETATION AS THE SOURCE OF THE TEXAS LAUGHING HEIR'S WOES

The detailed story of how a Texas laughing heir could be moved to tears begins with statutory language used for over a century and a half in Texas probate law and its interpretation in the previously cited 1981 Texas court of appeals *Welder* case.[128] As will be discussed in more detail later, the *Welder* opinion was based upon an inaccurate claim that the statute at issue codified the common law.[129] For now, the most informative access point for identifying the legal source of the laughing heir's potential sorrow is found in the language of Texas Estates Code subsection 101.001(b) and its predecessor statutes.[130] Subsection 101.001(b) states, *"[s]ubject to Section 101.051, the estate of a person who dies intestate vests immediately in the person's heirs at law.*"[131] The text of subsection 101.051(b) should also be read to acquire a more complete understanding.[132] Since 1848, this statutory language, with surprisingly little significant conceptual or textual change, has been consistently part of the Texas probate statutes.[133]

The above-referenced statutes should be considered within the context of important milestones in the development of the relevant law in this area.[134]

124. Author's original thought.
125. *Id.*
126. *Id.*
127. *Id.*
128. TEX. EST. CODE ANN. § 101.001(b); Welder v. Hitchcock, 617 S.W.2d 294, 297–98 (Tex. App.—Corpus Christi–Edinburg 1981, writ ref'd n.r.e.).
129. *See infra* Sections VI.A–B.
130. EST. § 101.001(b).
131. *Id.*
132. *Id.* § 101.051(b).
133. *See* GAMMEL, *supra* note 28, at 277; TEX. PROB. CODE ANN. § 37 (repealed 2009); EST. §§ 101.001(b), 101.051(b) (emphasis added).
134. Author's original thought.

As the immediately-above discussion shows, since 1848, the concept of "vests immediately in the person's heirs at law" has been consistently used in Texas probate statutes.[135] In addition, intestate succession statutes have, from that time to the present, provided for inheritance by a remote or laughing heir.[136] However, it was not until many decades later, in 1907, that a specific heirship declaration statute was passed providing for an "action to declare heirship" to confirm the identity of heirs in whom title immediately vested.[137] Much later, in 1971, Probate Code Section 37A was passed to clarify the right of devisees and heirs to disclaim assets to which they might be entitled.[138]

In 1981, the claim was clearly made by the thereafter often cited *Welder* case that Texas Probate Code Section 37 (from which Texas Estates Code subsections 101.001(b) and 101.051(b) were derived) codified the common law.[139] A similar common law connection was made concerning Texas Probate Code Section 37A, the original disclaimer statute.[140] The source for the *Welder* claim that the relevant Texas statutes are a codification of the common law, or in the case of Section 37A are connected to the common law, rests upon assertion and not upon cited authority.[141]

A more detailed discussion will be undertaken later; however, for now, the shortcomings of Texas law in the area of intestate succession by laughing heirs can be summarized.[142] Subsection 101.001(b) does not contain adequate guidance to the Texas laughing heir because the text does not supply a clear meaning for the historical statutory phrase "vests immediately in the person's heirs at law."[143] It simply asserts that title "vests immediately in a person's heirs at law," which by use of the plural "heirs" might be interpreted to mean all of the intestate's potential heirs referenced under the current succession statute regardless of whether, according to any lawful procedure, they have ever been declared heirs at law or consented to heirship status.[144] If so, does this mean all individuals who could possibly be heirs are immediately vested with title in some form of joint ownership?[145] For reasons which will be

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135. *See* GAMMEL, *supra* note 28, at 277.

136. *See id.*; EST. §§ 201.001–.003.

137. W. S. SIMKINS, THE ADMINISTRATION OF ESTATES IN TEXAS 354 (1908) (demonstrating that the statutory language used implies that the identity of heirs may be determined during an administration of the intestate's estate). This may have been the way heirs were identified before the statute was enacted. *See also* TEX. REV. CIV. STAT. ch. 25, art. 3521 (accessing through *The Texas Historical Project*, published by the Texas State Law Library).

138. Tex. H.B. 728, 62nd Leg., R.S. (1971); Acts 1971, 62nd Reg. Sess., ch. 979 § 1 at 2954.

139. Welder v. Hitchcock, 617 S.W.2d 294, 297–98 (Tex. App.—Corpus Christi–Edinburg 1981, writ ref'd n.r.e.).

140. *Id.* at 297.

141. *See* discussion *infra* Part V, Section VI.A.

142. Author's original thought.

143. TEX. EST. CODE ANN. § 101.001(b).

144. *Id.*

145. W.S. HOLDSWORTH & C.W. VICKERS, THE LAW OF SUCCESSION, TESTAMENTARY AND INTESTATE 3 (Lawbook Exchange 2004) (1899) (demonstrating that, according to Holdsworth, common

discussed later, this is not a reasonable interpretation of Texas law.[146] The *Welder* claim that this immediate vesting language is a common law codification does not provide guidance for a better understanding of this time-honored phrase, except perhaps to the extent that it states "there is never a time when title is not vested in someone."[147] This bit of hyperbole can be read to endorse vesting of title in a yet to be determined individual.[148]

Even if the above "blanket vesting" interpretation is ignored in favor of inheritance by an individual, the meaning of "vests immediately" in subsection 101.001(b) still lacks clarity.[149] The text does not state in which specific individual title vests or ownership is fixed or determined and whether that individual must consent to be vested.[150] Even the "common law" embellishment that *Welder* provides—that there is no shorter time period between decedent's death and the estate vesting in the heirs—does not clarify the statutory language, especially with regard to the identification of the person in whom title vests, timing of vesting in that person, and the issue of permanent non-renounceable ownership.[151] As will be examined in greater detail, injecting the common law claim into the mix does little to clarify the vesting immediately language and, when combined with the disclaimer statute, leaves open the possibility that ownership permanently vests without assent in our Texas laughing heir.[152]

It is not unreasonable for the reader to assert that the questions of when vesting occurs (immediately) and in whom (heirs at law) are not left wholly unanswered by the text and by the *Welder* interpretation.[153] However, there is little doubt a potential but undeclared individual heir, especially a remote one, would desire more specific information.[154] As will be discussed, pre-*Welder*, "non-common law" Texas case law treatment of intestate heirs' rights provides interpretations, which in some instances, appear to be more useful to specific heirs and others dealing with an intestate's estate.[155] In addition, greater certainty was had by a clearly stated procedure for declaring

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law inheritance by a joint-ownership of the family unit was rejected in English common law in favor of individual inheritance). The author could not find any reference to inheritance by "family unit" in Texas.

146. *See* discussion *infra* Part VII.

147. Welder v. Hitchcock, 617 S.W.2d 294, 297 (Tex. App.—Corpus Christi–Edinburg 1981, writ ref'd n.r.e.).

148. *See id.*

149. *See* EST. § 101.001(b).

150. *See id.*

151. *See Welder*, 617 S.W.2d at 297. The author notes that the language found in *Welder* is imprecise and confusing because it interprets the common law to mean that "[i]t has been said that there is no shorter interval of time between the death of a decedent and the vesting of his estate in his heirs." It also states in the same paragraph that, "[t]here is never a time when title is not vested in someone." This seems to imply that title might vest in some circumstances in persons other than heirs.

152. *See* discussion *infra* Part VI.

153. *See Welder*, 617 S.W.2d at 297.

154. *See id.*

155. *See* discussion *infra* Part VII.

the identity of the intestate's heirs in 1907.[156] While this legislation brought additional clarification to the issue of how heir identity is determined, *Welder*'s 1981 common law codification "muddied the waters" by failing to clarify whether immediate vesting occurs before or after heir identification.[157] The 1971 disclaimer statute, as interpreted by *Welder,* cited authorities regarding disclaimer which connected the passage of the statute with the idea that, according to the common law, the intestate's assets vested permanently in the heir without prior consent.[158] This certainly did not decrease the Texas laughing heir's prospects for an undesirable outcome.[159]

In fact, and as will be demonstrated, the *Welder* common law claim and any resulting implication from the association of the common law with the disclaimer statute (Texas Probate Code Section 37A) were not supported by valid authority and adopted according to Texas law.[160] Consequently, the current reliance upon *Welde*r as the primary guide to answering issues in this area of passage of title upon intestacy law has not increased the certainty about the specific heir in whom title immediately vests, whether forced ownership is possible, and what the heir must do to avoid an unwanted real-world burden.[161] As will be argued, this primarily results from the injection of the common law codification idea into Texas law concerning the passage of title upon intestacy law and the consequent ignoring of other viable interpretations by Texas courts.[162] For example, scholars have offered what appear to be non-common law, text-based interpretations of subsection 101.001(b)'s predecessor, Section 37 of the Texas Probate Code.[163] These non-common law related interpretations may reduce the Texas laughing heir's risk of a forced ownership claim and other previously-referenced problems.[164] Unfortunately, these interpretations have not been adopted by any court or the legislature, and the orthodox *Welder* interpretation remains the cited authority.[165] The laughing heir may have to wait for a more competent text-based court interpretation or legislative amendment to avoid becoming a crying heir.[166]

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156. *See* SIMKINS, *supra* note 137, at 354.

157. *See Welder*, 617 S.W.2d at 297.

158. *See id.*

159. *See id.*

160. *See* discussion *infra* Section VI.B.

161. *See* discussion *supra* Part III. As has been shown in previous examples cited, a person may be claimed to be an heir and then required to incur the expense of a defense.

162. *See* discussion *infra* Parts V, VII.

163. CRAIG HOPPER & D'ANA MIKESKA, O'CONNOR'S TEXAS PROBATE LAW HANDBOOK 141 (Thompson Reuters 2020); STANLEY JOHANSON, TEXAS ESTATES CODE ANNOTATED 69–70 (Thompson Reuters 2014).

164. *See* HOPPER & MIKESKA, *supra* note 163, at 141.

165. *See* Welder v. Hitchcock, 617 S.W.2d 294, 297 (Tex. App.—Corpus Christi–Edinburg 1981, writ ref'd n.r.e.).

166. Author's original thought.

V. INJECTION OF THE COMMON LAW: PRIMARY CAUSE OF LAUGHING HEIR'S SADNESS

To more fully understand the problem confronting the Texas laughing heir resulting from the injection of the common law into the passage of title upon intestacy law and the connection of the common law with Texas disclaimer law, it is useful to briefly recall a few key features about the relevant law for perspective.[167] Not only does Texas statutory law create the possibility of remote or laughing heirs, but, as discussed above, it also holds that the intestate's estate vests immediately in these laughing heirs.[168] Of course, it is important to bear in mind that this immediate vesting of title is subject to non-exempt debts and court-ordered child support which is delinquent as of the intestate's death.[169] Although the vests immediately concept has been part of Texas law since 1848, it was not until about 133 years later that *Welder* introduced the idea that the common law is the source-law for interpreting the applicable statutory language that title to an intestate's estate vests immediately in the person's heirs at law.[170]

It is unclear why the *Welder* court thought this was a necessary addition to Texas law after so many decades and how the court believed the understanding of the statutory language was improved.[171] Even supplying a common law gloss onto the statutes with somewhat dramatic assertions, like *there is no time when the intestate's assets are not vested in someone*, does not clarify how this concept relates to the declaration of an heir and whether the heir's consent is necessary before declaration.[172] Among the other flaws in *Welder's* common law codification theory is the meaning of the term common law, and the source of the common law authority is not provided by *Welder* or the courts who cite and follow *Welder*.[173] *Welder* claims that the common law principle allegedly adopted in Texas to apply to subsection 101.001(b) is that title to the intestate's estate vests immediately in his or her heirs at law upon death and that title to the intestate's estate assets is always, and at all times, vested in someone.[174] However, the evidence or proof that the text of subsection 101.001(b) supports the relatively recent common law codification claim is never clearly stated and amounts to an unsupported

167. *See Welder*, 617 S.W.2d at 297.
168. *See* TEX. EST. CODE ANN. §§ 101.001(b), 201.001.
169. *See id.* § 101.051(b).
170. *See Welder*, 617 S.W.2d at 297.
171. *See id.*
172. *See id.*
173. *See id.*; *see, e.g.*, Bailey v. Cherokee Cnty. Appraisal Dist., 862 S.W.2d 581, 584–85 (Tex. 1993); Armes v. Thompson, 222 S.W.3d 79, 84 (Tex. App.—Eastland 2006, no pet.). The Author's claim is also supported by an extensive review of cases citing *Welder* using Fastcase and Westlaw software programs.
174. *See Welder*, 617 S.W.2d at 297 (interpreting predecessor statute TEX. PROB. CODE ANN. § 37 (repealed 2009)).

allegation by the *Welder* court.[175] Furthermore, *Welder* and its progeny do not recognize or discuss whether the referenced common law was ever adopted in accordance with Texas law.[176]

The problems raised by the above-referenced common law codification claim are related to another potential headache for the Texas laughing heir resulting from *Welder*'s association of Section 37A of the Texas Probate Code with the common law.[177] In addition to the claim that automatic vesting is derived from the common law, another claimed common law principle acknowledged to exist is that an intestate heir (unlike the devisee under a will) may not renounce or disclaim ownership.[178] This concept may have found its way, at least by implication, into Texas jurisprudence by enactment of the disclaimer statute.[179] However, the contention that Texas has adopted the common law rule that an intestate heir may not renounce ownership has no recognized support in Texas law.[180] For example, contrary to the principle of forced ownership, according to well-over a century old Texas Supreme Court precedent, immediate vesting can be nullified by the laughing heir's action or inaction.[181] Thus, it can be reasonably argued that a Texas intestate heir should not be prevented from renouncing ownership if she or he can be denied immediate vesting without consent by a court.[182]

Furthermore, the disclaimer statute, both present and past versions, refers to an heir who *may be entitled* for disclaimer purposes.[183] By implication, an intestate heir who may be entitled to receive assets does not necessarily own the intestate's assets without additional steps being taken to establish title in a specific person.[184] There is no reason to believe this would not require that person's assent.[185] A more reasonable interpretation of the disclaimer law applied to an intestate heir is that its narrow purpose at passage was to comply with federal law and not to adopt the principle that the heir is vested with title by operation of law.[186] Unfortunately, this interpretation is not made clear by Texas case law or current legislation; thus, the ambiguous *Welder* connection remains.[187]

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175. *See id.* at 297–98.
176. *See id.*
177. *See id.*
178. *See id.* at 297.
179. *Id.*; *see*, *e.g.*, Dyer v. Eckols, 808 S.W.2d 531, 533 (Tex. App.—Houston [14th Dist.] 1991, writ dism'd by agr.); Leggett v. U.S., 120 F.3d 592, 594–95 (5th Cir. 1997) (embracing the "*Welder* theory" in disputes involving wills).
180. *See Welder*, 617 S.W.2d at 297.
181. *See* Steele v. Renn, 50 Tex. 467, 481 (1878).
182. *See id.*
183. *See Welder*, 617 S.W.2d at 297.
184. *See id.*
185. *See id.*
186. *See id.*; *but see* Dyer v. Eckols, 808 S.W.2d 531, 534 (Tex. App.—Houston [14th Dist.] 1991, writ dism'd by agr.) (disagreeing that the purpose of TEX. PROB. CODE ANN. § 37A (repealed 2009) is restricted).
187. *Dyer,* 808 S.W.2d at 534.

An undeclared but potential laughing heir who is ignorant of the intestate ancestor's death, or becomes aware of it later (perhaps much later), is not provided clear guidance as to his or her rights under the current state of Texas law.[188] As has been shown thus far, she or he does not know when and how title to the intestate's assets is vested in him or her, whether it vests without her or his assent, and if it does, the most effective way to avoid immediate vesting when ownership is not desired.[189] Given the ambiguity of Texas law concerning when title vests in a specific person, how it vests, and whether it incorporates the alleged common law principle that an intestate's heir at law may not renounce ownership, the burden of possible ownership can easily be unwelcome, unexpected, and sufficiently expensive to cause the laughing heir to cry out for relief.[190] As has been discussed, it is not clear whether using the disclaimer statute or any other current remedy is sufficient to dry the laughing heir's tears.[191]

Texas jurisprudence in this area must be examined more thoroughly and in greater detail to find a reasonable way to restore the Texas laughing heir's good humor.[192] Specifically, the flaws in the *Welder* opinion that need to be examined include the intended definition and scope of common law as referenced, the source of authority for the *Welder* common law claim and the connection to the statutory text, and whether *Welder*'s common law claim satisfies the Texas standards or rules for proper adoption of a common law principle into Texas law.[193]

VI. FULL DISCUSSION AND CRITIQUE OF THE SOURCE OF THE LAUGHING HEIR'S POTENTIAL SADNESS

To this point, an attempt has been made to demonstrate that the Texas laughing heir faces statutory text of uncertain meaning and an inaccurate court interpretation: the *Welder* orthodoxy.[194] This root of the Texas laughing heir's potential sadness will be discussed in greater detail.[195] In this section, the *Welder* opinion's specific assertions and deficiencies will be analyzed in more depth.[196] Also, the challenges of making a common law codification claim under Texas law and the effectiveness of current remedies for

188. Author's original thought.
189. *Id.*
190. *Id.*
191. *See* discussion *supra* Part III; *see also* discussion *infra* Section VI.C.
192. Author's original thought.
193. *See* Welder v. Hitchcock, 617 S.W.2d 294, 297 (Tex. App.—Corpus Christi–Edinburg 1981, writ ref'd n.r.e.).
194. *Id.* at 297–98 (interpreting the predecessor intestate inheritance and disclaimer laws TEX. PROB. CODE ANN. §§ 37, 37A (repealed 2009)); EST. §§ 101.001(b), 101.051(b), 122.001; PROP. §§ 240.001–.151.
195. *See* discussion *infra* Section VI.C.
196. *See* discussion *infra* Part VI.

misapplication of the common law will be explored.[197] This will enhance understanding of the source of the laughing heir's potential grief, help determine whether a remedy is possible, and identify what that remedy should be.[198]

With an apology to the reader for any redundancy, a few key points of current Texas law will be stated to clarify what is intended by "orthodox interpretation."[199] The Texas law of intestate succession, like those of many other jurisdictions, is liberal in the sense that it tends to allow individuals the right to inherit even if they are only related to the deceased by the most attenuated of connections, e.g., a great-great-nephew or niece of a maternal aunt.[200] As a consequence, a laughing heir may exist in Texas.[201] The Texas laughing heir is confronted by the fact that Texas law related to the passage of title upon intestacy law has embraced the concept that upon the intestate's death, the estate vests immediately in the intestate's heirs at law subject to the deceased's creditors' rights (with some recognized exemptions) and child support obligations.[202]

According to *Welder*, the routinely cited Texas court of appeals case in this area of law, we have been assured that this statute is a codification of common law rules: (1) "that title to an estate vests in the heirs immediately upon death of the decedent;" (2) "there is never a time when title is not vested in someone;" and (3) "there is no shorter interval of time than between the death of a decedent and the vesting of his estate in his heir."[203] This, in a nutshell, is the basic orthodox interpretation of immediate vesting in the passage of title upon intestacy law in Texas.[204] For purposes of the present discussion, the text of subsections 101.001(b) and 101.051(b) of the Texas Estates Code, like their predecessor Section 37 of the Texas Probate Code, has been interpreted to be a codification of the common law. [205] In addition, the ultimate focus of the *Welder* opinion was to interpret the disclaimer statute of that day (Texas Probate Code Section 37A), which it did by combining the orthodox interpretation with an additional connection to the common law.[206] The relevant common law connection for our purposes

197. Author's original thought.
198. *Id.*
199. *Id.*
200. TEX. EST. CODE ANN. § 201.001.
201. *Id.*
202. *Id.* §§ 101.001(b), 101.051(b).
203. *See* Welder v. Hitchcock, 617 S.W.2d 294, 297 (Tex. App.—Corpus Christi–Edinburg 1981, writ ref'd n.r.e.) (interpreting TEX. PROB. CODE ANN. § 37 (repealed 2009) from which the current statute was derived without substantive change).
204. *Id.*
205. *Id.*; *see* Texas P.M.R., Inc. v. Ripley, No. 04-19-00229-CV, 2019 WL 6887718, at *13–14 (Tex. App.—San Antonio Dec. 18, 2019, no pet.) (citing *Welder* as authority even though TEX. EST. CODE ANN. § 101.001(b) was the actual statute at issue).
206. *Welder*, 617 S.W.2d at 297.

concerns the theory that "an intestate share vested immediately by force of law in the heir at the time of the death and could not be divested."[207]

This common law theory, along with uncertainty caused by federal tax law and court interpretations of federal gift and estate tax consequences, motivated the Texas Legislature to enact a disclaimer statute.[208] The purpose was "to provide the means whereby any person who may be entitled to receive property under any will or inheritance from a decedent may disclaim and renounce such property."[209] The orthodox interpretation of Section 37, now subsection 101.001(b), combined with the interpretation of the disclaimer statute through the less alleged common law rules does not make the Texas laughing heir's life less problematic.[210] The mechanics of when title immediately vests in a specific heir and how a Texas laughing heir must proceed to avoid the burdens of ownership are vague.[211]

In later sections, methods of statutory interpretation will be discussed, which may provide a less gloomy outlook for the Texas laughing heir than the one provided thus far.[212] Over several decades, Texas courts interpreted the vests immediately language without referencing the common law, using the text, or construing the language in the context of other statutes or public policy.[213] These cases and others will be discussed later to glean useful insights.[214] With Texas legislation appearing after the nineteenth century, such as a specific heirship determination statute in 1907 and the disclaimer statute in 1971, it may have become possible to clarify the interpretation of the vests immediately language in the context of other statutes and give some relief to the potential, undeclared heir.[215] However, as is contended herein, the *Welder* orthodoxy does not do this, and the direction it took concerning the disclaimer statute may introduce greater risk than was warranted.[216]

As previously discussed, the concept espoused by some authorities is that an intestate heir may not renounce ownership of an intestate's estate to be a principle of the common law.[217] It is not clear whether the Texas Legislature's establishment of the right to disclaim in Section 37A of the

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207. *Id.*

208. Tex. H.B. 728, 62nd Leg., R.S. (1971); Acts 1971, 62 Reg. Sess. ch. 979 § 1 at 2954.

209. *See Welder*, 617 S.W.2d at 298.

210. Author's original thought.

211. *See* TEX. PROP. CODE ANN. ch. 240. The author recognizes that the current Texas disclaimer law under Chapter 240 of the Texas Property Code does not place a time limit on recording a disclaimer. However, there is a limitation under federal law, and when a potential heir is sued and disclaims it is not clear that the lawsuit is dismissed with prejudice. As will be discussed later, the existence of a disclaimer may imply acceptance of the theory that heir initially is the owner without consent.

212. *See* discussion *infra* Section VII.C.

213. *See* Ackerman v. Smiley, 37 Tex. 211, 216–19 (1872); Steele v. Renn, 50 Tex. 467, 481–83 (1878); Slaton v. Singleton, 9 S.W. 876, 877–78 (Tex. 1888).

214. *See* discussion *infra* Section VII.A.

215. *Id.*

216. Welder v. Hitchcock, 617 S.W.2d 294, 297–98 (Tex. App.—Corpus Christi–Edinburg 1981, writ ref'd n.r.e.).

217. *See* discussion *supra* Section I.A.

Probate Code was in recognition or adoption of the legal theory that an intestate heir cannot renounce ownership of the intestate's assets or was simply a response to protect Texas heirs from other jurisdictions who had adopted this common law principle.[218] However, the *Welde*r connection of the right to disclaim to the common law may have allowed for the interpretation that Texas accepts the claim made by many texts, treatises, and courts that a common law intestate heir owns title to inherited property without the heir's assent and is prohibited from renouncing ownership.[219]

One might ask whether it is necessary to have a disclaimer option if a person does not have ownership or any burden of ownership related to the intestate's estate.[220] Would the Texas laughing heir be better off without any common law connection and simply be presumed not to be an heir until properly declared with the heir's consent?[221] Unfortunately, this is not Texas law, and it is unclear whether under the Texas disclaimer law, what circumstances a potential, undeclared heir should disclaim, and whether the heir's disclaimer effectively avoids ownership in every case.[222] Thus, there appears to be a realistic possibility that a Texas laughing heir may be charged with ownership of an intestate's assets without assent, i.e., forced ownership.[223]

Because the current orthodox interpretation of the passage of title upon intestacy law rests upon a common law codification, or in the case of this disclaimer statute, some connection with the common law, this discussion will attempt to assess the validity of that claim in Texas.[224] Many questions should be explored in evaluating whether a common law claim is accurate.[225] For example, have Texas courts, *Welder* in particular, provided a sufficient definition of what is meant by the phrase common law or a recognized standard for establishing the existence of a common law principle so that the accuracy of the assertion can be evaluated?[226]

Does *Welder*, or any case relying upon *Welder*, direct us to a specific common law authority supporting the common law codification claim?[227] Is the task of determining a common law codification issue likely to be so

218. *See Welder*, 617 S.W.2d at 297–98.

219. *See* discussion *infra* Part VI (providing a more detailed discussion; however, the reasoning and holding in Dyer v. Eckols, 808, S.W.2d 531, 533–35 (Tex. App.—Houston [14th Dist.] 1991, writ dism'd by agr.) and its interpretation by Leggett v. U.S., 120 F.3d 592, 595–96 (5th Cir. 1997) do not foreclose the possibility that the intestate Texas heir might initially be vested with unrenounceable ownership).

220. Author's original thought.

221. *Id.*

222. *See Welder*, 617 S.W.2d at 297–98; *see* Drye v. U.S., 528 U.S. 49, 52 (1999); *In re* Schmidt, 362 B.R. 318, 323–26 (Bankr. W.D. Tex. 2007).

223. *See Welder*, 617 S.W.2d at 297; Karisch et al., *supra* note 113, at 195 (noting in some cases the intestate heir could be faced with forced ownership where a disclaimer is not properly perfected).

224. Author's original thought.

225. *Id.*

226. *Id.*

227. *Id.*

extremely difficult that obtaining a quality answer is unlikely?[228] Does Texas case law concerning the adoption of common law or the text of Texas Civil Practice and Remedies Code subsection 5.001(a) and its predecessor statutes support the adoption of the common law claim that the *Welder* opinion advances?[229] While not the ultimate test for the existence of a common law codification, given the continuity in language in the Texas probate statutes dealing with inheritance of an intestate's assets, did any pre-*Welder* case or other authority hold or opine that the immediate vesting concept found in the various Texas probate statutes codified the common law?[230]

Before examining the above questions, certain previously stated premises should be discussed in greater detail.[231] Texas laughing heirs are subject to Texas statutory law which, since 1848, has held that title to an intestate's estate vests immediately in the intestate's heirs at law subject to the claims of creditors with some exemptions.[232] It is somewhat remarkable that the relevant current statutory language has been virtually identical in almost all of the probate statutes passed since 1848.[233] A comparison of the 1848 statute and Probate Code Section 37—from which Texas Estates Codes subsections 101.001(b) and 101.051(b) are derived—is a good example of this.[234]

The 1848 statute states:

> Sec. 112. That when a person dies, leaving a lawful will, all of his estate devised or bequeathed by such will, shall vest immediately in the devisees or legatees; and all the estate of such person, not devised or bequeathed, shall vest immediately in his heirs at law; but all of such estate, whether devised or bequeathed, or not, except such as may be exempted by law from the payment of debts, shall still be liable and subject, in their hands, to the payment of the debts of such testator: and whenever a person dies intestate, all of his estate shall vest immediately in his heirs at law; but, with the exceptions aforesaid, shall still be liable and subject, in their hands, to the payment of the debts of the intestate. But upon the issuance of letters testamentary or of administration, on any such estate, the executor or

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228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.*
232. *See* GAMMEL, *supra* note 28, at 277; TEX. PROB. CODE ANN. § 37 (repealed 2009).
233. *See* GAMMEL, *supra* note 28, at 277. Author, using primarily Gammel's LAW OF TEXAS found in the *Portal to History*, https.//texashistory.unt.edu/explore/collections/glt/, examined all previous probate statutes (except for 20th century versions which were found in the various "Revised Statutes") concerning passage of title upon intestacy to verify this statement. Author also consulted the Texas Historical Statutes Project Revised Civil Statutes of the State of Texas for 1879 (Art. 1817), 1895 (Art. 1869), 1911 (Art. 3235), and 1925 (Art. 3314). Author also used as a guide for the 19th century was Chapter 1, "History of the Probate System of Texas," in W.S. SIMPKINS, ADMINISTRATION OF ESTATES IN TEXAS 5 (1907). Professor Simpkins concluded in 1908 that the probate code at the time he wrote was derived from the 1848 statute without much change.
234. *See* GAMMEL, *supra* note 28, at 277; TEX. PROB. CODE ANN. § 37 (repealed 2009).

> administrator shall have a right to the possession of the estate, as it existed at the death of the testator or intestate, with the exception aforesaid; and it shall be his duty to recover possession of and hold such estate in trust, to be disposed of under the provisions of this act.[235]

Texas Probate Code Section 37 states:

> When a person dies, leaving a lawful will, all of his estate devised or bequeathed by such will, and all powers of appointment granted in such will, shall vest immediately in the devisees or legatees of such estate and the donees of such powers; and all the estate of such person, not devised or bequeathed, shall vest immediately in his heirs at law; subject, however, to the payment of court-ordered child support payments that are delinquent on the date of the person's death; and whenever a person dies intestate, all of his estate shall vest immediately in his heirs at law but, with the exception aforesaid shall still be liable and subject in their hands, to the payment of the debts of the intestate and the delinquent child support payments; but upon the issuance of letters testamentary or of administration, upon any such estate, the executor or administrator shall have the right to the possession of the estate, as it existed at the death of the testator or intestate, with the exception aforesaid; and he shall recover possession of and hold such estate in trust, to be disposed of in accordance with the law.[236]

Texas Probate Code Section 37 adds a reference to powers of appointment and child support; otherwise, the language is in substance the same as the 1848 statute.[237] Section 101.001 of the current Estates Code basically rearranges the language of Section 37 in a more readable way and places some parts in another section of the Estates Code, i.e., subsection 101.051(b).[238] Nevertheless, the current provisions of Texas law contain almost identical language in the pertinent parts to the 1848 statute, and this immediate vesting language is found in almost all of the statutory revisions.[239]

The interpretation of the above-mentioned vests immediately statutory language with which we are concerned, despite decades-long consensus (since 1981) that it is simply a codification of the common law, is not as certain as the number of authorities (court opinions, treatises, briefs, etc.) approving *Welder* would have us believe.[240] Nevertheless, the *Welder* case is firmly part of Texas jurisprudence as is the claim that vesting immediately

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235. GAMMEL, *supra* note 28, at 278.

236. TEX. PROB. CODE ANN. § 37 (repealed 2009).

237. *See id.*

238. *Id.*; TEX. EST. CODE ANN. §§ 101.001, 101.051(b).

239. *See* EST. § 101.001; GAMMEL, *supra* note 28, at 277.

240. *See* Welder v. Hitchcock, 617 S.W.2d 294, 297 (Tex. App.—Corpus Christi–Edinburg 1981, writ ref'd n.r.e.) (noting that Author's review of Westlaw shows that *Welder* has been cited eighty-two times).

in the persons' heirs at law is a statutory affirmation of common law rules.[241] The language found in a 1981 court of civil appeals case, *Welder*, which is most often cited to explain the common law origin and meaning of vests immediately, states in pertinent part:

> While the order of descent and distribution is determined specifically by the Legislature, several rules of common law have been adopted by this State to facilitate the transmission of intestate property. One such rule is that title to an estate vests in the heirs immediately upon the death of the decedent. There is never a time when title is not vested in someone. *Zahn v. National Bank of Commerce of Dallas, 328 S.W.2d 783 (Tex. Civ. App. Dallas 1959, writ ref'd n.r.e.*). This rule of common law has been enacted into the Probate Code. Section 37, Tex. Probate Code (1980). The vesting of title in the heirs upon death of the decedent is said to be legally occurring within an infinitely small period of time. It has been said that there is no shorter interval of time than between the death of a decedent and the vesting of his estate in his heirs.[242]

The *Welder* court clearly states that the above-referenced common law rules were embodied in the Texas Probate Code Section 37.[243] As has been shown, *Welder* has been cited as authority after Texas Estates Code Section 101.001 was enacted.[244] The specific language of significance in the opinion is the claim that the common law rule that "title to an estate vests in the heirs immediately upon death of the decedent," that "[t]here is never a time when title is not vested in someone," and "that there is no shorter interval of time than between the death of a decedent and the vesting of his estate in his heirs" is codified into Texas law.[245] Curiously, *Welder* made this finding for the first time 133 years after the 1848 statute containing the same relevant statutory language was adopted.[246]

The *Welder* opinion does not define the term common law or provide a citation to the source for the common law principle it asserts the statute codified.[247] For authority, *Welder* cites an earlier court of civil appeals case, *Zahn v. National Bank of Commerce of Dallas*.[248] *Zahn* does not reference the common law as the source of the statute.[249] In fact, if one traces the authority cited in the *Zahn* case through each previous case cited as authority

241. *Id.* at 297–98.
242. *Id.* at 297.
243. *Id.*
244. *See* Est. of Lee, 551 S.W.3d 802, 815 (Tex. App.—Texarkana 2018, no pet.).
245. *Welder*, 617 S.W.2d at 297; TEX. PROB. CODE ANN. § 37 (repealed 2009).
246. *See Welder*, 617 S.W.2d at 297; GAMMEL, *supra* note 28, at 277 (noting the potential for uncertainty raised by the reference to vesting in "someone" and vesting in "heirs" may be worthy of comment).
247. *Welder*, 617 S.W.2d at 297–98.
248. Zahn v. Nat'l Bank of Com. of Dall., 328 S.W.2d 783, 785 (Tex. App.—Dallas 1959, writ ref'd n.r.e.).
249. *See* Munger v. Munger, 298 S.W. 470, 473 (Tex. App.—Dallas 1927, no writ.).

to the earliest case authority cited, there is no mention of the common law.[250] Instead, Article 3314 of the Revised Civil Statutes is ultimately the original source for the *Welder* claim through *Zahn*.[251] Article 3314 contains identical language to almost all related Texas probate statutes back to 1848—that title vests immediately in the person's heirs—but it does not reference the common law.[252] Nevertheless, *Welder* relies upon *Zahn* as the authority for the claim that Texas Probate Code Section 37 is a codification of the common law.[253]

Since 1848, with one exception, probate statutes enacted by Texas legislatures have used almost identical language concerning the transfer of assets at death.[254] Thus, it would seem that one would find some authority in all the years that have passed since 1848, other than the 1981 *Welder* case, to confirm the common law codification claim.[255] However, a review of the Texas court cases since 1848 to those interpreting Article 3314 of the 1925 Revised Statutes reveals no reference to a common law source of authority supporting the *Welder* assertion.[256] This fact, coupled with the previous finding that the supporting cases cited by *Welder* do not mention the common law, indicates that the claim that any Texas legislature intended to codify the common law in statutes dealing with the passage of title upon intestacy law is weak and perhaps unsupported.[257]

Another part of the Texas laughing heir's common law antagonist is found in *Welder*'s reference to another principle of common law: an intestate heir may own or have title to estate assets vested therein without the right to renounce—forced ownership.[258] As previously observed, the opinion in *Welder* is ultimately an interpretation of Texas Probate Code Section 37A (the disclaimer statute) in a dispute between intestate heirs over proper distribution after a disclaimer.[259] On its way to its holding, the *Welder* court connected the passage of Section 37A to a problem that Texas devisees and

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250. White v. White, 142 S.W.2d 500, 503 (Tex. 1944); Casey v. Kelley, 185 S.W.2d 492, 493 (Tex. App.—Fort Worth 1945, writ ref'd); Munger v. Munger, 298 S.W. 470, 473 (Tex. App.—Dallas 1927, no writ.).

251. TEX. REV. CIV. STAT. ch. 25, art. 3314; *see Welder*, 617 S.W.2d at 297; *Zahn*, 328 S.W.2d at 785.

252. TEX. REV. CIV. STAT. ch. 25, art. 3314; *see* GAMMEL, *supra* note 28, at 277.

253. *See Welder*, 617 S.W.2d at 297.

254. *See* GAMMEL, *supra* note 28, at 277.

255. Author's original thought.

256. *See* JAMES WILMER DALLAM, A DIGEST OF THE LAWS OF TEXAS: CONTAINING A FULL AND COMPLETE COMPILATION OF THE LAND LAWS; TOGETHER WITH THE OPINIONS OF THE SUPREME COURT (Legare St. Press eds., 2022) (1845); OLIVER CROMWELL HARTLEY, A DIGEST OF THE LAWS OF TEXAS (Philadelphia, Thomas, Cowperthwait & Co. eds., 1850). The Author wants readers to also see cases compiled in West's Digest as well as Paschal and Dallam Digests found at the Texas State Law Library website guides.sll.Texas.gov/historical–Texas-Statutes/unofficial-codified-laws.

257. *See Welder*, 617 S.W.2d at 297–98.

258. *See id.*

259. *Id.* at 297.

heirs affected by gift and estate tax issues might have resulting from the above alleged common law principle.[260] *Welder* states in pertinent part:

> Upon these statutory and common laws was superimposed the disclaimer statute of Section 37A. Prior to the enactment of Section 37A in 1971, the right of a person named as a devisee or legatee in a will to disclaim a bequest was recognized in Texas. A split of authority existed, however, with regard to whether an heir or distributee could disclaim at all in the case of intestacy. The theory was that a bequest under a will was regarded an as "offer" which a devisee or legatee could accept or reject. On the other hand, an intestate share vested immediately by force of law in the heir at the time of death and could not be divested.[261]

While in this instance *Welder* refers to a legal treatise as a source for the common law reference, the opinion does not cite any legislative history or other authority which says that Section 37A was intended in any way as a recognition or remedy for the common law principle of forced ownership for an intestate heir.[262] Two other courts addressing Texas disclaimer law (Section 37A) in cases involving will beneficiaries interpreted the law as a response to the common law in will cases by employing the "relation-back" doctrine found in Section 37A, effectively allowing the devisee to refuse the offered gift under the will.[263] A reasonable reading of these cases is that under the *Welder/Dyer/Leggett* theory of Section 37A's purpose, an intestate heir could not renounce at common law and, therefore, a disclaimer was necessary.[264]

Thus, our Texas laughing heir may not be happy, and in fact may be sad, if he or she learns the common law will be applied so that she or he is deemed the owner of the intestate's assets.[265] This is especially true when the heir has not assented and a disclaimer is somehow defective.[266] As will be discussed, if Texas has somehow recognized this principle of common law when the Texas laughing heir has vigorously opposed being saddled with the burden of ownership of unwanted and costly assets, this would certainly be enough to frustrate anyone to tears.[267]

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260. *Id.* at 297–98.
261. *Id.* at 297.
262. *Id.*
263. Dyer v. Eckols, 808 S.W.2d 531, 533, 594–97 (Tex. App.—Houston [14th Dist.] 1991, writ dism'd by agr.) (arguing that the Uniform Disclaimer of Transfer by Will, Intestacy or Appointment Act was intended to remedy the heirs common law predicament and avoid forced ownership); *see* Leggett v. U.S., 120 F.3d 592, 594–95 (5th Cir. 1997).
264. *Dyer*, 808 S.W.2d 594–97.
265. *See* Karisch et al., *supra* note 113, at 216.
266. *See id.* at 188.
267. Author's original thought.

A. Weakness in the Welder *Claim: Finding the Common Law Is No Laughing Matter*

Before demonstrating the potential weaknesses of the disclaimer statute in protecting the Texas laughing heir from forced ownership, it is best to return to the first set of questions raised concerning defining and identifying the meaning of the term common law.[268] The original sin of the *Welder* opinion is that it does not define what it means by the common law or identify the proper common law authority to use to verify the codification claim.[269] Thus, it is difficult to test *Welder*'s claim about the common law basis or connection of the statutes at issue to the common law.[270]

Perhaps a definition of common law one might speculate *Welder* intended can be found in other sources of Texas law on the subject.[271] In 1840, the legislature of the Republic of Texas adopted the common law of England in limited circumstances as the rule of decision in Texas.[272] After statehood, the Texas Legislature also adopted the common law of England as the rule of decision, and this has been the law in Texas to the present day.[273] This is found to this very day in subsection 5.001(a) of the current Texas Civil Practice and Remedies Code.[274] Subsection 5.001(a) indicates that the common law of England is the rule of decision when consistent with the constitution or state law.[275] Thus, one might reasonably assume that the *Welder* opinion was aware of Texas law and was referring to the common law of England.[276] However, the opinion's failure to reference the English common law authority relied upon leaves the reader uncertain as to what part of the over nine-hundred-year history (at that time) of the English common law an interested person could find the authority *Welder* had in mind.[277]

Even if *Welder* means that the predecessor of subsection 101.001(b), Texas Probate Code Section 37, codifies the common law of England, and one agrees that the enactment of subsection 101.001(b) has not changed Section 37, *Welder*'s failure to provide some hint about how the justices identified the English common law source prevents testing its claim.[278] One way to advance this investigation as to whether subsection 101.001(b) codifies the common law of England is to determine whether it is even

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268. *See* discussion *supra* Part V.
269. *See id.*
270. *See id.*
271. Author's original thought.
272. GAMMEL, *supra* note 28, at 177–179 (noting this is the second volume).
273. H.P.N. GAMMEL, THE LAWS OF TEXAS, 1822–1897, at 78–79 (Austin, Gammel Book Co. 1898) (noting this is the third volume).
274. TEX. CIV. PRAC. & REM. CODE ANN. § 5.001(a).
275. *Id.*
276. Author's original thought.
277. *See* ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 3–29 (Liberty Fund 1986); J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 13–41 (Butterworths eds., 3d ed. 1990).
278. *See* TEX. EST. CODE ANN. § 101.001(b); TEX. PROB. CODE ANN. § 37 (repealed 2009).

possible to arrive at an operational definition of common law that *Welder* may have intended, but did not articulate, and then to seek relevant authority.[279]

Two sources generally considered authoritative—one English and one American—may provide some insight into what a reasonably accurate definition of the common law may be.[280] Blackstone defines the common law in this way:

> The *lex non scripta*, or unwritten law, includes not only *general customs*, or the common law properly so called; but also the *particular customs* of the certain parts of the kingdom; and likewise those *particular laws*, that are by custom observed only in certain courts and jurisdictions.
>
> When I call these parts of our law *leges non scriptae*, I would not be understood as if all those laws were at present merely *oral*, or communicated from the former ages to the present solely by word of mouth. It is true indeed that, in the profound ignorance of letters which formerly overspread the whole western world, all laws were entirely traditional, for this plain reason, that the nations among which they prevailed had but little idea of writing. Thus the British as well as the Gallic druids committed all their laws as well as learning to memory; and it is said of the primitive Saxons here, as well as their brethren on the continent, the *leges fola memoria et usu retinebant*. But with us at present the monuments and evidences of our legal customs are contained in the records of the several courts of justice, in books of reports and judicial decisions, and in the treatises of learned sages of the profession, preserved and handed down to us from the times of highest antiquity. However, I therefore stile these parts of our law *leges non scriptae*, because their original institution and authority are not set down in writing, as acts of parliament are, but they receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom.[281]

Chancellor Kent defines the common law from the American side as follows:

> The common law includes those principles, usages, and rules of action applicable to the government and the security of persons and property, which do not rest for their authority upon and express and positive declaration of the will of the legislature. According to the observation of the eminent English judge, a statute law is the will of the legislature in writing, and the common law is nothing but statutes worn out by time; and all the law began by the consent of the legislature.

279. Author's original thought.

280. *See* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: A FACSIMILE OF THE FIRST EDITION OF 1765–1769, at 63–64 (Univ. of Chi. Press eds., 1979); JAMES KENT, COMMENTARIES ON AMERICAN LAW 439 (Fred B. Rothman & Co. eds., 12th ed. 1989).

281. BLACKSTONE, *supra* note 280, at 63–64.

> This is laying down the origins of the common law too strictly. A great proportion of the rules and maxims which constitute the immense code of the common law, grew into use by gradual adoption, and received, from time to time, the sanction of the courts of justice, without any legislative act or interference. It was the application of the dictates of natural justice and of cultivated reason to particular cases. In the just language of Sir Matthew Hale, the common law of England is, "not the product of the wisdom of some one man or society of men, in any one age; but of the wisdom, counsel, experience, and observation of many ages of wise and observing men."[282]

Both of these recognized authorities agree that the source of the common law is generally found in the written decision of judges in which the judges articulate principles of custom and usage from time immemorial.[283] Despite these authoritatively sourced definitions, they suffer from a serious case of imprecision.[284] Application of these statements is likely difficult without more detailed explanation of how to identify some specific principle as being part of the common law of England which applies under Texas law.[285]

Thus, even if *Welder* had referenced a general definition of the English common law, the resulting additional clarity might have been wanting.[286] Perhaps an inquiry into the history of the common law of England might narrow the inquiry.[287] The development of the common law of England is sometimes traced from about 1066 A.D. (the time of the Norman Conquest) to the present; however, the foundation is usually thought to have been laid in about 1154 A.D.[288] There are several historical events in English history which have substantially affected the common law.[289] Important historical events in the United States may also be significant.[290] It may be useful to determine the historical period of the common law *Welder* intended.[291]

How should *Welder* have proceeded to identify a relevant period?[292] *Welder* might have referenced the common law of England according to English sources as they existed at the time Texas first adopted the common law (in 1840) or later when the 1848 statute (now subsection 5.001(a) of the

282. KENT, *supra* note 280, at 471.
283. *See id.*; BLACKSTONE, *supra* note 280, at 63–64.
284. Author's original thought.
285. *Id.*
286. *Id.*; Welder v. Hitchcock, 617 S.W.2d 294, 297 (Tex. App.—Corpus Christi–Edinburg 1981, writ ref'd n.r.e.).
287. Author's original thought.
288. BAKER, *supra* note 277, at 13–41.
289. *See* THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 3–76 (The Lawbook Exchange, Ltd. Union, eds., 5th Ed. 2001).
290. Herbert Pope, *The English Common Law in the United States*, 24 HARV. L. REV. 6, 6–30 (1910); Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 4–26 (1936).
291. Author's original thought.
292. *Id.*

Civil Practice and Remedies Code) was passed.[293] It seems that using 1848 as the time-based standard would be reasonable because the English common law in 1848 would apply to the current statute (subsection 101.001(b)) resulting from the almost identical language found in it and in Probate Code Section 37.[294] It has been shown that the language in these statutes is substantively the same as the 1848 statute. [295] However, the Texas Supreme Court in *Grigsby v. Reib* held that the common law of England in 1840—1848 can be reasonably included in this holding—was not adopted in its entirety in Texas.[296] Instead, the common law as declared by the courts of the several states is the preferred method for determining the applicable common law.[297]

If one is to determine whether there is specific English common law authority to support the *Welder* opinion, identifying the period from which the applied source can be found might be somewhat helpful but, as will be discussed, under the Texas approach to finding the applicable common law, not entirely necessary.[298] In any event, *Welder* does not provide any useful information in this regard.[299]

Even if one can determine the relevant period of the common law (English or Americanized version), there are other questions to be answered such as whether English statutes, and not just judicial decisions, are considered to be part of the applicable English common law.[300] Also, it is important to be mindful of the historical difference in the common law as announced by English authorities versus the interpretation and application of it by Texas courts.[301] Scholars consistent with the *Grigsby* holding have shown that the interpretation and application of the common law is carried out according to unique Texas standards.[302] If the *Welder* common law reference is to the Texas version of the common law, then how does the laughing heir determine which parts of the English common law concerning immediate vesting were adopted by Texas courts applying Texas standards and which parts were not?[303] In addition, Texas constitutional provisions and statutes or other relevant legal, social, or economic circumstances may impact whether common law authority is applicable in Texas or was codified into law.[304]

293. *Id.*
294. *Id.*
295. *See* discussion *supra* Part IV.
296. Grigsby v. Reib, 153 S.W. 1124, 1125 (Tex. 1913).
297. *Id.*
298. Author's original thought.
299. *Id.*
300. *Id.*
301. *Id.*
302. *See* Ford W. Hall, *An Account of the Adoption of the Common Law by Texas*, 28 TEX. L. REV. 801, 816 (1950); Grigsby v. Reib, 153 S.W. 1124, 1125 (Tex. 1913).
303. Author's original thought.
304. *Id.*

Unfortunately, even though it may have been possible, *Welder* and the cases following it do not provide any citation or discussion of the details of what is intended by the use of the phrase common law.[305] The *Welder* approach is simply to cavalierly reference the common law without any additional discussion, explanation, or citation.[306] This approach does not provide the Texas laughing heir with clear guidance about their legal position.[307] The *Welder* opinion also appears to be unaware of substantial Texas case law which has rules and standards for adopting the common law in Texas.[308] However, given the above discussion about the challenges in defining and finding the common law applicable in Texas, attempting to claim that a statute has codified the common law may be somewhat of a "fool's errand."[309] An example of why the task of determining the meaning and source of *Welder*'s use of the term common law might be extraordinarily difficult is the enormous number of books and articles written on the topic of the English common law.[310]

One way to evaluate the *Welder* claim is to explore the principles used in Texas to adopt a common law principle.[311] However, before attempting that, it is useful to determine whether *Welder*'s general common law phrase could lead to English common law authority which would support or deny the *Welder* claim.[312] Although there is disagreement about the most authoritative source concerning English common law in the United States, *Blackstone's Commentaries* is, according to two scholarly sources, of undeniable relevance in American law.[313] Published at about the time of the American Revolution, Blackstone was heavily relied upon by the colonists and citizen legislators as a source of law in fashioning the U.S. Constitution, state constitutions, and laws.[314] The statement of the common law regarding vesting of title in the case of intestacy, according to Blackstone, is as follows:

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305. Welder v. Hitchcock, 617 S.W.2d 294, 297–98 (Tex. App.—Corpus Christi–Edinburg 1981, writ ref'd n.r.e.).

306. *See id.*

307. *See id.*

308. *See id*.

309. Author's original thought.

310. *See* HOGUE, *supra* note 277; BAKER, *supra* note 277, 13–41; S. F. C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 1–428 (Butterworths, London, Eng., 2d ed. 1981); OLIVER WENDELL HOLMES, JR., THE COMMON LAW 4–216 (Reada Classic. Com. 2010) (1881); HOLDSWORTH & VICKERS, *supra* note 145, at 3; MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 3–159 (Charles M. Gray ed., The Univ. of Chic. Press 2002) (1739); PLUCKNETT, *supra* note 289; *see also* Hirsch, *supra* note 42, 591–96 (demonstrating how common authority may be found and presented).

311. Author's original thought.

312. *Id.*

313. DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 142–46 (Louisiana State Univ. Press eds., 1988); DANIEL J. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW: AN ESSAY ON BLACKSTONE'S COMMENTARIES 201 (Univ. of Chi. Press eds., 1996).

314. LUTZ, *supra* note 313, at 142–46.

> Descent, or hereditary succession, is the title whereby a man on the death of his ancestor acquires his estate by right of representation, as his heir at law. **An heir therefore is he upon who the law calls the estate immediately on the death of the ancestor:** and an estate, so descending to the heir, is in law called the inheritance.[315]

This statement of the common law rule defines the heir as the person in whom the estate immediately vests.[316] Thus, immediate vesting occurs once the heir is identified and that this identification is the point at which vesting occurs.[317] The rule *Welder* claims is that the common law codification is a loosely worded statement capable of broad application which does not restrict vesting to identified or declared heirs at law.[318] Unlike Blackstone, *Welder*'s common law claim does not state that immediate vesting occurs in a specific heir.[319] A bald statement that the property vests immediately in the heirs without clearly stating that it vests once the heir has been properly identified appears to be an incorrect statement of the common law according to Blackstone.[320]

The upshot of the above discussion is that it is highly unlikely whether it can be satisfactorily demonstrated that the *Welder* claim, that the relevant statute codified the common law, is accurate.[321] In fact, the Blackstone version of the common law rule provides more information about how to apply the concept of immediate vesting than simply saying "[t]here is never a time when title is not vested in someone."[322] Even if it is possible to define and determine the source of common law using a modified *Welder* approach, another potential obstacle for applying the *Welder* common law claim is that Texas law has statutory and case law rules for incorporating the common law of England into Texas law.[323] The *Welder* case does not reference these rules, so its common law codification assertion as it applies to the Texas laughing heir bears another significant weakness.[324]

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315. BLACKSTONE, *supra* note 280 (emphasis added).
316. *Id.*
317. *Id.*
318. Welder v. Hitchcock, 617 S.W.2d 294, 298 (Tex. App.—Corpus Christi–Edinburg 1981, writ ref'd n.r.e.).
319. *Id.*
320. BLACKSTONE, *supra* note 280.
321. *See* TEX. EST. CODE ANN. §§ 101.001(b), 101.051(b).
322. *Welder*, 617 S.W.2d at 297.
323. Grigsby v. Reib, 153 S.W. 1124, 1125 (Tex. 1913); Hall, *supra* note 302, at 816; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 5.001(a).
324. *Welder*, 617 S.W.2d at 297–98.

B. Welder*'s Failure to Follow Texas Adoption of Common Law Rules May Give Hope to Texas Laughing Heir*

For unknown reasons, *Welder* does not reference a substantial body of Texas law related to adopting, recognizing, or incorporating English common law.[325] Texas law in this regard is anchored by the 1840 legislative decision (when Texas was a republic) to employ English common law as a rule of decision when not inconsistent with the Texas constitution or laws.[326] At that time, the common law of England attained primacy over the civil law of Spanish and Mexican origins but did not discard such civil law.[327] The current statement of the law, which was present when *Welder* was decided, is found in Texas Civil Practice and Remedies Code subsection 5.001(a) which states, "[t]he rule of decision in this state consists of those portions of the common law of England that are not inconsistent with the constitution or the laws of this state, the constitution of this state, and the laws of this state."[328]

Past research indicates that case law from other states and legal treatises by American authors were the main sources to determine the contours of the common law in Texas courts.[329] In addition, research shows that the source of authority for the absorption of English common law in Texas is also found in Blackstone and American legal scholars such as Kent and Story.[330] Another important consideration is that Texas courts have held that the common law of England never was adopted wholesale.[331] Perhaps the recognition that Texas law before and after this (the opinion was that the adoption of the English common law was limited) resulted in the generation of a body of "rules or standards" for determining whether a principle of common law should be recognized as part of Texas law.[332] As will be shown, the rules found in the opinions of Texas courts also provide answers to questions previously raised concerning defining what *Welder* meant by the common law.[333]

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325. *Id.*

326. *See* GAMMEL*, supra* note 28, at 277–78; Hall*, supra* note 303, 816, at 316 (noting this article is an excellent source and provided much of the basis for this section). Of course, the influence of the Spanish civil law in Texas is generally recognized. The various instances where the Spanish and Mexican civil law has been adopted in Texas and the contrasting instances where the English common law has been followed are informatively discussed. This topic is often found in discussions of Texas history and legal history. *See also* MICHAEL ARIENS, LONE STAR LAW: A LEGAL HISTORY OF TEXAS 4–35 (Tex. Tech Univ. Press, 2011).

327. Hall, *supra* note 302, at 816.

328. TEX. CIV. PRAC. & REM. CODE ANN. § 5.001(a).

329. *Id.*

330. *Id.*

331. Courand v. Vollmer, 31 Tex. 397, 399 (1868).

332. *Id.*

333. Welder v. Hitchcock, 617 S.W.2d 294, 297 (Tex. App.—Corpus Christi–Edinburg 1981, writ ref'd n.r.e.).

The body of rules found in the opinions of the Texas courts can be stated in a general summary for ease of application.[334] The overarching rule is found in a 1854 Texas Supreme Court decision by Chief Justice Hemphill.[335] This case involved a determination of whether to apply a common law principle espoused by Kent, American state authority, and Coke, a preeminent English common law authority.[336] The court here refused to apply a common law principle, finding the principle was established under circumstances which did not exist in Texas.[337] Chief Justice Hemphill's words illustrate the basic rule of Texas common law adoption in rejecting the common law rule that a seller of land must be in possession to sell it.[338]

> Let that be as it may, and whether the reason given for the rule be or not a sufficient justification in the times to which it applied, one thing is certain: no such condition of society has existed in this State to authorize, under pretense of defeating combinatory and unhallowed schemes of oppression, any such rule or principle as would deprive an owner of the right to sell his lands, simply because there was another in possession.[339]

The purpose of a part of Professor Hall's work was to examine common law application decisions in Texas case law during the formative period (1840–1860).[340] The rule established early on was that a common law principle will be rejected when inconsistent with Texas social circumstances, economic conditions, or current morals.[341] In later times, the Supreme Court of Texas has been consistent in insisting that prior to application of the common law principle it must be shown that it is not "wholly discordant with the traditions, customs, and morals of our people."[342] Thus, a claim that a Texas statute has codified the common law without determining whether it comports with social, economic, and historic Texas circumstances or morals will likely lead to an inaccurate conclusion about whether the common law has been codified in a Texas statute.[343]

As previously alluded to, another rule that appears to have been applied is rooted in the recognition that because Texas was never a colony of Great Britain, the common law was not incorporated as a whole, which also means that English statutes were not adopted.[344] Interpretation of the common law

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334. Carder v. McDermett, 12 Tex. 546, 550 (1854).
335. *Id.*; Author's original thought.
336. *Carder,* 12 Tex. at 551.
337. *Id.* at 553.
338. *Id.* at 554.
339. *Id.* at 551.
340. *See* Hall, *supra* note 302, at 810.
341. *Id.* at 811–814.
342. Dickson v. Strickland, 265 S.W. 1012, 1022–23 (Tex. 1924).
343. *See* discussion *supra* Sections VI.A–B.
344. S. Pac. Co. v. Porter, 331 S.W.2d 42, 45 (Tex. 1960); *see* Courand v. Vollmer, 31 Tex. 397, 401 (1868); *see also* Hall, *supra* note 302, at 820 (focusing on footnote 91).

by other American states has been the most prevalent source to determine the substance of the common law of England applicable in Texas.[345] However, Texas courts can choose which line of state court cases, each with differing holdings, to follow.[346] In sum, as to the source and application of common law in Texas, there appears to be three major rules: (1) the chief source of common law is found in the interpretation of other state court decisions, and Texas courts may choose which one to follow; (2) the common law must be applied consistent with the traditions and the social, geographic, and economic circumstances found in Texas; and (3) English common law according to English sources like Blackstone can be used but must satisfy the compatibility with Texas circumstances test.[347]

Despite the relatively recent claim by *Welder* that Texas Probate Code Section 37, now Texas Estates Code subsection 101.001(b), is a codification of the common law, there has been no authority applying Texas law to support this claim.[348] In fact, it appears that subsection 101.001(b) may not codify the English common law, according to Blackstone, because there is no support for the potential interpretation based upon the common law that title vests immediately regardless of whether an individual has been declared an heir.[349]

As to the other common law rule that the *Welder* opinion introduced into Texas law, it is accurate to observe that other American state courts have applied the alleged common law principles and held that at common law an heir could not renounce title and was forced to be the owner.[350] However, there is no Texas authority to show that subsection 101.001(b) and its predecessors, Section 37 or Section 37A of the Texas Probate Code, codify or adopt the common law or principles of the common law according to the Texas method for determining this issue.[351] Thus, our Texas laughing heir may have reason to be more optimistic: Texas law in the area of passage of title upon intestacy law can disentangle itself from any common law connection.[352]

345. Grigsby v. Reib, 153 S.W. 1124, 1125 (Tex. 1913).

346. *See* Hall, *supra* note 302, at 820; *see also* Bryant v. Kelton, 1 Tex. 415, 427 (1846).

347. Author's original thought; *see* Hall, *supra* note 302, at 820.

348. Welder v. Hitchcock, 617 S.W.2d 294, 297 (Tex. App.—Corpus Christi–Edinburg 1981, writ ref'd n.r.e.).

349. *See* discussion *supra* Section VI.A.

350. *Welder*, 617 S.W.2d at 297; *see* Watson v. Watson, 13 Conn. 83, 85–86 (1839); Coomes v. Finegan, 7 N.W.2d 729, 732 (Iowa 1943); Bostian v. Milens, 193 S.W.2d 797, 804 (Mo. Ct. App.1946); Bradley v. State, 123 A.2d 148, 150 (N.H. 1956); *In re* Est. of Christian, 652 P.2d 1137, 1141 (Haw. 1982); Hardenbergh v. Comm'r., 198 F.2d 63, 67 (8th Cir. 1952); Lauritzen, II, *supra* note 42, at 573; *but see* Roehner & Roehner, *supra* note 42, at 289–315; *see* Hirsch, *supra* note 42, at 591–96.

351. TEX. EST. CODE ANN. § 101.001(b); TEX. PROB. CODE ANN. § 37(A) (repealed 2009).

352. *Welder*, 617 S.W.2d at 297.

C. Is Defeat of the Common Law Antagonist and Clarification of Disclaimer Law's Purpose Enough to Make the Sad Laughing Heir Smile Again?

Based upon the examination thus far, it appears that the Texas laughing heir may be pleased to find the antagonist common law has, to some extent, been vanquished.[353] However, even assuming the *Welder* orthodoxy is abandoned insofar as the vests immediately concept is no longer interpreted as a codification of the common law, is the ownership without assent or forced ownership possibility for a Texas laughing heir also resolved?[354] Texas law provides the right to disclaim, and experienced practitioners are no doubt aware of the potential for using a disclaimer to avoid the claim of unwanted ownership.[355] The Texas Legislature and courts have never clearly stated whether the chief purpose of the disclaimer statute was to protect the Texas laughing heir (declared or undeclared) or any other heir from the potential of being vested with title without assent.[356] A review of the legislative history and a scholarly article concerning Texas disclaimer law and the Texas Uniform Disclaimer of Property Interests Act (2013), indicates Texas disclaimer law was focused upon several other objectives.[357]

A statutory right to disclaim estate assets was not provided by Texas law until 1971.[358] Given the law and statutory language concerning vesting of title to an intestate's assets have been almost identical in every probate statute since 1848, it seems somewhat curious that a disclaimer right for intestate hearing was not thought necessary in Texas until 1971.[359] The pressure on the Texas Legislature to pass a disclaimer statute appears to have been from the uncertainty about the effectiveness of the case law establishing disclaimer at that time in relation to federal gift and estate taxation.[360] Thus, it is likely that a chief objective of the Texas disclaimer statute was to facilitate the use of the federal estate and gift tax law disclaimer.[361] Unfortunately, many years before the disclaimer statute was passed, a federal court case held that an heir automatically owns the intestate's property without the heir's assent.[362] Federal courts and congressional legislation therefore took the stance that an

353. Author's original thought.

354. Author's original thought.

355. EST. § 122.001; TEX. PROP CODE ANN. ch. 240.

356. Karisch et al., *supra* note 113, at 195. The *Dyer* and *Leggett* cases contain language which imply there is a connection to the issue of ownership without assent. It may be significant that these cases involve wills and not intestate succession. Dyer v. Eckols, 808 S.W.2d 531, 533–34 (Tex. App.—Houston [14th Dist.] 1991, writ dism'd by agr.); Leggett v. U.S., 120 F.3d 592, 594–97 (5th Cir. 1997).

357. Karisch et al., *supra* note 113, at 214.

358. Tex. H. B. 728, 62nd Leg., R.S. (1971); Acts 1971, 62nd Reg. Sess., ch. 979 § 1 at 2954.

359. *Id.*; *see* discussion *supra* Part IV.

360. Karisch et al., *supra* note 113, at 183; *see* Welder v. Hitchcock, 617 S.W.2d 294, 297 (Tex. App.—Corpus Christi–Edinburg 1981, writ ref'd n.r.e.).

361. Karisch et al., *supra* note 113, at 224.

362. Hardenbergh v. Comm'r, 198 F.2d 63, 67 (8th Cir. 1952).

intestate's assets immediately vested in the heirs who could not renounce ownership unless state law provided for a disclaimer qualified under federal law.[363]

However, there are some instances when a disclaimer does not work as expected and the laughing heir (or any heir) is forced to own the intestate's assets.[364] Consequently, one might argue that the Texas Legislature's enactment of a right to disclaim may be interpreted as implying recognition of the common law principle that title vests immediately and permanently in an intestate heir, and therefore, a remedy was necessary.[365] However, the language of Texas disclaimer law may not fully inform our Texas laughing heir when to disclaim to avoid forced ownership with certainty.[366] Thus, this common law principle may be sufficiently present in Texas law to trap the unwary Texas laughing heir.[367]

As previously discussed, in 1971, the Texas Legislature passed Texas Probate Code Section 37A.[368] It provided in part that "any person who may be entitled to receive any property under any will or inheritance from a decedent" could irrevocably disclaim rights in such property in whole or in part.[369] At present day, the Estates Code disclaimer provision also uses the phrase "may be entitled" in reference to persons who may disclaim.[370] This language could be interpreted to mean that vesting has not yet occurred but could possibly occur at some later time.[371] Our Texas laughing heir, who under *Welder* is unable to determine for certain whether title has vested in him or her before being declared an heir, may be forced to decide if she or he should disclaim as soon as possible after the intestate dies.[372] If this is the best practice, it is a treacherous one because the laughing heir may not know of the intestate's death for an extended period.[373]

The procedure under disclaimer law for determining whether a person is an heir who may be entitled to ownership is not clearly stated.[374] This makes it difficult to determine whether the passage of Section 37A did or did not imply an acceptance of the proposition that title vested immediately in

363. *Id.*; *see* I.R.C. § 2518.
364. *See* Karisch et al., *supra* note 113, at 195.
365. Author's original thought.
366. TEX. EST. CODE ANN. § 122.001. Use of the phrase disclaimer law refers to the whole body of statutory disclaimer law from § 37A to the current statutes.
367. Author's original thought.
368. Tex. H.B. 728, 62nd Leg., R.S. (1971); Acts 1971, 62nd Reg. Sess., ch. 979 § 1 at 2954.
369. TEX. PROB. CODE ANN. § 37(A) (repealed 2009).
370. EST. § 122.002.
371. Author's original thought. The laughing heir's confusion about the best action to take is related in large part to the text of §101.001(b) which given the *Welder* common law gloss has created confusion about whether vesting of title occurs before or after the heir is declared.
372. *Id.*
373. *Id.*
374. Author's original thought.

the heirs at law and thereafter could not be renounced.[375] However, if the evidence presented previously is convincing that adoption of a common law principle in Texas must be explicit and in conformance with case law standards, then rejecting the implication of ownership without assent based upon English common law becomes a more credible position.[376] Consequently, the limited remedy addressed in the disclaimer law was to protect intestate heirs from anxiety about the unwanted and unrenounceable ownership principle that the federal courts had adopted, and not to remedy a common law principle adopted in Texas.[377]

Nevertheless, some may ask about the effectiveness of a disclaimer in Texas state law cases when one does not want to be an owner and the issue of proper timing can be resolved.[378] Perhaps we should determine whether a crying heir can find solace by simply perfecting a disclaimer according to statute.[379] If a disclaimer works and the laughing heir can avoid ever being tagged with ownership then, other than to satisfy intellectual curiosity, the validity of the common law claims about potential harsh result of the vests immediately concept without assent may not warrant practical concern.[380] This inquiry may also be of assistance in determining whether the common law principle of forced ownership can be deemed to have been entirely eliminated from Texas law.[381]

Texas law which provides protection for insolvent devisees, consistent with other jurisdictions, does protect our Texas laughing heir from potential sadness in some instances.[382] The *Dyer* case held that a disclaimer relates back to the testator's death and the disclaiming devisee (attempting to avoid a creditor) does not effectively transfer property they own.[383] This "relation-back" theory prevented the disclaimer from being a fraudulent transfer for purposes of the Texas Uniform Fraudulent Transfer Act.[384] However, *Dyer* also interprets the *Welder* case claim that Section 37 was a recognition of the common law, but it appears to limit the holding to disclaimer of devised property.[385] As a result, the Texas Uniform Fraudulent Transfer Act has been amended to adopt this holding which appears (now by statute) to also apply to intestate heirs.[386]

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375. *See* EST. § 122.001; TEX. PROP. CODE ANN. ch. 240.
376. Author's original thought; *see* EST. § 122.001; PROP. ch. 240.
377. Author's original thought; *see* EST. § 122.001; PROP. ch. 240.
378. Author's original thought; *see* EST. § 122.001; PROP. ch. 240.
379. Author's original thought; *see* EST. § 122.001; PROP. ch. 240.
380. Author's original thought; *see* EST. § 122.001; PROP. ch. 240.
381. Author's original thought; *see* EST. § 122.001; PROP. ch. 240.
382. Author's original thought.
383. Dyer v. Eckols, 808 S.W.2d 531, 533 (Tex. App.—Houston [14th Dist.] 1991, writ dism'd by agr.).
384. *Id.*
385. *Id.*
386. TEX. BUS. & COM. CODE ANN. § 24.002(12).

Despite the amendment of the Fraudulent Transfer Act, which is an obvious benefit to our gloomy laughing heir, Texas law is unfavorable in many ways.[387] In Texas, for persons dying before September 1, 2014, the failure to disclaim within nine months of death results in ownership without consent.[388] Intestate heirs can be sued under Texas local tax laws for delinquent taxes or property without the right to disclaim before the suit is filed naming her or him as an owner.[389] As was previously discussed, an heir may, under Rule 152 of the Texas Rules of Civil Procedure, be forced to respond to a lawsuit filed against a relative who died while the lawsuit was pending.[390] The burden of responding to a lawsuit is an incidence of ownership.[391] The Texas prohibition against using a disclaimer to avoid a child support obligation may imply ownership of property inherited by an heir (and perhaps a devisee) without the right to renounce.[392]

It is important to recall that in the federal law arena a state disclaimer may not be effective.[393] The United States Supreme Court, in an intestacy case, did not adopt the *Dyer/Leggett* approach.[394] It found that the right to disclaimer (under Arkansas law) is a property right for tax lien purposes, and the opinion relied on the principle that an heir owns the intestate's property and may not renounce.[395] The Court ignored the reasoning of *Leggett v. U.S.* which applied the relation-back theory, or acceptance-rejection theory, to allow a Texas devisee to avoid a federal tax lien.[396] Also, the intestate must disclaim in accordance with federal law or be subject to unwanted gift or estate taxes even though current Texas law has no such limit.[397] There have also been court cases holding that Medicaid recipients must also fear that forced ownership will cause loss of benefits.[398] A disclaimer filed after the filing of a bankruptcy petition results in the disclaimant being deemed the owner of property for bankruptcy purposes.[399] Outside of Texas, our laughing heir may be faced with greater risk.[400]

Thus, the laughing heir's woes are not necessarily alleviated by a disclaimer.[401] The alleged common law principle that heirs are automatically

387. Author's original thought.
388. Karisch et al., *supra* note 113, at 195.
389. Yock, *supra* note 105, at 48–53.
390. TEX. R. CIV. P. 152.
391. *See Welder*, 617 S.W.2d at 297–98 (explaining "forced ownership" includes any burden that is usually associated with ownership of property even the obligation to dispute or disclaim an "accusation" that one owns or has responsibility for property).
392. TEX. PROP. CODE ANN. § 240.151(g).
393. Drye v. U.S., 528 U.S. 49, 61(1999).
394. *Id.*
395. *Id.*
396. *Id.*; Leggett v. U.S., 120 F.3d. 592, 597 (5th Cir. 1997).
397. I.R.C. § 2518; *see* TEX. EST. CODE ANN. § 122.001; PROP. ch. 240.
398. Karisch et al., *supra* note 113, at 219.
399. *In re* Schmidt, 362 B.R. 318, 325 (Bankr. W.D. Tex. 2007).
400. *See id.*; Drye v. U.S., 528 U.S. 49, 61 (1999).
401. *In re* Schmidt, 362 B.R. at 325; *see Drye*, 528 U.S. at 61.

and permanently vested with title to an intestate's assets remains burrowed deeply and tenaciously in American jurisprudence and, as a consequence, remains an obstacle for a Texas laughing heir.[402] Connecting this principle with Texas disclaimer law, or not specifically rejecting it in the passage of Texas disclaimer law, is a problem.[403] It fails to protect the intestate heir from unwanted ownership and could be used to allege that the Texas laughing heir has an unrenounceable ownership of the Texas intestate's estate in some form or fashion.[404] To the dismay of our Texas laughing heir, it should be recalled that Black's Law Dictionary defines disclaim to mean "a renunciation [of] one's legal [right or] claim."[405] It appears disclaiming may reasonably be interpreted to mean a person is giving up a right he or she possesses and is not simply refusing to accept that which is offered—not good news for our Texas laughing heir.[406] The remedy may lie in a better interpretation of the actual text of subsection 101.001(b) and Section 122.002 of the Estates Code if there is no outright statutory amendment to deny that forced ownership in any form exists in Texas.[407]

VII. Does the Pre-*Welder* Texas Case Law Approach Provide Greater Protection from Forced Ownership?

A. Historical Treatment of Vests Immediately and Theory of Permanent Vesting (Forced Ownership) Explored

Before suggesting legislation or employing Texas-recognized statutory construction principles to establish a non-common law, text-based interpretation of subsection 101.001(b) and the current Texas disclaimer law, it may be useful to review how pre-*Welder* Texas courts interpreted the historical vests immediately language without reliance upon the common law.[408] By examining these older cases and exploring how court perceptions of public policy shaped the opinions, suggestions for change will, hopefully, be better informed.[409]

An interesting approach is found in some of these cases decided before the "declaration of heirship" statute of 1907.[410] Before this time, Texas courts

402. Author's original thought; Welder v. Hitchcock, 617 S.W.2d 294, 297–98 (Tex. App.—Corpus Christi–Edinburg 1981, writ ref'd n.r.e.).

403. *Id.*

404. *Id.*

405. *Disclaim*, BLACK'S LAW DICTIONARY (9th ed. 2009).

406. *See id.*

407. Author's original thought; *see* TEX. EST. CODE ANN. §§ 101.001(b), 122.002.

408. Ackerman v. Smiley, 37 Tex. 211, 216–19 (1872); Steele v. Renn, 50 Tex. 467, 481–83 (1878); Slaton v. Singleton, 9 S.W. 876, 877–78 (Tex. 1888).

409. Author's original thought; *see Ackerman*, 37 Tex. at 216–19; *Steele*, 50 Tex. at 481–83; *Slaton*, 9 S.W. at 877–78.

410. Author's original thought; *see Ackerman*, 37 Tex. at 216–19; *Steele*, 50 Tex. at 481–83; *Slaton*, 9 S.W. at 877–78.

often found that title had not been immediately and permanently vested in the heirs.[411] In the nineteenth century, Texas courts did not strictly and literally construe the immediate vesting language found in probate statutes at that time.[412] In fact, the courts did not interpret the vests immediately in the person's heirs at law language to mean, as *Welder* states, "that there is no shorter interval of time than between the death of a decedent and the vesting of his estate in his heir."[413]

For example, in *Steele v. Renn*, an intestate heir was not able to assert that title had previously immediately vested in him or her for the purpose of defeating claims of a bona fide purchaser for value.[414] In *Steele*, the court justified its decision to favor the rights of the bona fide purchaser over the heir based in part upon the public policy at the time.[415] The significance of this public policy approach will be discussed later.[416] For now, it indicates that the common law was not considered as the basis for interpreting the statute.[417] In addition, in *Slaton v. Singleton*, the court interpreted immediate vesting to be conditioned upon proof of heirship.[418] Even in the twentieth century cases, Texas courts also refused to recognize immediate vesting claims by heirs who did not timely assert their claims.[419]

Texas courts have also disturbed the initial finding of immediate vesting in specific heirs at law.[420] In *Henson v. Jarmon*, two children born out-of-wedlock were allowed to assert an heirship claim when the intestate died before the statute granting out-of-wedlock children heirship rights was passed.[421] Thus, it appears that there is Texas case law which does not interpret immediate vesting to always mean vested in an heir in any truly immediate and permanent sense.[422] If an heir can be involuntarily deprived of an immediately vested right, then it seems reasonable to argue that under

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411. Author's original thought; *see Ackerman*, 37 Tex. at 216–19; *Steele*, 50 Tex. at 481–83; *Slaton*, 9 S.W. at 877–78.

412. Author's original thought; *see Ackerman*, 37 Tex. at 216–19; *Steele*, 50 Tex. at 481–83; *Slaton*, 9 S.W. at 877–78.

413. *See* Welder v. Hitchcock, 617 S.W.2d 294, 297 (Tex. App.—Corpus Christi–Edinburg 1981, writ ref'd n.r.e.).

414. *See Steele*, 50 Tex. at 481–83.

415. *Id.*

416. *See* discussion *infra* Section VII.B.

417. Author's original thought; *see Ackerman*, 37 Tex. at 216–19; *Steele*, 50 Tex. at 481–83; *Slaton*, 9 S.W. at 877–78.

418. *Slaton*, 9 S.W. at 877 (discussing another line of early Texas cases which remain viable holding that a creditor seeking to sue an intestate heir without proceeding through the probate courts may do so under certain limited circumstances). However, the creditor bears the burden of proving the identity of the heir; a person qualifies as an heir only if he or she has taken possession or control of the intestate's property. This identification of the acted heirs has been part of Texas law and provides Texas's laughing heir more protection. *See* Low v. Felton, 84 Tex. 378, 385 (1892).

419. Turner v. Nesby, 848 S.W.2d 872, 878 (Tex. App.—Austin 1993, no writ).

420. Henson v. Jarmon, 758 S.W.2d 368, 368 (Tex. App.—Tyler 1988, no writ).

421. *Id.*

422. *See, e.g.*, TEX. EST. CODE ANN. § 121.053 (requiring that an heir survive the intestate by 120 hours. Thus, it seems immediate vesting is conditioned upon identification of the specific heir).

Texas law an heir did not authentically and without assent own the intestate's property.[423]

B. Competing Public Policies Can Complicate Texas Laughing Heir's Life

As referenced above, Texas case law in the distant past seemed to rely (to some extent) upon public policy in interpreting statutory text.[424] Passage of title upon intestacy laws appear to involve adapting various customary societal expectations in the written form.[425] These expectations came to be referred to as public policy.[426] Identifying public policy issues that arise may provide some understanding for the interpretations of statutory language and should be considered in recommending changes in the statute or case law.[427]

One public policy goal that has been applied by Texas courts in intestate situations can be characterized as title stability.[428] In this discussion, title stability means establishing ownership of assets as clearly and efficiently as possible to facilitate efficient buying and selling of property.[429] The goal of title stability can influence how and when title vests.[430] It can also play a role in whether title and ownership must be vested in the laughing heir without assent and, consequently, play a part in determining whether the intestate heir can renounce (disclaim) ownership.[431] From an alternative viewpoint, title stability could facilitate the properly identified and assenting intestate heir's right to claim immediate vesting.[432] Thus, the heir could more securely claim her or his ownership is fixed and non-forfeitable.[433]

While court application of the policy of title stability to specific facts does not always lead to predictable, consistent, or desirable results, it has been the basis for resolving some disputes.[434] In Texas jurisprudence, title stability has had a definite impact on the meaning of the "vests immediately in the person's heirs at law" language found in the statutory text.[435] By clinging to the doctrine of immediate vesting upon death, some assurance of

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423. EST. § 201.062(a)(2)(J) (hypothesizing the idea that someone who might otherwise be declared an heir may be denied ownership). A parent may be disqualified from inheriting from an intestate minor child under some circumstances. Perhaps the other strand of the *Welder* common law gloss, i.e., "there is never a time when title is not vested in someone," has some limited usefulness.

424. Steele v. Renn, 50 Tex. 467, 481–83 (1878).

425. Hirsch, *supra* note 42, at 591–96. The inspiration for this section is derived from this very well-done and most interesting article. Professor Hirsch shows how policies applicable to intestate inheritance by insolvent heirs who don't want to own assets intersect with policies that support a creditor's need to be fully repaid.

426. *Id*.

427. Author's original thought; *see Steele*, 50 Tex. at 481–83.

428. *See Steele*, 50 Tex. at 481–83.

429. *Id.*

430. *See id.*

431. Author's original thought.

432. *Id.*

433. *Id.*

434. *Steele*, 50 Tex. at 481–83.

435. Author's original thought; TEX. EST. CODE ANN. § 101.001(b).

title stability is achieved.[436] However, it would be even more effective if interpretation of the vests immediately language was interpreted to refer to a specific heir determined by a particular method to be consistent with the policy goal of title stability.[437]

The old, often-cited legal principle that courts should honor and use the deceased's intent as a chief guide to property disposition is clearly a part of a "competing policies discussion."[438] Based upon this, some may question whether, despite being charged with knowledge of the intestate succession laws, an intestate decedent would have intended that an heir receive their estate who is so truly remote as to be laughable.[439] From the Texas laughing heir's perspective, regardless of the intestate's assumed intent, because of his or her lack of knowledge of the remote ancestor's affairs, the laughing heirs are caught between a rock and a hard place.[440] Despite the legislature's belief that it has accurately estimated the intestate's intent, the laughing heirs will have to contend with those who believe the inheritance is inappropriate and the potentially treacherous decision to become involved with an estate of which they are ignorant.[441]

The problem of competing policies or a policy that produces contradictory results found in the state law arena is intensified by federal court cases in which the concept of immediate vesting is linked with the claimed common law principle that an intestate heir cannot renounce ownership.[442] This has resulted in more serious problems for the intestate heir because of the federal government's apparent policy priority of making sufficient assets available for income tax purposes.[443] This same policy of maximum asset availability has occurred in Medicaid eligibility law as well.[444] In these situations, the government policy priority appears to outweigh any perceived unfairness to the intestate heir of forced ownership.[445] Thus, determining the legal obligations and rights of our Texas laughing heir is also made more difficult by federal policy.[446]

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436. EST. § 101.001(b).

437. Author's original thought.

438. THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS AND OTHER PRINCIPLES OF SUCCESSION: INCLUDING INTESTACY AND ADMINISTRATION OF DECEDENT'S ESTATES 807–17 (West Academic Publishing eds., 2d ed. 1976). Professor Atkinson's work is interesting on this point, because he discusses the impact of "strict" construction of a will which does not rely upon the "testator's intent" and instead on the meaning of the words used and not an attempt to discuss the testator's intent as a "liberal" construction does. When interpreting "passage of title upon intestacy" and succession laws perhaps this "strict" versus "liberal" construction difference should be considered.

439. Cavers, *supra* note 4, at 208.

440. Author's original thought.

441. TEX. EST. CODE ANN. § 202.001.

442. Hardenbergh v. Comm'r, 198 F.2d 63, 66–68 (8th Cir. 1952); *see* Lauritzen, II, *supra* note 42, at 576; *but see* Roehner & Roehner, *supra* note 42, at 289–315.

443. Drye v. U.S., 528 U.S. 49, 52 (1999).

444. Karisch et al., *supra* note 113, at 219.

445. *Id.*

446. *Id.*

A related policy issue which seems to always seep into the above-discussed policy concerns is whether the intestate heir can be forced to own the intestate's assets, and, if so, whether the heir can always and effectively disclaim.[447] If it is believed, as a matter of policy, that the heir's creditors should have the opportunity to collect a lawful debt, then this may explain the holdings of some out-of-state courts that an intestate heir cannot renounce ownership.[448] This pro-creditor policy and the underlying "unrenounceable forced ownership" theory has not been fully adopted in Texas.[449] However, as in the previous discussion of the *Dyer* case and other instances, it cannot be stated with any degree of certainty that Texas public policy ever clearly eliminated the idea that an intestate heir could be forced to own property.[450]

A final thought in the area of policy is that any application of common law principles in Texas must confront the long-standing Texas court-made legal policy that in addition to statutory and constitutional restrictions, the hurdle of compatibility with the Texas legal, social, and economic landscape must be cleared.[451] This policy may make it difficult to accept the validity of common law claims made by *Welder* or other courts, especially the concept that an heir owns the intestate estate without the necessity of assent.[452] Thus, the Texas laughing heir is likely to encounter confusion and uncertainty in the application of Texas passage of title upon intestacy law which a better statutory interpretation or legislative amendment might resolve.[453] Perhaps Texas courts and lawmakers could be persuaded, as one scholar has observed, "policy wise" that our American legal system has refused, or at least been reluctant, to force citizens to undertake "laborious or intimate activities" against their will.[454]

C. Text-Based Analysis May Cheer-up the Laughing Heir

If the Texas laughing heir will benefit from no longer viewing passage of title upon intestacy subsection 101.001(b) through the common-law lens, what sort of analysis would clarify the meaning of "vests immediately in the person's heirs at law"?[455] As the immediately above discussion

447. Author's original thought; Karisch et al., *supra* note 113, at 219.
448. Hirsch, *supra* note 42, at 591–96.
449. Dyer v. Eckols, 808 S.W.2d 531, 533 (Tex. App.—Houston [14th Dist.] 1991, writ dism'd by agr.).
450. *See* discussion *supra* Section VI.C.
451. See discussion *supra* Part V, Section VI.B.
452. Welder v. Hitchcock, 617 S.W.2d 294, 297 (Tex. App.—Corpus Christi–Edinburg 1981, writ ref'd n.r.e.); *Dyer*, 808 S.W.2d at 531.
453. Author's original thought.
454. *See* Hirsch, *supra* note 42, at 629 (discussing remarks about forced ownership).
455. Author's original thought; TEX. EST. CODE ANN. § 101.001(b).

demonstrated, there is pressure to liberally construe the text to meet public policy expectations.[456]

Perhaps a better approach would be to interpret subsection 101.001(b) of the Estates Code, derived from Section 37 of the Probate Code, in a commonsense way without reference to the common law or any policy goals.[457] Professor Stanley Johanson interprets the statute in a common sense way without reference to the common law.[458] He states:

> Section 37 serves several important purposes. First, by declaring that title vests immediately in the heirs or devisees, the statute establishes that there is never a hiatus in title to property passing from a decedent. Suppose, for example, that the decedent's will is contested and that the trial court decision is appealed. It may be years before it is finally determined whether the heirs inherit title (if the contest is successful or the will beneficiaries succeeded to the decedent's property). But once their title is determined, their title relates back to the moment of death.[459]

This text-based interpretation confines the meaning of vesting immediately to avoidance of a hiatus in ownership of the intestate's assets upon death.[460] The purpose is not to codify the common law and introduce unnecessary baggage into the equation.[461] Instead, the interpretation recognizes that the person in whom title vests must first be determined by some legal process.[462] It seems apparent the Texas laughing heir, using the customary method of statutory interpretation, is directed to other statutes to find the answers to issues such as whether title vests immediately in undeclared potential heirs or is conditional upon formal identification and consent.[463]

According to Craig Hopper and D'Ana H. Mikeska, known Texas probate law experts, in O'Conner's *Texas Probate Law Handbook* (2020):

> Generally, when a person dies intestate, an ownership interest in the decedent's property vests in the decedent's heirs immediately upon death. The vesting of this interest does not, however, generate any documentary evidence identifying the decedent's heirs or the property to which they are entitled to establish who the heirs are and the property they are entitled to, a person must apply for a judicial determination of heirship. Once a judgment declaring heirship has been obtained, third parties can rely on it and are

456. *See* discussion *supra* Section VII.B; Steele v. Renn, 50 Tex. 467, 481–83 (1878).
457. Author's original thought; EST. § 101.001(b).
458. JOHANSON, supra note 163, at 69–70.
459. JOHANSON, *supra* note 163, at 69–70.
460. *See id.*
461. *See id.*
462. *See id.*
463. Author's original thought.

> protected in their dealings with the estate's personal representative or the decedent's heirs.[464]

This well recognized authority on Texas probate law, as well as Professor Johanson's commentary, provide a preferable interpretation of the statute.[465] In accord with these interpretations, the vesting occurs when the heir is declared by lawful procedure.[466] This approach does not create a "title stability destroying gap" in the transfer of title at death but, without resorting to unsubstantiated common law gloss, directs that the heir must be declared before title vests.[467] At least in this interpretation there is some opportunity for the Texas laughing heir who wants no part of the estate to have an opportunity to object.[468]

These interpretations do not completely address the whole problem faced by our laughing heir.[469] When the alleged common law principle of heir ownership without assent worms its way into the mix, our Texas laughing heir remains in a gloomy mood.[470] Consistent with the focus of this Article, how should the potential heir interpret his or her rights and options if ownership or any related burden is unwanted?[471] A more commonsense meaning of immediate vesting cannot escape the issues and challenges presented by the disclaimer statute related to the forced ownership issue.[472] Perhaps statutory amendment is necessary to determine the nature of the heir's ownership.[473] Nevertheless, the usual rules of statutory construction may provide a useful correction.[474]

The customary initial application of the general laws of statutory construction to subsection 101.001(b) may cure the above-referenced flaws in the orthodox interpretation and offer a preferable alternative.[475] Key general rules of statutory construction are found in the recent Supreme Court case of *Odyssey 2020 Academy, Inc. v. Galveston Central Appraisal District*.[476] The rules can be fairly summarized as follows: (1) "'to ascertain and give effect to the [l]egislature's intent"'; (2) to apply the plain language of the statute and the ordinary meaning of words used to determine legislative intent; and (3) to give effect to all words of a code and avoid constructions

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464. *See* HOPPER & MIKESKA, *supra* note 163, at 141.
465. *See* JOHANSON, *supra* note 163, at 69–70.
466. *See id.*
467. *Id.*
468. Author's original thought.
469. *Id.*
470. *Id.*
471. *Id.*
472. *Id.*
473. *Id.*
474. Calvert v. Texas Pipe Line Co., 517 S.W.2d 777, 781 (Tex. 1974).
475. *Id.*
476. Odyssey 2020 Acad., Inc. v. Galveston Cent. Appraisal Dist., 624 S.W.3d 535, 540 (Tex. 2021).

which would render any part of it meaningless.[477] The court references other supporting authority for the proposition that a court does not give a statute a meaning that conflicts with other provisions and interprets a provision in the context of the entire law in which it is found.[478]

It is also instructive to consult the fine work of Scalia and Garner, as well as the nonexclusive subsections 311.061(a) and 311.021(2) of the Code Construction Act when attempting to construe a statute.[479] These authorities support interpreting text in the context of the entire statute.[480] The vagueness of Texas Estates Code subsection 101.001(b) regarding how and when (immediately before or after the heir is identified) title vests may be remedied when the entire statute is considered.[481] For example, the statute plainly states vesting is subject to subsection 101.051(b).[482] Subsection 101.051(b) conditions vesting on the payment of debts.[483] Thus, the idea that vests immediately means literally and forever without any intervening consideration, such as proper identification of the heir, does not seem to be a reasonable perspective.[484]

The other parts of Texas law providing the context for interpreting subsection 101.001(b) can be found in Chapter 202 of the Texas Estates Code.[485] This provides the guide for determining who the heirs might be, which according to the position taken herein, must be done before vesting can be claimed.[486] The procedures to be followed in determining the identity of heirs and their respective interests in the deceased's estate assets are set forth in those provisions.[487] In applying the above-stated rules of statutory construction, one must avoid ignoring other relevant provisions of the statute or code.[488] There is no validity to the claim that an undeclared potential intestate heir is the legal owner of the intestate decedent's property because actual heirship facts and other relevant factors have not been determined as provided for by Chapters 201, 202, 203, and 204 of the Texas Estates Code.[489] Any other interpretation is without foundation and would impermissibly nullify important provisions of the Texas Estates Code.[490]

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477. *Id.*

478. *Id.*

479. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 47 (1st ed. 2012); TEX. GOV'T CODE ANN. §§ 311.061(a), 311.021(2).

480. *See* SCALIA & GARNER, *supra* note 479, at 391 (disagreeing with interpreting text to give effect to legislative intent).

481. *See* TEX. EST. CODE ANN. § 101.001(b).

482. *Id.* § 101.051(b).

483. *Id.*

484. *See id.*; Author's original thought.

485. EST. §§ 101.001(b), 202.201–.206.

486. *See id.*

487. *See id.*

488. Odyssey 2020 Acad., Inc. v. Galveston Cent. Appraisal Dist., 624 S.W.3d 535, 540 (Tex. 2021).

489. *See* EST. §§ 201.001–204.201.

490. Author's original thought.

As discussed, the above-referenced statutes set forth detailed standards of proof and procedures for determining the heirs of an intestate decedent.[491] Included in these requirements is that a proper application must be brought by the proper party and be supported by necessary evidence.[492] In fact, the evidence required is specified and the precise language to be recited in the judgment is also set forth.[493] The legal effect of a properly drafted judgment is established.[494] In addition, a non-judicial way to determine heirship is authorized in Texas Estates Code Section 203.001.[495] These methods necessarily provide a Texas laughing heir some protection from forced ownership by providing at least an opportunity to disclaim because the heir has notice that someone claims they are an heir.[496]

Any claim that under Texas law, whenever a person dies intestate, anyone who may be an heir at law is deemed, without her or his assent, to own the deceased's property for all purposes, and all attendant personal liability, is incorrect.[497] According to the proper statutory construction, vesting is conditioned upon identification of the specific heir.[498] If heirship was determined simply at the point of the intestate decedent's death by identifying who is a likely heir, then the proposed statutory interpretation would impermissibly nullify relevant provisions of the Estates Code contrary to the legislature's intent.[499] Returning to the focus of this Article, this theory could conceivably extend to extremely remote relatives who might have little or no awareness of the intestate decedent or his or her estate and no opportunity to disclaim.[500] The most reasonable, sensible, and text-driven interpretation of immediate vesting language found in subsection 101.001(b) is that the time at which the heirs at law are properly identified is the earliest point when legal title can vest in an heir.[501]

A text-based interpretation can resolve the issue of when the immediate vesting occurs.[502] The vesting occurs when the heir is identified and relates back to the intestate's date of death.[503] However, there is an additional issue if we interpret subsection 101.001(b) in the context of the disclaimer law.[504] Is the Texas laughing heir faced with the issue of ownership without

491. *See* EST. §§ 101.051(b), 202.201–.206, 201.001–204.201.
492. *Id.*
493. *Id.* § 202.201.
494. *Id.*
495. *Id*. § 203.001.
496. Author's original thought.
497. *Id.*
498. *Id.*
499. *Id.*
500. *Id.*
501. *Id.*; TEX. EST. CODE ANN. § 101.001(b).
502. Author's original thought.
503. *Id.*
504. *Id.*; EST. § 122.001.

assent?[505] A pro-Texas laughing heir interpretation can be borrowed from the *Leggett* case.[506] The disclaimer law and subsection 101.001(b) can be read together to mean that the idea of vesting immediately in the heirs at law is a legal fiction.[507] If the heir accepts the asset, then she or he is deemed to own it from the date of death.[508] However, the heir can reject ownership and there is no forced ownership under Texas law.[509] This interpretation has not been adopted explicitly by Texas courts or the Texas Legislature.[510] Thus, our Texas laughing heir has no assurance that he or she can avoid unwanted ownership and sadness under Texas law.[511] Legislative action may ultimately be the best route.[512]

VIII. CONCLUSION: HOW TO AVOID MAKING A TEXAS LAUGHING HEIR CRY

What steps could be taken to avoid causing our hero, the Texas laughing heir, to cry?[513] The laughing heir is used throughout to create sympathy for a person who is a potential heir under Texas law but has only minimal knowledge, at best, of the intestate's estate.[514] Despite this lack of knowledge, Texas law is not clear as to how this person can avoid being dragged into litigation or other involvement with the intestate's estate and perhaps forced to own unwanted property.[515]

The primary argument here has been that the *Welder* interpretation, or the orthodox interpretation, of the statutory passage of title upon intestacy law is flawed in its common law codification claim; this flaw obscures the best interpretation of the "vests immediately in the person's heir at law" language.[516] One option is to discard the *Welder* common-law claim, as it has been shown to be unsubstantiated, in favor of a proper statutory construction in which it is made clear that vests immediately is conditioned upon proper lawful identification of the persons in whom title vests.[517] This would provide the intestate heir with at least some opportunity to address, and perhaps avoid, ownership or any incidents of ownership (e.g., being named in a lawsuit).[518]

505. Author's original thought.
506. Leggett v. U.S., 120 F.3d. 592, 597 (5th Cir. 1997).
507. *Id.*
508. *Id.*
509. *Id.*
510. *Id.*
511. Author's original thought.
512. *Id.*
513. *Id.*
514. *Id.*; *see Cavers*, *supra* note 4, at 208.
515. Author's original thought.
516. Welder v. Hitchcock, 617 S.W.2d 294, 297 (Tex. App.—Corpus Christi–Edinburg 1981, writ ref'd n.r.e.).
517. Author's original thought.
518. *Id.*

At present, the Texas laughing heir's defensive weapon is a disclaimer.[519] Unfortunately, *Welder* commits another unforced error by joining the common law claim concerning vests immediately with the disclaimer statute.[520] In so doing, *Welder* connects the need for a disclaimer with another alleged common law rule that an intestate heir cannot renounce his or her ownership of the estate.[521] This error makes an intestate heir's life more complicated because it exposes an intestate heir to the potential of forced ownership of the intestate's assets.[522] Thus, our remote Texas laughing heir with inadequate or no knowledge of the passing of an intestate relative or the condition of the estate, may be more adversely affected than a regular heir.[523] When the estate is one that could be a true burden and no reasonable person would want to be connected, the heir's questionable options to effectively avoid entanglement cause a Texas laughing heir to cry for relief.[524]

The proposed statutory construction is certainly more accurate and leads to preferable results for the Texas laughing heir.[525] However, as has been shown, the disclaimer law is not satisfactory, and the proposed statutory construction has not been adopted by any Texas court.[526] Our Texas laughing heir's good mood can be more securely obtained, and tears of frustration avoided, by a legislative action that clearly rejects the application of the common law to the passage of title upon intestacy law or disclaimer law, especially any observance of the notion that an intestate heir owns the intestate's assets without the right to renounce—no forced ownership in Texas![527]

While public policies such as title stability and child support creditor's rights must be considered, the law should be clear that the immediate vesting occurs once the heir is clearly identified by legal process.[528] Furthermore, the law should be stated so that no one should be treated as an heir or the object of vesting without consent (consent, however, may be construed from the heir's actions).[529] The burden should be on the party claiming someone is an heir to prove it, and any burden upon the nonconsenting heir to avoid any burden or incidents of ownership should be minimal and liberally construed in the heir's favor.[530]

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519. TEX. PROP. CODE ANN. § 240.002.
520. *Id.*; *Welder*, 617 S.W.2d at 298.
521. *Welder*, 617 S.W.2d at 298.
522. Author's original thought.
523. *Id.*
524. *Id.*
525. *Id.*
526. TEX. PROP. CODE ANN. § 240.002.
527. Author's original thought.
528. *Id.*
529. *Id.*
530. *Id.*