PROBATE PROCESS

THE ESTATE ADMINISTRATION GUIDE

Presenters

LAURA UPCHURCH, Brenham
Moorman Tate Urquhart Haley
Upchurch & Yates

TINA R. GREEN, Texarkana
Capshaw Green

BROOKE HARDIE, Austin
Law Offices of Brooke Hardie

STEVEN D. FIELDS, Fort Worth
Court Administrator
Probate Court No. 2

OMAR J. LEAL, Corpus Christi
Branscomb | PC

Co-Authors

SHARON B. GARDNER¹
Crain, Caton & James
A Professional Corporation
1401 McKinney, 17th Floor
Houston, Texas 77010
(713) 658-2323
sgardner@craincaton.com

PATRICK J. PACHECO
JPMorgan Chase, N.A.
707 Travis, Tenth Floor
Houston, Texas 77002
(713) 216-3894
patrick.j.pacheco@jpmorgan.com

State Bar of Texas

ESTATE PLANNING AND PROBATE 101 COURSE
June 7, 2011
Fort Worth

CHAPTER 3

¹ Special thanks to Sarah Patel Pacheco for allowing them to use portions of her outlines on administration and settlement agreements and her other contributions to this article. The authors also thank Tina Green, Mickey R. Davis, Helen B. Wils, and Holly J. Gilman for their contributions to this outline. Finally, the authors thank the Honorable Russell Austin for allowing the authors the use of his excellent papers dealing with probate alternatives.
TABLE OF CONTENTS

I. SCOPE OF ARTICLE .......................................................................................................1

II. ALTERNATIVES TO PROBATE .............................................................................1
    A. Proceedings to Declare Heirship........................................................................1
        1. Overview ....................................................................................................1
           a. Decedent Died Intestate ........................................................................1
           b. Decedent’s Will Fails To Fully Dispose of Estate ...............................1
           c. Decedent’s Will is Not Probated Within Four Years After Death ......1
        2. Who May Apply .........................................................................................1
        3. Application .................................................................................................1
        4. Notice .........................................................................................................2
        5. Ad Litem Appointment...............................................................................2
        6. Hearing .......................................................................................................2
        7. The Court’s Judgment ................................................................................3
    B. The Affidavit of Heirship ..................................................................................3
        1. Overview ....................................................................................................3
        2. Validity .......................................................................................................3
        3. Benefit ........................................................................................................3
        4. Statutory Form ............................................................................................3
    C. The Small Estate Affidavit ................................................................................3
        1. Overview ....................................................................................................3
        2. Determining Value .....................................................................................4
        3. Application .................................................................................................4
        4. Asset Collection ..........................................................................................5
        5. Undisclosed Heir(s) ....................................................................................5
        6. Effect of Affidavit ......................................................................................5
        7. Benefits .......................................................................................................5
    D. Informal Family Agreements .............................................................................5
        1. Overview ....................................................................................................5
        2. Parties to Agreement ..................................................................................6
           a. Necessary Parties ..................................................................................6
           b. Proper Parties .......................................................................................7
           c. Persons Without Standing to Contest Settlement .................................7
              (1) Named Executor ...........................................................................7
              (2) Temporary Administrator .............................................................7
              (3) Creditor .........................................................................................7
        3. Consideration ..............................................................................................8
        4. Court Approval ...........................................................................................8
        5. Enforcement ...............................................................................................8
           a. Legally Enforceable ...............................................................................8
           b. Breach of Contract ................................................................................9
The Estate Administration Guide Chapter 3

E. Application For Order Of No Administration .................................................10
   1. Overview .................................................................................................10
   2. Requirements ..........................................................................................10
   3. Hearing and Order Upon Application ......................................................10
   4. Effect of Order ........................................................................................11
   5. Proceeding To Revoke Order ...................................................................11
F. Summary Proceedings For Estate ....................................................................11
   1. Overview .................................................................................................11
   2. Application & Order ................................................................................11

III. PRE PROBATE MATTERS .................................................................................11
A. Overview .........................................................................................................11
B. Funeral Arrangements .....................................................................................11
   1. Written Directions ....................................................................................11
   2. Persons Having Statutory Right to Make Burial Instructions ..................12
   3. Payment of Funeral Expenses and Filing Fees .........................................12
   4. Opening Safe Deposit Box .......................................................................12
      a. Without Court Order ...........................................................................12
      b. With Court Order ................................................................................12
C. Procedure to Appoint Temporary Administrator ............................................13
   1. Overview ..................................................................................................13
   2. Who is the Applicant ................................................................................13
   3. Application ...............................................................................................13
   4. Requesting Powers of Temporary Administrator .....................................13
   5. Hearing .....................................................................................................14
   6. Suitability of a Temporary Administrator .................................................14

IV. UNDERTAKING PROBATE ESTATE ADMINISTRATION ....................................15
A. Initial Information and Considerations ...........................................................15
   1. Locating the Will ......................................................................................15
   2. Funeral Arrangements ..............................................................................15
   3. Death Certificates .....................................................................................16
   4. Secure Home ............................................................................................16
   5. Determining Responsibilities ...................................................................16
   6. Determine Residence and Domicile of Decedent .....................................17
   7. Obtain Overview of the Assets and the Debts of the Estate .....................17
   8. Information on Personal Representative and Beneficiaries ....................17
   9. Witnesses ..................................................................................................17
B. Advise Client of Client’s Fiduciary Duties & Potential Liability .......................17

V. PROBATE PROCEEDINGS ..................................................................................18
A. Independent Administration by Will ...............................................................18
B. Probate of Will and Appointment of Administrator with Will Annexed ......18
C. Appointment of Independent Administrator ...................................................18
D. The Probate of the Will ...................................................................................18
   1. Application ...............................................................................................18
   2. Original Will and Codicil .........................................................................18
   3. Notice .......................................................................................................19
   4. Testimony .................................................................................................19
   5. Order .........................................................................................................19
   6. Oath ..........................................................................................................19
   7. Letters Testamentary ................................................................................19
E. Notice to Creditors ..........................................................................................20
F. Notice to Beneficiaries .....................................................................................20
G. Notice to Certain Charities ..............................................................................21
H. Inventory and List of Claims ...........................................................................21
I. Ancillary Probate ..............................................................................................21
   1. Texas ........................................................................................................21
   2. Other States .............................................................................................21

VI. THE APPLICANT, APPLICATION, CITATION, HEARING, AND ORDER ...21
   A. Applicant ....................................................................................................21
      1. Preferences ...........................................................................................21
      2. Disqualification .......................................................................................22
   B. Application ...................................................................................................22
      1. Intestate ..................................................................................................22
      2. Will Annexed .........................................................................................22
      3. Comment ...............................................................................................22
   C. Citation .....................................................................................................22
      1. Administration With and Without Wills ...............................................22
      2. Lost Wills ..............................................................................................22
      3. Court Requirements .............................................................................22
   D. Hearing .....................................................................................................23
      1. Time ......................................................................................................23
      2. Facts ....................................................................................................23
      3. Testimony ............................................................................................23
      4. Appraisers ..........................................................................................23
   E. Order .........................................................................................................23
   F. Contest ......................................................................................................23

VII. DECIDING ON DEPENDENT ADMINISTRATION ........................................23
   A. Purpose .....................................................................................................23
   B. Limitations ...............................................................................................24
   C. Restrictions On Representatives...............................................................24
D. Permitting Administration ................................................................. 24
   1. Administration Appropriate .................................................... 24
   2. Necessity.................................................................................. 24
E. Annual Accounting .............................................................................. 24
   1. Duty to File............................................................................. 24
   2. Accounting Contents .............................................................. 25
   3. Court Review and Approval ..................................................... 25
      a. Audit.................................................................................. 25
      b. Approval.......................................................................... 25
      c. Payment of Claims............................................................ 25
   4. Failure to File........................................................................... 26
   5. Choosing Dependent Administration ........................................ 26

VIII. LETTERS, OATH, BOND AND SAFEKEEPING ........................................... 26
A. Letters............................................................................................. 26
   1. Issuance.................................................................................. 26
   2. Qualification ........................................................................... 26
   3. Time....................................................................................... 26
B. Oath.................................................................................................. 26
C. Bond................................................................................................. 26
   1. Sureties.................................................................................. 26
   2. Bond Amount ....................................................................... 26
   3. New Bonds .......................................................................... 27
D. Safekeeping Agreement ..................................................................... 27

IX. OVERVIEW OF DUTIES & LIABILITIES......................................................... 27
A. Duties and Powers.......................................................................... 27
   1. General Duties....................................................................... 27
   2. General Powers ..................................................................... 27
   3. Court Supervised Powers....................................................... 27
   4. Power to Operate a Business ................................................ 27
   5. Power to Borrow.................................................................... 28
      a. Application......................................................................... 28
      b. Citation............................................................................ 28
      c. Order............................................................................... 28
B. Liability............................................................................................ 28

X. COLLECTION OF ASSETS ............................................................................. 28
A. Community Property vs. Separate Property .................................. 28
B. Inventory, Appraisement and List of Claims................................. 29
   1. Probate Assets Only ............................................................... 29
   2. Liabilities............................................................................... 29
   3. Claims.................................................................................. 30
The Estate Administration Guide Chapter 3

4. Appraiser Certification ................................................................. 30
5. Affidavit of Personal Representative........................................... 30
6. Separate and Community Property ............................................ 30

C. Inventory Assets and Associated Problems .............................. 30
1. Real Estate ............................................................ 30
   a. Obtain Exact Legal Descriptions ...................................... 30
   b. Identify Homestead Property .......................................... 30
   c. Obtain Insurance & Pay Taxes ....................................... 30
   d. Review Farm and Ranch Property ................................. 30
   e. Review Mineral Interests .............................................. 31
2. Stocks and Bonds .............................................................. 31
   a. Re-Registering Securities .............................................. 31
   b. Establishing Securities Account .................................... 32
   c. Obtaining CUSIP Numbers .......................................... 32
   d. Partitioning Community Shares ................................. 32
3. Cash & Notes ................................................................. 32
   a. Establishing Estate Accounts ...................................... 32
   b. Watch FDIC Limits .................................................. 32
   c. Identify Non-Probate Accounts ................................. 32
   d. Collect Notes .......................................................... 33
   e. Partitioning Community Shares ................................. 33
4. Insurance .......................................................... 33
5. Miscellaneous Assets .......................................................... 34
6. Employee Benefits .............................................................. 34
7. Debts ........................................................................ 34

XI. CREDITORS AND CLAIMS ......................................................... 34
A. Notice ........................................................................... 34
   1. Publication Notice ..................................................... 34
   2. Mail Notice ............................................................. 34
   3. Permissive Notice ...................................................... 34
   4. Penalty ....................................................................... 35
B. Presenting Claims ............................................................... 35
   1. Claim Form .............................................................. 35
   2. Deposit of Claim ...................................................... 35
C. Approval and Rejection of Claims ............................................... 35
   1. The Representative’s Action ................................... 35
   2. The Court’s Action ................................................... 35
   3. Suit on Rejected Claim Must be Filed Within 90 Days of Rejection ....... 35
      a. Improperly Presented Claims .................................. 36
      b. Suits on Partially Rejected Claims ......................... 36
D. Claims of the Personal Representative ..................................... 36
   1. Personal Representative’s Own Claims: 6 Months ............... 36
2. Claims Procedure Inapplicable to Independent Administrators ..........37
3. Expenses of Administration ..................................................................37
4. Child Support Claims ...........................................................................37
E. Claims of Secured Creditors ....................................................................37
F. Classification and Payment ......................................................................38
  1. Classification of Claims .....................................................................38
  2. Payment of Claims .............................................................................38
  3. Quick Reference Table ......................................................................38

XII. SALES AND LEASES ...............................................................................38
  A. Nature and Purpose ............................................................................38
  B. Property Subject to Sale ......................................................................39
  C. Applicant ............................................................................................39
  D. Application ...........................................................................................39
    1. Contents ............................................................................................39
    2. Citation ..............................................................................................39
    3. Hearing .............................................................................................39
  E. Negotiating the Sale .............................................................................40
    1. Listing Agreements ..........................................................................40
    2. Avoiding DTPA Claims Relating to the Condition of the Property ......40
    3. Earnest Money Contract ....................................................................41
    4. Addressing Environmental Issues .....................................................42
  F. Order of Sale .........................................................................................42
  G. Report of Sale ........................................................................................43
  H. Confirmation of Sale .............................................................................43
    1. Time ..................................................................................................43
    2. Review ..............................................................................................43
  I. Leases and Renting ..................................................................................43
    1. Minerals ............................................................................................43
      a. Application ....................................................................................43
      b. Notice ............................................................................................44
      c. Order ..............................................................................................44
    2. Real and Personal Property ...............................................................44

XIII. ADMINISTERING JOINT ASSETS .........................................................44
  A. Community Property ............................................................................44
  B. Tenants in Common ...............................................................................44

XIV. REMOVAL AND COMPENSATION ......................................................44
  A. Removal ...............................................................................................44
    1. Instituting ..........................................................................................44
    2. Grounds .............................................................................................45
      a. No Notice Required .....................................................................45
b. Notice Required ................................................................. 45
  c. Additional Grounds ................................................................. 45
3. Procedure ........................................................................ 45
4. Costs ................................................................................. 46
B. Executor’s Commissions ......................................................... 46
  1. Commission .................................................................... 46
  2. No Commission ................................................................. 46
  3. Extra Compensation ............................................................ 47
  4. Expenses ........................................................................ 47

XV. HOMESTEAD, EXEMPT PROPERTY AND ALLOWANCES ............... 47
  1. Availability ....................................................................... 48
  2. Passage of Title ................................................................. 48
  3. Right of Use and Equipment ............................................... 48
    a. Surviving Spouse .............................................................. 48
    b. Children ...................................................................... 48
  4. Creditors’ Rights .................................................................. 49
  5. Delivery ............................................................................. 49
A. Exempt Property ................................................................. 49
  1. Solvent Estates .................................................................. 49
  2. Insolvent Estates ................................................................. 49
B. Exempt Property Allowance .................................................. 49
C. Family Allowance ................................................................ 50

XVI. DISCLAIMERS .............................................................................. 50
  A. Generally ........................................................................ 50
  B. Applicable Law ................................................................. 50
    1. I.R.C. Section 2518 .......................................................... 50
    2. Texas Probate Code Section 37A ........................................ 51
    3. Texas Property Code Section 112.101 .............................. 52
    4. Strict Application of 9 Month Requirement ....................... 53
    5. Date of Transfer ............................................................... 53
    6. Age Twenty-One Rule ....................................................... 54
    7. Purpose ........................................................................ 54
    8. Full and Partial Disclaimers ............................................. 54
    9. Common Use of Disclaimers ............................................. 56

XVII. CLOSING THE ESTATE .............................................................. 57
  A. When to Close ................................................................. 57
  B. Partial Distributions ........................................................... 57
  C. Receipts and Releases ....................................................... 57
  D. Section 151 Texas Probate Code ....................................... 57
  E. Section 149E Texas Probate Code ..................................... 57
XVIII. CLOSING DEPENDENT ADMINISTRATIONS .................................................58
   A. When to Close .................................................................................................58
   B. Final Accounting .............................................................................................58
      1. Contents ....................................................................................................58
      2. Citation .....................................................................................................58
      3. Examination ..............................................................................................59
   C. Distribution .....................................................................................................59
      1. Delivery ....................................................................................................59
      2. Penalty ......................................................................................................59
      3. Receipts for Assets ...................................................................................59
   D. Discharge and Release ....................................................................................59
   E. Escheat .............................................................................................................59

XIX. LITIGATION .........................................................................................................60
   A. Probate Jurisdiction and Venue .......................................................................60
      1. Generally ..................................................................................................60
      2. Constitutional County Court ....................................................................60
         a. Uncontested Matters ...........................................................................60
         b. Contested Matters ...............................................................................60
      3. County Court at Law ................................................................................60
      4. District Court ............................................................................................60
      5. Statutory Probate Court ............................................................................61
   B. Concurrent Jurisdiction Statutory Probate Courts and District Courts ..........61
      1. Matters Appertaining to or Incident to Estates .........................................61
         a. Texas Probate Code Section 5B .........................................................62
         b. Conflicts with Civil Practice and Remedies Code Section 15.007 ....62
         c. Discretionary Versus Mandatory .......................................................63
      2. Common Law Rule Determining Jurisdiction ..........................................63
      3. Trustee Liability Suits ..............................................................................63
      4. Assignment of a Statutory Probate Judge .................................................63
   C. Executing Rule 11 Agreements .......................................................................64
      1. Agreement Made By Counsel ...................................................................64
   D. Final Versus Interlocutory Probate Orders ......................................................64
      1. Overview ..................................................................................................64
      2. The Crowson Test ...................................................................................64
      3. Final Orders ..............................................................................................65
      4. Interlocutory Orders .................................................................................66

XX. TAX ISSUES .........................................................................................................67
   A. Decedent’s Final Federal Income Tax Return–IRS Form 1040 ......................67
   B. Estate’s Federal Fiduciary Income Tax Return–IRS Form 1041 ....................67
   C. Decedent’s Final Federal Gift Tax Return–IRS FORM 709 .........................68
D. Federal Estate Tax Returns ..........................................................69
E. State Inheritance Tax Return ........................................................70

XXI. ETHICS ..........................................................................................70
A. Who is the Client ........................................................................70
B. Permissible Multiple Representation ............................................70
C. Theft By Personal Representative ..................................................71
D. Conflicts of Interest ......................................................................73

XXII. EXHIBITS .....................................................................................75
A. Exhibit A: Texas Probate Code Section 128A ...............................75
B. Exhibit B: Quick Reference Table Creditor Claim Procedures .......78
C. Exhibit C: Affidavit of Facts Concerning The Identity of Heirs ..........80
D. Exhibit D: Affidavit for Collection of Small Estate .......................82
E. Exhibit E: Order Approving Affidavit for Collection of Small Estate 85
F. Exhibit F: Sample Family Settlement Agreement .........................86
G. Exhibit G: Sample Beneficiary Distribution Agreement ...............90
H. Exhibit H: Application for Appointment of Temporary Administrator 95
I. Exhibit I: Order Appointing Temporary Administrator ..................98
J. Exhibit J: Application for Probate of Will and Issuance of Letters 
   Testamentary ............................................................................100
K. Exhibit K: Order Admitting Will To Probate and Appointing Independent 
   Executor ..................................................................................103
L. Exhibit L: Oath of Independent Executor .......................................106
M. Exhibit M: Duties Letter To Client .................................................107
N. Exhibit N: Inventory and List of Claims .........................................114
I. SCOPE OF ARTICLE
While there are few certainties in life, death and taxes appear to be among them. Thus, the areas of estates and trusts continue to require able attorneys well versed in the procedures relating to the opening, administration and settlement of a decedent’s estate. And Texas laws, in this area, are among some of the most developed in the nation.

This article provides a general overview of the various estate settlement options and related procedural and common law issues. Prior to commencing a formal administration, however, alternatives to probate should be considered. Thus, the article provides an overview of both the probate process and alternative procedures. Taxes, while not always due, should always be considered, and the article discusses the various estate filing and reporting deadlines.

In addition to dealing with state and federal laws, the settlement of an estate can be significantly affected by various contested matters that arise during the administration. A discussion of some of the more common procedural issues are included.

Finally, the article discusses recent developments and ethical considerations for those advising estate representatives.

References to Sections and/or the Probate Code are to the Texas Probate Code unless otherwise noted.

II. ALTERNATIVES TO PROBATE
A. Proceedings to Declare Heirship
1. Overview
When a person dies without a will or a provision of the will fails to dispose of all the probate assets, the most common estate settlement proceeding is a judicial declaration of heirship. This ancillary probate procedure is found in Texas Probate Code Sections 48-56. The three most common situations when an heirship proceeding may be necessary are discussed below.

   a. Decedent Died Intestate
   An heirship may be required when the decedent died intestate, i.e., without a will, and the heirs are unable to use an alternative procedure (such as a small estate affidavit) to establish the rights and interests of the heirs. See discussion infra.

   b. Decedent’s Will Fails To Fully Dispose of Estate
   An heirship may be required when the decedent died testate, i.e., with a will, but the will does not dispose of all probate assets. For example, the will makes specific provisions for estate assets to be devised to certain beneficiaries, i.e., specific bequests, but fails to dispose of the residuary estate. Thus, the testator has technically died partially testate and partially intestate. And an heirship proceeding may be required to determine the legal owners of the remaining assets.

   c. Decedent’s Will is Not Probated Within Four Years After Death
   An heirship may be required when more than four (4) years have elapsed since the decedent’s death. Even if the decedent died with a will, the failure to probate it within four years may require an heirship when the applicant is unable to show that he or she was not in default as required by Section 73.

2. Who May Apply
   An application for heirship may be filed by an administrator, heir, secured creditor, guardian, or other interested party. TEX. PROB. CODE ANN § 49 (Vernon 2003 & Supp. 2008).

3. Application
   Texas Probate Code Section 49(a)(1)-(8) sets out the information required to be included in the heirship application.
Particular scrutiny should be given to the following:

- The name and address of the applicant and, if the application will be filed in a non-statutory probate court, the last 3 digits of the applicant’s social security number and driver’s license;
- The name and address of every heir;
- The heir’s relationship to the decedent, e.g. spouse, son, niece, etc.;
- The heir’s percentage interest in the estate;
- The name and address of every child born to or adopted by the decedent. See Penland v. Agnich, 940 S.W.2d 324 (Tex.Civ.App.—Dallas 1997, no writ) (determining adopted children were lawful issue to take class gift under testamentary trust);
- The name and address of each spouse;
- When and where they were married or divorced; and
- Statement that all information regarding marriages, divorces and children have been listed.

The application must also be supported by the applicant’s affidavit which states that all the allegations are true in substance and in fact and no material fact or circumstance has been omitted. The affidavit is a mandatory requirement to acquire proper jurisdiction. Rose v. Burton, 614 S.W.2d 651, (Tex.Civ.App.—Texarkana 1981, ref. n.r.e.).

4. Notice

All heirs must receive certified or registered mail service of the application. TEX. PROB. CODE ANN. § 50(a) (Vernon 2003 & Supp. 2008). The court may also require personal service. See Id. Therefore, it is advisable to check any local rules or practices prior to the hearing.

Additionally, it is necessary to serve all unknown heirs or known heirs whose addresses are unknown by publication. TEX. PROB. CODE ANN. § 50(b) (Vernon 2003 & Supp. 2008). The posted citation should be made in the county where the heirship proceeding is pending and where the decedent last resided. TEX. PROB. CODE ANN. § 50(c) (Vernon 2003 & Supp. 2008).

5. Ad Litem Appointment

Effective September 1, 2003, the court must appoint an ad litem in every heirship proceeding to represent the interests of the unknown heirs. TEX. PROB. CODE ANN. § 53(c) (Vernon 2003 & Supp. 2008). The court may appoint an attorney ad litem or guardian ad litem to represent any living heirs whose whereabouts are unknown or are incapacitated when necessary to protect their interests. TEX. PROB. CODE ANN. § 53(b) (Vernon 2003 & Supp. 2008).

6. Hearing

A hearing is required to grant the application. The hearing is on the record, i.e., before a court reporter. The court may hear the applicant’s testimony as to the application and will generally require testimony from at least two (2) disinterested witnesses (although no amount of witnesses is specifically required by the Texas Probate Code). The testimony of the witnesses must be reduced to writing, signed by the witnesses, acknowledged by the court clerk and placed in the court’s file. TEX. PROB. CODE ANN. § 53(a) (Vernon 2003 & Supp. 2008).

The Court will receive as prima facie evidence of the facts therein stated an affidavit of heirship or court judgment if same has been recorded in the deed records.

© Sharon B. Gardner & Patrick J. Pacheco
sm2011-04-14 OJL Advanced Estate Planning Probate Course (C0558753).DOC
for at least five (5) years. **TEX. PROB. CODE ANN. § 52 (Vernon 2003 & Supp. 2008).**

7. **The Court’s Judgment**

The judgment declaring heirship should include the name, address and percentage interest of each heir. At the risk of stating the obvious, the total of the percentage interests stated in the judgment should always equal 100 percent.

The effect of the judgment is to protect third parties from claims by omitted heir(s). Once entered, an heirship judgment is final and appealable as other judgments. *See Forlano v. Joyner, 906 S.W. 2d 118 (Tex.Civ.App.—Houston [1st Dist.] 1995, no writ)* (determining transfer order was interlocutory and not appealable); *Spies v. Milnek, 928 S.W. 2d 317 (Tex.Civ.App.—Fort Worth 1996, no writ)* (probate order final and appealable if it finally adjudicates substantial right). Any heir may, however, appeal, by bill of review, the judgment within four years if not properly served. And an excluded heir may appeal at anytime upon proof of actual fraud and recover from the other heirs.

It is advisable to file a certified copy of the judgment determining heirship in the real property records in the county where the decedent owned any real property, and the judgment should be indexed in the name of the decedent as grantor and the heir as grantee. The filing will thereafter constitute constructive notice of the facts therein stated and will allow an expeditiously insured title transfer by the title company in the future.

**B. The Affidavit of Heirship**

1. **Overview**

This ancillary probate procedure is set forth in Texas Probate Code Section 52. It is a statement of facts concerning the decedent’s family history, genealogy, marital status, and the identity of his heirs.

2. **Validity**

The Affidavit of Heirship’s validity is premised upon its being executed by the maker, acknowledged before a notary public, and having been of public record for five (5) or more years in the deed records. Title companies and transfer agents may proceed on the basis of an affidavit of heirship being on record for less than the five (5) year requirement. They generally require a minimum of three (3) affidavits from totally disinterested persons.

3. **Benefit**

An Affidavit of Heirship may allow a decedent’s heirs to expeditiously transfer title from the decedent’s estate consisting primarily of a homestead without resorting to a judicial proceeding.

4. **Statutory Form**

The legislature responded to the requests of the title company industry to create a uniform form for Affidavits of Heirship. The statutory form for an Affidavit of Heirship is attached as Exhibit C to this outline.

**C. The Small Estate Affidavit**

1. **Overview**

The Small Estate Affidavit authorized by Section 137 of the Texas Probate Code, may be used in the following situations:

- No petition for the appointment of a personal representative is pending or has been granted;
- Thirty (30) days have elapsed since the death of the decedent; and,
- The value of the entire estate, not including homestead and exempt property, does not exceed $50,000.

If a homestead is the only real property in the estate, title to the homestead can often be transferred through the small estate
affidavit. A form of a small estate affidavit and order are attached as Exhibits D & E to the outline.

2. Determining Value

A Small Estate Affidavit allows the passage of title to property to the heirs when the value of the estate is less than $50,000.00 *exclusive* of the value of the homestead and exempt property. Exempt personal property is provided for a family having an aggregate value of not more than $60,000.00 or $30,000.00 if owned by a single adult. TEX. PROP. CODE ANN. § 42.001 (Vernon 2003 & Supp. 2008).

Exempt personal property includes:

- home furnishings, including heirlooms;
- provisions for consumption;
- farming or ranching vehicles and implements;
- tools, equipment, books, and apparatus, including boats and motor vehicles used in a trade or profession;
- wearing apparel;
- jewelry not to exceed 25 percent (25%) of the aggregate limitations prescribed by Section 42.001(a);
- two firearms;
- athletic and sporting equipment, including bicycles;
- a two wheeled, three wheeled or four wheeled motor vehicle for each member of the family or a single adult who holds a driver’s license or who does not hold a driver’s license but who relies on another person to operate the vehicle for the benefit of the nonlicensed person;
- the following animals and forage on hand for their consumption;
- two horse, mules or donkeys, and a saddle, blanket and bridle for each;
- 12 head of cattle;
- 60 head of other type of livestock;
- 120 fowl;
- household pets; and
- the present value of any life insurance policy.

Texas Property Code Section 42.0021 provides an *additional* exemption for a retirement plan including a person’s right to assets held in or to receive payments, whether vested or not, under any stock bonus, pension, profit sharing, or similar plan, including a retirement plan for self-employed individuals.

The “traditional” IRA remains exempt. And Texas Property Code Section 42.0021(a) has been amended to include Roth IRAs as exempt property. This exemption applies to all contributions made before, on, or after the effective date of the statute.

3. Application

The applicant should file with the clerk of the Court an affidavit sworn to by two disinterested witnesses and by such distributees as have legal capacity, and if the facts warrant, by the natural guardian or next of kin of any minor or incompetent who is also a distributee. Note, there is no requirement for a guardianship of an incapacitated person, including a minor.

The affidavit must include all information required by Section 137 including:

- A list of the assets and liabilities of the estate;
- The names and addresses of the distributees; and
• Relevant family history facts concerning heirship that evidence their right to receive the money or property of the estate.

Due to SB 699, it appears that the affidavit should also include the last 3 digits of the applicant’s social security number and driver’s license if the application will be filed in a non-statutory probate court.

Upon the court’s approval, it should be recorded as an official public record by the clerk of the county. This occurs automatically in some counties. In others, it is necessary to file a certified copy in the Deed Records. A sample order is attached as Exhibit C to this Outline.

4. Asset Collection

To prove the right of the heirs, a certified copy of the affidavit can be provided by the estate distributees to persons owing money to the estate, having custody or possession of estate property, or acting as registrar, fiduciary or transfer agent of the estate or for estate property. At a minimum, the Small Estate Affidavit should be recorded in the deed records of the county where the homestead is located to effectuate title transfer.

5. Undisclosed Heir(s)

Any undisclosed heir may recover from an heir who receives consideration from a bona fide purchaser for value to a homestead passing under this affidavit. A purchaser without notice of any undisclosed heir takes title free of the interests of the undisclosed heir. A purchaser always takes title subject to creditor claims against the decedent.

6. Effect of Affidavit

Persons making payment, delivery, transfer or issuance of title pursuant to the affidavit described in Texas Probate Code Section 137(a) are released from liability, as if made to a personal representative of the decedent, without being required to see to the application thereof or to inquire into the truth of the statements contained in the affidavit. If the person to whom the affidavit is presented refuses to pay, deliver, transfer or issue the property as requested, such property may be recovered by suit by the distributees upon proof of the facts in the affidavit.

Distributees receiving payment, delivery, transfer or issuance of estate assets are liable to any person having a prior right or to any personal representative thereafter appointed.

Persons who execute the affidavit shall be liable for any damage or loss to any person which arises from any payment, delivery, transfer or issuance made in reliance on the affidavit.

7. Benefits

This ancillary probate procedure allows the heirs to a small or large estate consisting primarily of a homestead, furniture and furnishings, automobile and pension/profit sharing plan, to expeditiously transfer title to same.

D. Informal Family Agreements

1. Overview

It is the policy of the state of Texas to encourage resolution of disputes and the “early settlement of pending litigation through voluntary settlement procedures.” TEX. CIV. PRAC. & REM. CODE ANN. § 154.002 (Vernon 1997). The Texas Supreme Court and a number of appellate courts have expressly stated that they continue to favor and support family settlement agreements. See Shepherd v. Ledferd, 962 S.W.2d 28 (Tex. 1998); In Re Estate of Hodges, 725 S.W.2d 265, 267 (Tex. App. – Amarillo 1986, writ ref’d n.r.e.); Estate of Morris, 577 S.W.2d 748,
Encouraging settlement and compromise is in the public interest. See *Bass v. Phoenix Seadrill/78, Ltd.*, 749, F.2d 1154, 1164 (5th Cir. 1985); *Knutson v. Morton Foods, Inc.*, 603 S.W.2d 805, 808 (Tex. 1980); *Gilliam v. Alford*, 69 Tex. 267, 6 S.W. 757, 759 (Tex. 1887).

The rationale underlying the validity of family settlement agreements is explained by the Court in *Pitner v. United States*, 388 F.2d 651, 656 (5th Cir. 1967), which states that,

This approach is made possible by section 37 of the [Texas] Probate Code which provides that when a person dies leaving a will, . . . all of his estate devised or bequested by such will shall vest immediately in the devisees or legatees; . . . subject to the payment of the decedent’s debts. This provision leaves the beneficiaries of an estate free to arrange among themselves for the distribution of the estate and for the payment of expenses from that estate.

Thus, upon an individual’s death, his or her property immediately vests in the beneficiaries named in his or her will, if any. This principal of immediate vesting allows the beneficiaries to divide the estate, subject to any creditor claims, as they may agree and enter into a family settlement agreement to that effect. The family settlement agreement may result in a formal administration or provide a means to avoid it altogether. See *Estate of Hodges*, 725 S.W.2d at 267.

A family agreement by parties who have interests in the decedent’s estate are typically seen where the parties are trying to avoid litigation costs associated with a will contest. Two elements must be addressed in a family settlement agreement. Interested parties must agree (i) to not probate the will; and, (ii) to the disposition of the estate property.

A sample family settlement agreement and sample beneficiary distribution agreement are attached as Exhibits F & G to this outline.

2. Parties to Agreement

Logic dictates that all persons affected by a controversy should be joined as parties in pending litigation and a resulting settlement. Parties to the agreement must include those with interests under the will. However, parties whose interests are not changed or affected by the agreement need not sign. Minors or incompetents who are beneficiaries under the will must be represented by guardians. See *Shepherd v. Ledford*, 962 S.W.2d 28 (Tex. 1998) (holding family settlement agreement is an alternative method of administration in Texas and is a favorite of the law).

Not all persons, however, have standing to intervene or object to a settlement agreement. A discussion of the parties who should be joined in or who have standing to challenge the settlement of probate, trust, and guardianship litigation follows.

a. Necessary Parties

Every person having a “pecuniary” interest in the estate should be joined as a party to the settlement agreement. Generally, this includes all:

- a decedent’s heirs at law, to the extent a will contest has been or may be filed which could result in the decedent dying intestate, see *Leon v. Keith*, 733 S.W.2d 372 (Tex. App. – Waco 1987, writ ref’d n.r.e.); and
- all persons who are or may be beneficiaries of the estate under a
probated or alleged will, see *Manning v. Sammons*, 418 S.W.2d 362, 367 (Tex.Civ.App. – Fort Worth 1967, writ ref’d n.r.e.).

It is not necessary, however, for beneficiaries of the estate to be made parties to the agreement if their interest will not be affected by it. *See Fore v. McFadden*, 276 S.W.2d 327 (Tex.Civ.App. – Texarkana 1925, writ dis’m). Note, the Texas Attorney General’s office should be a party to any pending settlement of an estate involving a charity’s interest. *See* TEX. PROB. CODE ANN. § 128A (Vernon 2003 & Supp. 2008); TEX. PROP. CODE ANN. § 123.001 et seq. (Vernon 2003 & Supp. 2008).

b. Proper Parties

In addition to “necessary” parties, a settling party should consider whether there are any other persons that should be joined as a party to the agreement to avoid a future challenge to the terms of the agreement. A settling fiduciary should also consider including all persons whose interest may be affected by the agreement as parties to the agreement to avoid claims against the fiduciary in the future.

All persons who may have a potential claim under a prior will or the heirship statutes should be joined as a party, if possible. If they are not joined as a party, the settling parties should include some mechanism in the agreement to establish the beneficiaries or heirs of the estate. For example, a will should be probated subject to the settlement agreement to preclude an excluded heir from seeking an heirship in the future. Alternatively, an heirship judgment should be entered and the probate of any alleged will denied to avoid a party moving to probate such a will at a later date.

c. Persons Without Standing to Contest Settlement

Not every person “interested” in an estate has standing to contest or object to a settlement agreement. Standing is generally contingent on the person having a “pecuniary interest” affected by the probate or defeat of a will. *See In re Estate of Hodges*, 725 S.W.2d 265 (Tex. App. – Amarillo 1986, writ ref’d n.r.e.); *Biddy v. Jones*, 475 S.W.2d 322 (Tex.Civ.App. – Amarillo 1971, no writ); *Logan v. Thomason*, 202 S.W.2d 212 (Tex. 1947). Texas courts here held that the following individuals lack standing to oppose a family settlement agreement.

(1) Named Executor

The person appointed as executor of the estate lacks standing to object to a family settlement agreement. *See In re Estate of Hodges*, 725 S.W.2d at 268 (right to compensation as executor not pecuniary interest in estate); *Biddy*, 475 S.W.2d at 323 (agreement not to probate binding on named executor not party to agreement).

(2) Temporary Administrator

A temporary administrator of an estate has no justiciable interest in either the admission to or denial of a will to probate. *See Aaronson v. Silver*, 304 S.W.2d 218, 220 (Tex.Civ.App. – Austin 1957, writ ref’d n.r.e.).

(3) Creditor

A creditor lacks standing if the payment of his claim is not affected by the settlement of the contest to the admission or denial of the probate of the will. *See Logan*, 202 S.W.2d at 212. But, a creditor may have standing to contest the suitability of a proposed personal representative. *See* TEX. PROB. CODE ANN. §§ 3(r), 10 (Vernon 2003 & Supp. 2008); *see also, Allison v. F.D.I.C.*,.
861 S.W.2d 7, 10 (Tex.App.—El Paso 1993, writ dism’d by agreement).

3. Consideration
The avoidance of a will contest constitutes adequate consideration to support the contractual aspects of a family settlement agreement.

4. Court Approval
Court approval of a family settlement agreement must be sought in the following situations:

- When the will has been probated and the intent is to overturn the probated will;
- When a minor whose guardian is also an interested party;
- When there are unknown remaindermen as interested parties; and
- If the settlement agreement modifies or terminates a testamentary or other irrevocable trust.

5. Enforcement
As previously discussed, settlement agreements are highly favored by Texas courts. See discussion, supra. A settlement agreement will not be disturbed because of ordinary mistake of law or fact and will be upheld when all parties have the same knowledge or a means to obtain the same knowledge provided there is no fraud, misrepresentation, concealment, or other inequitable conduct. See Crossley v. Staley, 988 S.W.2d 791 (Tex. App.–Amarillo 1999, mand. denied).

Furthermore, the unilateral mistake of law of the party to a settlement agreement is not grounds to void the agreement. See Crossley at 796 citing Atkins v. Womble, 300 S.W.2d 688, 703 (Tex.Civ.App. – Dallas 1957, writ ref’d n.r.e.).

a. Legally Enforceable
The issue whether an agreement is binding or legally enforceable is a question of law. See Montanaro, 946 S.W.2d 428, 430 (citing Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768, 814 (Tex. App. – Houston [1st Dist.] 1987, writ ref’d n.r.e.), cert. dism’d, 485 U.S. 994, 108 S.Ct. 1305, 99 L.Ed.2d 686 (1988); Huffco Petroleum Corp. v. Trunkline Gas Co., 769 S.W.2d 672, 674 (Tex. App. – Houston [14th Dist.] 1989, writ denied); Southwestern States Oil & Gas Co. v. Sovereign Resources, Inc., 365 S.W.2d 417, 419 (Tex.Civ.App.– Dallas 1963, writ ref’d n.r.e.). Therefore, unless there is ambiguity or the surrounding facts and circumstances demonstrate a factual issue as to the settlement agreement, the issue whether the agreement fails for lack of an essential term is a question of law to be determined by the court. See Browning v. Holloway, 620 S.W.2d 611, 615 (Tex.Civ.App. – Dallas 1981, writ ref’d n.r.e.).

In doing so, the court may consider evidence of the facts and circumstances surrounding its execution. See Montanaro, 946 S.W.2d at 430 citing Sun Oil Co. v. Madeley, 626 S.W.2d 726, 731 (Tex. 1981). When the evidence shows the parties intended to enter into a settlement agreement, courts must enforce the agreement. See Montanaro, 946 S.W.2d at 430 citing TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.003, 154.071 (Vernon 1997); Matter of Ames, 860 S.W.2d at 592. In reaching its determination, the court will decide whether all the essential terms were included in settlement agreement and all conditions precedent to the enforcement of the agreement have occurred.

An ambiguous agreement, however, creates an unresolved issue of fact. The party challenging the agreement may be entitled to a jury trial on any unresolved fact issues. For example, in Martin v. Black, 909...
S.W.2d at 196, the court considered whether a term sheet reached at mediation and signed by all parties was an enforceable settlement agreement. At issue was the final term which provided that “the parties’ understandings are subject to securing documentation satisfactory to the parties.” Id. at 194. The court held that a question of fact existed regarding whether the parties intended the execution of formal documentation to be a condition precedent to the formation of a contract or a memorialization of an existing contract. Id. citing Foreca, S.A. v. GRD Development Co. Inc., 758 S.W.2d 744, 746 (Tex. 1988).

But when no fact issue exists, the court may find as a matter of law that the agreement is enforceable notwithstanding the fact that the agreement contemplated circulation of final settlement documentation. See Hardman v. Dault, 2 S.W.3d 378 (Tex. App. – San Antonio 1999, no pet.) (parties’ agreement not “subject to” execution of subsequent documents).

b. Breach of Contract

A party to a written settlement agreement may seek to enforce the agreement under general contract law. This right applies to both Rule 11 agreements, see Stevens v. Snyder, 874 S.W.2d at 243, and mediation agreements, see Cadle Co. v. Castle, 913 S.W.2d 627, 630 (Tex. App. – Dallas 1995, writ denied). At trial, the plaintiff must be prepared to prove: “(1) a contract existed between the parties; (2) the contract created duties; (3) the defendant breached a material duty under the contract; and (4) the plaintiff sustained damage.” Id. at 631 citing Snyder v. Eanes Indep. Sch. Dist., 860 S.W.2d 692, 695 (Tex. App. – Austin 1993, writ denied).

The party seeking to enforce the agreement will typically bring suit to enforce the contract alleging breach of contract or seeking specific performance. See Stevens, 874 S.W.2d at 243. The original petition should contain a short statement of the cause of action sufficient to provide fair notice of the claim, including a statement regarding the contractual relationship between the parties and the substance of the settlement agreement. See Id. at 631 citing Air & Pump Co. v. Almaquer, 609 S.W.2d 309, 313 (Tex.Civ.App. – Corpus Christi 1980, no writ); 14 TEX. JUR. 3D Contracts § 338 (1981). Defenses to a breach of contract suit may include (i) lack of capacity, (ii) denial of execution, (iii) lack of consideration, (iv) usury, (v) condition precedent, (vi) accord and satisfaction, (vii) duress, (viii) fraud, (ix) illegality, and (x) satisfaction and accord. See Id. at 631.

Each party is entitled to pretrial discovery. When no material issue of fact exists, a party is entitled to summary judgment. If an issue of material fact exists, a party may request a jury trial. See Id. at 631 citing Trinity Universal Ins. Co. v. Ponsford Bros., 423 S.W.2d 571, 575 (Tex. 1968). To preserve the right to a jury trial, the litigant must timely request a jury trial and preserve his record. See Ashmore v. Smith, 2004 WL 1171717 (Tex.App.—Austin 2004, n.p.h.) (memorandum opinion) (party waived right to jury trial on enforcement of contract because he only sought jury trial on original underlying issues and not on validity of agreement).

c. Contempt of Court

The court may render an agreed judgment on a settlement agreement. See TEX. CIV. PRAC. & REM CODE ANN. § 154.071 (Vernon 1997). The entry of an enforceable agreed judgment requires (i) the continued consent of all parties at the time the judgment is rendered, and (ii) the entry of an agreed judgment which literally complies with the terms of the settlement agreement.
Any party may revoke their consent prior to the time the court renders judgment. See S&A Restaurant Corp. v. Leal, 892 S.W.2d 855 (Tex. 1995) citing Quintero v. Jim Walter Homes, Inc., 654 S.W.2d 442, 444 (Tex. 1983); Samples Exterminators v. Samples, 640 S.W.2d 873, 874-75 (Tex. 1982). It is important to recognize the distinction between the approval of a settlement and the rendering of a judgment. See S&A Restaurant, 892 S.W.2d at 858. In S&A Restaurant, the Texas Supreme Court found that the approval of a settlement agreement does not constitute the entry, or rendering, of a judgment and, thus, a party to the agreement could revoke their consent and preclude the entry of an agreed judgment. Id. at 858; but see Reppert, 943 S.W.2d at 174 (oral pronouncement that court “accepted and approved” agreement and made “it a judgment of the court” renders judgment). The entry of an agreed judgment after a party revokes their consent is void. Id. at 857 citing Samples, 640 S.W.2d at 875.

Further, the proposed judgment must “literally comply with the terms of the agreement.” See Tinney v. Willingham, 897 S.W.2d 543 (Tex. App. – Fort Worth 1995, no writ) citing Wyss v. Bookman, 235 S.W.2d 567, 569 (Tex. Comm’n App. 1921, holding approved); Vickery v. American Youth Camps, Inc., 532 S.W.2d 292 (Tex. 1976). Failure to meet this requirement renders the judgment unenforceable. See Tinney, 897 S.W.2d at 544 citing Vickery, 532 S.W.2d at 292.

d. Statute of Limitation

As a general rule, a party to a settlement agreement has four (4) years to seek to set aside the agreement on the basis of fraud or otherwise. See Johnston v. Barnes, 71 S.W.2d 164, 165 (Tex. App. – Houston [14th Dist.] 1986, no writ); see also Helen Wils, STATUTES OF LIMITATION IN PROBATE AND TRUST LITIGATION, SBOT 23rd Adv. Est. Plan. & Prob. Course (1999).

E. Application For Order Of No Administration

1. Overview

This proceeding is found in Texas Probate Code Sections 139 through 142. Note, this formal ancillary probate procedure should not be confused with a Court’s finding of no necessity for administration pursuant to Section 89A (muniment of title) or Section 48 (determination of heirship proceeding). See discussion, supra and infra.

2. Requirements

The requirements of an application of no administration are:

- Decedent is survived by a spouse or minor child;
- The value of the estate, exclusive of homestead and exempt property, cannot exceed the amount of the family allowance;
- The application must include the names of the heirs or devisees, a list of creditors and known claims, a description of real and personal property, its value and mortgage thereon; and
- A prayer for the Court to establish a family allowance.

And, due to SB 699, it appears that the application should also include the last 3 digits of the applicant’s social security number and driver’s license if the application will be filed in a non-statutory probate court.

3. Hearing and Order Upon Application

The court may hear the application for order of no administration with or without notice. If the court finds that the facts
contained in the application are true and that
the expenses of last illness, funeral charges,
and expenses of the proceeding have been
paid or secured, the court shall set a family
allowance and if the entire assets of the
estate, not including homestead and exempt
property, are exhausted as a result, shall
order that no administration be had of the
estate and assign to the surviving spouse and
minor children the entire estate. TEX. PROB.
CODE ANN. § 140 (Vernon 2003 & Supp.
2008).

4. Effect of Order
The order of no administration
constitutes sufficient legal authority to all
persons owing money, having custody of
property, or acting as registrar or transfer
agent of any estate property, and to persons
purchasing from or otherwise dealing with
the estate, for payment or transfer to persons
described in the order as entitled to receive
the estate without administration. These
persons shall also be entitled to enforce
their right to payment or transfer by suit.
TEX. PROB. CODE ANN. § 141 (Vernon 2003

5. Proceeding To Revoke Order
Within one year after the entry of an
order of no administration, any interested
person may file an application to revoke the
order by alleging that (i) other property has
been discovered, (ii) property belonging to
the estate was not included in the
application for no administration, or (iii)
the property included in the application was
incorrectly valued resulting in the situation
that the total value of the estate as adjusted
would exceed the amount necessary to
justify the court in ordering no
administration. Upon proof of the
allegations, the court shall revoke the order
of no administration.

If there is a contest to the value of the
property, the court may appoint two

F. Summary Proceedings For Estate
1. Overview
This alternative is available pursuant to
Texas Probate Code Section 143 when:

- An inventory, appraisement and list
  of claims has been filed; and
- The estate, exclusive of homestead,
exempt property and family
  allowance, does not exceed claims
  in the first four classes.

2. Application & Order
After application, the personal
representative shall upon order of the Court
pay claims in the order provided and file a
final account. On approval of the final
account, the personal representative is
discharged and the administration closed.

III. PRE-PROBATE MATTERS
A. Overview
Because there is essentially a two-week
waiting period before a will can be admitted
to probate or a personal representative
approved, there is occasionally a need to act
quickly before the posting period has passed
to appoint a personal representative. These
proceedings are generally limited in scope,
time, and only utilized in limited
circumstances.

B. Funeral Arrangements
1. Written Directions
Although the will may not have been
admitted to probate, a review of the
decedent’s will should be made to determine
whether the decedent’s intent was expressed
relating to burial instructions. See TEX.
HEALTH & SAFETY CODE ANN. §711.02(g)
(Vernon 1998). A temporary administrator
is not usually necessary to make funeral arrangements. A determination should be made as to whether the decedent appointed an agent to control disposition of remains to arrange for his or her funeral arrangements. TEX. HEALTH & SAFETY CODE ANN. § 711.002(b) (Vernon 1998). If so, the agent designated in the form will have priority in arranging the funeral.

2. Persons Having Statutory Right to Make Burial Instructions

Texas Health and Safety Code Section 711.002(a) lists the individuals with the right to make burial arrangements including cremation and interment. The following persons are listed in the statute, in descending order, as having priority:

- Person designated in a writing signed by the decedent;
- Decedent’s surviving spouse;
- Any of the decedent’s adult children;
- Either of the decedent’s parents;
- Any of the decedent’s adult siblings; otherwise
- The person of closest kinship to the decedent (according to the intestacy statutes).

3. Payment of Funeral Expenses and Filing Fees

Texas Probate Code Section 77 provides a means to file an emergency application to obtain funds from decedent’s assets to pay for the expenses related to the funeral. The court may order a person, financial institution, or other entity to pay to the funeral home an amount not to exceed $5,000 from the assets of decedent’s estate for funeral expenses. See TEX. PROB. CODE ANN. § 113(a) (Vernon 2003 & Supp. 2008).

4. Opening Safe Deposit Box

Wills and legal documents are commonly stored in safe deposit boxes. Texas Probate Code Section 36B, et seq., provides the procedures for opening such boxes to assist in locating the will, burial instructions, insurance policies payable on death, or other important documents of decedent.

a. Without Court Order

Financial institutions may permit the following individuals to examine the box or documents following the death of the owner of the box:

- The decedent’s surviving spouse;
- Decedent’s parents;
- An adult descendant of the decedent;
- A person named as executor in a copy of a will that appears to be valid.


If a will is found, the institution or person may deliver it to (i) the clerk of the court, or (ii) the person named as executor in the will. The institution or person is required to retain a copy of the document appearing to be a will for four (4) years after the date of its release. See TEX. PROB. CODE ANN. § 36E (Vernon 2003 & Supp. 2008).

If a burial contract is discovered, the institution or person may release the original burial contract to the person who requested the examination of the box. The original of a life insurance contract may be released to the named beneficiary under the policy.

b. With Court Order

An application can be filed with a court having probate jurisdiction seeking an order authorizing the examination of a decedent’s
safe deposit box. See TEX. PROB. CODE ANN. § 36B (Vernon 2003 & Supp. 2008). The court may appoint a “court representative” to examine the safe deposit box or instruments in the presence of (i) the judge or her agent, and (ii) the person or representative of a financial institution with possession or control of the safe deposit box or documents. Id. The court may authorize the court representative to take possession of (i) decedent’s will, (ii) any burial contracts, and (iii) any life insurance policies payable on decedent’s death. Id. at § 36C(a). If allowed to take possession, the court representative must deliver (i) the will to the clerk of the court, (ii) the burial contract to the person designated by the judge, and (iii) any life insurance policies to the beneficiaries named therein. Id. at § 36C(b).

C. Procedure to Appoint Temporary Administrator

1. Overview
A temporary administration may be sought when the interest of a decedent’s estate requires the immediate appointment of a personal representative. For example, appointment may be sought to prevent waste or secure assets.

2. Who is the Applicant
Any “interested person” may apply for the appointment of a temporary administrator. See TEX. PROB. CODE ANN. § 76 (Vernon 2003 & Supp. 2008). Interested persons include not only heirs, devisees, and spouses, but also creditors or any others with a property right in, or claim against, the estate being administered. See TEX. PROB. CODE ANN. § 3(r) (Vernon 2003 & Supp. 2008).

3. Application
A verified application must be filed with the court and meet the requirements listed in Section 131A(b) of the Texas Probate Code. If the decedent died testate, the application must also incorporate all of the information required by Section 81 of the Texas Probate Code. If the decedent died intestate, the application must incorporate all of the information required by Section 82 of the Texas Probate Code.

The application must be verified and contain an affidavit stating:

- the name, address, and interest of the applicant and, due to SB 699, the last 3 digits of the applicant’s social security number and driver’s license if the application will be filed in a non-statutory probate court;
- facts showing the immediate necessity for the appointment of a temporary administrator;
- the temporary administrator’s requested powers and duties;
- a statement that the applicant is entitled to letters of temporary administration and is not disqualified by law from serving as a temporary administrator; and
- a general description of the decedent’s property.


A form of an Application for Appointment of Temporary Administrator is attached as Exhibit H to the outline.

4. Requesting Powers of Temporary Administrator
The purpose behind the appointment of a temporary administrator is to preserve the status quo of the estate until it can be delivered into the control of the permanent administrator. Nelson v. Neal, 787 S.W.2d 343, 346 (Tex. 1990). Thus a temporary administrator has the limited powers
specifically conferred upon him in the order of appointment. The powers requested generally directly relate to the necessity for appointment but can include all the powers of a dependent administrator.

At a minimum, the applicant should consider seeking sufficient powers to address the needs of the estate pending the appointment of a permanent representative. These may include the power:

- To preserve and protect the property of the decedent’s estate;
- To arrange and pay for the funeral;
- To search for and take possession of all testamentary and trust documents executed by decedent prior to his death;
- To open estate bank accounts as necessary;
- To secure decedent’s residence and take possession of his personal property, including, but not limited to the personal property located in the residence;
- To collect, receive and deposit all money, accounts (including bank accounts), rent, claims, and causes of action owing to decedent, held by the estate, or subject to administration in the estate;
- To file all necessary federal and state tax returns due by the decedent and the decedent’s estate, and to pay all taxes due;
- To take possession of all papers, books, documents, instruments, files, records, accounts, canceled checks, receipts, bank statements, and all other matters in writing of every kind which are reasonably necessary in his judgment for the proper performance of his duties and to carrying out the orders of the court; and/or
- To accept service and represent the decedent’s interest in any lawsuit by or against the decedent, including settlement of the suit, subject to approval of the court.

5. Hearing
As the appointment of a temporary administrator is ex parte, a formal hearing is not required. But a hearing must be held within fifteen (15) days if requested by an interested person. See TEX. PROB. CODE ANN. § 131(3)(i) (Vernon 2003 & Supp. 2008).

6. Suitability of a Temporary Administrator
A court’s determination of a temporary administrator’s suitability is reviewed based on an “abuse of discretion” standard. Olguin v. Jungman, 931 S.W.2d 607, 610 (Tex. App.—San Antonio 1996, no writ); Kay v. Sandler, 704 S.W.2d 430, 433 (Tex. App.—Houston [14th Dist.] 1985, writ ref’d n.r.e.). A court abuses its discretion if its decision to appoint a temporary administrator is arbitrary, unreasonable, and without reference to guiding principles. Mercedes-Benz Credit Corp. v. Rhyne, 925 S.W.2d 664, 666 (Tex. 1996). It is of no consequence that any other court would decide the issue differently so long as the matter to be decided is within the discretion of the court. Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 242 (Tex. 1985).

What makes a person unsuitable? Neither the Texas Probate Code nor the courts have attempted to define the meaning of unsuitability. Boyles v. Gresham, 309 S.W.2d 50, 53-54 (Tex. 1958). Instead, the courts have focused on the facts presented in each case. Id.; Olgin, 931 S.W.2d at 610. In looking at those facts, the court is granted broad discretion in determining whether an individual is “suitable” to serve as an
executor or administrator. *Kay*, 704 S.W.2d at 433. The proponent of the will in a will contest is not disqualified, as a matter of law, from serving as temporary administrator, nor would his appointment as such constitute an abuse of the trial court’s discretion. *Mulry v. Grimes*, 280 S.W.2d 350, 352 (Tex.Civ.App.—Waco 1955, no writ).

**IV. UNDERTAKING PROBATE ESTATE ADMINISTRATION**

**A. Initial Information and Considerations**

1. **Locating the Will**

As soon as practicable after the death of a testator, a diligent search should be made for the decedent’s will. If the attorney who drafted the will is known, he should be contacted to see if he is holding the will in safekeeping. If not, check the decedent’s safe deposit box, discussed *supra*, and the clerk of the county court. The original of the will should be obtained as soon as possible. A copy can be probated in the case of a lost will which cannot be produced in Court. TEX. PROB. CODE ANN. §§ 81(b) and 85 (Vernon 2003 & Supp. 2008). When the will is obtained, determine what proof will be necessary to have the will admitted to probate. This will depend on whether the will is a holographic or a typewritten will, whether it is a copy, and whether it is self-proved pursuant to Section 59 of the Texas Probate Code. If the will does not appear to be self-proved, then it will be necessary to find out more information regarding the identity and location of the witnesses. If the witnesses to the will cannot be located, you will need two disinterested witnesses who can prove up the decedent’s handwriting.

Consider the definition of a will in reviewing the decedent’s papers. Section 3(ff) defines a will to include a codicil, a testamentary instrument that merely appoints an executor or guardian, which directs how property may not be disposed of, or revokes another will. Section 58 clarifies that if a person dies partially intestate, a document which purports to disinherit a person would be effective as to the intestate share. You can now probate a document which says “I hereby disinherit (name) for all purposes.”

2. **Funeral Arrangements**

The decedent’s wishes should be respected if they are known but do not have to be carried out if they are unreasonable or financially burdensome. Unfortunately, often the decedent’s wishes are expressed only in the will, which might not be discovered or located before disposition of the body must occur. Obviously, such instructions cannot be binding.

Typically, the surviving spouse will make funeral arrangements. These are often made before the lawyer becomes involved. To the extent that input is requested, however, there are a few matters an attorney may want to pass along to the surviving spouse or family. For example, the surviving spouse should ask for an itemized written statement of the products and services that have been selected and the price for each item before any contract is signed. The family is entitled to such a statement under the FTC’s Funeral Rule. They should look over that list and decide whether there are any products or services that they do not want. Unless the statement says that a particular product or service is required by state law or by the cemetery (e.g., the cemetery may require a grave liner), the family does not have to purchase it. Under Texas law, the decedent’s estate, and not the surviving spouse personally, is liable for the costs of the funeral. The spouse or other family member making funeral arrangements should check whether the contract purports to make them responsible for paying funeral expenses if the
decedent’s estate does not have enough money.

Funeral expenses are given priority when an estate has limited assets. Under the Texas Probate Code, the first $15,000 in funeral expenses must be paid before any other claims. Funeral expenses in excess of $15,000 are to be paid in the same manner as other unsecured debts of the estate. Although the executor does not necessarily make the funeral arrangements, he or she is responsible for keeping track of the expenses and paying the bills from the estate’s assets. All reasonable funeral expenses are payable from the estate. If a relative or friend pays the funeral director, he or she will be entitled to reimbursement from the estate. Generally, funeral expenses include all costs for preparation, transport and burial of the body; costs of conducting memorial and burial services, including any traditional meal for family and friends; and costs of travel, meals, and lodging for the person who is in charge of making arrangements.

3. Death Certificates

At the time funeral arrangements are being made, it is a good idea to order a number of certified copies of the death certificate from the funeral home. Most people start with five or ten. These certificates may also be obtained from the county department of vital statistics. The executor may need an original death certificate in order to transfer stock certificates and other assets, to obtain insurance proceeds and death benefits, to gain access to safe deposit boxes, to complete tax returns, and for numerous other reasons.

As Executor of the estate, you will be required to file a United States Estate (and Generation-Skipping Transfer) Tax Return (Form 706) and a Texas Inheritance Tax Return (Form 17-106) on or before [nine months after the date of death]. Any estate or inheritance taxes due must be paid from estate funds at that time. You have agreed to retain our firm, and we will assist you in preparing these returns. In addition, you will be required to file a U.S. Fiduciary Income Tax Return (Form 1041) on behalf of the estate for any year in which the estate receives any taxable income or gross receipts in excess of $600.00. This return is due four and one-half

Examples of information which can be obtained from the death certificate include: (1) date of death; (2) place of death; (3) the place of residence; (4) date of birth; and (5) place of birth.

4. Secure Home

It is advisable to secure the decedent’s home in some manner. Sadly, burglars look at funeral notices to find out when people will be away from home.

5. Determining Responsibilities

It is not unusual for both a CPA and an attorney to be involved in the process of doing the tax compliance work for an estate. To avoid any possible misunderstanding, the retained probate attorney should confirm the scope of his responsibilities after the initial meeting, preferably by written engagement letter. This letter, in addition to setting out ethical issues regarding the representation (such as potential conflicts of interest between the fiduciary and the beneficiaries and confidentiality issues), should expressly set forth the agreement regarding the responsibilities of the various professionals. It might provide, for example:
months after the estate’s year-end. The estate may elect to use a fiscal or calendar year end. This election is usually made on the estate’s first income tax return. You will also be required to file a final U.S. Income Tax Return (From 1040) on behalf of the decedent. This return will be due on April 15, 20[xx]. It is our understanding and agreement that your accountants, [name of accounting firm], will assist you in preparing and filing any income tax returns that are required to be filed on behalf of the estate or the decedent, and that we are not being retained to prepare or file these returns.

6. Determine Residence and Domicile of Decedent
The will must be filed for probate in the county of the domicile of the decedent if he had a fixed place of domicile or in the county where his principal property was located when he died if he had no fixed place of domicile. TEX. PROB. CODE ANN. § 6 (Vernon 2003 & Supp. 2008).

7. Obtain Overview of the Assets and the Debts of the Estate
The determination of the nature of the assets and debts of an estate is important to determine whether the will should be probated as a muniment of title requiring no administration or whether a regular administration should be established. TEX. PROB. CODE ANN. § 89A (Vernon 2003 & Supp. 2008). It is also important to decide whether an ancillary administration in states other than Texas will be necessary. At this time, it is a good idea to also determine whether or not the estate may be insolvent. An estate which will clearly be insolvent should not necessarily be established as an independent administration but possibly should be opened as a dependent administration under the control of a probate court or a county court. Section 145(r) of the Texas Probate Code permits the named independent executor to resign and not be excluded from being considered as a dependent representative under court control.

8. Information on Personal Representative and Beneficiaries
The names, addresses, and telephone numbers of the personal representative and beneficiaries should be obtained as soon as possible.

9. Witnesses
Once you have determined what type of testimony will be necessary to probate the will, identify which family member or close acquaintance of the decedent will serve as a witness to establish the proof of death before the Court. Consider whether more than one witness is necessary.

For example, an attorney may prove up the self-proving will in some counties if he is willing to swear to the facts regarding the decedent. But, a non-self-proved will generally requires additional witnesses. TEX. PROB. CODE ANN. § 59(b) (Vernon 2003 & Supp. 2008)(“a signature on a self-proving affidavit is considered a signature to the will if necessary to prove that the will was signed by the testator or witnesses, or both, but in that case, the will may not be considered a self-proved will”).

B. Advise Client of Client’s Fiduciary Duties & Potential Liability
The attorney for a proposed personal representative should explain to the potential fiduciary his or her powers, duties and potential liability prior to his or her appointment if possible. In these discussions, it is important to impress upon the new appointee the potential for being
sued as a result of their fiduciary appointment. It is also advisable to then follow up with a letter confirming these discussions. A sample letter to an executor is attached as Exhibit M.

V. PROBATE PROCEEDINGS

A. Independent Administration by Will

The types of administration of estates vary depending on whether there is a will and the status of the estate. A decedent can appoint, by his or her will, an independent executor and provide that such Executor shall act free from the control of the Court. TEX. PROB. CODE ANN. § 145(b) (Vernon 2003 & Supp. 2008). This means that there is no court participation in the administration of the estate other than the probate of the will, the initial appointment of the independent executor, the independent executor’s oath, notice to beneficiaries, notice to creditors, and the approval of an inventory, appraisal, and list of claims filed by the independent executor. TEX. PROB. CODE ANN. § 145 (Vernon 2003 & Supp. 2008). The vast majority of estates administered in Texas involve independent executors.

B. Probate of Will and Appointment of Administrator with Will Annexed

Sometimes a decedent leaves a will but fails to appoint an executor or all the appointed executors are deceased or no longer competent to serve. Alternatively, the decedent may have had his or her will drafted when the decedent lived in another state and the will does not clearly provide for independent administration is not clear. In those circumstances, it is possible to probate the will and appoint an independent administrator with will annexed. TEX. PROB. CODE ANN. § 178(b) (Vernon 2003 & Supp. 2008).

C. Appointment of Independent Administrator

This is an administration option in both testate and intestate estates. TEX. PROB. CODE ANN. § 145(c)-(e) (Vernon 2003 & Supp. 2008). When no executor is serving or when the executor is not an independent executor, or when the decedent dies intestate, all the beneficiaries or heirs of the estate can agree and petition the court for the appointment of an independent administrator. If the court grants this relief, the independent administrator will have the same freedom from court control as an independent executor.

Note, when the decedent died without a will, the court generally must determine the decedent’s heirs prior to appointing the independent administrator. It is possible to conduct the heirship and have an independent administrator appointed on the same day as long as the heirship is entered first.

D. The Probate of the Will

1. Application

An application to probate will and for issuance of letters testamentary should be filed with the county clerk. Section 81(a) of the Texas Probate Code sets out the contents of the application. An example is attached as Exhibit J to this outline.

2. Original Will and Codicil

If possible, the original of the will and any codicils should be attached to the application. But remember: Do not un staple original documents when copying or filing. Rather, they should be filed intact to avoid any claims of substitution or alteration.

If a copy of a will is to be probated, the application will require additional information and citation. Section 81(b) sets out the contents of an application for a written will not produced in court, and Section 85 gives the proof requirements for
a written will not produced in court. Section 128(b) also provides the proper notice requirements for a will not produced in Court. And when the application will be filed in a non-statutory probate court, it appears that the application should also include the last 3 digits of the applicant’s social security number and driver’s license.

Finally, prior to September 1, 2007, Texas recognized oral wills. But Sections 63 and 64 were revoked effective September 1, 2007 by HB 391. See Acts 2007, 80th Leg., HB 391.

3. Notice
Notice by posting is the type of notice required for the probate of a will. TEX. PROB. CODE ANN. § 128 (Vernon 2003 & Supp. 2008). When an application is filed, the clerk’s office will issue a receipt that will show the return date of the application. The return date is the date upon which notice by posting will be returned and therefore is the earliest date upon which a hearing to admit the will to probate can be held.

4. Testimony
Testimony for the witness(es) needs to be prepared since most courts do not have a court reporter for probate hearing. An example of testimony needed for a hearing on the admission of a self-proved will to probate is contained as part of the materials in this article. If the witnesses reside out of the subpoena range of the Court, the application may submit written interrogatories to the witnesses pursuant to the terms of Section 22 of the Texas Probate Code. Note that the original will may need to be withdrawn from the custody of the clerk so that the witness may testify from the original document.

5. Order
An order admitting the will to probate and authorizing issuance of letters testamentary also needs to be prepared. Some courts like them submitted in advance of the hearing; others accept it at the hearing. An example of an order admitting the will to probate is attached as Exhibit K to this outline.

If bond is not waived by the terms of the will or the court, the order appointing administrator or executor will need to set forth the amount of the bond. If a bond is posted, the amount will be set by the court and is usually based on the value of the personal property of the estate. The personal representative and the surety will each sign the bond (the form of which is found in Section 196 of the Texas Probate Code), and the court will have to approve it before Letters Testamentary or of Administration can issue.

6. Oath
An oath for any personal representative (executor or administrator) should also be prepared prior to the hearing. The provisions of the oath are found in Section 190 of the Texas Probate Code. Examples of the oath of the independent executor are attached as Exhibit L to this outline.

7. Letters Testamentary
Once the judge signs the appropriate order and the representative signs the oath (and both sign the bond, if applicable) and all are filed with the Court, it is possible to order letters testamentary or letters of administration the letters show the date on which the executor or administrator qualified and certify the authority of the executor or administrator to deal with the assets of the estate. The letters are extremely important in the administration of an estate, and a sufficient number of copies should be ordered to help transfer assets. Frequently, transfer agents and other
financial institutions will require recent letters testamentary or letters of administration. It is generally necessary to order Letters on a periodic basis so that a supply which is no more than sixty days old is on hand.

Note many courts provide a handout that lists the duties of the personal representative. Whether a handout is provided, the attorney should advise the client immediately of his or her duties and what is expected of a fiduciary. If your client is employing a certified public accountant, notify them of what is expected and confirm their agreement in writing to perform the tasks requested. See discussion supra.

E. Notice to Creditors

Section 294 of the Texas Probate Code requires all personal representatives, including independent executors, to publish a notice to creditors. This must be done within one month after receiving letters. TEX. PROB. CODE ANN. § 294(a) (Vernon 2003 & Supp. 2008). Proof of publication of the printed notice with the publisher’s affidavit must be filed with the court. TEX. PROB. CODE ANN. § 294(b) (Vernon 2003 & Supp. 2008).

In addition to a general notice to creditors, all secured creditors must be given separate written notice of the appointment of the personal representative within two months after the issuance of Letters if the personal representative has actual knowledge of the claim. TEX. PROB. CODE ANN. § 295(a) (Vernon 2003 & Supp. 2008). Notice shall be sent by certified mail, return receipt requested or registered mail. TEX. PROB. CODE ANN. § 295(b) (Vernon 2003 & Supp. 2008). A copy of the notice and a copy of the return receipt shall be filed with the court clerk. TEX. PROB. CODE ANN. § 295(c) (Vernon 2003 & Supp. 2008).

Section 294(a) provides instructions that notice be given in a manner selected by the personal representative. The choices for addressing the claim are: (1) to the representative; (2) in care of the representative’s attorney; or (3) to be addressed “representative, Estate of ___________ (naming the estate).

Finally, unsecured creditors may require notice depending on the type of administration involved. The personal representative may give permissive notice to any unsecured creditor having a money claim against the estate. The notice should expressly state that the creditors must present the claim within four months from the date of receipt of the notice or the claim is barred. TEX. PROB. CODE ANN. § 294(d), 298(a) (Vernon 2003 & Supp. 2008).

The notice must include: (1) the date of issuance of letters; (2) the address to which the claim may be presented; (3) an instruction of the personal representative’s choice that the claim be addressed to the attorney, the personal representative’s attorney, or “Representative, Estate of ___________.” TEX. PROB. CODE ANN. § 294(d) (Vernon 2003 & Supp. 2008).

One notice under Sections 294 and 295 is sufficient, even if a successor representative is later appointed. TEX. PROB. CODE ANN. § 296 (Vernon 2003 & Supp. 2008).

F. Notice to Beneficiaries

Effective September 1, 2007, Section 128A of the Texas Probate Code was amended to require the personal representative to give notice to all beneficiaries within 60 days after a will has been admitted to probate unless one of three exceptions apply. An affidavit or certificate must be filed with the court within 90 days confirming notice was given or explaining why it was not. The new Section is attached as Exhibit A to this paper.
G. Notice to Certain Charities

If a state, governmental, or charitable organization is named in a will as a devisee, notice to the entity must be given within 30 days after the date the will is admitted to probate. TEX. PROB. CODE ANN. § 128A(b) (Vernon 2003 & Supp. 2008).

H. Inventory and List of Claims

An Inventory and List of Claims must be filed 90 days from the date of the personal representative’s appointment. See discussion infra.

In any estate in which a Federal estate tax return will need to be filed (a taxable estate), it is advisable to apply to the court for authority to extend the due date of the Inventory, Appraisement and List of Claims. Without such an extension, the Inventory and List of Claims will be due 90 days after the qualification of the personal representative of the estate.

The extra time is often useful since much of the same information required on the inventory will be used on the tax return. As a general rule, most courts are willing to extend the time to file the inventory until shortly after the due date for the Federal estate tax return.

I. Ancillary Probate

1. Texas

If there is real property located in counties other than the county of original probate, certified copies of the will and order admitting the will to probate should be filed in the Deed Records of that county and all counties in Texas where the decedent owned property. This will help clarify the chain of title for future disposition.

2. Other States

An ancillary probate is only necessary if a Texas decedent dies owning real property (including minerals) in another state. Each state has its own system of probate, and it will be necessary to determine what type of probate procedure is involved. Some states like Texas have a simplified ancillary probate procedure which allows mere recording of authenticated copies of the will and the order admitting the will to probate suffice to transfer title. TEX. PROB. CODE ANN. §§ 95-99 (Vernon 2003 & Supp. 2008). Other states, however, require a court proceeding, and it is necessary to retain local counsel to ensure that the ancillary probate of the decedent’s will is handled correctly.

In any situation in which an ancillary probate is required and an administration of the non-Texas property will also be required, the personal representative should ascertain that he or she is capable of acting in that jurisdiction. For example, some states do not allow corporate fiduciaries from other states to serve as personal representatives in that state, and a local administrator will have to be appointed. Also, some financial institutions will not qualify as a personal representative in states where they are not doing business.

VI. THE APPLICANT, APPLICATION, CITATION, HEARING, AND ORDER

A. Applicant

An executor named in a will or any person “interested in the estate” may make the application. See TEX. PROB. CODE ANN. § 3(r), 76 (Vernon 2003 & Supp. 2008). The application may also be made by one on behalf of another. See Lancaster & Wallace v. Sexton, 245 S.W. 958 (Tex.Civ.App. 1922, writ ref’d).

1. Preferences

Section 77 of the Texas Probate Code stipulates the order of persons qualified to seek and act as the estate’s representative and grants the court the discretion to appoint where there are applicants of equal level.
The order of preference is in declining order as follows:

- person named in the Decedent’s will;
- surviving spouse;
- principal beneficiary;
- any beneficiary;
- next of kin;
- creditor of the decedent;
- person of good character who applies for the position; and
- any other person not disqualified under §78 of the Code.


2. Disqualification

An incapacitated person, a convicted felon, a non-resident with no appointed resident agent, a corporation not authorized to act in the state as a fiduciary, or any person found by the court to be unsuitable will be disqualified from accepting an appointment as a representative. TEX. PROB. CODE ANN. § 78 (Vernon 2003 & Supp. 2008). The court may also exercise its discretion in determining the person to be appointed as a representative. See Kay v. Sandier, 704 S.W.2d 430 (Tex. App.—Houston [14th Dist.] 1985 ref’d n.r.e). Bryan v. Blue, 724 S.W.2d 400 (Tex. App.—Waco 1986, no writ).

B. Application

1. Intestate

Where the decedent dies intestate, the application will include those facts specified under Section 82 of the Texas Probate Code. And, due to SB 699, it should also include the last 3 digits of the applicant’s social security number and driver’s license if the application will be filed in a non-statutory probate court.

2. Will Annexed

Where the decedent dies with a will but dependent administration is appropriate, the application should contain those additional facts required under Section 81 of the Texas Probate Code. And, due to SB 699, it should also include the last 3 digits of the applicant’s social security number and driver’s license if the application will be filed in a non-statutory probate court.

3. Comment

The application should always specify in the pleadings, as well as in the prayer, whether the applicant is seeking an administration or administration with will annexed.

C. Citation

The purpose of citation is to establish the court’s jurisdiction over all interested persons and to charge such persons with notice of the proceeding. See Hirshfeld v. Brown, 30 S.W. 962 (Tex.Civ.App. 1895, writ ref’d); Heavey v. Castles, 12 S.W.2d 615 (Tex.Civ.App.—Eastland 1928, writ ref’d); Hilburn v. Jennings, 698 S.W.2d 99 (Tex. 1985).

1. Administration With and Without Wills

Service of citation for these proceedings is required to be by posting. TEX. PROB. CODE ANN. § 128(a) (Vernon 2003 & Supp. 2008).

2. Lost Wills

Service of citation is to be upon all heirs by personal service or publication. TEX. PROB. CODE ANN. § 128(b) (Vernon 2003 & Supp. 2008).

3. Court Requirements

Where the Texas Probate Code does not specifically require citation or notice, then it is within the court’s discretion to
determine whether notice will be given and the form, manner of service, and method of return that will be required. TEX. PROB. CODE ANN. § 33(a)-(b) (Vernon 2003 & Supp. 2008).

D. Hearing

1. Time
   No hearing may be held on any application until citation has been returned. TEX. PROB. CODE ANN. § 128(c) (Vernon 2003 & Supp. 2008). Thus, a hearing will not be scheduled until after the first Monday following ten (10) days from the date of posting, personal service, or publication. See TEX. PROB. CODE ANN. § 33(f), (g) (Vernon 2003 & Supp. 2008).

2. Facts
   The applicant must prove to the court’s satisfaction by live, sworn testimony all of the appropriate facts required under Sections 88 and 194(3) of the Texas Probate Code.

3. Testimony
   All testimony provided at the hearing must be committed to writing and subscribed and sworn to in open court. See TEX. PROB. CODE ANN. § 87 (Vernon 2003 & Supp. 2008). See discussion supra.

4. Appraisers
   Effective June 17, 2005, the court may appoint appraisers upon a showing of good cause. See TEX. PROB. CODE ANN. § 248 (Vernon 2003 & Supp. 2008). The appointment may be made on the court’s own motion or on the motion of any interested party. Should good cause arise during the administration, the interested person can subsequently submit to the court an application and set it for hearing.

E. Order

   At the hearing, the court should be presented with an order that grants Letters Testamentary or Administration to the applicant (or other named person) and contains the additional requirements of Section 181 of the Texas Probate Code. It is important that the order specify whether the representative was appointed either as administrator or administrator with will annexed.

F. Contest

   The Texas Probate Code permits any person to oppose an application for administration by filing a written contest at any time before the original application is granted. Note, due to SB 699, it should also include the last 3 digits of the contestant’s social security number and driver’s license if the contest will be filed in a non-statutory probate court.

   After a trial of such contest, letters will be granted to the person whom the court determines best entitled thereto without further notice. See TEX. PROB. CODE ANN. § 179 (Vernon 2003 & Supp. 2008); Williams v. White, 105 S.W.2d 1105 (Tex.Civ.App.—Waco 1937, no writ).

VII. DECIDING ON DEPENDENT ADMINISTRATION

A. Purpose

   The primary purposes of a dependent administration are to collect and preserve the estate’s assets, make payment of debts in order of their priority and to the extent of any assets; and finally, to distribute those assets which remain to the proper heirs, devisees, or legatees of the decedent. See Atkinson, Wills Sec. 103 (2d ed. 1953); Runnels v. Kownslar, 27 Tex. 528 (1864); Houston v. Mayes’ Estate, 66 Tex. 297, 17 S.W. 729 (1886); Palfrey v. Harborth, 158 S.W.2d 326 (Tex.Civ.App.—San Antonio 1942, writ ref’d).
B. Limitations

No administration can be undertaken after four years from the decedent’s death unless there exists a necessity to receive or recover funds or property due to the decedent’s estate. TEX. PROB. CODE ANN. §§ 73(a) and 74 (Vernon 2003 & Supp. 2008). But the appointment of an administrator in violation of this mandate will not make such appointment void or subject to a collateral attack. See Nelson v. Bridge, 98 Tex. 523, 86 S.W. 7 (1905); Roberts v. Roberts, 165 S.W.2d 122 (Tex.Civ.App.—Amarillo 1942, writ ref’d w.o.m.).

C. Restrictions On Representatives

A dependent administration is an extremely restrictive method for administering a decedent’s estate. The estate representative is at all times subject to direct court control and supervision. Court approval must be obtained before any sales of property, payment of debts, execution of contracts, settlement of lawsuits, expenditure of funds, distribution of assets, or any acts which obligate the estate. See TEX. PROB. CODE ANN. § 4 (Vernon 2003 & Supp. 2008). The representative must submit and maintain a bond, file and obtain the approval of annual accounts as well as a final accounting. See TEX. PROB. CODE ANN. § 36 (Vernon 2003 & Supp. 2008). Because of these extensive controls, this proceeding becomes a very cumbersome and expensive undertaking.

D. Permitting Administration

The Probate Code establishes specific instances when a dependent administration will be permitted and mandates that there be both pleadings and proof to establish that a necessity exists to open an estate or there must be before the court a request for a partition of the estate.

1. Administration Appropriate

Section 178(b) of the Texas Probate Code indicates an administration is appropriate in either of the following five instances:

- When a person dies intestate, or
- When no executor is named in a will, or
- When an executor predeceases a testator and no alternate is named, or
- When an executor fails or neglects to qualify within twenty (20) days of the will’s admission to probate, or
- When the executor neglects to present the will for probate within 30 days after death.

2. Necessity

It is presumed that a necessity to probate a will exists when there are two or more unpaid debts of the estate regardless of their size. See Ragsdale v. Prather, 132 S.W.2d 625 (Tex.Civ.App. 1939, writ ref’d). But even where debts are found to exist, there must also be some assets in the estate upon which they can attach. See Cohn v. Saenz, 211 S.W. 492 (Tex.Civ.App. 1919, writ ref’d). It is also required that the facts which indicate necessity not only be alleged but must be proved. See Galveston, H. & S.A.R. Co. v. Blankfield, 253 S.W. 956 (Tex.Civ.App. 1923, no writ).

E. Annual Accounting

1. Duty to File

The representative of a dependent estate has a duty to file a sworn, written report with the court within twelve (12) months from the date of qualification and at the end of each twelve (12) month period thereafter until the estate is closed. See TEX. PROB. CODE ANN. §§ 399(a)-(b) (Vernon 2003 & Supp. 2008).
2. **Accounting Contents**

   Section 399 of the Texas Probate Code contains specific detailed instructions as to what information and proof must be presented. The annual account should contain:

   - A list and description of all property subsequently discovered by the representative but not listed on the inventory;
   - Any changes in the estate’s property;
   - A complete report of all receipts of the estate by source and nature, and separated by principal and income;
   - A detailed list of all individual disbursements supported by vouchers or evidence acceptable to the court;
   - A complete, accurate, and detailed description of all property being administered, its condition and use; if rented, the amount and terms;
   - All cash balances identified by depository name, account number, type, and amount. A separate report from each bank or depository must be attached confirming the accounts by number, amount, and whether held under safekeeping;
   - A detailed description of all personal property sufficient to identify the property, its location, its value, and any income it produced;
   - A statement that all tax returns due during the accounting period have been filed, taxes paid, the amount of the taxes, the date paid, and the governmental entity to which the taxes were paid;
   - If taxes are delinquent, a description of the reason for the delinquency;
   - A statement that all required bond premiums of the accounting period were paid;
   - Proof of the existence of all assets; and
   - A detailed listing of all claims owed by the estate and unpaid.

3. **Court Review and Approval**

   The annual account must remain on file with the clerk for ten (10) days before it can be presented to the court for consideration. TEX. PROB. CODE ANN. § 401(b) (Vernon 2003 & Supp. 2008).

   a. Audit

      The court must review the accounting to determine its correctness, whether the representative has properly handled the affairs of the estate, the need for an increase in bond, the assets remaining in the estate, and claims owed by the estate and unpaid.

   b. Approval

      Upon satisfaction by the court that the accounting is correct, an order of approval will be entered. PROB. CODE ANN. § 401(e) (Vernon 2003 & Supp. 2008). This order is not final as to allowances or expenses and may be reviewed and corrected in the final account. See Walling v. Hubbard, 389 S.W.2d 581 (Tex.Civ.App.—Houston [1st Dist] 1965, dis’m w.o.j.); Anderson v. Armstrong, 132 Tex. 122, 120 S.W.2d 444 (1938), adhered to 132 Tex. 132, 132 S.W.2d 393 (1939).

   c. Payment of Claims

      Upon approval of the accounting, the court must act on the payment of claims against the estate. In solvent estates, the court can order immediate payment at any time. In insolvent estates, a pro rata payment will be ordered by the court only after an annual account has been approved. See TEX. PROB. CODE ANN. §§ 401(e)(1), (2) (Vernon 2003 & Supp. 2008).
4. Failure to File
Should the representative fail to file any annual account, he or she is subject to a show cause proceeding instituted either by the court or by any interested person which will require the preparation of an accounting of the estate. See Tex. Prob. Code Ann. § 402 (Vernon 2003 & Supp. 2008). If the representative still fails to comply, the court can remove and fine the representative up to $1,000. See Tex. Prob. Code Ann. § 403 (Vernon 2003 & Supp. 2008).

5. Choosing Dependent Administration
While a dependent administration is not usually one of first choice, there are factors which may be present to make this selection appropriate. Thus, where an estate is insolvent or potentially insolvent or where substantial conflicts exist between the named executor and the heirs or legatees, a selection of dependent administration may be advisable. The primary purpose in making this choice is to use the court’s supervision powers as a shield for the appointed representative.

VIII. LETTERS, OATH, BOND AND SAFEKEEPING

A. Letters
1. Issuance

2. Qualification
A representative has qualified when the oath has been taken, the bond has been made and approved by the court, and both have been filed with the clerk. See Tex. Prob. Code Ann. § 189 (Vernon 2003 & Supp. 2008).

3. Time
The representative must qualify within 20 days following the date of the order that granted the letters or before the order has been revoked. Tex. Prob. Code Ann. § 192 (Vernon 2003 & Supp. 2008).

B. Oath
The Code specifies the content of the representative’s oath, permits it to be taken before a notary, and requires that it be filed with the court. See Tex. Prob. Code Ann. § 190 (Vernon 2003 & Supp. 2008).

C. Bond
Unless the Texas Probate Code specifically eliminates the need for a bond or the representative is a corporate fiduciary, it is solely within the court’s discretion to determine whether a bond will be required. See Tex. Prob. Code Ann. §§ 194, 195(b) (Vernon 2003 & Supp. 2008).

1. Sureties

2. Bond Amount
3. New Bonds
The court may require a new bond to be obtained in any of the instances listed under Texas Probate Code Section 203. The bond may be increased or decreased by application and order or upon the court’s own motion. New bonds will usually be required upon the filing of an inventory, annual accounting, or when information is provided that additional liquid assets are to be received by the representative. See TEX. PROB. CODE ANN. § 205 (Vernon 2003 & Supp. 2008). Effective September 1, 2007, the Judge may require a new bond at anytime. See TEX. PROB. CODE ANN. §§ 205 and 206.

D. Safekeeping Agreement
The Texas Probate Code permits the bond to be reduced by placing assets of the estate on deposit with appropriate corporate depositories. See TEX. PROB. CODE ANN. §§ 194(4)-(6) (Vernon 2003 & Supp. 2008). The appropriate method is to file a written application advising the court of the specific assets that are requested to be deposited, obtain a court order approving the deposit, and then return a receipt and agreement of the depository.

IX. OVERVIEW OF DUTIES & LIABILITIES
A. Duties and Powers
The estate’s representative is a statutory agent of the court and any rights, powers, or duties that apply are not only established by the laws of this state but also by common law principles.

1. General Duties
It is the duty of the representative upon appointment to take reasonable care of all estate property as a prudent man would do except for extraordinary casualties. See TEX. PROB. CODE ANN. § 230 (Vernon 2003 & Supp. 2008); Roberts v. Stewart, 80 Tex. 379, 15 S.W. 1108 (1891); Radford v. Coker, 519 S.W.2d 934 (Tex.Civ.App.—Waco 1975, writ ref’d n.r.e.). The representative’s duty is to collect all assets, claims, debts due, personal property, records, books, title papers, and business papers of the estate and hold them for delivery to those entitled when the estate is closed. See TEX. PROB. CODE ANN. §§ 5, 232, and 233 (Vernon 2003 & Supp. 2008); Atlantic Ins. Co. v. Fulfs, 417 S.W.2d 302 (Tex.Civ.App.—Fort Worth, 1967, writ ref’d n.r.e.).

2. General Powers
To accomplish those duties, the Probate Code confers upon the representative the power and authority to incur expenses and to expend funds for the maintenance and upkeep of all assets. See Dyer v. Winston, 77 S.W. 227 (Tex.Civ.App. 1903, no writ). But, the only debts that may be created against the estate are those provided by law. See Price v. McIvre, 25 Tex. 769 (1860); McMahan & Co. v. Harbert’s Admrs., 35 Tex. 451 (1871).

3. Court Supervised Powers
Section 234(a) of the Texas Probate Code specifies that those powers that significantly impact the estate may only be exercised with prior court approval. The representative is, however, permitted to exercise certain limited powers without court supervision. See TEX. PROB. CODE ANN. § 234(b) (Vernon 2003 & Supp. 2008).

4. Power to Operate a Business
The court may permit the representative, upon application and order, to operate a farm, ranch, factory, or other business of the decedent within certain limitations. See TEX. PROB. CODE ANN. §§ 238, 238A (Vernon 2003 & Supp. 2008);
R. E. Stafford & Co. v. Dunovant’s Estate, 81 S.W. 65 (Tex.Civ.App. 1904, no writ); Altgeit v. Alamo Nat. Bank, 98 Tex. 252, 83 S.W. 6 (1904). Texas Probate Code Section 238 was amended, effective September 1, 2007, to help facilitate and provide notice to those parties who would be interested in the business operation. See TEX. PROB. CODE ANN. § 238. Section 238 now provides that the court, after notice of all interested parties and a hearing, may authorize the personal representative to operate a decedent’s business if (i) the decedent’s will does not direct the business to be sold, (ii) the sale is not necessary, and (iii) the continued operations is in the estate’s best interest. See Id. Section 238 now also provides a number of powers that can be granted in conjunction with the operations of the business and addresses the requirements of a possible sale. See Id.

5. **Power to Borrow**

A representative with prior court approval may borrow money and pledge real or personal property of the estate in order to pay taxes, expenses of administration, approved claims, or renew and extend valid existing liens against estate assets. TEX. PROB. CODE ANN. §§ 329(a)(1)-(4) (Vernon 2003 & Supp. 2008).

a. **Application**

A sworn application must be filed containing the specific reasons for such request. See TEX. PROB. CODE ANN. § 329(b) (Vernon 2003 & Supp. 2008).

b. **Citation**

The clerk must issue citation by posting upon all interested persons to appear and show cause why an application to borrow funds or renew liens on behalf of the estate should not be granted. TEX. PROB. CODE ANN. § 329(b) (Vernon 2003 & Supp. 2008).

c. **Order**

The Court upon hearing and presentment of satisfactory evidence shall issue an order specifying the terms, conditions, and authority that is to be granted. The loan term may not exceed three (3) years from the date of the original letters but may be extended for one (1) additional year without new citation or notice. See TEX. PROB. CODE ANN. § 329(c) (Vernon 2003 & Supp. 2008).

**B. Liability**


**X. COLLECTION OF ASSETS**

Collection of the assets of an estate usually involves three steps. First, there is the identification of the assets for estate tax purposes and for purposes of preparing the Inventory. Second, there is a determination of whether the assets are community property or separate property. Third, there is the physical collection, segregation, and distribution of the estate assets.

**A. Community Property vs. Separate Property**

If a person dies while married, one of the most important determinations to be made during the administration of the estate is whether the assets are the separate
property of the decedent or the community property of the decedent and his or her spouse. There is a presumption that all property acquired by either of the spouses during marriage is community property. See TEX. FAM. CODE ANN. § 5.02 (Vernon 2003 & Supp. 2008). Separate property consists of property a person owned prior to marriage or property acquired by gift or inheritance. If an asset is community property, it will be owned in equal undivided interests between the estate and the surviving spouse. The personal representative should only take possession of the separate property of a decedent, the community property owned by both spouses to the extent the decedent had the right to control that property during lifetime, and the community property which was under the joint control of the spouses. TEX. PROB. CODE ANN. § 177(b) (Vernon 2003 & Supp. 2008).

As soon as practicable after the probate of the will, the surviving spouse should receive his or her share of the assets. After an inventory has been filed, the surviving spouse may apply to the court for a partition of the community property. TEX. PROB. CODE ANN. § 385(a) (Vernon 2003 & Supp. 2008).

The determination of whether assets are community property or separate property can be an extremely complex matter and is often a source of controversy during the administration of an estate. The determination also becomes complex when the spouses have commingled property and heirs and/or creditors are alleging that certain property is separate or community.

B. Inventory, Appraisal and List of Claims

The inventory, appraisal and list of claims (“inventory”) is usually due 90 days after the personal representative is qualified. TEX. PROB. CODE ANN. §§ 250, 251 (Vernon 2003 & Supp. 2008). This is a listing of the assets (not debts) of the estate. An example of a form which can be used for preparing the inventory is attached as an Exhibit to this outline.

1. Probate Assets Only

An inventory lists probate assets and their value only; it does not list non-probate assets. For example, life insurance or employee benefits payable to a named beneficiary other than the decedent’s estate and other assets which do not pass through the estate or under the will of the decedent should not appear on the inventory.

2. Liabilities

An inventory does not list liabilities of the decedent or claims against the estate. It only lists claims which can be asserted by the estate. An example would be a note payable to the Estate. Thus, a note payable by the Estate would not be listed on the Inventory.
3. **Claims**  
As part of the inventory, appraisement and list of claims, the personal representative should describe any claims the estate has (contingent or otherwise) against any person. For example, a personal injury or wrongful death suit can be an unliquidated claim of the estate.

4. **Appraiser Certification**  
If an appraiser was appointed by the Court, the appraiser should sign the inventory and swear before a notary public that the value placed on the inventory for the property which he or she appraised is accurate.

5. **Affidavit of Personal Representative**  
The inventory must be signed and sworn to by the personal representative with a statement as required by Section 252 of the Texas Probate Code.

6. **Separate and Community Property**  
The inventory must specify what portion of the estate is separate property and what portion of the estate is community property. TEX. PROB. CODE ANN. § 250(b) (Vernon 2003 & Supp. 2008).

C. **Inventory Assets and Associated Problems**

1. **Real Estate**  
With respect to collection of real estate, there are some important issues to keep in mind.

   a. **Obtain Exact Legal Descriptions**  
   As soon as possible, obtain an exact legal description of the property. Although a precise legal description will not be necessary for tax purposes, it will be necessary for purposes of transferring the title at a later date or properly distributing the property. It is helpful to have a copy of the deed vesting title in the decedent in order to properly transfer title out of the decedent.

   b. **Identify Homestead Property**  
   A determination must be made as to whether any real estate represents the homestead of a surviving spouse or surviving minor children. In such an instance, the respective rights and obligations (i.e., taxes, maintenance, utilities, insurance, etc.) of the personal representative and the owner of the homestead right must be carefully considered. The surviving spouse and minor children are entitled to occupy the homestead regardless of whether the homestead is the decedent’s separate property or community property of the decedent and the surviving spouse. TEX. PROB. CODE ANN. § 282 (Vernon 2003 & Supp. 2008).

   c. **Obtain Insurance & Pay Taxes**  
   Also, insurance on improved real property should be maintained and ad valorem taxes kept current. The personal representative also needs to keep the property secured and insured. The personal representative should be made aware of the possible liability to the representative from injuries incurred on the property or other damage to the property if insurance is not maintained. For example, property with a swimming pool poses a liability problem particularly if the house or building is vacant.

   d. **Review Farm and Ranch Property**  
   Any ongoing farming or ranching business connected with real estate should be carefully reviewed. If the business was primarily run as an income tax shelter for the decedent, it may no longer be appropriate for the personal representative to continue that business since the income tax situation of the estate may be far
different from that of the decedent and the operation costs of the decedent and the operation costs of such a business may be inordinately large. On the other hand, the personal representative must be careful to preserve the value of any farming or ranching business either by continuing to manage the business or by liquidating it in an orderly and timely fashion.

e. Review Mineral Interests

Mineral interests cause unique problems during estate administration. In the case of producing royalty interests, oil and gas companies will frequently suspend royalty checks when it is discovered that a royalty owner is deceased. New division orders should be requested from and prepared by the oil and gas companies and signed by the personal representatives so that the personal representative can begin receiving all payments. Each company has its own requirements before it will authorize a new division order; however, those requirements usually include obtaining certified copies of the will and the order admitting the will to probate as well as Letters Testamentary and a Death Certificate. A new division order affects only the relationship between the estate and the oil company. It does not transfer title to the underlying property interest which will not be transferred to the ultimate beneficiary until the estate assets are distributed.

2. Stocks and Bonds

The personal representative should acquire the original stock and bond certificates. With respect to re-registration of the securities, however, a personal representative has two choices. First, he or she may choose to have the securities re-registered in the name of the personal representative and later repeat the re-registration process in order to distribute the securities to the beneficiaries. Alternatively, the securities may remain in the name of the decedent but in the possession of the personal representative or in a brokerage house until such time as the securities are to be sold or distributed to the beneficiaries. Which choice is made depends on the circumstances including the anticipated length of administration, whether the stocks are likely to be sold prior to distribution to the beneficiaries, and the stability of the stock.

a. Re-Registering Securities

In order to re-register securities, each transfer agent will usually request the following:

- Original of stock certificate or bond;
- Certified copy of the will and the Order Admitting the will to Probate;
- Death certificate;
- Letters Testamentary;
- Affidavit of Domicile in which the personal representative will swear that the decedent was a resident of a certain jurisdiction at the time of decedent’s death; and
- Stock power with signature of the personal representative guaranteed.

These materials should be sent to the stock transfer agent for the particular security. The stock transfer agent is named on the face of the stock certificate. Unfortunately, stock transfer agents are sometimes changed, and it is usually a good idea to make a telephone call prior to transmitting the materials to ensure that the stock transfer agent still remains the same. Almost any stockbroker will know the transfer agent of a particular stock. In any event, the above-listed documents should be sent by certified or registered mail.
b. Establishing Securities Account

In estates where there are many different stocks and bonds, the personal representative may establish an agency or brokerage account with a financial institution (i.e., an account with a securities brokerage house or a custody account with a bank). The securities can thus be placed in “street name” and can be sold or transferred to the beneficiaries merely by a letter of instructions from the personal representative. The personal representative should take the additional cost of this option versus the value of the stock into account when making the decision.

c. Obtaining CUSIP Numbers

The CUSIP identification numbers of each security can be obtained from the face of the certificate. In the case of securities which are not in the possession of the executor (for instance, securities may already be held in street name by a brokerage firm prior to decedent’s death), the CUSIP number should be obtained from the custodian of the security.

d. Partitioning Community Shares

If stock is community property, it is frequently advisable to have the stock divided and re-registered as soon as possible, with half of the shares being placed in the name of the personal representative and half of the shares placed in the name of the surviving spouse. The decision to do this will depend on the number of community debts outstanding. See discussion supra.

3. Cash & Notes

Cash is a fairly easy asset to collect. Notes can be a little more complicated. For purposes of preparing the tax returns and the inventory, the personal representative should obtain the style of the account, name and location of bank or other financial institution, account number, and type of account for each cash account of the decedent which was in existence on the date of death. Copies of all promissory notes should be obtained.

a. Establishing Estate Accounts

This can be done either by establishing a new estate account or by changing the name on the accounts previously held by the decedent. In the latter case, the personal representative should make sure that no other person continues to have the power to draw on the account. The personal representative should also file a Form SS-4 to obtain a taxpayer identification number since banks will require this number when estate accounts are created.

b. Watch FDIC Limits

The personal representative should be careful to remain within the FDIC and FSLIC insurance limitation on accounts. There can be personal liability to the representative for loss if the personal representative maintains more than an insured amount in a financial institution. It is the author’s opinion that an estate account holding a portion of decedent’s funds and a separate account in decedent’s name which holds funds which together total over $250,000 (assuming the new higher limits apply) in one institution does not protect the assets.

c. Identify Non-Probate Accounts

The personal representative needs to ensure that the accounts actually belong to the decedent and are not joint tenancy with right of survivorship accounts which belong to the surviving joint tenant. The wording of the documents creating the survivorship account is critical and should be carefully reviewed. Section 439(a) sets out the requirements for an account held as joint tenants with rights of survivorship.
(JTWROS). A JTWROS account must be signed by the party who dies and must contain language substantially similar to the form set out in Section 439(a). If a person claims an account is a JTWROS account, the personal representative should make sure the signature card is in compliance with Section 439(a).

d. Collect Notes

There may be notes which are payable to the order of the decedent. In that event, the maker must be given instructions, along with a copy of Letters, so that the maker continues making payments to the personal representative. The personal representative should secure the possession of the original promissory note.

e. Partitioning Community Shares

Community property interests of the surviving spouse can be paid out directly to that spouse and the interest of the decedent can be placed in the name of the personal representative. Again, this action will depend on the status of the debts of the community. See discussion supra.

4. Insurance

Unless insurance is made payable to the estate or the personal representative, it is usually not a probate asset. Sometimes the personal representative handles the collection of that asset for the beneficiary or helps instruct the beneficiary on how to go about obtaining the proceeds. The personal representative should be sure to get a Form 712 for each insurance policy. The Form 712 is prepared by the insurer and indicates the face value of the policy, the ownership of the policy, the beneficiary of the policy, and the net proceeds. The obtaining of the form is for the protection of the representative if challenged.

Since a will can apportion taxes to non-probate assets such as insurance proceeds, the personal representative and his or her attorney should read the will carefully to determine if insurance is to be used to help satisfy estate taxes. Tax apportionment when a will is silent has always been an issue of debate and confusion. Typically, the will controls the apportionment of taxes but sometimes the will is silent. When the will is silent, Section 322A of the Texas Probate Code controls. It provides that the personal representative is to charge each “person interested in the estate” a portion of the total estate tax which such portion is to represent a ratio of the value of that person’s interest to the total tax value of the estate.

When a community property policy is payable to the estate of the decedent, the surviving spouse is probably entitled to one-half of the proceeds. See, e.g., Salvato v. Volunteer State Life Insurance Co., 424 S.W.2d 1 (Tex.Civ.App.—Houston 1968, no writ). If the policy is payable to a third party, then the surviving spouse may be entitled to reimbursement for premiums paid from community property or to his or her community property interest in the policy. This depends on whether naming the beneficiary on the policy is considered a “fraud on the community” under Texas law and is a fairly complicated issue which will require careful analysis and study of the case law.

The personal representative should also ascertain whether the decedent owned an interest in any policy on the life of another. In general, this occurs when a community property policy is owned on the life of the surviving spouse. To the extent that the policy had a cash value at the time of the decedent’s death, this is considered to be an asset of his or her estate. The personal representative should obtain and complete Part II of a Form 712 for each such policy.
5. **Miscellaneous Assets**

The personal representative should obtain possession of the original title papers to cars, boats, and other vehicles which require title transfer. Insurance should be maintained on these assets until sold or distributed.

The personal representative should obtain an inventory of any safe deposit boxes in which the decedent had an interest and should examine all of the documents in the safe deposit boxes closely to determine whether they present clues to assets which have not otherwise been discovered. Many people maintain documents in their safe deposit boxes on assets which have long ago been sold or transferred.

6. **Employee Benefits**

The personal representative should work closely with the decedent’s employer to determine what benefits, if any, the estate is entitled to receive. In addition, the personal representative may also be the person who helps any named beneficiary of a non-probate employee benefit plan to obtain the proceeds.

7. **Debts**

The personal representative should make a list of all of the known obligations of the decedent as soon as possible. It is important to note that debts are not listed on the inventory. If it is determined that the estate is solvent, then an independent executor has the power and authority to pay debts as they come due and are presented. However, if there is any potential for insolvency, then the independent executor should consider holding up paying any debts and instead follow the order of priority for debts of the decedent set forth in Section 322 of the Texas Probate Code. Alternatively, the independent executor may wish to try to convert the administration into a dependent administration and therefore take advantage of the protection of the court in this regard. For example, if there is a contingent liability such as a personal injury suit pending against the decedent, a dependent estate would offer more protection in the procedure to obtain judgment.

**XI. CREDITORS AND CLAIMS**

A. **Notice**

The representative must furnish all creditors with notice of his or her appointment and qualification and advise them that their claims should be filed against the estate. See **TEX. PROB. CODE ANN. §§ 294 – 297 (Vernon 2003 & Supp. 2008).**

1. **Publication Notice**

All general creditors of an estate must be provided notice by publication within one month after issuance of letters of appointment. Publication notice is to be in any newspaper located in the county where such letters have been issued, or where no newspaper exists, then by posting. A copy of the publisher’s affidavit with the published notice must be filed with the clerk. See **TEX. PROB. CODE ANN. § 294 (Vernon 2003 & Supp. 2008).**

2. **Mail Notice**

Within two months after appointment, all secured, recorded lien creditors known to the estate representative are to be furnished notice by certified or registered mail. A copy of the such notice and the return receipt are to be filed with the clerk. See **TEX. PROB. CODE ANN. § 295 (Vernon 2003 & Supp. 2008).**

3. **Permissive Notice**

Any time before an administration is closed the personal representative may give notice to an unsecured creditor having a claim against the estate stating that the
creditor must present the claim within four (4) months after the date of receipt or the claim is barred if not already barred by the general statutes of limitation. TEX. PROB. CODE ANN. § 294(d) (Vernon 2003 & Supp. 2008).

4. Penalty
Where the representative fails to notify creditors both he or she and their sureties are liable for any damage suffered by such creditor unless notice was obtained by other means. See TEX. PROB. CODE ANN. § 297 (Vernon 2003 & Supp. 2008); Tiboldi v. Palms, 78 S.W. 726 (Tex.Civ.App. 1904), aff'd, 97 Tex. 414, 79 S.W. 23.

B. Presenting Claims
It is imperative that strict adherence to the statutory requirements for presentment of a claim be accomplished in order to obtain classification and payment either by approval or through suit. See TEX. PROB. CODE ANN. §§ 313, 314, 319 (Vernon 2003 & Supp. 2008).

1. Claim Form
Sections 301 through 304 of the Texas Probate Code establish the specific requirements for the claim form, its contents, and authentication.

2. Deposit of Claim
The claim may be deposited either with the representative or with the clerk. See TEX. PROB. CODE ANN. §§ 298(a), 308 (Vernon 2003 & Supp. 2008).

C. Approval and Rejection of Claims
1. The Representative’s Action
Whether the claim is presented to the representative or filed with the clerk, it is the representative who must approve or reject the claim within thirty days or it will be rejected by operation of law. See §§ 309 and 310; Cobb v. Norwood, 11 Tex. 556 (1854); Graham v. Vining, 1 Tex. 639 (1846). In order to approve the claim, the representative must satisfy himself or herself as to its legality and validity. See Green Machinery Co. v. Smithee, 474 S.W.2d 279 (Tex.Civ.App.—Amarillo 1971, no writ).

2. The Court’s Action
After the personal representative allows or disallows the claim, in whole or in part, the court either approves, in whole or in part, or rejects the claim and also classifies the claim. TEX. PROB. CODE ANN. 312(c) (Vernon 2003 & Supp. 2008). The court, however, cannot disapprove a claim which has been rejected—it has the right to hear only approved claims and any order rejecting a claim which the administrator has not approved is a nullity. Small v. Small, 434 S.W.2d 940, 942 (Tex.Civ.App.—Waco 1968, writ ref’d n.r.e.). Nor can the court approve a claim which was not presented to the administrator. Butler v. Summers, 253 S.W.2d 418 (Tex. 1952).

3. Suit on Rejected Claim Must be Filed Within 90 Days of Rejection
Counsel representing a creditor should check with the clerk’s office to ascertain whether a claim has been accepted or rejected. There is no provision in the Code for notification requirements to a creditor. “The statutes contemplate that a creditor will keep himself informed as to the status of his claim and take the steps required by law to reduce the same to judgment.” Russell v. Dobbs, 354 S.W.2d 373, 376 (Tex. 1962).

If a creditor does not file suit on a rejected claim within 90 days of rejection, the suit is barred. TEX. PROB. CODE ANN. § 313 (Vernon 2003 & Supp. 2008). The 90-day requirement was not suspended where the lawyer for the administratrix led the claimant to believe that the claim would be
accepted. Id. In State v. Estate of Brown, 802 S.W.2d 898 (Tex. App.—San Antonio 1991, no writ), the State Comptroller submitted a claim for sales and use taxes in excess of $400,000. The administratrix rejected the claim. The Comptroller then filed state tax liens and the administratrix filed a motion to release the tax liens on the basis that the liens were barred by limitations inasmuch as the Comptroller failed to file suit within the 90 day period permitted by Section 313 of the Texas Probate Code. The estate was not liable and the liens were ordered released. Id. at 899.

However, if a claimant fails to file suit within 90 days after rejection of a claim, all may not be lost. In Albiar v. Arguello, 612 S.W.2d 219 (Tex.Civ.App.—Eastland 1980, no writ), the holders of a promissory note filed a claim against the administrator of the estate co-maker of the note. The claim was rejected by operation of law and the holders of the note did not file suit within 90 days. Nevertheless, the administrator, the co-maker and husband of the decedent, was liable for the full amount of the note in his individual capacity.

a. Improperly Presented Claims

If a claim has been improperly presented, the 90-day statute of limitations is not activated. Boney v. Harris, 557 S.W.2d 376 (Tex.Civ.App.—Houston [1st Dist.] 1972, no writ) (where the affidavit is not in substantial compliance with the statute, 90 day limitations period could not run against a void claim). See also Small v. Small, supra at 942 (where a claimant presented a claim without proper verification, the transaction is a nullity and the administrator’s allowance has no effect whatsoever).

However, defects of form of the claim or insufficiency of exhibits are deemed waived unless the personal representative objects in writing and files the objection with the clerk within 30 days after the claim has been presented. TEX. PROB. CODE ANN. § 302 (Vernon 2003 & Supp. 2008). City of Houston v. Aguilar, 607 S.W.2d 310 (Tex.Civ.App.—Austin 1980, no writ).

b. Suits on Partially Rejected Claims

If the administrator partially allows the claim, the creditor has a choice: it may accept the amount allowed or file suit on the entire amount of the claim. Clads v. Newberry, 453 S.W.2d 243, 247 (Tex.Civ.App.—Fort Worth 1970, no writ).

D. Claims of the Personal Representative

1. Personal Representative’s Own Claims: 6 Months

The personal representative of a decedent’s estate shall file his own verified claim with the court granting letters within six months after the representative has qualified or the claim is barred. TEX. PROB. CODE ANN. § 317(a) (Vernon 2003 & Supp. 2008). It is not necessary for the personal representative to first present the claim to himself. For a personal representative to present a claim to himself would place “the personal representative . . . in the peculiar position of being required to file written objections to his own claim . . . .” Anderson v. Oden, 780 S.W.2d 463, 466 (Tex. App.—Texarkana 1989, no writ). The purpose of Section 317 is to prevent a personal representative from deciding on the propriety of his own claims against the estate and the representative’s contracts made on behalf of the estate. This avoids conflicts of interest. See, Ullrich v. Estate of Anderson, 740 S.W.2d 481, 483 (Tex. App.—Houston [1st Dist.] 1987, no writ). If the claim is filed within the required time, it is entered on the court’s claims docket and acted upon in the same manner as other claims. TEX. PROB. CODE ANN. § 317(b) (Vernon 2003 & Supp. 2008).
2. **Claims Procedure Inapplicable to Independent Administrators**

In all likelihood, Section 317 does not apply to independent executors although the statute refers to “personal representative,” which, under Section 3(aa), includes independent executors. TEX. PROB. CODE ANN. § 3(aa) (Vernon 2003 & Supp. 2008). Prior to the 1995 amendments, Section 313 referred to the claims of executors or administrators rather than personal representatives. See also, Deane v. Driscoll, 56 S.W. 503 (Tex.Civ.App.—San Antonio 1933, writ dism’d); and Kitchens v. Culhane, 398 S.W.2d 165, 166 (Tex.Civ.App.—San Antonio 1965, writ ref’d n.r.e.) (Section 317 inapplicable to independent administration).

3. **Expenses of Administration**

Claims accruing against the estate after letters have been granted are not governed by the claims procedures of § 294 et seq. TEX. PROB. CODE ANN. § 317(c) (Vernon 2003 & Supp. 2008). In Ullrich v. Anderson, supra, the claim of an accountant who provided accounting services to an estate was submitted to the probate court; the administrator had no authority to review the claim against the estate for which he had contracted and for which he could be personally liable.

4. **Child Support Claims**

The Texas Family Code was amended, effective September 1, 2007, to provide that child support claims survive death of the obligor unless the original order provides to the contrary. The claim is not considered liquidated and is a Class 4 claim.

E. **Claims of Secured Creditors**

Creditors having claims for money secured by real or personal property must be given notice by the personal representative within two months after the personal representative receives letters. TEX. PROB. CODE ANN. § 295 (Vernon 2003 & Supp. 2008). This provision applies to independent executors. TEX. PROB. CODE ANN. § 146(a) (Vernon 2003 & Supp. 2008).

If the personal representative later learns of the existence of other secured creditors, the personal representative must give notice to them within a reasonable time after learning of their existence. Id. The personal representative and the surety are liable for damages that result from a personal representative’s failure to give notice provided that the creditor did not otherwise have notice. TEX. PROB. CODE ANN. § 297 (Vernon 2003 & Supp. 2008).

In presenting its claim, the secured creditor needs to elect whether to have the claim treated as a matured secured claim to be paid in the due course of administration or as a preferred debt and lien against the specific property securing the debt to be paid in accordance with the terms of the contract. TEX. PROB. CODE ANN. § 306(a) (Vernon 2003 & Supp. 2008).

If the secured creditor does not present its claim within four months of its receipt of notice required under Section 295 or six months after letters were granted, whichever occurs later, he will be deemed to have elected preferred debt and lien status. If no election is made, the claim will be treated as a preferred debt and lien. TEX. PROB. CODE ANN. § 306 (Vernon 2003 & Supp. 2008).

As a preferred debt and lien creditor, the creditor may look only to the collateral for payment of the claim. Cessna Finance Corp. v. Morrison, 667 S.W.2d 580, 586 (Tex. App.—Houston [1st Dist.] 1984, no writ). If the collateral declines in value or is insufficient to pay the debt, the creditor is out of luck and cannot recover any deficiency as an unsecured creditor.

The court must approve or disapprove and classify any claim approved by the
representative that has been on file for ten days. TEX. PROB. CODE ANN. § 312(b) (Vernon 2003 & Supp. 2008). If the court is satisfied that the claim is valid and just, it will be approved and classified, otherwise additional evidence must be presented in order to obtain approval. See TEX. PROB. CODE ANN. §§ 312(b), (c) (Vernon 2003 & Supp. 2008). Disapproval by the court is final and appealable but does not bar another claim on the same account. See Furniture Dynamics, Inc. v. State of Hurley, 560 S.W.2d 486 (Tex.Civ.App.—Dallas 1977, no writ).

F. Classification and Payment

1. Classification of Claims

It is the duty of the court to classify all claims which have been approved either following presentment or by judgment. See TEX. PROB. CODE ANN. §§ 312(d), 313 (Vernon 2003 & Supp. 2008). All claims approved by the court are classed pursuant to TEX. PROB. CODE ANN. § 322 in the following order:

Class 1. Funeral and last illness expenses not to exceed $15,000. Any excess is classified as an unsecured claim. TEX. PROB. CODE ANN. § 146(a)(3); § 322.
Class 2. Administration expenses. TEX. PROB. CODE ANN. § 146(a)(3); § 322.
Class 3. Claims secured by a mortgage or other lien against specific property, including tax liens; Second mortgages. TEX. PROB. CODE ANN. § 146(a)(3); § 322.
Class 4. Claims for delinquent child support and accrued interest. TEX. PROB. CODE ANN. § 146(a)(3); § 322.
Class 5. Claims for taxes, penalties, and interest due the State of Texas. TEX. PROB. CODE ANN. § 146(a)(3); § 322.
Class 6. Claims for Texas Department of Corrections confinement. TEX. PROB. CODE ANN. § 146(a)(3); § 322.
Class 7. Claims for state medical assistance payments. TEX. PROB. CODE ANN. § 146(a)(3); § 322.
Class 8. All other claims.


2. Payment of Claims

The specific order for payment of claims by the representative and the method to obtain payment are governed by various sections of the Probate Code. See TEX. PROB. CODE ANN. §§ 319 and 320 (Vernon 2003 & Supp. 2008). In order to obtain payment of a claim, it must be presented before the estate is closed or at such earlier times as permitted by the Texas Probate Code, i.e., upon sale of mortgaged property or twelve months following the issuance of letters. See TEX. PROB. CODE ANN. §§ 318, 333 - 335, 401 (Vernon 2003 & Supp. 2008).

3. Quick Reference Table

The Honorable Russell Austin, Judge of Probate Court No. 1 of Harris County, Texas, has put together an excellent chart dealing with creditors’ claims. It is attached as an Exhibit to this paper.

XII. SALES AND LEASES

A. Nature and Purpose

A sale of estate assets under a court order is a judicial sale that acts upon the estate; therefore, a purchaser receives that title held by the decedent and such sale is not subject to collateral attack. See Lynch v. Baxter, 4 Tex. 431 (1849); Williams v. McDonald, 13 Tex. 322 (1855); Murchison v. White, 54 Tex. 78 (1880). The court may
order assets sold for any purpose specifically indicated by the Texas Probate Code or when the Court finds that a necessity for such sale exists. See §§ 331 and 341.

B. Property Subject to Sale

When a sale is necessary, advisable, or in the best interest of the estate, an application may be made to the court for a sale of the following assets:

- All perishable, wasting or deteriorating assets, or those assets that will constitute an expense or disadvantage to the estate must be promptly sold. Tex. Prob. Code Ann. § 333 (Vernon 2003 & Supp. 2008).
- Personal property, including crops and livestock, may be sold to pay administration expenses, funeral expenses, last illness expenses, allowances, or claims. But exempt property or property subject to specific legacies may not be sold. Tex. Prob. Code Ann. § 334 (Vernon 2003 & Supp. 2008).
- All property which cannot be partitioned among the heirs or paid in cash to the estate may be sold. See Tex. Prob. Code Ann. §§ 381 and 427 (Vernon 2003 & Supp. 2008).

C. Applicant

It is generally the personal representative who will make an application for a sale of estate property. However, where a representative neglects to apply for the sale of estate assets to pay charges or claims against the estate, then any interested person or a secured creditor may apply for a sale of estate assets. See Tex. Prob. Code Ann. §§ 334, 338 and 347 (Vernon 2003 & Supp. 2008).

D. Application


1. Contents

An application to sell property must be in writing, sufficiently describe the property or interest to be sold, contain a sworn detail statement of the present condition of the estate, and provide facts that show a necessity or advisability for the sale. See Tex. Prob. Code Ann. § 342 (Vernon 2003 & Supp. 2008); Gillenwaters v. Scott, 62 Tex. 670 (1884).

2. Citation


3. Hearing

Upon the filing of an application to sell property, the court may approve the sale without a hearing if the application is not
E. Negotiating the Sale

The sale of estate property can lead to future litigation if not carefully handled. Sales of property by personal representatives are generally complicated by the lack of personal knowledge of the personal representative, as seller, regarding the property’s condition. This may lead to claims of deceptive trade practices against the seller for failure to disclose defects, termites, or other conditions that may affect the value of the property. A discussion of some commonly encountered issues follows.

1. Listing Agreements

Personal representatives commonly retain a real estate broker to list and market estate property. Similar to any other contract executed by the personal representative, the listing agreement should be executed by the representative only in his or her fiduciary capacity. Furthermore, the personal representative should consider revising the listing agreement to protect the estate. For example, the listing agreement may be modified to provide as follows:

- The broker may not act as an intermediary agent but may only represent seller;
- The right to compel arbitration is subject to probate court approval;
- The brokers’ fees are subject to court approval;
- The property will be sold “as is”;
- The personal representative is exempt from providing a disclosure statement and will not execute one;
- The broker is not authorized to make any representations regarding the condition of the property other than to advise it is being sold as is;
- Title will be transferred by special or no warranty deed; and
- The personal representative would only sign the listing agreement in his or her representative capacity.

2. Avoiding DTPA Claims Relating to the Condition of the Property

A purchaser of real property can sue the seller under Texas’ Deceptive Trade Practices Act for engaging in false, misleading, or deceptive acts related to the sale. See Fernandez v. Schultz, 15 S.W.3d 648 (Tex. App.—Dallas 2000, no pet. history) (citing TEX. BUS. & COM. CODE ANN. § 17.50(a)(1) (Vernon 2003 & Supp. 2008). Claims are often made based on undisclosed conditions affecting the value of the property. The elements of a DTPA action for failure to disclose material information and misrepresentations are: (1) the plaintiff is a consumer; (2) the defendant engaged in false, misleading, or deceptive acts; and (3) these acts constituted a producing cause of the consumer's damages. See Doe v. Boys Clubs of Greater Dallas, Inc., 907 S.W.2d 472, 478 (Tex. 1995); see also TEX. BUS. & COM. CODE ANN. § 17.50(a)(1) (Vernon 2003 & Supp. 2008). Proof of the producing cause of the plaintiff's injury is essential for a recovery under the DTPA. Tex. Bus. And Com. Code Ann. § 17.50(a)(1). Producing cause is actual causation in fact. Prudential Insurance Company of America v. Jefferson Associates, Ltd., 896 S.W.2d 156, 161 (Tex. 1995). To show actual causation in fact requires proof that an act or omission was a substantial factor in bringing about the injury which would not have otherwise occurred. McClure v. Allied Stores of Texas, Inc., 608 S.W.2d 901, 903 (Tex. 1980). Therefore, a buyer will be entitled to recover only if there is some evidence to support each element of the cause of action.
Making appropriate disclosures and avoiding misrepresentations can be problematic when property is sold by a personal representative due to the fact that he or she may have limited knowledge of the property but the buyer assumes that the personal representative has knowledge of the property’s condition and defects. Misunderstandings and miscommunication have lead to personal representatives being sued for DTPA and having to defend against such actions. To avoid DTPA, the personal representative can take a few simple steps to reduce potential claims.

First, a personal representative should consider declining to execute a property disclosure statement generally required by sellers. Tex. Property Code Section 5.008(e) provides that the standard disclosure notice requirements do not apply to a transfer of property “by a fiduciary in the course of the administration of a decedent’s estate, guardianship, conservatorship, or trust.” TEX. PROB. CODE ANN. § 5.008(e) (Vernon 1995).

Furthermore, the personal representative should consider selling the property “as is.” As previously discussed, proof of causation is essential to a DTPA claim. By purchasing a property "as is," a buyer agrees to make his own evaluation of the bargain and to accept the risk that he could be wrong. See Prudential Ins. Co. of Am. v. Jefferson Assoc., Ltd., 896 S.W.2d 156, 161 (Tex. 1995). In Prudential, the Texas Supreme Court held that a buyer who agrees, freely and without fraudulent inducement, to purchase real estate "as is" cannot recover damages from the seller when the property is later discovered not to be in as good a condition as the buyer believed it was when he inspected it before the sale. Id. at 158. Even though Prudential involved the sale of commercial property, courts have found its analysis is equally applicable to an "as is" provision in a contract for the sale of residential property.

Therefore, based on the Prudential and subsequent decisions, personal representatives can substantially mitigate potential DTPA claims by selling the property “as is.” The “as is” language should be in both the earnest money contract and the deed. Note, the “as is” provisions of the earnest money contract should be drafted to survive closing and remain in effect.

3. Earnest Money Contract

Once a buyer is located, the parties typically enter into an earnest money contract similar to any other real estate sale. However, it is beneficial to make certain revisions to the standard earnest money contract to make allowance for the unique circumstances applicable to sales by a personal representative. Potential revisions may include:

- The contract is subject to court approval;
- The property is to be sold “as is”; 
- The property will be conveyed by special or no warranty deed;
- The personal representative will have no duty to repair the property after a casualty loss;
- The buyer cannot require specific performance of the real estate contract;
- The right to compel arbitration is subject to probate court approval;
- The buyer agrees that his or her damages will be limited to the return of his or her earnest money if the sale does not close;
- The seller is selling the property only in his or her capacity as personal representative and shall not be liable in his or her individual capacity; and
The closing date shall be extended to the extent necessary to allow the court to act on the Report of Sale and enter a decree confirming the sale.

Note that if a sale does not close, the personal representative must set aside the order confirming sale because it is a final order. See Vineyard v. Irvin, 855 S.W.2d 208 (Tex. App.—Corpus Christi 1993). Therefore, the order must be set aside by a motion for new trial within 30 days or by a bill of review within two (2) years.

4. Addressing Environmental Issues

The personal representative should not overlook potential liabilities of the decedent’s estate including, but not limited to, environmental issues. In the last ten (10) years, federal and state law continues to impose responsibility upon individuals to cure environmental contamination. Both the Comprehensive and Environmental Response Compensation and Liability Act (“CERCLA”) and the Texas Superfund equivalent require that individuals use due diligence to assess environmental contamination caused by business operations or that continue to exist on real property (regardless of whether the person was responsible for the contamination or not). Therefore, if the decedent was involved in a business which raises environmental concerns, one could argue that the personal representative must use the same due diligence to identify and redress such environmental considerations during their tenure as personal representative. Companies which have a tendency to involve environmental issues include dry cleaners, paint companies, cement manufacturers, chemical manufacturers, fertilizer companies, gas stations, auto shops including, but not limited to, repair, body work and paint.

Although a discussion of all the potential environmental concerns is beyond the scope of this outline, personal representatives should attempt to make a preliminary determination whether the decedent’s estate may be responsible for any environmental damage. Furthermore, if the personal representative intends to take an active role in the decedent’s business, either as a shareholder, officer, or director, the personal representative may be subjecting himself to personal liability for such actions. Generally, individuals who take an active role in a business can be responsible for environmental damage caused in the operation of such business. The courts generally look to all decision makers when assessing monetary responsibility, in whole or in part, for the decision which resolved in the environmental contamination. In recent years, personal representatives have often elected themselves in prominent positions in companies managed or controlled by the decedent prior to his or her death. Because of the potential liability, it is suggested that a personal representative only be elected in his or her capacity as personal representative of the estate. If possible, the personal representative should avoid electing him/herself individually into these roles to avoid personal liability. This limitation has become even more important since December of 1999 at which time the ten (10) year grace period in which to make reasonable efforts to cure environmental problems expired.

F. Order of Sale

The order of sale is evidence of the court’s finding that it was necessary, advisable, or advantageous to dispose of the property. Such order empowers the representative to make the sale on such terms and conditions as it may specify. See TEX. PROB. CODE ANN. § 346 (Vernon 2003
& Supp. 2008). The order will contain the following:

- A description of the property or interest in sufficient detail that it may be identified; and
- The manner of the sale (public or private). See TEX. PROB. CODE ANN. §§ 336, 349, 350 (Vernon 2003 & Supp. 2008); and
- The necessity, advisability, and purpose for the sale. See TEX. PROB. CODE ANN. §§ 333–336 (Vernon 2003 & Supp. 2008); and
- Any additional bond requirements when real property is sold. TEX. PROB. CODE ANN. § 354 (Vernon 2003 & Supp. 2008); and
- Provisions stating that the sale may be made and that a report thereof will be returned according to law; and
- Specification of all terms of the sale such as cash or credit. See TEX. PROB. CODE ANN. §§ 333, 337 and 348 (Vernon 2003 & Supp. 2008).

G. Report of Sale
The personal representative must file a report of sale within thirty days after the sale. See TEX. PROB. CODE ANN. § 353 (Vernon 2003 & Supp. 2008). The report must show the following:

- The date of the order of sale;
- Description of the property sold;
- The time and place of the sale;
- The name of the purchaser or purchasers;
- The amount for which the property or interest was sold; and
- Whether the purchaser is ready to comply with the order of Sale.

H. Confirmation of Sale
The court’s order confirming the sale immediately vests title in the purchaser for sales of personal property. The order for sales of real property authorizes the representative to execute proper deeds which convey the estate’s interest in the property. See TEX. PROB. CODE ANN. §§ 339, 355 and 356 (Vernon 2003 & Supp. 2008). A court has no power to confirm a sale where there was no prior order authorizing the sale. See Ball v. Collins, 5 S.W. 622 (Tex. 1887).

1. Time
A report of sale must remain on file for five days before it may be approved by the court. See TEX. PROB. CODE ANN. § 355 (Vernon 2003 & Supp. 2008).

2. Review
Before a sale may be confirmed, the court must review the report of sale and determine the adequacy of the representative’s bond, the fairness of the sales price, and whether the sale conforms to law. Only then may the court enter a decree which shows conformity with the Probate Code requirements and authorize the representative to make a conveyance of the property. See TEX. PROB. CODE ANN. §§ 355 and 357 (Vernon 2003 & Supp. 2008).

I. Leases and Renting
1. Minerals
The representative may, subject to the court’s control, enter into leases of real property for the purpose of exploring, developing, and producing oil, gas, metals and other minerals either at public or private sale. See TEX. PROB. CODE ANN. §§ 367, 368-9 (Vernon 2003 & Supp. 2008).

a. Application
The application to lease must describe the property and interest to be leased,
specify the reasons it should be leased, and where appropriate, describe the lease terms. See Tex. Prob. Code Ann. §§ 367(c)(1), 368(a) and 369(b)(1) (Vernon 2003 & Supp. 2008).

b. Notice
   Citation and service may be by publication, posting, or in some instances, no citation may be required. See Tex. Prob. Code Ann. §§ 367(c)(2)(b) and 369(b)(2) (Vernon 2003 & Supp. 2008).

c. Order
   The court, after a hearing and approval of the application, will enter an order specifying the court’s findings, terms and conditions of the lease, bond requirements, and authorizing execution of any lease agreements. See Tex. Prob. Code Ann. §§ 367(c)(5)-(7), 368(b), 369(b) (4) (Vernon 2003 & Supp. 2008).

2. Real and Personal Property

XIII. ADMINISTERING JOINT ASSETS

A. Community Property
   Where there exists a duly qualified personal representative of the estate, he or she is empowered to administer all community property which was under the deceased spouse’s sole or joint management and control at the date of death. See Tex. Prob. Code Ann. § 177(b) (Vernon 2003 & Supp. 2008). Chanowsky v. Friedman, 219 S.W.2d 501 (Tex. Civ. App.—Fort Worth 1949, writ ref’d n.r.e.). The representative must, therefore, inventory, bond, account, administer, and distribute such community subject to its being withdrawn from the administration. See Tex. Prob. Code Ann. § 385 (Vernon 2003 & Supp. 2008) (Partition of Community Property).

B. Tenants in Common
   A personal representative of the estate is empowered, where the decedent owned property in common with other persons, to the use and enjoyment of such property for the estate’s benefit in the same manner as the other common or joint owners would be entitled. See Tex. Prob. Code Ann. § 235 (Vernon 2003 & Supp. 2008); Gentry v. Marburger, 596 S.W.2d 201 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref’d n.r.e.). The representative has relatively the same duties and responsibilities regarding co-owned property as with community property. See Tex. Prob. Code Ann. §§ 235, 250(b) and 386 (Vernon 2003 & Supp. 2008).

XIV. REMOVAL AND COMPENSATION

A. Removal

1. Instituting
   The removal of a representative may be instituted either by the court on its own motion or by any interested person. Tex. Prob. Code Ann. § 222 (Vernon 2003 & Supp. 2008). A person who has no
interest in the estate may not bring this proceeding. See Greer v. Boykins' Estate, 82 S.W.2d 698 (Tex.Civ.App.—Beaumont 1935, no writ).

2. **Grounds**

   It is the specific basis that is being advanced for the representative’s removal that will establish the type of notice that must be provided.

a. **No Notice Required**

   No notice is required to remove the representative when the court finds that he or she has:

   - failed to timely qualify;
   - failed to return an Inventory;
   - failed to furnish a new bond;
   - leaves the state; or
   - or cannot be served with notice.

   See **TEX. PROB. CODE ANN. §§ 222(a)(1)—(5).**

b. **Notice Required**

   Notice must be furnished to the representative by personal service when sufficient grounds appear that he or she has:

   - misapplied, embezzled, or removed assets from the state;
   - failed to return any account required;
   - failed to obey an order from the court with proper jurisdiction;
   - is guilty of gross misconduct or mismanagement in the performance of any duties;
   - becomes incompetent, imprisoned or incapable of properly performing any duties of trust; or
   - fails within three years from the granting of letters to make final settlement unless the time for settlement is extended by the court.

   See **TEX. PROB. CODE ANN. § 222(b)(1)(6) (Vernon 2003 & Supp. 2008).**

c. **Additional Grounds**

   Additional grounds for removal may arise when:

   - The representative purchases a claim against the estate. See **TEX. PROB. CODE ANN. § 324 (Vernon 2003 & Supp. 2008);**
   - The representative fails to endorse his or her allowance or rejection upon a claim within thirty (30) days of its presentment. See **TEX. PROB. CODE ANN. § 310 (Vernon 2003 & Supp. 2008); or**
   - The representative fails to file a sworn statement of the condition of an estate within twenty (20) days after notice that a new bond or increased bond is to be required by the court or any interested person. See **TEX. PROB. CODE ANN. § 194(8)(e) (Vernon 2003 & Supp. 2008).**

3. **Procedure**

   No particular form is provided for an application to remove a representative. It appears, however, that at the very least the representative should be able to ascertain from the complaint, the nature of his or her alleged default. See **Perkins v. Wood, 63 Tex. 396 (1885).** An order of removal must state the cause for removal. If personal service was obtained, then all letters issued must be ordered returned otherwise all letters should be ordered canceled, and all assets in the hands of the representative must be ordered delivered to those persons entitled thereto or to a qualified successor. See **TEX. PROB. CODE ANN. § 222(c) (Vernon 2003 & Supp. 2008).**
4. Costs
When a representative is removed for cause, both he or she and their sureties are liable for all costs, expenses, and attorney fees relating to such removal or for obtaining compliance with the court orders and for all expenditures that have been made without authorization. See TEX. PROB. CODE ANN. § 245(a) (Vernon 2003 & Supp. 2008); Fillion v. Osborne, 585 S.W.2d 842 (Tex.Civ.App.—Houston [1st Dist] 1979, no writ).

B. Executor’s Commissions
The will should be read to determine whether it contains a clause setting forth the compensation of the personal representative. The personal representative may be entitled to a commission on certain funds received into and distributed out of the estate. TEX. PROB. CODE ANN. § 241 (Vernon 2003 & Supp. 2008). Even though the estate is independent of court supervision, the stated 5 percent commission is not an absolute right but is discretionary and subject to challenge by creditors or beneficiaries; the court has jurisdiction to receive, consider, and act on applications for compensation filed by independent executors.

Section 241(a) clarifies which assets are properly subject to a commission. It reads as follows:

“... [N]o commission shall be allowed for receiving funds which were on hand or were held for the testator or intestate at the time of his death in a financial institution or a brokerage firm, including cash or a cash equivalent held in a checking account, savings account, certificate of deposit, or money market account; nor for collecting proceeds of any life insurance policy.” (emphasis added)

TEX. PROB. CODE ANN. § 241(a) (Vernon 2003 & Supp. 2008). (Section 241(e) of the Texas Probate Code clarifies the definition of “financial institution” for purposes of defining exclusions to commissions.)

Section 241(a) authorizes an executor to apply to the Court for reasonable compensation or commission on life insurance policy collection if the executor has to provide “unusual effort to collect funds.” The statute should be read carefully in order to properly advise the personal representative as to the proper calculation of commissions.

1. Commission
The representative is entitled to a commission for performance of his duties of 5 percent of all cash received or paid during administration, but such may not exceed 5 percent of the gross fair market value of the estate subject to administration. See TEX. PROB. CODE ANN. § 241(a) (Vernon 2003 & Supp. 2008); Walling v. Hubbard, 389 S.W.2d 581 (Tex.Civ.App.—Houston [1st Dist.] 1965, writ n.r.e.). There are certain exceptions to the five percent rule. For example, a commission is not allowed on funds the personal representative receives which were in financial institutions at the decedent’s date of death; for collecting life insurance policies; or for paying cash to heirs or legatees.

2. No Commission
A representative will not be permitted to recover a commission for funds which were on hand or were held in financial institution or brokerage firm at death, payments to heirs or legatees, payments made outside of his or her duties, commissions on payments to the representative as a creditor, employed agent commissions or payments, borrowed money, or receipts or payments while operating a business. See TEX. PROB. CODE ANN. §

3. Extra Compensation
   The court may upon application allow a representative additional compensation for managing a farm, factory, other business, or when the calculated commission is unreasonably low. TEX. PROB. CODE ANN. § 241(a) (Vernon 2003 & Supp. 2008); Dwyer v. Kaltayer, 68 Tex. 554, 5 S.W. 75 (1887).

4. Expenses
   The representative upon satisfactory proof is permitted to recover from the estate all reasonable and necessary expenses incurred in preservation, safekeeping, and management of the estate, collecting or attempting to collect claims or debts, recovering or attempting to recover property of the estate, and reasonable attorney fees necessarily incurred in the management of the estate. See TEX. PROB. CODE ANN. §§ 242-244 (Vernon 2003 & Supp. 2008). Thus, expenses for bond premiums, fire insurance, attorney and accountant fees, and funeral expenses are a few of those expenses which the representative may recover. See Moore v. Bryant, 31 S.W. 223 (Tex.Civ.App. 1895, no writ); King v. Battaglia, 84 S.W. 839 (Tex.Civ.App. 1905, writ ref’d); Richardson v. McCloskey, 276 S.W. 680 (Tex. Comm’n App. 1925, opinion adopted); Park v. Hominick, 522 S.W.2d 533 (Tex.Civ.App.—Corpus Christi 1974, no writ); Armstrong v. Stallworth, 613 S.W.2d 1 (Tex.Civ.App.—El Paso 1979, no writ); Connor v. Wright, 737 S.W.2d 42 (Tex. App.—San Antonio 1987, no writ).

XV. HOMESTEAD, EXEMPT PROPERTY AND ALLOWANCES
   A rural homestead consists of 200 acres of land for a married decedent or 100 for a single decedent, while an urban homestead consists of a lot or lots not exceeding ten acres. See TEX. CONST. ART. 16, § 51; TEX. PROP. CODE ANN. § 41.001 (Vernon 1995 & Supp. 2008). As recently amended, Section 41.001 of the Texas Property Code provides that “[i]f used for the purposes of an urban home or as both an urban home and a place to exercise a calling or business, the homestead of a family or a single, adult person, not otherwise entitled to a homestead, shall consist of not more than 10 acres of land which may be in one or more contiguous lots, together with any improvements thereon.” TEX. PROP. CODE ANN. § 41.001(a) (Vernon 2005). A homestead is considered to be “urban” if, at the time the designation is made, the property is:
   - Located within the limits of a municipality or its extraterritorial jurisdiction or a platted subdivision; and
   - Served by police protection, paid or volunteer fire protection, and at least three of the following services.
provided by a municipality or under contract to a municipality:
  o electric;
  o natural gas;
  o sewer;
  o storm sewer; and
  o water.

TEX. PROP. CODE ANN. § 41.001(c) (Vernon 2003 & Supp. 2008).

1. Availability
A homestead exemption, regardless of whether the property is separate or community, may only be claimed when the decedent is survived by a spouse, minor children or adult unmarried children remaining with the family. See TEX. PROP. CODE ANN. §§ 272 and 282 (Vernon 2003 & Supp. 2008); Givens v. Hudson, 64 Tex. 471 (1885); Zwerneznann v. Von Rosenberg, 76 Tex. 522, 13 S.W. 485 (1890); Childers v. Henderson, 76 Tex. 664, 13 S.W. 481 (1890); Jenkins v. Hutchens, 287 S.W.2d 295 (Tex.Civ.App.—Eastland 1956, writ ref’d n.r.e.).

2. Passage of Title
Title to a homestead vests in the heirs of the decedent as other real property under the laws of descent and distribution upon death with a surviving spouse. See TEX. PROB. CODE ANN. § 283 (Vernon 2003 & Supp. 2008). Thus, the homestead cannot be construed as an estate asset subject to the control of the representative or court nor is any income derived therefrom. See TEX. PROB. CODE ANN. § 282 (Vernon 2003 & Supp. 2008); Childers v. Henderson, 76 Tex. 664, 13 S.W. 481 (1890); Franklin v. Woods, 598 S.W.2d 946 (Tex.Civ.App.—Corpus Christi 1980, no writ); Thompson v. Thompson, 149 Tex. 632, 236 S.W.2d 779 (1951).

3. Right of Use and Equipment
The homestead may not be partitioned until all superior rights of occupancy have been terminated. See TEX. CONST. ART. 16, § 52; TEX. PROP. CODE ANN. § 8 (Vernon 2003 & Supp. 2008); Hudgins v. Sansom, 72 Tex. 229, 10 S.W. 104 (1888).

a. Surviving Spouse
The right of the surviving spouse to the homestead is unqualified as to any heir or general creditor of the decedent. See Eubank & Co. v. Landram, 59 Tex. 247 (1883). The survivor is entitled to receive and enjoy all income, rents, and profits so long as the homestead right exists. See Mattingly v. Kelly, 124 S.W. 483 (Tex.Civ.App. 1909, no writ); Gulf C. & S. F. Ry. Co. v. Coffman, 11 S.W.2d 631 (Tex.Civ.App.—Waco 1928) aff’d, 23 S.W.2d 304 (Tex. Comm’n App. 1930, holding approved). The survivor is not generally allowed to recover for improvements made to the homestead and is responsible for taxes and normal upkeep. See Sargeant v. Sargeant, 118 Tex. 343, 15 S.W.2d 589 (1929).

b. Children
Children are not permitted a homestead right where the decedent had a surviving spouse. See Salmons v. Thomas, 62 S.W. 102 (Tex.Civ.App. 1901, no writ).

The right of a minor child to the homestead when both spouses die exists only through a guardian and is subject to the discretion of the court. See Hall v. Fields, 81 Tex. 553, 17 S.W. 82 (1891); Wiener v. Zwieb, 105 Tex. 262, 141 S.W. 771 (1911), reh. den., 105 Tex. 281, 147 S.W. 867 (1912).

When unmarried adult children survive, the homestead is immune from general creditors. See Ward v. Hinkle, 117 Tex. 566, 8 S.W.2d 641 (1928). A widowed or divorced person who returns to live with the deceased’s family qualifies to remain in
the homestead, but this does not include stepchildren not related by blood. See Childers v. Henderson, 76 Tex. 664, 13 S.W. 481 (1890); Anderson v. McGee, 130 S.W. 1040 (Tex.Civ.App. 1910, no writ); Thompson v. Kay, 124 Tex. 252, 77 S.W.2d 201 (1934). An unmarried child may not, however, stop or prevent partition among the heirs. See Thompson v. Kay, supra.

4. Creditors' Rights
A general creditor of the decedent cannot require a sale of the homestead or exempt property where there are survivors entitled to these exemptions. Such property may only be reached by purchase money creditors or for taxes. See TEX. PROB. CODE ANN. §§ 270, 277, 281, and 320(a) (Vernon 2003 & Supp. 2008); TEX. PROP. CODE ANN. § 41.002; Zwerne-Mann v. Von Rosenberg, 76 Tex. 522, 13 S.W. 485 (1890); Butler v. Summers, 151 Tex. 618, 253 S.W.2d 418 (Tex. 1952); Franklin v. Woods, 598 S.W.2d 946 (Tex.Civ.App.—Corpus Christi 1980, no writ).

5. Delivery
The Code provides that immediately after the inventory has been approved, the court shall set aside the homestead. TEX. PROB. CODE ANN. § 271 (Vernon 2003 & Supp. 2008). The delivery of the homestead is to be made to the surviving spouse, if there is one, or to the guardian of the minor children. TEX. PROB. CODE ANN. § 272 (Vernon 2003 & Supp. 2008).

A. Exempt Property
The surviving spouse, minor and unmarried children are also entitled to have exempt personal property set aside for their use during administration. See TEX. PROB. CODE ANN. §§ 271 and 272 (Vernon 2003 & Supp. 2008); TEX. CONST. ART. 16, § 49; TEX. PROP. CODE ANN. §§ 42.001 and 42.002.

1. Solvent Estates
In a solvent estate, exempt property may be used by persons entitled thereto during the administration. Such right of use terminates when the estate is closed, and the property will then be distributed to the heirs or devisees of the decedent. See TEX. PROB. CODE ANN. § 278 (Vernon 2003 & Supp. 2008); Kelley v. Shields, 448 S.W.2d 135 (Tex.Civ.App.—San Antonio 1969, writ ref’d n.r.e.).

2. Insolvent Estates
In an insolvent estate, title to the exempt personal property passes to the spouse and children free of all debts except those debts secured by existing liens or claims for funeral and last illness expenses presented within sixty days of the issuance of letters of administration. See TEX. PROB. CODE ANN. §§ 277, 279, 281, and 320(a)(1) (Vernon 2003 & Supp. 2008); American Bonding Co. of Baltimore v. Logan, 106 Tex. 306, 166 S.W. 1132 (1914) (Certified Questions Answered).

B. Exempt Property Allowance
When the decedent’s estate does not contain a homestead or exempt personal property, the surviving spouse and children may apply to the court for an allowance in lieu thereof. An allowance of up to $15,000 for the homestead and $5,000 for other exempt property is permitted. See TEX. PROB. CODE ANN. §§ 273 and 275 (Vernon 2003 & Supp. 2008); In re: Mays’ Estate, 43 S.W.2d 306 (Tex.Civ.App.—Beaumont 1931, writ ref’d). Such allowance may be satisfied in money, property, or both, and regardless of whether it was bequeathed to another. See TEX. PROB. CODE ANN. § 274 (Vernon 2003 & Supp. 2008). Property of the estate may be sold by court order to obtain funds necessary for the payment of such allowance. See TEX. PROB. CODE ANN. § 276 (Vernon 2003 & Supp. 2008).
C. Family Allowance

Immediately upon approval of the inventory, the court shall fix a family allowance for support of the surviving spouse and minor children. Such allowance shall be sufficient for their maintenance for one year from the date of death. See TEX. PROB. CODE ANN. §§ 286-293 (Vernon 2003 & Supp. 2008). No allowance can be made where the spouse or minor children possess sufficient property of their own from which they are able to provide for their own maintenance. See TEX. PROB. CODE ANN. § 288 (Vernon 2003 & Supp. 2008); Pace v. Eoff, 48 S.W.2d 956 (Tex. Comm’n App. 1932, holding approved); Kennedy v. Draper, 575 S.W.2d 627 (Tex.Civ.App.—Waco 1978, no writ); Noble v. Noble, 636 S.W.2d 551 (Tex.Civ.App.—San Antonio 1982 writ ref’d n.r.e.). This allowance when proper is a matter of right and is not construed as an advancement, thus repayment at the end of the estate is not required. See TEX. PROB. CODE ANN. § 290 (Vernon 2003 & Supp. 2008); Chefflet v. Willis, 74 Tex. 245, 11 S.W. 1105 (1889); Stutts v. Stovall, 544 S.W.2d 938 (Tex.Civ.App.—San Antonio 1976, writ ref’d n.r.e.). A family allowance can consist of either money, property, or both, and the court may order a sale of assets to raise such allowance including the sale of property specifically bequeathed where no other assets exist. See TEX. PROB. CODE ANN. §§ 292 and 293 (Vernon 2003 & Supp. 2008).

XVI. DISCLAIMERS

A. Generally

A disclaimer is an unqualified refusal by a person, in writing, to accept property or an interest in property. TEX. PROB. CODE ANN. § 37A (Vernon 2003 & Supp. 2008); I.R.C. § 2518(b)(1); Treas. Reg. § 25.2518-2(a)(2). Both federal and state law governs disclaimers. Federal law requirements relate primarily to the tax affects of a qualified disclaimer. Under federal law, if a person makes a qualified disclaimer, that person is treated as if he or she never received an interest in the disclaimed property. I.R.C. Section 2518(a). Conversely, state law requirements relate primarily to the procedural requirements to disclaim property and the resulting property rights in disclaimed property.

B. Applicable Law

1. I.R.C. Section 2518

Internal Revenue Code Section 2518 provides as follows:

(a) General Rule.—For purposes of this subtitle, if a person makes a qualified disclaimer with respect to any interest in property, this subtitle shall apply with respect to such interest as if the interest had never been transferred to such person.

(b) Qualified Disclaimer Defined—For purposes of subsection (a), the term ”qualified disclaimer” means an irrevocable and unqualified refusal by a person to accept an interest in property but only if—

(1) such refusal is in writing,

(2) such writing is received by the transferor of the interest, his legal representative or the holder of the legal title to the property to which the interest relates not later than the date which is 9 months after the later of—

(A) the date on which the transfer creating the interest in such person is made, or

(B) the day on which such person attains age 21,

(3) such person has not accepted the interest or any of its benefits, and

(4) as a result of such refusal, the interest passes without any direction on the part of the person making the disclaimer and passes either—
(A) to the spouse of the decedent, or
(B) to a person other than the person making the disclaimer.

c) Other Rules—For purposes of subsection (a)—

(1) DISCLAIMER OF UNDIVIDED PORTION OF INTEREST.--A disclaimer with respect to an undivided portion of an interest which meets the requirements of the preceding sentence shall be treated as a qualified disclaimer of such portion of the interest.

(2) POWERS.--A power with respect to property shall be treated as an interest in such property.

(3) CERTAIN TRANSFERS TREATED AS DISCLAIMERS. -- A written transfer of the transferor's entire interest in the property--

(A) which meets requirements similar to the requirements of paragraphs (2) and (3) of subsection (b), and

(B) which is to a person or persons who would have received the property had the transferor made a qualified disclaimer (within the meaning of subsection (b)), shall be treated as a qualified disclaimer.

I.R.C. § 2518.

2. Texas Probate Code Section 37A

Section 37A of the Texas Probate Code sets forth the state law requirements for an effective disclaimer (other than a disclaimer of a beneficial interest in trust which is governed in part by Texas Property Code Section 112.010). If a disclaimer is effective for state law purposes, the property passes as if the beneficiary had predeceased the disclaimant and is not subject to the claims of creditors of the disclaimant. TEX. PROB. CODE ANN. § 37A (Vernon 2003 & Supp. 2008).

Section 37A generally provides in pertinent part as follows:

- A disclaimer must be evidenced by an acknowledged, written memorandum that is filed in the probate court where a decedent’s will has been probated or where an application for the administration of the estate is pending. TEX. PROB. CODE ANN. § 37A(a) (Vernon 2003 & Supp. 2008).

- If the decedent’s will has not been probated, the estate administration has been closed, or if more than one year has passed since the issuance of letters testamentary, the disclaimer must be filed with the county clerk of the decedent’s residence or, if out of state, in the county where the property is located. TEX. PROB. CODE ANN. § 37A(a) (Vernon 2003 & Supp. 2008).

- A disclaimer generally must be delivered to and received by the legal representative of transferor or the holder of legal title to the disclaimed property no later than nine months after decedent’s date of death (or in the case of a future interest, the date the beneficiary is ascertained and his or her interest is vested). In the case of a charitable beneficiary or governmental agency, however, the disclaimer must be filed the later of (i) one year after it receives the notice required under Section 128, or (ii) six months after the personal representative files the estate inventory. Delivery may be in person or by registered or certified mail. TEX. PROB. CODE ANN. § 37A(b) (Vernon 2003 & Supp. 2008). (Note: For charitable beneficiaries, see Section 128A of
the Probate Code for special beneficiary notice requirements.)

- Once filed and served, disclaimers are irrevocable. TEX. PROB. CODE ANN. § 37A(d) (Vernon 2003 & Supp. 2008).

- A disclaimer may be in full or in part. A partial disclaimer is only effective as to the interest specifically described and disclaimed. TEX. PROB. CODE ANN. § 37A(e) (Vernon 2003 & Supp. 2008). (Note: See partial disclaimer discussion below for potential inconsistency between state and federal law as to interests that may be partially disclaimed.)

- A partial disclaimer by a surviving spouse is not a disclaimer of any other interest of the spouse that may arise as a result of the partial disclaimer. TEX. PROB. CODE ANN. § 37A(f) (Vernon 2003 & Supp. 2008).

- A disclaimer shall not be effective after a beneficiary accepts the property. Acceptance is defined for purposes of the statute as taking possession or exercising dominion and control in the capacity of a beneficiary. TEX. PROB. CODE ANN. § 37A(g) (Vernon 2003 & Supp. 2008).

3. **Texas Property Code Section 112.010**

   As to interests in testamentary or inter vivos trusts, Texas Property Code Section 112.010 either mirrors or supplements the requirements of 37A by providing as follows:

   Section 112.010. Acceptance or Disclaimer by or on Behalf of Beneficiary

   1. Acceptance by a beneficiary of an interest in a trust is presumed.

   2. If a trust is created by will, a beneficiary may disclaim an interest in the manner and with the effect for which provision is made in the applicable probate law.

   3. Except as provided by Subsection (c-1) of this section, the following persons may disclaim an interest in a trust created in any manner other than by will:

      - (1) a beneficiary, including a beneficiary of a spendthrift trust;

      - (2) the personal representative of an incompetent, deceased, unborn or unascertained, or minor beneficiary, with court approval by the court having jurisdiction over the personal representative; and

      - (3) the independent executor of a deceased beneficiary, without court approval.

   (c-1) A person authorized to disclaim an interest in a trust under Subsection (c) of this section may not disclaim the interest if the person in his capacity as beneficiary, personal representative, or independent executor has either exercised dominion and control over the interest or accepted any benefits from the trust.

   (c-2) A person authorized to disclaim an interest in a trust under Subsection (c) of this section may disclaim an interest in whole or in part by:

      - (1) evidencing his irrevocable and unqualified refusal to accept the interest by written memorandum, acknowledged before a notary public or other person authorized to take acknowledge-
ments of conveyances of real estate; and

(2) delivering the memorandum to the trustee or, if there is not a trustee, to the transferor of the interest or his legal representative not later than the date that is nine months after the later of:

(A) the day on which the transfer creating the interest in the beneficiary is made;

(B) the day on which the beneficiary attains age 21; or

(C) in the case of a future interest, the date of the event that causes the taker of the interest to be finally ascertained and the interest to be indefeasibly vested.

(d) A disclaimer under this section is effective as of the date of the transfer of the interest involved and relates back for all purposes to the date of the transfer and is not subject to the claims of any creditor of the disclaimant. Unless the terms of the trust provide otherwise, the interest that is the subject of the disclaimer passes as if the person disclaiming had predeceased the transfer and a future interest that would otherwise take effect in possession or enjoyment after the termination of the estate or interest that is disclaimed takes effect as if the disclaiming beneficiary had predeceased the transfer. A disclaimer under this section is irrevocable.

(e) Failure to comply with this section makes a disclaimer ineffective except as an assignment of the interest to those who would have received the interest being disclaimed had the person attempting the disclaimer died prior to the transferor of the interest.


4. Strict Application of 9 Month Requirement

The nine-month disclaimer period under federal tax law is strictly applied. There is no procedure for the application for or the granting of an extension of the time to make a qualified disclaimer. Therefore, although an extension of time may be granted to file a gift or estate tax return, the extension to file the applicable return does not extend the time for making a qualified disclaimer. The only potential extension to the nine month due date as set forth in the regulations is the weekend and holiday exception. Under Treasury Regulation § 25.2518-2(c)(2) when a final disclaimer date falls on a weekend or legal holiday, the disclaimer period is extended to the next following day that is not a weekend or legal holiday.

5. Date of Transfer

Given the strict application of the nine-month disclaimer period, it is important to accurately determine the date of transfer for disclaimer purposes. The table below identifies the applicable period for many common transfers:

<table>
<thead>
<tr>
<th>Type of Transfer</th>
<th>Date of Transfer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lifetime Gifts</td>
<td>Date of Completed Gift</td>
</tr>
<tr>
<td>Life Insurance</td>
<td>Date of Insured’s Death</td>
</tr>
<tr>
<td></td>
<td>POD/ROS</td>
</tr>
<tr>
<td></td>
<td>Date of Account-holders Death</td>
</tr>
<tr>
<td>Irrevocable Trust</td>
<td>Date Trust Became Irrevocable</td>
</tr>
<tr>
<td>GPOA</td>
<td>Date of Transferor’s Death</td>
</tr>
<tr>
<td>Pre-1977 Transfer</td>
<td>Special Situation—See Treas. Reg.</td>
</tr>
</tbody>
</table>
§25.2511-1(c)(2)

6. **Age Twenty-One Rule**

Recognizing the potential difficulties for younger beneficiaries in disclaiming assets, the Code provides that a beneficiary who has not attained the age of twenty-one years has until nine months after his or her twenty-first birthday to make a qualified disclaimer. In other words, the date of transfer for disclaimer purposes is the date of the beneficiary’s twenty-first birthday. It is important to remember, however, that beginning on the date of the disclaimant’s twenty-first birthday (the date of transfer), if the disclaimant accepts the transfer or any benefits (even though he or she may have accepted benefits prior to attaining age twenty-one) he or she will be prohibited from making a qualified disclaimer. (Note: Although a transferee under the age of twenty-one cannot accept an interest or benefits in a transfer that would affect his or her ability to disclaim property after attaining age twenty-one, it may be possible to disclaim property under state law upon reaching the age eighteen, the age of majority.)

7. **Purpose**

As discussed in the introduction, if an individual makes a qualified disclaimer for federal tax law purposes, the property passes “as if the interest had never been transferred to such person.” I.R.C. § 2518 (a). Therefore, the disclaimer can be an effective tax-planning tool. For example, if a will fails to create a bypass trust to take advantage of a decedent’s applicable credit amount (i.e., unified credit), a surviving spouse could disclaim assets equal to the applicable credit amount allowing those assets to pass to their children and avoid wasting the decedent’s applicable credit. If, however, the disclaimer fails to satisfy the requirements of a qualified disclaimer, the resulting transfer may be subject to additional transfer taxes.

In the example, the disclaiming, surviving spouse would be deemed to have made a gift of the disclaimed property to the children who received the property as a result of the unqualified disclaimer—a very unsatisfactory tax result.

Similarly, if a person makes an effective state law disclaimer, the disclaimed property passes as if the disclaimant had predeceased the decedent. Under the Probate Code, an effective disclaimer relates back to the date of the decedent’s death and “is not subject to the claims of any creditors of the disclaimant.” TEX. PROB. CODE ANN. § 37A (Vernon 2003 & Supp. 2008). As a result, an effective disclaimer may be used to avoid claims of a creditor of a beneficiary. Further, since the beneficiary never accepted an interest in the transfer, the disclaimer cannot be attacked as a fraudulent conveyance. See *Dyer v. Eckols*, 808 S.W.2d 531 (Tex. App.—Houston [14th Dist.] 1991, writ dism’d). If, however, the disclaimant fails to satisfy the state law requirements of an effective disclaimer, the ineffective disclaimer will be deemed to be an assignment of the disclaimed property by the disclaimant and subject the disclaimed property to the claims of the disclaimant’s creditors. TEX. PROB. CODE ANN. § 37A (Vernon 2003 & Supp. 2008). Note, however, while a disclaimer may be used to defeat most creditor claims, a disclaimer will not defeat a federal tax lien. See *Drye v. United States*, 120 S.Ct. 474 (1999).

8. **Full and Partial Disclaimers**

A disclaimer is not an all or nothing proposition. A beneficiary may disclaim all or a portion of a transfer by virtue of disclaiming only a certain described portion, specific dollar amount, fraction, or some formula amount of the transfer.
As might be expected, a full disclaimer creates the fewest potential pitfalls or issues. Essentially, when a beneficiary is in the position to disclaim all property being transferred, the primary concern is compliance with the federal and state law requirements to create an effective and qualified disclaimer. While a full disclaimer of specifically transferred assets is often used for tax-planning purposes, a full disclaimer is more often seen when the primary purpose of the disclaimer is the avoidance of the beneficiary’s creditors.

As to partial disclaimers, under federal law a qualified partial disclaimer can only be made as to an “undivided portion of interest” in property. I.R.C. § 2518(c)(1). This will be satisfied only if the disclaimed interest relates to “severable property.” Treas. Reg. § 25.2518-3(a)(1)(ii). Contrast the federal requirement to the state law right of a beneficiary to disclaim property “in whole or in part,” including but not limited to (1) specific powers of invasion, (2) powers of appointment, and (3) fee estates in favor of life estates. TEX. PROB. CODE ANN. § 37A(e) (Vernon 2003 & Supp. 2008). As a result of the more limiting language of the federal statute, the disclaimer of partial rights to an interest in property while retaining other rights to an interest in property, may qualify as an effective state law disclaimer but is not a qualified disclaimer of an “undivided portion of interest” in property under federal law. Treas. Reg. § 25.2518-3(b).

The following partial disclaimers qualify as effective state law and qualified federal law disclaimers:

- A disclaimant disclaims a power of appointment and any other right to direct beneficial enjoyment is limited by an ascertainable standard. A power of appointment is treated as a separate interest in property and may be disclaimed independently from any other interest in the property. Treas. Reg. § 25.2518-3(a)(1)(iii).
- A disclaimant disclaims 300 acres of a devised 500 acres. 300 acres is a severable property interest. Treas. Reg. § 25.2518-3(d), Example (3).
- A disclaimant disclaims a percentage of every interest created by the donor (e.g., a percentage of the devised income interest in a farm). Treas. Reg. § 25.2518-3(d), Example (4).
- A disclaimant disclaims the income and remainder interest of shares of stock transferred in trust and as a result the shares are transferred out of the trust without any direction on the part of the disclaimant. Treas. Reg. § 25.2518-3(d), Example (6).
- A disclaimant disclaims a fractional share of an estate residuary which will then pass to the decedent’s spouse. Disclaimant disclaims such amount so the numerator of the fraction disclaimed will result in the smallest amount that will allow decedent’s estate to pass free of federal estate tax and the denominator is the value of the residuary estate (e.g., a formula fractional amount). Treas. Reg. § 25.2518-3(d), Example (20).

The following partial disclaimers will not qualify as effective state law and qualified federal law disclaimers:

- A disclaimant devised shares of stock in corporation A disclaims the income interest in the stock but retains a remainder interest in the same shares. Disclaimer is not to an undivided portion of an interest. Reg. § 25.2518-3(d), Example (2).
• A disclaimant disclaims a power of appointment but retains a right to direct beneficial enjoyment that is not limited by an ascertainable standard. A power of appointment is treated as a separate interest in property and may be disclaimed independently from any other interest in the property, however, any other right to direct beneficial enjoyment must be limited by an ascertainable standard. Treas. Reg. §§ 25.2518-3(a)(1)(iii), 25.2518-3(d), Example (9).

• A disclaimant disclaims the income interest of shares of stock transferred in trust but the shares remain in the trust. Disclaimer is not qualified because shares remained in the trust. Treas. Reg. § 25.2518-3(d), Example (5).

9. Common Use of Disclaimers
Disclaimers are a highly effective tax planning and creditor protection planning tool. The following is a list of commonly utilized disclaimer strategies:

• Disclaimer of formula amount to fully utilize the decedent’s applicable credit amount. When a will leaves all assets to a surviving spouse, the spouse may disclaim a formula amount to result in the smallest amount of assets qualifying for the marital deduction passing to spouse and the disclaimed assets passing to children or other non-spouse beneficiaries.

• Disclaimer of non-probate assets to fully fund bypass trust. Often, the failure to coordinate beneficiary designations with the estate plan may result in an under funded bypass trust. By disclaiming non-probate assets, for example life insurance proceeds, that will then be payable to the decedent’s estate, sufficient assets may be made available to fully fund a bypass trust. Note, due to the spousal exception of Section 2518, it may be possible to disclaim into a bypass trust of which the spouse is a potential beneficiary and/or trustee.

• Disclaimer of children’s right to discretionary principal from a trust that would otherwise qualify for QTIP treatment. If a trust that provides for mandatory income distributions to the surviving spouse but also permits discretionary principal distributions to children which prevents QTIP treatment (and qualification for the unlimited marital deduction), having the children disclaim their rights to principal distributions may allow you to elect QTIP treatment.

• Disclaimer of spouse and all beneficiaries to allow interests to pass to spouse by intestacy rather than into a trust that does not qualify for QTIP treatment. If a testamentary marital trust does not provide for the mandatory income interest necessary to qualify for QTIP treatment, successfully having the spouse and all other beneficiaries to disclaim may allow assets to pass to the spouse by intestate succession and qualify for the unlimited marital deduction.

• Disclaimer of child beneficiaries to create direct skips. A child may disclaim assets to create direct skips to grandchildren in order to utilize the decedent’s available generation-skipping tax exemption. This is particularly advantageous when children have substantial wealth in their own right, and the stacking of
additional assets into their estates will only increase the estate tax burden at their deaths.

XVII. CLOSING THE ESTATE

A. When to Close

Usually, an estate is kept open until a closing letter is received from the Internal Revenue Service and all state inheritance tax matters have thereafter been completed. This can take up to several years particularly if an audit is involved.

B. Partial Distributions

Prior to closing out the estate, it is possible to make partial distributions to the beneficiaries. In particular, specific bequests and pecuniary bequests which are not required to bear tax pursuant to the terms of the will can be distributed promptly and, in fact, if distribution of pecuniary bequests is left too long, the estate may have to pay interest on the value of the assets. See Williams v. Smith, 146 Tex. 269, 206 S.W.2d 208 (1947). Partial distribution of general bequests and of the residuary estate can also be made; however, the representative should be careful to avoid unintended income tax consequences based on the distributable net income (“DNI”) in the estate.

C. Receipts and Releases

When an estate is being distributed, the personal representative should obtain a signed receipt from each beneficiary and, if possible, a signed release of all claims that beneficiary may have against the personal representative for past acts and omissions relating to the administration of the estate.

D. Section 151 Texas Probate Code

Section 151 of the Texas Probate Code provides that a personal representative may file an Affidavit with the Court which has the effect of terminating the representative’s authority and closing the estate. This procedure is seldom taken advantage of as it deprives the personal representative from later obtaining Letters Testamentary if an additional asset is discovered and needs to be transferred without a great deal of difficulty. In addition, it generally has not proved to be necessary and is not required by most courts. The failure to file an affidavit as provided for in Section 151 does not appear to create any liability on behalf of the personal representative. A closing affidavit may be used to terminate bond liabilities and release sureties where a bond has been required of the independent executor, independent Administrator, or community administrator. The Section 151 affidavit may be very useful in situations where the representative wants to be released from responsibility and begin the running of limitation statutes but not want to force the issue by seeking a judicial discharge.

E. Section 149E Texas Probate Code

Adopted in 1999, Section 149E of the Texas Probate Code allows a personal representative to seek a judicial discharge from any liability relating to the administration of the decedent’s estate. Section 149E provides that “after an estate has been administered and if there is no further need for an independent administration of the estate, the independent executor of the estate may file an action for declaratory judgment under Chapter 37, Civil Practice and Remedies Code, seeking to discharge the independent executor from any liability involving matters relating to the past administration of the estate that have been fully and fairly disclosed.” TEX. PROB. CODE ANN. § 149E (Vernon 2003 & Supp. 2008). Each estate beneficiary must be personally served with citation or agree to waive such service. See Id. In order to grant the requested relief, the court
generally will require the independent representative to file a final account that “includes any information the court considers necessary to adjudicate the independent executor's request for a discharge of liability.” See Id. If approved and any objections are overruled, the personal representative may be discharged in a final order.

While available, the procedure has not been used by the majority of personal representatives as it may cause a beneficiary to bring counterclaims to the pending petition once they are joined as a party. Section 149E is very useful, however, in situations where a lawsuit appears to be inevitable.

XVIII. CLOSING DEPENDENT ADMINISTRATIONS

A. When to Close
   An administration may be closed when all debts have been paid in full or to the extent that the estate’s assets will permit their payment, and no further necessity exists for the administration to continue. TEX. PROB. CODE ANN. § 404(a)(1) (Vernon 2003 & Supp. 2008). The representative must close the administration within three years following the grant of letters unless good cause can be shown why it should continue. TEX. PROB. CODE ANN. § 222(b)(6) (Vernon 2003 & Supp. 2008). The court on its own motion may require that the representative timely close the administration. TEX. PROB. CODE ANN. §§ 222(b)(6) and 406 (Vernon 2003 & Supp. 2008). Any person interested in the estate may also institute a proceeding to require that the estate be closed. See TEX. PROB. CODE ANN. §§ 222(b)(6), 262, 373 and 406 (Vernon 2003 & Supp. 2008).

B. Final Accounting
   Whenever an administration is to be closed, the representative must present to the court an account for final settlement. See TEX. PROB. CODE ANN. § 405 (Vernon 2003 & Supp. 2008).

1. Contents
   The final account must present a complete picture of the estate and all of the representative’s acts during the administration either by reference and/or exhibit (inventory, accountings, sales, leases, etc.). This account must have attached vouchers to support all matters not previously included in an accounting. The final accounting must also recite:
   • all property which the representative acquired;
   • all dispositions of property;
   • all debts that have been paid;
   • all unpaid debts and expenses;
   • all property still possessed by the representative;
   • all persons entitled to receive the estate, if any;
   • all advances or payments made if any;
   • tax references due that have been filed, amount of taxes, date taxes were paid, and to which governmental entity taxes were paid;
   • delinquent taxes and tax returns and reasons for delinquency; and
   • all bond premiums that have been paid.

   See TEX. PROB. CODE ANN. § 405 (Vernon 2003 & Supp. 2008); Main v. Brown, 72 Tex. 505, 10 S.W. 571 (1889).

2. Citation
   Notice must be furnished to each heir and beneficiary of the decedent containing a copy of the final accounting that was filed and the time and place it will be considered. TEX. PROB. CODE ANN. § 407 (Vernon 2003 & Supp. 2008). Service shall be by certified
mail, personal service, publication, posting, ad litem, or any combination thereof as directed by the court. See TEX. PROB. CODE ANN. §§ 407(1)-(4) and 411 (Vernon 2003 & Supp. 2008). The court may accept waivers of notice from the heirs or beneficiaries. TEX. PROB. CODE ANN. § 407(5) (Vernon 2003 & Supp. 2008).

3. Examination
   In the same manner as annual accounts, the final account will remain on file for ten days before it is presented to the court for examination. Once the court is satisfied that all necessary persons have been cited, it will examine, audit, and settle the account and, if necessary, hear evidence as to any exceptions or objections. TEX. PROB. CODE ANN. § 408(a) (Vernon 2003 & Supp. 2008). At this time, the court may review all prior annual accounts and disallow any prior approved expenses. See Anderson v. Armstrong, 132 Tex. 122, 120 S.W.2d 444 (1938), adhered to 132 Tex. 132 S.W.2d 393 (1939).

C. Distribution
   Following approval of the final account, the court must enter an order directing that the representative distribute to all entitled persons any of the remaining estate assets. TEX. PROB. CODE ANN. § 408(b) (Vernon 2003 & Supp. 2008). The court’s order is final, binding, and appealable only in direct proceedings. See Vann v. Calcasieu Trust & Savings Bank, 204 S.W. 1062 (Tex.Civ.App.—Dallas 1918, writ ref’d); Cobb v. Crawford, 120 S.W.2d 1085 (Tex.Civ.App.—El Paso 1938, no writ).

1. Delivery
   The representative, pursuant to the court’s order of distribution, must deliver to the persons named in such order all assets remaining in his or her hands. Such delivery need not be a formal transfer but, if required, a deed of conveyance may be made as to real property. See Guilford v. Love, 49 Tex. 715 (1878).

2. Penalty
   Failure to make timely and proper delivery will make the representative liable for damages to those persons entitled to receive the estate’s assets. See TEX. PROB. CODE ANN. § 14 (Vernon 2003 & Supp. 2008).

3. Receipts for Assets
   A representative may and should require a receipt from all persons to whom property is distributed. While a receipt is not absolutely conclusive of delivery, it provides the court with the basis for its discharge of the representative. See Heavey v. Castles, 12 S.W.2d 615 (Tex.Civ.App.—Eastland 1928, writ ref’d); Levien v. Rummel, 554 S.W.2d 34 (Tex.Civ.App.—Austin 1977, writ ref’d n.r.e.).

D. Discharge and Release
   Once all assets of the estate have been delivered and receipted for by the heirs, the representative may apply to the court for an order releasing the representative and discharging his or her sureties. See TEX. PROB. CODE ANN. § 408(d) (Vernon 2003 & Supp. 2008). The entry of an order for release and discharge is a ministerial act and must be granted where all requirements of the court’s prior order of distribution have been completed. See Crouch v. Stanley, 390 S.W.2d 795 (Tex.Civ.App.—Eastland 1965, writ ref’d n.r.e.) certiorari denied, 86 S. Ct. 1201, 383 U.S. 945.

E. Escheat
   In those situations where the representative is unable to ascertain the present whereabouts of persons entitled to receive assets of the estate, it will be
necessary to convert these assets to cash, hold the cash for six months and then turn the cash over to the State Treasurer. Those procedures applicable to this process and the penalties which the representative may incur are contained in Sections 427 through 432 of the Texas Probate Code.

XIX. LITIGATION
A. Probate Jurisdiction and Venue
1. Generally
   Most Texas courts were constitutionally created. Tex. Const. art. V, Sec. 1. The Texas Constitution also grants the legislature authority to establish other courts, the “statutory courts.”

2. Constitutional County Court
   In 1985, art. V, Sec. 16 of the Texas Constitution was amended to provide that “[t]he County Court has jurisdiction as provided by law.” Thus, the legislature has the authority to expand or diminish the court's powers. Section 26 of the Government Code as well as other statutory and code provisions determine jurisdiction with regard to specific matters. Section 5(b) of the Texas Probate Code provides the constitutional county court with jurisdiction in probate matters, and in those counties with constitutional county courts at law, all matters regarding probate and estate administration are first heard in these courts. TEX. PROB. CODE ANN. §§ 5(b) (Vernon 2003 & Supp. 2008).

a. Uncontested Matters.
   Uncontested matters are heard in the constitutional county court. Section 4 of the Texas Probate Code sets out those matters which shall be heard in the constitutional county court. The matters pertaining to probate include the probate of wills, grant of letters testamentary and of administration, settlement of accounts of personal representatives, and transaction of business appertaining to estate administration, settlement, partition, and distribution. TEX. PROB. CODE ANN. § 4 (Vernon 2003 & Supp. 2008).

b. Contested Matters
   If a dispute arises in a matter filed in the constitutional county court, the judge may on his own motion and shall on the motion of any interested party transfer the proceeding to the county court at law, statutory probate court, or district court. TEX. PROB. CODE ANN. § 5(c) (Vernon 2003 & Supp. 2008). The court to which the matter is transferred then hears the matter as if it was originally filed in that court. Id. Presumably, if no motion to transfer is filed in a contested matter, the constitutional county court hears the matter.

3. County Court at Law
   Probate matters may be filed in the county court at law if the legislature has granted the statutory county court at law authority to hear such matters. See TEX. GOVT. CODE § 25.0003(d); TEX. PROB. CODE ANN. § 5 (Vernon 2003 & Supp. 2008). In counties with county courts at law exercising probate jurisdiction, the county court at law may hear contested matters. If the case should have been heard in a county court at law, and it was heard in a district court, the judgment of the district court is void as a matter of law. See Miller v. Woods, 872 S.W.2d 343, 346 (Tex. App.—Beaumont 1994, no writ).

4. District Court
   The Texas Constitution provides the District Court with jurisdiction over all cases except where original jurisdiction is conferred by the Constitution or other law upon some other court. TEX. CONST. ART. V, § 8. There is no general grant of probate jurisdiction to district courts. See Miller v. Woods at 345.
District courts, however, have original jurisdiction over executors and administrators. TEX. PROB. CODE ANN. § 5(a) (Vernon 2003 & Supp. 2008). Thus, if a suit is filed against an executor or an administrator in a county in which a county court or county court at law exercises probate jurisdiction, the suit must be filed in the district court.

5. Statutory Probate Court

In a county with a statutory probate court, the "statutory probate court is the only court created by statute with probate jurisdiction." TEX. GOV’T. CODE § 25.0003(e) (emphasis added). Thus, in counties with a statutory probate court, county courts at law have no probate jurisdiction. Statutory probate courts share original jurisdiction over probate proceedings with the constitutional county court to the exclusion of the district court. See Bailey v. Cherokee County Appraisal District, 862 S.W.2d 581, 585 (Tex. 1993); TEX. PROB. CODE ANN. § 5(c) (Vernon 2003 & Supp. 2008).

B. Concurrent Jurisdiction Statutory Probate Courts and District Courts

A statutory probate court has concurrent jurisdiction with the district court with regard to (i) all personal injury, survival, or wrongful death actions by or against a person in the person's capacity as a personal representative, (ii) in all actions involving an inter vivos trust, (iii) in all actions involving a charitable trust, and (iv) all actions involving a personal representative of an estate in which each other party aligned with the personal representative is not an interested person in that estate. See TEX. PROB. CODE ANN. § 5(e) (Vernon 2003 & Supp. 2008); see also Green v. Watson, 860 S.W.2d 238 (Tex. App.--Austin 1993, no writ) (general discussion of jurisdiction over matters incident to estate). Furthermore, a statutory probate court has exclusive jurisdiction of all applications, petitions, and motions regarding probate or administrations. See Id. § 5(d).

Furthermore, Section 5A of the Texas Probate Code provides, in part, as follows:

All statutory probate courts may, in the exercise of their jurisdiction, notwithstanding any other provisions of this Code, hear all suits, actions, and applications filed against or on behalf of any heirship proceeding or decedent's estate, including estates administered by an independent executor; all such suits, actions, and applications are appertaining to and incident to an estate.

Id. § 5A(b)(emphasis added).

1. Matters Appertaining to or Incident to Estates

All courts with original probate jurisdiction may hear all matters "incident to an estate." TEX. PROB. CODE ANN. § 5(e) (Vernon 2003 & Supp. 2008). With regard to probate matters, the phrases "appertaining to estates" or "incident to estates" include the probate of wills, the issuance of letters testamentary and of administration, the determination of heirship, claims by or against an estate, actions for trial of title to land and the enforcement of liens, actions for trial of the right to property, actions to construe wills, actions involving the interpretation and administration of testamentary trusts, and in general, all matters pertaining to the settlement, partition, and distribution of estates of deceased persons. TEX. PROB. CODE ANN. § 5A(b) (Vernon 2003 & Supp. 2008).
a. Texas Probate Code Section 5B

Section 5B grants statutory probate judges the discretion to transfer a lawsuit pending in another court to their court. Section 5B provides that:

A judge of a statutory probate court, on the motion of a party to the action or on the motion of a person interested in an estate, may transfer to his court from a district, county, or statutory court a cause of action appertaining to or incident to an estate pending in the statutory probate court or a cause of action in which a personal representative of an estate pending in the statutory probate court is a party and may consolidate the transferred cause of action with the other proceedings in the statutory probate court relating to that estate.


Section 5B sets out four criteria that must be met for the transfer of a cause to a decedent’s estate as follows:

- the court exercising the transfer power must be a statutory probate court;
- there must be a decedent’s estate pending in the statutory probate court;
- the cause of action to be transferred must be pending in a district, county, or statutory court; and
- the cause of action must be appertaining to or incident to the guardianship estate pending in the statutory probate court or the cause of action must be one in which the personal representative of the estate pending in the statutory probate court is a party.

See Id.

While Section 5B is not mandatory on its face, case law has held that the transfer is mandatory once the statutory probate court grants the transfer motion. In First State Bank of Bedias v. Bishop, the appellate court held that upon the timely filing of a plea in abatement or other appropriate motion, the district court or any other court having concurrent jurisdiction with the probate court must immediately relinquish its jurisdiction to the statutory probate court. See 685 S.W.2d 732, 736 (Tex. App.--Houston [1st Dist.] 1985, writ ref’d n.r.e.).

b. Conflicts with Civil Practice and Remedies Code Section 15.007

In 1995, the legislature adopted Section 15.007 of the Civil Practice and Remedies Code. Section 15.007 of the Civil Practice provides that:

Notwithstanding Sections 15.004, 15.005, and 15.031, to the extent that venue under this chapter for a suit by or against an executor, administrator, or guardian as such, for personal injury, death or property damage conflicts with venue provisions under the Texas Probate Code, this chapter controls. Civil Practice and Remedies Code §15.007 (1998).

TEX. CIV. PRAC. & REM. CODE ANN. § 15.007 (Vernon 2004).

The Supreme Court weighed in and determined that mandatory venue provisions trump probate jurisdiction. See Reliant v. Gonzales, 102 S.W.3d 868 (Sec.15.007 trumps transfer authority granted statutory probate courts under Section 5B of the Texas Probate Code.
c. Discretionary Versus Mandatory

The transfer rights of a statutory probate court are discretionary, not mandatory.

2. Common Law Rule Determining Jurisdiction

The general common law rule for determining jurisdiction is "first in time, first in right." Texas courts generally have adhered to the common law rule. In Bailey v. Cherokee County Appraisal District, 862 S.W.2d 581, 586 (Tex. 1993) the court found that where concurrent jurisdiction exists, the court in which the suit was first filed acquires dominant jurisdiction to the exclusion of coordinate courts. See also Thomas v. Tollon, 609 S.W.2d 859, 860 (Tex. App.—Houston [14th Dist. 1981, (writ ref'd n.r.e.) (where a county court originally exercised jurisdiction over a decedent's estate, it was the proper court to determine matters incident to the estate); Curtis v. Gibbs, 511 S.W.2d 263 (Tex. 1974); Mower v. Boyer, 811 S.W.2d 560 (Tex. 1991); Weldon v. Hill, 678 S.W.2d 268 (Tex. App.—Fort Worth, 1984, writ ref'd n.r.e.).

3. Trustee Liability Suits

Which court has subject matter jurisdiction in breach of fiduciary duty actions against a trustee? Section 115.001 of the Texas Property Code provides that "[A] district court has original and exclusive jurisdiction over all proceedings concerning trusts . . . . except for jurisdiction conferred by law on a statutory probate court." TEX. PROP. CODE § 115.001 (a)-(d) (Vernon 1995). A statutory probate court has concurrent jurisdiction with the district court in all actions involving inter vivos, charitable, and testamentary trusts. TEX. PROB. CODE ANN. §§ 5(d) and 5A(c) (Vernon 2003 & Supp. 2008). To further complicate matters, Section 5A(b) provides that if the action is appertaining to or incident to an estate, the case "shall be brought in the statutory probate court rather than in the district court." TEX. PROP. CODE ANN. § 5A(b) (Vernon 2003 & Supp. 2008). Under Palmer v. Coble Wall Trust Co., Inc., 851 S.W.2d 178, 182 (Tex. 1993), a suit is appertaining to or incident to an estate "when the controlling issue is the settlement, partition, or distribution of an estate."

The following may serve as a jurisdictional guide for actions against trustees for breach of fiduciary duty:

- If the controlling issue is "appertaining to or incident to an estate," the suit must be filed in the statutory probate court;
- If the controlling issue is not "appertaining to or incident to an estate," it can be filed in a statutory probate court if one is available under the venue rules;
- If no statutory probate court is available in the appropriate venue and/or the controlling issue is not "appertaining to incident to an estate," the action may be filed in a district court; and
- If the action is filed in a district court, and the controlling issue is "appertaining to or incident to an estate," and a motion to transfer is filed under § 5B, it may be moved to a statutory probate court.

4. Assignment of a Statutory Probate Judge

Effective September 1, 1999, litigants in counties where there is no statutory probate court, county court at law or other statutory court exercising the jurisdiction of a probate court may request the assignment of a statutory probate judge to hear the contested portion of the proceeding. If the county judge has not transferred the
contested portion to the district court prior to the date the motion requesting the assignment is filed, the judge must grant the request and seek the assignment. The failure to comply with the request is an abuse of the presiding county judge’s discretion. See In re Vorwerk, 6 S.W.3d 781 (Tex. App.—Austin 1999, no pet.) (assignment to district court after request for assignment of statutory judge abuse of trial court’s discretion).

C. Executing Rule 11 Agreements.
   1. Agreement Made By Counsel
      Attorneys representing personal representatives or applicants for personal representativeship should recognize that agreements, including Rule 11 agreements, may arise from one document or a series of documents such as letters between counsel of record. One case on point is the Texas Supreme Court decision of Padilla v. LaFrance, 907 S.W.2d 454 (Tex. 1995). In Padilla, plaintiff’s counsel made a settlement demand in a letter to defense counsel and requested the delivery of settlement documents and payment by a certain date. The defendant responded to the demand in a subsequent letter in which the defendant agreed to pay the demanded sum but inquired how a pending lien would be handled. Plaintiff’s counsel responded with a third letter confirming the matter had been settled. Approximately one week after the demanded date, defendant then proceeded to issue settlement checks along with a formal settlement agreement. Upon receipt, plaintiff returned the checks contending that defendant did not timely accept the proposed settlement offer. Defendant then filed all three letters with the court claiming the letters constituted a valid, binding settlement agreement under Rule 11. Id. at 458. Plaintiff responded claiming that the letters were not an enforceable settlement agreement under Rule 11 or, in the event the Court finds the letters to collectively constitute a valid Rule 11 agreement, it could not enforce the agreement because consent was withdrawn prior to the time the ‘agreement’ was filed with the Court. The Texas Supreme Court held that a Rule 11 agreement could be the result of multiple documents provided the documents, when construed together, reflect all material terms of the agreement. Id. at 460-61. The Court further held that a Rule 11 agreement is valid prior to filing and could be filed even after another party withdraws his or her consent.

      Therefore, counsel should be careful when engaging in a letter writing campaign that results in an unintentional agreement binding on his or her client. To avoid inadvertent agreement, communications should be written in a manner that invites an offer or settlement but does not constitute one.

D. Final Versus Interlocutory Probate Orders
   1. Overview
      Only final orders of a court exercising original probate jurisdiction can be appealed. TEX. PROB. CODE ANN. § 5(f) (Vernon 2003 & Supp. 2008). Because of the ongoing nature of a personal representative proceeding, it is often unclear whether a personal representative order is a final or interlocutory order. It is this quagmire that can lead to confusion over the right to appeal and the running of appellate timetables.

      2. The Crowson Test
      The 1995 Texas Supreme Court’s decision of Crowson v. Wakeham, 897 S.W.2d 779, 783 (Tex. 1995) resulted in a new standard for determining whether a probate order was appealable. Under Crowson, an appellate court must first determine if there is an express statute declaring that phase of the probate
proceeding to be final and appealable. *Id.* If no statute exists, the appellate court must then look to see “if there is a proceeding of which the order in question may logically be considered one part, but one or more pleadings also part of that proceeding raise issues or parties not disposed of, then the order is interlocutory.” *Id.* at 783; see also *In re Guardianship of Murphy*, 1 S.W.3d 171 (Tex. App.—Fort Worth 1999, no pet. history); *A & W Indus. v. Day*, 977 S.W.2d 738, 740 (Tex. App.—Fort Worth 1998, no writ).

Some commentators appear to construe *Crowson* to require that all probate orders be severed unless a statute expressly provides that the order is final and appealable. See 29 TEX. JUR. 3rd *Decedent’s Estates* § 8. Appellate courts have not, however, interpreted *Crowson* to require the entry of a severance order prior to considering whether an order is final in the absence of clear statutory authority. Rather, the courts have looked first for an express statute that declares the order to be final and appealable. See *A & W Indus. v. Day*, 977 S.W.2d at 740. When a statute does not exist, the court will generally determine whether the order “finally disposes and is conclusive on the issue or controverted question for which that particular part of the proceeding was brought.” *Stubbs v. Ortega*, 977 S.W.2d 718, 720 (citing *Crowson*, 897 S.W.2d at 783; see also *A & W Indus. v. Day*, 977 S.W.2d at 740). If the court finds that the order finally disposes of all issues in that phase of the proceeding, the order is final and appealable. *Id.* In several recent decisions, the appellate courts never considered the existence of a severance order to be a requirement when finding that the respective probate orders at issue on appeal were final orders. See *Stubbs v. Ortega*, 977 S.W.2d at 720; *A & W Indus. v. Day*, 977 S.W.2d at 740; *Logen v. McDaniel*, 21 S.W.3d 683 (Tex. App.—Austin 2000, no pet. history).

To avoid issues relating to the right to appeal, an order can be made final by a severance order provided it meets the severance criteria. A severance order allows the parties to avoid ambiguities regarding whether the matter is appealable. *Crowson*, 897 S.W.2d at 783. Parties can and should seek a severance order either with the judgment disposing of one party or group of parties or seek severance as quickly as practicable after the judgment. *Id.* For example, a partial summary judgment addressing a discrete issue can be severed by agreement or order of the court to allow the parties an opportunity to proceed with any resulting appeal rather than wait until all remaining issues are resolved.

3. **Final Orders**

Orders that have been held to be final include the following:

(i). **Standing**

An order finding that a party lacks standing has been held to be a final and appealable order under the *Crowson* standard. See *A&W Indus., Inc. v. Day*, 977 S.W.2d at 740. Although *A&W* involved a decedent’s estate, the appellate court’s reasoning is equally applicable to a personal representativeship proceeding.

(ii). **Order Appointing Personal Representative**

An order appointing a particular person as either temporary or permanent personal representative is a final and appealable order. See *Woollett v. Matyastik*, 23 S.W.3d 218 (Tex. App.—Austin 2000, pet. denied) (appellate court found order appointing temporary personal representative became final); *Romick v. Cox*, 360 S.W.2d 430 (Tex.Civ.App.—Dallas 1962, no writ) (order removing
personal representative and appointing successor personal representative was final order).

Similarly, an order finding that an applicant is not suitable to serve as a personal representative has also been held to be a final order. See In re Estate of Vigor, 970 S.W.2d 597 (Tex.App.—Corpus Christi 1998, no writ) (order as to suitability final because it settled claim to serve).

(iii) Order Approving Attorney Fees

An order approving or denying a personal representative’s attorney’s fees has been held to be a final and appealable order. See Wittner v. Scanlan, 959 S.W.2d 640 (Tex. App.—Houston [1st Dist.] 1995, writ denied). In Wittner, the appellate court held that an order awarding attorney’s fees is a final, appealable order because the administration of a personal representativeship estate is an ongoing process, and because it would be unfair to delay review until the estate is closed. In reaching its decision, the court noted the trial court could have expressly provided that all attorney fees awarded were interlocutory and subject to review at the time of filing of the final account. Id. at 642 (citing Lurie v. Atkins, 678 S.W. 2d. 510 (Tex. App.—Houston [14th Dist.] 1984, no writ)). Wittner was, however, decided prior to the adoption of the Crowson test. Therefore, it is presently unclear whether appellate courts will reach the same result when applying the Crowson test.

(iv). Order Continuing Ad Litem’s Appointment

In Coleson v. Bethan, the Fort Worth Court of Appeals held that an order continuing an attorney ad litem’s appointment is a final and appealable order. 931 S.W.2d 706 (Tex. App.—Fort Worth 1996, no writ) (citing Youngs v. Choice, 868 S.W.2d 850, 852 (Tex. App.—Houston [14th Dist.] 1993, writ denied); Christensen v. Harkins, 740 S.W.2d 69, 71-72 (Tex. App.—Fort Worth 1987, no writ); Taliaferro v. Texas Commerce Bank, 660 S.W.2d 151, 153 (Tex. App.—Fort Worth 1983, no writ); Spies v. Milner, 928 S.W.2d 317 (Tex. App.—Fort Worth 1996, n.w.h.); cf. Forlano v. Joyner, 906 S.W.2d 118, 119-20 (Tex. App.—Houston [1st Dist.] 1995, no writ)). Note: Effective September 1, 2007, an ad litem’s appointment terminates once a guardian is appointed. See TEX. PROB. CODE ANN. § 646(e) (Vernon 2003 & Supp. 2008).

(v). Order Confirming or Disapproving Sale of Real Property

An order confirming or disapproving a report of sale of a ward’s real property is a final appealable order. See TEX. PROB. CODE ANN. § 834 (Vernon 2003 & Supp. 2008); see also Vineyard v. Irvin, 855 S.W.2d 208 (Tex. App.—Corpus Christi 1993, no writ)(order of sale final and appealable order).

4. Interlocutory Orders

The following have been held to be interlocutory and, thus, not final and appealable probate orders:

(i) Order Transferring Business

In the decision of In re Guardianship of Murphy, the Fort Worth Court of Appeals held that an order transferring the business of the guardianship from Wichita County to Harris County was not a final, appealable order. 1 S.W.3d 171. The appellate court concluded that the transfer of a guardianship merely resulted in a venue change. It did not dispose of any parties or issues in a particular phase of the guardianship and, thus, was not final. Id. at 172.
(ii) Order Transferring Lawsuit to Guardianship

An order transferring a lawsuit to a statutory probate court pursuant to Section 606 has been held to be interlocutory and, therefore, not subject to appeal. *See Forlano v. Joyner, 906 S.W.2d 118* (Tex. App.—Houston [1st Dist.] 1995, no writ). In *Forlano*, the Houston Court of Appeals dismissed the appeal of the order transferring the lawsuit. It did not meet the *Crowson* test as (i) an express statute did not provide it could be appealed, and (ii) the transfer order did not resolve a claim that could be severed. *Id.* at 120.

(iii) Order Denying Standing Challenge

An order denying a motion to dismiss for lack of interest in a decedent’s estate has been held to be interlocutory. *See Tischer v. Williams, 331 S.W.2d 210* (Tex. 1960). The appellate court’s reasoning would be equally applicable to an order denying a standing challenge in a guardianship proceeding.

XX. TAX ISSUES

In the months following the death of a decedent, up to four different federal tax returns may need to be filed. In addition, for many decedents, one or more state inheritance tax returns may also become due. In order to avoid potential penalties for failure to file required returns, it is crucial that you promptly identify which returns may be required. The four federal returns are the decedent’s final federal income tax return, IRS Form 1040, decedent’s final gift tax return, IRS Form 709, decedent’s federal estate and generation-skipping tax return, IRS Form 706, and the Estate’s fiduciary income tax return, IRS Form 1041.

A. Decedent’s Final Federal Income Tax Return–IRS Form 1040

The decedent’s personal representative is required to file the decedent’s final income tax return for the tax year beginning on January 1 of the year of the decedent’s death and ending on the date of the decedent’s death. IRC § 6012(b)(1). The return is due on April 15 of the year following the year of the decedent’s death in the same manner as if the decedent had survived the entire year. If the return cannot be completed in a timely manner, the personal representative may request the standard automatic four-month extension to file, however, this extension does not extend the time to pay taxes that may be owing. The application for an automatic four month extension is to be made by filing an IRS Form 4868, which includes an estimate of the total tax liability and a corresponding payment, on or before the regular April 15 due date for the return.

In the event additional time is required beyond the automatic four month extension, the personal representative may request an additional extension of time by filing IRS Form 2688 which must include an adequate explanation for the additional extension. If approved, the additional extension will likely be for an additional two month period.

Many attorneys do not prepare or assist in preparation of the decedent’s final 1040. It is important, however, to carefully coordinate with the decedent’s CPA and/or personal representative to ensure that attention is given to this matter.

B. Estate’s Federal Fiduciary Income Tax Return–IRS Form 1041

The decedent’s personal representative is also required to file the estate’s fiduciary income tax return. The timing of the estate’s return is dependent on the personal representative’s selection of a calendar or
fiscal year. An estate may select a fiscal rather than calendar tax year provided the fiscal year ends on the last day of a calendar month and does not exceed a total of twelve months. For example, if the decedent’s date of death is November 3, 2005, the estate may elect a fiscal year ending on October 31, 2006. The advantage of a fiscal year is that it reduces the expense of filing a first return for a potential short tax year (in our example, for the period beginning on November 3, 2005 and ending on December 31, 2005) and may, in many instances, allow for the deferral of income taxes payable at either the estate level or, if income is distributed, the beneficiary level (this is because all income carried out to the beneficiary is treated as if distributed on the last day of the estate’s fiscal year). If an estate elects a fiscal year, the return will be due on the 15th day of the fourth month following the close of the fiscal year. The election of a calendar or fiscal year is made by the filing of the return (or extension) by the due date of the initial due date of the return without regard to extensions.

In addition to estates, revocable trusts may elect to be considered as part of an estate for fiduciary income tax purposes under IRC § 645. This election is limited to revocable trusts of decedents dying after August 5, 1997, and remains in effect from the date of the decedent's death until two years after the decedent's death if no estate tax return is required or until six months after the final determination of estate tax liability if an estate tax return is required. Presumably, this period is the anticipated amount of time the Service believes is necessary to properly wind up estate matters.

While tax deferral and avoidance of a short tax year may appear to favor the use of a fiscal year, care should be taken in considering the practical aspects of a fiscal year. For example, if you select a fiscal year ending on October 31, will you be able to secure adequate income information for the fiscal year, will 1099s have been issued, will calendar year information be available for purposes of apportioning income, etc. Issues such as these may cut in favor of selecting a calendar year or an initial fiscal year which is less than 12 months but ends concurrently with a calendar quarter.

Finally, as with the decedent’s final income tax return, you may file for an extension of time to file and, if you do not prepare the return, you should once again carefully coordinate with the estate’s CPA on tax year selection and filing.

C. Decedent’s Final Federal Gift Tax Return—IRS Form 709

The decedent’s personal representative is required to report all previously unreported taxable gifts made by the decedent on a timely filed gift tax return. Treas. Reg. § 25.6019-1(c). For gifts made prior to the year of death, the returns should be filed as soon as possible. For gifts made in the year of death, the gift tax return is due on April 15 in the year following decedent’s death.

If a 709 for gifts made during the year of decedent’s death cannot be timely filed, you may request an automatic four month extension on IRS Form 4868, Part IV along with the request for extension of time to file decedent’s final IRS Form 1040 (or by letter if no 1040 extension is requested). In addition, you may request additional time to file concurrently with a request for additional time to file the decedent’s final Form 1040 on IRS Form 2688 by checking the appropriate boxes on Item 4 (or again by letter if no additional extension of time is requested for decedent’s final 1040). As with the extension of time to file decedent’s final 1040, however, an extension of time to file decedent’s final 709 does not extend the time to pay any gift tax owing.
D. Federal Estate Tax Returns

If the value of the decedent's gross estate on the date of death exceeds the IRC § 2010 applicable exclusion amount for the year of decedent's death, the estate's personal representative is charged with filing IRS Form 706. For tax years 2006, 2007 and 2008, the applicable exclusion amount is $2,000,000. For tax year 2009, the applicable exclusion amount is $3,500,000. The estate tax is currently repealed for the 2010 tax year, but it is anticipated to return in 2011 due to the “sunset” rules. Thus, the 2011 applicable exclusion amount will be $1,000,000 (which is the what the exemption amount would have been in 2011 under the Taxpayer Relief Act of 1997 prior to the enactment of the Economic Growth and Tax Relief Reconciliation Act of 2001, which increased the recent exemption amounts), unless Congress enacts new rates between now and 2011.

The estate tax return for a decedent’s estate is due on the calendar date of decedent’s death nine months from decedent’s death. For example, for a decedent dying on November 1, 2008, the federal estate tax return would be due on August 1, 2009. If the estate’s personal representative is unable to timely file the return, you may request an extension of time to file for a period of six months under IRC § 6081 for reasonable cause. If granted, the time for filing will be fifteen months from the date of decedent’s death. The extension of time to file does not, however, act as an extension of time to pay any estate tax owing.

If the estate lacks sufficient assets or liquidity to pay any estate tax owing, you may request a discretionary extension of time to pay for a period not to exceed ten years under IRC § 6161. Although the Section provides for up to a ten-year extension, an extension is normally granted for a period of no more than one year per request. As you near the extended payment deadline, you must renew your request for extension and demonstrate that reasonable cause continues to exist.

In the same manner that an extension of time to file does not grant an extension of time to pay, the grant of an extension of time to pay does not act as an extension of time to file. Therefore, it is imperative that you promptly identify estate assets and make an initial determination of the estimated estate tax liability in order to file the appropriate extensions request if necessary. It is important to remember that the penalty for failure to timely file the estate tax return is substantial. If you fail to file a return by the due date (or extended due date) the penalty is 5% of the tax due for each month or any fraction of the month up to 25% in the aggregate. For example, if a return due on November 1, 2006, showing estate tax due of $200,000 was filed on November 2, 2006, the penalty for failing to timely file would be $10,000—an expense the estate representative is likely to expect you to satisfy. Both the extension of time to file and extension of time to pay may be made on IRS Form 4768 with appropriate explanations of the reasonable cause for the delay in filing or payment attached.

In certain instances, the estate will not have sufficient liquidity to satisfy its estate tax liability due to the existence of a closely held business as an asset of the estate. When the value of the estates closely held business exceeds 35% of the adjusted gross estate, the estates personal representative may elect to pay the tax attributable to the closely held business interest in up to 10 equal annual installments. IRC § 6166(a). Although the rules applicable to this election are somewhat cumbersome, the election carries a preferred interest rate of 2% on the tax attributable to the first $1,000,000 of the taxable value of the
closely held business and a rate of 45% X Estate Tax Underpayment Rate. IRC 6601(j). In addition, provision for interest only payments for the first four years extends the payment extension to a potential fourteen years.

There is no special IRS Form available for making the election. The election may be made by simply attaching a notice of election to the timely filed 706. The notice of election should set forth the decedent’s name and social security number, the amount of estate tax to be paid in installments, the date of the first installment payment, the number of annual installments, the identity of the qualifying property, and a description of the facts supporting the estate’s qualification for installment treatment.

E. State Inheritance Tax Return

If a 706 is due for the estate, then one or more state inheritance tax returns may also be due concurrently with the 706. In Texas, however, it is no longer necessary to file a Texas inheritance tax return for decedents dying after 2004. The executor should confirm whether a state return is due in another state. For example, a return may be due in other states when a deceased Texas resident owned real property in other states.

XXI. ETHICS

A. Who is the Client

It is not uncommon for an executor to bring one or more beneficiaries to an attorney’s office for legal advice. The questions which are likely to arise and cause ethical issues for the practitioner include:

- Who does the attorney represent?
- If the attorney only represents the executor, do the beneficiaries understand that the attorney does not represent them?

Several recent cases highlight the potential liability to a lawyer and/or law firm who fails to make clear who it represents in estate matters. The use of non-representation letters will hopefully avoid malpractice suits by family members who claim you represent their interests in the estate settlement proceeding. Likewise, any discussion or communications from the personal representative’s attorney to the estate beneficiaries should again make it clear that he or she does not represent the beneficiaries. Furthermore, the beneficiaries should be encouraged to seek their own counsel regarding matters relating to the estate.

B. Permissible Multiple Representation

The lawyer may represent multiple clients if:

1. lawyer reasonably believes representation of each client will not be materially affected; and
2. each client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages, if any. See DR-1.06(c).

Note, Comment 15 to DR-1.06 provides:

Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as a husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration, it may be unclear whether the client is the fiduciary or is the estate or trust, including its beneficiaries. The lawyer
should make clear the relationship to the parties involved. How can you protect yourself against conflicts of interest? A few suggestions follow:

- Avoid accepting multiple persons as clients. If you do, read the Disciplinary Rules carefully and withdraw if a conflict becomes apparent.
- When accepting multiple persons as clients, obtain conflict waivers and consent letters in dual representation situations.

See discussion of conflicts infra.

C. Theft By Personal Representative

Attorneys representing personal representatives should clearly and carefully advise their clients of their fiduciary duties at the time of their appointment and assist those clients in complying with the provisions of the Texas Probate Code during the period of their administration. However, the realities of practicing law teach us that not all clients are perfect and not all clients follow their attorney’s advice. When those clients are acting as a fiduciary, the client’s actions may become a reflection on his or her attorney. Furthermore, the client may have unknowingly used the lawyer’s services to further the client’s fraudulent conduct.

For example, a person may have obtained personal representativeship to gain control of an individual’s assets and to use those for his or her personal benefit. Upon discovering the nefarious conduct, the attorney representing the personal representative must decide whether he or she can continue to represent the personal representative and, regardless, whether they can do anything ethically to rectify or mitigate the damage to the ward.

First, the attorney may, but is not required to, disclose information gained from attorney-client communications regarding theft of estate property or fraud on the estate to the Court presiding over the administration. Rule 1.05 provides as follows:

(c) A lawyer may reveal confidential information:

1. When the lawyer has been expressly authorized to do so in order to carry out the representation.
2. When the client consents after consultation.
3. To the client, the client's representatives, or the members, associates, and employees of the lawyer's firm, except when otherwise instructed by the client.
4. When the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law.
5. To the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client.
6. To establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer's associates based upon conduct involving the client or the representation of the client.
7. When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.
8. To the extent revelation reasonably appears necessary to
rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.


Second, the comments to Rule 1.05 indicate that full protection of client information is not justified when a client plans to or engages in criminal or fraudulent conduct or where the culpability of the lawyer's conduct is involved. The comments elaborate on several situations where an attorney may disclose client communications. First, the lawyer may reveal information relating to the representation in order to avoid assisting a client's criminal or fraudulent conduct, and Rule 1.05(c)(4) permits doing so. Furthermore, an attorney has a duty to not use false or fabricated evidence, and Rule 1.05(c)(4) permits revealing information necessary to comply with this rule. Third, the lawyer may have been unknowingly involved in past conduct by the client that was criminal or fraudulent. In this circumstance, the lawyer's services were made an instrument of the client's crime or fraud and, therefore, the comments state that the “lawyer has a legitimate interest both in rectifying the consequences of such conduct and in avoiding charges that the lawyer's participation was culpable.” Id. cmt. 12. Rule 1.05(c)(6) and (8) give the attorney the discretion to reveal both unprivileged and privileged information in order to serve those interests. Fourth, when an attorney learns that a client intends prospective conduct that is criminal or fraudulent, his or her knowledge of the client's purpose may enable the lawyer to prevent commission of the prospective crime or fraud. The comments state that “[w]hen the threatened injury is grave, the lawyer's interest in preventing the harm may be more compelling than the interest in preserving confidentiality of information.” Id. at cmt. 13. Rule 1.05(c)(7) grants the lawyer the professional discretion, “based on reasonable appearances, to reveal both privileged and unprivileged information in order to prevent the client's commission of any criminal or fraudulent act.” Id. Finally, comment 13 to Rule 1.05 provides that:

The lawyer's exercise of discretion under paragraphs (c) and (d) involves consideration of such factors as the magnitude, proximity, and likelihood of the contemplated wrong, the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the client's conduct in question. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer believes necessary to the purpose. Although preventive action is permitted by paragraphs (e) and (d), failure to take preventive action does not violate those paragraphs. But see paragraphs (e) and (f). Because these rules do not define standards of civil liability of lawyers for professional conduct, paragraphs (c) and (d) do not create a duty on the lawyer to make any disclosure and no civil liability is intended to arise from the failure to make such disclosure.

At a minimum, the attorney should consider resigning as attorney of record. Often times this will signal the court that a problem exists that requires closer scrutiny. This also allows the attorney to comply with comment 21 to Rule 1.05 which provides that “[i]f the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.15(a)(1).” *Id.* at cmt 21.

D. Conflicts of Interest

In estate proceedings, the opportunity arises to represent multiple fiduciaries and beneficiaries. These interests could potentially become adverse during the course of the estate. Rule 1.06 of the Texas Disciplinary Rules provides:

(a) A lawyer shall not represent opposing parties to the same litigation.

(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

   (1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or

   (2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.

(c) A lawyer may represent a client in the circumstances described in (b) if:

   (1) the lawyer reasonably believes the representation of each client will not be materially affected; and

   (2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

(d) A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.

(e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.

(f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.

In the initial fee agreement, this potential conflict must be waived. The clients should waive the conflict in writing
and acknowledge that there has been full and fair disclosure of the potential conflict. A sample paragraph disclosing such a conflict may read as follows:

We are also representing ______________ and ______________. As to the matter of joint representation, there are two important ethical points to address. First, all three (3) of you are our clients, and all of you have independent duties as our clients. Normally, we do not represent three (3) clients regarding the same matter; however, as long as your interests are not in conflict and you consent to our representation, we may ethically represent all three of you. It is possible, however, during the course of our representation, that differences of opinion between the three of you may rise to the level of true conflicts of interest (e.g., with respect to terms of settlement or litigation strategy). Most disagreements can be addressed and resolved without ever developing into conflicts of interest, and we are currently unaware of any facts that might give rise to a conflict between the three of you; however, such a possibility always exists.

If any conflict which could affect our representation of the three of you does arise, you have an obligation to let us know promptly. We know this possibility may seem remote. However, we have found that it is best to cover such a possibility at the outset of our attorney-client relationship. As part of this agreement, you acknowledge that we have discussed the possible conflict, and you consent to our representation of all of the above.

All information you provide to us will be kept confidential from third parties unless you specifically direct us otherwise. As between all the clients and our firm, however, you authorize us to reveal any information that we receive from any of the clients to the other. Thus, as part of this representation agreement, you expressly waive the confidentiality of our communications as between the three of you. You also agree to discuss any issues that may arise with respect to the preparation and execution of any documents in good faith and promise that your conduct at all times will be fair and open with one another and with us.
EXHIBIT A.
law of [decedent] stand to gain or lose the property depending upon the construction given the will. They should be named defendants and served with citation so that they could be represented at such hearing. The mere fact that the named executor is present does not assure that their interest will be adequately represented. [¶] Legatees and/or devisees and heirs at law whose interests in property will be affected by a construction of the will are indispensable parties to an action to construe the will and must be made parties in accordance with [TRCP 39].” But see Wojcik v. Wesolick, 97 S.W.3d 335, 338 (Tex.App.—Houston [14th Dist.] 2003, no pet.). See annotation under Probate Code § 333, p. 127.

PROB § 128A. NOTICE TO CERTAIN BENEFICIARIES AFTER PROBATE OF WILL

2. Section 128A below is effective for estates of decedents who die on or after Sept. 1, 2007. Subsection (a) below was amended by S.B. 593, § 1, 80th Leg., enacted May 26, 2007, effective Sept. 1, 2007, without reference to the conflicting amendment made by H.B. 391, § 5.04, 80th Leg., enacted May 15, 2007, effective Sept. 1, 2007. For resolving conflicts, see p. V.

(a) In this section, “beneficiary” means a person, entity, state, governmental agency of the state, charitable organization, or trust entitled to receive real or personal property under the terms of a decedent’s will, to be determined for purposes of this section with the assumption that each person who is alive on the date of the decedent’s death survives any period required to receive the bequest as specified by the terms of the will.

(b) Except as provided by Subsection (d) of this section, not later than the 60th day after the date of an order admitting a decedent’s will to probate, the personal representative of the decedent’s estate, including an independent executor or independent administrator, shall give notice that complies with Subsection (c) of this section to each beneficiary named in the will whose identity and address are known to the personal representative or, through reasonable diligence, can be ascertained. If, after the 60th day after the date of the order, the personal representative becomes aware of the identity and address of a beneficiary who was not given notice on or before the 60th day, the personal representative shall give the notice as soon as possible after becoming aware of that information.

(c) Notwithstanding the requirement under Subsection (b) of this section that the personal representative give the notice to the beneficiary, the personal representative shall give the notice with respect to a beneficiary described by this subsection as follows:

(1) if the beneficiary is a trust, to the trustee, unless the personal representative is the trustee, in which case the personal representative shall give the notice to the person or class of persons first eligible to receive the trust income, to be determined for purposes of this subdivision as if the trust were in existence on the date of the decedent’s death;  

(2) if the beneficiary has a court-appointed guardian or conservator, to that guardian or conservator;  

(3) if the beneficiary is a minor for whom no guardian or conservator has been appointed, to a parent of the minor; and  

(4) if the beneficiary is a charity that for any reason cannot be notified, to the attorney general.

(d) A personal representative is not required to give the notice otherwise required by this section to a beneficiary who:

(1) made an appearance in the proceeding with respect to the decedent’s estate before the will was admitted to probate; or  

(2) received a copy of the will that was admitted to probate and waived the right to receive the notice in an instrument that:

(A) acknowledges the receipt of the copy of the will;  

(B) is signed by the beneficiary; and  

(C) is filed with the court.  

(e) The notice required by this section must:

(1) state:  

(A) the name and address of the beneficiary to whom the notice is given or, for a beneficiary described by Subsection (c) of this section, the name and address of the beneficiary for whom the notice is given; and  

(B) the decedent’s name;
(C) that the decedent's will has been admitted to probate;
(D) that the beneficiary to whom or for whom the notice is given is named as a beneficiary in the will; and
(E) the personal representative's name and contact information; and
(2) contain as attachments a copy of the will admitted to probate and the order admitting the will to probate.

(f) The notice required by this section must be sent by registered or certified mail, return receipt requested.

(g) Not later than the 90th day after the date of an order admitting a will to probate, the personal representative shall file with the clerk of the court in which the decedent's estate is pending a sworn affidavit of the personal representative, or a certificate signed by the personal representative's attorney, stating:
(1) for each beneficiary to whom notice was required to be given under this section, the name and address of the beneficiary to whom the personal representative gave the notice or, for a beneficiary described by Subsection (c) of this section, the name and address of the beneficiary and of the person to whom the notice was given;
(2) the name and address of each beneficiary who filed a waiver of the notice;
(3) the name of each beneficiary whose identity or address could not be ascertained despite the personal representative's exercise of reasonable diligence; and
(4) any other information necessary to explain the personal representative's inability to give the notice to or for any beneficiary as required by this section.

(h) The affidavit or certificate required by Subsection (g) of this section may be included with any pleading or other document filed with the clerk of the court, including the inventory, appraisement, and list of claims or an application for an extension of the deadline to file the inventory, appraisement, and list of claims, provided that the pleading or other document with which the affidavit or certificate is included is filed not later than the date the affidavit or certificate is required to be filed as provided by Subsection (g) of this section.

PROB §128A. NOTICE TO CERTAIN ENTITIES AFTER PROBATE

Section 128A below is effective for estates of decedents who die before Sept. 1, 2007, and subsection (a) below is effective for nuncupative, or oral, wills made before Sept. 1, 2007.

(a) If the address of the entity can be ascertained with reasonable diligence, an applicant under Section 81 of this code shall give the state, a governmental agency of the state, or a charitable organization notice that the entity is named as a devisee in a written will or a written will not produced that has been admitted to probate.

PROB §128A. NOTICE TO CERTAIN ENTITIES AFTER PROBATE

Section 128A below is effective for estates of decedents who die before Sept. 1, 2007, and subsection (a) below is effective for nuncupative, or oral, wills made before Sept. 1, 2007.

(a) If the address of the entity can be ascertained with reasonable diligence, an applicant under Section 81 of this code shall give the state, a governmental agency of the state, or a charitable organization notice that the entity is named as a devisee in a written will, a written will not produced, or a nuncupative will that has been admitted to probate.

(b) The notice required by Subsection (a) of this section must be given not later than the 30th day after the date of the probate of the will.

(c) The notice must be in writing and state the county in which the will was admitted to probate. A copy of the application and the order admitting the will to probate and, if the application is for probate of a written will, a copy of the will must be attached to the notice.

(d) An entity entitled to notice under Subsection (a) of this section must be notified by registered or certified mail, return receipt requested.

(e) The applicant must file a copy of the notice with the court in which the will was admitted to probate.
## EXHIBIT B.

### Quick Reference Table

**Creditor Claim Procedures**

<table>
<thead>
<tr>
<th>QUESTION</th>
<th>INDEPENDENT ADMINISTRATION</th>
<th>DEPENDENT ADMINISTRATION</th>
<th>GUARDIANSHIP PROCEEDING</th>
</tr>
</thead>
<tbody>
<tr>
<td>When do I notify creditors?</td>
<td>Within one month after letters issued. §§ 146; 294(a)</td>
<td>Within one month after letters issued. §§ 294(a)</td>
<td>Within one month after letters issued. §§ 785(a)</td>
</tr>
<tr>
<td>What form must an unsecured claim take?</td>
<td>No particular form required.</td>
<td>Use statutory language supported by sworn affidavit. §201</td>
<td>Use statutory language supported by sworn affidavit. §§ 785, 788</td>
</tr>
<tr>
<td>When must a creditor present its claim?</td>
<td>Anytime, unless in receipt of §294(d) notice letter.</td>
<td>Before estate is closed, subject to §§ 294(d), 298</td>
<td>Before estate is closed. §§ 785, 788</td>
</tr>
<tr>
<td>To whom is the claim presented?</td>
<td>Independent Executor</td>
<td>Dependent Administrator or deposit with the court clerk. §308</td>
<td>Guardian or deposit with the court clerk. §§ 785, 788</td>
</tr>
<tr>
<td>When must the P.R. object to claim defects, e.g., vouchers, exhibits</td>
<td>No statutory requirement to be followed.</td>
<td>Administrator must object within 30 days of presentment. §307</td>
<td>Guardian must object within 30 days of presentment. §729</td>
</tr>
<tr>
<td>How do I bar an unsecured creditor’s claim?</td>
<td>Notify creditor before estate is closed per §§ 294(d), 146(a)(2)</td>
<td>Notify creditor before estate is closed pursuant to §294(d)</td>
<td>Notify creditor before estate is closed. §§ 784(c), 785</td>
</tr>
<tr>
<td>When must an unsecured creditor respond to avoid the claim’s bar?</td>
<td>Within 120 days of receipt of notice. §146(d)</td>
<td>Within 4 months of receipt of notice. §294(a)</td>
<td>Within 120 days of receipt of notice. §§ 784(c), 785</td>
</tr>
<tr>
<td>When do I notify secured creditors?</td>
<td>Within two months after letters issued. §§ 146; 295</td>
<td>Within two months after letters issued. §295</td>
<td>Within 4 months after letters issued. §§ 784, 785</td>
</tr>
<tr>
<td>What election(s) must a secured creditor make?</td>
<td>Elect to be paid in due course of administration or select preferred debt &amp; lien status. §146(b)(a)</td>
<td>Elect to be paid in due course of administration or select preferred debt &amp; lien status. §306(a)</td>
<td>Elect to be paid in due course of administration or select preferred debt &amp; lien status. §295</td>
</tr>
<tr>
<td>When must a secured creditor make the election?</td>
<td>Within 6 months after letters issued or 4 months of §295 notice. §146(b)</td>
<td>Within 6 months after letters issued or 4 months of §295 notice. §306(b)</td>
<td>Upon presentment to the guardian. §793(a)</td>
</tr>
<tr>
<td>How is claim treated when an election is not made?</td>
<td>Claim is treated as a preferred debt &amp; lien. §146(b)</td>
<td>Claim is treated as a preferred debt &amp; lien. §306(b)</td>
<td>Claim is treated as a preferred debt &amp; lien. §793</td>
</tr>
<tr>
<td>When must the P.R. approve/reject claim?</td>
<td>No statutory time period. §146(b)(2)</td>
<td>Within 30 days of presentment. §309</td>
<td>Within 30 days of presentment. §790</td>
</tr>
<tr>
<td>What if P.R. takes no action?</td>
<td>Creditor can sue whenever it elects.</td>
<td>Claim is deemed rejected after 30 days. §310</td>
<td>Claim is deemed rejected after 30 days. §797</td>
</tr>
<tr>
<td>When must I file suit on a rejected claim?</td>
<td>Anytime before the applicable S/L runs.</td>
<td>Within 90 days after rejection. §313</td>
<td>Within 90 days after rejection. §800</td>
</tr>
<tr>
<td>Must the claim be classified before payment?</td>
<td>Yes. Claim is classified pursuant to §§ 322; 146(a)(3)</td>
<td>Yes. Claim is classified pursuant to §322</td>
<td>Not applicable</td>
</tr>
<tr>
<td>QUESTION</td>
<td>INDEPENDENT ADMINISTRATION</td>
<td>DEPENDENT ADMINISTRATION</td>
<td>GUARDIANSHIP PROCEEDING</td>
</tr>
<tr>
<td>--------------------------------</td>
<td>-----------------------------</td>
<td>---------------------------</td>
<td>-------------------------</td>
</tr>
<tr>
<td>How will my claim be classified?</td>
<td>As one of eight classes: §322</td>
<td>As one of eight classes: §322</td>
<td>Not applicable</td>
</tr>
<tr>
<td>What are the classes?</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Class 1</td>
<td>Funeral &amp; last illness expenses not to exceed $15,000; excess expenses become a class 8 claim. §§146(a)(3); 322</td>
<td>Funeral &amp; last illness expenses not to exceed $15,000; excess expenses become a class 8 claim. §§322</td>
<td>Not applicable</td>
</tr>
<tr>
<td>Class 2</td>
<td>Administration expenses; preservation, safekeeping and estate management costs. §§146(a)(3); 322</td>
<td>Administration expenses; preservation, safekeeping and estate management costs. §§322</td>
<td>Not applicable</td>
</tr>
<tr>
<td>Class 3</td>
<td>Any secured claim to be paid in the due course of administration, including tax liens and second mortgages. §§146(a)(3); 322</td>
<td>Any secured claim to be paid in the due course of administration, including tax liens and second mortgages. §§322</td>
<td>Not applicable</td>
</tr>
<tr>
<td>Class 4</td>
<td>A child support judgment. §§146(a)(3); 322</td>
<td>A child support judgment. §§322</td>
<td>Not applicable</td>
</tr>
<tr>
<td>Class 5</td>
<td>State taxes, penalties &amp; interest thereon. §§146(a)(3); 322</td>
<td>State taxes, penalties &amp; interest thereon. §§322</td>
<td>Not applicable</td>
</tr>
<tr>
<td>Class 6</td>
<td>T.D.C. costs of confinement. §§146(a)(3); 322</td>
<td>T.D.C. costs of confinement. §§322</td>
<td>Not applicable</td>
</tr>
<tr>
<td>Class 7</td>
<td>State reimbursement for medical costs. §§146(a)(3); 322</td>
<td>State reimbursement for medical costs. §§322</td>
<td>Not applicable</td>
</tr>
<tr>
<td>Class 8</td>
<td>All other claims, e.g. unsecured creditors. §§146(a)(3); 322</td>
<td>All other claims, e.g. unsecured creditors. §§322</td>
<td>Not applicable</td>
</tr>
<tr>
<td>How will my claim be paid?</td>
<td>Executor may pay at any time subject to §§320, 321; 146(c)</td>
<td>Claims are paid in the following priority (1) class 1 claims; (2) family allowance §286; (3) class 2 claims; and, (4) class 3 - 8 claims. §§320, 321</td>
<td>Claims paid in following order (1) ward's expenses for care, maintenance and education, (2) administration expenses (3) any other claim, §805(a)(b)</td>
</tr>
</tbody>
</table>

Compliments Of:
Judge Russell Austin
Harris County Probate Court No. 1
EXHIBIT C.

[Style]

AFFIDAVIT OF FACTS CONCERNING THE IDENTITY OF HEIRS

Before me, the undersigned authority, on this day personally appeared ________ ("Affiant") (insert name of affiant) who, being first duly sworn, upon his/her oath states:

1. My name is ________ (insert name of affiant), and I live at ________ (insert address of affiant's residence). I am personally familiar with the family and marital history of ________ ("Decedent") (insert name of decedent), and I have personal knowledge of the facts stated in this affidavit. [In a non-statutory probate court, also add the last three digits of each applicant’s social security number and driver’s license number].

2. I knew decedent from ________ (insert date) until ________ (insert date). Decedent died on ________ (insert date of death). Decedent's place of death was ________ (insert place of death). At the time of decedent's death, decedent's residence was ________ (insert address of decedent's residence).

3. Decedent's marital history was as follows: ________ (insert marital history and, if decedent's spouse is deceased, insert date and place of spouse's death).

4. Decedent had the following children: ________ (insert name, birth date, name of other parent, and current address of child or date of death of child and descendants of deceased child, as applicable, for each child).

5. Decedent did not have or adopt any other children and did not take any other children into decedent's home or raise any other children, except: ________ (insert name of child or names of children, or state "none").

6. (Include if decedent was not survived by descendants.) Decedent's mother was: ________ (insert name, birth date, and current address or date of death of mother, as applicable).

7. (Include if decedent was not survived by descendants.) Decedent's father was: ________ (insert name, birth date, and current address or date of death of father, as applicable).

8. (Include if decedent was not survived by descendants or by both mother and father.) Decedent had the following siblings: ________ (insert name, birth date, and current address or date of death of each sibling and parents of each sibling and descendants of each deceased sibling, as applicable, or state "none").

9. (Optional.) The following persons have knowledge regarding the decedent, the identity of decedent's children, if any, parents, or siblings, if any: ________ (insert names of persons with knowledge, or state "none").

10. Decedent died without leaving a written will. (Modify statement if decedent left a written will.)
11. There has been no administration of decedent's estate. (Modify statement if there has been administration of decedent's estate.)

12. Decedent left no debts that are unpaid, except: __________ (insert list of debts, or state "none").

13. There are no unpaid estate or inheritance taxes, except: __________ (insert list of unpaid taxes, or state "none").

14. To the best of my knowledge, decedent owned an interest in the following real property: __________ (insert list of real property in which decedent owned an interest, or state "none").

15. (Optional.) The following were the heirs of decedent: __________ (insert names of heirs).

16. (Insert additional information as appropriate, such as size of the decedent's estate.)

Signed this ___ day of __________, ___.

_______________________________
(signature of affiant)

State of __________

County of __________

Sworn to and subscribed to before me on __________ (date) by __________ (insert name of affiant).

_______________________________
(signature of notarial officer)

(Seal, if any, of notary) ______________

(printed name)_____________________

My commission expires: ____________
EXHIBIT D.

[Style]

AFFIDAVIT FOR COLLECTION OF SMALL ESTATE

STATE OF TEXAS §
COUNTY OF _______§

BEFORE ME, the undersigned Notary Public, on this day personally appeared __________, listed below as distributees; and __________, as disinterested witnesses, who, being by me duly sworn on oath deposed and said:

1. On ______ [date], __________ [name of decedent] (“Decedent”) died in ______. ________ County, Texas. At the time of ________ [his or her] death, Decedent was domiciled in ________ County, Texas.

2. Decedent’s Social Security number is ________________.

3. No petition for the appointment of a personal representative of Decedent’s estate is pending or has been granted.

4. Thirty days have elapsed since the date of Decedent’s death.

5. The value of the entire assets of Decedent’s estate, excluding homestead and exempt property, does not exceed $50,000.

6. All of the assets of Decedent’s estate, including homestead and exempt property, are as follows:

<table>
<thead>
<tr>
<th>Description</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>a.</td>
<td></td>
</tr>
<tr>
<td>b.</td>
<td></td>
</tr>
</tbody>
</table>

7. All of the liabilities of Decedent’s estate are as follows:

<table>
<thead>
<tr>
<th>Creditor</th>
<th>Description</th>
<th>Amount of Claim</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
The right of distributees of the Decedent’s estate to receive money or property from the estate, exclusive of homestead and exempt property, exceeds the known liabilities of the estate. The names, addresses, telephone numbers, and family relationships to decedent of the undersigned distributees along with their respective shares of the estate are as follows:

| Family Name/Address/ Relationship to Decedent Portion of Estate Claimed |
|-----------------|-----------------|-----------------|
| Telephone No.   |                 |                 |

a.  

b.  

[In a non-statutory probate court, also add the last three digits of each distributee’s social security number and driver’s license].

[Alternative One. When affiants are neither minors nor incompetents]

9. None of the affiants are minors or incompetents.

[Alternative Two. When affiant is minor]

9. is [a minor], and this affidavit is signed by __________, __________ [his or her] guardian, on __________ [his or her] behalf.

The undersigned distributees further state on oath that the facts recited in the foregoing Affidavit for Collection of Small Estate are within the distributees’ personal knowledge and are true and correct. Distributees pray that this Affidavit be approved by the Court and filed in the Small Estate Records of this County, and that the clerk issue certified copies of the filed Affidavit in order to allow the distributees to present them to persons owing money to the estate, having custody or possession of estate property, or acting as registrar, fiduciary, or transfer agent of anyone having evidence of interest, indebtedness, property, or other rights belonging to the estate.

__________________________ [signature of affiant]
__________________________ [typed name]
__________________________ [add if facts warrant:]
the ____ (natural guardian or next of kin or guardian) of ____ (name),
________ (a minor or an incompetent)]

SUBSCRIBED AND SWORN TO BEFORE ME on the ____ day of _____, to certify which
witness my hand and official seal.

[Seal]

____________________________ [signature of affiant]

____________________________ [typed name]

Notary Public in and for the State of Texas
My commission expires

________________

[Repeat signature and jurat for each distributee]

[Repeat following signature and jurat for each of two witnesses]

Witness:

I have no interest in the estate of ________ [name], deceased, and am not related to said decedent
under the laws of the State of Texas. The facts recited in the foregoing Affidavit for Collection of Small
Estate are within my personal knowledge and are true and correct.

____________________________ [signature of affiant]

____________________________ [typed name]

____________________________ [address]

Notary Public in and for the State of Texas
My commission expires

________________

SUBSCRIBED AND SWORN TO BEFORE ME on the ____ day of _____, to certify which
witness my hand and official seal.

[Seal]

____________________________ [signature of affiant]

____________________________ [typed name]

Notary Public in and for the State of Texas
My commission expires

________________
EXHIBIT E.

[Style]

ORDER APPROVING AFFIDAVIT FOR COLLECTION OF SMALL ESTATE

On [date], the Court considered and examined the Affidavit for Collection of Small Estate filed by [distributees’ names]. The Court finds that it has jurisdiction and venue of this Estate, that the Affidavit complies with the requirements of the Probate Code, and that the Estate qualifies as a small estate under the Probate Code. The Court further finds that the Affidavit should be approved.

IT IS THEREFORE ORDERED that the Affidavit for Collection of Small Estate filed by [distributees’ names] is APPROVED, that the County Clerk shall record the Affidavit in the Small Estate Records of this County, and that the County Clerk shall issue certified copies of the Affidavit to the persons entitled to them.

_______________________________
Presiding Judge

APPROVED AS TO FORM ONLY:

By:

(TBA #______________)
____________________________
______________, Texas ______
(____) _____________ (Facsimile)
EXHIBIT F.

RULE 11 & FAMILY SETTLEMENT AGREEMENT

THE STATE OF TEXAS

§

COUNTY OF HARRIS

§

THIS SETTLEMENT AGREEMENT (“this Agreement”) is entered into by and among ____________, __________, __________, and the respective heirs, personal representatives, executors, directors, officers, partners, affiliates, administrators, successors, agents, attorneys and assigns of each of them, as evidenced by their signatures affixed hereto. The preceding persons are sometimes collectively referred to herein as “the Parties” and individually referred to as “a Party.” The term “Decedent’s Estate” shall refer to all probate and non-probate property in which __________ had an ownership interest in or claim to as of the date of her death.

WITNESSETH:

WHEREAS, __________ (“Decedent”) died on ____________, in Houston, Texas;
WHEREAS, Decedent was a resident of Houston, Harris County, Texas, at the time of his death;
WHEREAS, Decedent had two children: __________ and __________;
WHEREAS, on ____________, __________ filed an Application for Probate and Issuance of Letters Testamentary seeking to admit the purported Will of Decedent dated ____________;
WHEREAS, on ____________, __________ filed a Petition in Intervention for the purpose of opposing the probate of the alleged Last Will & Testament of the Decedent dated ____________ and claiming to be the Decedent’s surviving spouse;
WHEREAS, on ____________, __________ filed a Petition in Intervention for the purpose of opposing the probate of the alleged Last Will & Testament of the Decedent dated ____________;
WHEREAS, __________, __________ and __________ survived the Decedent by the statutory period and are Parties to this agreement;
WHEREAS, Decedent executed a prior will dated ____________;
WHEREAS, a dispute exists between the Parties and as to the validity of the testamentary instruments executed by Decedent;
WHEREAS, the Parties wish to resolve all differences and disputes between them in order to avoid further litigation and expense and to make peace; and
WHEREAS, by executing this Agreement no Party hereto concedes any legal or factual contentions of any other Party or makes any admissions but, rather, each Party denies any contrary contention made by any other Party and enters into this Agreement solely to terminate and settle their differences in an effort to minimize costs, expenses, and ongoing attorney’s fees.

NOW, THEREFORE, FOR GOOD AND VALUABLE CONSIDERATION, including the mutual agreements, understandings, stipulations, representations, and releases set forth herein, the sufficiency of such consideration being hereby acknowledged and confessed by each of the Parties hereto, make the following representations and agreements:

1. Decedent’s Testamentary Instruments. Each Party represents to every other Party that he or she is not aware of any testamentary instruments executed or alleged to have been executed by Decedent that remained in existence and effective at the time of her death other than the Will and the Codicil.

2. Decedent’s Estate. Each Party represents to each other Party, to the best of his or her knowledge, there are no properties, real or personal, belonging to Decedent as of her date of death other than the assets disclosed on Exhibit A attached to this agreement.

3. Probate of Decedent’s Will and Codicil. The Parties agree that ____________ shall be admitted to probate.
4. **Appointment of Personal Representative of Decedent’s Estate.** _________ shall be appointed as the sole Independent Executor of the Estate of the Decedent. The other Parties agree to execute and return immediately any necessary documents indicating their consent to _________’s appointment as the Independent Executor or personal representative of Decedent’s probate estate.

5. **Distribution of Estate Assets.** The Parties agree that all of Decedent’s property, being all real and personal property the Decedent had an interest in or claim to at time of her death including, but not limited to the property listed on Exhibit A, shall pass subject to the terms of this Agreement. The Property shall be distributed as follows:
   a. ___________ shall receive the total sum of __________________ in cash and __________________. ________ shall receive such assets in full and final settlement of their interest in the Decedent’s Estate. The Parties agree that the ___________ shall deliver a check payable jointly to _________ and his counsel in accordance with the terms of this Agreement.
   b. ___________ shall receive the total sum of __________________ in cash and __________________. ________ shall receive such assets in full and final settlement of their interest in the Decedent’s Estate. The Parties agree that the ___________ shall deliver a check payable jointly to _________ and his counsel in accordance with the terms of this Agreement. ___________ waives, renounces and disclaims any right she may have to seek a family allowance pursuant to Section 286, et seq., of the Texas Probate Code, or otherwise.
   c. _________ shall receive the rest and remainder of Decedent’s estate (being all assets other than the total sums passing to _________ and _________ under the this Agreement.
   d. ___________ shall pay and deliver to _________ and ___________, the property and checks in payment of the amount and assets due them under this Agreement contemporaneously with the receipt of a court order authorizing this agreement (or authorizing the issuance of a check in accordance with this Agreement). The delivery of the assets shall be in full and final settlement of _________ and _________ interest in the Decedent’s estate.
   e. The Parties agree and confirm that all distributions and/or property passing to _________ and _________ and any other amounts passing to _________ and _________ under the terms of this Settlement Agreement shall be treated for income tax purposes as a settlement of a claim and/or as a gift or bequest of “a specific sum of money or of specific property” not payable in installments and are not punitive, not for services rendered, and no portion represents income or interest relating to such specific sum of money; i.e., none of the distributions will constitute distributable net income to _________ and _________.

7. **Conveyance Documents.** In order to effectuate the conveyance of all of Decedent’s interest in the property passing pursuant to the terms of this Agreement (described in Exhibit A or otherwise), the parties shall deliver to any other parties all such requisite executed documentation, deeds, bill of sales and stock transfers as may be necessary complete the division of the Decedent’s estate in compliance with this Agreement. All the Parties shall also shall also cooperate with each other to facilitate the delivery of any assets to any other party under the terms of this Agreement.

8. **Administration of Decedent’s Estate.** ___________, as the personal representative of Decedent’s estate, will have sole authority over and responsibility for the administration of the Decedent’s estate including, but not limited to, the preparation and filing of any of Decedent’s income and gift tax returns, all death tax returns and all fiduciary income tax returns, as may be due, and the distribution of estate assets to himself as the sole beneficiary of the Decedent’s estate. ___________ represents that he will properly file all returns and provide for the payment of any related taxes. ___________ does hereby INDEMNIFY, DEFEND and HOLD HARMLESS ___________ and ___________, from any and all liability, transferor, transferee or otherwise, (i) relating to ___
serving as personal representative of Decedent’s Estate, including any and all past, current or future federal or state income gift or death taxes, and any related interest and penalties which may be claimed, or assessed, relating to Decedent’s Estate, (ii) relating to any and all past, current or future federal or state income, gift or death taxes, including any interest, and penalties, imposed by reason of the distributions provided for in this Agreement, and (iii) arising from all claims, costs, expenses, including but not limited to attorneys fees and expenses, accountant fees and expenses, experts, litigation costs and bond premiums, relating to any attempt by the Internal Revenue Service or other persons or entities to assess, collect or enforce any claims, demands, assessments or judgments against ___________ or ______________, for past, current or future federal or state income, gift or estate taxes, and any related penalties and interest.

9. Release. Each Party, for themselves and their lineal heirs, beneficiaries, assigns, representative, agents and descendants, hereby forever release and discharge each other Party, individually, and in all capacities, and their respective heirs, personal representatives, executors, affiliates, officers, directors, partners, administrators, successors, agents, attorneys, and assigns of and from any and all liabilities, claims, and causes of action including, but not limited to, tortious interference with inheritance rights, tortious interference with contracts, tortious interference with business relations, physical, mental, or emotional distress, any gifts made by Decedent, will contests, claims of conflict of interest, claims against attorneys, accountants, fiduciaries or agents, unjust enrichment, the administration of the estate or the guardianship of the Decedent, all claims which were or could have been made in currently pending litigation, fraudulent concealment, rights of reimbursement, exempt property, fraud, fraud on the community, theft, undue influences, misappropriation, breach of fiduciary duty, and any other statutory rights and demands and causes of action of any kind and/or character, whether known or unknown, fixed or contingent, liquidated or unliquidated, whether or not asserted, arising out of or any way connected with any act, omission or event related to any Party and/or the Decedent’s Estate, the guardianship of the Decedent, and the Revocable Trust, save and except for the representations, warranties, obligations under this Agreement.

10. Party’s Attorneys Fees and Expenses. Each Party hereby agrees to be responsible for his or her own respective attorney’s fees, costs, and expenses through the date of this Agreement, including their respective attorney’s fees, costs, and expenses necessary and/or incurred in the effectuation of this Agreement. The Parties further agree that if it becomes necessary to assert any claim to enforce or defend the provisions of this Agreement, the prevailing Party shall be entitled to recover reasonable attorney’s fees and other related litigation expenses from the non-prevailing Party.

11. Representations. Each Party makes the following representations to each other Party:

a. The representing Party is legally competent to execute this Agreement and that this Agreement is valid, binding and enforceable.

b. The representing Party believes that Decedent did not properly execute any right of survivorship or pay on death agreements or other agreements relating to the creation of non-probate assets and that any such agreements or contracts are void and of no effect and that any non-probate assets are an assets of Decedent’s probate estate and pass pursuant to the terms of this Agreement.

c. The representing Party owns the claims released herein and has not assigned, released, waived, relinquished, pledged or in any manner whatsoever, sold or transferred, his or her interest, right, and/or claims to or against the Decedent, Decedent’s estate, except to his or her attorneys.

d. Each party confirms and agrees that such party (i) has relied on his or her own judgment and has not been induced to sign or execute this Agreement by promises, agreements or representations not expressly stated herein, (ii) has freely and willingly executed this Agreement and hereby expressly disclaims reliance on any fact, promise, undertaking or representation made by the other party, save and except for
the express agreements and representations contained in this Agreement, (iii) waives any right to additional information regarding the matters governed and effected by this Agreement, (iv) was not in a significantly disparate bargaining position with the other party. and (v) has been represented by legal counsel in this matter.

11. **Entire Agreement.** The provisions of this Agreement constitute the entire Agreement between the Parties, and supersede all previous negotiations and documents. No oral modification shall be binding upon either Party. The terms hereof are contractual in nature and are not mere recitals, and shall be binding upon the heirs, spouses, descendants, executors, administrators, successors, representatives, and assigns of the Parties hereto, upon complete execution by the Parties.

12. **Construction.** All Parties acknowledge and agree that all the Parties have participated in the drafting of this Agreement and no one Party shall be considered the drafter of this Agreement and, therefore, no presumptions shall be made for or against any other Party on the basis that any one Party was the drafter of this Agreement.

13. **Multiple Counterparts.** This Agreement may be executed in multiple counterparts, each of which shall be deemed an original for all purposes.

14. **Effective Date.** This Agreement shall be effective as of the last to occur of the following the date that the last Party executes this Agreement.

15. **Choice of Laws.** This Agreement shall be construed and interpreted in accordance with the laws of the State of Texas.

**EXECUTED on ______________________, 200___.**

_________, Individually, and in all capacities

_________, Individually, and in all capacities

[add jurat/acknowledgement]

EXHIBIT “A”

LISTING OF ASSETS
EXHIBIT G.

BENEFICIARY DISTRIBUTION AGREEMENT

THE STATE OF TEXAS §

COUNTY OF HARRIS §

THIS AGREEMENT ("this Agreement") is entered into by and among _______________ ("____"), _______________ ("____"), _______________ ("____"), _______________ ("____"), _______________ ("____") and _______________ ("____"), and the respective heirs, personal representatives, executors, administrators, successors, agents, attorneys and assigns of each of them, as evidenced by their signatures affixed hereto. The preceding persons are sometimes collectively referred to herein as "the Parties" and individually referred to as "a Party." The term "Decedent" shall refer to _______________ and the term "Decedent’s Estate" shall refer to all probate and non-probate property in which _______________ had an ownership interest in or claim to as of the date of his/her death.

W I T N E S S E T H:

WHEREAS, the Decedent died on _______________, in __________ County, Texas;
WHEREAS, Decedent’s wife/husband, _______________ ("__________"), died on _______________;
WHEREAS, prior to his/her death, Decedent arranged for _______________’s Will to be admitted to probate;
WHEREAS, Decedent left a valid Last Will and Testament ("Will") that has been admitted to probate in the above-referenced proceeding. A copy of the Will is attached as Exhibit A to this Agreement;
WHEREAS, Decedent’s Will provides that each of the Parties is entitled to ________ of Decedent’s estate subject to probate administration;
WHEREAS, it has been determined that ________ is or was in possession of assets of the Decedent’s Estate that have not been delivered to the Administrator to date, and he/she acknowledges that such assets should be treated as an advance toward his/her interest in the Decedent’s Estate;
WHEREAS, it has been determined that _____ has received _______________ without Administrator’s permission, and he/she acknowledges that such amounts should be treated as an advance toward his/her interest in the Decedent’s Estate;
WHEREAS, the Parties agree that all assets of the Decedent’s Estate that were in the possession of any Party and that have not been delivered to the Administrator to date shall be treated as an advance toward his or her interest in the Decedent’s Estate;
WHEREAS, the Parties survived the Decedent by the statutory period and are Parties to this agreement;
WHEREAS, issues exist between the Parties regarding the amounts and/or assets due the Decedent’s Estate from some of the Parties and, thus, the remaining interest of each Party in the Decedent’s Estate after taking into account advancements and assets retained by such Party;
WHEREAS, the Parties wish to resolve all differences and disputes between them in order to avoid further litigation and expense and to make peace; and
WHEREAS, by executing this Agreement no Party hereto concedes any legal or factual contentions of any other Party or makes any admissions but, rather, each Party denies any contrary contention made by any other Party and enters into this Agreement solely to terminate and settle their differences in an effort to minimize costs, expenses, and ongoing attorney’s fees.

NOW, THEREFORE, FOR GOOD AND VALUABLE CONSIDERATION, including the mutual agreements, understandings, stipulations, and representations set forth herein, the sufficiency of such
consideration being hereby acknowledged and confessed by each of the Parties hereto, make the following representations and agreements:

6. **Decedent’s Testamentary Instruments.** Each Party represents to every other Party that he or she is not aware of any testamentary instruments executed or alleged to have been executed by Decedent that remained in existence and effective at the time of her death other than the Will attached as Exhibit A to this Agreement.

7. **Decedent’s Estate.** Each Party represents to each other Party that to the best of his or her knowledge, there are no properties, real or personal, belonging to Decedent as of her date of death other than the assets disclosed on Exhibit B attached to this agreement.

8. **Agreed Advancements.** The Parties acknowledge that the Decedent’s Estate shall be distributed to each of the Parties as set forth in the Will but enter into this agreement to settle all disputes regarding assets of the Decedent’s Estate that have been advanced to or retained by one or more of the Parties to this Agreement. Therefore, the Parties agree that certain assets have been distributed to some of the Parties to date and that such distribution and/or receipt shall be treated as an advancement of such stated Party’s ________ interest in the Decedent’s Estate as follows:

   (a) **:* The Parties acknowledge and agree that * has received the following assets as an advancement of his/her interest in the Decedent’s Estate and such assets/amounts shall reduce his/her ________ share of the Decedent’s Estate:
      i) * has received cash in the total amount of $_________. A reconciliation of the cash received by * and the debts and other offsets is attached as Exhibit C to this Agreement;
      ii) * has received the Decedent’s ____________ with an agreed value of $________;
      iii) * has received the Decedent’s ◊ with an agreed value of $_____;  
      iv) * has received the Decedent’s ◊◊ with an agreed value of $_____;  
      v) * has received the Decedent’s ◊◊◊ with an agreed value of $_____;  
      vi) * has received a court-approved advancement of $_______ in cash from the Administrator;

   (b) **:** The Parties acknowledge and agree that ** has received the following assets of the Decedent’s Estate and such assets/amounts shall reduce his/her one- _____ share of the Decedent’s Estate:
      i) ** has received the Decedent’s ____________ with an agreed value of $________;
      ii) ** has received a court-approved advancement of $__________ in cash from the Administrator;

   (c) ***: The Parties acknowledge and agree that *** has received the following assets of the Decedent’s Estate and such assets/amounts shall reduce his/her ________ share of the Decedent’s Estate:
      i) *** has received a court-approved advancement of $__________ in cash from the Administrator;

   (d) ****: The Parties acknowledge and agree that **** has received the following assets of the Decedent’s Estate and such assets/amounts shall reduce his/her ________ share of the Decedent’s Estate:
      i) **** has received cash in the total amount of $________ via the pay-off of a loan due by **** and paid off after the Decedent’s death with cash on deposit at ____________________ in the Decedent’s accounts;
      ii) **** has received a court-approved advancement of $________ in cash from the Administrator;
The Parties acknowledge and agree that ***** has received the following assets as an advancement of his/her interest in the Decedent’s Estate and such assets/amounts shall reduce his/her _____ share of the Decedent’s Estate:

i) ***** has received a court-approved advancement of $_______ in cash from the Administrator;

9. **Agreements as to Distribution of the Real Properties.** The Parties acknowledge that the Decedent’s Estate includes real estate and that they would prefer for such real property to be distributed as they may agree among themselves. The Parties agree that (i) the real properties have been appraised by a court appointed real estate appraiser, (ii) he or she has received a copy of the appraisal from Administrator, and (iii) such appraised values shall be used for purposes of determining each property’s distribution value. The Parties further agree that the real property shall be distributed as between the Parties as follows:

   (a) All of the Decedent’s interest in the real property, including improvements, commonly known as ______________, _____, Texas, having an appraised value of $________, shall be distributed to ** as a part of his/her one-_____ interest in the Decedent’s Estate;

   (b) All of the Decedent’s interest in the real property, including improvements, commonly known as ______________, _____, Texas, having an appraised value of $________, shall be distributed to ** as a part of his/her one-_____ interest in the Decedent’s Estate;

   (c) All of the Decedent’s interest in the real property, including improvements, commonly known as ______________, _____, Texas, having an appraised value of $_______, shall be distributed to ** as a part of his/her one-_____ interest in the Decedent’s Estate;

   (d) All of the Decedent’s interest in the real property, including improvements, commonly known as ______________, _____, Texas, having an appraised value of $________, shall be distributed to **** as a part of his/her one-_____ interest in the Decedent’s Estate;

10. **Distribution of Remaining Assets.** The Parties acknowledge that the Administrator will distribute the remaining assets of the Decedent’s Estate, after payment of all remaining debts, administration expenses, legal and accounting fees, in a manner that equalizes each Party’s _______ interest in the Decedent’s Estate, taking into account the agreed advancements and distributions set forth in Paragraphs 3 and 4 of this Agreement. The value of such remaining assets shall be as of date of distribution. The Parties further agree that they will agree as among themselves the division of any remaining household furnishings and personal effects. The Parties agree that Administrator shall have no further obligation to pursue assets in any of the Parties possession and control and that this Agreement is intended to settle all claims of each Party relating to assets of the Decedent’s Estate in any other Party’s possession and/or control, including claims of property due the Decedent’s Estate and for return of assets.

11. **Conveyance Documents.** In order to effectuate the conveyance of all of Decedent’s interest in the property passing pursuant to the terms of this Agreement (described in Exhibit B or otherwise), the Parties shall deliver to any other Parties all such requisite executed documentation, deeds, bill of sales and stock transfers as may be necessary to complete the division of the Decedent’s estate in compliance with this Agreement. All the Parties shall also cooperate with each other and Administrator to facilitate the delivery of any assets to any other Party under the terms of this Agreement.

12. **Release of Administrator.** The Parties acknowledge that they have entered into this Agreement to resolve all pending issues regarding each of the Parties interest in the
Decedent’s Estate and the assets taken, stolen, and/or received by certain Parties but not others. The Parties request that Administrator rely on this Agreement in settling Decedent’s Estate and distributing Decedent’s assets as provided herein. The Parties further release and discharge Administrator from any claims relating to her compliance with this Agreement, including but not limited to ceasing collection efforts regarding property that may be due the Decedent’s Estate, the determination of the assets in any Party’s possession or control, and the distribution values determined for Estate assets.

13. **Representations.** The Parties to this Agreement make the following representations to such other Parties:
   
   (a) Each Party represents to the other Parties that he or she is not aware of any assets of the Decedent’s Estate other than those assets listed on Exhibit B to this Agreement;
   
   (b) Each Party represents to the other Parties that he/she is not aware of any cash, dividend, rents, or other assets of the Decedent’s estate than is not accounted for on Exhibit C;
   
   (c) The representing Party is legally competent to execute this Agreement and that this Agreement is valid, binding and enforceable;
   
   (d) The representing Party believes that Decedent did not properly execute any right of survivorship or pay on death agreements or other agreements relating to the creation of non-probate assets and that any such agreements or contracts are void and of no effect and that any non-probate assets are an assets of Decedent’s probate estate and pass pursuant to the terms of this Agreement;
   
   (e) The representing Party owns the claims released herein and has not assigned, released, waived, relinquished, pledged or in any manner whatsoever, sold or transferred, his or her interest, right, and/or claims to or against the Decedent, Decedent’s estate, except to his or her attorneys;
   
   (f) Each Party confirms and agrees that such Party (i) has relied on his or her own judgment and has not been induced to sign or execute this Agreement by promises, agreements or representations not expressly stated herein, (ii) has freely and willingly executed this Agreement and hereby expressly disclaims reliance on any fact, promise, undertaking or representation made by any other Party or Administrator, save and except for the express agreements and representations contained in this Agreement, (iii) waives any right to additional information regarding the matters governed and effected by this Agreement, (iv) was not in a significantly disparate bargaining position with the other party, and (v) has been represented by legal counsel in this matter or has voluntarily waived such right; and
   
   (g) Each of the Parties acknowledge and understand that the Administrator does not request his or her interest in matters relating to the Decedent’s Estate, has not provided them legal advice and has not made any representations to him or her. Each Party further acknowledges that (i) Administrator has suggested that he or she retain counsel if they have any questions regarding the terms or effect of this Agreement, and (ii) each Party is relying on his or her own judgment in entering into this Agreement.

9. **Entire Agreement.** The provisions of this Agreement constitute the entire Agreement between the Parties, and supersede all previous negotiations and documents. No oral modification shall be binding upon either Party. The terms hereof are contractual in nature and are not mere recitals, and shall be binding upon the heirs, spouses, descendants, executors, administrators, successors, representatives, and assigns of the Parties hereto, upon complete execution by the Parties.
10. **Construction.** All Parties acknowledge and agree that all the Parties have participated in the drafting of this Agreement and no one Party or the Administrator shall be considered the drafter of this Agreement and, therefore, no presumptions shall be made for or against any other Party on the basis that any one Party was the drafter of this Agreement.

11. **Multiple Counterparts.** This Agreement may be executed in multiple counterparts, each of which shall be deemed an original for all purposes.

12. **Effective Date.** This Agreement shall be effective as of the last to occur of the following the date that the last Party executes this Agreement.

13. **Choice of Laws.** This Agreement shall be construed and interpreted in accordance with the laws of the State of Texas.

EXECUTED on _____ day of ______________________, 20__.

* *

** **

*** ***

**** ****

***** *****

[add jurat/acknowledgement]
APPLICATION FOR APPOINTMENT OF TEMPORARY ADMINISTRATOR

TO THE HONORABLE COURT:

______________________________ (“Applicant”) furnishes the following information for the appointment of a Temporary Administrator and for issuance of Letters of Temporary Administration to Applicant:

1. Applicant's domicile and residence address is ________________. Applicant is interested in this Estate as [describe Applicant's interest in the Estate]. [In a non-statutory probate court, also add the last three digits of each applicant’s social security number and driver’s license number].

2. Decedent died on __________________, _____, in ______, ______ County, Texas, at the age of _____ years.

3. Decedent was domiciled and had a fixed place of residence in _____ County at the time of death, and the principal part of Decedent's estate was in _____ County at the time of death.

4. No petition for the appointment of a personal representative of Decedent's Estate is pending, nor has any petition for the appointment of a personal representative been granted.

5. Decedent died intestate, to the best knowledge and belief of Applicant.

6. The names, ages and residences of Decedent's heirs, and the relationship of each heir to the Decedent are as follows:

<table>
<thead>
<tr>
<th>Name, Age and Relationship</th>
<th>Residence Address</th>
</tr>
</thead>
</table>

[The list should include a complete listing of the heirs, their ages or dates of birth, their residence addresses, and their relationships to the Decedent. The list should also identify any heirs who are minors or under a guardianship.]

7. No child or children were born to, or adopted by, Decedent.
7. Decedent had ____ child(ren) born or adopted who survived Decedent, and they are fully identified in paragraph 6 above.

8. Decedent was never divorced.

[or]

8. Decedent was divorced from _______________________, on _______________, ______.

9. Decedent owned property of a probable value in excess of $__________ which property is described as [e.g., real property, cash, securities, automobiles, livestock, household goods, personal effects].

10. There is an immediate necessity for the appointment of a temporary administrator because:

[State specific reasons]

11. The following powers and duties are necessary for the protection of the estate:

[List specific powers]

12. Applicant is entitled to receive Letters of Temporary Administration and is not be disqualified by law from serving as Temporary Administrator.

WHEREFORE, Applicant prays that citation issue as required by law to all persons interested in this Estate; that Letters of Temporary Administration be issued to Applicant; and that all other orders be entered as the Court may deem proper.

Respectfully submitted,
[Attorney information]
AFFIDAVIT

Before me, on this day personally appeared _____________, Applicant, who after being duly sworn by me, on oath stated that the foregoing Application for Appointment of Temporary Administrator is true and correct.

Sworn to and subscribed before me on ________________, _____, by [name of Applicant].

My Commission Expires: 

__________________

Notary Public, State of Texas

__________________
(print Notary's name)
EXHIBIT I.

[Style]

ORDER APPOINTING TEMPORARY ADMINISTRATOR

On this day came on to be heard the Application for Appointment of Temporary Administrator filed by _____________________ ("Applicant") in the Estate of _____________________, Deceased ("Decedent"). The Court considered the Application and heard the evidence and finds that:

1. The allegations contained in the Application are true;
2. Decedent is dead;
3. This Court has jurisdiction and venue over the Decedent's Estate;
4. There is an immediate necessity for the appointment of a Temporary Administrator pursuant to 131A of the Texas Probate Code;
5. ______________ is not disqualified to act as such Temporary Administrator, and
6. The Estate must be protected.

It is therefore,

ORDERED, that ______________ is appointed Temporary Administrator of the Estate of _____________________, Deceased, until ____________, ______, and that Letters of Temporary Administration shall be issued upon filing a Court approved bond in the sum of $______ and making the oath. It is further,

ORDERED, that the Temporary Administrator shall have the following powers:

[List Specific Powers]

It is further,

ORDERED, that the Clerk issue Letters of Temporary Administration to ______________ when he has qualified according to law.
Signed the ______ day of ____________________ , ___.

JUDGE PRESIDING

APPROVED AS TO FORM:

[Attorney information]
EXHIBIT J.

[Style]

APPLICATION FOR PROBATE OF WILL
AND ISSUANCE OF LETTERS TESTAMENTARY

TO THE HONORABLE COURT:

______________ ("Applicant") furnishes the following information to the Court for the
probate of the written Will of ___________ ("Decedent") and for issuance of Letters Testamentary:

1. Applicant is an individual interested in this Estate, domiciled in and residing at ______, ________, ________ County, Texas. [if more than one applicant add __________ is an
individual interested in this Estate, domiciled in and residing at __________, __________, __________ County, Texas, {collectively referred to as “Applicant”).] [In a non-statutory
probate court, also add the last three digits of each applicant’s social security number
and driver’s license number].

[or]

1. Applicant is interested in this Estate and is __________, a bank domiciled in and situated at
__________, __________, __________ County, Texas, and is acting herein by and through its
duly authorized representative. ”).] [In a non-statutory probate court, also add the last
three digits of each applicant’s social security number and driver’s license number].

[or]

1. __________ is an individual interested in this Estate, domiciled in and residing at
__________, __________, __________ County, Texas, and __________ is interested in
this Estate and is a bank domiciled in and residing at __________, __________,
__________ County, Texas, and __________ is acting herein by and through its duly
authorized representative (collectively referred to as “Applicant”). ”).] [In a non-statutory
probate court, also add the last three digits of each applicant’s social security number and driver’s license number].

2. Decedent died on __________, in __________, __________ County, Texas, at the age of __________ (___) years.

3. This Court has jurisdiction and venue because Decedent was domiciled and had a fixed place of residence in this county on the date of death [or state other basis for jurisdiction and venue, see discussion §____].

4. Decedent owned real and personal property described generally as __________ [generally describe Decedent’s property, note, however, some courts expect a detailed listing of the property while other courts only require a general description) with a probable value in excess of $____________.

5. Decedent left a valid written Will ("Will") dated ____________, which was never revoked and is filed herewith.

6. The subscribing witnesses to the Will and their present residence addresses are:

   ____________ [list each name and current address if known]. [If applicable add: The Will was made self-proved in the manner prescribed by law].

   [or]

6. The Will was wholly in the handwriting of Decedent and Decedent's signature is subscribed thereto.

7. No child or children were born to or adopted by Decedent after the date of the Will.

   [or]

7. After the date of the Will, ____________, who survived Decedent, [(was) (were)] [(born to)

   (adopted by)] Decedent.

8. Decedent was never divorced.
8. Decedent was divorced from __________ on __________. [or] Decedent was divorced from __________, the date or place of which divorce is not known to Applicant.

9. A necessity exists for the administration of this estate.

10. Decedent's Will named Applicant to serve without bond or other security as Independent [Executor, Executrix, Executors or, Executrixes]. Applicant is not be disqualified by law from serving in such capacity or from accepting Letters Testamentary. Applicant is entitled to such Letters.

11. No state, governmental agency, or charitable organization is named by the will as a devisee.

[or]

11. The following state, governmental agency, or charitable organization are named by the will as a devisee:

[list]

WHEREFORE, Applicant prays that citation issue as required by law to all persons interested in this Estate; that the Will be admitted to probate; that Letters Testamentary be issued to Applicant; and that all other orders be entered as the Court may deem proper.

Respectfully submitted,

[Attorney information]
EXHIBIT K.

[Style]

ORDER ADMITTING WILL TO PROBATE AND APPOINTING INDEPENDENT EXECUTOR

On this day the Court heard the application to probate of the Last Will and Testament of ____________________- ("Decedent"), and the Court finds as follows:

1. This Court has jurisdiction and venue over the Decedent’s estate;

2. An application to probate will and appoint independent executor along with the original of Decedent’s Last Will and Testament dated ____________, [add any codicils] (the “Will”) was filed with this Court on ________, ____;

3. The Application complies with the Texas Probate Code;

4. Citation has been served and returned in the manner and for the length of time required by the Texas Probate Code;

5. Decedent died on ____________;

6. Four (4) years have not elapsed since the date of death of Decedent, and the filing of the Application;

7. The Will was executed with the formalities and solemnities and under the circumstances required by law to make it a valid will [add, if applicable, that the Will has been made self-proved by the acknowledgment thereof by the Decedent and the affidavits of the attesting witnesses, each made before an officer authorized to take acknowledgments to deeds of conveyance and to administer oaths under the laws of this State, such acknowledgment and affidavits being evidenced by the certificate, with official seal affixed, of such officer attached or annexed to said Will, all in compliance with Section 59 of the Texas Probate Code];

8. No objection to or contest of the probate of the Will has been filed with the Court;

9. Decedent executed the Will with the formalities and solemnities and under the circumstances required by law to make it a valid will;
10. Decedent was at least eighteen (18) years of age, and was of a sound mind, at the time the Decedent executed the Will;

11. The Will was not revoked by Decedent;

12. No children were born to or adopted by the Decedent after the date of the Will [or list children born to or adopted by the Decedent after the date of the Will, see discussion of pretermitted children at §______];

13. The Decedent has never been divorced [or list names of ex-spouse and date(s) of divorce(s)];

14. No state, governmental, or charitable organization is named in the Will as a devisee [or list each such organization];

15. A necessity exists for the administration of the Decedent’s estate;

16. The person for whom Letters Testamentary are sought is entitled thereto by law and is not disqualified;

17. All of the necessary proof required for the probate of said Will has been made and that the person to whom Letters are to be granted is named in the Will as Independent Executor(rix), without bond.

IT IS ACCORDINGLY,

ORDERED, that the Last Will and Testament of ____________________, Deceased, is hereby admitted to probate, and the Will, together with the Application for probate, is ordered to be recorded by the Clerk in the minutes of this Court. It is further,

ORDERED that ________________ is appointed as Independent Executor(rix) of the Estate of _____________, Deceased, and Letters Testamentary as Independent Executor(rix) thereof, without bond, be granted to ________________ upon taking the Oath required by law. It is further,

ORDERED that ________________________________ appraise the assets of the Estate.

[or]
ORDERED the appointment of appraisers are waived.

SIGNED on this the ___ day of _____________________, 20____.

________________________________
JUDGE PRESIDING

APPROVED:
[Attorney information]
EXHIBIT L.

[Style]

OATH OF INDEPENDENT EXECUTOR

I do solemnly swear that the writing which has been offered for probate is the Last Will of
_______________, Deceased, so far as I know or believe, and that I will well and truly perform
all the duties of Independent Executor of said Estate of ____________, Deceased.

____________________________________

SWORN TO AND SUBSCRIBED before me by ______________ on this ___ day of
______________, ___.

____________________________________

NOTARY PUBLIC IN AND FOR
THE STATE OF _________
Dear *

By this letter, we want to furnish you with some basic information concerning the administration of your _____’s estate. You should retain this letter for future reference. This summary is not intended to discuss all matters of administration or to be an exhaustive treatment of the subject matter. Although it is lengthy, it is really just an overview, and it will be useful for reference purposes over time. In fact, we have already discussed many of these issues over the last few weeks, and _ and we will undoubtedly revisit them in the months to come.

General Matters

As you know, the Order admitting _____’s will to probate was signed on __________, 200__. You have qualified as independent executor of the estate by filing your oath of office. An “executor” is the legal representative of an estate, the person appointed in a will to carry out the testator’s wishes as expressed in that will and to administer the estate.

An “independent” executor, such as you, may act independently of the Probate Court’s control, except with respect to those matters which have already been accomplished (i.e., filing an application for probate and being appointed independent executor) and the filing of the required Inventory, Appraisement and List of Claims (which we will discuss later). If you had not been appointed independent executor in _____’s will, virtually all of your duties and actions would be subject to prior approval by the court, and that procedure would be cumbersome, time-consuming and expensive.

An independent administration is unique to the state of Texas, and it will greatly facilitate the administration of this estate. As an independent executor, you have broad powers, limited only by the will and the Texas Probate Code, and you are authorized to do, without court approval, all things authorized by the will and all things which an ordinary executor would be permitted to do only with court approval.

Your qualification as independent executor entitles you to receive Letters Testamentary from the County Clerk. Letters Testamentary evidence your appointment as independent executor and your authority to act for and on behalf of the estate. We have previously ordered and received Letters for your use. We suggest that you forward to _______________ with _______________ on Letter for his records.
Please keep in mind that Letters are only valid for sixty (60) days each time the Clerk issues them, as required by the Texas Business and Commerce Code. Thus, as a rule, we do not order more than is needed. You may need additional Letters at various times during the estate administration; if so, please give us a call.

**Estate Administration**

Simply stated, the administration of __________’s estate involves the collection of all assets owned by and all claims owing to him, the payment of all debts, liabilities, claims, and expenses owed by him or his estate, including applicable federal and state death taxes, and finally, the distribution of the remaining assets to the beneficiaries entitled thereto pursuant to __________’s will.

As you are aware, __________ are the beneficiaries of __________’s estate. However, the admission of the will to probate can be challenged for up to two (2) years from __________, the date it was admitted to probate. If challenged, the court could order you to account for all your actions as independent executor to third parties. [Because your situation presents a significant potential for a will contest or because of potential creditor issues, we suggest that you administer the estate with the highest level or formality]. While this may be overly cautious, it may be helpful in defending you against potential claims by, and allow you to avoid potential liability to, the ultimate beneficiaries and/or creditors.

Thus, the remainder of this letter will generally discuss your fiduciary duties, as executor, and certain notice and filing requirements of which you should be aware.

**Fiduciary Powers and Duties**

As we discussed previously, your appointment as independent executor grants you broad powers which are coupled with very high fiduciary duties that are designed to protect the interests of the beneficiaries of __________’s estate, the taxing authorities, and the estate creditors. Briefly stated, you should observe the following guidelines at all times:

- You should keep the beneficiaries of the estate reasonably informed of the administration and use your best efforts to promptly collect the assets and administer and settle the estate.

- You must always be in a position to account for all revenue received, moneys spent, assets sold (or for some reason purchased), and as to all other matters that directly or indirectly affect the estate.

- Do not commingle __________’s property with your own or that of any of your businesses or __________’s business interests. Commingling usually is done with cash, and it is imperative that you never commingle your __________’s funds with funds that are not his, not even for a day.

- Do not leave estate funds uninvested. We will address the issue of investments in a separate letter to you.
• Do not engage in any self-dealing with __________’s estate. However, some types of self-dealing can be accomplished, such as the sale contemplated by a buy/sell agreement if that becomes advisable. This is allowable because __________ approved the sale in writing in advance of his/her death.

Compliance with many of these guidelines can be accomplished by setting up appropriate estate accounts and handling the estate accounting matters in the manner we will discuss in more detail below.

Accounts and Records

The best way to handle accounting matters is for the estate to open one or more accounts at a bank and/or trust company of your choosing, and then place all the cash and investment grade assets into that account. As we discussed, the first step in setting up the estate account is to obtain a separate taxpayer identification number for your __________’s estate. You have arranged for __________ to obtain this number on your behalf. This new number should be used as the taxpayer identification number for the estate accounts.

The next step is to establish an estate account agreement with the bank or trust company of your choosing. The account should be styled as follows:

“________________, Independent Executor of the Estate of _______________, Deceased.”

It is important for you to see that all cash received and expended for the estate passes through the estate account. Generally, the account will operate as follows:

• As estate revenue is received, be it dividends, interest, sales proceeds, or other revenue, the revenue should be deposited into the estate account, and the exact nature of the deposit should be identified in the account ledger.

• All estate disbursements should be made from the estate account, and a detailed record should be maintained of all distributions.

• As we will discuss below, you may have paid some estate expenses to date, including funeral expenses and debts outstanding at the date of death, from your own separate funds or from the company. Those estate expenses should be reimbursed to you after the account is opened.

If the above routine is followed consistently throughout the administration of the estate, you will be able to utilize the account statements as the primary resource for information regarding estate receipts and disbursements. We also will be able to note any sales of any non-investment grade assets, such as the car and ______________, if the proceeds are placed into the account.

Note that any debts, expenses or other disbursements should not be paid by __________’s business interests, including ______________ or ______________. This will preserve the autonomous nature of these businesses. However, should the estate require a
distribution from one or more of __________’s business interests, we can assist you with the coordination of any allowed distribution or the structuring of an appropriate loan.

**Expenses Incurred to Date**

There will be a number of expenses which should properly be borne by the estate. As soon as it is convenient, we suggest that you prepare a simple accounting of all transactions that have occurred as of this date with respect to the estate, and provide copies to __________ and us. If certain expenses have been paid on behalf of the estate, arrangements can be made to reimburse the proper person or entity from the account.

**Insurance**

It is your duty as independent executor to insure the estate property against loss and liability. We advise you to insure any real property (including structures), and any other property of significant value against theft or loss. We also suggest that you carry liability insurance on the real properties and any other estate property which warrants such coverage.

Further, you may determine it is appropriate to employ one or more individuals during the administration of the estate. Please let us know prior to their employment so we may discuss whether it is appropriate to obtain workman’s compensation or similar insurance during the term of their employment.

**Notice to Creditors**

Your appointment as independent executor requires you to meet certain failing deadlines with respect to notice to creditors and governmental agencies. The first deadline requires you to notify certain potential creditors of __________. Within one (1) month from the date of the filing of your oath, a statutory notice must be published to the general creditors of the estate. As you are aware, we have prepared this notice on your behalf, and we have previously forwarded you a copy for your records.

You are also required to give notice to all secured creditors. Secured creditors are creditors whose indebtedness is secured by real or personal property, and secured by property __________ owned an interest in, individually, at the time of his/her death. The notice to each secured creditor must be given within two (2) months of your appointment as executor. If an executor fails to give the required notice, he or she can be held personally liable for any damages which any person suffers as a result of the failure to give the notice. You have confirmed that you are not aware of any secured creditors.

With regard to unsecured creditors, an executor is no longer required to give an unsecured creditor notice of an executor. However, an executor may choose to give unsecured creditors notice to force the creditors to either establish their claims of payment or be permanently barred from seeking payment from the estate. Texas law requires that the notice to unsecured creditors include the following: (i) date of executor’s appointment; (ii) address where the claim may be presented; (iii) to whom the claim should be addressed; and (iv) a statement that the claim must be presented within four (4) months after the date of the receipt of the notice or the claim is barred. This notice may be given at any time before the estate is closed.
The advantage of giving unsecured creditors notice is that it expedites the process of identifying any potential creditors and settle the debts as promptly as possible. This will allow you, as executor, to eventually distribute the remaining estate assets without the concern that a creditor will attempt to collect on a debt. The disadvantage is that the notice may prompt a creditor to file a claim that would not have been filed without the information contained in the notice. However, it is rare that a creditor will do nothing for up to six (6) years, at which time the debt is generally barred by the applicable statute of limitation. It is generally preferable to address any potential claims in the initial stages of the administration versus waiting to see when and if the creditor will attempt to collect the debt.

To date, you have requested that we give ______________________ notice to expedite the resolution of the alleged debt they claim is still due. If you become aware of any other potential creditors and wish us to provide them a similar notice, please provide us with each such creditor’s name, address, and a general description of the alleged debt. If possible, please also provide us with copies of any recent invoices, contracts, or any other document which you or _______ executed relating to the alleged debt for our review. Upon receipt, we will prepare and send the appropriate notice on your behalf.

Inventory

You are also responsible for filing with the probate court, for the court’s approval, an Inventory and List of Claims, sworn to by you to be accurate to the best of your knowledge. The Inventory is essentially a catalog of estate properties which must be carefully prepared. It must include proper and complete descriptions of the various probate assets together with accurate valuations of such assets as of the date of death. Contrary to the laws of some states, in Texas it is only necessary to report in the Inventory the probate assets and claims owing to the decedent. It is not necessary to include non-probate assets or debts owing by the decedent or the estate.

While the Inventory is generally due to be filed within ninety (90) days from ____________, our practice is to coordinate the information on the Inventory with the Federal Estate and Texas Inheritance Tax Returns, which are due nine (9) months from the date of death (unless extended). This allows us to prepare the Inventory based on the asset information and valuations included in the final death tax returns. It also allows us to avoid any duplication of effort and related expense between ____________ and us in gathering information which will be necessary to prepare the death tax returns and the Inventory.

Accordingly, we have petitioned the Court for an extension of time to file the Inventory until after the death tax returns are filed. The Court has granted our request and the Inventory is now due ____________.

Once the death tax returns are finalized, we will prepare the Inventory for your review and execution. After the Inventory has been executed by you, we will file the Inventory with the court and obtain an Order approving it.
Non-Probate Property

At this point, we want to discuss with you the difference between probate and non-probate property, because often times this is a matter of some confusion. Some types of property belonging to a deceased individual may not be subject to the will or the control of the executor, but instead may pass to a beneficiary or beneficiaries by contract or operation of law. Such assets are commonly referred to as non-probate assets. A common example of non-probate property is life insurance proceeds payable to a named beneficiary other than the decedent’s estate. Any death benefit payable under such a policy would not be subject to the control of you, as executor, and is not required to be reported in the Inventory. On the other hand, if a decedent had an interest in life insurance on the life of another person, that asset is required to be reported in the Inventory.

While non-probate assets are not required to be reported in the Inventory, such assets generally must be reported in the decedent’s estate for federal and state death tax purposes. Therefore, if you locate any asset which may be a non-probate asset, please advise us of the potential asset so that we may advise you whether the asset is a probate or non-probate asset and how to handle the collection of such asset.

Estate and Income Tax Returns

Additionally, a Federal Estate Tax Return will be required to be filed for _________’s estate if the estate has a value of $_________ (including prior taxable gifts and certain transfers). The return is due nine (9) months from the date of _________’s death. For good cause shown in a written application, a six (6) month extension of time may be obtained for filing the returns. [_______ and his/her firm of _______________ will handle the preparation of these death tax returns.]

Further, although _________ will be advising you with respect to all income tax matters, we want to take a moment to discuss a few of the most basic matters relating to the estate and income taxation of _________’s estate.

In connection with the death tax returns, under certain circumstances an estate is offered an election to value the estate on the date of death or on the date six (6) months thereafter. This is referred to as “alternate valuation date” and in _________’s case, is _______________. For purposes of this election, the entire estate may be valued as of either _______________. For purposes of this election, the entire estate may be valued as of either _______________ or _______________, whichever produces the lowest estate valuation. However, if any assets are sold during the six-month period, the actual sales price of the sold assets determines the alternate value of those assets. Alternate valuation is a valuable and important election, and it is a decision that _________ will discuss with you in greater detail after he/she has more information about your _________’s investment assets.

You should also be aware that the income tax cost basis of all the assets _______ owned, except those which might be classified as income in respect of a decedent (e.g., accrued interest or dividends), will now be the fair market value on _______________, or the alternate valuation date of _______________, if elected. Thus, in the event of the sale of any assets, the only capital gain for purposes of income taxation would be that in excess of the new income tax basis.
Further, we anticipate it will be necessary to prepare and file a final federal income tax return for __________ covering the period beginning on January 1st of _____ and ending on the date of his death, but it is not due until April 15, _____. We understand that you have requested an extension of time to file this return. Note that once the return is prepared, you should sign it in your fiduciary capacity, i.e., as independent executor.

A federal fiduciary income tax return (Form 1041) will have to be filed by the estate for any year during the administration in which the gross income of the estate exceeds $600. If required, the return is due on the fifteenth (15th) day of the fourth (4th) month following the closing of the estate’s tax year. The estate may select for its tax year either a calendar year or a fiscal year. Furthermore, the estate is not required to estimate its income taxes for its first two tax returns. In this case, tax planning and savings might be accomplished in connection with income tax matters and returns involving the estate because of deferral and because the estate is a separate taxpayer. It will be to your advantage to maintain the estate as a separate taxpayer throughout the administration, so we advise you not to change the names on any accounts or other assets in __________’s name without checking with us.

We understand _______________ with the accounting firm of ____________________ will be assisting you in the preparation and filing of all these income tax returns over the course of the administration. As the administration of the estate progresses, we anticipate that __________ will be discussing with you these income tax matters in greater detail. However, please feel free to call us if you have any questions.

Conclusion

There no doubt will be questions which you will have from time-to-time and you should feel free to call me at any time.

Very truly yours,

[Attorney]
EXHIBIT N.

[Style]

INVENTORY AND LIST OF CLAIMS

TO THE HONORABLE JUDGE OF THE COURT:

______________________________, as the Independent Executor, of the Estate of ________________________, returns to the Court the following Inventory of all of the property, real and personal, belonging to the Estate of ________________________, Deceased, that has come to his knowledge, together with a list of claims belonging to said Estate:

**List of Property**

<table>
<thead>
<tr>
<th>Item No.</th>
<th>Description</th>
<th>Value at Date of Death</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Real Estate - See Exhibit A, attached</td>
<td>$</td>
</tr>
<tr>
<td>2.</td>
<td>Stocks and Bonds, See Exhibit B, Attached</td>
<td></td>
</tr>
<tr>
<td>3.</td>
<td>Cash, See Exhibit C, attached</td>
<td></td>
</tr>
<tr>
<td>4.</td>
<td>Other Miscellaneous Property, See Exhibit D, attached</td>
<td>_________</td>
</tr>
</tbody>
</table>

Total Property $               

**List of Claims Belonging to Estate**

<table>
<thead>
<tr>
<th>Item No.</th>
<th>Description</th>
<th>Value at Date of Death</th>
</tr>
</thead>
<tbody>
<tr>
<td>[or]</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

None Determined To Date

WHEREFORE, PREMISES CONSIDERED, ________________________, as Independent Executor of the Estate of ________________________, requests that (i) the Court approve this Inventory and List of Claims; and (ii) for such other and further relief to which he/she may show himself justly entitled.

Respectfully submitted,

[Attorney information]
AFFIDAVIT

I, __________________________, do solemnly swear that the foregoing Inventory of the Estate of ______________________, Deceased, and List of Claims is a true and complete Inventory and List of the Property and Claims of the said Estate that have come to my knowledge.

________________________________

SUBSCRIBED AND SWORN TO BEFORE ME, on this the __ __ day of ___________, 20__.

(SEAL)                   NOTARY PUBLIC IN AND FOR
                          THE STATE OF TEXAS