

# **TEXAS ESTATE ADMINISTRATION**

## **CASES AND MATERIALS**

**GERRY W. BEYER**

**Governor Preston E. Smith Regents Professor of Law  
Texas Tech University School of Law**

*AuthorHouse™  
1663 Liberty Drive, Suite 200  
Bloomington, IN 47403  
www.authorhouse.com  
Phone: 1-800-839-8640*

*© 2008 Gerry W. Beyer. All rights reserved.*

*No part of this book may be reproduced, stored in a retrieval system, or transmitted by any means without the written permission of the author.*

*First published by AuthorHouse 07/28/08*

*ISBN: 978-1-4389-0750-5 (sc)*

*Library of Congress Control Number:*

*Printed in the United States of America  
Bloomington, Indiana*

*This book is printed on acid-free paper.*

## Chapter One

### INTRODUCTION TO ESTATE ADMINISTRATION\*

---

---

When a person dies, some type of formal process is required for two main reasons. First, successors in interest need proof that they are indeed the new owners of the decedent's property by virtue of being heirs under the state's intestacy law or by being beneficiaries under the decedent's valid will. Procedures to establish title are relatively simple and often do not require a full estate administration. Second, the decedent's creditors need to be paid. In a sense, death is like going bankrupt. Estate administration assures that creditors get paid to the fullest extent possible. However, state statutes often shield a portion of the decedent's estate from the claims of creditors to protect the decedent's surviving spouse, minor children, and sometimes adult children who are still living at home.

An estate administration begins with the personal representative collecting all of the decedent's probate assets. The personal representative preserves this property and manages it in a fiduciary capacity. The personal representative then pays the creditors and if property still remains, distributes it to the appropriate heirs or beneficiaries. The details of estate administration vary tremendously among the states. This Chapter reviews the basic structure of the administration process.

#### A. PROPER APPLICANT

Neither the probate of the decedent's will nor an administration of the decedent's estate occurs automatically upon a person's death. Someone must start the process. Normally, this person needs a pecuniary interest such as being an heir, beneficiary, or creditor. In some situations, however, a person without an interest may be able to request a temporary arrangement to protect the decedent's property from being dissipated because no one is managing or safeguarding the property.

---

\*Adapted from GERRY W. BEYER, WILLS, TRUSTS, AND ESTATES: EXAMPLES & EXPLANATIONS ch. 12 (4<sup>th</sup> ed. 2007).

---

## **B. LOCATE WILL**

The applicant needs to determine whether the decedent died with a valid will. A careful search is needed to either (1) locate the will, or (2) conclude that the decedent is unlikely to have died testate because a reasonable search did not turn up a will. There are four basic categories of locations where the decedent's will might be found.

### **1. Decedent's Home or Office**

The decedent may have retained the will and kept it at home or at the decedent's office. Thus, the applicant should search common storage locations such as filing cabinets, desk drawers, and spiritual books (e.g., Bible, Koran, or Torah). Some testators carefully hide their wills and thus it may take some ingenuity to find them.

### **2. Safe Deposit Box**

Instead of keeping the will at home, the testator may have placed the will in a safe deposit box at a bank or other financial institution. Many states have statutes allowing relatively rapid access to the decedent's safe deposit box to locate the decedent's will as well as other documents which need to be found quickly such as a burial plot deed and life insurance policies. *Read* Prob. Code §§ 36B-36F.

### **3. Significant Individuals**

The testator may have transferred possession of the will to someone whom the testator trusted to bring it forth upon the testator's death. Common repositories for the will include the testator's family members, close friends, the person named as the executor, and the attorney who drafted the will. State law usually requires anyone in possession of a decedent's will to turn that will over to the court or to someone who intends to probate the will. *Read* Prob. Code § 75.

### **4. Clerk of the Court**

Many states permit a testator to deposit the will with the clerk of the court for safekeeping. The clerk files the will in a secure location and then turns the will over to an authorized person or the court upon the testator's death. *Read* Prob. Code § 71.

---

### C. PREPARE APPLICATION

The person who desires to initiate the probate or administration process must prepare an application meeting state law requirements. The application may be lengthy and require the applicant to recite assorted information about the decedent, the decedent's property, the applicant, and the heirs or beneficiaries.

### D. FILE IN APPROPRIATE COURT

The applicant takes the application, the original will (if any), and the appropriate filing fee (typically between \$100 and \$200) to the appropriate court. The applicant must make certain the court has both jurisdiction and venue over probate matters. Specialized courts may deal with probate matters. These courts are often called *probate* courts, *orphans'* courts, or *surrogate's* courts. In other states, courts of more general jurisdiction preside over probate matters such as county courts or district courts. Proper jurisdiction may depend on the population of the county — large urban counties are more likely to have specialized probate courts than small rural counties.

The applicant must also be sure to file in the court that has venue over the decedent's estate. Typically, venue is based on the county of the decedent's domicile at the time of the decedent's death. If the decedent owned real property in another state or country, venue for proceedings affecting title to that land will be in the other jurisdiction. These proceedings are often referred to as *ancillary administration*.

### E. CITATION

The probate statutes of many states require the clerk of the court to give some type of notice that an administration has been requested or that a will has been filed for probate. This notice alerts interested persons to the pending action so they can contest the will or bring forth the decedent's will when an intestate administration is requested. Jurisdictions vary considerably regarding the method of citation. Some states such as Texas permit a very broad type of citation such as by posting a notice on the front door of the courthouse or a nearby bulletin board. Other states require more specific notice to heirs and beneficiaries by methods such as personal service or registered or certified mail. Several states even require the beneficiaries named in the most recent will which the decedent revoked to be given notice. In some states, parties who receive notice are precluded

from contesting the will at a later time while in other states, parties who had notice may still contest the will for a statutorily specified period. Common terms for this adversarial process of beginning estate administration after giving notice to interested persons include *solemn form probate* and *formal probate*.

Some states permit probate without the necessity of giving notice to interested persons. Accordingly, the probate process begins with an *ex parte* proceeding. Because potential contestants did not receive notice, they are not precluded from later bringing a will contest action unless the statute of limitations to do so has expired. Common terms for this type of proceeding include *common form probate* and *informal probate*.

Some states authorize both notice and non-notice types of probate. Thus, the applicant needs to decide which method best suits the applicant's needs in terms of expense, time commitment, finality, and resistance to later attack.

## **F. PROBATE OF WILL OR DETERMINATION OF HEIRS**

The court conducts a hearing to decide whether the will is valid and whether an administration is necessary. As discussed above, this hearing may either be adversarial or *ex parte* depending on the type of probate. In adversarial situations, this hearing cannot occur too quickly after notice is given. Typically, one to two weeks must elapse after the notice before the court may conduct the hearing to be sure persons who want to oppose or intervene in the action have sufficient time to do so.

If the applicant is attempting to probate a will, the court must determine whether the will is valid. In the usual case where the will is accompanied by a self-proving affidavit and no one is contesting the probate, the hearing is quite brief, perhaps five minutes or less. If there is no self-proving affidavit, the hearing will take longer because the testimony of the subscribing witnesses or of individuals familiar with the testator's or witnesses' handwriting is often required. If the court finds the will valid, it is admitted to probate. The applicant may not need to ask the court to open an administration if one is not necessary. For example, there may be no unpaid debts or all the unpaid debts may be secured by real property. Simply admitting the will to probate as a *muniment of title* may be all that is necessary to document title transfer from the decedent to the beneficiaries.

If the decedent died intestate, the court will make a determination of the identity of the heirs. If there is no need for an estate administration, this *determination of heirship* may be all that is required to prove that title to

property passed from the decedent to the heirs. The court will open an administration if one is necessary to pay debts or to partition property among the heirs.

A few states have adopted the civil law concept of *universal succession*. Under this procedure, property passes directly from the decedent to the heirs and beneficiaries. No formal administration is required even if the decedent had creditors. Instead, the creditors must seek payment directly from the heirs and beneficiaries.

## G. TYPE OF ADMINISTRATION

There are many different types of estate administration and many states authorize several methods. The testator, the court, or the personal representative may have the ability to select or recommend the type of administration used for the decedent's estate.

The traditional type of administration, often called *dependent administration*, is strictly supervised by the court every step of the way from start to finish. The personal representative must get permission before taking most actions, such as selling estate assets and paying creditors, and then get those acts approved by the court after doing them. Dependent administration is cumbersome, inconvenient, costly, and time-consuming.

A more modern type of administration, *independent, informal, or nonintervention administration* as it is often called, allows the representative to work without court supervision unless an issue requires court involvement or an interested person, such as an heir, beneficiary, or creditor, complains about the way the representative is conducting the administration.

If the estate is small or if there are few debts, many states have short-form, summary, or abbreviated administration methods which reduce the procedures necessary to resolve creditor issues and to determine title matters.

## H. APPOINTMENT OF PERSONAL REPRESENTATIVE<sup>1</sup>

If an administration is needed, usually because the decedent died with

---

<sup>1</sup>Portions of this section are adapted from Gerry W. Beyer, *Selecting Executors and Trustees*, EST. PLAN. DEV. (Dec. 1994).

unpaid debts, the court will appoint a personal representative to take charge of and manage the decedent's probate assets, pay creditors, and distribute any remaining property to the heirs and beneficiaries. If the decedent died intestate, the personal representative is usually called an *administrator*. State statutes provide a list of individuals, in priority order, who are entitled to the position. This list usually begins with the intestate's surviving spouse, adult children, parents, and siblings and ends with creditors and other reputable people in the community.

If the decedent died with a valid will, the testator may have named the personal representative, called the *executor*, in the will. If the will did not name an executor, the court will appoint an *administrator with the will annexed*, also called an *administrator c.t.a. (cum testamento annexo)*, to carry out the terms of the will and administer the estate.

## 1. Legal Capacity and Desirable Characteristics

Shortly after receiving your law license, Client hires you to prepare a will. After carefully questioning Client about how Client wishes to dispose of property, you ask Client, "Who do you want to name as your executor?" Client gives you one of those deer-in-the-headlight looks and says, "I don't know. How do I decide?" What factors do you recommend that Client consider in making this important decision?

To start with, the executor must have legal capacity under local law to serve. *Read* Prob. Code § 78. The basic requirements are relatively uniform although the criteria vary among the states. For example, an individual executor must typically be (1) an adult (usually at least eighteen years of age unless the court has removed a younger person's disabilities of minority or the person is married), (2) not incompetent or incapacitated, (3) not a convicted felon, and (4) not found to be otherwise unsuitable by the court. In some states, a non-resident may not serve as an executor unless the non-resident takes special steps such as appointing a resident agent to accept service of process. If the executor is a corporation, it must comply with applicable state law. States may impose relatively few requirements on a bank or savings and loan association (e.g., merely having a corporate charter authorizing the corporation to act as a fiduciary may be sufficient) while imposing additional requirements on other types of corporations and non-domestic corporations.

The executor should have characteristics that will enhance the likelihood that the person will do a good job of administering Client's estate. The following traits are desirable.

---

***a. Honesty***

The executor must be someone in whom Client has complete trust. If Client has any doubt regarding the potential designee's honesty or integrity, you should urge Client to select a different person.

***b. Common Sense and Good Judgment***

The executor must make many discretionary decisions. Accordingly, it is important for the executor to have a good measure of common sense. The executor must act prudently and reasonably at all times.

***c. Financially Responsible***

Individuals and corporations who have experienced success in their own financial matters are more likely to be able to do the same for assets managed in a fiduciary capacity. In addition, financially stable persons are usually not as motivated to embezzle estate property as are persons with fiscal troubles. Client should seek an executor who is financially solid and not involved in litigation which could lead to the individual's or corporation's bankruptcy.

***d. Investment Experience and Skill***

The level of experience, skill, and knowledge needed to serve as an executor depends on the type, amount, and value of property that the executor will manage. Vastly different expertise is needed to manage diverse investments such as high-rise apartment buildings in a large city, farms, portfolios of stocks, bonds, commodity futures, derivatives, and other securities, retail businesses, and oil and gas properties.

***e. Awareness of Legal Issues***

Although an executor need not be an attorney, the executor must be aware of potential legal issues or at least know that consultation with an attorney or other expert is essential.

***f. Fiduciary Personality***

An individual needs to possess a special type of personality to serve successfully as an executor. For example, the executor must be calm and

patient in dealing with beneficiaries, professional in working with the court, and astute at determining which creditors to pay.

***g. Longevity***

An executor may need to serve for several years and perhaps decades if the estate is complex or subject to protracted litigation. Thus, the age and health of an individual executor are often important considerations. The prospect of a corporate fiduciary being in business in the future must also be taken into account.

***h. Proximity***

The executor should be someone who would be geographically available to serve. For example, it is difficult for an executor living in Alaska to handle the estate of a Maine decedent.

***i. Lack of Distractions***

Just like passengers who sit in airplane exit rows, an executor must be able to perform the required duties without being distracted by other concerns. If Client selects an individual, the individual (or a close member of the individual's family) should not be suffering personal problems such as an illness, a change in job, or a divorce which could prevent the person from giving the estate the attention it requires. In a corporate setting, Client should avoid fiduciaries in the midst of mergers, takeovers, bankruptcy proceedings, or significant litigation.

***j. Prior Approval***

Before naming anyone as an executor, the person should be shown a draft of the will and asked if the person would be willing to serve. It is costly, both in terms of time and money, if the named executor refuses to accept the position.

***k. Successors***

Client should name at least one alternate executor in case Client's first choice is unable or unwilling to serve. Client may also specify a method for selecting a successor executor. If there are no alternates and no selection method, court action will be necessary to fill the vacancy. Client may wish to include a provision specifying under what circumstances the

executor may be removed from office. This type of provision may reduce delay and court costs if a currently serving executor can no longer serve due to illness, incompetency, or dishonesty.

## **2. Individual or Corporation Personal Representative?**

Client listened intently as you explained the legal requirements and desirable characteristics of an executor. Client then told you that Client either wants to name Son or Bank as the executor. Client now seeks your advice as to which of these would be the better choice. What factors should Client consider in making this decision?

Client may be motivated to select Son believing that Client is bestowing some sort of honor or privilege. This is not the case. An executor's position is tough, demanding, and filled with potentially overwhelming responsibilities, duties, and exposure to personal liability. The appointment of an executor should be a business decision, not an emotional one.

Client may obtain some important benefits by selecting an individual, such as Son, to serve as the executor. Son may be willing to serve for free unlike corporate executors who expect reasonable compensation for their services. Because Son is well-acquainted with Client, Son is likely to have knowledge of the family situation, Client's goals, and the needs and personalities of the beneficiaries. As a result, Son may be in a good position to exercise the substituted judgment which Client desires. Son may have an appreciation for certain types of estate property which Client would like to see preserved and kept in the family such as heirlooms and collectable items. Likewise, Son may be familiar with the operation of family and closely-held businesses.

Client must also evaluate the potential problems which may flow from appointing Son as the executor. Son has probably never served as an executor in the past and thus is unaccustomed to carrying out the fiduciary obligations associated with estate administration. Son may lack experience in making prudent investment decisions and in managing estate assets and is less likely to be as financially solvent as Bank. In addition, Son may lack significant assets which the beneficiaries could reach to remedy a breach of fiduciary duty. Appointing Son could increase family strife if the will places Son in the position of playing favorites among Client's children (Son's siblings).

On the other hand, however, naming Bank as executor may be advantageous to Client. Probably the foremost advantage of naming Bank as the executor is the skill and experience the corporate fiduciary would bring to the job. Bank handles fiduciary matters on a regular basis and is

well-equipped to handle the day-to-day affairs of an estate (e.g., accounting services, record keeping, allocation of receipts and expenditures between principal and income, determining the tax basis of property, filing tax returns, etc.). In addition, Bank has the ability to provide certain services without additional cost to the estate, e.g., protecting valuables in Bank's vault, providing routine administration services, rendering advice on investment and tax matters, etc. Bank also has vast experience with making prudent investments and will have investment opportunities available to it that Son would not. Client's estate would also benefit from having Bank as the executor because of Bank's continuous existence — Bank does not get sick, take vacations, have family emergencies, or die. If Bank does breach its fiduciary duties, the aggrieved beneficiaries may have a greater chance of recovery against Bank than Son. Most individuals lack sufficient non-exempt property to permit a full recovery while corporate executors typically have significant assets against which the beneficiaries may proceed.

Client must also consider the disadvantages of naming Bank as the executor. Bank will charge a fee for its services unlike Son who may be willing to serve without charge. However, the fee may be a small price to pay for the expertise Bank would bring to the job. Of course, if the value of Client's estate is relatively low, the fee may be prohibitive. Another concern may be Bank's lack of a rich history with Client, Client's property, and the beneficiaries which Son would bring to the job. However, Client may be seeking a neutral or balanced approach. Bank can make unbiased decisions because it is unencumbered by the emotions and feelings of family loyalty and sympathy which could prevent Son from making objective decisions.

### **3. Co-Executors**

Client listened to your critique of the pros and cons of naming Son and Bank as executors. Realizing the benefits of having each of these persons serving, Client asked you, "What about if I name both Son and Bank to serve as co-executors?" How would you advise Client about this alternative?

If the court appoints more than one executor, Client's estate benefits from the experience and expertise of both Son and Bank. Better decisions may result because of the deliberation which occurs when the co-executors present and discuss multiple viewpoints. Multiple executors also provide greater protection to the estate and beneficiaries. There are built-in checks and balances because each executor should evaluate the conduct of the other executor. An evil executor will have a harder time carrying out any untoward schemes because there will be another executor watching.

Client must also consider the problems that arise upon the appointment of co-executors. For example, both executors usually must agree before they can take any action. Requiring the consent of Son and Bank may slow down the administration process even if they are in agreement simply because of the extra time and effort needed to obtain and document the consent. Another disadvantage of naming both Son and Bank is the potential of a deadlock and the paralysis which follows upon a tie vote. A costly judicial resolution of this standoff would then be needed. Client could avoid this problem by either (1) appointing an odd number of fiduciaries, or (2) providing a method for resolving tie votes. If Client appoints both Bank and Son, there is a significant likelihood of additional administrative fees because of the extra conferences, telephone calls, and paperwork that is required. Bank may even charge a higher fee if Son is a co-executor because of the additional time it usually takes to deal with an individual. Bank may also be reluctant to serve with Son for fear of liability for Son's improper acts. Normally, each co-executor is jointly and severally liable for the acts of all executors.

## **I. QUALIFICATION OF PERSONAL REPRESENTATIVE**

Once the court appoints the personal representative, the person must take the necessary steps to formally assume office. The personal representative must qualify before the clerk of the court can issue letters.

### **1. Oath of Office**

The personal representative is usually required to take an oath swearing that the representative will faithfully carry out the duties of the position. In some states, a mere statement of acceptance of the duties of office is sufficient.

### **2. Bond**

The personal representative may need to post bond conditioned on the faithful performance of the representative's duties. The court sets the amount of the bond based on the value of the decedent's estate. The personal representative may deliver that amount in cash to the court, however, the personal representative typically obtains the bond from a surety company. In exchange for the payment of premiums, the surety company agrees to pay the amount of the bond to the creditors and beneficiaries if the personal representative breaches the applicable

fiduciary duties. Of course, if the surety is required to pay, the surety will seek reimbursement from the personal representative.

States are divided on the bonding requirement. Some states like Texas require a bond unless the will expressly waives the bond. On the other hand, some state statutes do not require a bond unless the testator expressly requires it in the will or the court deems it necessary. In addition, some states, including Texas, exempt corporate fiduciaries from the bonding requirement.

Client decided to name Son as the executor. You now need to determine whether Client wants Son to post bond before Son can serve. What concerns would you bring to Client's attention to assist Client in making an informed decision?

Bond premiums are expensive as is the court proceeding which is necessary to set the amount. Client may save these expenses by waiving the bond. The costs of the hearing and the annual bond premiums are proper estate expenses and thus reduce the amount the beneficiaries eventually receive. However, bonds do protect the beneficiaries from evil executors. Of course, if Client truly believes Son will act improperly, Client should rethink the decision to name Son in the first place.

## J. ISSUANCE OF LETTERS

After qualifying by taking the oath of office or filing a statement of acceptance and posting any necessary bond, the personal representative is entitled to letters, either *letters testamentary*, if there is a will, or *letters of administration*, in the case of an intestate decedent. Letters are typically one page documents issued under the seal of the court which indicate that the personal representative has been appointed by the court and has qualified. The personal representative may then show these as evidence of the representative's authority when dealing with estate matters or collecting estate property. Third parties who deal with a person who has letters are usually protected from liability to the heirs or beneficiaries if the executor mismanages the property. Consequently, third parties often want to retain an original letter for their files. Because the cost of letters is nominal, often under \$10.00 a copy, the personal representative should estimate the number of letters needed before qualifying and obtain all the necessary letters at the same time to prevent multiple trips to the courthouse and the associated time and monetary cost.

---

## **K. COLLECT AND PROTECT DECEDENT'S PROBATE ASSETS**

The personal representative must collect and preserve all of the decedent's probate assets for the benefit of the creditors and the heirs or beneficiaries. The personal representative does not have title to these assets but does have a right to possess the assets which is superior to the anticipated distributees. In practice, it may require considerable effort to gain possession of estate property because family members often raid the decedent's home and remove items to which they feel they are entitled. The personal representative does not have authority over non-probate assets such as life insurance proceeds, joint tenancy property with the survivorship feature, and pay on death bank accounts.

## **L. MANAGE DECEDENT'S PROBATE ASSETS**

The personal representative must manage the decedent's probate assets. For example, the representative may need to sell or rent estate property, decide on issues regarding the management of stock portfolios, run businesses, etc. In all aspects of this management, the representative is a fiduciary and held to a high standard of care and the utmost degree of loyalty. The duties of a personal representative are very similar to those of a trustee.

## **M. INVENTORY AND APPRAISEMENT**

One of the typical duties of the personal representative is to prepare an inventory of all of the decedent's probate assets and indicate the fair market value of each as of the date of the decedent's death. Traditionally, the court is involved in the process of selecting professional appraisers to value the decedent's property for the personal representative. Many modern statutes, however, permit the representative to value the assets without assistance and, if necessary, to select and hire appraisers. The inventory and appraisal helps the creditors to determine which assets are available to pay their claims and thus provides them with valuable insight into how they should proceed to have the best chance of getting paid. Additionally, the inventory helps the heirs and beneficiaries to determine the property to which they may be entitled.

## **N. PROTECT CERTAIN PROPERTY FROM CREDITORS**

The surviving spouse, minor children, and, in a few states, unmarried adult children who still live at home may be able to retain some of the decedent's property free from the claims of certain creditors. This property is often in addition to the property they receive by way of intestacy or under the testator's will. State legislatures have made public policy decisions that these individuals deserve protection and that their needs outweigh the rights of the decedent's creditors to be paid and the rights of heirs and beneficiaries to receive the decedent's property. Because this property is unavailable to creditors, the personal representative is usually required to set aside the property for the benefit of the protected individuals early in the administration process.

### **1. Homestead**

Many jurisdictions protect the decedent's homestead, that is, the residence used by the decedent and the decedent's family. Jurisdictions vary with regard to limitations placed on the physical size of the homestead. Some states have different rules depending on whether the homestead is in an urban or rural area. In addition, some states extend homestead protection to land used in a family business or farm. State law may accord the homestead two types of special treatment. First, it may be protected from creditors and second, close family members may have a superior right to occupy the homestead.

#### ***a. Creditor Protection***

The surviving spouse, minor children, and dependent children may receive a portion of the homestead free from the claims of most creditors. Jurisdictions vary tremendously with regard to the amount of protection accorded the homestead. Some states protect small amounts such as \$5,000 or \$15,000. On the other hand, some states such as Texas protect the entire homestead regardless of its value. If the decedent lived in rental accommodations, some states permit a statutorily specified amount of other property, such as cash, to be protected from creditors in lieu of the homestead.

#### ***b. Occupancy Rights***

Some states grant the surviving spouse and minor children the right to live in the homestead even if they do not receive title to it as heirs or will beneficiaries. This right, based on the ancient concept of *quarantine*, may

be quite limited or extremely valuable. In some states, the occupancy right of the family members exists for a relatively short period of time such as forty days. Other states, however, give the surviving spouse the right to live in the homestead for the rest of the surviving spouse's life unless the surviving spouse voluntarily abandons the homestead. Minor children may obtain the right to remain until they reach majority.

In states with lengthy homestead occupancy rights, the decedent's heirs and beneficiaries may never actually get to enjoy the property. For example, assume that Husband and Wife married when both were eighteen years old. Wife inherited a house from her parents who had died a year later. Shortly after moving into this home, Wife died. Wife's will left the house to Sister. Under the law of some states, Husband could live in the home for the rest of his life which could easily be more than one-half of a century. Husband could even remarry and bring the new spouse into the home. During this time, which could be the rest of Sister's lifetime, Sister would be unable to benefit from her ownership of this property.

## **2. Exempt Personal Property**

The surviving spouse and minor children are often granted the right to retain certain personal property free from the claims of creditors. Jurisdictions vary considerably with regard to the type of items which are exempt. Usually, exempt personal property is tangible in nature such as home furnishings, food, clothes, jewelry, firearms, sporting equipment, cars not used for income, certain quantities of farm animals, and household pets. In some states, certain types of intangible personal property may also be exempt such as the cash surrender value of life insurance policies and current wages for personal services. The maximum value of the exemption varies widely among the states.

## **3. Family Allowance**

The court may have the authority to grant an allowance for the support of the surviving spouse and minor children for some statutorily provided period of time. Typically, it is the amount necessary to keep them in the style of living to which they were accustomed while the decedent was alive for one year after the decedent's death although some states authorize family allowances to be made until the administration is closed. Some states impose an upper limit on the family allowance.

#### 4. Waiver of Protections

States vary as to whether the spouse may waive rights to the homestead, exempt personal property, and the family allowance. Unimpeded, the rights of the surviving spouse may tremendously disrupt the deceased spouse's estate plan. Accordingly, careful consideration of homestead, exempt personal property, and the family allowance is needed every time an estate plan is prepared.

### O. NOTICE TO CREDITORS

The personal representative must alert the decedent's creditors that the decedent has died and that the court has appointed a personal representative. This information permits the creditors to take the proper steps to present their claims so they can get paid. Jurisdictions vary with regard to how the representative gives this notice, that is, by publication, by mail, or in person. Many states require the personal representative to give the notice in a relatively timely fashion such as within one to four months of receiving letters. Some states have different procedures for different types of creditors, e.g., secured, unsecured, and government claimants such as taxing authorities.

Many states restrict the ability of a creditor to recover on a claim once the creditor receives notice. These provisions are called *nonclaim statutes*. A typical nonclaim statute provides that if a creditor does not present the creditor's claim for payment within four months after receiving notice, the creditor's claim is forever barred even if the statute of limitations on that claim has not yet expired.

In *Tulsa Professional Collection Services, Inc. v. Pope*,<sup>2</sup> the United States Supreme Court indicated that a creditor must receive realistic notice, such as mail service or personal service, before a nonclaim statute can constitutionally deprive a creditor of the creditor's property right to be paid. Thus, it is unlikely that publication notice to known creditors (or those who are reasonably ascertainable) is sufficient. Most state legislatures have revised their nonclaim statutes to comply with this mandate.

---

<sup>2</sup>485 U.S. 478 (1988).

---

## **P. PAY CREDITORS**

After receiving the notice, the creditor should present the claim in a timely fashion. Typically, the creditor can present the claim either to the personal representative or the court. The representative then evaluates the claim. If the claim is valid, the representative accepts the claim. Acceptance does not mean the claim will actually be paid. Instead, it merely means that the claim is in the stack of claims to be paid if the estate ends up with sufficient property to do so. If the representative thinks the claim is bogus, the representative will reject the claim. Many states require the creditor to file suit within a relatively short period of time after rejection to preserve the creditor's ability to recover on the claim.

At the appropriate time specified by state law, such as after a certain period of time from the opening of the administration or at the end of the administration, the personal representative pays the accepted claims. Statutes provide a priority order for paying the claims if the estate is insufficient to satisfy all creditors and other claims such as the homestead, exempt personal property, and family allowance. Statutes often favor creditors who provided funeral services or medical care, the property set aside for the surviving spouse and minor children, and administration expenses.

## **Q. PROVIDE REPORTS AND ACCOUNTINGS**

Many states require the personal representative, especially in court-supervised administrations, to make annual reports and accountings of all actions taken that involved estate property. These accountings may be extremely detailed and require the representative to justify every expenditure and report all income. Accountings are often under oath and must be supported by receipts documenting each reported item. The court may then conduct a hearing to determine if the report or account should be approved.

## **R. DISTRIBUTION AND CLOSING ESTATE**

If estate property remains after paying the creditors and other claimants, the personal representative distributes the balance to the appropriate heirs or beneficiaries. If there is insufficient estate property to satisfy all of a testator's devises and bequests, the representative determines which beneficiaries are preferred by following the abatement order. Once the

representative distributes all of the decedent's property, the estate may be closed and the representative relieved of further responsibilities.

## S. THE PRO SE ISSUE

### *STEELE v. MCDONALD*

Texas Appeals – Waco 2006  
202 S.W.3d 926  
no pet.

Before Chief Justice GRAY, Justice VANCE, and Justice REYNA.

#### ORDER

PER CURIAM.

There are four appellants in this case: Gene C. Steele as an individual, Gene C. Steele as Independent Executor of the Estate of William B. Duke, Sally Steele (Gene's wife), and Tom F. Simmons. When the appeal was perfected, all four were represented by Brice B. Beale. However, Gene has now discharged Beale, but it is unclear whether Sally or Tom has and whether Gene has in his capacity as Independent Executor of the Duke Estate. Because of the current uncertainty regarding Beale's status, we will order Beale to either (1) file a written response indicating that he continues to represent some or all of the appellants, a notice of non-representation, or a motion to withdraw; or (2) appear in this Court and show cause why his representation of any of the appellants should continue.

The Clerk of this Court advised Beale by letter dated July 11, 2006 that the appellants' brief he filed on June 12, 2006 is deficient. The letter notified Beale that an amended brief correcting the deficiencies identified must be filed within twenty-one days or the brief would be struck. To date, Beale has not filed an amended brief or otherwise responded to the Clerk's notice. Accordingly, the brief Beale filed on June 12, 2006 is struck. *See* Tex.R.App. P. 9.4(i).

#### Representation of Individuals

Gene notified the Clerk of this Court by letter dated August 16 that "Brice B. Beale, attorney of record for the appellants, has been released as counsel."

"A client can discharge an attorney at any time, with or without cause." *In re Users Sys. Servs., Inc.*, 22 S.W.3d 331, 335 (Tex.1999) (orig.proceeding); *accord* Tex. Disciplinary R. Prof'l Conduct 1.15(a)(3) & cmt. 4, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G app. A

(Vernon 2005) (Tex. State Bar R. art. X, § 9). A formal motion to withdraw is not required to effectuate the client's intentions in this regard. *See Users Sys. Servs.*, 22 S.W.3d at 335-36.

According to Gene at least, the appealing parties have terminated Beale's representation. Gene states that he will be representing himself. He provides his name and address as "Appellants Pro-SE contact information." However, because Gene is not licensed to practice law, he is prohibited from representing his co-appellants. *See* Tex. Gov't Code Ann. § 81.102 (Vernon 2005); *Jimison v. Mann*, 957 S.W.2d 860, 861-62 (Tex.App.-Amarillo 1997, order) (per curiam). Therefore, Sally and Tom either continue to be represented by Beale, which appears unlikely in light of Gene's letter, or they are not currently represented in this matter.

#### Representation of the Independent Executor

It is not at all clear whether Gene may appear *pro se* as an independent executor. Rule of Civil Procedure 7 states, "Any party to a suit may appear and prosecute or defend *his rights* therein, either in person or by an attorney of the court." Tex.R. Civ. P. 7 (emphasis added). A plain reading of Rule 7 suggests that Gene may not appear *pro se* as Independent Executor of the Duke Estate because in this role he is litigating rights in a representative capacity rather than on his own behalf. Our research has not disclosed a Texas case involving the representative of a decedent's estate prosecuting a suit in behalf of the estate *pro se*.

Courts in other jurisdictions which have addressed this issue have virtually all concluded that the representative of an estate may not appear *pro se* in behalf of the estate. *See Godwin v. State ex rel. McKnight*, 784 So.2d 1014, 1015 (Ala.2000); *Davenport v. Lee*, 348 Ark. 148, 72 S.W.3d 85, 90-91 (2002); *Ratcliffe v. Apantaku*, 318 Ill.App.3d 621, 252 Ill.Dec. 305, 742 N.E.2d 843, 847 (2000); *State v. Simanonok*, 539 A.2d 211, 212-13 (Me.1988) (per curiam); *Waite v. Carpenter*, 1 Neb.App. 321, 496 N.W.2d 1, 3-4 (1992); *Kasharian v. Wilentz*, 93 N.J.Super. 479, 226 A.2d 437, 438-39 (1967) (per curiam); *Brown v. Coe*, 365 S.C. 137, 616 S.E.2d 705, 708 (2005); *State ex rel. Baker v. County Ct. of Rock County*, 29 Wis.2d 1, 138 N.W.2d 162, 166 (1965); *see also Jones v. Correctional Med. Servs., Inc.*, 401 F.3d 950, 951-52 (8th Cir.2005) (representative of estate may not proceed *pro se* if estate has other beneficiaries or creditors); *Shepherd v. Wellman*, 313 F.3d 963, 970-71 (6th Cir.2002) (same); *Iannaccone v. Law*, 142 F.3d 553, 559 (2d Cir.1998) (same); *contra Reshard v. Britt*, 819 F.2d 1573, 1582-83 (11th Cir.1987), *vacated en banc by an equally divided court*, 839 F.2d 1499 (11th Cir.1988) (per curiam).

Consistent with these authorities, we hold that Gene may not prosecute this appeal *pro se* in his capacity as Independent Executor of the Duke

Estate. Thus, Gene as Independent Executor is either represented by Beale or not currently represented in this matter.

#### Determination of Representation

Beale is the person best situated to resolve the ambiguity regarding the current representation of Sally and Tom as individuals and of Gene as Independent Executor.

Accordingly, we ORDER Brice B. Beale to file, within fifteen (15) days after the date of this Order, either (i) a written response indicating that he continues to represent some or all of the appellants, (ii) a non-representation notice under Rule of Appellate Procedure Rule 6.4, or (iii) a motion to withdraw under Rule of Appellate Procedure 6.5. If none of these documents is timely filed, Brice B. Beale must appear on November 15, 2006, at 9:00 a.m., when this Court is in session at the Tenth Court of Appeals, McLennan County Courthouse, 501 Washington, Room 404, Waco, Texas, to show cause why his representation of some or all of the appellants should continue.

FAILURE OF BRICE B. BEALE TO COMPLY WITH THIS ORDER MAY RESULT IN THE ISSUANCE OF A JUDGMENT OF CONTEMPT.

The Court orders that this Order be personally served on Brice B. Beale by overnight delivery via a commercial delivery service within the meaning of Rule of Appellate Procedure 9.5(b).

#### Appellant's Brief

Gene filed a *pro se* brief on July 27 which purports to have been filed on behalf of Sally and Tom as individuals and on behalf of himself as Independent Executor. However, Gene is prohibited by law from filing a brief on behalf of the other appealing parties. *See* Tex. Gov' t Code Ann. § 81.102; *Jimison*, 957 S.W.2d at 861-62. Thus, no appellant's brief is currently on file for Sally, Tom, or Gene as Independent Executor.

Gene's brief also suffers from one of the same deficiencies as the brief filed by Beale—the omission of an appendix with the “necessary contents” prescribed by Rule of Appellate Procedure 38.1(j)(1). *See* Tex.R.App. P. 38.1(j)(1). Therefore, Gene is hereby notified that, if he fails to file the original and five copies of an appendix containing the “necessary contents” within twenty-one (21) days after the date of this Order, his *pro se* brief will be struck, and the appeal will proceed as if no appellant's brief had been filed on Gene's behalf. *Id.* 9.3(a)(1)(C), 9.4(i), 38.8(a), 38.9(a).

Tex.R.App. P. 38.1(j)(1). Local Rule 13 further provides, “Every ‘necessary’ and ‘optional’ appendix must have an index and each

appended document must be preceded by a numbered or lettered tab.” 10th Tex.App. (Waco) Loc. R. 13 3.

With regard to an appellant’s brief to be filed on behalf of Sally and/or Tom as individuals and Gene as Independent Executor, no brief will be required until it is determined which of them is represented by counsel and which are appearing *pro se*.

#### Appellees’ Brief

Appellees filed a brief in response to Gene’s brief on August 30. They have also filed a motion to dismiss the appeal, in which they request damages under Rule of Appellate Procedure 45 based on their contention that this is a frivolous appeal. However, this motion will not be considered until the issues surrounding Appellants’ representation are resolved. Appellees will be permitted to file a supplemental or amended brief as necessary.

IT IS SO ORDERED.

Chief Justice GRAY dissenting.

TOM GRAY, Chief Justice, Memorandum dissenting opinion to Order.

An independent executor can do anything the decedent could do if he was still alive, unless there is some limitation upon the independent executor’s powers at the time of the appointment. *See generally cases cited in Kanz v. Hood*, 17 S.W.3d 311, 316-317 (Tex.App.-Waco 2000, pet. denied) (Gray, C.J., dissenting). I would include in that expansive statement of authorized acts the ability to appear on behalf of the estate and act as the decedent could with regard to being the litigant in a judicial proceeding. Today’s holding to the contrary by the majority causes me grave concern for truly cost effective independent administration of estates in Texas. For this reason and as explained below, I dissent.

Texas has long been recognized for the truly effective independent administration of a decedent’s estate. Probate planning in other states frequently involves setting up trusts during the life of the decedent to own and control assets and, more importantly, keep them from becoming part of the decedent’s estate subject to the administration of the probate court at the time of the decedent’s death. That type planning, and its attendant costs, is avoided in Texas by our very effective and efficient administration of estates using truly independent administrators, though it may be used in Texas for other purposes. All over Texas estates are being probated, inventories prepared and filed, and estates being closed without an attorney being involved. I do not see how that can continue under the holding of the majority that although Gene had appeared as his own attorney, representing himself individually and as independent executor of Duke’s Estate, “Gene, as independent executor, is either represented by Beale [an

attorney] or not currently represented in this matter.” Maj. Op. pgs. 928-929.

I find no help or support for this holding in the citation of out of state authorities on this issue. And I note that even that authority is divided. But unless those states provide for Texas style independent administration, and the person attempting to represent the estate in those cases was appointed as the independent executor of the estate, and also unless the powers of the independent administrator in those states are as broad as the powers of an independent administrator in Texas, the discussion of out of state authority is suspect and the reliance on that authority is misplaced.

As I previously stated, I would already have stricken the brief filed by attorney Beale for failure to comply with the rules. *See Steele v. McDonald*, 195 S.W.3d 349, 350 (Tex.App.-Waco 2006, order) (Gray, C.J., concurring to letter order). Likewise, I would now strike the brief tendered by Gene Steele for the same reason, noncompliance with the rules. I would then notify all four appellants that they have one final opportunity to file a compliant brief or their appeal will be dismissed for want of prosecution due to the failure to file a brief that complies with the rules.

Finally, to placate the concern of the majority, we could specifically notify Gene Steele in his capacity as independent executor that there may be an issue of whether, as independent executor, he can appear as the personal representative of an estate in litigation involving the estate. For certain, I would not decide this issue without briefing as the majority has done. The expansive holding of the majority means that nothing can be done by a personal representative in any judicial proceeding other than via an attorney. This is not the law. Further, this holding will come as an enormous surprise to the personal representatives of estates that have been and are currently being probated and who regularly represent the estate as independent executor in judicial proceedings without being represented by counsel.

I join no part of the majority’s order.

### NOTES AND QUESTIONS

1. Do you agree with the majority or the dissenting opinion?
2. It is interesting to note that the executor did not seek a petition of review from the Supreme Court of Texas.
3. For a detailed analysis of this issue, see Michael Hatfield, *Pro Se Executors—Unauthorized Practice of Law, or Not?*, 59 Baylor L. Rev. 329 (2007), explaining that:

---

[t]here is a well known and continuing split among Texas's seventeen statutory probate courts. The split regards the rights of the person named executor to probate a will or otherwise appear in court without hiring a lawyer. Eight of the courts permit it, but nine insist an executor doing so would be engaging in the unauthorized practice of law and, thus, cannot be permitted. Depending upon how the split is resolved, either nine of the statutory probate court judges are denying executors their pro se appearance rights otherwise guaranteed under Texas law or eight of the courts are assisting the unauthorized practice of law.