NEW RULES IN AN INDEPENDENT ADMINISTRATION AND HOW TO DEAL WITH THEM

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State Bar of Texas
36th ANNUAL
ESTATE PLANNING AND PROBATE COURSE
June 27-29, 2012
San Antonio

CHAPTER 12

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"The Priority of Creditors' Claims in Independent Administrations" (*Baylor Law Review*, Spring 1990)
"Texas Probate Jurisdiction--New Patches for the Texas Probate Code" (*Texas Law Review*, January 1976)
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"Creditors' Claims in Probate," South Texas College of Law 26th Annual Wills & Probate Institute (September, 2011)
"Unsecured Claims and MERP Claims in Probate,"State Bar of Texas Advanced Elder Law Course (April, 2010)
"The Twin UPIAs and the New U. S. Treasury Regulations: Progress, or 'Voodoo Investonomics"?, State Bar of Texas Advanced Estate Planning Strategies Course (April, 2006)

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NEW RULES IN INDEPENDENT ADMINISTRATIONS AND HOW TO DEAL WITH THEM

I. OVERVIEW OF INDEPENDENT ADMINISTRATION.

A. Introduction: Purposes of Estate Administration. Over the years we have all heard that an independent executor "steps into the shoes" of the decedent and settles an estate free of court supervision. I think that we sometimes forget, however, that the freedom given to an independent executor or administrator under the law is not a license for him to do anything he wants, especially when that executor or administrator is not serving under a will drafted by a good lawyer and that grants the executor broad powers. An independent administration, after all, is still an administration.

Title to a decedent's property vests at death in the decedent's heirs or legatees, subject to administration, but for what purposes? Yes, there are often taxes to be paid and post-death income tax and transfer tax planning opportunities to consider, but the fact is that the purposes of all estate administrations are the same–to gather a decedent's assets, to pay his debts, and then to return possession of any remaining property to the heirs or beneficiaries who own that property as a matter of law.

Even when a decedent leaves a "good" will granting his independent executor broad powers, I find it useful to explain to a new independent executor client that he will better understand his duties and responsibilities if he thinks of himself as a bankruptcy trustee rather than as the "stand in" for the decedent or agent for the beneficiaries. After all, an estate administration is a state law insolvency proceeding and a substitute for bankruptcy, since an "estate" is not a "person" who can file for bankruptcy under federal law. See, e.g. In re Estate of Whiteside by Whiteside, 64 B.R. 99 (Bkrtcy E.D.Cal. 1986); In re Estate of Patterson, 64 B.R. 807 (Bkrtcy W.D. Tex. 1986). And the role of an executor or administrator is very much like that of a bankruptcy trustee in that his primary functions are (1) to gather the "bankrupt's" assets, (2) to notify creditors, (3) to file an inventory of the estate assets, (4) to pay the bankrupt's debts, and (5) to deliver the remaining assets back to the bankrupt. Of course, the fact that the "bankrupt" is dead adds an additional layer of complexity because the assets not needed to pay estate debts must be returned to the decedent's heirs or legatees as the new owners of the decedent's property. Nevertheless, bankruptcy and estate administration have many more similarities than differences, and when analyzing the impact of changes in state law governing the process, I find it useful to remember that an independent executor's primary job is to settle the estate, not unduly prolong its administration because he believes that it to be in the "best interests" of the beneficiaries (the "estate") to do so.

B. Independent Administration. Independent administration has been part of Texas law since 1843 and likely originated from civil law concepts of Spanish law. WILLIAM I. MARSCHALL, JR., "Independent Administration of Decedents' Estates," 33 TEX. L. REV. 95 (1954) (hereinafter, Marschall at ____). No matter its roots, independent administration has proved to be a simple, streamlined, and relative inexpensive way to settle estates in Texas.

1. BACKGROUND. Prior to 1977, under what is now TEX. PROB. CODE ANN. § 145(b) (Supp. 2012) (hereinafter cited "PROB. C. § ____"), Texas law allowed an independent administration to be created only by a testator through specific directions in his will:

> Any person capable of making a will may provide in his will that no other action shall be had in the county court in relation to the settlement of his estate than the probating and recording of his will, and the return of an inventory, appraisement and list of claims.

> When such will has been probated, and the inventory, appraisement and list aforesaid has been filed by the executor and approved by the court, as long as the estate is represented by an independent executor, further action of any nature shall not be had in the court except where this Code specifically and explicitly provides for some action in the court. (emphasis added)

The first sentence of the statute reads much like it has since 1876. See Vernon's Ann. Civ. St. art. 3436, Acts 1876, p. 124. State law simply permitted a testator, as a part of his freedom to do with his property as he wished, to direct that his estate be settled without court supervision by his chosen executor. His executor's authority to act "independently" originated from the testator, not from the court, and the special trust relationship established by the testator in his will was one that could not be transferred by that executor to someone else or delegated to a third party to execute. Roy v. Whitaker, 92 Tex. 346, 48 S.W. 892, 895 (1898), 49 S.W. 367 (1899). In fact, because the source of the independent executor's power was the decedent's will and not the court, an independent executor could begin acting once the decedent's will had been admitted to probate even though the executor had not yet "qualified" to serve by filing his oath. E.g., Cocke v. Smith, 142 Tex. 392, 179 S.W.2d 954 (1944).

2. LIMITED COURT JURISDICTION/SCOPE OF EXECUTOR'S POWERS. Under the old case law and PROB. C. § 145, the appointment of an independent executor suspended the court's jurisdiction over him only insofar as the settlement of the estate was concerned and did not deprive the court of jurisdiction altogether. Roy v. Whitaker, supra at 896.

> "But an independent executor is not a law unto himself. He is required to conform to the probate laws so far as applicable. His independence consists largely in his right to act without an order of the court. . . His powers are derived from three sources–the will, the pertinent statutes, and common-law principles not displaced by statute." Marschall at 108.

Moreover, absent contrary provisions in the will, an independent executor's duties and functions were the same as those of a court-supervised personal representative. E.g., Roy v. Whitaker, supra; WOODWARD AND SMITH, Probate and Decedents' Estates, 17 TEX. PRACTICE § 495 (1971, and now supplemented by Professor Gerry Beyer) (hereinafter, WOODWARD & SMITH at §___"). Like any other personal representative, an independent executor's job was to "settle" the estate promptly and, when he completed his work, to return possession of the decedent's remaining assets to the beneficiaries who owned them. See Cochran's Administrators v. Thompson, 18 Tex. 652 (1857); Farmers' & Merchants' Nat. Bank v. Bell, 31 Tex. Civ. App. 124, 71 S.W. 570 (1902, writ ref'd).

For many years, in describing the scope of an independent executor's powers in carrying out his duties, courts commonly would say that "[a] n independent executor may, without order of the probate court, do any act which an ordinary executor or administrator could do with or under such an order." Lang v. Shell Petroleum Corp., 138 Tex. 399, 159 S.W.2d 478, 482 (1942); Carleton v. Goebler, 94 Tex. 93, 58 S.W. 829 (1900).

Professor M. K. Woodward, formerly the leading commentator in the area, noted that a statement like the one above from Lang v. Shell Petroleum is overly broad and that under PROB. C. § 145 and Roy v. Whitaker, supra, "unless a particular action by an independent executor could be regarded as one performed in the **settlement** of the estate, it was subject to court supervision." WOODWARD & SMITH at § 495. Consequently, no matter how much the Legislature might expand the kinds of acts that an administrator might take with court approval in a court-supervised administration, an independent executor's powers arguably remained more limited

and exercisable only as necessary for him to settle the estate. Id. at §§ 497, 499. As stated in Roy v. Whitaker:

> That article [the precursor of PROB. C. §145] does not purport to withdraw the estate from the jurisdiction of the county court, but permits the testator to commit to his executor the performance of all acts in reference to the "settlement" of the estate without the control of the court. The estate remains under its jurisdiction. . . but the court is restrained by the terms of the law from taking any action in regard to the settlement of the estate while the executor appointed by the will is discharging his duties. . .The limitation placed upon the powers of the court operates to confer authority upon the executor to do without action of the court those things which it is prohibited to order. This is the measure of the of the independent power conferred by law upon the executor . . . Roy v. Whitaker, supra at 896-97.

C. Major Issues Addressed by New Legislation. In 2011, the Legislature sought to address two major concerns in the statutes dealing with independent administration: (1) to clarify the scope of an independent executor's powers and thereby address when good faith, third party purchasers from an independent executor or administrator will be protected against the claims of heirs and distributees, particularly when an estate has not yet been formally closed, and (2) to further clarify, modify and codify how creditors' claims must be handled in independent administrations, and especially the claims of secured creditors. Although the Legislature also engaged in other "fine tuning" of independent administration statutes, the more important changes involve the two subjects mentioned above. **NOTE: Throughout this outline, for simplicity and brevity, I sometimes refer to "independent executor" rather than "independent executor or administrator." My comments generally apply to both kinds of personal representatives except where distinctions need to be drawn between the two.**

II. THIRD PARTY PURCHASERS/POWER OF SALE

A. Necessity of Joinder of Beneficiaries in Sales by an Independent Executor.

1. SECTION 188 STATUTORY PROTECTION. PROB. C. § 188 provides that when an executor or administrator has performed any acts "in conformity with his authority and the law, such acts shall continue to be valid. . .so far as regards the rights of innocent purchasers of any of the property of the estate from such executor or administrator, for a valuable consideration, in good faith, and without notice of any illegality in the title to the same" (emphasis added), even if it is later determined that the acts were invalid or that the executor lacked authority.

While a purchaser of estate property apparently has no duty to inquire into matters outside the public records, under Section 188 a purchaser does have to examine those records and determine if the executor is acting "in conformity with his authority and the law." MICHAEL R. TIBBETS, "Power to Sell: Considerations for Purchasers and Lessees Regarding Independent Executor's Authority," 21 THE HOUSTON LAWYER 28, 31 (1983) (hereinafter, "Tibbets at ____"); Dallas Services for Visually Impaired Children, Inc. v. Broadmoor, II, 635 S.W.2d 572 (Tex. App.–Dallas 1982, writ ref'd n. r. e.); see Coy v. Gaye, 84 S.W. 441 (Tex. Civ. App. 1905, no writ). Because the only sources of an independent executor's power to sell are the decedent's will, Texas statutes, and the common law (as interpreted by case law), one cannot be an innocent purchaser from an independent executor who acts outside the authority given him by the will or under the law. Tibbets at 31.

2. INDEPENDENT EXECUTOR'S POWERS BEFORE 2011. Since upon a decedent's death title to his property vests immediately in his heirs or legatees, subject to the payment of his debts, his executor is entitled to possession (not ownership) of that property and delinquent court-ordered child support payments, with his executor to administrator entitled to possession of that property "in trust to be disposed of in accordance with law." PROB. C. § 37. Historically, a decedent's personal property had to be consumed first in order to pay debts before an executor or administrator could resort to real property. See PROB. C. § 32 (invoking common law); PROB. C. § 322B(a) (payment of debts first out of personal property in the residuary estate under a will); Minter v. Burnett, 90 Tex. 245, 38 S.W. 350 (1896); Arnold v. Dean, 61 Tex. 249 (1884). Consequently, absent a specific grant of a power of sale in the decedent's will, an independent executor's authority to sell real property could arise only by implication (by necessity in order to pay claims) or by statute.

a. Power to Pay Debts. PROB. C. § 334 generally authorizes the probate court to order sales of personal property if it finds that a sale would be in the "best interest of the estate in order to pay expenses of administration, funeral expenses, expenses of last illness, allowances, or claims against the estate, from the proceeds of sale of such property." Prior to 1973, the same rule applied under PROB. C. § 341, which permitted a court to order a sale of real property when it "appears necessary or advisable" to "[p]ay expenses of administration, funeral expenses and expenses of last sickness of decedents, and allowances and claims against the estates of decedents." Accordingly, absent an express grant of a power of sale in the will, an independent executor could do the same. Tibbets, supra at 31; e.g., Roy v. Whitaker, supra; Terrill v. Terrill, 189 S.W.2d 877 (Tex. App.–San Antonio 1945, writ ref'd); see McDonough v. Cross, 40 Tex. 251 (1874).

When an independent executor enters into a sale under such circumstances and the validity of the sale is later challenged by the beneficiaries, the burden is on the purchaser to show the existence of facts authorizing the executor to sell (generally, the existence of debts). 29 TEX. JUR.3d, Decedents' Estates § 978 (2006); Harring v. Shelton, 103 Tex. 10, 122 S.W. 13, 14 (1909); Freeman v. Tinsley, 40 S.W. 835 (Tex. Civ. App.–1897).

b. Power of Sale Granted in Will. Of course, if a decedent grants his independent executor a broad power of sale in his will, the executor can sell estate property pursuant to that authority, whether or not the sale is necessary to pay debts and expenses. PROB. C. § 332. Even when the independent executor's power of sale under a will is narrowly defined and, for example, exercisable only as required to pay debts, some cases suggest that the existence of debts at the time of the sale will be presumed and that the person challenging the independent executor's authority to sell (rather than the purchaser) bears the burden of proving that no debts existed at the time of the sale before the sale will be overturned. Tibbets at 31; 29 TEX. JUR.3d, Decedents' Estates § 978 (2006); Terrell v. McCown, 91 Tex. 231, 43 S.W. 2, 12 (1897). If the challenger carries his burden of proof, however, the sale will be set aside. Tibbets at 31; e.g., Blanton v. Mayes, 58 Tex. 422, 10 S.W. 452 (Tex. 1889).

c. Law Changes in 1973-1975. In 1973, a new subsection was added to PROB. C. § 341 [a predecessor of Section 341(2)] that gave the probate court the power to order sales of real estate when "necessary or advisable" to "[d]ispose of property of the estate of a decedent which consists in whole or in part of an undivided interest in real estate, when it is deemed in the best interest of the estate to sell such interest." Acts 1973, 63rd Leg., p. 408, ch. 182 § 4 (emphasis added). Two years later, the new subsection of the statute was amended to read in its current form to allow the disposition of "any interest in real property of the estate," rather than just an undivided interest, when it is deemed in the best interest of the estate. As a result of these changes,

the probate court could order sales of real property even when those sales were not necessary to settle the estate. What was less clear was whether the statutory expansion of what a court could authorize an administrator to do indirectly expanded an independent executor's authority.

(1) One Theory: Addition of Section 341(2) Expands Authority. Under the more broad description of an independent executor's authority, as in Lang v. Shell Petroleum Corp., supra, an independent executor can do without court order whatever a probate court can authorize an administrator to do in a dependent administration. Under that interpretation of the law, the expansion of the court's power to authorize sales of real property in the "best interest" of an estate likewise expanded an independent executor's power of sale. WOODWARD & SMITH at §499 (1971); see M. K. WOODWARD, "Independent Administration Under the New Texas Probate Code," 34 TEX. L. REV. 687, 687-89 (1956); M. K. WOODWARD, "Some Developments in the Law of Independent Administrations," 37 TEX. L. REV. 828, 829-30 (1959).

(2) Second Theory: Authority Limited to "Settlement" of Estate. Under a narrower interpretation of the law and Roy v. Whitaker, PROB. C. § 145 arguably suspends the probate court's jurisdiction (and corresponding shifts authority to an independent executor) only over "the performance of all acts in reference to the 'settlement' of the estate" unless otherwise directed by the decedent by will. Roy v. Whitaker, supra at 896; see WOODWARD & SMITH at § 495; PROB. C. § 145(b)(". . .no action shall be had in the county court in relation to the settlement of the estate. . ."). Under this theory, legislative expansions of powers exercisable by administrators with court approval during a dependent administration, and especially to take actions that are not necessary for him to settle an estate, are not extended to independent executors, whose authority arguably remains constrained to those powers necessary to settle the estate. WOODWARD & SMITH at §§ 497, 499; see M. K. WOODWARD, "Some Developments in the Law of Independent Administrations," 37 TEX. L. REV. 828, 830-31 (1959); Note, Marshall v. Holbert's Estate, 13 S. W. L. J. 257 (1959). That is, absent a broader grant of authority under a decedent's will, an independent executor's power to sell real property will exist only when its exercise is necessary to settle the estate–in most cases, only when a sale is necessary to pay taxes, debts and expenses under PROB. C. §341(1).

(3) Selected Cases.

(a) In Smith v. Hodges, 294 S.W.3d 774 (Tex. App.–Eastland 2009, no writ), an independent administrator filed an application in the county court to sell 164 acres of land because "[t]he property cannot be partitioned." The judge, recognizing his lack of jurisdiction, refused to set the application for hearing. The independent administrator went ahead and sold the land to her daughter and son-in-law, prompting other heirs to file suit in county court alleging that the administrator had breached her fiduciary duty by failing to obtain court approval of the sale. The case was transferred to the district court, and the other heirs filed a motion for partial summary judgment, arguing as their sole ground for relief that the independent administrator failed to comply with Sections 331-353 and obtain approval of the sale by the probate court. The district court granted the heirs' motion for summary judgment and set aside the administrator's deed.

The Eastland Court of Appeals reversed and remanded the district court's judgment setting aside the deed, holding that an independent administrator is not required to comply with Sections 331-353 [**Note:** There was no discussion of Section 352(d), which does grant jurisdiction to the court to approve a self-dealing transaction after notice and hearing]. The Court of Appeals noted that (i) the sole reason given by the independent administrator for selling the land in her original application for sale was that the property could not be partitioned, and (ii) an

independent administrator cannot sell land for that reason without first seeking court approval under PROB. C. § 150. Yet, the Court of Appeals still reversed the district court's partial summary judgment, pointing out that (i) an independent administrator can sell real property under the same circumstances that an administrator can with court approval, and (ii) an independent administrator may sell land not only to pay debts as permitted under PROB. C. § 341(1) but also when it is in the "best interest" of the estate to do so under PROB. C. § 341(2). Id. at 779. The "issue of whether conditions existed authorizing the sale by Smith may be litigated on remand." Id.

In sum, because PROB. C. § 188 protects the title of innocent purchasers who, in good faith and without notice of any illegality in title, purchase property from an independent administrator acting "in conformity with his authority and the law," then the independent administrator's sale could be upheld on remand if the purchasers carry their "burden of proof to show the existence of debts against the estate or other such conditions that would have authorized the sale [which presumably might include that a sale was in the "best interest" of the estate]." Id. at 780.

(b) Lease Cases. Three cases involving an independent executor's power to grant oil and gas and surface leases are also illustrative of how these arguments can play out under the two theories discussed above. PROB. C. § 367(b) provides that "personal representatives . . . acting solely under orders of court" may be authorized by the probate court to enter into an oil and gas lease, including one lasting beyond the date when the estate should be closed. PROB. C. § 361 authorizes the court to approve a surface lease of land for more than one year if it finds it "would be to the interest of the estate."

(A) In Marshall v. Holbert's Estate, 315 S.W.2d 604 (Tex. App.–Eastland 1958, writ ref'd), an independent executor, acting under a will that did not grant her a power to lease or sell real property, sought and obtained court approval to enter into an oil and gas lease under PROB. C§ 367. The district court, on appeal from the probate court, held that Section 367 applied to independent executors, that the independent executor had the power to enter into the lease in order to pay debts, and accordingly entered a judgment purporting to remove the cloud on the lessee's title resulting from a second oil and gas lease signed by one of the devisees under the will.

On appeal, the Eastland Court of Appeals reversed, expressly stating in its opinion: "The only issue properly presented to the probate court was whether or not the probate statute granted the probate court the authority to empower an independent executor to execute an oil and gas lease." Id. at 606 (emphasis added). Focusing on the phrase "acting solely under orders of court" in Section 367, the Court of Appeals held that Section 367 does not apply to independent executors, and consequently that the probate court lacked jurisdiction to authorize the independent executor to enter into the oil and gas lease. The Court of Appeals did not address whether the executor independently had the power to enter into the lease: Since "the probate court had no jurisdiction to grant the [independent executor's] application. . .the district court, on appeal, had no jurisdiction thereof or of the other causes asserted" [adjudicating title to the lease and removing the cloud on title]. See Note, Marshall v. Holbert's Estate, 13 S. W. L. J. 257 (1959).

(B) In contrast, in Lowrance v. Whitfield, 752 S.W.2d 129 (Tex. App.–Houston [1st Dist.] 1988, writ den.), the decedent left his wife a legal life estate in his property, with a remainder to his children subject to a condition that if the children attempted to sell or convey their remainder interest during the spouse's lifetime, they would forfeit their inheritance. One of several oil and gas leases was signed by the decedent's wife, individually and as independent executor of the decedent's estate, without the joinder of the remaindermen. The

children argued that the widow was not authorized to enter into an oil and gas lease as independent executor, citing Marshall v. Holbert's Estate, supra.

While conceding that the probate court did not have jurisdiction to authorize an independent executor to enter into an oil and gas lease under Section 367, the court noted that Section 367 might still serve as a source of the independent executor's authority to do so on her own because an independent executor generally can do without court order whatever an administrator can do with court approval. The children argued that entering into an oil and gas lease related to the preservation of the estate, not its settlement under Roy v. Whitaker, and consequently that the independent executor had no power to lease. The court held that under the particular circumstances, the independent executor did have authority to enter into the oil and gas lease during the administration for the purpose of preserving and protecting the assets of the estate, pointing out that to hold otherwise would expose the independent executor to potential liability for her failure to act to preserve the estate. Id. at 135.

(C) Finally, in Gatesville Redi-Mix, Inc. v. Jones, 787 S.W.2d 443 (Tex. App.–Waco 1990 pet. den.), an independent executor signed a new surface lease of land in 1981, more than 7 years after the decedent's death and at a time when there were no outstanding debts. Shortly after the executor's death, the heirs discovered that the executor had entered into the lease and challenged its validity. Citing the Lang v. Shell Petroleum Corp. test, the court found that the trial court had acted correctly in directing a verdict in favor of the heirs. The only authority relied on by the lessee as the source of the independent executor's power was Section 361, and the Court of Appeals held that the lessee had failed to carry his burden of proof that the lease "would be to the interest of the estate" under Section 361 at the time the lease was made:

> We do not believe the mere circumstance of the higher rate of rental rendered the 15-year lease beginning in 1986 and carrying to 2001, executed in the seventh year of the administration of the estate without need of funds for the estate or the devisees, to be in the interest of the estate. We believe and hold that such finding by the probate court or by the independent executor under the conditions existing at the time of the execution of the lease would have been an abuse of discretion. Id. at 445-446.

See Green v. Hannon, 369 S.W.2d 853, 855 (Tex. Civ. App.–Texarkana 1963, writ ref'd n.r.e.) (Independent executor could not enter into agreement to sell stock that had not yet been re-registered into the name of sole beneficiary of the estate when the decedent had died 10 years earlier and the estate was fully administered: "The only right that could have been left with the Independent Executor, as to the 13 shares of stock, was to transfer the stock to the person legally entitled to the same."); compare Dallas Services for Visually Impaired Children, Inc. v. Broadmoor II, 635 S.W.2d 572 (Tex. App.–Dallas 1982, writ ref'd n.r.e.)(a case distinguished in Gatesville in which a sale of land by the independent co-executors and co-life tenants under a will granting the co-executors a broad power of sale was upheld against a later challenge by the charitable remainderman under the will).

d. Inconsistency in Statutory Authority. Adding yet another twist on the subject, note that under PROB. C. §§ 333 and 334, the probate court can order sold (i) personal property that is liable to perish, waste, or deterioration in value, or that will be an expense or disadvantage to the estate to retain, or (ii) other personal property "if the court finds that so to do would be in the best interest of the estate in order to pay expenses of administration, funeral expenses, expenses of last illness, allowances, or claims against the estate, from the proceeds of sale of such property." (emphasis added). Oddly, the Probate Code appears to give the court (and indirectly, an independent executor) greater latitude

to sell real property than personal property despite the fact that the latter is supposed to be consumed first to pay claims under the common law and under most wills!

e. Advent of Independent Administrations by Consent. As noted above, for over 100 years an independent administration could be established only by a testator through specific provisions in his will. In 1979, the Legislature decided that so long as all heirs or beneficiaries of an estate agreed and nominated someone to serve as independent executor or independent administrator, the probate court should have the power to allow a decedent's estate to be administered free from court supervision.

(1) Independent Executors by Consent. When an executor is appointed in a will and at the request of the beneficiaries under PROB. C. § 145(c) he is permitted by the court to act independently, the scope of his power of sale under the will remains the same. Once appointed, an independent executor by consent is still an executor and free to exercise all powers granted him in the will without court approval in the same way that an executor under court supervision can do so under PROB. C. § 332.

When a will appoints an independent executor but does not grant any specific powers, the independent executor is empowered to take the same actions an administrator can tale with or without court approval, unless of course the will directs otherwise. E.g., Carleton v. Goebler, 94 Tex. 93, 58 S.W. 829 (1900). That is, the court order granting an independent administration under PROB. C. § 145(c) frees the executor from court supervision, but his powers are no broader than those of other personal representatives under the law–i.e., he can sell personal property in order to pay debts and expenses, and he can sell real property but only as permitted under PROB. C. § 341(1) (to pay taxes, debts, and expenses) and possibly in the "best interests" of the estate under PROB. C. § 341(2) (at least under one of the two theories discussed earlier).

(2) Successor to an Independent Executor by Consent. PROB. C. § 154A provides that when (i) "a person who dies testate names an independent executor **who commences serving**" but later ceases to serve and (ii) all successor executors named in the will also fail to qualify or are unwilling or unable to serve, the beneficiaries can seek the appointment of someone to serve as successor independent "executor" in much the same way that PROB. C. § 145(d) allows them to seek the appointment of an independent administrator with will annexed when all named executors are dead or otherwise unwilling or unable to serve. There is one significant difference between the two statutes, however. Section 154A provides that the successor independent "executor" (really, an administrator with will annexed) **will have all of the powers of his predecessor, including powers granted under the will**, whereas an independent administrator with will annexed appointed under Section 145(d) will have only the powers given to a personal representative under the law and not any additional powers granted in the will.

There does not seem to be any compelling public policy reason for this differing treatment under such similar circumstances. History is likely the only explanation. PROB. C. § 154 (which has been a part of the Code since 1955) has allowed the probate court (after citation and hearing) to empower a administrator with will annexed appointed to succeed an independent executor "to assume, exercise, and discharge, under the orders and directions of said court, made from time to time, all or such parts of the rights, powers, and authority" given to the former independent executor in the will as the court finds to be in the best interest of the estate. In sum, Section 154A simply permits the court to grant on the front end, at the request of the beneficiaries, the expanded powers it could grant under Section 154 to an administrator with will annexed under court supervision who succeeds an independent executor.

(3) Other Independent Administrators by Consent. As mentioned above, PROB. C. § 145(d) allows beneficiaries to agree and seek the appointment of a person as independent administrator with will annexed for the estate of a testator whose will named no executor or when no executor named in the will is living, willing and able to serve. PROB. C. § 145(e) allows the decedent's heirs to obtain similar relief when a decedent dies intestate. The power of sale of such an independent administrator normally will be similar to those of an independent executor acting under a will that contains no power of sale [discussed in subparagraph (1) above]. See PROB. C. §§ 333, 334, 341.

f. **The Bottom Line Prior to 2011**. When a decedent's will contained no power of sale, cautious purchasers (and title companies) normally would insist that a decedent's heirs or legatees join in sales of real property absent proof of the existence of debts and expenses that must be paid in order to settle the estate. Tibbets at 32. The reason, apparently, was that many third parties were unwilling to run the risk of whether or not an independent executor could sell real property in the "best interest" of the estate, relying solely on PROB. C. § 341(2) as the source of his authority, since a sale in the "best interest" of the estate may not be necessary to settle the estate.

3. ESTATE OPEN OR CLOSED: FIDUCIARY v. BENEFICIARY SALES. Long before the Probate Code was adopted, beneficiaries, personal representatives, third parties and their lawyers ran into problems determining when (i) an independent administration had "closed," (ii) the independent executor's authority had terminated, and (iii) a decedent's heirs or legatees had gained exclusive control over the decedent's property (the title to which vested in them immediately upon the decedent's death under PROB. C. § 37). This confusion arose from the fact that once an independent executor is appointed, the probate court loses jurisdiction over the "settlement" of the estate, including its closing. It is the independent executor who decides when the estate has been fully administered and when to make final distribution, as there was (and still is) no statute either compelling an independent executor to formally close an estate or limiting the time an administration may remain open. See, e.g., McDonough v. Cross, 40 Tex. 251 (1874); Parks v. Knox, 61 Tex. Civ. App. 493, 130 S.W. 230 (1910, no writ); Redditt v. Quinn, 215 S.W.2d 367 (Tex. Civ. App.–Eastland 1948, writ ref's n.r.e.)(It was proper for the district court to dismiss a suit seeking to compel an independent executor to account and make final distribution when the facts clearly showed that the estate had not been fully administered). There was at one time a presumption that an estate was closed after one year. E.g., Jones v. Jimmerson, 302 S.W.2d 161 (Tex. Civ. App.–Texarkana 1957, writ ref'd n.r.e.). That presumption no longer exists. E.g., Bradford v. Bradford, 377 S.W.2d 747 (Tex. Civ. App.–Texarkana 1964, writ ref'd n.r.e.); Ford v. Roberts, 478 S.W.2d 129 (Tex. Civ. App.–Dallas 1972, writ ref'd n.r.e.). In fact, PROB. C. §§ 149A and 149B now require that beneficiaries wait at least 15 months and two years, respectively, before they can demand an accounting and distribution.

Prior to 1979, no statute granted the probate court jurisdiction to remove an independent executor once he was appointed. As a result, before then beneficiaries frustrated with an unduly long period of administration could (i) try to prod an independent executor to close the estate by asking the court to require him to give bond under the predecessor of PROB. C. § 149, or (ii) in extreme cases, seek equitable relief in the district court by requesting the appointment of a receiver to take control of the estate assets and settle it. See, e.g., O'Connor v. O'Connor, 320 S.W.2d 384 (Tex. Civ. App.–Dallas 1959, writ dism'd); Metting v. Metting, 431 S.W.2d 906 (Tex. Civ. App.–San Antonio 1968, no writ); M. K. WOODWARD, "Some Developments in the Law of Independent Administrations," 37 TEX. L. REV. 828, 839-41 (1959).

Similarly, an independent executor wanting a discharge from liability to the beneficiaries for his actions during an estate administration had few options. He could (i) resign and account under the predecessor of PROB. C. § 221, (ii) in an appropriate case, apply to the probate court for a partition and distribution of the estate under the predecessor of PROB. C. § 150 and incident to that action file an accounting and seek a discharge, or (iii) file his accounting in the district court and seek a declaratory judgment confirming that he was entitled to a discharge. M. K. WOODWARD, "Independent Administration Under the New Texas Probate Code," 34 TEX. L. REV. 687, 697 (1956). Alternatively, the independent executor could seek to close the estate informally and obtain releases from the beneficiaries.

a. Original Probate Code: Voluntary Closings under Section 151. When the Legislature adopted the Probate Code in the mid-1950s, it sought to address these issues (as well as create a means for discharging sureties on bonds of independent executors) by including in the new Code (i) PROB. C. § 152, which provides beneficiaries with a means for compelling an independent executor to close an estate at any time after it has been fully administered, and (ii) PROB. C. § 151, which permits an independent executor to formally close an estate and thereby put third parties on notice that his authority has ended. E.g., JOHN R. ANTHONY, "The Story of the Texas Probate Code," 2 S. TEX. L. J. 1, 40-41 (1956); M. K. WOODWARD, "Independent Administration Under the New Texas Probate Code," 34 TEX. L. REV. 687, 695 (1956)

(1) The provisions of the original Section 151, which after 2011 can be found in TEX. PROB. CODE §§ 151(a-1), allow an independent executor, when an estate is fully administered and after final distribution has occurred, to formally close the administration by filing a closing report, verified by an affidavit and containing an accounting as well as receipts or other proof of delivery of the remaining assets of the estate to the beneficiaries. Significantly following this procedure does not relieve the independent executor of liability to the beneficiaries for any malfeasance he may have committed during the administration.

(2) Some cases suggest that an estate could be closed only by following one of the statutory procedures. See, e.g., Bradford v. Bradford, 377 S.W.2d 747 (Tex. Civ. App.–Texarkana 1964, writ ref'd n.r.e.); Moore v. Vines, 461 S.W.2d 642 (Tex. Civ. App.–Dallas 1970), aff'd 474 S.W.2d 437 (Tex. 1971). However, since closing an estate under the statutory procedures is optional, it is clear that an independent executor can close an estate informally by simply delivering the decedent's assets to the beneficiaries after all of the decedent's debts have been paid. See, e.g., InterFirst Bank-Houston, N.A. v. Quintana Petroleum Corp., 699 S.W.2d 864 (Tex. Civ. App.–Houston [1st Dist.] 1985, writ ref'd n.r.e.); In re Estate of Hanau, 806 S.W.2d 900 (Tex. App.–Dallas 1991, pet. den.); Estate of McGarr, 10 S.W.3d 373 (Tex. App.–Corpus Christi 2000, pet. den.); Estate of Bean, 206 S.W.3d 749 (Tex. App.—Texarkana 2006, pet. den.); In re Estate of Teinert, 251 S.W.3d 66 (Tex. App.–Waco 2008, pet. den.).

b. Expansion of Probate Court Jurisdiction/New Remedies. Much later, beginning in the 1970s, the Legislature decided to streamline probate proceedings by eliminating trial de novo of contested probate matters in the district court, to create specialized statutory courts to begin hearing probate matters in metropolitan areas, to expand the jurisdiction of those courts and of certain county courts at law, and to give beneficiaries and courts more options to compel independent executors to fulfill their duties. Examples include the adoption of:

> (i) Section 149A, effective in 1972 and subsequently amended, giving beneficiaries the right to demand an accounting once an independent administration has been open at

least 15 months;

(ii) Section 149B, effective in 1979 and subsequently amended, giving beneficiaries the right (once an independent administration has been open at least two years) to both an accounting and an order that part or all of the estate be distributed if continuing the administration is not necessary;

(iii) Section 149C, effective in 1979 and subsequently amended, granting the probate court the authority to remove an independent executor for various reasons; and

(iv) Sections 149D-149F, effective in 1999, providing a means for an independent executor to distribute most of the estate assets to the beneficiaries and then seek a declaratory judgment that he be discharged from liability in connection with his administration of the estate (with the court authorized to require an accounting to audit and settle that accounting).

c. Section 151 Voluntary Closings Rarely Used. When Section 151 was first adopted, commentators and practitioners thought this statutory remedy would be used more often than it has been and bring certainty to beneficiaries, purchasers and title examiners seeking to determine whether or not an estate was still open. See, e.g., JOHN R. ANTHONY, "The Story of the Texas Probate Code," 2 S. TEX. L. REV. 1, 40-41 (1955); M. K. WOODWARD, "Independent Administration Under the New Texas Probate Code," 34 TEX. L. REV. 687, 695-96 (1956); WOODWARD & SMITH, supra at § 512.

Independent administrations are rarely closed under Section 151 for many reasons:

(1) First, in many cases an independent executor chooses not to formally close the estate just in case an asset belonging to the decedent is discovered later. So long as the estate has not been formally closed, the executor can still obtain letters and transfer that asset to the beneficiaries. PROB. C. § 153.

(2) Second, filing an affidavit that does not meet the requirements of the statute, such as one with a report reflecting that a cash reserve has not yet been distributed, will not result in the closing of the estate. See Burke v. Satterfield, 525 S.W.2d 950, 954-955 (Tex. 1975); Matter of Estate of Minnick, 653 S.W.2d 503 (Tex. App.–Amarillo 1983, no writ); compare Texas Commerce Bank-Rio Grande Valley, N. A. v. Correa, 28 S.W.3d 723 (Tex. App.–Corpus Christi 2000, pet. den.)(Estate considered closed when a final account filed by independent co-administrators had been approved by the probate court, their resignations accepted by the court, and the remaining assets of the estate distributed to the beneficiaries subject to a deferred, unpaid estate tax liability payable in installments); Estate of McGarr, 10 S.W.3d 373 (Tex. App.–Corpus Christi 2000, pet. den.).

(3) Third, Section 151 requires the independent executor to attach to his affidavit a "closing report" (similar to an accounting). In many cases, both the executor and the beneficiaries wish to avoid the cost of preparing that accounting. Moreover, an independent executor who prepares an accounting or other financial information for his beneficiaries will often choose instead to close an estate informally in order to obtain releases from the beneficiaries.

(4) Fourth, Section 151 requires the independent executor to distribute all of the assets of the estate to the beneficiaries before filing the statutory closing report and affidavit, leaving the executor without funds to defend himself if one or more beneficiaries complain.

(5) Fifth, the filing of an affidavit and closing report under Section 151 does not relieve the independent executor of liability to the beneficiaries. PROB. C. § 151(c)(2); Burke v. Satterfield, supra at 953. In fact, the probate court does not have

jurisdiction to examine the substance of the closing report or to approve or disapprove it; rather, the filing is "purely administrative in nature, providing simply a method whereby the closing of an independent administration can be made a matter of record." Id.; In re Estate of Hanau, 806 S.W.2d 900 (Tex. App.–Dallas 1991, pet. den.); compare Estate of Bean, 206 S.W.3d 749 (Tex. App.–Texarkana 2006, pet. den.). An independent executor concerned about potential liability exposure to the beneficiaries will be inclined either (i) to close the estate informally (obtaining receipts and releases from the beneficiaries) or (ii) to seek a declaratory judgment and judicial discharge under PROB. C. §§ 145D-F, with his attorneys' fees and costs under either approach likely to be charged against the estate.

d. **The Bottom Line Prior to 2011:** Since formally closing an estate is optional, most independent administrations are closed informally by a distribution of a decedent's assets after all debts have been paid. Yet, in most cases, no notice of the closing of the estate is recorded in the public records putting third parties on notice of that fact. This is particularly true with respect to real property since (i) title to that property vests in the heirs or beneficiaries at death under PROB. C. § 37 and (ii) deeds of distribution often are unnecessary because recording the decedent's will or judgment determining heirship in the deed records is normally sufficient to clear title.

Consequently, in the past in their **dealings with an independent executor**, and particularly several years after the executor first qualified, third parties often could not be sure whether or not an estate was still open and would require the decedent's heirs or beneficiaries to join in the executor's transactions. Nor would many third parties accept a current letters testamentary as proof that the estate was still open, for under PROB. C. § 186, letters are simply "sufficient evidence of appointment and qualification of the personal representative of an estate and of the date of qualification," not evidence that he is still serving or that an estate is still open. See Tibbets at 30.

Instead, third parties looked to PROB. C. § 188 for protection from liability. Under that statute, arguably an innocent purchaser is not required to inquire into facts outside the public record in order to confirm whether or not an estate is still open:

> "This [closing of an estate] is not a fact which a remote purchaser, such as Broadmoor, should be required to determine at its peril. An independent executor has authority to determine for himself when the estate is ready for distribution. The fact that he may have actually delivered the property to the beneficiary does not necessary divest him of continuing power to administer the estate. So long as the estate has not been formally closed by an affidavit of the executor in accordance with section 151. . . or by an order of the probate court. . .the purchaser is entitled to rely on the recitals in the deed that the executors are acting as independent executors." Dallas Services for Visually Impaired Children, Inc. v. Broadmoor II, 635 S.W.2d 572, 578 (Tex. App.–Dallas 1982, writ ref'd n.r.e.); see Tibbets at 29-30.

Yet, assuming that Broadmoor accurately states the law, third parties still were reluctant to deal solely with the independent executor due to the concerns discussed earlier in the outline over the scope of the independent executor's power of sale and whether in the particular transaction the independent executor was acting "in conformity with his authority and the law." See, e.g., Gatesville Redi-Mix, Inc. v. Jones, 787 S.W.2d 443 (Tex. App.–Waco 1990, pet. den.); Smith v. Hodges, 294 S.W.3d 774 (Tex. App.–Eastland 2009, no writ) and discussion in Section III(A)(2) above.

In their dealings directly with the beneficiaries, third parties also had to be careful because a transaction solely with the beneficiaries later could

be upended by a transaction by the independent executor. See, e.g., Harper v. Swovelan d, 591 S.W.2d 629 (Tex. Civ. App.–Dallas 1979, no writ)(Title passing under a deed by an independent executor of property specifically devised under a decedent's will was upheld as against claims of the specific legatees); Woodward v. Jaster, 933 S.W.2d 777 (Tex. App.–Austin 1996, no writ)(Lawyer sues and obtains a judgment against his beneficiary/client for representing that beneficiary in an action to remove a personal representative of an estate. Lawy er's judgment lien against beneficiary's share of estate real property was lost when the personal representative sold the property); see generally Larson v. Enserch Exploration, Inc., 644 S.W.2d 61 (Te x. App.–Amarillo 1982, writ ref'd n.r.e.)(Oil and gas lease by independent executor signed almost 4 years after death and after all debts had been paid upheld against later lease signed by testamentary trustees who claim ed that the estate was closed because the court construed an instruction in the will that the executors file a final report with the county court as requirem ent that had to be met before the trust was considered to be funded and the estate closed).

Consequently, when there was no clear evidence that an estate was clo sed, either in the probate records or in the relevant real property records, third parties often required the independent executor to join in the transaction or, alternatively, required the independent executor to confirm that either the estate was closed or that he had irrevocably relinquished his authority to administer the property involved in the transaction.

B. New Legislation Impacting Sales of Estate Property to Third Parties.

1. SECTION 145A: JUDICIAL GRANT OF POWER TO SELL REAL ESTATE WITH CONSENT OF BENE FICIARIES. This new statute permits the probate court, in the order appointing an independent executor or administrator, to grant him general or specific authority to sell real property (or to expand the power of sale given him under a will) in accordance with consents given by the beneficiaries in the application for his appointment. For example, if the beneficiaries of the estate want real estate liquidated, even if its sale is not necessary to settle the estate, they can ask the court to grant the indepen dent executor or adm inistrator authority to sell all real estate or only certain parcels, thereby eliminating any question over the personal representative' s authority to sell. Compare PROB. C. § 145B. Note that Section 145A only concerns the power to sell **real property**, not personal property.

The statute does **not** authorize the beneficiari es to seek an expansion of an i ndependent executor's or administrator's authority **after** his appointm ent, presumably because once he has been appointed, the court loses jurisdiction over the administration.

2. SECTION 145B: INDEPENDENT EXECUTOR'S GENERAL POWERS. This new and important statute confirms that an independent executor's powers are as broad as those exercisable by an adm inistrator with court approval in a dependent administration, consistent with the view expressed in Lang v. Shell Petroleu m Corp., 138 Tex. 399, 159 S.W.2d 478 (1942), and not limited to those tied solely to the settlement of the estate under the narrower view suggested in Roy v. Whitaker, 92 Tex. 346, 48 S.W. 892 (1898) m od. 49 S.W. 367 (1899).

a. Code Changes Expand Independent Executor's Powers. New PROB.C. § 145B provides that unless otherwise specifically provided in the Code, "any action that a personal representative subject to court supervision may take with or without court order may be taken by an independent executor without a court order." (emphasis added). Note that the new statute not only provides that an independent executor may take **"any action"** that an administrator can but also does not contain the "in relation to the settlement" of the estate language of Section 145(b) that m ight indirectly restrict the

scope of an independent executor's powers.

In light of the breadth of authority given under PROB. C. § 145B, one might wonder why it was necessary to adopt PROB. C. § 145A as well. Among the reasons for dealing separately with the power to sell real property in Section 145A were (i) to allow the court, at the request of the beneficiaries, to narrow the power to sell real property an independent executor or administrator otherwise would receive automatically upon his appointment under PROB. C. § 145B, particularly when the beneficiaries want only certain lands sold, and (ii) to establish a mechanism whereby an independent administrator clearly will be authorized to sell real property and third parties protected by statute when they purchase from him under new PROB. C. § 145C. Of course, an independent executor appointed under PROB. C. § 145(b) also can exercise any power of sale given him under the will. See PROB. C. § 332.

b. Impact on Independent Administrators. PROB. C. § 145B applies to independent administrators as well as independent executors (even though the statute refers only to executors) because the term "independent executor" generally includes an "independent administrator" under PROB. C. § 3(q). Compare PROB. C. § 145C(a) [providing that the definition of Section 3(q) will not apply under that statute].

Insofar as sales of real estate are concerned, an independent administrator now normally can sell real property for the purposes described in either PROB. C. §§ 341(1)(debts, expenses, etc.) or 341(2)("best interest" of the estate). The one exception may be the powers of a **successor** independent "executor" appointed under PROB. C. § 154A [really, an administrator with will annexed]. Recall that under Section 154A, a successor independent executor's powers can expanded, with beneficiary consent, to include some or all of the powers given the former independent executor under the decedent's will.

c. Scope of Real Estate Powers. Since the probate court can authorize an administrator in a dependent administration to "dispose" of real property in the "best interest" of the estate under Section 341(2) when the court determines it to be necessary or advisable to do so, then an independent executor now clearly can do the same under Section 145B, whether or not the sale is necessary to **settle** the estate.

Similarly, an independent executor now has authority to enter into longer-term surface leases under the parameters described in PROB. C. § 361 if it "would be to the interest of the estate" as well as oil and gas leases meeting the requirements of PROB. C. § 367, if leasing is necessary or advisable, and whether or not there are unpaid debts.

d. Scope of Other Powers. Unlike Section 145A discussed above, Section 145B applies to **all acts** of an independent executor, not just real estate transactions. Thus, PROB. C. § 145B provides a source of power for an independent executor to sell personal property, to continue a businesses, to borrow money, etc. to the same extent that a probate court can authorize an administrator to take similar actions during a dependent administration.

e. Remaining Limitations on Powers. There are still a few things an independent executor cannot do without first obtaining a court order under the Probate Code. For example, an independent executor can seek court approval of a self-dealing transaction under PROB. C. § 352, of extraordinary compensation under PROB. C. § 241, and most importantly, a judicial partition or sale of estate property that is incapable of a fair and equal partition and distribution under PROB. C. § 150. Section 145B should **not** be read to empower an independent executor or administrator to take these and other actions requiring court approval under statutes that specifically apply to independent executors and over which the probate court still has jurisdiction. PROB. C. § 145(h)("When an

independent administration has been created. . .as long as the estate is represented by an independent executor, further action of any nature shall not be taken in the county court except where this Code **specifically and explicitly** provides for some action in the county court."); see, e.g., City Nat. Bank of San Saba v. Penn, 92 S.W.2d 532 (Tex. Civ. App.–Austin 1936, no writ); Smith v. Hodges, 294 S.W.3d 774 (Tex. App.–Eastland 2009, no writ); In re Spindor, 840 S.W.2d 665 (Tex. App.–Eastland 1992, no writ).

3. SECTION 145C: CONFIRMATION OF POWER TO SELL PROPERTY. Discussed later in the outline are those provisions of this new statute that provide special protection, in many but not all circumstances, to third party, good faith purchasers of estate assets from independent executors and administrators in reliance on the apparent authority of those personal representatives to bind the estate. Pertinent to the discussion in this part of the outline, however, are three subparagraphs of this new statute.

a. Scope of Power to Sell Estate Property. PROB. C. § 145C(b) reaffirms Section 145B by providing that unless limited by the terms of the decedent's will, an independent executor or administrator shall "have the same power of sale for the same purposes as a personal representative has in a supervised administration, but without the requirement of court approval." Unlike Section 145A, Section 145C applies to both real and personal property.

b. Section 145C Supplements Other Authority. Presumably to make sure that the more specific provisions of Section 145C do not inadvertently limit the powers given elsewhere to independent executors and administrators, PROB. C. § 145C(d) confirms that the statute "does not limit the authority of an independent executor or independent administrator to take any other action without court supervision or approval with respect to estate assets that may take place in a supervised administration, for purposes and within the scope otherwise authorized by this code, including the authority to enter into a lease and to borrow money." (emphasis added) Thus, Probate Code Section 145C supplements, and does not supplant, the broad grant of powers under Section 145B.

It is not entirely clear what purpose is served by the words "for purposes and within the scope otherwise authorized by this code" unless that phrase was intended to clarify that an independent executor or administrator relying on a Probate Code statute as the source for his authority (i) can act only under facts and circumstances that would allow a probate court to grant its approval, see, e.g., Gatesville Redi-Mix, Inc. v. Jones, 787 S.W.2d 443 (Tex. App.–Waco 1990, pet. den.)(lease of land many years after death overturned since an approval of a similar lease by the probate court would have constituted an abuse of discretion), and (ii) must comply with other requirements of the relevant Probate Code statute (other than court approval), such those dictating the terms of any sale, lease, etc. For example, an independent executor who enters into (a) an oil and gas lease based on PROB. C. § 367 presumably cannot agree to a primary term of longer than 5 years, and (b) any sale of real estate involving estate financing probably must require a down payment of at least 20% and the balance financed under a note bearing interest at not less than 4% interest under PROB. C. § 348.

c. Liability of Fiduciary. The new statute does not relieve an independent executor or administrator of "any duty owed to a devisee or heir in relation, directly or indirectly, to the sale." PROB. C. § 145C(d).

4. SECTION 151(b): NOTICE OF CLOSING OF ESTATE. Section 151 has been amended to provide a new way to close an estate--by a "notice of closing estate."

a. Requirements.

(1) Contents of Notice. PROB. C. § 151(b)(1) provides that an independent executor may file a "notice of closing estate," verified by affidavit, that states:

"(A) that all debts known to exist against the estate have been paid or have been paid to the extent permitted by the assets in the independent executor's possession;

"(B) that all remaining assets of the estate, if any, have been distributed; and

"(C) the names and addresses of the distributees to whom the property of the estate, if any, remaining on hand after the payment of debts has been distributed."

Significantly, neither a "closing report" or proof of delivery of property must be filed under this new statutory option. Instead, the independent executor must file with the notice either "signed receipts or other proof that all distributees have received a copy of the notice of closing estate." PROB. C. § 151(b)(2).

(2) Notice to Distributees. Before filing the notice of closing estate, the independent executor must provide a copy of the notice to each distributee of the estate and, as mentioned above, file with the notice proof that he has done so. Id.

b. Effect of Filing Notice of Closing.

(1) Fiduciary and Surety Liability. Unlike under the "old style" closing report approach carried forward in PROB. C. § 151(a-1), when an independent executor files a "notice of closing estate," the sureties on the independent executor's bond are **not** released for the future acts of the principal, presumably because no "report" or accounting must be filed with the notice. PROB. C. § 151(c)(4). As under the "old style" closing report approach, an independent executor is not relieved of liability to the beneficiaries under the new option. PROB. C. § 151(c)(2).

(2) Effective Date of Closing of Estate. The new amendments to PROB. C. § 151 change the effective date of when an estate is closed under **both** an "old style" closing report under PROB. C. §§ 151 (a-1) and the new "notice of closing estate" option under PROB. C. § 151(b). An independent administration now will be considered closed 30 days after the filing of the closing report or notice of closing estate unless an objection is filed by an interested party during that 30-day period. If an objection is filed, "**the estate is closed when the objection has been disposed of or the court signs an order closing the estate**." PROB. C. § 151(c)(1)(emphasis added).

(3) Termination of Independent Executor's Powers. On the other hand, PROB. C. § 151(c)(2) provides that the "closing of an independent administration by filing" either an "old style" closing report or a new "notice of closing estate" terminates the independent executor's power and authority.

(4) Third Parties. Similarly, an independent executor's filing of either an "old style" closing report or a new "notice of closing estate" apparently (i) under PROB. C. § 151(c)(3), obligates third parties to begin dealing directly with estate distributees with respect to estate property (with the acts of those distributees binding as regards the persons with whom they deal) and (ii) under PROB. C. § 151(d), constitutes sufficient legal authority for persons having custody of property belonging to the estate to transfer that property directly to the distributees "described in the will." **[Note:** The latter statute should be corrected to clarify that in the case of an independent administration of the estate of an intestate decedent, third parties can deliver estate assets to those determined to be the decedent's heirs.]

c. 30-Day "Waiting Period" Issues. The imposition of a 30-day "waiting period" between the date a closing report or notice of closing is filed and the date an estate is considered "closed" does not seem to make much sense and only raises new problems.

(1) Powerless Executor in an "Open" Estate? Under a strict reading of the statute, (i) an independent executor loses his powers and authority on filing of a Section 151 closing report or notice of closing and (ii) third parties can (or must) thereafter commence dealing directly with the distributees of the estate. That makes sense because under both options, the independent executor already is required to have distributed all of the estate assets to the beneficiaries prior to filing. Yet, if the independent executor loses his powers and no longer holds any estate assets, then what is the purpose for leaving the estate "open" for 30 days with an independent executor impotent to act and with no assets to administer? If the distributees have complaints against the former independent executor, they can simply sue him; and if a credit or has a complaint, he can sue the distributees.

(2) What is the Role and Jurisdiction of the Court? Previously, it was clear that the probate court lacked jurisdiction to interfere with an independent executor's closing of an estate under Section 151. E.g., Burke v. Satterfield, supra. Under the new statute, if an objection is filed during the 30-day waiting period, does the probate court now have jurisdiction to do something in order to "dispose" of that objection? If Section 151 closings are intended to remain purely administrative in nature and, as stated in Burke v. Satterfield, to provide a means "whereby the closing of an independent administration can be made a matter of record," then the probate court should not have jurisdiction to inquire into "objections" or even to sign an order closing the estate as specifically allowed under new PROB. C. § 151(c).

On the other hand, if the purpose for adding the 30-day "waiting period" is to confer jurisdiction on the probate court to consider objections and assume an active role in closing the estate, then the statute should say so and contain language similar to that found in Section 152 or Section 149B specifically allowing the court to require an accounting, to audit that accounting, to grant a discharge, etc.

In my opinion, this statute should be amended to delete the 30-day waiting period in order to promote the apparent underlying purpose of the new amendments–to provide a simple, inexpensive, purely administrative way to evidence the closing of an estate as a matter of public record.

d. New Option is More User Friendly. As mentioned earlier, those who drafted the original Probate Code probably thought the Section 151 closing report procedure would be used more often than it has been and bring certainty for determining when an estate had been closed. The new notice of closing option may become more popular because it is so much more "user friendly."

(1) Easier: No Accounting or Receipts Required. Eliminating under the new option the requirements of a closing report, related accounting, and signed receipts from the beneficiaries should simplify the process as well as reduce costs. When the independent executor or administrator is confident in the actions he has taken during an administration and that beneficiary releases are unnecessary, he can use the new option as a means to formally close the estate and terminate his fiduciary relationship without having to waste time and money dealing with the beneficiaries, negotiating releases, etc.

(2) Statute of Limitations Tool. The new, simpler notice of closing estate option also could become a useful tool for independent executors desiring to cause the statute of limitations to commence to run without undertaking the potential risks associated with an informal closing or a proceeding seeking a judicial discharge under PROB. C. §§ 149D-149F.

The statute of limitations normally commences to run in favor of a fiduciary against his beneficiaries either (i) when the fiduciary relationship terminates or (ii) when the beneficiaries knew or should have known of facts that in the exercise of reasonable

diligence would have led to the discovery of the executor's wrongful act. E.g., Little v. Smith, 943 S.W.2d 414, 420 (Tex. 1997); Estate of McGarr, 10 S.W.3d 373 (Tex. App.–Corpus Christi 2000, pet. den.); InterFirst Bank-Houston, N. A. v. Quintana Petroleum Corp., 699 S.W.2 d 864 (Tex. Civ. App.–Houston [1st Dist.] 1985, writ ref'd n.r.e.); Courseview Inc v. Phillips Petroleum Co., 158 S.W.2d 197 (1957). Moreover, in estate administrations, beneficiaries normally are charged with notice of facts in the public records (such as deeds, the contents of the decedent's will, etc.) that are sufficient to put them on inquiry concerning many acts taken during the adm inistration of an estate and prior to the closing of an estate. See Little v. Sm ith, supra; Mooney v. Harlin , 622 S.W.2d 83 (Tex. 1984); Estate of Denman, No. 04-10-00839 (Tex. App.–San Antonio [4th Dist.] Nov. 23, 2011). Consequently, closing an estate using either option under PROB. C. § 151 should cause the statute of limitations to commence to run in favor of an independent executor or administrator against claims of his beneficiaries because the beneficiaries not only (a) are charged with constructive notice of the term ination of the fiduciary relationship after the notice is filed, but also (b) are given actual notice of that fact when the independent executor sends them a copy of the notice in advance of its filing pursuant to the statute. Id.

5. SECTION 145C: NEW STATUTORY PROTECTION FOR THIRD PARTIES IN ESTATE SALES. Discussed earlier in the outline are the provisions of Sections 145A - 145C that broaden the power of an independent executor to engage in certain acts. Section 145A provides one way to expand an independent executor's or administrator's power to sell **real property**; Section 145B effectively expands **all powers** of independent executors and administrators to match those ex ercisable by administrators with court approval in dep endent administrations, including but not limited to sales of estate property (real and personal); and Section 145C(b) reaffirm s the general grant of **powers of sale** under PROB. C. § 145B.

The rest of PROB. C. § 145C focuses solely on **sales of estate assets**, of both real and personal property, but not other acts or powers of independent executors and adm inistrators. More im portantly, Section 145C contains new guidance concerning the rights and responsibilities of third parties in their dealings with independent executors and administrators in sales of estate property , and especially in real estate transactions.

a. Duty of Inquiry as to Power of Sale. "A person who is not a devisee or heir is not required to inquire into the power of sale of estate property of the independent executor or independent administrator or the propriety of the exercise of the power of sale if the person deals with the independent executor or independent administrator in good faith and:

(A) a power of sale is granted to th e independent executor in the will;

(B) a power of sale is granted under Section 145A of this code in the court order appointing the independent executor or independent administrator; or

(C) the independent executor or independent administrator provides an affidavit, executed an d sworn to under oath and recorded in the deed records of the county where the property is located, that the sale is necessary or advisable for any of the purposes described in Section 341(1) of this code." PROB. C. § 145C(c)(1).

The affidavit described in (C) above is conclusive proof as between a purchaser who relied on the affidavit in good faith and the personal representative and beneficiaries of the estate as respects the authority of the independent executor's or administrator's authority to sell. PROB. C. § 145C(b).

b. Statutory Protection for Third Parties. "The signature or joinder of a devisee or heir who has an interest in the property being sold as described in

this section is not necessary for the purchaser to obtain all right, title, and interest of the estate in the property being sold." PROB. C. § 145C(c)(2).

While the foregoing sentence is found in the subsection of Section 145 addressing the rights of third parties who rely on an independent executor's or administrator's affidavit concerning the existence of debts and claims, by its terms the sentence above confirms that joinder of the heirs or devisees is unnecessary when property is sold "as described in this section"–i.e., all of Section 145C. Compare reference to subsection (c)(1)(C) in first sentence of PROB. C. § 145C(c)(2).

(1) Sales When Independent Executor Has a Power of Sale Under a Will. Recall that under PROB. C. § 332, an executor under court supervision can exercise, without prior court approval, a power of sale given him in the decedent's will. PROB. C. § 145C(c)(1)(A) now confirms that a third party, good faith purchaser need not inquire into either the power of sale or the propriety of its exercise if the executor is exercising a power of sale granted by the will. Thus, a third party need not be concerned whether or not the sale is in the "best interest" of the estate, whether or not there are debts, etc.

Note: Section 145C(c)(1)(A) refers to authority granted to an "independent executor in the will" and under PROB. C. § 145C(a) the term "independent executor" **does not** include an independent administrator. While PROB. C. § 154A allows the probate court to grant a successor independent "executor" certain powers given under a decedent's will, PROB. C. § 145C contains no specific reference to powers granted under that Section. In the future, it might be wise for the Legislature to add a specific reference to Section 154A in PROB. C. § 145C(c)(1)(A) or PROB. C. § 145C(c)(1)(B) discussed below.

(2) Real Property Sold under Section 145A Power. Similarly, PROB. C. § 145C(c)(1)(B) confirms that a third party, good faith purchaser need not inquire into the propriety of an exercise of a power to sell real property granted under PROB. C. § 145A. Since a mineral lease is technically a sale of real property, Section 145C(c)(1)(B) presumably applies to mineral leases as well.

(3) Sales Dependent on Other Sources of Authority. PROB. C. § 145C(c)(3) deals with independent executors or administrators who cannot look either to the decedent's will or to a judicial grant of authority under PROB. C. § 145A as a source of their power to sell estate property.

As mentioned above, PROB. C. § 145B confirms that an independent executor or administrator generally has the power, without court approval, to take any action a personal representative under court supervision could take with or without court order. This general authority is reconfirmed in PROB. C. § 145C(b) with respect to powers of sale. As a result, an independent executor or administrator whose only sources of powers are those of court-supervised administrators can (i) sell real property to pay debts, expenses and claims, relying on PROB. C. § 341(1) as the source of his power, (ii) dispose of real property in the best interest of the estate, relying on PROB. C. § 341(2) as the source of his power, (iii) sell personal property to prevent loss or waste or to pay debts, expenses and claims, relying on PROB. C. §§ 333 and 334 as the sources of his power, and (iv) enter into an oil and gas lease, relying on PROB. C. § 367 as the source of his power..

Even though an independent executor or administrator has the power to sell under these circumstances under PROB. C. § 145B, **PROB. C. § 145C does not grant blanket statutory protection to all third party, good faith purchasers** of estate property from them.

Rather, to obtain that protection, PROB. C. § 145(c)(1)(C) requires the third party, good faith purchaser to obtain from the independent executor or

administrator and file "in the deed records of the county where the property is located" an affidavit confirming that the sale is being made "for any of the purposes described in Section 341(1) of this code"–i.e., to pay debts, expenses and claims.

(a) Reliance on Affidavit. As noted earlier, PROB. C. § 145C(c)(2) confirms that "[a]s to acts taken in good faith reliance, the affidavit described by Subsection (c)(1)C) of this section isconclusive proof, as between a purchaser of property from an estate, and the personal representative of the estate or the heirs and distributees of the estate, with respect to the authority of the independent executor or independent administrator to sell the property."

(b) Personal Property. Note that PROB. C. § 145C(c)(1)(C) refer only to Section 341 and not to statutes dealing with sales of personal property when describing the permissible purposes for which sales must be made and covered in the independent executor's or administrator's supporting affidavit. That should not matter in most cases, for (i) Section 145C applies to sales of estate property, not just sales of real property, and (ii) the "purposes described in Section 341(1)" are virtually identical to those for which personal property can be sold under Section 334.

When the estate sale involves property other than real property, however, and particularly property having no **physical location** such as contract rights, causes of action, copyrights, patents, many stocks and bonds, etc., a purchaser may not know how to satisfy Section 145C(c)(1)(C)'s requirement that the personal representative's affidavit concerning the existence of debts be "filed in the deed records of the county where the property is located." In these circumstances, the purchaser probably should insist on an affidavit being recorded in the deed records, the original probate records, and anywhere else he can think of that may be relevant.

Note: If a sale of personal property is being made for the purpose of preventing loss or waste under PROB. C. § 333 at a time when there are no outstanding debts, the statute arguably does not apply.

(4) Sale May Still Be Valid Absent Statutory Protection. Once again, even when the requirements of PROB. C. § 145C are not satisfied, a sale may still be valid as an exercise of the broad powers given all independent executors and administrators under PROB. C. § 145B. In the event of a later challenge of the executor's authority by the heirs or beneficiaries (or purchasers from them), however, the burden will rest with the purchaser to show that circumstances existed authorizing the personal representative to sell–either the existence of debts or, in the case of real property, that the sale was in the "best interest" of the estate. See PROB. C. § 145C(d); Smith v. Hodges, 294 S.W.3d 774 (Tex. App.–Eastland 2009, no writ).

c. Due Diligence: What if the Estate is "Closed"? Since an independent administration can be closed either formally or by a voluntary distribution, will a third party, good faith purchaser under PROB. C. § 145C be protected if he accepts a deed or assignment from an independent executor or administrator after the estate has been closed?

(1) Should Not Matter Absent Actual or Constructive Notice of Closing. Perhaps this subject should have been specifically addressed in Section 145C, but the second (and last) sentence of PROB. C. § 145C(c)(2) appears to confirm indirectly that when the statute applies, a good faith purchaser will be protected even if the estate is closed:

> The signature or joinder of a devisee or heir who has an interest in the property being sold as described in this section is not necessary for the purchaser to obtain all right, title, and interest of the estate in the property being sold.

If in making the sale the independent executor or administrator exceeds his authority, the heirs or

beneficiaries may have a cause of action for damages against him. See PROB. C. § 145C(c)(3)("This section does not relieve the independent executor or independent administrator of any duty owed to a devisee or heir in relation, directly or indirectly, to the sale."). The title of the purchaser, however, still should be good.

(2) Due Diligence Required of Purchasers. Does the statute excuse third party purchasers from engaging in **any** due diligence? Recall that under PROB. C. § 188, "innocent purchasers of any of the property of the estate. . .for a valuable consideration, in good faith, and without notice of any illegality in the title to the same" comprise the class of persons entitled to protection under that statute. In contrast, PROB. C. § 145C(c) protects a person "who is not a devisee or heir" and who deals in "good faith" with an independent executor or administrator. Moreover, unlike Section 188, Section 145C specifically provides that such a third party, good faith purchaser "is not required to inquire into the power of sale of estate property." Id.

One might argue that the foregoing sentence excuses a third party, good faith purchaser from any duty to inquire, including the duty to examine the probate records of the county in which the administration is pending. However, it seems more likely, if not certain, that under Mooney v. Harlin, supra, any purchaser dealing with a personal representative of any kind will be charged with constructive notice of facts those probate records might reflect so that, for example, if the estate has been formally closed, the purchaser would not be considered a "good faith" purchaser under the statute. Alternatively, the statute arguably excuses the purchaser only from the duty to investigate the "power of sale of estate property" and "the propriety" of its exercise, not whether or not the person with whom he is dealing is still the personal representative of the estate. See King v. Ruvalcaba, 10-08-00233-CV (Tex. App.–Waco 2010) (purchaser from independent executor not charged with notice of abstract of judgment against decedent's beneficiary in a sale by the independent executor, even though will of decedent was of record, since that is not in the chain of title leading to the decedent's ownership; "nor was anything filed in the probate record that would put a purchaser on notice of the recorded abstract of judgment" against the beneficiary.); American Finance and Investment Co. v. Herrera, 20 S.W.3d 829 (Tex. App.–El Paso 2000, no writ)("A purchaser in good faith may rely on the apparent regularity of probate proceedings and the apparent authority of a duly qualified independent executor in selling the property of the estate and need not inquire in to matters outside the record that might affect the executor's authority." Id. at 833, citing Dallas Services for Visually Impaired Children, Inc. v. Broadmoor, II, 635 S.W.2d 572 (Tex. App.–Dallas 1982, writ ref'd n.r.e.), supra).

(3) Public Policy Considerations. PROB. C. § 145C provides protection for purchasers of estate property in sales based on (i) an express power of sale in a will (with the decedent presumably aware of the risk of granting that power to his chosen executor insofar as the rights of his beneficiaries were concerned), (ii) a power to sell real property expressly granted by court order under PROB. C. § 145A (with the concurrence of the beneficiaries who arguably should be estopped to challenge exercises of the authority granted with their approval), or (iii) an affidavit from the independent executor or administrator confirming that there are unpaid debts, expenses and claims (i.e., circumstances under which a power of sale exists by statute or by implication).

In the first two situations, a purchaser's duty to inquire should not be unduly burdensome, for so long as the estate has not been formally closed, the purchaser should be entitled to rely on the independent executor's apparent authority under the will or court order.

In the last situation, when an independent executor

or administrator has no express power of sale under a will or court order but under PROB. C. § 145B he has the power to sell certain property in the "best interest" of the estate, it is not unreasonable to require the purchaser either (i) to obtain from the independent executor an affidavit that the sale is for the purpose of paying debts, expenses and claims, (ii) to require the heirs or beneficiaries to join in the sale or (iii) under the rule of *caveat emptor,* to bear the risk that the personal representative lacks authority to make the sale. In this way, heirs and beneficiaries are not left completely unprotected against the acts of a "runaway" independent executor or administrator except when either the decedent (by will) or the beneficiaries themselves (by their consents under PROB. C. § 145A) have expressly authorized him to have broader authority.

After all, it is the independent executor or administrator, not the court, who (i) decides when an estate has been fully administered and ready to be closed and (ii) actually knows whether or not the estate has in fact been closed informally by a distribution. Requiring third parties to bear the risk of an independent executor's or administrator's lack of authority due to facts they cannot learn through an examination of the public records may impede legitimate sales of estate assets in the best interests of the estate and its beneficiaries. Accordingly, it would seem that insofar as the estate "open/closed" problem, a rule similar to the one expressed in Dallas Services for Visually Impaired Children, Inc. v. Broadmoor, II, 635 S.W.2d 572 (Tex. App.–Dallas 1982, writ ref'd n.r.e.) strikes a reasonable balance:

> "This [the closing of the estate] is not a fact which a remote purchaser, such as Broadmoor, should be required to determine at its peril. An independent executor has authority to determine for himself when the estate is ready for distribution. The fact that he may have actually delivered the property to the beneficiary does not necessary divest him of continuing power to administer the estate. So long as the estate has not been formally closed by an affidavit of the executor in accordance with section 151. . . or by an order of the probate court. . .the purchaser is entitled to rely on the recitals in the deed that the executors are acting as independent executors."

In sum, the responsibility should rest with the personal representative, the beneficiaries, or both, to decide when either (i) to formally close an estate under Sections 151 or 152 or (ii) to file in the public records a deed of distribution, affidavit or other evidence confirming that the estate is closed.

d. Open Issues When Power of Sale is Limited. While the new amendments to the Probate Code go a long way in clearing up questions over the scope of an independent executor's power of sale and the closing of estates, there remain some lingering issues when statutory protection is not available.

(1) Sale to Avoid Joint Ownership v. Sale in "Best Interest" of Estate. As mentioned above, PROB. C. § 150 allows an independent executor to seek from the probate court an order either partitioning or ordering the sale of property "incapable of a fair and equal partition and distribution." If the court concurs, it can grant relief. Section 150 generally cannot be used, however, as a tool for compelling a partition or sale of land or other property as opposed to distributing it in kind to the beneficiaries in undivided interests. E.g., Terrill v. Terrill, 189 S.W.2d 877, 879 (Tex. Civ. App.–San Antonio 1945, writ ref'd); Clark v. Posey, 329 S.W.2d 516, 518-19 (Tex. Civ. App.–Austin 1959, writ ref'd n.r.e.); Smith v. Hodges, 294 S.W.3d 774 (Tex. App.–Eastland 2009, no writ); In re Spindor, 840 S.W.2d 665 (Tex. App.–Eastland 1992, no writ).

Now that it is clear under PROB. C. § 145B that independent executors and administrators can dispose of real property in the "best interest" of an estate, it may be difficult (or impossible) for a third party to determine in a particular case whether a sale is being made in the "best interest" of the estate or as

a means to avoid a distribution in kind. If an executor will not provide an affidavit that the sale is made to pay debts or claims and the third party wishes to go forward with the purchase without the benefit of statutory protection, the purchaser may want to ask the independent executor or administrator to state in the deed that the sale is being made in the "best interest of the estate and not for the purpose of partition."

More cautious purchasers of estate real or personal property under these circumstances will continue to require the joinder of the heirs or beneficiaries in such sales.

(2) Exercises of Powers Many Years After Original Grant of Letters. Although PROB. C. § 145B grants an independent executor or administrator the power to sell real property in the "best interest" of an estate, the executor or administrator may not exercise that power under circumstances where approval of the sale by the probate court in a dependent administration would have been an abuse of discretion. See, e.g., Gatesville Redi-Mix, Inc. v. Jones, 787 S.W.2d 443 (Tex. App.–Waco 1990, pet. den.). Thus, whenever a third party is dealing with an independent executor or administrator outside the protection available under PROB. C. §§ 145C or 188 and after a reasonable period of administration, the third party should require the heirs or beneficiaries to join in the sale.

III. CREDITORS' CLAIMS

A. Nature of Independent Executor's Duty to Creditors. "The appointment of an administrator is merely a trust to pay the claims of creditors, and then to restore the remainder of the assets to the heirs." E.g., Cochran's Administrators v. Thompson, 18 Tex. 652, ___ (1857); Farmers' & Merchants' Nat. Bank v. Bell, 31 Tex. Civ. App. 124, 71 S.W. 570 (1902, writ ref'd); see Pearce v. Stokes, 155 Tex. 564, 291 S.W.2d 309 (1956). Some courts have suggested that a personal representative's primary duty is to creditors and that he only secondarily represents the decedents' heirs or distributees. E.g., Stone v. Townsend, 190 Miss. 547, 1 So.2d 237 (1941); Faulkner v. Faulkner, 23 Ariz. 313, 203 P. 560 (1922). After all, since one of a personal representative's main responsibilities is to pay the claims, one would think that he would owe creditors a duty to treat them fairly and to pay their claims in proper order (and held personally liable to them when he failed to do so). See Ex Parte Buller, 834 S.W.2d 622 (Tex. App.--Beaumont 1992); Ertel v. O'Brien, 852 S.W.2d 17 (Tex. App.-Waco 1993, writ den.). Surprisingly, more recent cases and statutes go the other way, and particularly when the personal representative is an independent executor.

1. NO DUTY TO CREDITORS? Two recent cases hold that except in limited circumstances, an independent executor owes no duties to creditors. See, e.g., FCLT Loans v. Estate of Bracher, 93 S.W.3d 469 (Tex. App.--Houston [14th Dist.] 2002), a case involving a claim by a creditor that independent co-executors allegedly made fraudulent transfers of estate assets to avoid the payment of its claim as well as breached their fiduciary duties to the creditor by allowing the assets of the estate to be dissipated before paying its claim. "[The duty to pay claims under PROB. C. § 146] does not support a claim that an independent executor holds estate assets in trust for the benefit of creditors, nor does it otherwise give rise to a fiduciary duty. . .Under the present statutory scheme. . . we cannot say an independent executor automatically holds the estate assets in trust for the benefit of estate creditors." Id at 481. The court distinguished Pearce v. Stokes, supra, and Cochran's Administrators v. Thompson, supra, noting that both involved court-supervised administrations, as well as Ex Parte Buller, supra and Ertel v. O'Brien, supra.

This issue came up again in a very recent case, Mohseni v. Hartman, 01-10-00078-CV (TXCA1 June 9, 2011). That case involved an unsecured creditor who sued an independent executor for negligence, alleging that the executor mismanaged

a restaurant owned by the decedent by (i) failing to pay outstanding payroll, sales and property taxes, and (ii) thereby unnecessarily incurring avoidable penalties and interest that caused the estate to become unable to pay his claim. The Houston Court of Appeals, First District, agreed with its sister court in FCLT Loans that an independent executor owes no duty to an unsecured creditor, confirming that "absent any specific undertaking to manage the creditors interests in the case of a bankrupt estate," an independent executor owes no general duty of care to an unsecured creditor, emphasizing that (a) legal title to a decedent's property vests at death in the beneficiaries under PROB. C. § 37; and (b) insofar as the management of estate assets is concerned, an executor owes a general duty to the beneficiaries (in whom title is vested), not to creditors.

2. STATUTORY PROTECTION. As importantly, PROB. C. § 146(c) provides statutory protection to an independent executor who pays a claim not barred by the statute of limitations so long as at the time he paid the claim, the executor reasonably believed the estate has sufficient assets to pay all claims.

Frankly, in my opinion, it is difficult to justify granting an independent executor a special exemption from liability for failure to carry out the main duty assigned to him under the law– to set aside exempt property and to pay creditors in proper order. An independent administration is still an administration, and one established either at the direction of the testator or upon the request of the beneficiaries (generally with a family member or beneficiary serving as the independent executor or administrator). Absent debts and claims, there generally is no necessity for an administration at all; accordingly, when an administration is opened (whether independent or dependent), the personal representative should be held accountable if he fails to properly perform one of the basic functions he was appointed to do.

B. Claims in Independent Administrations–In General. When an estate is settled in a court-supervised (or "dependent") administration, the probate court serves the same functions as a bankruptcy court (and the administrator acts much like a bankruptcy trustee). The administrator is in charge of marshaling the decedent's assets, evaluating the amount and validity of the decedent's debts, but it is the **court** that finally approves all claims, determines how claims should be prioritized, and directs when and how claims are paid. The entire process is governed by a 6-step statutory probate claims procedure: (1) The administrator gives **notice to creditors**; (2) A creditor formally "**presents**" or files his claim; (3) The administrator either **allows or rejects** the claim, with an allowed claim moving on to the court for final approval and a rejected claim either litigated on the merits or settled; (4) The court reviews the action taken by the administrator on allowed claims, and after hearing objections from interested parties, either **approves or disapproves** the claim; (5) The court **classifies** each approved claim (as well as any claim resolved through litigation or settlement), thereby establishing each claim's **priority** vis-a-vis the claims of other creditors; and (6) The administrator, with court approval, **pays** claims with court approval.

In "independent" administrations, the independent executor or administrator "steps into the decedent's shoes" and performs these tasks free from court supervision and, for the most part, without the benefit of the certainty afforded by the statutory rules. Although statutory claim **procedures** generally do not apply in independent administrations, the **substantive** claim rules do apply in order to ensure that claims are paid in the same order in both kinds of administrations. Higginbotham v. Alexander Trust Estate, 129 S.W.2d 352 (Tex. Civ. App.—Eastland 1939, writ ref'd) Bunting v. Pearson, 430 S.W.2d 470 (Tex. 1968); Collins v. State, 506 S.W.2d 293 (Tex. Civ. App.—San Antonio 1973, no writ).

Prior to 1996, commentators believed that independent executors were required to give the same notices to creditors as required of administrators in court-supervised administrations, notwithstanding the fact that the procedural provisions of the probate claim statutes generally do not apply in independent administrations. WOODWARD & SMITH § 500; see Roberts v. Carlisle, 4 S.W.2d 144 (Tex. Civ. App. —Dallas 1928, writ dism'd). Beginning in the 1990s, the Legislature began adopting statutes to clarify which statutory rules were "procedural" and which were "substantive" and how those substantive rules applied during independent administrations.

C. Unsecured Creditors.

1. STATUS OF THE LAW BEFORE 2011. Before 2011, the Legislature had already addressed in PROB. C. §§ 146 and 147 many of the questions over how claims must be handled in independent administrations. For example, PROB. C. § 146(a) already confirmed that an independent executor:

> "(1) shall give the notices required under Sections 294 and 295 [Notices to general creditors by publication and the State and secured creditors by certified mail under PROB. C. §§ 294(a), 294(b)];
>
> "(2) may give the notice permitted under Section 294(d) and bar a claim under that subsection [Notice by certified mail to an unsecured creditor compelling him to present a claim within 120 days or his claim will be barred];
>
> "(3) shall approve, classify, and pay, or reject, claims against the estate in the same order of priority, classification, and proration prescribed in this Code; and
>
> "(4) shall set aside and deliver to those entitled thereto exempt property and allowances for support, and allowances in lieu of exempt property, as prescribed in this Code, to the same extent and result as if the independent executor's actions had been accomplished in, and under orders of, the court."

a. Presentment of Claims. Years ago, PROB. C. § 146 authorized an independent executor to "receive presentation" of claims. However, the formal "presentment" of a claim had no practical legal effect because an independent executor approves and pays claims extrajudicially. E.g., Alterman v. Frost Nat. Bank of San Antonio, 675 S.W.2d 619 (Tex. App. —San Antonio 1984, no writ); Bunting v. Pearson, 430 S.W.2d 470 (Tex. 1968). Consequently, the "receive presentation of claims" language was deleted in the 1990s, leaving Section 146 to refer instead only to the approval, rejection, classification, and pro-rata payment of claims.

b. Unsecured Claims Handled Informally. In independent administrations, unsecured claims are paid much more informally. If a creditor sends a bill that is not paid voluntarily by the independent executor, that creditor simply can and should file suit against the independent executor and, after his debt has been reduced to judgment, seek to execute on that judgment against estate property in the hands of the independent executor. PROB. C. § 147.

Many creditors (and particularly collection agencies hired by credit card companies) still file formal claims with the probate clerk in the manner required in dependent administrations. Independent executors often take no formal action on these "claims" other than pay those they know to be valid and wish to pay. An independent executor also can simply choose not to pay a claim and instead (i) contact the creditor and attempt to settle it, (ii) ignore it and hope that the creditor will write it off rather than file suit to collect his debt, or (iii) ignore it and hope that ultimately it will become barred by the statute of limitations..

c. Response to Special 294(d) Notice. PROB. C.

§§ 294(d) and 146 allow an independent executor to give an unsecured creditor a special notice and bar the creditor's claim if the creditor fails to take prompt responsive action within 120 days of the notice. Section 146 was amended to address how an unsecured creditor must respond to a Section 294(d) notice. PROB. C. §§ 146(d), (e) confirm that to avoid the statutory § 294(d) claim bar, an unsecured creditor must "give notice to the independent executor of the nature and amount of the claim" within the 120-day response period by:

> (i) a written instrument hand-delivered with proof of receipt, or mailed by certified mail, return receipt requested, to the independent executor or his attorney;
> (ii) a pleading filed in a lawsuit with respect to the claim; or
> (iii) a written instrument or pleading filed in the court in which the administration of the estate is pending. PROB. C. § 146(e).

2. **NEW 2011 LEGISLATIVE CHANGES.**

a. Additional Requirements for Section 294(d) Notices. One minor change made in 2011 is to add New PROB. C. § 145(a-1), which requires an independent executor or administrator to include in his Section 294(d) notice, in addition to the information required under Section 294, a statement that a claim may be "effectively presented" only by following one of the methods prescribed in Section 146(e) reproduced above.

b. Procedural v. Substantive Provisions. Despite earlier updates to the claim statutes, both practitioners and courts remained confused over which statutory claim rules were "substantive" and applied in independent administrations. To help alleviate this confusion, New PROB. C. § 146(b-7) now confirms that "[e]xcept as otherwise provided by this section, the procedural provisions of this code governing creditor claims in supervised administrations do not apply to independent administrations," specifically including Section 313 (dealing with suits on rejected claims) and parts of Section 306 (dealing with secured claims). Thus, while the law was previously clear, Section 146 now specifically confirms that if a creditor "presents" a claim that is rejected by an independent executor, that claim will not be barred under section 313 if the creditor fails to file suit on his "rejected claim" within 90 days of its "presentment."

c. Statutes of Limitation. For over a century Texas has not had a special, "self-executing" statute of limitations for barring claims against an estate. A claim can be barred only by the running of the statute of limitations.

(1) Tolling of Statute of Limitations at Death. The running of statutes of limitation is tolled by a decedent's death for a period of 12 months unless a personal representative sooner qualifies. TEX. CIV. PRACTICE & REMEDIES CODE § 16.062. Upon qualification of a personal representative within the 12-month period, the statutes of limitations commence to run again. Id.

(2) How Does a Creditor Toll the Running of the Statute of Limitations During an Administration? In order to toll the running of the statute of limitations in a court supervised administration, the creditor must either (i) file a claim for money with the clerk or (ii) file suit against the personal representative with respect to a claim not required to be presented. PROB. C. § 299; see Furr v. Young, 607 S.W.2d 532, 536 (Tex. Civ. App. —Fort Worth 1979, no writ)(The running of the statute of limitations will not be tolled by filing a suit to establish a claim which is required to be presented but has not been properly presented).

Since claims generally do not have to be presented or "filed" in independent administrations, it was not clear what actions taken by a creditor during an independent administration would once again toll the running of the statute of limitations once it commenced to run again following the qualification of an independent executor.

(3) **New Law.** In 2011, the Legislature adopted New PROB. C. § 146(b-6), which provides that the running of general statutes of limitations can be tolled by a creditor in an independent administration only by:

(a) a written approval of his claim signed by the independent executor,
(b) a pleading filed in a lawsuit pending at the time of th decedent's death, or
(c) a suit brought by the creditor against the independent executor.

(4) **Comment: Special Notice Response v. Statute of Limitations Tolling.** Recall that an unsecured creditor who receives a special Section 294(d) notice from an independent executor or administrator must give "notice of the nature and amount of his claim" under Section 146(a)(2) within 120 days or his claim will be barred. However, not all "notices" given in the manner allowed under Section 146(e) meet the requirements for tolling the running of the general statute of limitations under Section 146(b-6).

Example: For example, assume that just before a decedent dies, an unsecured creditor has a claim against the decedent that, had the decedent survived, would become barred by the statute of limitations in 6 months. Assume that an independent executor is appointed one month after death and as a result, the statute of limitations starts to run again. Assume that 3 months after his appointment, the independent executor gives the unsecured creditor a special 294(d) notice and 2 months later (5 months after the statute of limitations commenced running again), the creditor files his notice of claim with the probate court. The creditor's claim **will not** be barred under Sections 294(d) and 146(a)(2) because the notice was filed within the 120-day period provided by law. However, the claim **will become barred** if the creditor fails to file suit on that claim before the end of the remaining 6-month general statute of limitations period because filing a simple "notice of the nature and amount of his claim" in the probate court does not meet the requirements for tolling the running of the general statute of limitations. Compare PROB. C. § 146(b-6) with PROB. C. § 146(e).

D. Secured Creditors. The Probate Code now provides much more guidance on this subject. Unfortunately, certain statutory changes made in 2011 were ill advised, likely will lead to previously avoidable litigation, and will make unnecessarily cumbersome and expensive the claims process for secured creditors in independent administrations.

1. SECURED CREDITOR'S ELECTION

a. Status of the Law Before 2011. In a court-supervised administration, in addition to formally presenting his claim, a secured creditor must make an election with respect to his collateral. He must either (i) elect to be a "matured secured claim" creditor under PROB. C. § 306(a)(1) to be paid in due course of administration or (ii) elect to be a "preferred debt and lien claim" creditor under PROB. C. § 306(a)(2). For quite some time now, a secured creditor has been required to make this same election in an independent administration. PROB. C. § 146(b). A secured creditor desiring to elect matured secured claim status must do so by the later of 4 months after the date the creditor receives notice to creditors (by certified mail) from the independent executor or 6 months after the date original letters were issued. Id A creditor who does not make an effective election to be a matured secured claim creditor within the statutory time period will be treated as a preferred debt and lien creditor. Id.

(1) Preferred Debt and Lien Claim Creditors. Without going into all of the considerations that impact what election a creditor should make, the more important consequences of "preferred debt and lien" status are that (i) the secured creditor remains entitled to be paid in accordance with the terms of his contract; (ii) no other claims, including claims

for funeral expenses and administration expenses, can be paid out of his collateral; and (iii) the secured creditor can look solely to his collateral for payment and not other estate assets. In effect, an election of "preferred debt and lien" status converts the creditor's claim into a "non-recourse" debt insofar as the estate is concerned.

(2) Matured Secured Claim Creditors. In contrast, a creditor who elects matured secured claim status will be a "third class" creditor and is entitled (i) is entitled to be paid ahead of other creditors out of his collateral unless other assets of the estate are insufficient to pay first or second class claims (funeral and last illness expenses up to $15,000 and expenses of administration), (ii) is entitled to accelerate the maturity of his debt, (iii) is entitled to recover his deficiency (if the proceeds from the sale of his collateral are less than his debt) as an unsecured creditor from other assets of the estate, Wyatt v. Morse, 129 Tex. 199, 102 S.W.2d 296 (1937), and (iv) is precluded from exercising any other remedy (such recovering title to his collateral by exercising his vendor's lien) in a manner inconsistent with his election.

(3) Making the Election. Prior to 2011, PROB. C. § 146(b) specifically required a secured creditor with a claim for money against an estate "to give notice to the independent executor" of his election to be treated as a matured secured claimant. If the secured creditor failed to make his election, or made his election beyond the prescribed time period, his claim was automatically treated as a preferred debt and lien claim. Id. Notice had to be given in the same manner that unsecured creditors must follow in response to a Section 294(d) special barring notice.

b. **NEW LEGISLATION**: In 2011, the Legislature modified the manner in which a secured creditor must make his election **if his claim is secured by real property**.

(1) Recording Notice of Election. PROB. C. § 146(b) now requires a secured creditor with a claim secured by real property also to "record a notice of the creditors' election. . .in the deed records of the county in which the real property is located."

(2) Impact on Election. In addition, PROB. C. § 146(b) was amended to provide that if a secured creditor makes his matured secured claim election during the prescribed time period but "fails to record notice of the claim in the deed records as required within the prescribed period," his claim will be treated as a preferred debt and lien claim.

(3) **Comment and Examples.** This change in the mechanics of how a secured creditor makes his Section 306 election when his collateral is real property was added to implement other statutory changes limiting a secured creditor's extrajudicial collection rights. Those changes are discussed later in the outline.

Separate and apart from those issues are some of the problems the new procedure may create on its own. Consider the following examples:

Example 1. Assume that a bank holds a decedent's note which is secured by oil and gas properties situated in 50 different Texas counties. Assume the bank elects "matured secured claim" status by giving the independent executor notice of his election and by recording notice of his election in the various county deed records. Assume that the estate proves to be insolvent, and 3 years later the independent executor finally sells the decedent's oil and gas properties, intending to use part of the proceeds to pay $50,000 in legal fees that could not be paid out of other estate assets. During that sale process, the bank discovers that it failed to file notice of its matured secured claim election in 1 of the 50 counties where its collateral was situated. Who gets the proceeds from the sale of the bank's collateral?

Both the independent executor and the bank thought the bank's claim was a "matured secured" claim as a result of the bank's attempted election and,

consequently, that the bank's collateral could be used (if necessary) to pay the executor's legal fees and administration expenses. But Section 306(b) is clear that if a secured creditor fails to record timely in the deed records his notice of election, the creditor is deemed to have elected preferred debt and lien status. As a result, in the above example, does not the bank's oversight and failure to file its notice of election in just 1 of the 50 counties cause its claim to become a preferred debt and lien claim as a matter of law, with the result that (i) 100% of the proceeds from the sale of the collateral must be paid to the bank (since no other claims, including administration expenses, can be paid out of a preferred debt and lien secured creditor's collateral ahead of debt of the secured creditor) and (ii) the independent executor's lawyer goes unpaid? Can the secured creditor sue other creditors (including the independent executor's lawyers and other agents) and recover from them any proceeds from sales of oil and gas production collected during the administration and that might have been used to pay administration expenses?

Example 2. Assume the same facts as **Example 1** except that it is the independent executor, rather than the bank, who discovers the error. Would the independent executor have a duty to notify the bank of its superior priority as part of his duty to pay claims in the proper order?

PROB. C. § 146(c) absolves an independent executor from liability for paying claims when he reasonably believes the estate has sufficient assets to pay all claims. In our example, however, surely at some point in time during the estate administration the independent executor came to realize that there was not enough money to pay all claims (and consequently, PROB. C. § 146(c) would not apply). Even if the statute protected the independent executor for some of his past acts, the statute would not protect him for payments of administration expenses once the independent executor realized there was not enough money to pay all claims, both secured and unsecured.

2. PRIORITY AND PAYMENT OF SECURED CLAIMS. Under PROB. C. § 146, independent executors are subject to the same rules for determining the priority of creditors' claims. E.g., Pottinger v. Southwestern Life Ins. Co., 138 S.W.2d 645 (Tex. Civ. App. —Waco 1940, no writ). Independent executors also must pay creditors of the same class on a prorata basis if there are insufficient funds to pay all claims of the same class. Alamo Nat'l Co. v. Key, 114 S.W.2d 931 (Tex. Civ. App.—San Antonio 1938, writ dism'd). There are many other outlines that discuss the classification of claims and the order in which claims must be paid. E.g., "Creditors' Claims in Probate," S. TEX. COLLEGE OF LAW 26th ANNUAL WILLS & PROBATE INST. (September, 2011).

a. Payment of Claims–In General. PROB. C. § 147 provides that a person having a debt or claim against an estate "may enforce the same by suit against the independent executor; and, when judgment is recovered against the independent executor, the execution shall run against the estate of the decedent in the hands of the independent executor which is subject to such debt." The same statute allows an independent executor 6 months after the date of his appointment to plead in any suit brought on a claim for money. Overall, however, the statute basically invites creditors to engage in a "race to the courthouse."

b. Problems. This can lead to problems when the estate turns out to be insolvent. First, because an independent executor acts without court supervision and often without the advice of competent counsel, he may pay debts as they come in and only realize later that the estate is insolvent and that he has paid creditors out of order. Second, an independent executor may initially misunderstand what property constitutes "estate" assets available to pay claims. For example, he may believe that "estate assets" include property that is exempt from claims (such as the homestead), assets that pass outside of the estate (such as life insurance and employee benefits), and assets of the surviving spouse (such as the spouse's

"special community" property) that are not subject to some or all of the decedent's debts.

As mentioned earlier in the outline, in the past any failure to pay creditors in the correct order could result in personal liability for the independent executor. Ertel v. O'Brien, 852 S.W.2d 17 (Tex. App.—Waco 1993, writ denied). PROB. C. § 146(c) now provides some protection for independent executors on this front, and recent decisions indicate that courts are not anxious to find that an independent executor or administrator owes any duty at all to creditors, particularly in solvent estates.

3. EXTRAJUDICIAL COLLECTION RIGHTS: THE LAW PRIOR TO 2011.

a. Effect of Death on Creditor's Contractual Power of Sale. The death of the grantor of a deed of trust does not in and of itself suspend the mortgagee's power of sale. E.g., Robertson v. Paul, 16 Tex. 472 (1856); Rogers' Heirs v. Watson, 81 Tex. 400, 17 S.W. 29 (1891); Weiner v. Zwieb, 105 Tex. 262, 141 S.W. 771 (1911) reh. den. 147 S.W. 867 (1912); Pearce v. Stokes, 291 S.W. 2d 309 (Tex. 1956). A secured creditor who exercises his power of sale before an administration has been opened, however, is at risk that the sale may be set aside later at the option of a personal representative appointed during the 4-year statutory period for opening an administration. E.g., Pearce v. Stokes, supra; Weiner v. Zwieb, supra. The sale is not void, only voidable. Id. Prior to 2011, it was clear that only the opening of a court-supervised administration suspended a secured creditor's extrajudicial collection rights, and the rationale for doing so was that the exercise of those collection rights by the creditor would interfere with the court's supervision of the administration of the estate and the statutory rules required to be followed in that process.

b. Opening an Independent Administration Did Not Suspend a Secured Creditor's Power of Sale. When an estate is under independent administration, however, the exercise by a creditor of his power of sale will **not** interfere with judicial supervision of the estate pursuant to the statutory procedures found in the Probate Code. Consequently, for many years it had been clear that the opening of an independent administration **did not** suspend a secured creditor's extrajudicial collection rights. E.g., Taylor v. Williams, 101 Tex. 388, 108 S.W. 815 (Tex. 1908); Wiener v. Zwieb, supra; Fischer v. Britton, 83 S.W.2d 305 (Tex. 1935); Pearce v. Stokes, supra; Bozeman v. Folliott, 556 S.W.2d 608 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.).

As indicated in Taylor v. Williams:

> It is true, as held in *Roy v. Whitaker (92 Texas, 346)*, that the management and settlement of an estate by an independent executor is an administration, but this proves little to the present purpose. The question is, is it that kind of an administration which, by force of the probate law, extinguishes or supersedes the power of sale of a trustee appointed by the testator? The contrast between such administrations and the regular ones satisfies us that the reasons upon which the rule under discussion [suspension of power of sale] was founded do not apply to them. That rule, broadly stated, is, that all claims for money, including those secured by liens, must be probated and enforced through the Probate Court and that the existence of a power of sale does not alter the case. The very statement of it does not apply to independent administrations. No creditor can go to the Probate Court to enforce his claim against an executor so long as his independent control is allowed to continue, whereas all creditors are required to go into that court to enforce claims against regular administrators. In the case of independent administrations the statutes have not required any course of procedure through which relief may be had, while in the other case the mode of proceeding is carefully and

> exclusively prescribed. The conclusion is that the creditor is left to pursue the general rules of law by which remedies are given, and one of those remedies, in cases like this, is the exercise of the power of sale. We can find no reason for holding that such a power can not be exercised, seeing that it is not extinguished by death, nor forbidden by any provision of the probate law, like those controlling regular administrations. Taylor v. Williams at 817 (emphasis added)

In fact, in Bozeman v. Folliott, 556 S.W.2d 608 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.), the Court of Appeals held that once a foreclosure sale had occurred during an independent administration, that sale could not be overturned later when the administration was brought under court supervision.

c. Probate Code Did Not Direct Otherwise. PROB. C. § 146 has for many years required an independent executor to pay claims in the same order of priority, classification, and proration as required in a court-supervised administration. That statute, however, has never required an independent executor **to pay claims** in the same **manner** or following the same payment procedures described in the Code. To the contrary, and as mentioned above, PROB. C. § 147 expressly allows a creditor to sue an independent executor, obtain a judgment, and enforce that judgment by writ of execution against estate property in the hands of that executor. Nor is there any legislative history suggesting that previous amendments of PROB. C. §§ 146 and 306 were intended to override longstanding case law confirming that a secured creditor's power of sale is not suspended, either temporarily or permanently, by the opening of an independent administration.

d. Independent Executor Could Seek Equitable Relief. In sum, for years it was clear that (i) a secured creditor was free to foreclose during an independent administration and (ii) it was incumbent upon an independent executor, when faced with a foreclosure that could harm the estate or other creditors, to seek to enjoin the sale. E.g., Hunt v. Seeley, 115 F.2d 205 (5th Cir. 1940); Farmers and Merchants National Bank of Waco v. Bell, 71 S.W. 570 (Tex. App. 1902, writ ref'd) (grant of independent executor's request to enjoin a forced sale of estate assets by an unsecured creditor was upheld where it was shown that doing so was necessary to protect the interests of other creditors due to the estate's insolvency); compare Woods v. Bradford, 284 S.W. 673 (Tex. Civ. App.–El Paso 1926).

e. Geary Case/Amendment of Section 146. In 1989 and 1990, two different Courts of Appeals incorrectly concluded that the Section 306 secured creditor's election did not apply in independent administrations, potentially leading to significant differences in how secured creditors were paid depending on what kind of administration was opened. See Joffrion v. Texas Bank of Tatum, 780 S.W.2d 451 (Tex. App.—Texarkana 1989), opinion vacated by settlement, 792 S.W.2d 456 (Tex. 1990); Texas Commerce Bank v. Cox, 783 S.W.2d 16 (Tex. App.—Austin 1990, writ denied)(The Court of Appeals in Austin, after first issuing an opinion reaching the opposite result, withdrew its original, unpublished opinion and reversed its position). I wrote an article criticizing both cases, pointing out that the secured creditor's election rules must apply in independent administrations because (i) they affect claim classification and priority and (ii) PROB. C. § 146 requires that claims be paid "in the same order of priority, classification, and proration" as prescribed in the Code. C. B. SCHWARTZEL, "The Priority of Creditors' Claims in Independent Administrations," 42 BAYLOR L. REV. 291 (1990). A few years later, Section 146 was amended to overrule the two cases and to confirm that the Section 306 election rules do indeed apply to independent executors. As discussed earlier, prior to its amendment in 2011, Section 146(b) simply stated that if a secured creditor wanted to have his claim approved as a "matured secured claim to be paid in

due course of administration," he had to make a timely election to that effect or his claim would be deemed a preferred debt and lien.

In a case decided under the law in force prior to the amendment of Section 146, an appellate court reached the opposite (and generally right) conclusion that in independent administrations, secured creditors must elect either preferred debt and lien or matured secured claim status. Texas Commerce Bank National Association v. Geary, 938 S.W.2d 205 (Tex. App.- Dallas 1997) rev'd on other grounds Geary v. Texas Commerce Bank, 967 S.W.2d 836 (Tex. 1998). At the end of its opinion reversing the lower court on res judicata grounds, the Texas Supreme Court unfortunately added the following comments on Section 306:

> In concluding, we note a final matter. In reversing another ground for summary judgment not relevant to the res judicata issue, the court of appeals analyzed whether section 306 of the Texas Probate Code applies to independent estate administrations. This issue is of limited future interest because recent legislation clearly states that, for deaths occurring on or after January 1, 1996, independent administrations are subject to section 306. See Act of May 27, 1995, 74th Leg., R.S., ch. 1054, § 30, 1995 Tex. Gen. Laws 5207, 5216. **In any event, we decline to consider this issue**, and each of the other issues raised, because res judicata is an independent ground for disposition of this appeal. Geary v. Texas Commerce Bank, supra at 839-40 (emphasis added).

f. Confusion Leading the 2011 Changes. Some practitioners felt, based on the comments of the Texas Supreme Court in Geary, that not only did the secured creditor election rules of Section 306 but also other parts of Section 306 either apply or should apply in independent administrations. In particular, some felt that secured creditors should be **paid in the same manner** in both kinds of administrations, not just in the same order and priority. Adopting such an approach would cause secured claims to be handled differently than before in independent administrations.

(1) Preferred Debt and Lien Claim Creditors. For example, both PROB. C. §306(a)(2) and PROB. C. § 146(b) direct that the claim of a preferred debt and lien secured creditor shall be paid according to the terms of the contract that secured the lien, subject to the representative's option to prepay the debt if he believes doing so to be in the best interests of the estate. PROB. C. § 306(e) provides [but not PROB. C. § 146 before its amendment in 2011] that if the property securing a preferred debt and lien claim is not sold or distributed within 6 months after letters are issued and the creditor's debt is not brought current, then in a dependent administration the creditor can apply, and **the probate court must grant**, one of three judicially approved remedies, including permission to foreclose. If Geary were read to cause all of Section 306 to apply to independent administrations, including Section 306(e), then arguably in an independent administration a preferred debt and lien creditor (i) should not be free to foreclose or exercise other extrajudicial collection rights during the first 6 months of an independent administration and (ii) should be able to foreclose thereafter only if by then his debt has not been brought current.

(2) Matured Secured Claim Creditors. Similarly, PROB. C. § 306(c) provides that a matured secured creditor's claim not only will be paid "in due course of administration" but also that a matured secured creditor "is not entitled to exercise any other remedies in a manner that prevents the preferential payment of" first and second class claims. Prior to 2011, PROB. C. § 146 contained only the first phrase but not the second, although clearly a secured creditor who elected matured secured claim status under Sections 306(a)(1) and 146(b) would have to live with the consequences of his election. Once again, if the

dicta in Geary were construed broadly, then in order to ensure that first and second class claims are paid first, arguably a matured secured creditor's extrajudicial collection rights should be suspended indefinitely by the opening of an independent administration.

3. EXTRAJUDICIAL COLLECTION RIGHTS: THE 2011 CHANGES. Unfortunately, the new amendments to Section 146 adopted the foregoing view and **materially change the rights of secured creditors to exercise their extrajudicial collection rights.** I believe these changes were unwise, unwarranted and unnecessary and will result only in confusion, needless litigation, and increased costs of administration, contrary to the underlying goals of independent administration. **Can you tell I do not like the new statutes?**

Geary does not hold that all of Section 306 applies to independent executors; in fact, in its opinion the Texas Supreme Court specifically declined to rule on the Section 306 issue. Moreover, keep in mind that the Geary case was one involving only the secured creditor's election (which affects claim priority and classification), an issue already addressed by amending Section 146 to overrule Cox and Joffrion. In sum, the Texas Supreme Court's comment that "independent administrations are subject to section 306" should be read in context to mean, at the very most, that the Section 306 election provisions apply, not the entire statute! In that regard, since the underlying policy of independent administration under PROB. C. § 145(h) is to keep the courts from interfering with an independent executor's settlement of the estate "except where this Code specifically and explicitly provides for some action," construing Section 306 to suspend extrajudicial remedies and thereby force creditors to pursue judicial remedies would seem odd.

a. The Changes.

(1) Preferred Debt and Lien Claim Creditors. New PROB. C. § 146(b-2) provides that a secured creditor whose has elected preferred debt and lien status "is free to exercise any judicial or extrajudicial collection rights, including the right to foreclose and execution; provided, however, that the creditor does not have the right to conduct a nonjudicial foreclosure sale within six months after letters are granted."

The 6-month delay undoubtedly stems from the fact that under PROB. C. § 306(e), an administrator in a court-supervised administration has that much time before a preferred debt and lien creditor can seek **judicial relief**, including court approval to exercise his extrajudicial powers (such as foreclosure). Yet, Section 306(e) does not by its express terms "specifically and explicitly" apply to independent executors or even establish a process that must be followed when a secured claim is paid during a court-supervised administration. Rather, it simply establishes a "trigger" giving a preferred debt and lien creditor, **at its option**, certain statutory judicial remedies that creditor can pursue during a court-supervised administration if he wishes.

In sum, the 2011 amendments did not "clarify" existing law governing the rights of secured creditors. Rather, they changed it, and for no compelling public policy reason in light of the fact that (i) a preferred debt and lien creditor is entitled to be paid in accordance with the terms of his contract (which include his extrajudicial collection rights); (ii) as a general proposition, a secured creditor's contractual, extrajudicial collection rights are **not** automatically suspended or negated when a decedent dies; and (iii) the rationale for suspending the exercise of those collection rights even in a dependent administration was to prevent creditor interference with the **court's supervisory powers and jurisdiction** over the administration of the estate, a situation not present when an estate is settled independently.

(2) Matured Secured Claim Creditors. New

PROB. C. § 146(b-1) provides that a matured secured creditor's claim "remains secured by an lien or security interest against the specific property securing payment of the claim but subordinated to the payment from the property of claims having a higher classification under Section 322 of this code." This is a good change, for it clarifies that it is not intended for the secured creditor's lien to be extinguished (as opposed to subordinated) when the creditor elects matured secured claim election. See SARA DYSART, "Texas Probate Code Redefines Secured Creditor's Rights and Remedies," REAL PROPERTY, PROBATE & TRUST LAW REPORTER (January 2007) at page 39 (suggesting that by making a matured secured claim election, the creditor's lien and right of foreclosure are lost and the secured creditor simply has preferential rights to be paid out of the proceeds when that property is sold).

Unfortunately, the new statute goes on to provide in PROB. C. §§ 146(b-1)(1)(A) and (B) that the matured secured creditor (i) is not entitled to exercise any remedies in a manner that prevents the payment of "higher priority claims and allowances" [as similarly provided in PROB. C. § 306(c)] and (ii) "during the administration of the estate, is not entitled to exercise any contractual collection rights, including the power to foreclose, **without either the prior written approval of the independent executor or court approval**" (a phrase that was **not** previously in Section 146).

Once again, Section 146 already prohibited a matured secured claimant from exercising contractual remedies in a manner inconsistent with his election, but that does not necessitate **suspending indefinitely his extrajudicial collection rights** during all independent administrations, whether or not the rights of other creditors will be prejudiced. It is true that there are rare occasions when (i) an estate is insolvent; (ii) a secured creditor elects matured secured claim status; and (iii) an independent executor clearly has the right to consume the secured creditor's collateral **if there are not enough other assets to pay certain first and second class claims.** Under prior law, in these rare cases when an independent executor was faced with a foreclosure or other forced sale that could prejudice the rights of other creditors, he could seek equitable relief, usually by applying to enjoin the sale.

The question, then, is whether public policy is served by suspending indefinitely the extrajudicial collection rights of **all** matured secured creditors in **all** independent administrations (solvent or not) solely to protect an independent executor in these remote circumstances? In my opinion, the answer is clearly "NO," especially because (i) the underlying public policy behind independent administration is to allow estate to be settled free from court involvement and at reduced cost and (ii) the new law effectively negates the provisions of the secured creditor's contracts by forcing a secured creditor to file suit to collect his debt in lieu of exercising extrajudicial collection rights he bargained for in his contract with the decedent.

(3) Special Filing Rule for Real Property Collateral. Realizing that a secured creditor's election will impact third parties, and especially those who might purchase land at a foreclosure sale, PROB. C. § 146 was amended to require a secured creditor to record a copy of his notice of election in the deed records of the county in which his collateral is situated, whether the creditor elects "preferred debt and lien" or "matured secured" claim status. As mentioned earlier in the outline, if a notice of election is **not** recorded on a timely basis, the secured creditor is deemed to have elected preferred debt and lien status. PROB. C. § 146(b). In other words, the failure of a matured secured claim creditor either to **timely give notice of election** to the independent executor or to **timely record** his notice of election in the relevant deed records now results in his claim being deemed a preferred debt and lien claim. This special rule applies only in independent administrations and **not** in court supervised administrations, and applies only to

creditors with claims secured by **real property**.

b. Public Policy Criticisms. The new statutory changes undermine the purposes of independent administration and unnecessarily expand court involvement in estates requiring no judicial assistance. Prior to its amendment, PROB. C. § 146 only required that claims be paid in the same order of priority, classification, and proration, thereby ensuring that creditors were not paid differently in both kinds of administrations. Creditors have never been paid in the same manner in both kinds of administrations. Nor is there any compelling reason for suspending a secured creditor's extrajudicial collection rights in independent administrations in order to make that happen.

(1) Preferred Debt and Lien Claim Creditors. What is the compelling public policy reason for suspending a preferred debt and lien creditor's power to foreclose for 6 months? Perhaps it could be argued that preferred debt and lien creditors should have to wait 6 months before they can foreclose in order to give an independent executor time to "get his feet on the ground," marshal the assets of the estate, determine solvency, and develop a plan of administration. Yet, suspending the power of sale ignores and undermines the terms of the contract bargained for between the decedent and the creditor, and as a result courts many years ago decided that suspension of those rights could be justified only in dependent administrations as a means of preventing creditor interference with the court's jurisdiction and supervision of the administration.

In addition, in my opinion, there are stronger policy reasons for **not** suspending the preferred debt and lien secured creditor's collection rights.

First, it is reasonable for the independent executor and the decedent's beneficiaries, not the preferred debt and lien creditor, to bear the risk and responsibility for any problem that might result from an early foreclosure during an independent administration because it is the family who (i) chooses to open an independent administration rather seek the protection of the court and the statutory claim procedures through a dependent administration and (ii) generally controls when to commence an independent administration. That is, creditors already bear the cost and risk associated with waiting weeks or months while the family gathers financial information, obtains legal advice, evaluates what kind of administration to open, and perhaps even engages in preliminary negotiations with creditors. If the decedent's family or the decedent's designated independent executor **chooses** to open an independent administration (whether to save money or for some other reason), then they should bear the consequences of that choice.

Second, a preferred debt and lien creditor can look only to his collateral for payment and, as a result of his election, forfeits the right to collect a deficiency out of other estate assets. Under new PROB. C. § 146(b-2), a diligent secured creditor who makes his election immediately after an independent executor is appointed will face a 6 month delay, if not longer, before he can "conduct a nonjudicial foreclosure sale." Allowing the independent executor, by statute, to put off taking action (i) forces the preferred debt and lien creditor to incur another 6 months of interest and other carrying costs associated with his collateral (in addition to those accruing between the date of death and the commencement of the administration), all of which are recoverable solely from his collateral (which may or may not be worth the amount of his debt), (ii) forces the preferred debt and lien secured creditor to bear 100% of the risk associated with changes in the value of his collateral during the extra 6-month waiting period while the independent executor (if he wishes) "plays the market," (iii) gives the independent executor an opportunity to use his right to delay as leverage for negotiating concessions from the creditor, and (iv) in some cases, in light of these additional risks, may push a secured creditor in a solvent estate to elect instead matured secured creditor status (and not give

up his right to a deficiency) to the potential detriment of unsecured creditors or the decedent's family.

Consider a few typical loan situations where the new 6-month waiting period could be harmful to a preferred debt and lien secured creditor: (i) a margin loan secured by stocks in a falling market; (ii) a loan secured by livestock that might die or not be properly fed, treated and cared for by the independent executor during the 6-month waiting period; (iii) a loan secured by the inventory of a homebuilder at the time of a financial meltdown; (iv) a loan secured by oil and gas working interests that may have significant operating expenses and carrying costs (and perhaps even well proposals), with full control over the properties and decisions concerning them left in the hands of an independent executor who may not have the expertise to make good judgments; or (v) a car loan secured by an automobile worth less than the amount of the debt and that the independent executor or a member of the decedent's family might drive for 6 months as the car depreciates in value.

Now, it is certainly true that a forced sale of the collateral might not bring the best price and, as a result, (i) in an insolvent estate, unsecured creditors may receive less than they otherwise would have and (ii) in a solvent estate, the decedent's family may end of with less wealth after creditors have been paid. Yet, that also would have been true had the decedent lived and had the secured creditor foreclosed pursuant to the terms of his contract. If indeed an independent executor is supposed to "step into the shoes" of the decedent and settle the estate, then one of the consequences of doing so should be that the secured creditor should be able to insist that he paid as he would have been if the decedent were still alive–i.e., "according to the terms of the contract which secured the lien." See PROB. C. § 306(a)(2).

Third, even though the statute does not prevent an independent executor from exercising judicial remedies during the 6-month waiting period in order to protect his financial interests, that is hardly an adequate remedy. It forces the creditor and the estate into court when court action should not be necessary as well as requires both the creditor and the estate to incur higher legal fees and other expenses. As importantly, the independent executor may be able to delay the creditor's judicial remedy as well by exercising his right under PROB. C. § 147 not to "plead to any suit brought against him for money until after six months from the date that an independent administration was created and the order appointing an independent executor was entered by the county court." [**Note:** The secured creditor might argue that seeking foreclosure under circumstances where there is no opportunity to collect a deficiency is not a suit "for money" within the meaning of Section 147, but I have not investigated how that question might be resolved.]

(2) Matured Secured Claim Creditors. In addition to many of the same problems and risks faced by preferred debt and lien secured creditors, a matured secured creditor cannot exercise his contractual power of sale for an indefinite period under PROB. C. § 146(b-1)(1)(B). As a result, matured secured claim creditors likely will have to go to court in order to get paid, in both solvent and insolvent estates, notwithstanding the fact that those creditors are entitled to be paid out of their collateral ahead of all but a few creditors!

It could be argued, I suppose, that one reason for suspending indefinitely a matured secured creditor's extrajudicial collection rights (as opposed to suspending those rights for only 6 months as with preferred debt and lien creditors) is that an independent executor should not be required to relinquish possession of the secured creditor's collateral **just in case** there are not enough other estate assets to pay higher priority claims.

However, most estates settled by independent executors are solvent, and thus compelling all matured secured creditors to go to court to collect

their debts from an independent executor, absent his written consent, (i) frustrates the legislative policy behind independent administration of encouraging estates to be settled speedily and outside the courthouse and (ii) in estates with creditor problems, serves to increase the probability of insolvency (and of consumption of the matured secured creditor's collateral) as a result of the legal fees and court costs required to foreclose through the courts rather than proceed extrajudicially. In other words, in order to provide an independent executor additional comfort or protection in the rare case of an independent administration of an **insolvent estate**, the proposed new statutory scheme will, (a) invite independent executors to withhold their consent to foreclosure as leverage to exact concessions from matured secured claimants in estates having no creditor problems, (b) prolong the administration of the estate by necessitating litigation that should not be necessary, and (c) increasing the cost settling estates handled by independent executors.

c. Problems of Third Party Purchasers. Earlier in the outline I discussed some of the problems that could arise from the fact that a secured creditor with real property as collateral now must record notice of his election in the relevant real property records in order to obtain matured secured claim status. Those are just the "tip of the iceberg" of the kinds of problems likely to arise in independent administrations under the new approach.

(1) Secured Creditors With Personal Property as Collateral/Title of Purchasers at Forced Sales. Remember that the preferred debtand lien/matured secured claim election rules apply to all secured claims, whether the underlying collateral is real or personal property. **Thus, the extrajudicial powers of sale of all matured secured creditors are indefinitely suspended under new PROB. C. § 146(b-1).** Yet, there is no requirement (and frankly probably no practical way) to notify third parties when a secured creditor elects to be a matured secured claimant when his collateral is personal property.

Recognizing this problem, PROB. C. § 146(b-1)(2) provides that a third party, acting in good faith, may acquire good title to an estate asset (other than real property) in an extrajudicial sale by a secured creditor "without regard to whether such creditor had the right to collect or whether the creditor acted improperly in exercising such rights during an estate administration due to having elected matured secured claim status." In other words, if a bank repossesses a decedent's car notwithstanding having elected matured secured claim status, the title of the purchaser is still good!

Consider a couple of examples of how the new statutes might work in a few common situations.

Example 1. Assume that a person borrows $25,000 from the bank to purchase a car. A year later, the buyer dies. At his death, the car is worth $18,000 and the bank's loan balance is $24,000. In hopes of collecting a deficiency, the bank elects matured secured claim status. Assume that the bank repossesses the car and sellsit for $15,000, therefore violating PROB. C. § 146(b-1)(1)(B). The buyer would still acquire good title under new PROB. C. § 146(b-1)(2). Now, what are the consequences for the estate and the bank? If the estate is solvent and the bank's collateral was not needed to pay higher priority claims, the independent executor still has a claim against the bank for wrongful seizure. What is the amount of the estate's "damages"–the difference between the amount realized in the sale ($15,000) and what the car "shouldhave brought" at a sale ($18,000)? Will the bank also have to reimburse the attorneys' fees and costs incurred by the estate in collecting its damages?

Similarly, if the estate is insolvent, does the independent executor have a duty to sue the bank to recover from it (for other creditors, including the bank as to its $11,000 deficiency) the difference between the $18,000 value of the car at the time of

its repossession and its $15,000 sale price?

Example 2. Assume the same facts as in **Example 1** except that the bank's collateral was not an automobile but marketable securities that doubled in value after the bank liquidated its collateral. Is the independent executor entitled to recover from the secured creditor the appreciated value of the stock? And what will be the legal cost to the creditor, the estate, or both, of sorting out the mess?

Example 3. Now, add one more layer of complexity. How do these new rules apply when the creditor's collateral is both real and personal property, such as a farm loan where both farmland and the equipment are collateral for a loan? Which purchasers of property at an improper sale are entitled to be considered "good faith" purchasers whose title is protected under the statute? For example, assume that the bank takes possession of the equipment and sells it in an improper sale. Assume that a local equipment dealer buys half of the equipment and the rest is purchased by a farmer who lives in an adjoining county. Do both buyers get "good title" to the equipment as third parties "acting in good faith" under PROB.C. § 146(b)(2), or is the equipment dealer charged with constructive notice of the matured secured creditor's election (on file in the county where the farmland is situated and where the equipment dealer conducts business) and not considered to be a "good faith" purchaser under the statute?

(2) Secured Creditors Versus Unsecured Creditors. The new approach to the handling of secured claims could make it more difficult for secured creditors to get paid than unsecured creditors!

Example 4. Consider the following example. Assume that husband dies, survived by his wife, and wife qualifies as independent executrix. Assume that at the time of husband's death the couple owns the following: (1) Blackacre Ranch, consisting 1000 acres of land that wife inherited from her parents and that is worth $2,000,000; (2) farm equipment worth $400,000; (3) cash on deposit in City Bank in an account in husband's name in the amount of $10,000; (4) $15,000 in Exxon stock in husband's name, and (5) a $ 2,000,000 retirement plan of husband's payable to wife as the designated beneficiary. Assume that husband ran the ranch and was the only borrower on a $500,000 note to Farm Bank, that husband pledged all of his $400,000 in farm equipment as collateral for the loan, and that after husband's death Farm Bank elects matured secured claim status, thinking husband and wife are "rich" and that the bank could collect its deficiency from other assets of the estate. Finally, assume that in addition to the Farm Bank loan, there are other debts, including husband's credit card debts of $10,000 and an unsecured loan of $25,000 taken out by husband from City Bank. Thus, the assets and liabilities at death are as follows:

Wife's Separate Property Ranch	$2,000,000
Wife's Insurance Proceeds	2,000,000
Community Property:	
Exxon Stock	15,000
City Bank account	10,000
Farm Equipment	400,000
Community Debt:	
Farm Bank Loan	500,000
City Bank Loan	25,000
Credit card debt	10,000

Assume that wife probates husband's will with the help of a family friend, qualifies as independent executrix, rolls over her husband's retirement plan into a new IRA for herself, and acting in goodfaith, pays off husband's credit card debts out of the City Bank account. Learning that its account has been drained, City Bank promptly sues the independent executrix to recover on its $25,000 loan. Knowing the debt to be valid, the independent executrix consents to a judgment in favor of City Bank. City Bank then executes on its judgment, as permitted

under PROB. C. § 147, resulting in the sale of the Exxon stock and the application of $15,000 in proceeds to City Bank's debt, leaving an unpaid balance due City Bank of $10,000.

With no assets in h and other than the farm , the equipment, and her IRA, wife decides she needs a new lawyer and learns the following from him:

(A) The ranch and IRA are wife' s separate property, are not subject to her husband's contract claims, and because wife was not personally liable on her husband's debt, she does not have to use her separate property to pay off either the $10,000 loan balance at City Bank loan or the $500,000 loan at Farm Bank; and

(B) Wife has a right to recover ahead of all other creditors the $20,000 in legal and accounting fees she has and will run up as executrix settling her husband's estate.

How will this situation be h andled under the new statutory framework? Here is one possibility:

(1) Wife should not be personally liable to Farm Bank or City Bank for paying the credit card debt out of order because PROB. C. § 146(c) excuses her from personal liability so long as at the time she reasonably believed the estate would be large enough to pay all debts (when wife thought she would have to pay the debts out of her own assets).

(2) City Bank did nothing wrong in executing on its judgm ent against the Exxon sto ck under Texas Probate Code Section 147.

(3) The independent executrix **is** entitled to recover 100% of her $20,000 in attorneys' fees and other second class claims ahead of Farm Bank.

(4) PROB. C. § 146(b-1)(1)(A) prevents Farm Bank (as a m atured secured creditor) from exercising "any remedies in a manner that prevents the payment of such higher priority claims and allowances." As a result, it cannot sell the far m equipment without either obtaining the independent executrix' consent or through court action. When the equipment is finally sold for $400,000, wife gets $20,000 to pay expenses and Farm Bank gets $380,000.

If the foregoing analysis is correct, Farm Bank is left "holding the bag" notwithstanding the fact that had claims been paid in proper order, it would have received the full $400,000 in sale proceeds because (i) the City Bank account and Exxon stock worth $25,000 at death were more than enough to pay all administration expenses, and (ii) the executrix is not personally liable to Farm Bank for mishandling the estate notwithstanding that City Bank and the credit card companies, as unsecured creditors with inferior priority claims, benefitted at the expense of Farm Bank (because of th e executrix' mistakes City Bank's having won the "race to the courthouse" and having executed on its judgment). Farm Bank might be able to sue the credit card com panies and City Bank to try to get some of its money back, although that is hardly worth the effort.

While it is true that a sim ilar result could have occurred under Sections 146 and 147 prior to the 2011 amendments, at least Farm Bank would have had a fighting chance to protect itself by being able to exercise its extrajudicial collection rights earlier in the process.

(3) Summary. In sum , **if the purp ose** of suspending indefinitely a matured secured creditor's power of sale is solely to ensure that first and second class claims are paid **in case an estate is insolvent**, that goal could have been achieved in a much easier and less cumbersome way by leaving the law–that is, (i) to permit a secured creditor to foreclose, and (ii) in those few cases where the independent exec utor or other creditors m ight be prejudiced, let the independent executor either (a) seek to enjoin t he forced sale before it occurs o r (b) seek to recover later from the secured creditor up to the am ount of

the sale proceeds **if and to the extent** he needs it to pay first and second class claims.

On the other hand, **if the purpose** of suspending indefinitely the matured secured creditor's power of sale is to ensure that the estate realizes maximum value when the collateral is sold, then why not suspend indefinitely the extrajudicial collection rights of all secured creditors and require them to pursue judicial remedies as in a court supervised administration? Or, even more to the point, why not also change the law and deny unsecured creditors the right to execute on their judgments since (i) the estate rarely will realize full value for when estate property is seized and sold in a sheriff's sale and (ii) the independent executor arguably needs those sale proceeds as much or more to pay first and second class claims in order to protect the rights of other creditors (and particularly secured creditors with third class matured secured claims)?

Whatever the goals sought to be achieved by the proposed changes in the law, are they worth the additional cost, complexity and judicial intervention in independent administrations which frankly have worked quite well for many years without these changes? I think not.

IV. OTHER CHANGES AFFECTING INDEPENDENT ADMINISTRATION.

A. Removal of Independent Executor. PROB. C. § 149C(a) was amended to add new subparagraph (7) allowing a probate court to remove an independent executor when "the independent becomes incapable of properly performing the independent executor's fiduciary duties due to a material conflict of interest." This amendment was adopted in response to the Texas Supreme Court's decision in Kappus v. Kappus, 284 S.W.3d 831 (Tex. 2009). A thorough discussion of the case and of the amendment can be found in Professor Johanson's comments on Section 149C in JOHANSON'S TEXAS PROBATE CODE ANNOTATED (West 2011). Let me include an excerpt concerning his conclusions:

> The amendment "certainly makes no little sense from a policy or any other standpoint. And precisely what is a "material" conflict of interest, as distinguished from a conflict of interest that is not "material"? The statute gives no guidance. . .
> . . .
> To my mind, this is a litigation-breeding statute with no hope of a fine-tuning legislative fix, as to what might constitute a "material" conflict. It appears that the amendment was enacted with no deliberative discussion of its merits. For the reasons set out by the supreme court in *Kappus v. Kappus*, I recommend its repeal at the next legislative session."

B. Heirship Determination Required for Intestate Independent Administrations. PROB. C. § 145(g) was amended to require a formal determination of heirship under PROB. C. § 48, et seq before an independent administrator is appointed for an intestate estate under PROB. C. § 145(e). This makes some sense in view of the fact that the court cannot be sure that all of the heirs have requested the appointment of an independent administrator until it first determines who the heirs are.

C. Family Allowances.

1. THE LAW PRIOR TO 2011. If a decedent did not have a homestead or all of the articles of personal property exempt from execution, PROB. C. § 273 provided for allowances of up to $15,000 in lieu of the homestead and $5,000 in lieu of other exempt property to be set aside to the surviving spouse and minor children.

In addition, the surviving spouse and minor children were entitled to an allowance sufficient for their maintenance for one year following the decedent's

death (payable either in a lump sum or in installments) under PROB. C. §§ 286 and 287. The amount of a family allowance award can be substantial. See, e.g., In re Estate of Rhea, 257 S.W.3d 787 (Tex. App.–Fort Worth 2008)($20,000 to widower); Estate of Wolfe, 268 S.W.3d 780 (Tex. App.–Fort Worth 2008)($126,840 to widow).

2. NEW LEGISLATION. In 2011, the Legislature added incapacitated adult children to the list of persons entitled to share in the family allowance and allowances in lieu of homestead and exempt property under PROB. C. §§ 273, 286 and 287. **Comment. The expansion of the family allowances to include support for an incapacitated adult child may play an increasingly important role in the settlement of estates as well as undercut Medicaid planning.** Significantly, in the legislative history to HB 2492, among the purposes given for expanding the scope of the family allowances were that an incapacitated adult child "is equally in need of maintenance and support and may be left unprotected when creditors deplete an estate [and]. . .that an unprotected incapacitated adult child will inevitably require additional funds from public assistance agencies and the state. H. B. 2492 seeks to provide a solution to this issue by ensuring the availability of private funds for incapacitated adult children." In other words, expanding the scope of the family allowances may be an indirect way to compel creditors to subsidize those needing public assistance and to relieve the State from responsibility for future financial burdens.

Also keep in mind that the family allowance applies whether or not the decedent's estate is solvent, and thus a large family allowance for an incapacitated adult child could significantly diminish the inheritances of the decedent's intended beneficiaries, not just creditors.

APPENDIX A
SELECTED INDEPENDENT ADMINISTRATION STATUTES:
MAJOR 2011 LEGISLATIVE CHANGES

New Sec. 145A. GRANTING POWER OF SALE BY AGREEMENT. In a situation in which a decedent does not have a will or a decedent's will does not contain language authorizing the personal representative to sell real property or contains language that is not sufficient to grant the representative that authority, the court may include in an order appointing an independent executor under Section 145 of this code any general or specific authority regarding the power of the independent executor to sell real property that may be consented to by the beneficiaries who are to receive any interest in the real property in the application for independent administration or in their consents to the independent administration. The independent executor, in such event, may sell the real property under the authority granted in the court order without the further consent of those beneficiaries.

New Sec. 145B. INDEPENDENT EXECUTORS MAY ACT WITHOUT COURT APPROVAL. Unless this code specifically provides otherwise, any action that a personal representative subject to court supervision may take with or without a court order may be taken by an independent executor without a court order. The other provisions of this part are designed to provide additional guidance regarding independent administrations in specified situations, and are not designed to limit by omission or otherwise the application of the general principles set forth in this part.

New Sec. 145C. POWER OF SALE OF ESTATE PROPERTY. (a) Definition. In this section, "independent executor" does not include an independent administrator.

(b) General. Unless limited by the terms of a will, an independent executor, in addition to any power of sale of estate property given in the will, and an independent administrator have the same power of sale for the same purposes as a personal representative has in a supervised administration, but without the requirement of court approval. The procedural requirements applicable to a supervised administration do not apply.

(c) Protection of Person Purchasing Estate Property. (1) A person who is not a devisee or heir is not required to inquire into the power of sale of estate property of the independent executor or independent administrator or the propriety of the exercise of the power of sale if the person deals with the independent executor or independent administrator in good faith and:

(A) a power of sale is granted to the independent executor in the will;

(B) a power of sale is granted under Section 145A of this code in the court order appointing the independent executor or independent administrator; or

(C) the independent executor or independent administrator provides an affidavit, executed and sworn to under oath and recorded in the deed records of the county where the property is located, that the sale is necessary or advisable for any of the purposes described in Section 341(1) of this code.

(2) As to acts undertaken in good faith reliance, the affidavit described by Subsection (c)(1)(C) of this section is conclusive proof, as between a purchaser of property from an estate, and the personal representative of the estate or the heirs and distributees of the estate, with respect to the authority of the independent executor or independent administrator to sell the property. The signature or joinder of a devisee

or heir who has an interest in the property being sold as described in this section is not necessary for the purchaser to obtain all right, title, and interest of the estate in the property being sold.

(3) This section does not relieve the independent executor or independent administrator from any duty owed to a devisee or heir in relation, directly or indirectly, to the sale.

(d) No Limitations. This section does not limit the authority of an independent executor or independent administrator to take any other action without court supervision or approval with respect to estate assets that may take place in a supervised administration, for purposes and within the scope otherwise authorized by this code, including the authority to enter into a lease and to borrow money.

Sec. 146. PAYMENT OF CLAIMS AND DELIVERY OF EXEMPTIONS AND ALLOWANCES. (a) Duty of the Independent Executor. An independent executor, in the administration of an estate, independently of and without application to, or any action in or by the court:

(1) shall give the notices required under Sections 294 and 295;

(2) may give the notice permitted under Section 294(d) and bar a claim under that subsection;

(3) shall approve, classify, and pay, or reject, claims against the estate in the same order of priority, classification, and proration prescribed in this Code; and

(4) shall set aside and deliver to those entitled thereto exempt property and allowances for support, and allowances in lieu of exempt property, as prescribed in this Code, to the same extent and result as if the independent executor's actions had been accomplished in, and under orders of, the court.

(a-1) Statement in Notice of Claim. To be effective, the notice provided under Subsection (a)(2) of this section must include, in addition to the other information required by Section 294(d) of this code, a statement that a claim may be effectively presented by only one of the methods prescribed by this section.

(b) Secured Claims for Money. Within six months after the date letters are granted or within four months after the date notice is received under Section 295 of this code, whichever is later, a creditor with a claim for money secured by real or personal property of the estate must give notice to the independent executor of the creditor's election to have the creditor's claim approved as a matured secured claim to be paid in due course of administration. In addition to giving the notice within this period, a creditor whose claim is secured by real property shall record a notice of the creditor's election under this subsection in the deed records of the county in which the real property is located. If no [~~the~~] election to be a matured secured creditor is made, or the election is made, but not within the prescribed period, or is made within the prescribed period but the creditor has a lien against real property and fails to record notice of the claim in the deed records as required within the prescribed period [~~is not made~~], the claim shall be [~~is~~] a preferred debt and lien against the specific property securing the indebtedness and shall be paid according to the terms of the contract that secured the lien, and the claim may not be asserted against other assets of the estate. The independent executor may pay the claim before the claim matures if paying the claim before maturity is in the best interest of the estate.

(b-1) Matured Secured Claims. (1) A claim approved as a matured secured claim under Subsection (b) of this section remains secured by any lien or security interest against the specific property securing payment of the claim but subordinated to the payment from the property of claims having a higher classification under Section 322 of this code. However, the secured creditor:

(A) is not entitled to exercise any remedies in a manner that prevents the payment of the higher priority claims and allowances; and

(B) during the administration of the estate, is not entitled to exercise any contractual collection rights, including the power to foreclose, without either the prior written approval of the independent executor or court approval.

(2) Subdivision (1) of this subsection may not be construed to suspend or otherwise prevent a creditor with a matured secured claim from seeking judicial relief of any kind or from executing any judgment against an independent executor. Except with respect to real property, any third party acting in good faith may obtain good title with respect to an estate asset acquired through a secured creditor's extrajudicial collection rights, without regard to whether the creditor had the right to collect the asset or whether the creditor acted improperly in exercising those rights during an estate administration due to having elected matured secured status.

(3) If a claim approved or established by suit as a matured secured claim is secured by property passing to one or more devisees in accordance with Section 71A of this code, the independent executor shall collect from the devisees the amount of the debt and pay that amount to the claimant or shall sell the property and pay out of the sale proceeds the claim and associated expenses of sale consistent with the provisions of Section 306(c-1) of this code applicable to court supervised administrations.

(b-2) Preferred Debt and Lien Claims. During an independent administration, a secured creditor whose claim is a preferred debt and lien against property securing the indebtedness under Subsection (b) of this section is free to exercise any judicial or extrajudicial collection rights, including the right to foreclosure and execution; provided, however, that the creditor does not have the right to conduct a nonjudicial foreclosure sale within six months after letters are granted.

(b-3) Certain Unsecured Claims; Barring of Claims. An unsecured creditor who has a claim for money against an estate and who receives a notice under Section 294(d) of this code shall give to the independent executor notice of the nature and amount of the claim not later than the 120th day after the date the notice is received or the claim is barred.

(b-4) Notices Required by Creditors. Notice to the independent executor required by Subsections (b) and (b-3) of this section must be contained in:

(1) a written instrument that is hand-delivered with proof of receipt, or mailed by certified mail, return receipt requested with proof of receipt, to the independent executor or the executor's attorney;

(2) a pleading filed in a lawsuit with respect to the claim; or

(3) a written instrument or pleading filed in the court in which the administration of the estate is pending.

(b-5) Filing Requirements Applicable. Subsection (b-4) of this section does not exempt a creditor who elects matured secured status from the filing requirements of Subsection (b) of this section, to the extent those requirements are applicable.

(b-6) Statute of Limitations. Except as otherwise provided by Section 16.062, Civil Practice and Remedies Code, the running of the statute of limitations shall be tolled only by a written approval of a claim signed by an independent executor, a pleading filed in a suit pending at the time of the decedent's death, or a suit brought by the creditor against the independent executor. In particular, the presentation of a statement or

claim, or a notice with respect to a claim, to an independent executor does not toll the running of the statute of limitations with respect to that claim.

(b-7) Other Claim Procedures of Code Generally Do Not Apply. Except as otherwise provided by this section, the procedural provisions of this code governing creditor claims in supervised administrations do not apply to independent administrations. By way of example, but not as a limitation:

(1) Section 313 of this code does not apply to independent administrations, and consequently a creditor's claim may not be barred solely because the creditor failed to file a suit not later than the 90th day after the date an independent executor rejected the claim or with respect to a claim for which the independent executor takes no action; and

(2) Sections 306(f)-(k) of this code do not apply to independent administrations.

(c) Liability of Independent Executor. An independent executor, in the administration of an estate, may pay at any time and without personal liability a claim for money against the estate to the extent approved and classified by the personal representative if:

(1) the claim is not barred by limitations; and

(2) at the time of payment, the independent executor reasonably believes the estate will have sufficient assets to pay all claims against the estate.

(d) Notice Required of Unsecured Creditor. An unsecured creditor who has a claim for money against an estate and receives a notice under Section 294(d) shall give notice to the independent executor of the nature and amount of the claim not later than the 120th day after the date on which the notice is received or the claim is barred.

(e) Placement of Notice. Notice required by Subsections (b) and (d) must be contained in:

(1) a written instrument that is hand-delivered with proof of receipt or mailed by certified mail, return receipt requested, to the independent executor or the executor's attorney;

(2) a pleading filed in a lawsuit with respect to the claim; or

(3) a written instrument or pleading filed in the court in which the administration of the estate is pending.

Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956. Amended by Acts 1957, 55th Leg., p. 53, ch. 31, Sec. 2(c), eff. Aug. 21, 1957; Acts 1995, 74th Leg., ch. 1054, Sec. 1, eff. Jan. 1, 1996; Acts 1997, 75th Leg., ch. 1302, Sec. 8, eff. Sept. 1, 1997.

Sec. 147. ENFORCEMENT OF CLAIMS BY SUIT. Any person having a debt or claim against the estate may enforce the payment of the same by suit against the independent executor; and, when judgment is recovered against the independent executor, the execution shall run against the estate of the decedent in the hands of the independent executor which is subject to such debt. The independent executor shall not be required to plead to any suit brought against him for money until after six months from the date that an independent administration was created and the order appointing an independent executor was entered by the county court.

Acts 1955, 54th Leg., p. 88, ch. 55, eff. Jan. 1, 1956. Amended by Acts 1975, 64th Leg., p. 980, ch. 376, Sec. 1, eff. June 19, 1975; Acts 1977, 65th Leg., p. 1064, ch. 390, Sec. 4, eff. Sept. 1, 1977.

Sec. 149B. ACCOUNTING AND DISTRIBUTION. (a) In addition to or in lieu of the right to an accounting provided by Section 149A of this code, at any time after the expiration of two years from the date the court clerk first issues letters testamentary or of administration to any personal representative of an estate [~~that an independent administration was created and the order appointing an independent executor was entered~~], a person interested in the estate then subject to independent administration may petition the county court, as that term is defined by Section 3 of this code, for an accounting and distribution. The court may order an accounting to be made with the court by the independent executor at such time as the court deems proper. The accounting shall include the information that the court deems necessary to determine whether any part of the estate should be distributed.

. . .

Sec. 149C. REMOVAL OF INDEPENDENT EXECUTOR. (a) The county court, as that term is defined by Section 3 of this code, on its own motion or on motion of any interested person, after the independent executor has been cited by personal service to answer at a time and place fixed in the notice, may remove an independent executor when:

(1) the independent executor fails to return within ninety days after qualification, unless such time is extended by order of the court, either an inventory of the property of the estate and list of claims that have come to the independent executor's knowledge or an affidavit in lieu of the inventory, appraisement, and list of claims;

(2) sufficient grounds appear to support belief that the independent executor has misapplied or embezzled, or that the independent executor is about to misapply or embezzle, all or any part of the property committed to the independent executor's care;

. . .; or

(7) the independent executor becomes incapable of properly performing the independent executor's fiduciary duties due to a material conflict of interest.

. . .

Sec. 151. CLOSING INDEPENDENT ADMINISTRATION BY CLOSING REPORT OR NOTICE OF CLOSING ESTATE [~~AFFIDAVIT~~]. (a) Filing of Closing Report or Notice of Closing Estate [~~Affidavit~~]. When all of the debts known to exist against the estate have been paid, or when they have been paid so far as the assets in the hands of the independent executor will permit, when there is no pending litigation, and when the independent executor has distributed to the persons entitled thereto all assets of the estate, if any, remaining after payment of debts, the independent executor may file with the court a closing report or a notice of closing of the estate.

(a-1) Closing Report. An independent executor may file[~~:~~

[~~(1)~~] a closing report verified by affidavit that:

(1) shows:

(A) the [~~(i) The~~] property of the estate which came into the possession [~~hands~~] of the independent executor;

(B) the [~~(ii) The~~] debts that have been paid;

(C) the [~~(iii) The~~] debts, if any, still owing by the estate;

(D) the [~~(iv) The~~] property of the estate, if any, remaining on hand after payment of debts; and

(E) the [~~(v) The~~] names and residences of the persons to whom the property of the estate, if any, remaining on hand after payment of debts has been distributed; and

(2) includes signed receipts or other proof of delivery of property to the distributees named in the closing report if the closing report reflects that there was property remaining on hand after payment of debts.

(b) Notice of Closing Estate. (1) Instead of filing a closing report under Subsection (a-1) of this section, an independent executor may file a notice of closing estate verified by affidavit that states:

(A) that all debts known to exist against the estate have been paid or have been paid to the extent permitted by the assets in the independent executor's possession;

(B) that all remaining assets of the estate, if any, have been distributed; and

(C) the names and addresses of the distributees to whom the property of the estate, if any, remaining on hand after payment of debts has been distributed.

(2) Before filing the notice, the independent executor shall provide to each distributee of the estate a copy of the notice of closing estate. The notice of closing estate filed by the independent executor must include signed receipts or other proof that all distributees have received a copy of the notice of closing estate.

(c) Effect of Filing Closing Report or Notice of Closing Estate [~~the Affidavit~~]. (1) The independent administration of an estate is considered closed 30 days after the date of the filing of a closing report or notice of closing estate unless an interested person files an objection with the court within that time. If an interested person files an objection within the 30-day period, the independent administration of the estate is closed when the objection has been disposed of or the court signs an order closing the estate.

(2) The closing of an [~~filing of such an affidavit and proof of delivery, if required, shall terminate the~~] independent administration by filing of a closing report or notice of closing estate terminates [~~and~~] the power and authority of the independent executor, but shall not relieve the independent executor from liability for any mismanagement of the estate or from liability for any false statements contained in the report or notice [~~affidavit~~].

(3) When a closing report or notice of closing estate [~~such an affidavit~~] has been filed, persons dealing with properties of the estate, or with claims against the estate, shall deal directly with the distributees of the estate; and the acts of the [~~such~~] distributees with respect to the [~~such~~] properties or claims shall in all ways be valid and binding as regards the persons with whom they deal, notwithstanding any false statements made by the independent executor in the report or notice [~~such affidavit~~].

(4) [~~(2)~~] If the independent executor is required to give bond, the independent executor's filing of the closing report [~~affidavit~~] and proof of delivery, if required, automatically releases the sureties on the bond from all liability for the future acts of the principal. The filing of a notice of closing estate does not release the sureties on the bond of an independent executor.

(d) [~~(c)~~] Authority to Transfer Property of a Decedent After Filing the Closing Report or Notice of Closing Estate [~~Affidavit~~]. An independent executor's closing report or notice of closing estate [~~affidavit closing the independent administration~~] shall constitute sufficient legal authority to all persons owing any money, having custody of any property, or acting as registrar or transfer agent or trustee of any evidence of interest, indebtedness, property, or right that belongs to the estate, for payment or transfer without additional administration to the distributees [~~persons~~] described in the will as entitled to receive the particular asset or who as heirs at law are entitled to receive the asset. The distributees [~~persons~~] described in the will as entitled to receive the particular asset or the heirs at law entitled to receive the asset may enforce their right to the

payment or transfer by suit.

(e) [~~(d)~~] Delivery Subject to Receipt or Proof of Delivery. An independent executor may not be required to deliver tangible or intangible personal property to a distributee unless the independent executor receives [~~shall receive~~], at or before the time of delivery of the property, a signed receipt or other proof of delivery of the property to the distributee. An independent executor may [~~shall~~] not require a waiver or release from the distributee as a condition of delivery of property to a distributee.

ALLOWANCE IN LIEU OF HOMESTEAD STATUTES NOT INCLUDED IN APPENDIX

Sec. 286. FAMILY ALLOWANCE TO SURVIVING SPOUSES, [~~AND~~] MINORS, AND ADULT INCAPACITATED CHILDREN. (a) Unless an affidavit is filed under Subsection (b) of this section, immediately after the inventory, appraisement, and list of claims have been approved, the court shall fix a family allowance for the support of the surviving spouse, [~~and~~] minor children, and adult incapacitated children of the deceased.

(b) Before the approval of the inventory, appraisement, and list of claims, a surviving spouse or any person who is authorized to act on behalf of minor children or adult incapacitated children of the deceased may apply to the court to have the court fix the family allowance by filing an application and a verified affidavit describing the amount necessary for the maintenance of the surviving spouse, [~~and~~] minor children, and adult incapacitated children for one year after the date of the death of the decedent and describing the spouse's separate property and any property that minor children or adult incapacitated children have in their own right. The applicant bears the burden of proof by a preponderance of the evidence at any hearing on the application. The court shall fix a family allowance for the support of the surviving spouse [~~and~~] minor children, and adult incapacitated children of the deceased.

Sec. 287. AMOUNT OF FAMILY ALLOWANCE. Such allowance shall be of an amount sufficient for the maintenance of such surviving spouse, [~~and~~] minor children, and adult incapacitated children for one year from the time of the death of the testator or intestate. The allowance shall be fixed with regard to the facts or circumstances then existing and those anticipated to exist during the first year after such death. The allowance may be paid either in a lump sum or in installments, as the court shall order.

Sec. 288. WHEN FAMILY ALLOWANCE NOT MADE. No such allowance shall be made for the surviving spouse when the survivor has separate property adequate to the survivor's maintenance; nor shall such allowance be made for the minor children or adult incapacitated children when they have property in their own right adequate to their maintenance.

Sec. 290. FAMILY ALLOWANCE PREFERRED. The family allowance made for the support of the surviving spouse, [~~and~~] minor children, and adult incapacitated children of the deceased shall be paid in preference to all other debts or charges against the estate, except Class 1 claims.

Sec. 291. TO WHOM FAMILY ALLOWANCE PAID. The executor or administrator shall apportion and pay the family allowance:
(a) To the surviving spouse, if there be one, for the use of the survivor and the minor children and adult incapacitated children, if such children be the survivor's.

(b) If the surviving spouse is not the parent of such minor children and adult incapacitated children, or of some of them, the portion of such allowance necessary for the support of such minor child or children of which the survivor is not the parent shall be paid to the guardian or guardians of such child or children who are minors, and to the guardian of each adult incapacitated child or another appropriate person, as determined by the court, on behalf of the adult incapacitated child if there is no guardian.

(c) If there be no surviving spouse, the allowance to the minor child or children shall be paid to the guardian or guardians of such minor child or children, and the allowance to each adult incapacitated child shall be paid to the guardian of the adult incapacitated child or another appropriate person, as determined by the court, on behalf of the adult incapacitated child if there is no guardian.

(d) If there be a surviving spouse and no minor child or adult incapacitated child [~~children~~], the entire allowance shall be paid to the surviving spouse.

Sec. 292. MAY TAKE PROPERTY FOR FAMILY ALLOWANCE. The surviving spouse, [~~or~~] the guardian of the minor children, or the guardian of an adult incapacitated child or another appropriate person, as determined by the court, on behalf of the adult incapacitated child if there is no guardian, as the case may be, shall have the right to take in payment of such allowance, or any part thereof, any of the personal property of the estate at its appraised value as shown by the appraisement; provided, however, that property specifically devised or bequeathed to another may be so taken, or may be sold to raise funds for the allowance as hereinafter provided, only if the other available property shall be insufficient to provide the allowance.