THE ESTATE ADMINISTRATION GUIDE

Moderator:
DARLENE SMITH, *Houston*
Crain, Caton & James

Panelists:
OMAR J. LEAL, *Corpus Christi*
Branscomb

PAMELA D. ORSAK, *Victoria*
The Law Office of Pamela D. Orsak

Written by:
SARAH PATEL PACHECO
PATRICK J. PACHECO

State Bar of Texas
18TH ANNUAL
BUILDING BLOCKS OF WILLS, ESTATES, AND PROBATE COURSE
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Webcast

CHAPTER 5

Darlene Payne Smith *Shareholder & Mediator*

713.752.8640
dsmith@craincaton.com

Education

Bachelor of Science: Criminal Justice, University of Houston (Magna Cum Laude)

Doctor of Jurisprudence, University of Houston Law Center

Practice Areas

Fiduciary Litigation

Probate, Trust and Guardianship

Overview

Darlene Payne Smith is a mediator and a member of the firm's Probate Trust and Guardianship Group and the Fiduciary Litigation Group.

Her practice is focused on individuals who have experienced a loss or are facing the issue of a loved one who is becoming incapacitated or suffered a traumatic injury that rendered them incapacitated. Darlene fights to uphold the wishes of those who have established valid estate plans and she defends fiduciaries wrongfully accused. She seeks justice against fiduciaries who have wronged their beneficiaries.

As a result, Darlene often appears in courts in Harris, Montgomery, Brazoria, Galveston, Fort Bend, Brazos, San Jacinto, Chambers, Walker and Jefferson Counties as well as in Hildago and Cameron Counties.

Darlene represents fiduciaries and beneficiaries in trial and appellate courts of those counties, and across the State of Texas, in matters relating to probate, guardianship, trust administration and litigation.

Because of her knowledge and skill, Darlene often is sought to help resolve disputes or to improve the knowledge of fellow attorneys.

Darlene is a frequent speaker and serves as an adjunct professor at South Texas College of Law. She is a co-author of the Texas Jury Charge publication for Probate and Trust and a continuing member of the Pattern Jury Charge Committee. She is also a mediator and arbiter of probate, trust, guardianship, and related matters.

Darlene has been honored many times over the years for her accomplishments including being selected to the 2006-2011 and 2014-2015 Texas Super Lawyers lists (Thomson Reuters).

Admissions

Texas

United States District Court for the Southern District of Texas

Memberships/ Certifications

- Adjunct Professor – South Texas College of Law, 2014
- Adjunct Professor – South Texas College of Law, 2013
- Member – State Bar Pattern Jury Charge Committee, 2012
- Adjunct Professor – South Texas College of Law, 2012
- Member – State Bar Pattern Jury Charge Committee, 2011
- Adjunct Professor – South Texas College of Law, 2011
- Member – State Bar Pattern Jury Charge Committee, 2010
- Adjunct Professor – South Texas College of Law, 2010
- Co-Chair – Houston Bar Association Elder Law Committee, 2010
- Texas Bar Association;
- Houston Bar Association;
- Texas Bar Foundation;
- Probate Legislative Sub-Committee -- Houston;
- Past President –Women Attorneys in Tax and Probate;
- Former Vice President – Disability and Elder Law Lawyers Association;
- Planning Committee – Elder Law Section, State Bar;
- Planning Committee – Wills and Probate Institute;
- Elder Law Committee;
- Certified by the State Bar of Texas Pursuant to Texas Probate Code § 647A as Ad Litem
- Former Trust Committee Member - NAELA

Personal

Married - Michael David Smith;

Three Children - Stephan, Coleman and Hallie;

OMAR LEAL

BRANSCOMB | PC

802 N. Carancahua, Suite 1900; Corpus Christi, Texas 78401-0036
361-886-3800; 361-886-3805 (fax)
www.branscombpc.com

Education and Experience

J.D., University of Texas, 1999
Chief Notes Editor, *The Review of Litigation* (1998-1999)
B.B.A. in Finance (*summa cum laude)*, Texas A&M University, 1996
Branscomb | PC; Shareholder, Jan. 2006-Present; Associate, Aug. 1999- Dec. 2005

Professional Activities and Honors

Board Certified, Estate Planning and Probate Law, Texas Board of Legal Specialization
Fellow, The American College of Trust and Estate Counsel (ACTEC)
Past President, Corpus Christi Estate Planning Council
Past President, Corpus Christi Young Lawyers Association
AV Rated by Martindale Hubbell
Best Lawyers in America: Trusts and Estates
Texas Super Lawyers by *Law and Politics* as seen in *Texas Monthly*, 2014-16
Named "Texas Rising Star" by *Law and Politics* as seen in *Texas Monthly*, 2007-14
Fellow, Texas Bar Foundation
Maintaining Member, College of the State Bar of Texas
Corpus Christi Bar Association's Young Lawyer of the Year Award, 2008
Corpus Christi's Top 40 Under 40 Professionals Award

Community Activities

Director and Past Secretary, Coastal Bend Community Foundation
Past Secretary and Director, Corpus Christi Education Foundation Board
Volunteer Attorney, Texas Rio Grande Legal Aid

Selected Law Related Presentations

Creditor Issues Involving Personal Guaranties and Non-Probate Assets at Death; Houston Bar Association's Probate, Trusts & Estates Section, February 2016—Presenter

Administering the Estate; State Bar of Texas 14th, 15th, and 16th Annual Building Blocks of Wills, Estates and Probate Course, January 2014, January 2015, January 2016—Panelist

Drafting Your First Will; State Bar of Texas Webinar; November 2015—Moderator

Selected Creditor Issues at Death; State Bar of Texas 38th Annual Advanced Estate Planning and Probate Course, June 2014—Presenter and Co-Author

Probate/Alternatives to Administration; 2014 San Antonio Estate Planners Council Docket Call in Probate Court, February 2014—Presenter

Court Created Trusts; State Bar of Texas 24th Annual Estate Planning & Probate Drafting Course, October 2013—Co-Presenter and Co-Author

Alternative Procedures That Save Time & Money Inside and Outside of Probate; Corpus Christi Bar Association, 2013 Probate Law Seminar, September 2013—Presenter

Hot Topics in Estate Administration; State Bar of Texas 37th Annual Advanced Estate Planning and Probate Course, June 2013—Presenter and Co-Author

The Drafting Panel Discussion; State Bar of Texas 23rd Annual Estate Planning and Probate Drafting Course, October 2012—Panelist

Estate Planning and Probate 101; State Bar of Texas 36th Annual Advanced Estate Planning & Probate Course, June 2012—Moderator and Course Director

Introduction to Texas Probate and Administration; State Bar of Texas 12th Annual Building Blocks of Wills, Estates and Probate Course, January 2012—Panelist

Small Estate Administration: What Works and What the General Practitioner Should Know; Corpus Christi Bar Association 2011 Probate Law Seminar, August 2011—Presenter

PAMELA D. ORSAK
THE LAW OFFICE OF PAMELA D. ORSAK
306-B E. Airline Road
Victoria, Texas 77901
(361) 578-0001
(361) 237-1548 (facsimile)
pamela@orsaklaw.com

EDUCATION

J.D., Duke University School of Law, 1999
BBA in accounting *summa cum laude*, University of Houston, 1996

EMPLOYMENT

January 2011 – present	The Law Office of Pamela D. Orsak	Victoria, Texas
January 2006 – June 2010	Anderson, Smith, Null & Stofer Associate	Victoria, Texas
October 2004 – January 2006	Ware, Jackson, Lee & Chambers Associate	Houston, Texas
June 2002 – October 2004	Ware, Snow, Fogel & Jackson Associate	Houston, Texas
September 2000 – June 2002	Harris County Probate Court Number Three Litigation & Mental Health Staff Attorney	Houston, Texas
September 1999 – August 2000	Fourteenth Court of Appeals Briefing Attorney for The Honorable Kem T. Frost	Houston, Texas

PROFESSIONAL ACTIVITIES AND HONORS

Board Certified, Estate Planning and Probate Law, Texas Board of Legal Specialization
Victoria Area Estate Planning Council, President 2009-2010, Member 2008 – present
Victoria County Bar Association, President 2008-2009, Member 2007 – present
College of the State Bar, Member 2002 – present
Junior League of Victoria, Texas, Inc., Treasurer 2010-2011, Membership Development Chair 2012-2013, Public Relations Chair 2013-2014, Member 2006-present
Victoria Professional Express Network, a chapter of the American Business Women's Association, Member 2008-2012
Presbyterian Day School, Secretary 2011-2012
Houston Livestock Show and Rodeo, Lifetime Member
Junior League of Houston, Member 2002-2006

AUTHOR/SPEAKER

Speaker, "Administering the Estate," Building Blocks of Wills, Estates and Probate Course, 2016
Author/Speaker, "Save Me from Probate: Transfer on Death Deeds and Lady Bird Deeds," 40th Annual Advanced Estate Planning & Probate Course, 2016 & 2016 Stanley M. Johanson Estate Planning Workshop
Speaker, "Administering the Estate," Building Blocks of Wills, Estates and Probate Course, 2016
Author/Speaker, "Use and Abuse of Show Cause Motions in Probate Proceedings," 39th Annual Advanced Estate Planning & Probate Course, 2015
Speaker, "Estate Planning: Who, What, Why & How," Victoria College Foundation, 2015
Speaker, "Administering the Estate," Building Blocks of Wills, Estates and Probate Course, 2015
Speaker, "Administering the Estate," Building Blocks of Wills, Estates and Probate Course, 2014
Speaker, "Unintended Consequences of TOD, POD and Other Beneficiary Designations," Victoria Area Estate Planning Council, September 2014
Speaker, "Administering the Estate," Building Blocks of Wills, Estates and Probate Course, 2013
Speaker, "Estate Planning Post 2010," First Victoria National Bank, 2011
Speaker, "Trusts Who Needs Them," Victoria Professional Express Network, 2010
Speaker, "Why Do I Need a Will," Victoria Professional Express Network, 2008

CADENCE BANK

Trust Services

Executive Leadership

Patrick Pacheco | EVP, Trust Executive

Industry Experience: 25 years

- Board Certified in Estate Planning and Probate Law* by Texas Board of Legal Specialization
- Experienced in wealth management, designing and implementing strategies to advance personal or business long-term financial goals
- Previous law partner* Dow Golub Berg & Beverly; co-author of *Texas Practice Guide: Wills, Trusts and Estate Planning*

713-871-5445 | patrick.pacheco@cadencebank.com

SARAH PATEL PACHECO
Crain, Caton & James, P.C.
1401 McKinney, 17th Floor
Houston, Texas 77010
spacheco@craincaton.com
(713) 658-2323

Sarah Patel Pacheco is a shareholder with the law firm of Crain, Caton & James, P.C., in Houston, Texas, where she generally limits her practice to litigation, administration and tax issues relating to estate, trust, guardianship and related fiduciary appointments. She was elected its President in 2008. She received her Doctor of Jurisprudence in May 1993 from Southern Methodist University, School of Law, Dallas, Texas, and undergraduate degree in accounting in May of 1990 from the University of Texas at Arlington. She is Board Certified in Estate Planning and Probate Law by the Texas Board of Legal Specialization.

She is a co-author of the West Publishing's Texas Probate Practice Guide and West Publishing's Texas Wills, Trusts and Estate Planning Practice Guide, and the Editor of the Second and Third Editions of the State Bar of Texas' Guardianship Manual.

She served on the State Bar of Texas Legal Specialization Estate Planning and Probate Exam Commission from 2004-2010, including as its Chair her last term. In 2011, she was appointed to the State Bar of Texas Pattern Jury Charge Oversight Committee. She has served as the course director for the State Bar of Texas 2003 and 2011 Building Block of Wills, Trusts and Estate Planning Courses, 2005 Nuts and Bolts of Wills, Trusts and Estate Planning Course, the 2006 Advanced Estate Planning and Probate Course, the 2011 Advanced Guardianship and Elder Law Course and the 2013 Annual Advanced Estate Planning Strategies Course. In addition, she has served on numerous additional CLE planning committees. She is a frequent author and speaker for various state and local professional organizations. She was awarded the Standing Ovation Award for 2011 by the staff of TexBarCLE.

She has been active in various local and state legal organizations including: Houston Bar Association, Probate, Trust & Estates Section; Chair 2009-2010: CLE Committee; Co-Chair 2008-2009, Institutes Subcommittee Co-Chair 2006-2007: Judicial Polls Committee; 2008-2010: Houston Bar Foundation, Fellow (elected 2004): Houston Young Lawyers Association; Fellow (2000) & Co-Chair of Elder Law Committee (1998-2003): Texas Young Lawyers Association; Needs of Senior Citizens Committee (1999-2003): Generation-X Estate Planning Forum; Member (1999-present): American Bar Association: Real Property, Probate and Trust Law and Litigation Sections; Member (1993-present).

She has been repeatedly selected as a Texas Super Lawyer and before that a Texas Rising Star by Texas Monthly Magazine. She has been named by Texas Monthly as One of the Top 50 Female Texas Super Lawyers and One as the Top 100 Houston Super Lawyers. She has also been named a Top Lawyer in Houston, one of the Best Lawyers Under 40 by H Texas Magazine, and as a Top Lawyer in Houston by Houston and Houstonia Magazines. And, she has been selected as one of The Best Lawyers in America in the practice areas of Trusts and Estates annually since 2006 and Litigation – Trusts & Estates annually since 2012. In 2014, she has been named as Best Lawyers' Houston Litigation - Trusts and Estates "Lawyer of the Year." And, she was recently selected for a second time as Best Lawyers' Houston Litigation - Trusts and Estates "Lawyer of the Year" for 2017.

ACKNOWLEDGMENT

This outline and any related presentation is for educational purposes only and is not intended to establish an attorney-client relationship or provide legal advice. And, to ensure compliance with requirements imposed by the Internal Revenue Service, the authors inform you that any discussion of U.S. federal tax contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of: (i) avoiding penalties under the internal revenue code, as amended or (ii) promoting, marketing or recommending to another party any transaction or tax-related matter[s].

A prior version of this outline was co-written by Sharon Brand Gardner, formerly with Crain, Caton & James, and her contributions are significant and appreciated.

TABLE OF CONTENTS

THE ESTATE ADMINISTRATION GUIDE

I. SCOPE OF ARTICLE

While there are few certainties in life, taxes (except in 2010) and death, appear to be among them. Thus, clients continue to require able attorneys well versed in the procedures relating to the opening, administration and settlement of a decedent's estate. And Texas laws, in this area, are among the most developed in the nation.

This article provides a general overview of issues encountered in the administration and settlement of an estate. The article also discusses practical and ethical considerations when advising estate representatives. References to Sections and/or the Estates Code are to the Texas Estates Code unless otherwise noted.

II. PROFESSIONAL CONSIDERATIONS

A discussion of issues involved in an administration of the estate would not be complete without at least a reminder of the potential issues and claims that can involve the personal representative's advisors. Until the Texas Supreme Court issued its Belt opinion, there was little discussion of the claims. But, there has been a steady increase of these claims over the last 20 years. Thus, any professional, particularly an attorney, involved in an estate administration should become informed of the possible issues and ways to reduce potential claims. A brief discussion of reducing possible issues relating to advising a personal representative follows.

A. Assess The Potential Client

It is rumored that Abraham Lincoln gave the following advice to a new attorney upon passing the bar, "Young man, it's more important to know what cases not to take than it is to know the law." Jay G. Foonberg, How to Start and Build a Law Practice (3d. 1991) at 135. Unfortunately, neither President Lincoln nor anyone else can advise an attorney which clients, or cases, should be taken. Rather, it is a product of the attorney's legal education, practical experience, intuition, and sometimes moral and ethical beliefs. Each case must be evaluated based on the facts and circumstances of that particular proposed representation. Some cases involve greater litigation risks than others. This includes not only private engagements but also court appointments.

Warning signs of a representation or appointment that may cause potential litigation include:

- A client who has been represented by a number of attorneys.
- A client who is emotionally out of control.
- A client with unreasonable expectations.
- The know it all client.
- The client who wants to micromanage the representation.
- A client who wants to include the beneficiaries in administration matters.
- A client who is dependent on a third party.
- The out of control fiduciary.
- The out of control beneficiary.
- Hostile or vindictive fiduciary.
- Hostile or vindictive beneficiaries.
- A potentially incapacitated client.
- Beneficiaries with drug, alcohol or other dependencies.
- Existing or anticipated family conflict.

While the preceding is not intended to be a complete list, these situations are often a precursor to future litigation, which could include the attorney. An attorney is not under an ethical obligation to accept every requested engagement or appointment. It is appropriate for an attorney to consider whether the proposed engagement will result in him or her becoming an unwilling witness in, or party to future litigation.

B. Assess Your Legal Competency

Rule 1.01 of the Texas Disciplinary Rules of Professional Conduct provides that an attorney may not accept or continue a representation, which the attorney knows or should know, is beyond his or her legal competence. When determining whether a matter is beyond an attorney's competence, the practice area of the underlying representation is not the only issue. Relevant factors include the complexity of the particular case, the attorney's experience in addressing the facts of that particular case, the time the attorney is available to address the issues, and the attorney's experience in handling issues raised by such representation.

Furthermore, while an attorney may be technically competent to handle the proposed engagement, the attorney may determine that the proposed client's needs could be better served by referring the potential client to another attorney who has dealt with the specific issues and complexities that may be raised during the representation. An attorney does not violate, however, the Rules of Ethics if he or she associates with another attorney for purposes of gaining additional knowledge or expertise with regard to the client's specific issues, provided, the client's

representation can be carried out in a competent manner upon receiving such additional advice. *See* TEX. R. DISCIPLINARY P. 1.01(a), *reprinted in* TEX. GOV'T CODE tit. 2, subtit. G app. *See* discussion *infra.*

C. Consider Potential Conflicts of Interest

The Texas Disciplinary Rules of Professional Conduct provide that an attorney should not represent individuals who have material conflicts of interest. *See* TEX. R. DISCIPLINARY P. 1.06, *reprinted in* TEX. GOV'T CODE tit. 2, subtit. G app.. In a civil proceeding, clients may consent to certain conflicts of interest created by joint representation provided the consent is obtained after full disclosure. *See Id.*; *see also FDIC v. United States Fire Ins. Co.*, 50 F.3d 1304, 1314 (5th Cir. 1995). Potential or alleged conflicts of interest are generally raised when an attorney represents both a husband and a wife, or other joint clients, in a trust, estate or estate-planning context. While potential conflicts of interest do not prohibit all joint representations, it is necessary to evaluate the potential conflicts and the nature, implications and possible consequences of the joint representation before agreeing to the joint engagement. The failure to recognize conflicts of interest can lead to claims by the client and/or a third party. *See* discussion *infra.*

D. Clearly Define Who is the Client

Care should be taken to clearly (i) define who is the client, (ii) identify the specific capacities the client will be represented, and (iii) confirm the authority of the client to enter into the engagement. In matters relating to trust and estates, one person may represent a variety of interest. For example, a surviving spouse may seek representation as an executor and/or trustee of a trust created under the deceased spouse's will. He or she may also have individual claims or interests that require representation. The attorney should be clear whether he represents the spouse in all capacities, if no conflict exists, or only certain capacities. *See* discussion *infra.*

Likewise, it is advisable to review any relevant documents to confirm the potential client or clients have the legal ability to retain the attorney. For example, co-fiduciaries may require joint agreement under the terms of the governing instrument. *See Conte v. Conte*, 56 S.W.3d 830 (Tex. App.—Houston 2001, n.p.h.). Likewise, engagement by an entity requires the consent of certain officers or directors or appropriate resolutions.

E. Obtain Engagement Agreement

As with any representation, a well drafted engagement or fee agreement can both provide protection to the attorney and be beneficial to the client. The agreement should set out the scope of the engagement as well as the method of calculating and collecting fees. If entering into a joint representation of, for example, co-fiduciaries, the fee agreement should also discuss potential conflicts of interest and the expected course of action in the event of an actual future conflict. The agreement may also contain dispute resolution provisions.

F. Be Clear and Careful in All Written Communications with Clients

Issues and decisions that rise during an estate administration do not always have a clear answer. Rather, the advice provided often depends on financial and personal factors that differ from case to case. Likewise, in litigation, one client's litigation tolerance may be substantially different than another's.

1. Use Correspondence to Confirm and Clarify

As the objectives of clients may differ in hindsight, it is often advisable to confirm in writing ones advice on significant issues. For example, a litigation matter, a letter forwarding a draft of a settlement agreement may discuss the client's decisions to settle and potential recovery if the client elected not to settle and the case proceeds to trial.

2. Practice Safe Emailing

Care should be taken in email correspondence with clients. This form of communication is rapidly becoming the norm with many clients. For many clients, it has become desirable as it invites a quick response and they believe is less costly than calling the attorney. While a short response to some inquires is appropriate, many times the inquiry does not include all the relevant information and the response does not include the detailed analysis that the attorney would include a more formal communication. Also, continued email communications have a tendency to inhibit the formation of a strong attorney-client relationship. Therefore, the client may be more apt to change counsel instead of discussing a concern regarding a bill or related matters with the attorney.

G. Be Careful in All Written Communications with Beneficiaries & Third Parties

It is common when representing a fiduciary to communicate with the beneficiaries and/or creditors of the estate on the fiduciary's behalf. As discussed previously, these contacts may create a claim that the beneficiary, creditor, etc., believed that the attorney represented the beneficiary, creditor, etc. Thus, it is suggested that any written communication with any potential non-client reiterate (i) who the attorney

represents, and (ii) that the attorney does not represent the recipient.

Furthermore, it is advisable for an attorney to avoid preparing legal documents, such as waivers, disclaimers, etc., for non-clients. But, given the realities of the estate area, it is sometimes necessary for the fiduciary's attorney to prepare such documents to expedite his or her appointment or the settlement of the estate. If the attorney is providing the non-client a document for execution, the correspondence should clearly suggest that the recipient have the document reviewed by his or her own counsel.

For example, it is common to require waivers of service from various heirs or beneficiaries in order to proceed on an application regarding an estate or trust. The letter forwarding a waiver of service may provide as follows:

> A number of matters must be completed before Mr. X's appointment. Among those is to provide a copy of the application to you and serve it upon you in accordance with Texas law. Therefore, by separate copy of this letter, we have forwarded you a copy of the enclosed by certified mail to meet this technical requirement. It is possible, however, to expedite this matter by asking you to sign the enclosed Waiver of Citation. Assuming you are willing to do so, we enclose a Waiver of Citation for your review. If the enclosed meets your approval, please sign where indicated in the presence of a Notary Public. Once signed, please arrange to forward your signed Waiver to my offices in the enclosed self-addressed stamped envelope. Upon receipt, we can file it with the court indicating you have received a copy of the enclosed application. This will help Mr. X in moving this matter forward as soon as possible. Note, that we must remind you that we do not represent you in this matter. Therefore, if you have any questions or wish to discuss the legal significance of the enclosed Waiver, we suggest you contact counsel of your own selection before signing the enclosed Waiver as it may affect your legal rights with regard to the Estate.

Likewise, it is advisable to include in the document an acknowledgement of non-representation. It is notable the lending industry has been requiring these statements and acknowledgements in real estate closings for number of years. For example, a designation may include the following provisions:

> I further acknowledge that X Firm has prepared this Designation on behalf of its client, Mr. Y, as the proposed Independent Administrator with Will Annexed of the Estate of _____, Deceased, and does not represent me in this matter. I further acknowledge that I am aware that I may retain my own counsel to advise me regarding this Designation and/or the Estate.

Furthermore, a personal representative winding up his or her affairs may seek a receipt and release from various heirs or beneficiaries in order to seek his or her discharge as the fiduciary for the estate or trust. The letter forwarding a receipt and release may include the following:

> We remind you that we only represent Ms. X, in her capacity as trustee, in matters relating to the ABC Estate. Therefore, if you have any questions regarding this matter, we ask that you discuss those with counsel of your choosing before signing and returning the enclosed Receipt and Release and negotiating the enclosed check.

Furthermore, it is advisable for any document prepared for a non-client include confirmation of non-representation. For example, a waiver may include the following:

> I further acknowledge that X Firm has prepared this Waiver on behalf of its client, _____, as Independent Executor of the Estate of _____, Deceased and does not represent me in this matter; and
> I further acknowledge that I am aware that I may retain my own counsel to advise me regarding this Waiver and/or my interest in the Estate.

Likewise, a settlement agreement may include the following:

> _____, acknowledges that the X FIRM solely represents Y and do not represent and have never represented _____, and that in executing this Release, _____ has relied upon her own judgment and the advice of her own attorneys, and further, that she has not been induced to sign or execute this Release by promises, agreements or representations not expressly stated herein.

H. Advise Client of Client's Fiduciary Duties & Potential Liability

The attorney for a proposed personal representative or guardian should explain to the potential fiduciary his or her powers, duties and potential liability prior to his or her appointment, if possible. In these discussions, it is important to impress upon the potential or new appointee the possibility of being sued as a result of their fiduciary appointment. It is advisable to then follow-up with a letter confirming these discussions and reducing them to writing.

I. Avoid Making Alleged Representations and Use Disclaimers of Reliance When Appropriate

It is common for other parties to request that a fiduciary make express representations to verify certain facts or conditions. Representations may be used to confirm assets, liabilities, past events or other matters that an interested party deems relevant to an estate or trust. While such information is needed or even mandatory to meet certain fiduciary duties, the attorney for the fiduciary should avoid being the one making such representations. When he or she makes such representations and it turns out to be incorrect, the attorney may face claims of negligent misrepresentation. *See* discussion *supra.*

Furthermore, in any written documents that may be prepared by the attorney for the fiduciary and signed by a beneficiary or third party, it is suggested to include a statement that the attorney and/or his law firm does not represent the other parties. For example, a distribution or settlement agreement may include the following provision:

> Each Party confirms and agrees _____, and the law firm of _____, solely represent A and B and do not and has never represented any other Party and have not provided any other Party legal advice or services, information or made any representation to any other Party.

The Texas Supreme Court has sanctioned the use of such disclaimers of reliance to reduce potential claims based on reliance or negligent misrepresentation. *See Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 171 (Tex. 1997); *Atlantic Lloyds Insurance Company v. Butler*, 137 S.W.3d 199 (Tex. App.—Houston [1st Dist.] 2004, pet. denied)(disclaimer of reliance in settlement agreement conclusively negated other parties alleged reliance on any representations or lack of disclosure by other parties). A disclaimer of reliance may provide as follows:

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

J. Options When Faced With Potential Fiduciary Theft

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

For example, a person may engage an attorney to obtain his or her appointment as a fiduciary and then use those fiduciary assets for his or her personal benefit. Upon discovering the nefarious conduct, the attorney representing the fiduciary must decide whether he or she can continue to represent the fiduciary and, regardless, whether they can do anything ethically to rectify or mitigate the damage cause by the fiduciary's breach.

In deciding on a course of action, it is important to recognize that there is no clear authority that requires the disclose information gained from attorney-client communications regarding theft of fiduciary property, or fraud on the fiduciary estate. Rule 1.05 provides as follows:

> (c) A lawyer may reveal confidential information:
> ...

(7) When the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.

(8) To the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.

See TEX. R. DISCIPLINARY P. 1.05, *reprinted in* TEX. GOV'T CODE tit. 2, subtit. G app.

The comments to Rule 1.05 also indicate, however, that full protection of client information is not justified when a client plans to or engages in criminal or fraudulent conduct or where the culpability of the attorney's conduct is involved. The comments elaborate on several situations where an attorney may disclose client communications. First, the attorney may reveal information relating to the representation in order to avoid assisting a client's criminal or fraudulent conduct, and Rule 1.05(c)(4) permits doing so. Second, an attorney has a duty to not use false or fabricated evidence, and Rule 1.05(c)(4) permits revealing information necessary to comply with this rule. Third, the attorney may have been unknowingly involved in past conduct by the client that was criminal or fraudulent. In this circumstance, the attorney's services were made an instrument of the client's crime or fraud and, therefore, the comments state that the "lawyer has a legitimate interest both in rectifying the consequences of such conduct and in avoiding charges that the lawyer's participation was culpable." *Id.* cmt 12.

Rule 1.05(c)(6) and (8) give the attorney the discretion to reveal both unprivileged and privileged information in order to serve those interests. Finally, when an attorney learns that a client intends prospective conduct that is criminal or fraudulent, his or her knowledge of the client's purpose may enable the attorney to prevent commission of the prospective crime or fraud. The comments state that "[w]hen the threatened injury is grave, the attorney's interest in preventing the harm may be more compelling than the interest in preserving confidentiality of information." *Id*. at cmt 13. Rule 1.05(c)(7) grants the attorney the professional discretion, "based on reasonable appearances, to reveal both privileged and unprivileged information in order to prevent the client's commission of any criminal or fraudulent act." *Id.* Finally, comment 13 to Rule 1.05 provides that:

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

See TEX. R. DISCIPLINARY P. 1.05, comment 14, *reprinted in* TEX. GOV'T CODE tit. 2, subtit. G app.

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

K. Consider the Possible Rights of Successor Fiduciaries

Attorneys representing a fiduciary should be aware that an issue exists regarding the right and privity of a successor fiduciary to the agents of the prior fiduciary. When a fiduciary has been removed or died, a successor fiduciary is generally imposed with a duty to redress his or her predecessor's actions. When counsel represents a fiduciary, the question then becomes whether the successor is entitled to the predecessor's legal files. While the Texas Supreme Court decision of *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996), seems to imply that the attorney only represented that fiduciary/client, no Texas court has clearly addressed this issue in the context of an estate, or guardianship and at least one trial court has ordered the turnover of the prior attorney's files.

Until this issue is decided, an attorney for a former fiduciary should request the consent of the client or the client's representative's before releasing

his or her files to a successor fiduciary. If consent cannot be obtained, the attorney should require a court order compelling the turn over.

L. Review Malpractice Coverage Regarding Fiduciary Appointments

As discussed previously, court appointments may result in a range of potential claims from attorney malpractice to breach of fiduciary duty. Before accepting a court appointment, the appointee should consider whether potential claims would be covered by his or her errors and omission policy. For example, some policies do not cover fiduciary claims. This coverage can be generally added with a fiduciary rider. It is suggested that the potential role of the attorney be candidly discussed with the insurance representative to avoid a coverage issue in the future.

M. Be Cognizant Of The Discovery Rule

While the standard statute of limitation on legal malpractice is two years and breach of fiduciary duty is four years, the discovery rule can toll these applicable limitations period for years into the future. The Texas Supreme Court has twice held a fiduciary's misconduct to be inherently undiscoverable. *See Willis v. Maverick*, 760 S.W.2d 642, 647 (Tex. 1988) (attorney-malpractice actions subject to discovery rule because of fiduciary relationship between attorney and client and client's lack of actual or constructive knowledge of injury); *Slay v. Burnett Trusts*, 187 S.W.2d 377, 394 (1945) (trustee). The discovery of such claims may relate to the attorney's representation of the fiduciary and/or the fiduciary's actions or inactions. As a result, consideration should be given to retaining files and other information or documentation relevant to these engagements far beyond the standard period.

N. Other Thoughts

Finally, common sense probably provides the best guide to avoiding becoming a future defendant. When representing a fiduciary, both the fiduciary and his or her attorney (as the fiduciary's agent) appear to be held to a higher standard. Thus, care should be taken by both in carrying out their respective roles. Some final suggestions include:

- Avoid "Rambo" litigation
- Be cognizant of a fiduciary's duties of disclosure
- Do not allow fiduciary-client to use attorney's services to enable a clear breach of his or her duties
- Consider when to put matters in writing and when not to – even to the fiduciary
- Appropriate payment and segregation of fees and expenses

III. OVERVIEW OF DUTIES & LIABILITIES

A. Duties and Powers

The estate's representative is a statutory agent of the court and any rights, powers, or duties that apply are not only established by the laws of this state but also by common law principles.

1. General Duties

It is the duty of the representative upon appointment to take reasonable care of all estate property as a prudent man would do except for extraordinary casualties. *See* TEX. ESTATES CODE § 351.101; *Roberts v. Stewart,* 80 Tex. 379, 15 S.W. 1108 (1891); *Radford v. Coker,* 519 S.W.2d 934 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.). The representative's duty is to collect all assets, claims, debts due, personal property, records, books, title papers, and business papers of the estate and hold them for delivery to those entitled when the estate is closed. *See* TEX. ESTATES CODE § 361.102; *Atlantic Ins. Co. v. Fulfs,* 417 S.W.2d 302 (Tex. Civ. App.—Fort Worth, 1967, writ ref'd n.r.e.).

2. General Powers

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

3. Court Supervised Powers

An independent representative generally has the power to take all necessary actions without court approval.

In contrast, Section 351.051 of the Texas Estates Code specifies that those powers of a dependent representative that significantly impact the estate may only be exercised with prior court approval. The representative is, however, permitted to exercise certain limited powers without court supervision. *See* TEX. ESTATES CODE § 351.052.

4. Power to Operate a Business

An independent representative has the power to operate a business controlled by the estate without court approval. *See* TEX. ESTATES CODE CH. 401.

With regard to a dependent representative, the court may permit the representative, upon application

and order, to operate a farm, ranch, factory, or other business of the decedent within certain limitations. *See* TEX. ESTATES CODE § 351.202; *R. E. Stafford & Co. v. Dunovant's Estate*, 81 S.W. 65 (Tex. Civ. App. 1904, no writ); *Altgeit v. Alamo Nat. Bank*, 98 Tex. 252, 83 S.W. 6 (1904). Section 351.202 provides that the court, after notice of all interested parties and a hearing, may authorize the personal representative to operate a decedent's business if (i) the decedent's will does not direct the business to be sold, (ii) the sale is not necessary, and (iii) the continued operations is in the estate's best interest. *See Id*. It also provides a number of powers that can be granted in conjunction with the operations of the business and addresses the requirements of a possible sale. *See Id*.

5. Power to Borrow

An independent representative has the power to borrow funds need to administer and settle the estate without court approval. *See* TEX. ESTATES CODE CH. 401.

With regard to a dependent representative, court approval is required to borrow money and pledge real or personal property of the estate in order to pay taxes, expenses of administration, approved claims, or renew and extend valid existing liens against estate assets. TEX. ESTATES CODE § 358.251.

a. Application

A sworn application must be filed containing the specific reasons for such request. *See* TEX. ESTATES CODE § 358.252.

b. Citation

The clerk must issue citation by posting upon all interested persons to appear and show cause why an application to borrow funds or renew liens on behalf of the estate should not be granted. TEX. ESTATES CODE § 358.252.

c. Order

The Court upon hearing and presentment of satisfactory evidence shall issue an order specifying the terms, conditions, and authority that is to be granted. The loan term may not exceed three (3) years from the date of the original letters but may be extended for one (1) additional year without new citation or notice. *See* TEX. ESTATES CODE § 358.252.

B. Possible Tax Filings

In the months following the death of a decedent, up to four different federal tax returns may need to be filed. In addition, for decedents owning certain property in other states, one or more state death tax returns may also become due. In order to avoid potential penalties for failure to file required returns, it is crucial that the personal representative promptly identify which returns may be required. The four federal returns are the decedent's final federal income tax return, IRS Form 1040, decedent's final gift tax return, IRS Form 709, decedent's federal estate and generation-skipping tax return, IRS Form 706, and the Estate's fiduciary income tax return, IRS Form 1041. The personal representative should also file a Form 56 notifying the IRS of his or her appointment.

1. Decedent's Final Federal Income Tax Return

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

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

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

2. Estate's Federal Fiduciary Income Tax Return

The decedent's personal representative is also required to file the estate's fiduciary income tax return. The timing of the estate's return is dependent on the personal representative's selection of a calendar or fiscal year. An estate may select a fiscal rather than calendar tax year provided the fiscal year ends on the last day of a calendar month and does not exceed a total of twelve months. For example, if the decedent's date of death is November 3, 2016, the estate may elect a fiscal year ending on October 31, 2017. The advantage of a fiscal year is that it reduces the expense of filing a first return for a potential short tax year (in

our example, for the period beginning on November 3, 2016 and ending on December 31, 2016) and may, in many instances, allow for the deferral of income taxes payable at either the estate level or, if income is distributed, the beneficiary level (this is because all income carried out to the beneficiary is treated as if distributed on the last day of the estate's fiscal year). If an estate elects a fiscal year, the return will be due on the 15th day of the fourth month following the close of the fiscal year. The election of a calendar or fiscal year is made by the filing of the return (or extension) by the due date of the initial due date of the return without regard to extensions.

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

While tax deferral and avoidance of a short tax year may appear to favor the use of a fiscal year, care should be taken in considering the practical aspects of a fiscal year. For example, if a fiscal year ending on October 31 is selected, consideration should be given to whether the personal representative will be able to secure adequate income information for the fiscal year, such as 1099s. And, it may be necessary to apportion these annual statements. Issues such as these may cut in favor of selecting a calendar year or an initial fiscal year which is less that 12 months but ends concurrently with a calendar quarter.

Finally, as with the decedent's final income tax return, the personal representative may file for an extension of time to file. If the attorney does not prepare the return, he or she should once again carefully coordinate with the estate's CPA on tax year selection and filing.

3. Decedent's Final Federal Gift Tax Return

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

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

4. Federal Estate Tax Returns

If the value of the decedent's gross estate on the date of death exceeds the I.R.C. Section 2010 applicable exclusion amount for the year of decedent's death, the estate's personal representative is charged with filing IRS Form 706. For tax years 2006, 2007 and 2008, the applicable exclusion amount was $2,000,000. For tax year 2009, the applicable exclusion amount was $3,500,000. Estates had a choice in 2010 whether to use a $5,000,000 exemption or opt out of any estate tax but with limited income tax basis adjustment. For tax years 2011 and forward (or until they change the law again), the applicable exclusion amount is $5,000,000 (indexed for inflation since 1999). The 2017 applicable exclusion amount is $5,490,000, up from $5,450,000 for 2016 decedents.

And, even if the assets of the estate do not require the filing of an estate tax return, it may be advisable to file one when the decedent was married to take advantage of a deceased spouse's unused credit amount. The recent American Taxpayer Relief Act made the portability provisions first enacted in 2010 "permanent." Generally, portability of the applicable exclusion amount between married couples means that if the first spouse's estate does not fully use all of his or her applicable exclusion amount, the unused portion may be transferred/added to the surviving spouse's exemption so that he or she can use it plus his or her applicable exclusion amount when the surviving spouse dies. Thus consideration should also be given to filing a death tax return when necessary to preserve the option of portability.

The estate tax return for a decedent's estate is due on the calendar date of decedent's death nine months from decedent's death. For example, for a decedent dying on January 1, 2017, the federal estate tax return would be due on October 1, 2017. If the estate's personal representative is unable to timely file the return, a six month extension of time to file is available pursuant to I.R.C. Section 6081. This

extends the time to file to fifteen months after the decedent's death. But, the extension of time to file does not also extend the time to pay any estate tax owing. That must be separately requested on the extension application and requires a showing of good cause.

If the estate lacks sufficient assets or liquidity to pay any estate tax owing, the personal representative may request a discretionary extension of time to pay for a period not to exceed ten years under I.R.C. Section 6161. Although the Section provides for up to a ten-year extension, an extension is normally granted for a period of no more than one year per request. As the extended payment deadline nears, the request may be renewed if the personal representative is able to demonstrate that reasonable cause continues to exist.

In the same manner that an extension of time to file does not grant an extension of time to pay, the grant of an extension of time to pay does not act as an extension of time to file. Therefore, it is imperative that the personal representative promptly identify estate assets and make an initial determination of the estimated estate tax liability in order to file the appropriate extensions request if necessary. It is important to remember that the penalty for failure to timely file the estate tax return is substantial. If he or she fails to file a return by the due date (or extended due date) the penalty is 5% of the tax due for each month or any fraction of the month up to 25% in the aggregate. For example, if a return due on November 1, 2016, showing estate tax due of $200,000 was filed on November 2, 2017, the penalty for failing to timely file would be $10,000. Both the extension of time to file and extension of time to pay may be made on IRS Form 4768 with appropriate explanations of the reasonable cause for any delay in payment. To the extent possible, estimated taxes should be paid with the extension request as interest will begin to accrue on the original due date.

In certain instances, the estate will not have sufficient liquidity to satisfy its estate tax liability due to the existence of a closely held business as an asset of the estate. When the value of the estate's closely held business exceeds 35% of the adjusted gross estate, the personal representative may elect to pay the tax attributable to the closely held business interest in up to 10 equal annual installments. I.R.C. § 6166(a). There is no special IRS Form available for making the election. The election may be made by simply attaching a notice of election to the timely filed Form 706. The notice of election should set forth the decedent's name and social security number, the amount of estate tax to be paid in installments, the date of the first installment payment, the number of annual installments, the identity of the qualifying property, and a description of the facts supporting the estate's qualification for installment treatment.

5. State Transfer Tax Return

In Texas, it is no longer necessary to file a Texas inheritance tax return for decedents dying after 2004. But if a Texas resident owns real property or a nonresident owns other property outside of Texas, then one or more state inheritance tax returns may also be due. The executor should confirm whether a state return is due in another state.

C. Notice to Creditors

The Texas Estates Code requires all personal representatives, including independent executors, to publish a notice to creditors. This must be done within one month after receiving letters. TEX. ESTATES CODE § 308.051. Proof of publication of the printed notice with the publisher's affidavit must be filed with the court. TEX. ESTATES CODE § 308.053.

In addition to a general notice to creditors, all secured creditors must be given separate written notice of the appointment of the personal representative within two months after the issuance of Letters if the personal representative has actual knowledge of the claim. TEX. ESTATES CODE § 308.053(b). Notice shall be sent by certified mail, return receipt requested or registered mail. TEX. ESTATES CODE § 308.053(c). A copy of the notice and a copy of the return receipt shall be filed with the court clerk. TEX. ESTATES CODE § 308.053(d).

Finally, unsecured creditors may require notice depending on the type of administration involved. The personal representative may give permissive notice to any unsecured creditor having a money claim against the estate. The notice should expressly state that the creditors must present the claim before the 121st day from the date of receipt of the notice or the claim is barred. TEX. ESTATES CODE § 308.054.

The notice must include: (1) the date of issuance of letters; (2) the address to which the claim may be presented; (3) an instruction of the personal representative's choice that the claim be addressed to the attorney, the personal representative's attorney, or "Representative, Estate of _____." TEX. ESTATES CODE § 308.054(b).

One notice is sufficient, even if a successor representative is later appointed. TEX. ESTATES CODE § 308.055.

D. Notice to Beneficiaries

Effective September 1, 2007, Section 308.002 (formerly 128A) was amended to require the personal representative to give notice to all beneficiaries within 60 days after a will has been admitted to probate

unless one of three exceptions apply. An affidavit or certificate must be filed with the court within 90 days confirming notice was given or explaining why it was not. In 2011, these requirements were slightly relaxed. For example, while notice still must be given to most beneficiaries under the probated will, notice is not required if the bequest is $2,000 or less or paid within 60 days of probate. The amendments also provide alternatives to providing a full copy of the will and provide other clarifications. *See* Id.

E. Notice to Certain Charities

If a state, governmental, or charitable organization is named in a will as a devisee, notice to the entity must be given within 60 days after the date the will is admitted to probate. TEX. ESTATES CODE § 308.002. But if the charity cannot be notified, notice must be given to the attorney general. TEX. ESTATES CODE § 308.002(b)(4).

IV. COLLECTION & INVENTORY OF ASSETS

The collection and inventory of assets should be accomplished early in the administration process. To do so, it is necessary understand the character of each asset, the rights of the personal representative to take possession of certain asset, and the process or of collecting various assets. The more commonly encountered issues are addressed below.

A. Collection of Assets

1. Real Estate

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

a. Obtain Exact Legal Descriptions

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

b. Identify Homestead Property

A determination must be made as to whether any real estate represents the homestead of a surviving spouse or surviving minor children. In such an instance, the respective rights and obligations *(i.e.*, taxes, maintenance, utilities, insurance, etc.) of the personal representative and the owner of the homestead right must be carefully considered. The surviving spouse and minor children are entitled to occupy the homestead regardless of whether the homestead is the decedent's separate property or community property of the decedent and the surviving spouse. TEX. ESTATES CODE § 102.002.

c. Obtain Insurance & Pay Taxes

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

d. Review Farm and Ranch Property

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

e. Review Mineral Interests

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

2. Stocks and Bonds

The personal representative should acquire the original stock and bond certificates. With respect to re-registration of the securities, however, a personal

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

a. Re-Registering Securities

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

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

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

b. Establishing Securities Account

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

c. Obtaining CUSIP Numbers

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

d. Partitioning Community Shares

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

3. Cash & Notes

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

a. Establishing Estate Accounts

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

b. Watch FDIC Limits

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

c. Identify Non-Probate Accounts

The personal representative needs to ensure that the accounts actually belong to the decedent and are not joint tenancy with right of survivorship accounts which belong to the surviving joint tenant. The wording of the documents creating the survivorship account is critical and should be carefully reviewed. Section 113.151 sets out the requirements for an account held as joint tenants with rights of survivorship (JTWROS). A JTWROS account must be signed by the party who dies and must contain language substantially similar to the form set out in Section 113.052. If a person claims an account is a JTWROS account, the personal representative should make sure the signature card is in compliance with Section 113.052.

d. Collect Notes

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

e. Partitioning Community Shares

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

4. Insurance

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

Since a will can apportion taxes to non-probate assets such as insurance proceeds, the personal representative and his or her attorney should read the will carefully to determine if insurance is to be used to help satisfy estate taxes. Tax apportionment when a will is silent has always been an issue of debate and confusion. Typically, the will controls the apportionment of taxes but sometimes the will is silent. When the will is silent, Chapter 124 controls. TEX. ESTATES CODE CH. 125 It provides that the personal representative is to charge each "person interested in the estate" a portion of the total estate tax which such portion is to represent a ratio of the value of that person's interest to the total tax value of the estate.

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

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

5. Miscellaneous Assets

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

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

6. Employee Benefits

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

7. Debts

The personal representative should make a list of all of the known obligations of the decedent as soon as possible. It is important to note that debts are not listed on the inventory. If it is determined that the estate is solvent, then an independent executor has the power and authority to pay debts as they come due and are presented. However, if there is any potential for insolvency, then the independent executor should consider holding up paying any debts and instead follow the order of priority for debts of the decedent set forth in Section 355.102 of the Texas Estates Code. Alternatively, the independent executor may wish to try to convert the administration into a dependent administration and therefore take advantage of the protection of the court in this regard. For example, if there is a contingent liability such as a personal injury suit pending against the decedent, a dependent estate would offer more protection in the procedure to obtain judgment.

8. Potential Co-Owners

a. Spouses

If a person dies while married, one of the most important determinations to be made during the administration of the estate is whether the assets are the separate property of the decedent or the community property of the decedent and his or her spouse. There is a presumption that all property acquired by either of the spouses during marriage is community property. *See* TEX. FAM. CODE § 5.02. Separate property consists of property a person owned prior to marriage or property acquired by gift or inheritance. If an asset is community property, it will be owned in equal undivided interests between the estate and the surviving spouse.

Where a qualified personal representative of the estate exists, he or she is empowered to administer all community property which was under the deceased spouse's sole or joint management and control at the date of death. *See* TEX. ESTATES CODE § 453.009(a). *Chanowsky v. Friedman,* 219 S.W.2d 501 (Tex. Civ. App.—Fort Worth 1949, writ ref'd n.r.e.). The representative must, therefore, inventory, bond (if applicable), account, administer, and distribute such community subject to its being withdrawn from the administration. *See* TEX. ESTATES CODE § 360.252 (Partition of Community Property).

As soon as practicable after the probate of the will, the surviving spouse should receive his or her share of the assets. After an inventory has been filed, the surviving spouse may apply to the court for a partition of the community property. TEX. ESTATES CODE § 360.253(a).

And, the representative may eventually have to account to the surviving spouse for post-death income from community properties solely managed and received by the personal representative. TEX. ESTATES CODE CH. 310. Likewise, the personal representative should require an accounting of the surviving spouse as to all community assets held in the name of the surviving spouse and controlled by him or her. As to any such property, the personal representative should receive the decedent's one-half of the assets as soon as possible.

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

b. Tenants In Common

A personal representative of the estate is empowered, where the decedent owned property in common with other persons, to the use and enjoyment of such property for the estate's benefit in the same manner as the other common or joint owners would be entitled. *See* TEX. ESTATES CODE § 351.103; *Gentry v. Marburger*, 596 S.W.2d 201 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

B. Inventory & List of Claims

The inventory and list of claims is a listing of the assets (not debts) of the estate. An example of a form which can be used for preparing the inventory is attached as an Exhibit to this outline.

Unless executor has the option of filing an affidavit in lieu of Inventory, the inventory, is usually due 90 days after the personal representative has qualified. TEX. ESTATES CODE §§ 309.051, 309.052. But even if it is not necessary to file the inventory, an executor must provide a copy to each beneficiary. TEX. ESTATES CODE § 309.056.

1. Probate Assets Only

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

- Real Estate: Surface, Minerals (Royalty, Working Interests, Etc.)
- Tangible Personal Property:

  ⇒ Household Furnishings
  ⇒ Jewelry And Personal Effects
  ⇒ Collections (Art, Guns, Stamps, Coins, Etc.)
  ⇒ Motor Vehicles, Boats, Trailers, Etc.

- Intangible Personal Property:

  ⇒ Securities
  ⇒ Cash
  ⇒ Life Insurance
  ⇒ Annuities
  ⇒ IRAs
  ⇒ Loans, Notes And Receivables
  ⇒ Claims Under Property, Liability Or Other Insurance
  ⇒ Compensation
  ⇒ Unclaimed Money Fund
  ⇒ Escrows, Pledges And Deposits
  ⇒ Distributions:

    - Royalties/Working Interests
    - Partnership Distributions
    - Dividends
    - Past Due Loans, Notes, & Receivables

  ⇒ Tax Refunds Or Rights Of Reimbursement

2. Liabilities Not Listed

An inventory does not list liabilities of the decedent or claims against the estate. It only lists claims which can be asserted by the estate. An example would be a note payable *to* the estate. Thus, a note payable *by* the estate would not be listed on the Inventory.

3. Claims

As part of the inventory, appraisement and list of claims, the personal representative should describe any claims the estate has (contingent or otherwise) against any person. For example, a personal injury or wrongful death suit can be an unliquidated claim of the estate. Claims may include:

- Actions Against Prior Fiduciaries
- Action For Return/Collection Of Property
- Theft
- Invalid Gifts
- Invalid Or Ineffective Non-Probate Assets
- Invalid Foreclosures
- Improper Default Judgments
- Claims based on personal injuries or cause of death
- Claims for Reimbursement
- Jensen Claims
- Claims based on Fraud on the Community Estate

4. Appraised Property

If an appraiser was appointed by the Court, the appraised values should be included on the Inventory.

5. Affidavit of Personal Representative

The inventory must be signed and sworn to by the personal representative with a statement as required by Section 309.053 of the Texas Estates Code.

6. Separate and Community Property

The inventory must specify what portion of the estate is separate property and what portion of the estate is community property. TEX. ESTATES CODE § 309.051(a)(2). Relevant categories include:

- Community:

  ⇒ Sole Management
  ⇒ Joint Management

- Separate

C. Affidavit In Lieu of Inventory

When the decedent died on or after September 1, 2011, an independent executor has the option of filing an affidavit in lieu of filing the inventory of record. This option was adopted to address the privacy concerns of testators. This option is available when the only remaining debts at the applicable time are secured debuts or administration expenses. But, the ability to file the affidavit does not relieve the executor of the obligation to prepare an inventory and provide a copy to estate beneficiaries and, on request, to other "interested persons." *See* TEX. ESTATES CODE § 309.056.

V. DISCLAIMERS

A. Generally

A disclaimer is an unqualified refusal to accept property or an interest in property. TEX. PROP. CODE ANN. §. 240.002(2); I.R.C. §2518(b)(1); Treas. Reg. §25.2518-2(a)(2). Disclaimers are governed by both state and federal law. Even though the state and federal requirements differ in many respects, both sets of requirements must be met to effectuate a valid disclaimer.

Federal law requirements relate primarily to the tax effects of a qualified disclaimer. Under federal law, if a person makes a qualified disclaimer, that

person is treated as if he or she never received an interest in the disclaimed property. I.R.C. Section 2518(a). Conversely, state law requirements relate primarily to the procedural requirements to disclaim property and the resulting property rights in disclaimed property.

B. Applicable Law

1. I.R.C. Section 2518

Internal Revenue Code Section 2518 provides as follows:

> (a) General Rule.—For purposes of this subtitle, if a person makes a qualified disclaimer with respect to any interest in property, this subtitle shall apply with respect to such interest as if the interest had never been transferred to such person.
>
> (b) Qualified Disclaimer Defined—For purposes of subsection (a), the term "qualified disclaimer" means an irrevocable and unqualified refusal by a person to accept an interest in property but only if—
>
> (1) such refusal is in writing,
>
> (2) such writing is received by the transferor of the interest, his legal representative or the holder of the legal title to the property to which the interest relates not later than the date which is 9 months after the later of—
>
> (A) the date on which the transfer creating the interest in such person is made, or
>
> (B) the day on which such person attains age 21,
>
> (3) such person has not accepted the interest or any of its benefits, and
>
> (4) as a result of such refusal, the interest passes without any direction on the part of the person making the disclaimer and passes either—
>
> (A) to the spouse of the decedent, or
>
> (B) to a person other than the person making the disclaimer.
>
> (c) Other Rules—For purposes of subsection (a)—
>
> (1) DISCLAIMER OF UNDIVIDED PORTION OF INTEREST.--A disclaimer with respect to an undivided portion of an interest which meets the requirements of the preceding sentence shall be treated as a qualified disclaimer of such portion of the interest.
>
> (2) POWERS.--A power with respect to property shall be treated as an interest in such property.
>
> (3) CERTAIN TRANSFERS TREATED AS DISCLAIMERS. -- A written transfer of the transferor's entire interest in the property—
>
> (A) which meets requirements similar to the requirements of paragraphs (2) and (3) of subsection (b), and
>
> (B) which is to a person or persons who would have received the property had the transferor made a qualified disclaimer (within the meaning of subsection (b)), shall be treated as a qualified disclaimer.

I.R.C. § 2518.

2. Texas Property Code Chapter 240

Effective September 1, 2015, Chapter 240 of the Texas Property Code replaces former Chapter 122 of the Texas Estates Code and Section 112.010 of the Texas Trust Code. TEX. PROP. CODE ch. 240.

Chapter 240 governs the disclaimer of property. A disclaimer means the refusal to accept an interest in or power over property. TEX. PROP. CODE § 240.002(6); see also §15:37.

Thus, Chapter 240 applies to property passing as a result of:

- inheritance
- will
- community property with right of survivorship agreement
- joint tenancy with right of survivorship agreement
- any right of survivorship agreement
- insurance designation
- annuity
- incentive
- endowment
- employment
- deferred compensation
- pension plans
- profit-sharing plans
- thrift plans
- stock bonus
- retirement plans
- fringe benefit plans
- any other contract, agreement, or interest.

TEX. PROP. CODE ANN. § 240.002(2)(A)-(H).

The term "disclaimant" as now been defined to include:

(A) the person to whom a disclaimed interest or power would have passed had the disclaimer not been made;
(B) the estate to which a disclaimed interest or power would have passed had the disclaimer not been made by the personal representative of the estate; or
(C) the trust into which a disclaimed interest or power would have passed had the disclaimer not been made by the trustee of the trust.

TEX. PROP. CODE ANN. §240.002(3)(A)-(C)

And the term "disclaimed interest" refers to the "interest that would have passed to the disclaimant had the disclaimer not been made." TEX. PROP. CODE ANN. §240.002(4). Chapter 240 also governs property that passes to another person as a result of a disclaimer by the original named beneficiary, heir,

C. Effect Of Qualified And Effective Disclaimers

Under federal law, if a person makes a qualified disclaimer with respect to any interest in property, federal transfer tax provisions "shall apply" with respect to the disclaimed interest, as if the interest had never been transferred to such person. I.R.C. §2518(a)(1).

Additionally, once a disclaimer is made effective under Texas law, it operates to pass the disclaimed property as if the disclaimant predeceased the testator or decedent. *But see infra* for a discussion of interests that cannot be disclaimed.

When the disclaimed property will pass because of an event not related to the death of a decedent and descendants of a disclaimant share in the disclaimed interest by any method of representation under Section 240.051(e)(2)(B), the disclaimed interest will vest only to the descendants of the disclaimant living at the time of the event that causes the interest to pass. TEX. PROP. CODE § 240.0512(a)(1). But, when the disclaimed interest will instead passed to the disclaimant's estate under Section 240.051(e)(2)(B), the disclaimed interest passes by representation to the descendants of the disclaimant living at the time of the event that causes the interest to pass. TEX. PROP. CODE § 240.0512(a)(2).

When the disclaimant has no living descendant at the time of the triggering event, the disclaimed interest passes to those persons, including the state but excluding the disclaimant, "in such shares as would succeed to the transferor's intestate estate under the intestate succession law of the transferor's domicile had the transferor died immediately before the event described by" Section 240.512(a)(1). But, when a transferor's living surviving spouse has not remarried prior to before the event, the transferor is considered to have died unmarried immediately before the event. TEX. PROP. CODE § 240.0512(b).

Finally, upon the disclaimer of a prior interest, any future interest held by a "person other than the disclaimant takes effect as if the disclaimant had died immediately before the time the disclaimer takes effect under Section 240.051(c)(1)(A) but a future interest held by the disclaimant is not accelerated in possession or enjoyment." TEX. PROP. CODE § 240.0512(c).

A disclaimer by a person who is the appointee pursuant to the exercise of a power of appointment takes effect as of the date the instrument, in which the holder of the power of appointment exercises the power, becomes irrevocable. TEX. PROP. CODE § 240.055(a). And, a disclaimer of an interest in property by an object or taker in default of an exercise of a power of appointment takes effect as of the time the instrument creating the power becomes irrevocable. TEX. PROP. CODE § 240.055(b)

D. Barred or Limited Disclaimers

The Texas Uniform Disclaimer of Property Interests Act identifies certain situations when a disclaimer is barred or limited. They include:

- A disclaimer barred by a written waiver of the right to disclaim. *See* Tex. Prop. Code § 240.151(a).
- The disclaimant accepts the interest. *See* TEX. PROP. CODE § 240.151(b).
- The disclaimant voluntarily assigns, conveys, encumbers, pledges, or transfers the interest sought to be disclaimed or contracts to do so. *See* TEX. PROP. CODE § 240.151(b)
- The proposed disclaimed interest is sold under a judicial sale. *SEE* TEX. PROP. CODE § 240.151(b).
- A disclaimer by a child support obligor to the extent disclaimed property that could be applied to satisfy the disclaimant' s child support obligations when:

  (1) administratively determined by the Title IV-D agency as defined by Section 101.033, Family Code, in a Title IV-D case as defined by Section 101.034, Family Code; or
  (2) confirmed and reduced to judgment as provided by Section 157.263, Family Code.

See TEX. PROP. CODE § 240.151(g).

E. Purpose

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

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

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

F. Full and Partial Disclaimers

A disclaimer is not an all or nothing proposition. A beneficiary may disclaim all or a portion of a transfer by virtue of disclaiming only a certain described portion, specific dollar amount, fraction, or some formula amount of the transfer.

As might be expected, a full disclaimer creates the fewest potential pitfalls or issues. Essentially, when a beneficiary is in the position to disclaim all property being transferred, the primary concern is compliance with the federal and state law requirements to create an effective and qualified disclaimer. While a full disclaimer of specifically transferred assets is often used for tax-planning purposes, a full disclaimer is more often seen when the primary purpose of the disclaimer is the avoidance of the beneficiary's creditors.

As to partial disclaimers, under federal law a qualified partial disclaimer can only be made as to an "undivided portion of interest" in property. I.R.C. § 2518(c)(1). This will be satisfied only if the disclaimed interest relates to "severable property." Treas. Reg. § 25.2518-3(a)(1)(ii). Contrast the federal requirement to the state law right of a beneficiary to disclaim property "in whole or in part," including but not limited to (1) specific powers of invasion, (2) powers of appointment, and (3) fee estates in favor of life estates. TEX. ESTATES CODE § 122151. As a result of the more limiting language of the federal statute, the disclaimer of partial rights to an interest in property while retaining other rights to an interest in property, may qualify as an effective state law disclaimer but is not a qualified disclaimer of an "undivided portion of interest" in property under federal law. Treas. Reg. § 25.2518-3(b).

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

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

amount). Treas. Reg. § 25.2518-3(d), Example (20).

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

- A disclaimant devised shares of stock in corporation A disclaims the income interest in the stock but retains a remainder interest in the same shares. Disclaimer is not to an undivided portion of an interest. Treas. Reg. § 25.2518-3(d), Example (2).
- A disclaimant disclaims a power of appointment but retains a right to direct beneficial enjoyment that is not limited by an ascertainable standard. A power of appointment is treated as a separate interest in property and may be disclaimed independently from any other interest in the property, however, any other right to direct beneficial enjoyment must be limited by an ascertainable standard. Treas. Reg. §§ 25.2518-3(a)(1)(iii), 25.2518-3(d), Example (9).
- A disclaimant disclaims the income interest of shares of stock transferred in trust but the shares remain in the trust. Disclaimer is not qualified because shares remained in the trust. Treas. Reg. § 25.2518-3(d), Example (5).

G. Common Use of Disclaimers

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

- Disclaimer of formula amount to fully utilize the decedent's applicable credit amount. When a will leaves all assets to a surviving spouse, the spouse may disclaim a formula amount to result in the smallest amount of assets qualifying for the marital deduction passing to spouse and the disclaimed assets passing to children or other non-spouse beneficiaries.
- Disclaimer of non-probate assets to fully fund bypass trust. Often, the failure to coordinate beneficiary designations with the estate plan may result in an underfunded bypass trust. By disclaiming non-probate assets, for example life insurance proceeds, that will then be payable to the decedent's estate, sufficient assets may be made available to fully fund a bypass trust. Note, due to the spousal exception of Section 2518, it may be possible to disclaim into a bypass trust of which the spouse is a potential beneficiary and/or trustee.
- Disclaimer of children's right to discretionary principal from a trust that would otherwise qualify for QTIP treatment. If a trust that provides for mandatory income distributions to the surviving spouse but also permits discretionary +principal distributions to children which prevents QTIP treatment (and qualification for the unlimited marital deduction), having the children disclaim their rights to principal distributions may allow the personal representativeto elect QTIP treatment.
- Disclaimer of spouse and all beneficiaries to allow interests to pass to spouse by intestacy rather than into a trust that does not qualify for QTIP treatment. If a testamentary marital trust does not provide for the mandatory income interest necessary to qualify for QTIP treatment, successfully having the spouse and all other beneficiaries to disclaim may allow assets to pass to the spouse by intestate succession and qualify for the unlimited marital deduction.
- Disclaimer of child beneficiaries to create direct skips. A child may disclaim assets to create direct skips to grandchildren in order to utilize the decedent's available generation-skipping tax exemption. This is particularly advantageous when children have substantial wealth in their own right, and the stacking of additional assets into their estates will only increase the estate tax burden at their deaths.

VI. CREDITORS AND CLAIMS

A. Notice

The representative must furnish all creditors with notice of his or her appointment and qualification and advise them that their claims should be filed against the estate. *See* TEX. ESTATES CODE CH. 308.

1. Publication Notice

All general creditors of an estate must be provided notice by publication within one month after issuance of letters of appointment. Publication notice is to be in any newspaper located in the county where such letters have been issued, or where no newspaper exists, then by posting. A copy of the publisher's affidavit with the published notice must be filed with the clerk. *See* TEX. ESTATES CODE § 308.

2. Mail Notice

With one month of the estate representative's appointment, they must give notice to the comptroller of public accounts when the decedent remitted or should have remitted taxes administered by such agency. *See* TEX. ESTATES CODE § 308.051(a)(2).

Within two months after appointment, all known secured creditors must also receive notice of the estate representative's appointment. *See* TEX. ESTATES CODE § 2308.053. Secured creditors may arise from:

- Mortgages
- Auto Loans
- Pledges
- Mortgage/Home Equity Loans

These notices must be sent by certified or registered mail. *See* TEX. ESTATES CODE §§ 308.053(c).

And, a copy of the notice to lien creditors and the return receipt are to be filed with the clerk. *See* TEX. ESTATES CODE § 308.053(d).

Where the representative fails to notify creditors both he or she and their sureties are liable for any damage suffered by such creditor unless notice was obtained by other means. *See* TEX. ESTATES CODE § 308.056; *Tiboldi v. Palms,* 78 S.W. 726 (Tex. Civ. App. 1904), *aff'd,* 97 Tex. 414, 79 S.W. 23.

3. Permissive Notice

Any time before an administration is closed the personal representative may give notice to an unsecured creditor having a claim against the estate stating that the creditor must present the claim within four (4) months after the date of receipt or the claim is barred if not already barred by the general statutes of limitation. TEX. ESTATES CODE § 308.054. Unsecured creditors may be based on:

- Liquidated Claims
- Unliquidated Claims
- Taxes
- Promissory notes and other Loans
- Credit cards
- Tuition agreements
- Pledges
- Loans
- Employee claims
- Agreements Incident To Divorce
- Prior Divorces

    ⇒ Alimony
    ⇒ Child Support
    ⇒ Adult Disable Child

B. Presenting Claims

The claims procedures applicable to independent proceedings are generally set out in Texas Estates Code Chapter 403. The claims procedures applicable to dependent proceedings are set out in Texas Estates Code Chapter 355..

It is imperative that strict adherence to the statutory requirements for presentment of a claim be accomplished in order to obtain classification and payment either by approval or through suit. *See* TEX. ESTATES CODE CH. 355 (applicable to dependent administrations); TEX. ESTATES CODE CH. 403 (applicable to independent administrations).

1. Claim Form

Texas Estates Code Section 355.004 establishes the specific requirements for the affidavit needed to authenticate a claim.

2. Deposit of Claim

The claim may be deposited either with the representative or with the clerk. *See* TEX. ESTATES CODE §§ 355.001-.002, 403.056.

C. Approval and Rejection of Claims

1. The Representative's Action

Whether the claim is presented to a dependent representative or filed with the clerk, the representative should approve or reject the claim within thirty days or it will be rejected by operation of law. *See Cobb v. Norwood,* 11 Tex. 556 (1854); *Graham v. Vining,* 1 Tex. 639 (1846). There is no specific action required by an independent personal representative. *See* TEX. ESTATES CODE § 403.058. But because the Estate Code does not expressly confirm Section 355.052 does not apply to independent personal representatives, it is preferable to act on a claim, even if to simply reject it, within 30 days. *See* TEX. ESTATES CODE § 355.052.

In order to approve the claim, the representative must satisfy himself or herself as to its legality and validity. *See Green Machinery Co. v. Smithee*, 474 S.W.2d 279 (Tex. Civ. App.—Amarillo 1971, no writ). Note that a claim that is later established after it is rejected by operation of law after the passage of thirty days could result in the representative paying the costs individually. See TEX. ESTATES CODE § 355.052.

2. The Court's Action

After the personal representative allows or disallows the claim, in whole or in part, the court either approves, in whole or in part, or rejects the claim and also classifies the claim. TEX. ESTATES CODE 355.055. The court, however, cannot disapprove a claim which has been rejected—it has the right to hear only approved claims and any order rejecting a claim which the administrator has not approved is a nullity. *Small v. Small*, 434 S.W.2d 940, 942 (Tex. Civ. App.—Waco 1968, writ ref'd n.r.e.). Nor can the court approve a claim which was not presented to the

administrator. *Butler v. Summers*, 253 S.W.2d 418 (Tex. 1952).

3. Suit on Rejected Claim In Dependent Proceeding Must be Filed Within 90 Days of Rejection

Counsel representing a creditor should check with the clerk's office to ascertain whether a claim has been accepted or rejected. There is no provision in the Code for notification requirements to a creditor. "The statutes contemplate that a creditor will keep himself informed as to the status of his claim and take the steps required by law to reduce the same to judgment." *Russell v. Dobbs*, 354 S.W.2d 373, 376 (Tex. 1962).

In a dependent administration, if a creditor does not file suit on a rejected claim within 90 days of rejection, the suit is barred. TEX. ESTATES CODE § 355.064. The 90-day requirement was not suspended where the lawyer for the administratrix led the claimant to believe that the claim would be accepted. *Id*. In *State v. Estate of Brown*, 802 S.W.2d 898 (Tex. App.—San Antonio 1991, no writ), the State Comptroller submitted a claim for sales and use taxes in excess of $400,000. The administratrix rejected the claim. The Comptroller then filed state tax liens and the administratrix filed a motion to release the tax liens on the basis that the liens were barred by limitations inasmuch as the Comptroller failed to file suit within the 90 day period. The estate was not liable and the liens were ordered released. *Id*. at 899.

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

a. Improperly Presented Claims

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

But, defects of form of the claim or insufficiency of exhibits are deemed waived unless the personal representative objects in writing and files the objection with the clerk within 30 days after the claim has been presented. TEX. ESTATES CODE § 355.007. *City of Houston v. Aguilar*, 607 S.W.2d 310 (Tex. Civ. App.—Austin 1980, no writ).

b. Suits on Partially Rejected Claims

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

D. Claims of the Personal Representative

1. Personal Representative's Own Claims: 6 Months

The personal representative of a decedent's estate shall file his own verified claim with the court granting letters within six months after the representative has qualified or the claim is barred. TEX. ESTATES CODE § 355.201. It is not necessary for the personal representative to first present the claim to himself. For a personal representative to present a claim to himself would place "the personal representative. . . in the peculiar position of being required to file written objections to his own claim. . . ." *Anderson v. Oden*, 780 S.W.2d 463, 466 (Tex. App.—Texarkana 1989, no writ). The purpose of Section 355.201 is to prevent a personal representative from deciding on the propriety of his own claims against the estate and the representative's contracts made on behalf of the estate. This avoids conflicts of interest. *See, Ullrich v. Estate of Anderson*, 740 S.W.2d 481, 483 (Tex. App.—Houston [1st Dist.] 1987, no writ). If the claim is filed within the required time, it is entered on the court's claims docket and acted upon in the same manner as other claims. TEX. ESTATES CODE § 355.201(c).

2. Claims Procedure Inapplicable to Independent Administrators

In all likelihood, Section 355.201 does not apply to independent executors although the statute refers to "personal representative," which, Section 22.031 defines to include independent executors. TEX. ESTATES CODE § 22.031. Prior to the 1995 amendments, these sections referred to the claims of executors or administrators rather than personal representatives. *See also, Deane v. Driscoll*, 56 S.W. 503 (Tex. Civ. App.—San Antonio 1933, writ dism'd); and *Kitchens v. Culhane*, 398 S.W.2d 165, 166 (Tex. Civ. App.—San Antonio 1965, writ ref'd n.r.e.) (Section 317 inapplicable to independent administration).

3. Child Support Claims

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

E. Claims of Secured Creditors

As discussed supra, creditors having claims for money secured by real or personal property must be given notice by the personal representative within two months after the personal representative receives letters. TEX. ESTATES CODE § 308.053. This provision applies to independent executors. TEX. ESTATES CODE § 403.051.

If the personal representative later learns of the existence of other secured creditors, the personal representative must give notice to them within a reasonable time after learning of their existence. *Id*. The personal representative and the surety are liable for damages that result from a personal representative's failure to give notice provided that the creditor did not otherwise have notice. TEX. ESTATES CODE § 308.056.

In presenting its claim, the secured creditor needs to elect whether to have the claim treated as a matured secured claim to be paid in the due course of administration or as a preferred debt and lien against the specific property securing the debt to be paid in accordance with the terms of the contract. TEX. ESTATES CODE § 355.151.

If the secured creditor does not present its claim within four months of its receipt of notice required under Section 355.151 or six months after letters were granted, whichever occurs *later*, he will be deemed to have elected preferred debt and lien status. If no election is made, the claim will be treated as a preferred debt and lien. TEX. ESTATES CODE § 355.125(b). As a preferred debt and lien creditor, the creditor may look only to the collateral for payment of the claim. *Cessna Finance Corp. v. Morrison*, 667 S.W.2d 580, 586 (Tex. App.—Houston [1st Dist.] 1984, no writ). If the collateral declines in value or is insufficient to pay the debt, the creditor is out of luck and cannot recover any deficiency as an unsecured creditor.

The court must approve or disapprove and classify any claim approved by the representative that has been on file for ten days. TEX. ESTATES CODE § 355.055. If the court is satisfied that the claim is valid and just, it will be approved and classified, otherwise additional evidence must be presented in order to obtain approval. *See* TEX. ESTATES CODE § 355.056. Disapproval by the court is final and appealable but does not bar another claim on the same account. *See Furniture Dynamics, Inc. v. State of Hurley*, 560 S.W.2d 486 (Tex. Civ. App.—Dallas 1977, no writ).

F. Classification and Payment

1. Classification of Claims

All claims approved by the court are classed pursuant to Texas Estates Code Section 355.102 in the following order:

- Class 1: Funeral and last illness expenses not to exceed $15,000. Any excess is classified as an unsecured claim. TEX. ESTATES CODE § 355.102(b).
- Class 2: Administration expenses. TEX. ESTATES CODE § 355.102(c).
- Class 3: Claims secured by a mortgage or other lien against specific property, including tax liens; Second mortgages. TEX. ESTATES CODE § 355.102(d).
- Class 4: Claims for delinquent and unpaid child support and accrued interest. TEX. ESTATES CODE § 355.102(e).
- Class 5: Claims for taxes, penalties, and interest due the State of Texas. TEX. ESTATES CODE § 355.102(f).
- Class 6: Claims for Texas Department of Corrections confinement. TEX. ESTATES CODE § 355.102(g).
- Class 7: Claims for state medical assistance payments. TEX. ESTATES CODE § 355.102(h).
- Class 8: All other claims. TEX. ESTATES CODE § 355.102(i).

2. Payment of Claims

The specific order for payment of claims by the representative and the method to obtain payment is governed by various sections of the Estates Code. *See discussion supra*. An independent personal representative generally can pay claims when a good faith determination can be made as to all the claims in such class or classes with priority. A dependent personal representative may pay the claims, in order of priority, pursuant to Sections 355.106 or Sections 355.107. TEX. ESTATES CODE §§ 355.106 (application by personal representative, 355.107 application by creditor).

VII. HOMESTEAD, EXEMPT PROPERTY AND ALLOWANCES

A. Homestead

A rural homestead consists of 200 acres of land for a married decedent or 100 for a single decedent, while an urban homestead consists of a lot or lots not exceeding ten acres. *See* TEX. CONST. ART. 16, § 51; TEX. PROP. CODE § 41.001. As recently amended,

Section 41.001 of the Texas Property Code provides that "[i]f used for the purposes of an urban home or as both an urban home and a place to exercise a calling or business, the homestead of a family or a single, adult person, not otherwise entitled to a homestead, shall consist of not more than 10 acres of land which may be in one or more contiguous lots, together with any improvements thereon." TEX. PROP. CODE § 41.001(a). A homestead is considered to be "urban" if, at the time the designation is made, the property is:

- Located within the limits of a municipality or its extraterritorial jurisdiction or a platted subdivision; and
- Served by police protection, paid or volunteer fire protection, and at least three of the following services provided by a municipality or under contract to a municipality:

    - electric;
    - natural gas;
    - sewer;
    - storm sewer; and
    - water.

TEX. PROP. CODE § 41.001(c).

1. Availability

A homestead exemption, regardless of whether the property is separate or community, may only be claimed when the decedent is survived by a spouse, minor children or adult unmarried children remaining with the family. *See* TEX. ESTATES CODE §§ 102.002, 353.051; *Givens v. Hudson*, 64 Tex. 471 (1885); *Zwerneznann v. Von Rosenburg*, 76 Tex. 522, 13 S.W. 485 (1890); *Childers v. Henderson*, 76 Tex. 664, 13 S.W. 481 (1890); *Jenkins v. Hutchens*, 287 S.W.2d 295 (Tex. Civ. App.—Eastland 1956, writ ref'd n.r.e.).

2. Passage of Title

Title to a homestead vests in the heirs of the decedent as other real property under the laws of descent and distribution upon death with a surviving spouse. *See* TEX. ESTATES CODE § 102.003. Thus, the homestead cannot be construed as an estate asset subject to the control of the representative or court nor is any income derived therefrom. *Childers v. Henderson*, 76 Tex. 664, 13 S.W. 481 (1890); *Franklin v. Woods*, 598 S.W.2d 946 (Tex. Civ. App.—Corpus Christi 1980, no writ); *Thompson v. Thompson*, 149 Tex. 632, 236 S.W.2d 779 (1951).

3. Right of Use and Equipment

The homestead may not be partitioned until all superior rights of occupancy have been terminated. *See* TEX. CONST. ART. 16, § 52.

a. Surviving Spouse

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

b. Children

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

The right of a minor child to the homestead when both spouses die exists only through a guardian and is subject to the discretion of the court. *See Hall v. Fields*, 81 Tex. 553, 17 S.W. 82 (1891); *Wiener v. Zwieb*, 105 Tex. 262, 141 S.W. 771 (1911), *reh. den.*, 105 Tex. 281, 147 S.W. 867 (1912); *See also* TEX. ESTATES CODE § 102.006.

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

4. Creditors' Rights

A general creditor of the decedent cannot require a sale of the homestead or exempt property where there are survivors entitled to these exemptions. Such property may only be reached by purchase money creditors or for taxes. *See* TEX. ESTATES CODE § 102.004; TEX. PROP. CODE § 41.002; *Zwerne-Mann v. Von Rosenberg*, 76 Tex. 522, 13 S.W. 485 (1890);

Butler v. Summers, 151 Tex. 618, 253 S.W.2d 418 (Tea 1952); *Franklin v. Woods,* 598 S.W.2d 946 (Tex. Civ. App.—Corpus Christi 1980, no writ).

5. Delivery

Immediately after the inventory has been approved or the affidavit in lieu is filed, the court shall set aside the homestead. TEX. ESTATES CODE § 353.051. The delivery of the homestead is to be made to the surviving spouse, if there is one, or to the guardian of the minor children. TEX. ESTATES CODE §§ 353.051, 353.052.

B. Exempt Property

The surviving spouse, minor and unmarried children are also entitled to have exempt personal property set aside for their use during administration. *See* TEX. ESTATES CODE §§ 353.051, 353.052; TEX. CONST. ART. 16, § 49; TEX. PROP. CODE §§ 42.001, 42.002.

1. Solvent Estates

In a solvent estate, exempt property may be used by persons entitled thereto during the administration. Such right of use terminates when the estate is closed, and the property will then be distributed to the heirs or devisees of the decedent. *See* TEX. ESTATES CODE § 353.152; *Kelley v. Shields,* 448 S.W.2d 135 (Tex. Civ. App.—San Antonio 1969, writ ref'd n.r.e.).

2. Insolvent Estates

In an insolvent estate, title to the exempt personal property passes to the spouse and children free of all debts except those debts secured by existing liens or claims for funeral and last illness expenses presented within sixty days of the issuance of letters of administration or the filing of an affidavit in lieu of inventor. *See* TEX. ESTATES CODE §§ 353.151 - .153, 353.155; *American Bonding Co. of Baltimore v. Logan,* 106 Tex. 306, 166 S.W. 1132 (1914) (Certified Questions Answered).

C. Exempt Property Allowance

When the decedent's estate does not contain a homestead or exempt personal property, the surviving spouse and children may apply to the court for an allowance in lieu thereof. An allowance of up to $45,000 for the homestead and $30,000 for other exempt property is permitted. *See* TEX. ESTATES CODE §§ 353.053; *In re: Mays' Estate,* 43 S.W.2d 306 (Tex. Civ. App.—Beaumont 1931, writ ref'd). Such allowance may be satisfied in money, property, or both, and if no other property is available, many include property bequeathed to another. *See* TEX. ESTATES CODE § 353.055. Property of the estate may be sold by court order to obtain funds necessary for the payment of such allowance. *See* TEX. ESTATES CODE § 353.056.

D. Family Allowance

Immediately upon approval of the inventory or after the filing of the affidavit, the court shall fix a family allowance for support of the surviving spouse and minor children. Such allowance shall be sufficient for their maintenance for one year from the date of death. *See* TEX. ESTATES CODE §§ 353.101 et seq. No allowance can be made where the spouse or minor children possess sufficient property of their own from which they are able to provide for their own maintenance. *See* TEX. ESTATES CODE § 353.101(d); *Pace v. Eoff,* 48 S.W.2d 956 (Tex. Comm'n App. 1932, holding approved); *Kennedy v. Draper,* 575 S.W.2d 627 (Tex. Civ. App.—Waco 1978, no writ); *Noble v. Noble,* 636 S.W.2d 551 (Tex. Civ. App.—San Antonio 1982 writ ref'd n.r.e.). This allowance, when proper, is a matter of right and is in preference to all but Class 1 Claims. *See* TEX. ESTATES CODE § 353.104; *Chefflet v. Willis,* 74 Tex. 245, 11 S.W. 1105 (1889); *Stutts v. Stovall,* 544 S.W.2d 938 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.). A family allowance can consist of either money, property, or both, and the court may order a sale of assets to raise such allowance including the sale of property specifically bequeathed where no other assets exist. *See* TEX. ESTATES CODE §§ 353.105, - .106.

VIII. SALES

A. Nature and Purpose

Generally, estate property should be sold when necessary to pay expenses of administration, funeral expenses, expenses of last illness, allowances, and claims or it is in the best interest of the estate to do so prior to distribution. Such property may include:

- All perishable, wasting or deteriorating assets, or those assets that will constitute an expense or disadvantage to the estate. *See* TEX. ESTATES CODE § 356.051.
- Personal property, including crops and livestock, needed to pay administration expenses, funeral expenses, last illness expenses, allowances, or claims. But exempt property or property subject to specific legacies may not be sold. Tex. Estates Code § 356.101(b).
- Real property needed to pay expenses of administration, funeral, last illness, allowances, and claims. TEX. ESTATES CODE § 356.101.

- Easements and rights of way may be sold to pay charges or claims against the estate. TEX. ESTATES CODE § 356.501.
- All property which cannot be partitioned among the heirs or paid in cash to the estate may be sold.

Note, however, consideration should be given to the uniqueness of the property, the desire of the beneficiaries and also the abatement provisions if applicable.

B. Sales By Independent Representatives

An independent personal representative may generally sell real property, hire out personal property, and borrow funds without court authority provided these actions are expressly authorized under the terms of will or an agreement of the beneficiaries under Chapter 401. *See* TEX. ESTATES CODE CH. 401.

When they are not authorized in the will, these actions may be taken by an independent personal representative when necessary to pay expenses of administration, funeral expenses, expenses of last illness, allowances, and claims. *See* TEX. ESTATES CODE § 403.052. In this situation, the independent personal representative may be asked to provide an affidavit confirming the need for the sale as it provides statutory protections for an independent purchaser. *See* TEX. ESTATES CODE § 402.053(a)(3)(not applicable to independent administrators).

C. Sales By Dependent Representatives

Dependent representatives and others who do not fall within the categories set forth in 403.052 generally require court approval to sell estate property.

1. Application

When court approval is required, the first step in selling property is filing an application with the court to obtain generally authority to sell the estate property. But note when a representative neglects to apply for the sale of estate assets to pay charges or claims against the estate, then any interested person or a secured creditor may apply for a sale of estate assets. *See* TEX. ESTATES CODE § 356.252.

An application to sell property whether real or personal must conform to the Estates Code requirements for the sale of real property. TEX. ESTATES CODE § 356.252. Specifically, it must be in writing, sufficiently describe the property or interest to be sold, contain a sworn detail statement of the present condition of the estate, and provide facts that show a necessity or advisability for the sale. *See* Id.; *Gillenwaters v. Scott,* 62 Tex. 670 (1884).

And, citation must be issued upon filing of the application and served by posting. TEX. ESTATES CODE § 356.253. Applications by creditors require citation on the personal representative. TEX. ESTATES CODE § 356.201. Lack of citation does not make the sale void but it can be voided upon a direct attack. *See George v. Watson,* 19 Tex. 354 (1857); *Heath v. Layne,* 62 Tex. 686 (1884).

The court may approve the sale without a hearing if the application is not opposed. TEX. ESTATES CODE §§ 356.253-.256. If opposed, a hearing may be required and evidence present to support the need to sell the property. TEX. ESTATES CODE § 356.255.

The order of sale is evidence of the court's finding that it was necessary, advisable, or advantageous to dispose of the property. Such order empowers the representative to make the sale on such terms and conditions as it may specify. *See* TEX. ESTATES CODE § 356.256. The order will contain the following:

- A description of the property or interest in sufficient detail that it may be identified;
- The manner of the sale (public or private);
- The necessity, advisability, and purpose for the sale;
- Any additional bond requirements when real property is sold;
- Provisions stating that the sale may be made and that a report thereof will be returned according to law; and
- Specification of all terms of the sale such as cash or credit.

TEX. ESTATES CODE § 356.256.

2. Report of Sale

When court approval is required, once a deal is negotiated the representative must file a report of sale within thirty days after the sale. *See* TEX. ESTATES CODE § 356.551. The report must show the following:

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

See TEX. ESTATES CODE § 356.551.

Before a sale may be confirmed, the court must review the report of sale and determine the adequacy of the representative's bond, the fairness of the sales price, and whether the sale conforms to law. Only then may the court enter a decree which shows

conformity with the Estates Code requirements and authorize the representative to make a conveyance of the property. *See* TEX. ESTATES CODE §§ 356.554-.556.

The court's order confirming the sale immediately vests title in the purchaser for sales of personal property. TEX. ESTATES CODE § 356.557. And, the order for sales of real property authorizes the representative to execute proper deeds which convey the estate's interest in the property. *See* TEX. ESTATES CODE §§ 356.557-.558. A court has no power to confirm a sale where there was no prior order authorizing the sale. *See Ball v. Collins*, 5 S.W. 622 (Tex. 1887).

Note that a report of sale must remain on file for five days before it may be approved by the court. *See* TEX. ESTATES CODE § 356.552. So it is important to plan for than in any sales contracts.

D. Considerations When Negotiating the Sale

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

1. Listing Agreements

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

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

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

It has been argued that a purchaser of real property can sue the seller under Texas' Deceptive Trade Practices Act for engaging in false, misleading, or deceptive acts related to the sale. *See Fernandez v. Schultz*, 15 S.W.3d 648 (Tex. App.—Dallas 2000, no pet. history) (citing TEX. BUS. & COM. CODE § 17.50(a)(1). Claims are often made based on undisclosed conditions affecting the value of the property. The elements of a DTPA action for failure to disclose material information and misrepresentations are: (1) the plaintiff is a consumer; (2) the defendant engaged in false, misleading, or deceptive acts; and (3) these acts constituted a producing cause of the consumer's damages. *See Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 478 (Tex. 1995); *see also* TEX. BUS. & COM. CODE § 17.50(a)(1). Proof of the producing cause of the plaintiff's injury is essential for a recovery under the DTPA. Tex. Bus. And Com. Code § 17.50(a)(1). Producing cause is actual causation in fact. *Prudential Insurance Company of America v. Jefferson Associates, Ltd.*, 896 S.W.2d 156, 161 (Tex. 1995). To show actual causation in fact requires proof that an act or omission was a substantial factor in bringing about the injury which would not have otherwise occurred. *McClure v. Allied Stores of Texas, Inc.*, 608 S.W.2d 901, 903 (Tex. 1980). Therefore, a buyer will be entitled to recover only if there is some evidence to support each element of the cause of action.

Making appropriate disclosures and avoiding misrepresentations can be problematic when property is sold by a personal representative due to the fact that he or she may have limited knowledge of the property but the buyer assumes that the personal representative has knowledge of the property's condition and defects. Misunderstandings and miscommunication have led to personal representatives being sued for DTPA and having to defend against such actions. To avoid DTPA, the personal representative can take a few simple steps to reduce potential claims.

First, a personal representative should consider declining to execute a property disclosure statement generally required by sellers. Tex. Property Code Section 5.008(e) provides that the standard disclosure notice requirements do not apply to a transfer of property "by a fiduciary in the course of the

administration of *a decedent's estate*, guardianship, conservatorship, or trust." TEX. PROP. CODE § 5.008.

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

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

3. Earnest Money Contract

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

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

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

4. Addressing Environmental Issues

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

Although a discussion of all the potential environmental concerns is beyond the scope of this outline, personal representatives should attempt to make a preliminary determination whether the decedent's estate may be responsible for any environmental damage. Furthermore, if the personal representative intends to take an active role in the decedent's business, either as a shareholder, officer, or director, the personal representative may be subjecting himself to personal liability for such actions. Generally, individuals who take an active role in a business can be responsible for environmental damage caused in the operation of such business. The courts generally look to all decision makers when assessing monetary responsibility, in whole or in part, for the decision which resolved in the environmental contamination.

E. Leases By Independent Representatives

An independent personal representative may generally lease property without court authority. But

care should be taken to limit terms to the extent necessary and in the best interest of the beneficiaries and the estate. *See* TEX. ESTATES CODE CH. 401.

F. Leases By Dependent Representatives

A dependent representative may, subject to the court's control is most instances, enter into leases of real property for the purpose of exploring, developing, and producing oil, gas, metals and other minerals either at public or private sale. *See* TEX. ESTATES CODE chs. 357-358. If the lease is for one year or less, the representative may do so without prior court approval. TEX. ESTATES CODE § 357.001. But the representative must file a sworn report for any leased property which exceeds $3,000. *See* TEX. ESTATES CODE § 357.051. The process applicable to a dependent representative for a lease of more than a year is described below.

IX. LITIGATION

A. Probate Jurisdiction and Venue

1. Generally

Most Texas courts were constitutionally created. Tex. Const. art. V, Sec. 1. The Texas Constitution also grants the legislature authority to establish other courts, the "statutory courts." TEX. ESTATES CODE CH. 32.

2. Constitutional County Court

In 1985, Article V, Section 16 of the Texas Constitution was amended to provide that "[t]he County Court has jurisdiction as provided by law." Thus, the legislature has the authority to expand or diminish the court's powers. Section 26 of the Government Code as well as other statutory and code provisions determine jurisdiction with regard to specific matters. Section 32.002 provides the constitutional county court with jurisdiction in probate matters, and in those counties with constitutional county courts at law, all matters regarding probate and estate administration are first heard in these courts. TEX. ESTATES CODE § 32.002.

a. Uncontested Matters.

Uncontested matters are heard in the constitutional county court. Section 32.002 sets out those matters which shall be heard in the constitutional county court. The matters pertaining to probate are defined to include the probate of wills, grant of letters testamentary and of administration, settlement of accounts of personal representatives, and transaction of business relating to estate administration, settlement, partition, and distribution. TEX. ESTATES CODE § 31.001.

b. Contested Matters

If a dispute arises in a matter filed in the constitutional county court, the judge may on his own motion and shall on the motion of any interested party transfer the proceeding to the county court at law, statutory probate court, or district court. TEX. ESTATES CODE § 32.003. The court to which the matter is transferred then hears the matter as if it was originally filed in that court. *Id.* Presumably, if no motion to transfer is filed in a contested matter, the constitutional county court hears the matter.

3. County Court at Law

Probate matters may be filed in the county court at law if the legislature has granted the statutory county court at law authority to hear such matters. *See* TEX. GOV'T. CODE § 25.0003(d); TEX. ESTATES CODE § 32.004. In counties with county courts at law exercising probate jurisdiction, the county court at law may hear contested matters. *See* Id. If the case should have been heard in a county court at law, and it was heard in a district court, the judgment of the district court is void as a matter of law. *See Miller v. Woods*, 872 S.W.2d 343, 346 (Tex. App.—Beaumont 1994, no writ).

4. District Court

The Texas Constitution provides the District Court with jurisdiction over all cases except where original jurisdiction is conferred by the Constitution or other law upon some other court. TEX. CONST. ART. V, § 8. There is no general grant of probate jurisdiction to district courts. *See Miller v. Woods* at 345.

District courts, however, have concurrent jurisdiction over executors and administrators. TEX. ESTATES CODE § 32.007.

5. Statutory Probate Court

In a county with a statutory probate court, the "statutory probate court is the only court created by statute with probate jurisdiction." TEX. GOV'T. CODE § 25.0003(e) (emphasis added). Thus, in counties with a statutory probate court, county courts at law have no probate jurisdiction. Statutory probate courts share original jurisdiction over probate proceedings with the constitutional county court to the exclusion of the district court. *See Bailey v. Cherokee County Appraisal District*, 862 S.W.2d 581, 585 (Tex. 1993); TEX. ESTATES CODE § 32.005. Statutory probate courts also have original jurisdiction over actions against a trustee, agent or former agent under a power of attorney, to determine the validity of a power of attorney or an agents powers, and actions involving trusts. TEX. ESTATES CODE § 32.007.

B. Concurrent Jurisdiction Statutory Probate Courts and District Courts

A statutory probate court has concurrent jurisdiction with the district court with regard to:

(1) a personal injury, survival, or wrongful death action by or against a person in the person's capacity as a personal representative;
(2) an action by or against a trustee;
(3) an action involving an inter vivos trust, testamentary trust, or charitable trust;
(4) an action involving a personal representative of an estate in which each other party aligned with the personal representative is not an interested person in that estate;
(5) an action against an agent or former agent under a power of attorney arising out of the agent's performance of the duties of an agent; and
(6) an action to determine the validity of a power of attorney or to determine an agent's rights, powers, or duties under a power of attorney.

TEX. ESTATES CODE § 32.007.

Furthermore, a statutory probate court has exclusive jurisdiction of all applications, petitions, and motions regarding probate or administrations. *See* TEX. ESTATES CODE § 32.005(a).

1. Matters Related to Probate Proceeding

All courts with original probate jurisdiction may hear all matters "matters related to probate proceeding." TEX. ESTATES CODE § 32.001(a). For all courts, the phrase "matters related to probate proceeding" includes:

(1) an action against a personal representative or former personal representative arising out of the representative's performance of the duties of a personal representative;
(2) an action against a surety of a personal representative or former personal representative;
(3) a claim brought by a personal representative on behalf of an estate;
(4) an action brought against a personal representative in the representative's capacity as personal representative;
(5) an action for trial of title to real property that is estate property, including the enforcement of a lien against the property; and
(6) an action for trial of the right of property that is estate property.

TEX. ESTATES CODE § 31.002(a).

In a county in which there is no statutory probate court, but there is a county court at law exercising original probate jurisdiction, a matter related to a probate proceeding also includes:

(2) the interpretation and administration of a testamentary trust if the will creating the trust has been admitted to probate in the court; and
(3) the interpretation and administration of an inter vivos trust created by a decedent whose will has been admitted to probate in the court.

TEX. ESTATES CODE § 32.002(b).

And, in counties which have a statutory probate court, a matter related to a probate proceeding includes all of the preceding and "any cause of action in which a personal representative of an estate pending in the statutory probate court is a party in the representative's capacity as personal representative." TEX. ESTATES CODE § 32.002(c).

a. Texas Estates Code Section 34.001

Section grants statutory probate judges the discretion to transfer a lawsuit pending in another court to their court. Section 34.001 provides that:

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

TEX. ESTATES CODE § 34.001 (emphasis added).

While Section 34.001is not mandatory on its face, case law has held that the transfer is mandatory once the statutory probate court grants the transfer motion. In *First State Bank of Bedias v. Bishop*, the appellate court held that upon the timely filing of a plea in abatement or other appropriate motion, the district court or any other court having concurrent jurisdiction with the probate court must immediately relinquish its jurisdiction to the statutory probate court. *See* 685 S.W.2d 732, 736 (Tex. App.--Houston [1st Dist.] 1985, writ ref'd n.r.e.).

b. Conflicts with Civil Practice and Remedies Code Section 15.007

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

> Notwithstanding Sections 15.004, 15.005, and 15.031, to the extent that venue under this chapter for a suit by or against an executor, administrator, or guardian as such, for personal injury, death or property damage conflicts with venue provisions under the Texas [Estates] Code, this chapter controls.

TEX. CIV. PRAC. & REM. CODE § 15.007.

In 2003, Section 34.001 was adopted to confirm that "[n]otwithstanding any other provision of this chapter, the proper venue for an action by or against a personal representative for personal injury, death, or property damages is determined under Section 15.007, Civil Practice and Remedies Code." TEX. ESTATES CODE § 34.001(b). In 2005, the Supreme Court of Texas weighed in and determined that mandatory venue provisions trump probate jurisdiction. *See Reliant v. Gonzales*, 102 S.W.3d 868 (Tex. 2005)(Section 15.007 trumps transfer authority granted statutory probate courts under Texas Estates Code).

2. Common Law Rule Determining Jurisdiction

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

3. Trustee Liability Suits

Which court has subject matter jurisdiction in breach of fiduciary duty actions against a trustee? Section 115.001 of the Texas Property Code provides that "[A] district court has original and exclusive jurisdiction over all proceedings concerning trusts.... except for jurisdiction conferred by law on a statutory probate court." TEX. PROP. CODE § 115.001 (a)-(d). A statutory probate court has concurrent jurisdiction with the district court in all actions involving inter vivos, charitable, and testamentary trusts. TEX. ESTATES CODE § 32.007(3). To further complicate matters, Section 32.005 provides that if the action is appertaining to or incident to an estate, the case "shall be brought in the statutory probate court rather than in the district court." TEX. ESTATES CODE § 32.005. Under *Palmer v. Coble Wall Trust Co., Inc.*, 851 S.W.2d 178, 182 (Tex. 1993), a suit is appertaining to or incident to an estate "when the controlling issue is the settlement, partition, or distribution of an estate."

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

- If the controlling issue is "appertaining to or incident to an estate," the suit must be filed in the statutory probate court;
- If the controlling issue is not "appertaining to or incident to an estate," it can be filed in a statutory probate court if one is available under the venue rules;
- If no statutory probate court is available in the appropriate venue and/or the controlling issue is not "appertaining to incident to an estate," the action may be filed in a district court; and
- If the action is filed in a district court, and the controlling issue is "appertaining to or incident to an estate," and a motion to transfer is filed under § 34.001, it may be moved to a statutory probate court.

4. Assignment of a Statutory Probate Judge

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

C. Executing Rule 11 Agreements.

1. Agreement Made By Counsel

Attorneys representing personal representatives or applicants seeking to be appointed as a personal representative should recognize that agreements,

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

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

D. Final Versus Interlocutory Probate Orders

1. Overview

Only final orders of a court exercising original probate jurisdiction can be appealed. *Crowson v. Wakeham*, 897 S.W.2d 779, 783 (Tex. 1995). Because of the ongoing nature of a personal representative proceeding, it is often unclear whether a personal representative order is a final or interlocutory order. It is this quagmire that can lead to confusion over the right to appeal and the running of appellate timetables.

2. The *Crowson* Test

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

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

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

resulting appeal rather than wait until all remaining issues are resolved.

3. Final Orders

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

(i) Standing

An order finding that a party lacks standing has been held to be a final and appealable order under the *Crowson* standard. *See A&W Indus., Inc. v. Day*, 977 S.W.2d at 740.

(ii) Order Appointing Personal Representative

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

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

(iii) Order Approving Attorney Fees

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

(iv) Order Continuing Ad Litem's Appointment

In *Coleson v. Bethan*, the Fort Worth Court of Appeals held that an order continuing an attorney ad litem's appointment is a final and appealable order. 931 S.W.2d 706 (Tex. App.—Fort Worth 1996, no writ) (*citing Youngs v. Choice*, 868 S.W.2d 850, 852 (Tex. App.—Houston [14th Dist.] 1993, writ denied); *Christensen v. Harkins*, 740 S.W.2d 69, 71-72 (Tex. App.—Fort Worth 1987, no writ); *Taliaferro v. Texas Commerce Bank*, 660 S.W.2d 151, 153 (Tex. App.—Fort Worth 1983, no writ); *Spies v. Milner*, 928 S.W.2d 317 (Tex. App.—Fort Worth 1996, n.w.h.); *cf. Forlano v. Joyner*, 906 S.W.2d 118, 119-20 (Tex. App.—Houston [1st Dist.] 1995, no writ)).

(v) Order Confirming or Disapproving Sale of Real Property

An order confirming or disapproving a report of sale of real property is a final appealable order. *See Vineyard v. Irvin*, 855 S.W.2d 208 (Tex. App.—Corpus Christi 1993, no writ)(order of sale final and appealable order).

4. Interlocutory Orders

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

(i) Order Transferring Business

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

(ii) Order Transferring Lawsuit to Guardianship

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

(iii) Order Denying Standing Challenge

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

E. Family Settlement Agreements

1. Overview

It is the policy of the state of Texas to encourage resolution of disputes and the "early settlement of pending litigation through voluntary settlement procedures." TEX. CIV. PRAC. & REM. CODE § 154.002. The Texas Supreme Court and a number of appellate courts have expressly confirmed that they continue to favor and support settlement agreements. *See Shepherd v. Ledford*, 962 S.W.2d 28 (Tex. 1998*); In Re Estate of Hodges*, 725 S.W.2d 265, 267 (Tex. App.–Amarillo 1986, writ ref'd n.r.e.); *Estate of Morris*, 577 S.W.2d 748, 755-56 (Tex. Civ. App.–Amarillo, 1979, writ ref'd n.r.e.). Encouraging settlement and compromise is in the public interest. *See Bass v. Phoenix Seadrill/78, Ltd.***,** 749, F.2d 1154, 1164 (5th Cir. 1985); *Knutson v. Morton Foods, Inc.*, 603 S.W.2d 805, 808 (Tex. 1980); *Gilliam v. Alford*, 69 Tex. 267, 6 S.W. 757, 759 (Tex. 1887).

The rationale underlying the validity of family settlement agreements is explained by the Court in *Pitner v. United States*, which states that:

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

388 F.2d 651, 656 (5th Cir. 1967); *See* TEX. ESTATES CODE § 101.001 (former Section 37).

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

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

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

2. Parties to Agreement

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

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

a. Necessary Parties

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

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

But, it is generally not necessary for beneficiaries of the estate to be made parties to the agreement if their interest will not be affected by it. *See Fore v. McFadden*, 276 S.W.2d 327 (Tex. Civ. App.–Texarkana 1925, writ dis'm). Note, the Texas Attorney General's office should be provided the required notices in any settlement involving a charity's interest. *See* TEX. PROP. CODE ch. 123.

b. Proper Parties

In addition to "necessary" parties, a settling party should consider whether there are any other persons that should be joined as a party to the agreement to avoid a future claims to the assets. Furthermore, a settling fiduciary should consider including all persons whose interest may be affected by the agreement as parties to the agreement or related proceeding to avoid claims against the fiduciary in the future.

All persons who may have a potential claim under a prior will or the Heirship statutes should be joined as a party, if possible. It may also include any testamentary trustee entitled to receive property from a will that may be admitted to probate.

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

Also, if a necessary party is a charity, notice must also be given to the Texas Attorney General's office. TEX. PROP. CODE ch. 123.

c. Persons Without Standing to Contest Settlement

Not every person "interested" in an estate has standing to contest or object to a settlement agreement. Standing is generally contingent on the person having a "pecuniary interest" affected by the probate or defeat of a will. *See In re Estate of Hodges*, 725 S.W.2d at 268; *Biddy v. Jones*, 475 S.W.2d 322 (Tex. Civ. App.–Amarillo 1971, no writ); *Logan v. Thomason*, 202 S.W.2d 212 (Tex. 1947).

Texas courts here held that the following individuals lack standing to oppose a family settlement agreement.

(i) Named Executor

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

But, if the agreement calls for the admission of the will appointing the named executor to probate and the appointment of a personal representative, the named executor may still seek their appointment. In such case, the beneficiaries will need to join together supporting a contest of such person or entitles appointment but there is no guarantee they will be successful.

(ii) Temporary Administrator

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

(iii) Creditor

A creditor lacks standing if the payment of his claim is not affected by the settlement of the contest to the admission or denial of the probate of the will. *See Logan*, 202 S.W.2d at 212. But, a creditor may have standing to contest the suitability of a proposed personal representative. *See* TEX. ESTATES CODE § 22.018; *see also, Allison v. F.D.I.C.*, 861 S.W.2d 7, 10 (Tex. App.—El Paso 1993, writ dism'd by agreement).

3. Consideration

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

4. Court Approval

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

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

5. Enforcement

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

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

a. Legally Enforceable

The issue whether an agreement is binding or legally enforceable is a question of law. *See Montanaro*, 946 S.W.2d 428, 430 (*citing Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 814 (Tex. App. – Houston [1st Dist.] 1987, writ ref'd n.r.e.), *cert. dism'd*, 485 U.S. 994, 108 S.Ct. 1305, 99 L.Ed.2d 686 (1988); *Huffco Petroleum Corp. v. Trunkline Gas Co.*, 769 S.W.2d 672, 674 (Tex. App. – Houston [14th Dist.]

1989, writ denied); *Southwestern States Oil & Gas Co. v. Sovereign Resources, Inc.*, 365 S.W.2d 417, 419 (Tex. Civ. App.– Dallas 1963, writ ref'd n.r.e.). Therefore, unless there is ambiguity or the surrounding facts and circumstances demonstrate a factual issue as to the settlement agreement, the issue whether the agreement fails for lack of an essential term is a question of law to be determined by the court. *See Browning v. Holloway*, 620 S.W.2d 611, 615 (Tex. Civ. App. – Dallas 1981, writ ref'd n.r.e.).

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

An ambiguous agreement, however, creates an unresolved issue of fact. The party challenging the agreement may be entitled to a jury trial on any unresolved fact issues. For example, in *Martin v. Black*, 909 S.W.2d at 196, the court considered whether a term sheet reached at mediation and signed by all parties was an enforceable settlement agreement. At issue was the final term which provided that "the parties' understandings are subject to securing documentation satisfactory to the parties." *Id*. at 194. The court held that a question of fact existed regarding whether the parties intended the execution of formal documentation to be a *condition precedent* to the formation of a contract or a *memorialization* of an *existing contract*. *Id. citing Foreca, S.A. v. GRD Development Co. Inc.*, 758 S.W.2d 744, 746 (Tex. 1988). But when no fact issue exists, the court may find as a matter of law that the agreement is enforceable notwithstanding the fact that the agreement contemplated circulation of final settlement documentation. *See Hardman v. Dault*, 2 S.W.3d 378 (Tex. App. – San Antonio 1999, no pet.) (parties' agreement not "subject to" execution of subsequent documents).

b. Breach of Contract

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

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

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

c. Contempt of Court

The court may render an agreed judgment on a settlement agreement. *See* TEX. CIV. PRAC. & REM CODE § 154.071. The entry of an enforceable agreed judgment requires (i) the continued consent of all parties at the time the judgment is *rendered*, and (ii) the entry of an agreed judgment which literally complies with the terms of the settlement agreement.

Any party may revoke their consent prior to the time the court *renders* judgment. *See S&A Restaurant Corp. v. Leal*, 892 S.W.2d 855 (Tex. 1995) *citing Quintero v. Jim Walter Homes, Inc.*, 654 S.W.2d 442, 444 (Tex. 1983); *Samples Exterminators v. Samples*, 640 S.W.2d 873, 874-75 (Tex. 1982). It is important to recognize the distinction between the approval of a settlement and the *rendering* of a judgment. *See S&A Restaurant*, 892 S.W.2d at 858. In *S&A Restaurant*,

the Supreme Court of Texas found that the approval of a settlement agreement does not constitute the entry, or rendering, of a judgment and, thus, a party to the agreement could revoke their consent and preclude the entry of an agreed judgment. *Id*. at 858; *but see Reppert*, 943 S.W.2d at 174 (oral pronouncement that court "accepted and approved" agreement and made "it a judgment of the court" renders judgment). The entry of an agreed judgment after a party revokes their consent is void. *Id*. at 857 *citing Samples*, 640 S.W.2d at 875.

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

d. Statute of Limitation

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

X. CLOSING THE ESTATE

A. When to Close

The closing of an estate can occur by affirmative act or based on the facts and circumstances. And, even without invoking a formal closing method, an independent administration is considered closed when the debts have been paid, the property has been distributed, and there is no more need for administration. *In re Estate of Hanau*, 806 S.W.2d 900, 903 (Tex. App.—Corpus Christi 1991, writ denied); *Interfirst Bank-Houston v. Quintana Petroleum Corp.*, 699 S.W.2d 864, 874 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.). But before deciding which closing option is preferable, the fiduciary and his or her advisors should consider:

- Complexity of the estate.
- Number and cooperation of the beneficiaries.
- If fiduciary has to account for and distribute community property.
- Tax and expense allocation issues.
- Potential exposure to future creditor claims.
- Funding options.
- Complexity of tax elections.
- Collection of potential other assets.

1. Advantages of Closing Estate

Potential advantages of closing an estate include:

- Limitations periods arguably begin to run. *See Mooney v. Harlin*, 622 S.W. 2d 83 (Tex. 1981) ("[p]ersons interested in an estate admitted to probate are charged with the contents of the probate records.").
- Terminates a personal representative's obligations and duties.
- Terminates jurisdiction of probate court. *See Interfirst Bank-Houston v. Quintana Petroleum Corp.*, 699 S.W.2d 864, 874 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.)(probate court has jurisdiction over estate until closed).
- Avoids a potential removal action. *See In re Estate of Hanau*, 806 S.W.2d 900 (Tex. App.—Corpus Christi 1991, writ denied).
- Probate Court may lose jurisdiction to appoint successor personal representative. *See In re Estate of McCall*, 2002 WL 440779 (Tex. App.—El Paso 2002, no pet).

2. Disadvantage of Closing Estate

Potential disadvantages of formally closing an estate include:

- Requires complete distribution of estate. *In re Estate of Hanau*, 806 S.W.2d 900, 903 (Tex. App.—Corpus Christi 1991, writ denied); *Interfirst Bank-Houston v. Quintana Petroleum Corp.*, 699 S.W.2d 864, 874 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).
- Terminates jurisdiction of probate court**.** *See Interfirst Bank-Houston v. Quintana Petroleum Corp.*, 699 S.W.2d 864, 874 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.)(probate court has jurisdiction over estate until it is closed).
- Terminates a personal representative's powers and authority.
- Does not always bar future tort claims and suits against the independent personal representative.

B. Partial Distributions

Prior to closing out the estate, it is possible and even advisable to make partial distributions to the beneficiaries. It is often appropriate to distribute specific bequests and pecuniary bequests that are not to allocation or reduction for debts and administration expenses. In fact, when a personal representative waits to distribute pecuniary bequests, the estate may

have to pay interest on the value of the assets. *See Williams v. Smith,* 146 Tex. 269, 206 S.W.2d 208 (1947).

Likewise, it may be appropriate to make a partial distribution to residuary beneficiaries but the representative should be aware that the distribution may constitute distributable net income ("DNI") to the beneficiaries. But, sufficient assets should be retained to satisfy any remaining debts and administration expenses.

C. Distributing Without Agreements

One option is simply to distribute the assets when appropriate. Every independent personal representative has this option available. When the estate administration is simple, this is often the most appropriate option. But, when the estate involves potentially difficult beneficiaries or complex funding issues, this may leave the fiduciary exposed to potential claims for years.

1. Potential Advantages

Potential advantages of choosing simply to distribute include:

- Simplicity.
- Least expensive in the short run and perhaps the long run.
- Least confrontational.
- So long as estate has not been formally closed, purchaser is entitled to rely on recitals in deed that the independent personal representatives are acting as independent personal representatives. *Dallas Services for Visually Impaired Children, Inc. v. Broadmoor,* 635 S.W.2d 572 (Tex. Civ. App. – Dallas 1982, ref. n.r.e.).

2. Potential Disadvantages

Potential disadvantages of choosing simply to distribute include:

- No record or proof of delivery.
- No relief from any liability.
- No document that may support when limitations begins to run.
- No record of disclosures or proof any disclosures made – thus perhaps resulting in limitations not running for years.

D. Distributing With Only Receipt

Texas Estates Code Section 405.002 provides that an independent personal representative is not required to deliver personal property to a beneficiary until he or she signs a receipt or other proof of delivery of the property. TEX. ESTATES CODE § 204.002 A sample receipt is attached as an Exhibit to this outline.

1. Potential Advantages

Potential advantages of requesting a receipt include:

- Simplicity.
- Second least expensive in the short run and perhaps the long run.
- Generally not confrontational.
- Provides notice that fiduciary considers all estate assets distributed and arguably provides some objective evidence of when statute of limitations should have started running.
- Creates a basis to argue waiver, estoppel or laches in the event of a future claim by the beneficiaries.
- A receipt does not result in the closure of the estate, and thus, does not cause the probate court to lose jurisdiction over future disputes.
- A receipt does not terminate the independent personal representative's powers and he or she may have authority to act in future.
- May document informal closure by confirming all debts have been paid and all remaining property is distributed. *See Texas Commerce Bank v. Correa,* 28 S. W. 3d 723, 728 (Tex. App.—Corpus Christi 2000, pet denied); *In re Estate of Hanau,* 806 S.W.2d 900, (Tex. App.—Corpus Christi 1991, writ denied); but see *Ford v. Roberts,* 478 S.W.2d 129, 132 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.) (quoting *Bradford v. Bradford*, 377 S.W.2d 747, 749 (Tex. Civ. App.—Texarkana 1964, writ ref'd n.r.e.)(closing requires filing pleadings with court).

2. Potential Disadvantages

Potential disadvantages of closing an estate via a receipt include:

- Does not terminate independent personal representative's duties and obligations.
- Does not terminate independent personal representative's "relationship" for purposes of statute of limitations and discovery rule.
- No relief or discharge from any liability.
- May not provide sufficient disclosures or proof of sufficient disclosures to trigger running of statute of limitations.
- Does not prevent a beneficiary seeking to compel an accounting. *In re Estate of Rowan*, 2007 WL 1634054 (Tex. App.—Dallas 2007, no writ)(neither settlement agreement nor arbitration

resulted in court losing jurisdiction to compel an accounting).
- May result in distribution of assets needed to defend independent personal representative and/or formally close the estate.

E. Requesting Release

Releases and settlement agreements are highly favored by Texas courts. These agreements will not be disturbed because of ordinary mistake of law or fact, and will be upheld when all parties have the same knowledge or a means to obtain the same knowledge provided there is no fraud, misrepresentation, concealment or other inequitable conduct. *See Crossley v. Staley*, 988 S.W.2d 791 (Tex. App.—Amarillo 1999, mand. denied). And even unilateral mistake of law of the party to a settlement agreement is not grounds to avoid the agreement. *See Crossley 988* at 796, *citing Atkins v. Womble*, 300 S.W.2d 688 (Tex. Civ. App.—Dallas, 1957, writ ref'd n.r.e.). But a release, like any contract, is subject to a voidance on grounds of fraud or material misrepresentation. *See Williams v. Glash*, 789 S.W.2d 261 (Tex. 1990). The rationale is that an agreement obtained by fraud is, in effect, "no contract because there is no real assent to the agreement." *Schlumberger Tech Corp. v. Swanson*, 959 S.W.2d 171 (Tex. 1997) *citing Brown Thompson Co. v. Sawyers*, 234 S.W. 873 (Tex. 1921).

Independent personal representatives are fiduciaries and thus have the burden of proving the agreement is fair. And, as the recently released Pattern Jury Charges confirm, the fiduciary will have the burden of the beneficiary had knowledge of all "material facts" at the time he executed the release. Sample simple and more detailed release documents are attached as Exhibits to this outline.

1. Potential Advantages

Potential advantages of seeking a release include:

- The costs to obtain a release are generally less than those involved in obtaining a judicial release.
- Often a fiduciary can obtain a greater release via an agreement than a judicial settlement.
- When appropriate, a fiduciary can receive indemnities that generally cannot be imposed without agreement in a judicial settlement.
- Document disclosures made as to matters disclosed in a release, at a minimum, start the running of the statutes of limitation.
- Creates a basis to argue waiver, estoppel or laches in the event of a future claim by the beneficiaries.
- The concern over a breach of contract action may reduce future challenges to the agreement.
- A release does not result in closure of the estate and thus does not result in the court losing jurisdiction over future disputes.
- A release does not terminate the independent personal representative's powers and he or she has authority to act if needed in future.
- May document informal closure by confirming all debts have been paid and all remaining property is distributed. *See Texas Commerce Bank v. Correa*, 28 S. W. 3d 723, 728 (Tex. App.–Corpus Christi 2000, pet. denied); *In re Estate of Hanau*, 806 S.W.2d 900 (Tex. App.—Corpus Christi 1991, writ denied); but see *Ford v. Roberts*, 478 S.W.2d 129, 132 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.) (quoting *Bradford v. Bradford*, 377 S.W.2d 747, 749 (Tex. Civ. App.—Texarkana 1964, writ ref'd n.r.e.)(closing requires filing pleadings with court).

2. Potential Disadvantages

Potential disadvantages of closing an estate via a release include:

- Does not terminate independent personal representative's duties and obligations.
- Does not terminate independent personal representative's "relationship" for purposes of statutes of limitation and discovery rule.
- Does not prevent a beneficiary seeking to compel an accounting. *In re Estate of Rowan*, 2007 WL 1634054 (Tex. App.—Dallas 2007, no writ)(neither settlement agreement nor arbitration resulted in court losing jurisdiction to compel accounting).
- Fiduciary has burden to establish that beneficiary had full knowledge of all material facts. *See* PJC 235.20.
- Potential for future claims that a release is invalid or unenforceable due to lack of disclosure**.** *Avary v. Bank of America*, 72 S.W. 3rd 779 (Tex. App.—Dallas 2002, pet. denied)(claim based on alleged tort for failing to disclosure to heirs effect of apportionment on estate's remaining assets and liabilities); *Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1988)(breach of duty of full disclosure may be tantamount to fraudulent concealment); *but see Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 171 (Tex. 1997)(recognized disclaimers of reliance); *Atlantic Lloyds Insurance Company v. Butler*, 137 S.W.3d 199 (Tex. App.—Houston [1st Dist.] 2004, pet. denied)(disclaimer of reliance in settlement agreement conclusively negated other parties alleged reliance on any representations or lack of disclosure by other parties).

- Potential for future claims that a release is invalid or unenforceable based on extrinsic or intrinsic fraud. *Crouch v. McGaw*, 138 S. W. 2d 94, 97 (Tex. 1940)(extrinsic fraud denies beneficiary right to fully litigation rights); *Mills v. Baird*, 147 S. W. 2d 312, 316 (Tex. Civ. App.—Austin, 1941, writ ref'd)(intrinsic fraud may include fraudulent documents or false testimony).
- Potential for future claims that release invalid or unenforceable based on fraudulently inducement, mistaken, negligent misrepresentation, etc. *See McCamish, Martin, Brown & Koeffler v. Appling Interests*, 991 S.W.2d 787 (Tex. 1999); *but see Harris v. Archer*, 134 S.W.3d 411 (Tex. App.—Amarillo 2004, pet. denied)(disclaimer of reliance may on bar fraudulent inducement claim when fiduciary relationship exists between parties); *but see Prudential Ins. Co. v. Jefferson Assocs.*, 896 S.W.2d 156, 162 (Tex. 1995) (concealment or obstruction of party's investigation may negate disclaimer of reliance).
- Release is enforceable and possibly avoidable under principles of contract law. Thus, a release may bar a claim based on release, estoppel or waiver but will not be necessarily barred by *res judicata* until a judgment is entered on the contract.
- Potential future challenges to valid consideration. *See McDonald v. Carroll*, 783 S. W. 2d 286 (Tex. App.–Dallas 1990, writ denied)("A release and acceptance of benefits thereunder for an undisputed, liquidated and vested property right in an estate is without legal consideration."); *see also Farrell v Cogley* 146 S. W. 315, 318 (Tex.Civ.App.—San Antonio, 1912, writ ref'd).
- A beneficiary may try to use the terms or scope of a proposed release in subsequent litigation. *See* TEX. R. EVID. 408 (evidence of settlement may be offered for certain purposes).

F. Closing Reports And Notices Of Closing Estate Option

Section 405.005of the Texas Estates Code provides that a personal representative may file an report with the Court that has the effect of terminating the representative's authority and closing the estate**.** This procedure is seldom taken advantage of as it deprives the personal representative from later obtaining Letters Testamentary if an additional asset is discovered and needs to be transferred without a great deal of difficulty. A closing report may be used to terminate bond liabilities and release sureties where a bond has been required of the independent executor, independent administrator, or community administrator. Section 405.005 may be very useful in situations where the representative wants to be released from responsibility and begin the running of limitation statutes but does not want to force the issue by seeking a judicial discharge.

1. Statutory Requirements

Texas Estates Code Section 405.004 provides that an independent personal representative may file with the court a closing report or a notice of closing of the estate when:

- All of the known estate debts have been paid to the extent assets are available to provide for payment;
- There is no pending litigation; and
- The independent personal representative has distributed to the persons entitled thereto all assets of the estate, if any, remaining after payment of debts.

TEX. ESTATES CODE § 405.004.

The closing report must include all of the following:

- The property of the estate which came into the possession of the independent personal representative;
- The debts that have been paid;
- The debts, if any, still owing by the estate;
- The property of the estate, if any, remaining on hand after payment of debts;
- 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
- Signed receipts or other proof of delivery of any property distributed to the beneficiaries.

TEX. ESTATES CODE § 405.005.

Alternatively, an independent personal representative, in lieu of filing a closing report, may instead elect to file a notice of closing the estate verified by affidavit that states:

- 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 personal representative's possession;
- All remaining assets of the estate, if any, have been distributed; and
- 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;

- Include signed receipts or other proof that all distributees have received a copy of the notice of closing estate.

TEX. ESTATES CODE § 405.006.

The independent personal representative is required to provide each beneficiary a copy of the notice of closing estate before filing the report. *See id.* The independent administration is considered automatically 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. TEX. ESTATES CODE § 405.007. If filed within 30 days, the closing is delayed until the objection has been disposed of or the court signs an order closing the estate. *Id.*

The closing of the independent administration terminates the power and authority of the independent personal representative but does not release the independent personal representative "from liability for any mismanagement of the estate or from liability for any false statements contained in the report or notice." *Id.*

But, persons dealing with properties of the estate or with claims against the estate are then required to deal directly with the beneficiaries. And, their acts are valid and binding notwithstanding any false statement made in the closing notice or report. Also, these filings "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 described in the will as entitled to receive the particular asset or who as heirs at law are entitled to receive the asset." TEX. ESTATES CODE 405.007(e).

The filing of the closing report and proof of delivery, if required, automatically releases the sureties on the bond from all liability for the future acts of the principal. But, the filing of a notice of closing estate does not release the sureties on the independent personal representative's bond. TEX. ESTATES CODE 405.007(d).

2. Potential Advantages

Potential advantages of choosing to close the estate by filing a closing report include:

- This section relating to closing independent administration by affidavit cannot be construed as specifically providing the probate court with the power to look to the substance of the accounting in an effort to determine whether it is accurate or whether the executor has properly administered the estate. *Burke v. Satterfield*, 525 S. W. 2d 950, 953 (Tex. 1975).
- Lays foundation for argument that statute of limitations starts running no later than filing due to constructive notice. *See Mooney v. Harlin*, 622 S.W. 2d 83 (Tex. 1981) ("[p]ersons interested in an estate admitted to probate are charged with the contents of the probate records."); *Little v. Smith*, 943 S.W. 2d 414 ("constructive notice" applicable because "person knows where to find the relevant information" even if they fail to seek it out); *Estate of McGarr*, 10 S.W. 3d 373 (Tex. App.–Corpus Christi, 2000, pet denied)(beneficiaries claims barred by limitations because the facts relating to alleged self-dealing sufficiently disclosed in estate inventory and recorded deeds).
- Recording relieves the independent personal representative from future duties to administer the estate. *Texas Commerce Bank v. Correa*, 28 S. W. 3d 723, 728 (Tex. App.–Corpus Christi 2000, pet denied); *InterFirst Bank–Houston* v. *Quintana Petroleum Corp*., 699 S.W.2d 864, 873-74 (Tex. App.–Houston [1st Dist.] 1985, writ ref'd n.r.e.).
- Once decedent's estate is closed, court loses jurisdiction to remove independent executrix and appoint replacement. *In re Estate of Hanau*, 806 S.W.2d 900 (Tex. App.—Corpus Christi 1991, writ denied); *In re Estate of McCall*, 2002 WL 440779 (Tex. App.—El Paso 2002, no pet).
- Defect in closing report will not automatically void effect of closing the estate. *In re Estate of McCall*, 2002 WL 440779 (Tex. App.—El Paso 2002, no pet).

3. Potential Disadvantages

Potential disadvantages of choosing to close the estate by filing a closing report include:

- Filing of final account verified by affidavit terminates independent administration and power and authority of independent personal representative, but it does not relieve executor of liability for any mismanagement of estate or from liability for any false statements in affidavit. *InterFirst Bank–Houston* v. *Quintana Petroleum Corp*., 699 S.W.2d 864, 873-74 (Tex. App.–Houston [1st Dist.] 1985, writ ref'd n.r.e.); *Hanau v. Betancourt*, 800 S.W.2d 371 (Tex. App.—Corpus Christi 1990, no writ).
- Once decedent's estate was closed, court lost jurisdiction to remove independent personal representative and appoint replacement. *In re Estate of Hanau*, 806 S.W.2d 900 (Tex. App.—Corpus Christi 1991, writ denied).

- Statutory Probate Court loses right to transfer as a probate proceeding no longer pending. *See In re John G. Kennedy Memorial Foundation*, 159 S.W.3d 133 (Tex. App.—Corpus Christi 2004, no pet.).
- Probate courts lose ancillary and pendant jurisdiction. *See Schuld v. Dembrinski*, 12 S.W.3d 485, 487 (Tex. App.—Dallas 2000, no pet.) ("the pendency of a probate proceeding is a requisite for a court's exercise of jurisdiction over matters related to it"); *Garza v. Rodriguez*, 18 S.W.3d 694, 698 (Tex. App.—San Antonio 2000, no pet.) ("before a matter can be regarded as incident to an estate... a probate proceeding must actually be pending"); *Texas Commerce Bank-Rio Grande Valley, N.A. v. Correa*, 28 S.W.3d 723 (Tex. App.—Corpus Christi 2000, pet. denied)(probate court no longer had jurisdiction relating to foreclosure proceeding of former estate property).

G. Judicial Discharge Option

Before September 1, 1999, independent personal representatives arguably could not obtain court approval of his or her final accounting unless the will failed to completely dispose of all probate assets or provide a means to partition them among the estate beneficiaries. *See Rowland v. Moore*, 174 S.W.2d 248 (Tex. 1943); *see also* TEX. ESTATES CODE § 405.003. The argument was that the declaratory judgment statutes seemed to conflict with long standing law on the lack of jurisdiction of courts involving independent administrations. Thus, Texas Estates Code Section 405.003 confirms that an independent personal representative may seek a judicial discharge from liability relating to the administration of the decedent's estate. TEX. ESTATES CODE § 405.003. But, if the executor decides he or she wants to pursue a judicial discharge, it is recommended that he or she document any requests to the beneficiaries to settle the fiduciary's accounts via a release or other non-judicial means.

1. Statutory Requirements

Section 405.003 provides that "after an estate has been administered and if there is no further need for an independent administration of the estate, the independent personal representative of the estate may file an action for declaratory judgment under Chapter 37, Civil Practice and Remedies Code, seeking to discharge the independent personal representative from any liability involving matters relating to the past administration of the estate "that have been *fully and fairly disclosed*." TEX. ESTATES CODE § 405.003(a)(emphasis added). Thus, the independent personal representative may effectively initiate a lawsuit against the beneficiaries of the estate. Each estate beneficiary must be personally served with citation or agree to waive such service. *See id.*

Once filed, either the beneficiaries may request or the court may require the independent personal representative to file an accounting that "includes any information the court considers necessary to adjudicate the independent personal representative's request for a discharge of liability." *See id.* If approved and any objections are overruled, the personal representative may be discharged in a final order.

Also, before filing the petition, the independent personal representative should distribute all remaining assets other than a reasonable reserve to pay any estimated final expenses. TEX. ESTATES CODE § 405.003(d). Prior to finalizing the judicial discharge, the court may order the independent personal representative to distribute a portion of the remaining assets. *See id.*

2. Potential Advantages

Potential advantages of choosing to close the estate by seeking a judicial discharge include:

- Forces resolution of transactions and related complaints "fully and fairly" disclosed in accounting.
- Order judicially discharging independent personal representative is a final judgment after 30 days if not appealed. *See Crowson v. Wakeham*, 897 S.W. 2d 779, 781 (Tex. 1995).
- Approval of final accounting may be *res judicata* of all issues actually litigated and considered by the Court. *Coble Wall Trust Co. Inc. v. Palmer*, 859 S.W.2d 475, 480-81 (Tex. App.—San Antonio 1993, writ denied).
- Allows the independent personal representative to retain a defense fund to settle up his or her accounts.
- Except as ordered by the court, the independent personal representative is entitled to pay from the estate his or her legal fees, expenses, or other costs of a proceeding incurred in relation to the final accounting and discharge. *See* TEX. ESTATES CODE § Section 405.003(e).

3. Potential Disadvantages

Potential disadvantages of choosing to close the estate by seeking a judicial discharge include:

- The filing of a petition for judicial discharge may cause a beneficiary to bring counterclaims to the pending petition once they are joined as a party.
- No release or discharge as to false or undisclosed material information. *Thomas v. Hawpe*, 80 S.W.

129 (Tex.Civ. App— Dallas1904, writ ref'd) (*res judicata* did not bar claims against former temporary administrator who furnished false information in accounting).

- The filing of a petition for judicial discharge may cause a beneficiary to bring counterclaims to the pending petition once they are joined as a party.
- No release or discharge as to false or undisclosed material information. *Thomas v. Hawpe*, 80 S.W. 129 (Tex.Civ. App— Dallas1904, writ ref'd) (*res judicata* did not bar claims against former temporary administrator who furnished false information in accounting).
- Potential claims by beneficiaries for assessment of legal fees and expenses. *See* TEX. CIV. PRAC. & REM. CODE. § 37.009.
- The independent personal representative shall be personally liable to refund any amount not approved by the court as a proper charge against the estate. *See* TEX. ESTATES CODE 405.003(e).
- Court's approval of an accounting does not always adjudicate fiduciary's tort liability. *See Texas State Bank v. Amaro*, 87 S.W.3d 538, 544-545 (Tex.2002)(trustee accounting); *Bank of Texas, N.A. Trustee v. Mexia*, 135 S.W.3d 356, 362 (Tex. App.–Dallas 2004, pet. denied)(approval of trustee accounting is administrative function, not adjudication of trustee's tort liability).
- Order may be appealed, as in any other judgment. *See Crowson v. Wakeham*, 897 S.W. 2d 779, 781 (Tex. 1995).
- Order may be subject to bill of review for two years for extrinsic fraud. TEX. ESTATES CODE § 55.251(within two years "any interested person may, by bill of review filed in the court in which the probate proceedings were had, have any decision, order, or judgment rendered by the court, or by the judge thereof, revised and corrected on showing error therein"); *Montgomery v. Kennedy*, 669 S.W.2d 309 at 313 (Tex. 1984)("A fiduciary's concealment of material facts, used to induce an agreed or uncontested judgment, which prevents a party from presenting at trial his legal right, is extrinsic fraud"); *McDonald v. Carroll*, 783 S. W. 2d 286 (Tex. App.–Dallas 1990, writ denied).

H. Only Option For Dependent Administrations

A dependent administration may be closed when all debts have been paid to the extent possible, and no further necessity exists for the administration to continue. TEX. ESTATES CODE CH. 362. The Estates Code also provides that a representative must close the administration within three years following the grant of letters unless good cause can be shown why it should continue. TEX. ESTATES CODE § 361.052.

The court on its own motion may require that the representative timely close the administration. TEX. ESTATES CODE §§ 361.052. And, any person interested in the estate may also institute a proceeding to require that the estate be closed. *See* TEX. ESTATES CODE § 362.002.

Whenever an administration is to be closed, the dependent representative must present to the court an account for final settlement. *See* TEX. ESTATES CODE § 362.004. The final account must present a complete picture of the estate and all of the representative's acts during the administration either by reference and/or exhibit (inventory, accountings, sales, leases, etc.). This account must have attached vouchers to support all matters not previously included in an accounting. The final accounting must also recite:

- all property which the representative acquired;
- all dispositions of property;
- all debts that have been paid;
- all unpaid debts and expenses;
- all property still possessed by the representative;
- all persons entitled to receive the estate, if any;
- all advances or payments made if any;
- tax references due that have been filed, amount of taxes, date taxes were paid, and to which governmental entity taxes were paid;
- delinquent taxes and tax returns and reasons for delinquency; and
- all bond premiums that have been paid.

See TEX. ESTATES CODE § 362.004 ; *Main v. Brown*, 72 Tex. 505, 10 S.W. 571 (Tex. 1889).

Notice must be furnished to each heir and beneficiary of the decedent containing a copy of the final accounting that was filed and the time and place it will be considered. TEX. ESTATES CODE § 362.005. Service shall be by certified mail, personal service, publication, posting, ad litem, or any combination thereof as directed by the court. *See Id.* The court may accept waivers of notice from the heirs or beneficiaries. TEX. ESTATES CODE § 362.005(e).

In the same manner as annual accounts, the final account will remain on file for ten days before it is presented to the court for examination. Once the court is satisfied that all necessary persons have been cited, it will examine, audit, and settle the account and, if necessary, hear evidence as to any exceptions or objections. TEX. ESTATES CODE § 362.006. At this time, the court may review all prior annual accounts and disallow any prior approved expenses. *See Anderson v. Armstrong*, 120 S.W.2d 444 (Tex. 1938), *adhered* to 132 S.W.2d 393 (Tex. 1939).

Following approval of the final account, the court must enter an order directing that the dependent representative distribute to all entitled persons any of the remaining estate assets. TEX. ESTATES CODE § 362.011. The court's order is final, binding, and appealable only in direct proceedings. *See Vann v. Calcasieu Trust & Savings Bank*, 204 S.W. 1062 (Tex. Civ. App.—Dallas 1918, writ ref'd); *Cobbel v. Crawford*, 120 S.W.2d 1085 (Tex. Civ. App.—El Paso 1938, no writ). The dependent representative, pursuant to the court's order of distribution, must deliver to the persons named in such order all assets remaining in his or her hands. Such delivery need not be a formal transfer but, if required, a deed of conveyance may be made as to real property. *See Guilford v. Love*, 49 Tex. 715 (1878). Failure to make timely and proper delivery will make the representative liable for damages to those persons entitled to receive the estate's assets. *See* TEX. ESTATES CODE § 362.052.

Once all assets of the estate have been delivered and receipted for by the heirs, the representative may apply to the court for an order releasing the representative and discharging his or her sureties. *See* TEX. ESTATES CODE § 362.012. The entry of an order for release and discharge is a ministerial act and must be granted where all requirements of the court's prior order of distribution have been completed. *See Crouch v. Stanley*, 390 S.W.2d 795 (Tex. Civ. App.—Eastland 1965, writ ref'd n.r.e.) *certiorari denied*, 86 S. Ct. 1201, 383 U.S. 945.

XI. REMOVAL AND COMPENSATION

A. Removal

Both the grounds and procedure for removal of a representative are established by the Texas Estates Code. *See* TEX. ESTATES CODE §§ 404.003.-.0035, 361.051-.052. This does not, however, prevent the court from finding grounds other than those provided by the Estates Code to justify a removal of the representative. *See Haynes v. Clanton*, 257 S.W.2d 789 (Tex. Civ. App.—El Paso 1953, writ dism'd agr.).

1. Instituting

The removal of a representative may be instituted either by the court on its own motion or by any interested person. TEX. ESTATES CODE §§ 404.003.-.0035, 361.051-.052. A person who has no interest in the estate may not bring this proceeding. *See Greer v. Boykins' Estate*, 82 S.W.2d 698 (Tex. Civ. App.—Beaumont 1935, no writ).

2. Grounds

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

a. No Notice Required

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

- failed to timely qualify;
- failed to return an Inventory;
- failed to furnish a new bond;
- leaves the state for an extended period of time;
- There is clear and convincing evidence he or she has misapplied, embezzled or removed estate asset or is about to do so; or
- Cannot be served with notice.

See TEX. ESTATES CODE §§ 361.051, 404.003.

b. Notice Required

Notice must be furnished to any representative, independent or dependent, by personal service when sufficient grounds appear that he or she has:

- misapplied, embezzled, or removed assets from the state;
- failed to return any account required;
- failed to file the affidavit or certificate required by Section 308.004;
- failed to return any original or additional inventory required by law for the court;
- failed to obey an order from the court with proper jurisdiction;
- is guilty of gross misconduct or mismanagement in the performance of any duties;
- becomes incompetent, imprisoned or incapable of properly performing any duties of trust;
- material conflict of interest; or
- fails within three years from the granting of dependent letters to make final settlement unless the time for settlement is extended by the court.

See TEX. ESTATES CODE §§ 361.051, 404.0035.

c. Additional Grounds

Additional grounds for removal may arise when:

- The representative purchases a claim against the estate. *See* TEX. ESTATES CODE § 355.203;
- The representative fails to endorse his or her allowance or rejection upon a claim within thirty (30) days of its presentment. *See* TEX. ESTATES CODE § 355.052; or

- The representative fails to file a sworn statement of the condition of an estate within twenty (20) days after notice that a new bond or increased bond is to be required by the court or any interested person. *See* TEX. ESTATES CODE § 305.158.

3. Procedure

No particular form is provided for an application to remove a representative. It appears, however, that at the very least the representative should be able to ascertain from the complaint, the nature of his or her alleged default. *See Perkins v. Wood*, 63 Tex. 396 (1885). An order of removal must state the cause for removal. If personal service was obtained, then all letters issued must be ordered returned otherwise all letters should be ordered canceled, and all assets in the hands of the representative must be ordered delivered to those persons entitled thereto or to a qualified successor. *See* TEX. ESTATES CODE § 361.053.

4. Costs

When a representative is removed for cause, both he or she and their sureties can be held liable for all costs, expenses, and attorney fees relating to such removal or for obtaining compliance with the court orders and for all expenditures that have been made without authorization. *See* TEX. ESTATES CODE § 351.003; *Fillion v. Osborne*, 585 S.W.2d 842 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ). But an independent representative who defends his or her removal in good faith is entitled to reimbursement of reasonable fees and expenses incurred in the defense. *See* TEX. ESTATES CODE § 404.0036.

B. Executor's Compensation

An executor or administrator is entitled to compensation for serving as the estate's representative unless the will provides that the representative is not entitled to compensation. *See Stanley v. Henderson*, 139 Tex. 160, 162 S.W.2d 95 (Comm'n App. 1942). But, when a will does not address compensation or no will exists, the representative may be entitled to compensation under Chapter 352. *See* TEX. ESTATES CODE § 352.001 *et seq*. Section 352.002 provides which assets are properly subject to a commission. But note, Chapter 352 does not apply to will that sets executor's compensation.

1. Compensation Pursuant to Chapter 352

When a will does not set the amount of compensation, the representative is entitled to a commission for performance of his duties of 5 percent of all cash received or paid during administration, but such may not exceed 5 percent of the gross fair market value of the estate subject to administration. *See* TEX. ESTATES CODE § 352.002; *Walling v. Hubbard*, 389 S.W.2d 581 (Tex. Civ. App.—Houston [1st Dist.] 1965, writ n.r.e.). There are certain exceptions to the five percent rule. For example, a commission is not allowed on funds the personal representative receives which were in financial institutions at the decedent's date of death; for collecting life insurance policies; or for paying cash to heirs or legatees.

2. No Compensation Allowed by Chapter 352

Section 352.002 provides that a representative will not be permitted to recover a commission for funds which were on hand or were held in financial institution or brokerage firm at death, payments to heirs or legatees, payments made outside of his or her duties, commissions on payments to the representative as a creditor, employed agent commissions or payments, borrowed money, or receipts or payments while operating a business. *See* TEX. ESTATES CODE § 352.002(b)(2) ; *Terrill v. Terrill*, 189 S.W.2d 877 (Tex. Civ. App.—San Antonio 1945, writ ref'd); *Trammel v. Philleo*, 33 Tex. 395 (1870); *Brown v. Heirs of Walker*, 38 Tex. 109 (1873); *Richardson v. McCloskey*, 261 S.W. 801 (Tex. Civ. App.—Austin 1924) *rev'd on* other *grounds*, 276 S.W. 680 (Tex. Comm'n App. 1925, opinion adopted); *Downs v. Goodwin*, 271 S.W. 414 (Tex. Civ. App.—Beaumont 1925) *rev'd on other grounds*, 280 S.W.512 (Tex. Comm'n App. 1926, opinion adopted). The court may exercise its discretion when allowing or disallowing commissions based on the care and management exercised by the representative over the estate or lack thereof. *See* TEX. ESTATES CODE § 352.004. A representative must aver and show entitlement in order to obtain payment of a commission and may no longer claim such as a right.

3. Expenses

The representative is also permitted to recover from the estate all reasonable and necessary expenses incurred in preservation, safekeeping, and management of the estate, collecting or attempting to collect claims or debts, recovering or attempting to recover property of the estate, and reasonable attorney fees necessarily incurred in the management of the estate. *See* TEX. ESTATES CODE §§ 352.051- 352.053. Thus, expenses for bond premiums, fire insurance, attorney and accountant fees, and funeral expenses are a few of those expenses which the representative may recover. *See Moore v. Bryant*, 31 S.W. 223 (Tex. Civ. App. 1895, no writ); *King v. Battaglia*, 84 S.W. 839 (Tex. Civ. App. 1905, writ ref'd); *Richardson v. McCloskey*, 276 S.W. 680 (Tex. Comm'n App. 1925, opinion adopted); *Park v. Hominick*, 522 S.W.2d 533 (Tex.

Civ. App.—Corpus Christi 1974, no writ); *Armstrong v. Stallworth*, 613 S.W.2d 1 (Tex. Civ. App.—El Paso 1979, no writ); *Connor v. Wright*, 737 S.W.2d 42 (Tex. App.—San Antonio 1987, no writ).

EXHIBIT A**.**

[DATE]

_____
_____
_____

Re: No. _____; Estate of _____, Deceased; In Probate Court No. ___ of Harris County, Texas

Dear *:

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

General Matters

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

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

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

Your qualification as independent executor entitles you to receive Letters Testamentary from the County Clerk. Letters Testamentary evidence your appointment as independent executor and your authority to act for and on behalf of the estate. We have previously ordered and received Letters for your use. We suggest that you forward to _____ with _____ on Letter for his records.

Please keep in mind that Letters are only valid for sixty (60) days each time the Clerk issues them, as required by the Texas Business and Commerce Code. Thus, as a rule, we do not order more than is needed. You may need additional Letters at various times during the estate administration; if so, please give us a call.

Estate Administration

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

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

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

Fiduciary Powers and Duties

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

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

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

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

- Do not leave estate funds uninvested. We will address the issue of investments in a separate letter to you.

- Do not engage in any self-dealing with _____'s estate. However, some types of self-dealing can be accomplished, such as the sale contemplated by a buy/sell

agreement if that becomes advisable. This is allowable because _____ approved the sale in writing in advance of his/her death.

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

Accounts and Records

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

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

> "_____, Independent Executor of the Estate of _____, Deceased."

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

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

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

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

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

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

Expenses Incurred to Date

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

Insurance

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

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

Notice to Creditors

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

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

With regard to unsecured creditors, an executor is no longer required to give an unsecured creditor notice of an executor. However, an executor may choose to give unsecured creditors notice to force the creditors to either establish their claims of payment or be permanently barred from seeking payment from the estate. Texas law requires that the notice to unsecured creditors include the following: (i) date of executor's appointment; (ii) address where the claim may be presented; (iii) to whom the claim should be addressed; and (iv) a statement that the claim must be presented within four (4) months after the date of the receipt of the notice or the claim is barred. This notice may be given at any time before the estate is closed.

The advantage of giving unsecured creditors notice is that it expedites the process of identifying any potential creditors and settle the debts as promptly as possible. This will allow you, as executor, to eventually distribute the remaining estate assets without the concern that a creditor will attempt to collect on a debt. The disadvantage is that the notice may prompt a

creditor to file a claim that would not have been filed without the information contained in the notice. However, it is rare that a creditor will do nothing for up to six (6) years, at which time the debt is generally barred by the applicable statute of limitation. It is generally preferable to address any potential claims in the initial stages of the administration versus waiting to see when and if the creditor will attempt to collect the debt.

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

Inventory

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

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

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

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

Non-Probate Property

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

interest in life insurance on the life of another person, that asset *is* required to be reported in the Inventory.

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

Estate and Income Tax Returns

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

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

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

You should also be aware that the income tax cost basis of all the assets _____ owned, except those which might be classified as income in respect of a decedent (e.g., accrued interest or dividends), will now be the fair market value on _____, or the alternate valuation date of _____, if elected. Thus, in the event of the sale of any assets, the only capital gain for purposes of income taxation would be that in excess of the new income tax basis.

Further, we anticipate it will be necessary to prepare and file a final federal income tax return for _____ covering the period beginning on January 1st of _____ and ending on the date of his death, but it is not due until April 15, _____. We understand that you have requested an extension of time to file this return. Note that once the return is prepared, you should sign it in your fiduciary capacity, i.e., as independent executor.

A federal fiduciary income tax return (Form 1041) will have to be filed by the estate for any year during the administration in which the gross income of the estate exceeds $600. If required, the return is due on the fifteenth (15th) day of the fourth (4th) month following the closing of the estate's tax year. The estate may select for its tax year either a calendar year or a fiscal year. Furthermore, the estate is not required to estimate its income taxes for its first two tax returns. In this case, tax planning and savings might be accomplished in connection with income tax matters

and returns involving the estate because of deferral and because the estate is a separate taxpayer. It will be to your advantage to maintain the estate as a separate taxpayer throughout the administration, so we advise you not to change the names on any accounts or other assets in _____'s name without checking with us.

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

Conclusion

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

Very truly yours,
[*Attorney*]

EXHIBIT B.

[*Style*]

INVENTORY AND LIST OF CLAIMS

TO THE HONORABLE JUDGE OF THE COURT:

_____, as the Independent Executor[*rix*], of the Estate of _____, returns to the Court the following Inventory of all of the property, real and personal, belonging to the Estate of _____, Deceased, that has come to h__ knowledge, together with a list of claims belonging to said Estate:

List of Property

Item No.	Description	Value at Date of Death
1.	Real Estate - See Exhibit A, attached	$
2.	Stocks and Bonds, See Exhibit B, Attached	
3.	Cash, See Exhibit C, attached	
4.	Other Miscellaneous Property, See Exhibit D, attached	_____.__
	Total Property	$

List of Claims Belonging to Estate

Item No.	Description	Value at Date of Death

[or]

None Determined To Date

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

Respectfully submitted,
[*Attorney information*]

AFFIDAVIT

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

_____

SUBSCRIBED AND SWORN TO BEFORE ME, on this the ____ day of _____, 20___.

(SEAL)

_____
NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

EXHIBIT C.

RULE 11 & FAMILY SETTLEMENT AGREEMENT

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

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

W I T N E S E T H :

WHEREAS, _____("Decedent") died on _____, in Houston, Texas;

WHEREAS, Decedent was a resident of Houston, Harris County, Texas, at the time of his death;

WHEREAS, Decedent had two children: _____ and _____;

WHEREAS, on _____, _____ filed an Application for Probate and Issuance of Letters Testamentary seeking to admit the purported Will of Decedent dated _____;

WHEREAS, on _____, _____filed a Petition in Intervention for the purpose of opposing the probate of the alleged Last Will & Testament of the Decedent dated _____and claiming to be the Decedent's surviving spouse;.

WHEREAS, on _____, _____ filed a Petition in Intervention for the purpose of opposing the probate of the alleged Last Will & Testament of the Decedent dated _____.

WHEREAS, _____, _____ and _____survived the Decedent by the statutory period and are Parties to this agreement;

WHEREAS, Decedent executed a prior will dated _____;

WHEREAS, a dispute exists between the Parties and as to the validity of the testamentary instruments executed by Decedent;

WHEREAS, the Parties wish to resolve all differences and disputes between them in order to avoid further litigation and expense and to make peace; and

WHEREAS, by executing this Agreement no Party hereto concedes any legal or factual contentions of any other Party or makes any admissions but, rather, each Party denies any contrary contention made by any other Party and enters into this Agreement solely to terminate and settle their differences in an effort to minimize costs, expenses, and ongoing attorney's fees.

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

1. Decedent's Testamentary Instruments. Each Party represents to every other Party that he or she is not aware of any testamentary instruments executed or alleged to have been executed by Decedent that remained in existence and effective at the time of her death other than the Will and the Codicil.
2. Decedent's Estate. Each Party represents to each other Party, to the best of his or her knowledge, there are no properties, real or personal, belonging to Decedent as of her date of death other than the assets disclosed on Exhibit A attached to this agreement.

3. Probate of Decedent's Will and Codicil. The Parties agree that _____ shall be admitted to probate.
4. Appointment of Personal Representative of Decedent's Estate. _____ shall be appointed as the sole Independent Executor of the Estate of the Decedent. The other Parties agree to execute and return immediately any necessary documents indicating their consent to _____'s appointment as the Independent Executor or personal representative of Decedent's probate estate.
5. Distribution of Estate Assets. The Parties agree that all of Decedent's property, being all real and personal property the Decedent had an interest in or claim to at time of her death including, but not limited to the property listed on Exhibit A, shall pass subject to the terms of this Agreement. The Property shall be distributed as follows:
    a. _____ shall receive the total sum of _____ in cash and _____. _____ shall receive such assets in full and final settlement of their interest in the Decedent's Estate. The Parties agree that the _____ shall deliver a check payable jointly to _____ and his counsel in accordance with the terms of this Agreement.
    b. _____ shall receive the total sum of _____ in cash and _____. _____ shall receive such assets in full and final settlement of their interest in the Decedent's Estate. The Parties agree that the _____ shall deliver a check payable jointly to _____ and his counsel in accordance with the terms of this Agreement. _____ waives, renounces and disclaims any right she may have to seek a family allowance pursuant to Section 286, et seq., of the Texas Estates Code, or otherwise.
    c. _____ shall receive the rest and remainder of Decedent's estate (being all assets other than the total sums passing to _____ and _____ under the this Agreement.
    d. _____ shall pay and deliver to _____ and _____, the property and checks in payment of the amount and assets due them under this Agreement contemporaneously with the receipt of a court order authorizing this agreement (or authorizing the issuance of a check in accordance with this Agreement). The delivery of the assets shall be in full and final settlement of _____ and _____ interest in the Decedent's estate.
    e. The Parties agree and confirm that all distributions and/or property passing to _____ and _____ and any other amounts passing to _____ and _____under the terms of this Settlement Agreement shall be treated for income tax purposes as a settlement of a claim and/or as a gift or bequest of "a specific sum of money or of specific property" not payable in installments and are not punitive, not for services rendered, and no portion represents income or interest relating to such specific sum of money; *i.e.*, none of the distributions will constitute distributable net income to _____ and _____.
7. Conveyance Documents. In order to effectuate the conveyance of all of Decedent's interest in the property passing pursuant to the terms of this Agreement (described in Exhibit A or otherwise), the parties shall deliver to any other parties all such requisite executed documentation, deeds, bill of sales and stock transfers as may be necessary complete the division of the Decedent's estate in compliance with this Agreement. All the Parties shall also cooperate with each other to facilitate the delivery of any assets to any other party under the terms of this Agreement.
8. Administration of Decedent's Estate. _____, as the personal representative of Decedent's estate, will have sole authority over and responsibility for the administration of

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

9. Release. Each Party, for themselves and their lineal heirs, beneficiaries, assigns, representative, agents and descendants, hereby forever release and discharge each other Party, individually, and in all capacities, and their respective heirs, personal representatives, executors, affiliates, officers, directors, partners, administrators, successors, agents, attorneys, and assigns of and from any and all liabilities, claims, and causes of action including, but not limited to, tortious interference with inheritance rights, tortious interference with contracts, tortious interference with business relations, physical, mental, or emotional distress, any gifts made by Decedent, will contests, claims of conflict of interest, claims against attorneys, accountants, fiduciaries or agents, unjust enrichment, the administration of the estate or the guardianship of the Decedent, all claims which were or could have been made in currently pending litigation, fraudulent concealment, rights of reimbursement, exempt property, fraud, fraud on the community, theft, undue influences, misappropriation, breach of fiduciary duty, and any other statutory rights and demands and causes of action of any kind and/or character, whether **known or unknown**, fixed or contingent, liquidated or unliquidated, whether or not asserted, arising out of or any way connected with any act, omission or event related to any Party and/or the Decedent's Estate, the guardianship of the Decedent, and the Revocable Trust, save and except for the representations, warranties, obligations under this Agreement.
10. Party's Attorney's Fees and Expenses. Each Party hereby agrees to be responsible for his or her own respective attorney's fees, costs, and expenses through the date of this Agreement, including their respective attorney's fees, costs, and expenses necessary and/or incurred in the effectuation of this Agreement. The Parties further agree that if it becomes necessary to assert any claim to enforce or defend the provisions of this Agreement, the prevailing Party shall be entitled to recover reasonable attorney's fees and other related litigation expenses from the non-prevailing Party.
11. Representations. Each Party makes the following representations to each other Party:
    a. The representing Party is legally competent to execute this Agreement and that this Agreement is valid, binding and enforceable.
    b. The representing Party believes that Decedent did not properly execute any right of survivorship or pay on death agreements or other agreements relating to the creation of non-probate assets and that any such agreements or contracts are void and of no effect and that any non-probate assets are an assets of Decedent's probate estate and pass pursuant to the terms of this Agreement.

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

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

11. Entire Agreement. The provisions of this Agreement constitute the entire Agreement between the Parties, and supersede all previous negotiations and documents. No oral modification shall be binding upon either Party. The terms hereof are contractual in nature and are not mere recitals, and shall be binding upon the heirs, spouses, descendants, executors, administrators, successors, representatives, and assigns of the Parties hereto, upon complete execution by the Parties.
12. Construction. All Parties acknowledge and agree that all the Parties have participated in the drafting of this Agreement and no one Party shall be considered the drafter of this Agreement and, therefore, no presumptions shall be made for or against any other Party on the basis that any one Party was the drafter of this Agreement.
13. Multiple Counterparts. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original for all purposes.
14. Effective Date. This Agreement shall be effective as of the last to occur of the following the date that the last Party executes this Agreement.
15. Choice of Laws. This Agreement shall be construed and interpreted in accordance with the laws of the State of Texas.

EXECUTED on _____, 200__.

_____

_____, Individually, and in all capacities

_____

_____, Individually, and in all capacities

[*add jurat/acknowledgement*]

EXHIBIT “A”

LISTING OF ASSETS

EXHIBIT D.

BENEFICIARY DISTRIBUTION AGREEMENT

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

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

W I T N E S S E T H :

WHEREAS, the Decedent died on _____, in _____ County, Texas;

WHEREAS, Decedent's wife/husband, _____ ("_____"), died on _____;

WHEREAS, prior to his/her death, Decedent arranged for _____'s Will to be admitted to probate;

WHEREAS, Decedent left a valid Last Will and Testament ("Will") that has been admitted to probate in the above-referenced proceeding. A copy of the Will is attached as Exhibit A to this Agreement;

WHEREAS, Decedent's Will provides that each of the Parties is entitled to _____ of Decedent's estate subject to probate administration;

WHEREAS, it has been determined that _____ is or was in possession of assets of the Decedent's Estate that have not been delivered to the Administrator to date, and he/she acknowledges that such assets should be treated as an advance toward his/her interest in the Decedent's Estate;

WHEREAS, it has been determined that _____ has received _____ without Administrator's permission, and he/she acknowledges that such amounts should be treated as an advance toward his/her interest in the Decedent's Estate;

WHEREAS, the Parties agree that all assets of the Decedent's Estate that were in the possession of any Party and that have not been delivered to the Administrator to date shall be treated as an advance toward his or her interest in the Decedent's Estate;

WHEREAS, the Parties survived the Decedent by the statutory period and are Parties to this agreement;

WHEREAS, issues exist between the Parties regarding the amounts and/or assets due the Decedent's Estate from some of the Parties and, thus, the remaining interest of each Party in the Decedent's Estate after taking into account advancements and assets retained by such Party;

WHEREAS, the Parties wish to resolve all differences and disputes between them in order to avoid further litigation and expense and to make peace; and

WHEREAS, by executing this Agreement no Party hereto concedes any legal or factual contentions of any other Party or makes any admissions but, rather, each Party denies any contrary contention made by any other Party and enters into this Agreement solely to terminate and settle their differences in an effort to minimize costs, expenses, and ongoing attorney's fees.

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

6. Decedent's Testamentary Instruments. Each Party represents to every other Party that he or she is not aware of any testamentary instruments executed or alleged to have been executed by Decedent that remained in existence and effective at the time of her death other than the Will attached as Exhibit A to this Agreement.
7. Decedent's Estate. Each Party represents to each other Party that to the best of his or her knowledge, there are no properties, real or personal, belonging to Decedent as of her date of death other than the assets disclosed on Exhibit B attached to this agreement.
8. Agreed Advancements. The Parties acknowledge that the Decedent's Estate shall be distributed to each of the Parties as set forth in the Will but enter into this agreement to settle all disputes regarding assets of the Decedent's Estate that have been advanced to or retained by one or more of the Parties to this Agreement. Therefore, the Parties agree that certain assets have been distributed to some of the Parties to date and that such distribution and/or receipt shall be treated as an advancement of such stated Party's _____ interest in the Decedent's Estate as follows:
   (a) *: The Parties acknowledge and agree that * has received the following assets as an advancement of his/her interest in the Decedent's Estate and such assets/amounts shall reduce his _____ share of the Decedent's Estate:
      i) * has received cash in the total amount of $_____. A reconciliation of the cash received by * and the debts and other offsets is attached as Exhibit C to this Agreement;
      ii) * has received the Decedent's _____ with an agreed value of $_____;
      iii) * has received the Decedent's ◊ with an agreed value of $_____;
      iv) * has received the Decedent's ◊◊ with an agreed value of $_____;
      v) * has received the Decedent's ◊◊◊ with an agreed value of $_____;
      vi) * has received a court-approved advancement of $_____ in cash from the Administrator;
   (b) **: The Parties acknowledge and agree that ** has received the following assets of the Decedent's Estate and such assets/amounts shall reduce his/her one-_____ share of the Decedent's Estate:
      i) ** has received the Decedent's _____ with an agreed value of $_____;
      ii) ** has received a court-approved advancement of $_____ in cash from the Administrator;
   (c) ***: The Parties acknowledge and agree that *** has received the following assets of the Decedent's Estate and such assets/amounts shall reduce his/her _____ share of the Decedent's Estate:
      i) *** has received a court-approved advancement of $_____ in cash from the Administrator;
   (d) ****: The Parties acknowledge and agree that **** has received the following assets of the Decedent's Estate and such assets/amounts shall reduce his/her _____ share of the Decedent's Estate:
      i) **** has received cash in the total amount of $_____ via the pay-off of a loan due by **** and paid off after the Decedent's death with

cash on deposit at _____ in the Decedent's accounts;

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

(e) *****: The Parties acknowledge and agree that ***** has received the following assets as an advancement of his/her interest in the Decedent's Estate and such assets/amounts shall reduce his/her _____ share of the Decedent's Estate:

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

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

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

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

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

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

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

11. Conveyance Documents. In order to effectuate the conveyance of all of Decedent's interest in the property passing pursuant to the terms of this Agreement (described in Exhibit B or otherwise), the Parties shall deliver to any other Parties all such

requisite executed documentation, deeds, bill of sales and stock transfers as may be necessary to complete the division of the Decedent's estate in compliance with this Agreement. All the Parties shall also cooperate with each other and Administrator to facilitate the delivery of any assets to any other Party under the terms of this Agreement.

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

13. Representations. The Parties to this Agreement make the following representations to such other Parties:

    (a) Each Party represents to the other Parties that he or she is not aware of any assets of the Decedent's Estate other than those assets listed on Exhibit B to this Agreement;

    (b) Each Party represents to the other Parties that he/she is not aware of any cash, dividend, rents, or other assets of the Decedent's estate than is not accounted for on Exhibit C;

    (c) The representing Party is legally competent to execute this Agreement and that this Agreement is valid, binding and enforceable;

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

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

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

    (g) Each of the Parties acknowledge and understand that the Administrator does not request his or her interest in matters relating to the Decedent's Estate, has not provided them legal advice and has not made any representations to him or her. Each Party further acknowledges that (i) Administrator has suggested

that he or she retain counsel if they have any questions regarding the terms or effect of this Agreement, and (ii) each Party is relying on his or her own judgment in entering into this Agreement.

9. Entire Agreement. The provisions of this Agreement constitute the entire Agreement between the Parties, and supersede all previous negotiations and documents. No oral modification shall be binding upon either Party. The terms hereof are contractual in nature and are not mere recitals, and shall be binding upon the heirs, spouses, descendants, executors, administrators, successors, representatives, and assigns of the Parties hereto, upon complete execution by the Parties.
10. Construction. All Parties acknowledge and agree that all the Parties have participated in the drafting of this Agreement and no one Party or the Administrator shall be considered the drafter of this Agreement and, therefore, no presumptions shall be made for or against any other Party on the basis that any one Party was the drafter of this Agreement.
11. Multiple Counterparts. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original for all purposes.
12. Effective Date. This Agreement shall be effective as of the last to occur of the following the date that the last Party executes this Agreement.
13. Choice of Laws. This Agreement shall be construed and interpreted in accordance with the laws of the State of Texas.

EXECUTED on _____ day of _____, 20___.

_____
*
_____
_____

_____
**
_____
_____

_____
***
_____
_____

_____
****
_____
_____

_____

*****

_____

_____

[*add jurat/acknowledgement*]

EXHIBIT E

[style of case]

RECEIPT

The undersigned hereby acknowledges receipt of the assets of the Estate of Sally Jones, Deceased set forth in Exhibit A hereto, in full and complete satisfaction of the tangible personal property to which the undersigned is entitled.

DATED this _____ day of _____ 201_.

_____
[name]

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

This instrument was acknowledged before me on this _____ day of _____ 201_, by [name].

_____
NOTARY PUBLIC in and for
The State of Texas

EXHIBIT F

[style of case]

RECEIPT AND RELEASE

This will acknowledge that the undersigned has received from [names of fiduciaries], Independent Co-Executors of the Estate of Sally Jones, Deceased (hereinafter called "Fiduciaries"), the sum of _____ _____ AND NO/100 DOLLARS ($_____), as the cash legacy, less the Approved Adjustments, which represents the total sum that the undersigned is entitled under the provisions of the Last Will and Testament of Sally Jones, Deceased, duly probated under Cause No. _____, In the Probate Court Number ___ of Harris County, Texas, a copy of which has been delivered to the undersigned. The Approved Adjustments include (a) the prior partial distributions to the undersigned, and (b) the share of the total death taxes allocated to the undersigned pursuant to the Settlement Agreement (a copy of which, excluding exhibits, is attached as Exhibit A and incorporated by this reference). The undersigned does hereby release such Fiduciaries of and from all claims, demands, liabilities, and causes of action, whether nor known or unknown. The undersigned further represents that she is adequately represented by competent counsel of her own choosing in connection with the execution and delivery of this Release and in any and all matters relating thereto or has voluntarily waived her right to such counsel, knowing that Fiduciaries have recommended that the she seek advice of counsel prior to executing and returning this Release. SIGNED this _____ day of _____, 201_.

_____
Name:

SUBSCRIBED AND SWORN TO BEFORE ME on this the _____ day of _____, 201_, by _____.

_____
Notary Public, State of _____

EXHIBIT G

[style of case]

SETTLEMENT AND RELEASE AGREEMENT

This Agreement is made and entered into as of the Effective Date, by and among the Parties as defined below.

Article I: Definitions

1.1 The Parties to this Agreement are defined as follows:
   a. The term "XXXX" shall mean XXXX, in its fiduciary capacity as Independent Executor of the Jones Estate;
   b. The term "Ms. Smith" shall mean AAAA;
   c. The term "Mrs. Beduze" shall mean BBBB;

1.2 The term "Affiliates" of the person or entity designated shall mean such person's or entity's employees, directors, officers, shareholders, agents (including, without limitation, attorneys, accountants, and investment advisors), and all general and limited partnerships of which the person or entity is a partner, firms or corporations or any other entities directly or indirectly controlling such entity or directly or indirectly controlled by such person or entity.

1.3 The terms "Agreement" or "Release" shall refer to this Settlement and Release Agreement, including all Exhibits attached hereto.

1.4 The term "Jones Estate" shall mean all assets, principal and income, real or personal, however and whenever acquired, and any income there from, including any accumulated or undistributed income, of the Estate of Sally Jones, Deceased.

1.5 The term "Beneficiaries" shall refer to Ms. Smith and Mrs. Beduze.

1.6 The term "Claims" shall refer to and include any and all claims, causes of action, actions, costs, losses, damages, charges, challenges, contests, liabilities, promises, agreements, suits, and all other obligations and liabilities of whatsoever nature KNOWN and UNKNOWN, fixed or contingent, liquidated or unliquidated, anticipated or unanticipated, at law or in equity, for any type of relief or redress, including but not limited to money damages, whether founded on contract, tort (including but not limited to breach of fiduciary duty, NEGLIGENCE, gross negligence, fraud, tortious interference with inheritance rights, conversion, misrepresentation, conscious indifference, reckless disregard, and/or malicious conduct), intentional infliction of emotional distress, reimbursement, indebtedness, FRAUDULENT INDUCEMENT, bad faith, constructive fraud, lack of full disclosure, unjust enrichment, usurious fees, fee forfeiture, breach of contract and any other ground, whether or not asserted, which any of the Beneficiaries have, may have, or could have against XXXX, its Predecessors, Successors and Affiliates, including any claims which could have been brought by any of the Beneficiaries, relating to the Jones Estate or under Mrs. Jones's Will through the Effective Date of the Agreement. THE PARTIES AGREE THAT THE DEFINITION OF "CLAIMS" IS AND SHALL BE AS BROAD AS THE LAW WILL ALLOW.

1.7 The term "Effective Date" means the date the last Party signs this Agreement.

1.8 The term "Inventory" shall refer to the Inventory and List of Claims filed in the above-referenced proceeding and attached as Exhibit B.

1.9 The term "Mrs. Jones" shall mean Sally D. Jones, who died on January 1, 2009.

1.10 The term "Mrs. Jones's Will" shall refer to Mrs. Jones's Last Will and Testament dated September 30, 2008, attached as Exhibit A.

1.11 The terms "the Parties" or "the Parties hereto" shall collectively refer to XXXX and the Beneficiaries.

1.12 The term "Party" shall refer to any of XXXX, Ms. Smith and Mrs. Beduze.

1.13 The terms "Predecessor" or "Predecessors" shall refer to any person and/or entity serving prior in time as a fiduciary to the fiduciary in question.

1.14 The term "Successor(s)" shall refer to the heirs, devisees, descendants, legatees, executors, administrators, trustees, attorneys-in-fact, appointees under any power of appointment, guardians, conservators, personal representatives, assigns, successor trustees, successors by reason of a merger, acquisition or governmental action, and any Successors of a Successor.

1.15 The term "Transactions" shall include the following:

(i) the administration and settlement of the Jones Estate including, but not limited to, all actions, transactions, sales, purchases, payments, alleged failures to act, distributions, by XXXX or otherwise, relating to the Jones Estate;

(ii) XXXX's actions as a custodian or agent for Mrs. Jones, prior to her death, and;

(iii) the negotiation and consummation of this Agreement.

Article II: Recitals

WHEREAS, Mrs. Jones died on January 1, 2009.

WHEREAS, Mrs. Jones's Will attached as Exhibit A was admitted to probate under Cause No. [insert] in Probate Court No. __ of Harris County, Texas.

WHEREAS, XXXX was appointed and qualified as sole Independent Executor on February 1, 2009.

WHEREAS, all of Mrs. Jones's household furnishings and personal effects have been distributed in accordance with the terms of Will.

WHEREAS, XXXX was notified by _____ that she owned two paintings, which were in Mrs. Jones's possession at Mrs. Jones's death. XXXX has returned these items to _____.

WHEREAS, Mrs. Jones's Will provides that the residuary estate shall be distributed as follows:

a. Sixty Percent to Ms. Smith;
b. Forty Percent to Mrs. Beduze;

WHEREAS, XXXX seeks to settle its account as the Executor of Mrs. Jones's Estate;

WHEREAS, XXXX is willing to accept full and final releases set forth in this Agreement in lieu of a judicial settlement of XXXX's account as Executor.

Article III: Agreements

For and in consideration of the premises, the mutual covenants and the terms hereunder, the sufficiency of which consideration is hereby mutually acknowledged, the Parties to this Agreement hereby agree as follows:

3.1 Jones Estate.

a. Each of the Beneficiaries acknowledge that they (i) have received periodic statements from XXXX and agree that these provided periodic accountings for the Jones Estate, (ii) have reviewed and approved the statements attached as Exhibit ___, related to the period from January 1, 2009, through _____, (iii) have had the opportunity to inspect the books and records of XXXX, as Executor of the Jones Estate (iv) hereby waive any further right to any further accounting or information from XXXX, and (v) ratify and approve all actions of XXXX, as Executor of the Jones Estate, including the Transactions.
b. Each of the Beneficiaries hereby waives any right to any further accountings from XXXX, other than a copy of the monthly statements for the period following the Effective Date.
c. Each of the Beneficiaries acknowledges and agrees that she has received any furnishings and personal effects she may be due under the Jones Will.
d. Each of the Beneficiaries agree that XXXX is authorized to pay from the remaining assets of the Jones Estate all remaining administration expenses incurred through the transfer of the Jones Estate including, but not limited to, its accountant and legal fees and expenses (including fees and expenses relating to the negotiation and completion of this Agreement), XXXX's compensation, and any other fees and expenses relating to the transfer of the remaining assets of the Jones Estate, prior to the delivery of the remaining Jones Estate to the remainder beneficiaries.
e. The Beneficiaries agree that a list of all remaining assets of the Jones Estate is set forth on Exhibit ___ to this Agreement. Each of the Beneficiaries further agree:
    a. XXXX shall retain a reasonable amount for final debts and expenses, not to exceed Ten Thousand and 00/100 Dollars ($10,000) to provide for any remaining amounts relating to the winding up of the Jones Estate ("Winding Up Retention Amount").
    b. All debts and administration expenses including, but not limited to, legal, accounting and other fees and expenses paid to date, shall be paid from the remaining assets of the Jones Estate prior to a determination and distribution of each of the Beneficiaries' share of the Jones Estate.
    c. XXXX shall sell all remaining securities of the Jones Estate and then distribute the remaining cash of the Jones Estate, after payment of any debts and administration expenses and excluding the Winding Up Retention Amount, as follows:
        i. Sixty Percent to Ms. Smith;
        ii. Forty Percent to Mrs. Beduze;
    d. There will be some fluctuation in valuation and that the amounts actually distributed will likely not be exactly as reflected in Exhibit ____.
f. Each of the Beneficiaries acknowledges that some portion of the amounts to be distributed to her from the Jones Estate under this Agreement or otherwise may constitute taxable or reportable income to such Beneficiary. Each of the Beneficiaries agrees that she shall be responsible for such Beneficiary's share of any

income taxes relating to her share of the Jones Estate, including all distributions made to such Beneficiary under this Agreement.

g. XXXX will arrange to file the final income tax return for the Jones Estate on or before the filing deadline.
h. Each Beneficiary agrees to cooperate with XXXX to complete the distribution of any remaining assets of the Jones Estate.

3.2 Release Of Claims.

a. Each Beneficiary and their Successors, do hereby forever release and discharge XXXX, in its corporate capacity, as Executor of the Jones Estate, [*list any additional capacities, for example:* former agent for Mrs. Jones, as former trustee of Mrs. Jones's revocable trust], and all capacities related to the Jones Estate of and from any and all Claims including, but not limited to, the Transactions, save and except XXXX's obligations under this Agreement.
b. Furthermore, in the event that XXXX is ever joined as a party in any judicial proceeding relating to its prior appointment as Executor of the Jones Estate, XXXX shall be indemnified by the Party or Parties who joined or caused XXXX to be joined in any such proceeding, for all damages, costs, fees and expenses relating to such judicial proceeding, including attorneys, accountants, experts and court costs.
c. Each Beneficiary understands and agrees that as a material term of this Agreement that (i) they shall not pursue a claim or lawsuit against XXXX relating to their appointment as Executor of the Jones Estate, and (ii) they waive any right to demand an accounting or audit of Executor of the Jones Estate.

3.3 Representations And Warranties.

a. Each Party hereby stipulates, represents and warrants as follows:
    (i). That he, she or it is the current legal and beneficial owner of all of the Claims released by such Party herein;
    (ii). That he, she or it has not assigned, pledged or contracted to assign or pledge to any other person or entity any interest he, she or it may have in the Jones Estate, or in any Claims or interests in any possible litigation any of them otherwise might have brought relating to XXXX, and/or the Jones Estate;
    (iii). That the terms and provisions of this Release are valid, binding and enforceable;
    (iv). That he, she or it is adequately represented by competent counsel of his, her or its own choosing in connection with the execution and delivery of this Release and in any and all matters relating thereto or has voluntarily waived his, her or its right to such counsel, knowing that XXXX has recommended that the other Parties seek advice of counsel prior to executing this Agreement;
    (v). That he, she or it acknowledges that Sarah Patel Pacheco, and the law firm of Crain, Caton & James, P.C., solely represent XXXX and do not represent any other Party;
    (vi). That in executing this Release, he, she or it has relied upon his, her or its own judgment and the advice of his, her or its own attorneys, and further, that he, she or it has not been induced to sign or execute this Release by promises, agreements or representations not expressly stated herein;

(vii). That his, her or its consent to this Release was not procured, obtained or induced by improper conduct, undue influence or duress; and

(viii). That he, she or it either has (i) knowledge of all relevant and material information and facts and has been fully informed, including by advice of counsel, concerning the existence of potential Claims against XXXX, in their various individual and fiduciary capacities, or any other Party including other additional affirmative or defensive Claims arising from all matters known to them and arising during the period of negotiations leading to and culminating in the execution by them of this Release, in order for them to make an informed and considered decision to enter into this Release, and/or (ii) specifically and after advice of counsel is waiving (a) any right to obtain or demand, and (b) any obligation of XXXX, individually or in any fiduciary capacity, to provide such material information and facts or knowledge of Claims.

b. The Parties understand and agree that the other Parties have relied upon these representations and warranties in entering into this Release.

3.4 Miscellaneous Provisions.

a. Parties Bound. This Release shall be binding upon and shall inure to the benefit of the Parties hereto and their respective heirs, executors, administrators, personal representatives, Successors and assigns. The Parties acknowledge that each has had input into the drafting of this Release and no one (1) Party shall be deemed the drafter.

b. Attorney Fees and Expenses for Breach of Release. The Parties agree that if it becomes necessary to assert any claim to enforce or defend the provisions of this Release, the prevailing Party shall be entitled to recover reasonable attorneys' fees and other related litigation expenses from the non-prevailing Party.

c. No Oral Modification. No amendment, modification, waiver, or consent with respect to, any provision of any of this Release shall be effective unless the same shall be in writing and signed by the Party or Parties hereto against whom enforcement of the amendment, modification, waiver or consent is sought.

d. Counterparts. This Release may be executed simultaneously in two (2) or more counterparts, each of which shall be deemed an original, but all of which together shall constitute a single instrument. This Release shall only be binding when one (1) or more counterparts hereof, individually or taken together, shall bear all signatures of the Parties hereto reflected hereon as signatories.

e. Choice of Law. This Release shall be governed pursuant to the laws of the State of Texas.

f. Choice of Venue. Harris County, Texas shall be the appropriate and exclusive venue for any suit arising out of this Release including, but not limited to, any suit relating to XXXX or the enforcement or construction of this Release.

g. Assignment. This Release and the rights and obligations of the Parties hereto shall not be assigned or delegated by any Party hereto without the prior written consent of the other Parties hereof.

h. Incorporation. All Exhibits attached hereto are hereby incorporated by reference in this Release for the purposes set forth above.

i. Headings. The paragraph headings and sub-headings used herein are for descriptive purposes only and have no substantive meaning.

j. THIS WRITTEN RELEASE REPRESENTS THE FINAL RELEASE AMONG THE PARTIES HERETO AND MAY NOT BE CONTRADICTED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS, OR SUBSEQUENT ORAL OR WRITTEN RELEASES BETWEEN OR AMONG ONE OR MORE OF THE PARTIES HERETO.

[SIGNATURE PAGES TO FOLLOW]

EACH PARTY TO THIS AGREEMENT UNDERSTANDS THAT BY SIGNING THIS DOCUMENT, HE OR SHE MAY PERMANENTLY SURRENDER CLAIMS HE OR SHE WOULD OTHERWISE HAVE, INDIVIDUALLY AND/OR IN THE OTHER CAPACITIES SET FORTH IN THIS AGREEMENT, UNDER TEXAS LAW.

Executed in multiple counterparts of equal rank on this __ day of _____, 201_.

By:_____

_____

MR. _____

THE STATE OF _____ §
§
COUNTY OF _____ §

BEFORE ME, the undersigned authority, on this day personally appeared _____, known to me to be the person and officer whose name is subscribed to the foregoing instrument and acknowledged to me that she executed the same for the purposes and consideration therein expressed and in each of the capacities therein stated.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this _____ day of _____, 201_.

_____
NOTARY PUBLIC, IN AND FOR THE
STATE OF _____

My Commission Expires:

_____

Notary's Printed Name:

_____

EACH PARTY TO THIS AGREEMENT UNDERSTANDS THAT BY SIGNING THIS DOCUMENT, HE OR SHE MAY PERMANENTLY SURRENDER CLAIMS HE OR SHE WOULD OTHERWISE HAVE, INDIVIDUALLY AND/OR IN THE OTHER CAPACITIES SET FORTH IN THIS AGREEMENT, UNDER TEXAS LAW.

Executed in multiple counterparts of equal rank on this __ day of _____, 201_.

By:_____

_____

Ms. _____

THE STATE OF _____ §
§
COUNTY OF _____ §

BEFORE ME, the undersigned authority, on this day personally appeared Ms. _____, known to me to be the person and officer whose name is subscribed to the foregoing instrument and acknowledged to me that she executed the same for the purposes and consideration therein expressed and in each of the capacities therein stated.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this _____ day of _____, 201_.

_____
NOTARY PUBLIC, IN AND FOR THE
STATE OF _____

My Commission Expires:

_____

Notary's Printed Name:

_____