

**A HANDBOOK
FOR THE
INDEPENDENT EXECUTOR**

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I. Introduction. This handbook is designed to assist you in performing your duties as Independent Executor¹, by providing you with a resource for reference and general information. I encourage you to use it as a reminder of matters that you should handle, as well as a springboard for discussion with me. It is not designed to be a comprehensive discussion of the matters involved in an independent administration in Texas, nor is it intended to substitute for legal advice that you should obtain in the course of the estate administration. You should continue to work closely with me and your accountant in administering the estate, as each estate will have its own specific issues. There are a few general recommendations for you as you begin:

- A. Read the Will² and discuss its provisions with me.
- B. Consult the terms of the Will closely and ask me if anything is unclear when making decisions.
- C. Follow the Independent Executor's Golden Rule: Treat estate beneficiaries as you would want an Independent Executor to treat you if you were only a beneficiary.
- D. Be prompt in performing your duties and responsive to your accountant,

¹ Current practice is to use the gender neutral term "Executor" for male and female personal representatives. Many attorneys still use "Executors". Either is correct.

² If the decedent created a revocable trust, then it may be the primary source of guidance, in conjunction with the Will. I will use the term "Will" in this handbook to include both.

estate beneficiaries, and me. If your personal or business situation is likely to prevent this, it may be advisable for you to decline to serve.

II. The Appointment Process.

A. Probate of Will. Before an Independent Executor can assume duties as such, the Will must be admitted to probate and the court must appoint the Independent Executor. The Will cannot be admitted to probate until on or after the first Monday after ten days have elapsed from the date of filing the Will. This means that Wills filed on or before Thursday of a given week can be admitted to probate on or after the second Monday following the filing date. Some courts may require the filing to be made by a certain time of day on that Thursday in order to ensure that notice of the application to probate the Will can be posted at the courthouse for the requisite period of time.

B. The Probate Hearing. My assistant will set a hearing for the probate of the Will to occur on or after the Monday following ten days from the filing of the Will. Most require the hearing to occur during "open court" when a number of uncontested matters will be before the court. The hearing typically does not exceed five to ten minutes. Testimony must be given by someone familiar with the decedent who is familiar with the Will and the circumstances of the decedent's death. Testimony does not have to be given by the person named as Executor in the Will, but it is frequently most convenient for the person named as Executor in the Will to be present.

C. Issuance of Letters Testamentary. After the court has signed the order

admitting the Will to probate, and appointing the Independent Executor named in the Will, the Independent Executor will sign an oath. Once this oath has been filed with the clerk's office, the clerk will issue Letters Testamentary (or Letters of Administration in the case of a person not named as Executor by a Will). These Letters will be proof to third parties dealing with the Executor that he or she has powers as personal representative of the estate. In many cases, the Independent Executor will be required to supply original letters testamentary to third parties. Therefore, when Letters Testamentary are obtained, enough copies should be obtained to allow the Independent Executor to deal with the various entities that hold assets belonging to the decedent. Letters are valid for only sixty (60) days so we will not order more than you think you will need. Additional Letters Testamentary can be obtained at any time from the court clerk for a fee of \$2.00 each.

III. General Duties of Independent Executors.

A. Overview. In very broad terms, the duty of the Independent Executor is to collect all of the assets due to the estate, pay all of the debts and expenses of the estate, set aside exempt property and allowances for the family³, and distribute the estate to the beneficiaries of the estate.

B. Application of General Fiduciary⁴ Duties. An Independent Executor is

³ Necessary if the family members are not already the beneficiaries of the estate or if the estate may be insolvent.

⁴ A fiduciary is one who owes to another the duties of good faith, trust, confidence and candor, and who must exercise a

a fiduciary for the beneficiaries and persons interested in the estate. Under Texas law, an Independent Executor owes to the beneficiaries of the estate fiduciary duties similar to those owed by a trustee to the trust beneficiary. It is a position of great trust and carries with it a considerable amount of responsibility and thereby potential liability. You should ask me any time you have a question regarding a certain action before you take it. Generally, a trustee's duties (and therefore the duties of an Independent Executor) include the following:

1. Duty of Loyalty. It is the duty of the fiduciary to administer the estate solely in the interest of the beneficiaries. The fiduciary is not permitted to place herself in a position where it could benefit her to violate her duty to the beneficiaries.

2. Duty Not to Delegate. The fiduciary is under an obligation to personally administer the estate and is under a duty not to delegate to others acts that the fiduciary should personally perform.⁵

3. Duty to Keep and Render Accounts. A fiduciary is under a duty to the beneficiaries to keep full accounts that are clear and accurate. The Texas Probate Code gives a beneficiary the right to demand a

high standard of care in managing another's money or property.

⁵ The fiduciary should hire advisors such as attorneys and accountants, and may hire individuals to do ministerial tasks. But the fiduciary is the ultimate decision maker and may not delegate that responsibility.

written statement of accounts covering the estate's transactions at certain times.

4. Duty to Furnish Information.

A fiduciary is under a common law duty to the beneficiaries at reasonable times to give complete and accurate information regarding the estate.

5. Duty to Exercise Reasonable Care and Skill.

A fiduciary is under a duty in administering the trust or estate to exercise the same care and skill as a man of ordinary prudence would use in dealing with her own property.

6. Duty to Take and Retain Control of Estate Property.

The fiduciary is under a duty to take all reasonable steps to obtain and control the estate property.

7. Duty to Preserve Estate Property.

A fiduciary must use the same care and skill that a person of ordinary prudence would use to preserve estate property.

8. Duty to Enforce Claims.

A fiduciary is under a duty to take reasonable actions to collect claims that are due to the estate.

9. Duty to Defend.

The fiduciary is under a duty to do what is reasonable, under the circumstances, to defend actions by third parties against the estate.

10. Duty Not to Co-Mingle Estate Funds.

The fiduciary has a duty to keep estate property separate from other property, and to properly designate it as estate property. Not only is it the fiduciary's duty to keep the estate

property separate from the fiduciary's own property, but also to keep that property separate from other estates, trusts, or other entities such as partnerships.

11. Duty With Respect to Bank Deposits.

Although a fiduciary may deposit funds in a bank, he is under a duty to use reasonable care in selecting the bank and to properly designate the deposit as an estate deposit. He may not subject the deposit to unreasonable restrictions on withdrawal or leave the property in non-interest bearing accounts for unduly long periods of time.

12. Duty With Respect to Investments.

Because an Independent Executor's primary responsibility is to collect estate assets, pay creditors and distribute the estate, the Executor will not typically actively manage investments. The Independent Executor cannot ignore the investments, however, as he or she does have the duty to preserve estate property. If the assets of the estate require active management in order to preserve value, the Executor should consider hiring a professional to manage the investments then oversee the management in a prudent manner.

13. Duty to Deal Impartially With Beneficiaries.

When there are multiple beneficiaries of an estate, it is the duty of the fiduciary to deal impartially among the beneficiaries. An Executor will face tax elections and other situations that will require careful attention to impartiality.

14. Duty With Respect to Co-Fiduciaries.

Unless the Will provides otherwise, all fiduciaries

are under a duty to participate in the estate administration. Therefore, a fiduciary cannot properly delegate the acts required of the fiduciary to co-fiduciaries. It is also the duty of a fiduciary to use reasonable care to prevent other fiduciaries from committing a breach of trust. Pursuant to Texas law, any Executor can act alone to bind the estate, except that all Executors must execute any conveyance of real estate. Nonetheless, co-Executrices should act in concert because all may be held responsible.

C. Collection of Information. The Independent Executor will collect information regarding the estate for the preparation of the Inventory and Estate tax return (when required). It is easier to obtain information regarding asset values now rather than waiting until months later, and it may take time to get information from third parties.

IV. Duty to Keep Records and Accounts. It is imperative that the Independent Executor keep detailed records for the estate from the time that the Independent Executor first assumes her duties. Establishing proper accounts and record-keeping procedures at the outset will greatly simplify the Independent Executor's job.

A. Setting Up the Books and Records of the Estate. It will be difficult and time consuming for an Independent Executor to supply the appropriate accountings that it is her duty to provide if adequate books and records have not been established and maintained during the administration of the estate. There are a variety of ways that this record-keeping can be accomplished that will enable the Independent Executor to provide regular accountings with a minimum of

effort. These are discussed in more detail in the following sections.

B. Quicken or Similar Program. There are a number of financial software packages (such as Quicken by Intuit) that can assist the Independent Executor in the record-keeping process. Most of these retail for less than \$100. Although Quicken and similar financial programs are not specifically designed for estate administration, they can be modified very easily to provide meaningful reports to the beneficiaries and maintain detailed records for the Independent Executor. If the assets are numerous or involve many transactions, the Independent Executor should consider hiring a bookkeeper. Once the assets of an estate have been set up on Quicken or a similar program, checks can be entered and printed directly from the program, thus recording and categorizing expenses, income and sales or dispositions of property as they occur. Reports can then be produced quite easily as needed.

C. Custodianship Accounts. For larger estates, estates in which there are likely to be complex or large numbers of transactions, or estates in which there may be potentially contentious beneficiaries, the Independent Executor may want to consider setting up a custodial account at a financial institution to hold and invest the liquid assets of the estate. The financial institution will then produce monthly or quarterly statements showing the assets, disbursements, disposition of assets and other transactions, which can be disseminated to beneficiaries as well as to the Independent Executor. For beneficiaries who treat the Independent Executor with suspicion, holding the liquid assets

in this manner can provide comfort to the beneficiaries and therefore may reduce discord with the Independent Executor.

D. Record-keeping By Hand. This method is generally not recommended unless the estate is very simple and limited transactions will be occurring. Although there is no requirement that records be kept on a computer, reconstructing the estate transactions from hand maintained records can be time-consuming. Nonetheless, as long as the Independent Executor keeps copies of all of the checks written, account statements from all financial institutions in which assets are held, records of any sales of assets and disposition of proceeds, etc., the Independent Executor will be able to produce an accounting if and when one is demanded by a beneficiary, and at the close of the estate.

E. Maintenance of Records. Because of the Independent Executor's duty to keep and render accounts, it is imperative that the Independent Executor maintain adequate records during the course of the administration, and in some cases for a number of years thereafter. All statements from banks, financial institutions and other entities holding assets of the estate should be maintained. In addition, invoices or other evidence of debts or expenses paid by the estate should be maintained in the file. Copies of stock certificates that are surrendered should be maintained, together with copies of checks or wire transfers indicating the proceeds received from the disposition of those items.

F. Required Accountings. The Texas Probate Code allows a beneficiary to demand from an Independent Executor, at any time after 15 months has expired from the date the Independent Executor qualifies as such, an accounting for the estate. The information required to be included is the following:

1. The property belonging to the estate which has come into the hands of the Independent Executor.
2. The disposition that has been made of such property.
3. The debts that have been paid.
4. The debts and expenses still owing, if any, by the estate.
5. The remaining property of the estate.
6. Such other facts as may be necessary to a full and definite understanding of the exact condition of the estate.
7. Such facts, if any, that show why the administration should not be closed and the estate distributed.

In addition the Texas Probate Code also gives a beneficiary the right, after two years from the date that an independent administration is created, to require a similar accounting and distribution of the estate unless the court finds there is a continued necessity for administration. In most congenial family situations, no accounting is demanded, but voluntary reports are a good idea. (See below)

- G. Accountings Required by Will. The Independent Executor must always comply with the terms of the Will. If more frequent accountings are required by the Will, the Executor must supply them.
- H. Additional Accountings. Beneficiaries of estates frequently become disgruntled because of lack of information about estate matters. In estates which will continue for a lengthy period of time, frequently supplied accountings to keep the beneficiaries up to date on the progress of the estate will be time and effort well spent by the Independent Executor.
- V. Tax Related Filings. For most estates, the Independent Executor will be required to make a number of tax-related filings. The Independent Executor should consult with her accountant with regard to the applicability of these in any given estate, but these may include the following:
- A. Application for Taxpayer Identification Number (Form SS-4). In general, immediately after appointment as Independent Executor, the Independent Executor should obtain from the Internal Revenue Service a Taxpayer Identification Number (Form SS-4) which will be used for the estate during the course of the administration of the estate. Please discuss this with me and I will handle this for you if necessary.
- B. Notice of Fiduciary Relationship (Form 56). It may be advisable to file a Form 56 which notifies the Internal Revenue Service that the Independent Executor is serving in that capacity. The purpose of this is to put the Internal Revenue Service on notice as to the proper party to notify should there be a tax issue

that arises with respect to the decedent. If the Service is not on notice that a fiduciary has been appointed, and if a deficiency or similar tax notice is sent to the last address used by the decedent on a tax form, and is not forwarded to the Independent Executor, the rights of the decedent's estate to challenge actions by the IRS may be jeopardized. In cases in which there is a surviving spouse who has been filing joint income tax returns with the decedent, or in cases in which a responsible party will remain at the decedent's last address to receive any notices, this potential problem is less likely to arise.

- C. Decedent's Final Income Tax Return. The Independent Executor will have the responsibility for filing the decedent's final income tax return. Typically, a certified public accountant should be hired by the Independent Executor to perform this duty, but in some simpler estates, the Independent Executor may prepare this return. **I do not prepare income tax returns.**
- D. Income Tax Returns for the Estate. During the course of the administration of the estate, a fiduciary income tax return (Form 1041) must be filed for the estate for each year the estate earns more than a minimum amount of income. These returns will be due the 15th day of the fourth month following the close of the estate's fiscal year. A certified public accountant normally prepares these returns for the Independent Executor. There may be some tax benefit to selecting a fiscal year-end other than December 31. **All income tax issues should be directed to the estate's accountant.** 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 without checking with us.

- E. Federal Estate Tax (and Generation-Skipping Transfer Tax) Return (Form 706). If all assets in the estate (not reduced by deductions) are at least \$2,000,000 (as of 2008), a Form 706 must be filed for the decedent's estate, even if no estate taxes will be due. The estate tax return is typically prepared by a CPA and reviewed by the attorney, as necessary. It should be an accountant who does a substantial amount of work in the estate area. The return is a snapshot of all asset values on the date of death. Irrevocable options must also be chosen on the estate tax return. You must provide full and accurate information. Assets of the decedent which pass outside of probate (such as life insurance and retirement benefits) will be included in the gross estate, so the Independent Executor will need to obtain information regarding the non-probate assets as well. In addition, if taxable gifts were made during lifetime (gifts in excess of the annual gift tax exclusion), those gifts will have to be taken into consideration in determining whether the filing requirement is met. After all asset information has been compiled and put in a draft return, we will want to go over the return together very carefully, discussing each item and the various

options that may be exercised. This return is required to be filed nine months following the date of the decedent's death. An extension can be obtained for up to six months following that original due date (15 months from the date of the decedent's death). You should also be aware that the income tax cost basis of all estate assets, 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 the date of death, or the alternate valuation date, 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.

- F. Subchapter S Stock. If the estate includes any stock in a corporation which is classified as a Subchapter S corporation, you must notify your CPA. Various important restrictions and requirements apply to stock in Subchapter S corporations that may require an election or other action on your part within a certain time deadline.
- VI. Required Court Filings. An Independent Executor is generally free from court supervision, and thus may act on behalf of the estate without additional court authority. Nonetheless, in addition to the original court filings for the Independent Executor's appointment, there are a few court filings that are required or may be advisable.
- A. Inventory, Appraisal and List of Claims.
1. The Independent Executor is responsible for filing with the probate court, for the court's approval, an Inventory, Appraisal and List of Claims (the "Inventory"). The Inventory

is a snapshot of probate assets valued as of the date of the decedent's death. It must list all probate property of the estate which has come into the possession or knowledge of the Independent Executor, including all real property in the State of Texas and all personal property wherever situated. The Independent Executor must set out in the Inventory the fair market value of each item thereof as of the date of death, and for a married decedent specify whether separate or community property. The Inventory values are typically determined by the Independent Executor, with information from appraisers hired by the Independent Executor. In addition, if property is co-owned with others, the interest owned by the estate must be shown, together with the names and relationship of co-owners. The Inventory must also contain a list of claims setting out all claims due or owing to the estate. These are not claims that the estate owes, but rather are owed to the estate. The Inventory must contain an affidavit by the Independent Executor sworn before a notary public that the Inventory is a true and complete statement of the property and claims of the estate that have come to the Independent Executor's knowledge. The Independent Executor is not required to list property that passes outside of the probate estate (such as life insurance and other assets that pass by beneficiary designation or contract rights, and property in revocable management trusts or living trusts).

2. While the Inventory is generally due to be filed within ninety (90) days from the date Letters are issued, our practice is to

coordinate the information on the Inventory with the Federal Estate Tax Return, which is 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 estate tax return. It also allows us to avoid any duplication of effort and related expense between the CPA and us in gathering information which will be necessary to prepare the estate tax returns and the Inventory.

3. Once the estate tax return is finalized, or if not required, 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 request an Order approving it.

B. Notice to Beneficiaries. The Independent Executor is required to give each beneficiary named as a devisee in a Will, if the address can be ascertained with reasonable diligence, notice that the beneficiary is named as a devisee in the Will. A copy of the Application, Order admitting the Will to probate and copy of the Will must be attached. The notice must be sent by registered or certified mail, return receipt requested. We will prepare and send these for you if you will provide us each beneficiary's address. Then we will file a copy of the notice and proof of delivery with the court.

C. Notice to Creditors.

1. Within one month after receiving Letters Testamentary, an Independent Executor must publish in a newspaper of general

circulation in the county in which Letters were issued, a notice requiring all persons having claims against the estate to present those claims within the time prescribed by law. We will get that notice published and file a copy of the printed notice, together with an affidavit of the publisher, in the court.

2. You are also required to give notice to all secured creditors. Secured creditors are creditors whose indebtedness is secured by real or personal property the Decedent owned an interest in, individually, at the time of death. The notice to each secured creditor must be given within two (2) months of 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. If you receive actual notification of additional secured claims after the two month period, you must also send that secured creditor notice. We will prepare and send these notices for you if you will provide the names and addresses of any secured creditors, then file proof with the court.

3. At any time before an estate is closed, an Independent Executor may give notice by certified or registered mail, return receipt requested, to an unsecured creditor having a claim for money against the estate, stating that the creditor must present a claim within four months after the date of the receipt of the notice or the claim will be barred. The advantage of giving unsecured creditors notice is that it expedites the process of identifying

any potential creditors and settling the debts as promptly as possible. This would 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 limitations. 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.

D. Closing the Estate. In many independent administrations, the estate will never be officially "closed" with the court. In some cases, however, the Independent Executor may utilize one of the closing methods described later in this handbook.

VII. Specific Recommended Steps That May Be Needed. Although the actions listed below will not be appropriate or necessary in every estate administration, the Independent Executor should consider the following to determine if action is required.

A. Securing the Personal Residence of the Decedent. If a spouse survives the decedent, the surviving spouse (absent a premarital agreement) has the sole and exclusive right to continue occupying the residence until the surviving spouse's death or abandonment of the residence. If there is no surviving spouse (and no minor children with similar rights), the Independent Executor should

take steps to secure the residence. These might include the following:

1. Change locks so that persons who may have had access keys during the decedent's lifetime are no longer able to enter the residence without the consent of the Independent Executor. To avoid creating adversarial situations where none exist, the Independent Executor should communicate this to the beneficiaries of the estate so that the beneficiaries do not feel unnecessarily shut out of the administration. Although it is the Independent Executor's duty and responsibility to administer the estate and safeguard the property, this needs to be done with sensitivity to the beneficiaries and their needs, if the Independent Executor does not want to create a hostile situation which may ultimately lead to claims being made against the Independent Executor.

2. Stop deliveries and utilities, where appropriate. Newspaper deliveries and other deliveries that may be made to the house should be stopped. It may be advisable for utilities such as water, gas and electric to be left on to protect the house. The Independent Executor may want to evaluate whether phone service continues to be necessary. Items such as cable television should be discontinued.

B. Secure Valuables. If any cash, jewelry or other valuables are found in the residence or other premises, they should be carefully inventoried by the Independent Executor and placed in a safe deposit box or other appropriate place for safekeeping.

C. Insurance. The Independent Executor should confirm that insurance is in place on all real property, automobiles and other valuables. The Independent Executor should review the homeowner's policies to determine how long the residence may remain vacant without jeopardizing insurance coverage.

D. Mortgage Information. The Independent Executor should determine whether there are any mortgages on the residence or other property, and if so, determine their status and the proper method for payment.

E. Dealing with Personal Property.

1. The Independent Executor should determine how the personal property of the estate will be handled. Frequently, items such as furniture, furnishings, jewelry, clothing, etc., are left to a specified individual or group of individuals. If there is a surviving spouse and/or minor children, the Texas Probate Code provides that the property of the estate that is exempt from execution or for sale under Texas law (which would generally include items of personal use, such as furniture, furnishings, cars, etc.) be set apart for the use and benefit of the surviving spouse and minor children and unmarried children remaining with the family during the administration. If the estate is determined to be solvent at the final settlement of the estate, then those items will be subject to distribution among the heirs and distributees of the estate.

2. After the temporary setting aside of exempt property as

discussed above, the Independent Executor should follow carefully the provisions of the Will in terms of distributing the personal property of the decedent. For personal property not disposed of by the Will, and assuming the Independent Executor has authority pursuant to the Will to sell property, the Independent Executor may want to arrange an estate sale to dispose of the personal property of the estate. In order to avoid problems, this is something the Independent Executor should discuss with the beneficiaries of the estate prior to selling items that may have sentimental value to the beneficiaries.

F. Inventory of Personal Items. In any event, the Independent Executor may want to obtain an early inventory of items in the residence and other places in which there is property belonging to the decedent. There are appraisers available who for a relatively small fee will inventory the assets of the house. If an Independent Executor anticipates any problems with the family, it would be wise to have an immediate inventory made to avoid questions arising at a later date from the beneficiaries. If only one person is the beneficiary of the items or no one item is worth \$3,000, a one line estimate of value will usually suffice.

G. Automobiles. The Independent Executor should make arrangements for the automobiles of the estate to insure that they do not create liability for the estate. Insurance should be checked to make sure that it is still in effect. The automobiles should be stored in as secure a manner as possible without undue

cost. If the automobiles are left to a specific individual or individuals, and if they are not set aside as exempt property to a spouse or surviving spouse, it would be advisable for the Independent Executor to distribute these as soon as possible in a solvent estate, so that the expense of maintaining the automobiles passes to the beneficiaries. To do this, the car title should be changed with the Department of Motor Vehicles.

H. Dividing Personal Property Among Beneficiaries. In many cases, the personal property of the estate will be left to multiple beneficiaries (such as the children of the decedent). In this case, the Will may state how the property is to be divided. In many cases, however, the Will simply states that the property will be distributed as determined by the Executor, or as agreed upon by the beneficiaries. Even if the Executor is to make the determination, it is wise to do this with the participation of the beneficiaries. If the beneficiaries are unable to agree between themselves as to the disposition of the personal property, the Executor may want to devise a system to govern the distribution of items. For example, the beneficiaries could have a meeting at which each draws a number and selects items in the order drawn. Alternatively, the Executor may want to ask for a list from each beneficiary of the items that they want in the order that they desire the items, and compare lists and priorities and make a determination between the beneficiaries. Once again, the Executor should make sure that whatever method he or she selects is not at odds with the terms of the Will, unless all of the beneficiaries

have agreed that they wish to have it distributed in some way other than as provided in the Will.

- I. Credit Cards and Bank Debit Cards. The Independent Executor should notify any financial institutions which issued credit cards or bank debit cards to the decedent of the decedent's death. The cards should be destroyed by the Independent Executor. In addition, the Independent Executor may wish to give the discretionary notice to creditors discussed in Section VI(C), to all credit card companies and banks with whom the decedent is known to have done business.
- J. Safe Deposit Box. The Independent Executor should gain access to any safe deposit boxes held by the decedent for the purpose of determining whether any valuable items are in those safe deposit boxes. If any safe deposit boxes permit joint access by persons other than the Independent Executor, the Independent Executor may find it advisable to move any such valuable items that belonged to the decedent to a safe deposit box accessible only by the Independent Executor. In visiting the safe deposit box, the Independent Executor may want to take the beneficiaries with her to view the contents as they are opened, or may want to take another credible person who can testify as to the contents of the box. It is not uncommon for beneficiaries to believe that items were kept in a safe deposit box or were held by the decedent which had been disposed by the decedent many years ago (or are simply missing). Credible third parties or beneficiaries who will witness and inventory the box the first time that it is entered by the Independent Executor can be

valuable allies if a question is later raised with regard to missing valuables. A written inventory can be prepared at that time, signed by the third party.

- K. Set Up Estate Bank Accounts. Shortly after appointment, the Independent Executor will need to set up accounts at banks or other financial institutions to transact the business of the estate. In general, the estate will need an account on which checks can be written for the payment of expenses and debts of the estate. Unless size of account and account fees makes this unwise, it is typically desirable to set this up in an interest-bearing account. In addition, the Independent Executor is likely to need to set up one or more additional accounts to hold the more significant assets of the estate. To the extent assets are in financial institutions, the deposits should be fully covered by the FDIC or should be otherwise evaluated for safety of the principal. The Independent Executor may want to consider setting up a custodianship account with a financial institution. It is generally advisable to set up the minimum number of accounts that will allow the Independent Executor to effectively manage the estate. It is easier for record-keeping purposes if all debts and expenses flow through a single account, such as the estate's checking account. Money can be periodically moved to this account from investment accounts as needed.
- L. Consolidation of Accounts. If the decedent held multiple accounts at a variety of financial institutions, such as brokerage houses and mutual funds, the Independent Executor

may want to consolidate these accounts for ease in administration.

M. Setting Aside Family Allowances and Exempt Property. In the vast majority of estates, no property will be set aside to the surviving spouse and minor children as exempt property, homestead, or family allowance. This is because in most cases, the estate will in fact pass to the person or persons who would be entitled to have these set asides. Nonetheless, the Independent Executor should be aware that there are cases in which exempt property (such as personal effects, cars, furniture, etc.), the primary residence of a decedent, and property sufficient to support the family for a year, may be required to be set aside to the spouse and/or minor children.

N. Review Assets Held by the Estate. Although an Independent Executor's job is more limited than a trustee's job, since it is the Independent Executor's primary obligation to collect assets, pay bills and then distribute the assets (rather than investing them for a long period of time), the Independent Executor should nonetheless review the investments and assets of the estate to determine that there are no "problem" assets which need to be dealt with by disposition or otherwise. In most cases, an Independent Executor will have the power to sell assets. If the Independent Executor continues to maintain assets which are highly risky for the estate, the Independent Executor may find that the beneficiaries attempt to hold her or her liable for not behaving prudently with respect to the asset.

O. Funding Specific Bequests. The Independent Executor should discuss with me when specific bequests made in the Will should be funded. If gifts of cash or dollar amounts are not funded within twelve months, the estate may need to pay interest to the beneficiary when the gifts are finally funded.

P. Social Security Payments. The Independent Executor should notify the Social Security Administration as soon as possible if the decedent was a recipient of Social Security benefits so that the benefits can be terminated. A hold may be placed on decedent's bank account to which direct deposits were made until such time as the bank refunds to the Social Security Administration all benefit payments deposited to said account after the date of death. The Independent Executor should also determine from the Social Security Administration whether any death benefit is payable to the estate of the decedent.

VIII. Dealing with Claims by Creditors. One of the initial determinations that should be made by the Independent Executor is whether or not the estate appears to be solvent. In most cases, the debts owed by the decedent will be small in relation to the overall value of the estate, and it will be clear that there are sufficient liquid assets in order to be able to pay all creditors. In cases in which it appears that there may be more debts than assets in the estate, or in cases in which there is an issue as to whether the estate will be solvent or not, the Independent Executor should work closely with me regarding the administration of the estate and the payment of debts. In addition, some debts may need to be paid from separate property, and some from community.

- A. Ability to Pay Claims when Estate is Solvent. In general, an Independent Executor will classify and pay claims in the same order of priority, classification and proration described in the Texas Probate Code for dependent (court supervised) Executors. An Independent Executor is, however, free from personal liability from paying a claim at any time (to the extent it is approved and classified by the personal representative), if the claim is not barred by limitations at the time of payment, and the Independent Executor reasonably believes the estate will have sufficient assets to pay all claims against the estate.
- B. Classification of Claims. Claims against an estate are classified and shall have priority of payment in the following order:
1. Class 1 - funeral expenses and expenses of last sickness up to \$15,000 (the balance of which will be paid as Class 8 claims);
 2. Class 2 - expenses of administration and expenses incurred in the preservation, safekeeping and management of the estate;
 3. Class 3 - secured claims for money (such as mortgages, car liens, etc.), so far as the claims can be paid out of the proceeds of the property subject to the lien;
 4. Class 4 - claims for delinquent child support and child support arrearages;
 5. Class 5 - claims for taxes, penalties and interests due to the state of Texas;
 6. Class 6 - claims for the cost of confinement through the Texas Department of Criminal Justice;
 7. Class 7 - claims for repayment of medical assistant payments made by the state to or for the benefit of the decedent;
 8. Class 8 - all other claims.
 9. Note: A federal statute gives claims of the United States government priority before all other debts of a deceased debtor. Debts to the United States (such as tax payments) are not listed in the Texas statute, but an Independent Executor who fails to give priority to claims of the United States over other creditors is personally liable for those claims. Funeral and administration expenses are permitted to be paid first, since they are not considered to be debts of the decedent. In addition, family allowances are not considered debts and therefore take priority over debts due to the United States as well.
- C. Notices to Beneficiaries and Creditors. See above.
- D. Duty with Regard to Non-Probate Assets. 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 Executor's control 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 me of the potential asset so that I may advise you whether the asset is a probate or non-probate asset and how to handle the collection of the asset. If nonprobate assets generate estate tax, the Independent Executor will most likely have a duty to collect that from the beneficiary or offset other bequests to that beneficiary by the amount of the tax.

IX. Sale of Estate Assets.

- A. Sale of Real and Personal Property. In most cases in which an Independent Executor is appointed, the Will provides that the Independent Executor has the power of sale over the estate assets. Even in absence of a power of sale in the Will, the Independent Executor will generally be able to sell assets if necessary to pay the debts of the decedent, or if it is otherwise in the best interest of the estate. If the Will does not include a power of sale, the Independent Executor should consult with me regarding the propriety of selling estate assets.
- B. Direct or Indirect Sales to Independent Executor. There are strict restrictions upon the ability of an Independent Executor to purchase, directly or indirectly, any

property of the estate that he sells during the course of administration. An Independent Executor may purchase property from the estate only if:

1. The will admitted to probate and appointing the Independent Executor expressly authorizes the sale. (If written by me, it usually does.)
2. The sale is in compliance with the terms of a written contract signed by the decedent, including contract for deed, earnest money contract, buy/sell agreement, or stock purchase or redemption agreement.
3. The court makes a determination that the sale is in the best interest of the estate, after proper notice is given.

Even if an Independent Executor is authorized to make a sale to herself of estate property, she should be very careful in doing so. Beneficiaries and a court will tend to scrutinize any transaction in which the Independent Executor (or a family member or related entity) benefits.

X. Property Subject to Administration by the Independent Executor.

- A. General. In general, an Independent Executor has control over the separate property of the decedent and the community property subject to the sole management, control and disposition of the decedent (which would typically be assets acquired by the decedent during marriage which are not separate, and which have stayed within the decedent's sole management and control). The

Independent Executor is also entitled to control joint management community property. This is generally community property that was acquired by either spouse during marriage and which has been jointly managed or which has been placed into their joint names. The Independent Executor does not have control over the sole management property of the surviving spouse. The surviving spouse is entitled to administer that community property.

B. When Spouse is Independent Executor. When the spouse is the Independent Executor, this will generally be immaterial, since the surviving spouse will control all of the property, either as Independent Executor or as the surviving spouse. If the surviving spouse is not the Independent Executor, in a friendly Executor/surviving spouse situation, the surviving spouse may choose to let the Independent Executor administer all of the community estate.

C. When Surviving Spouse is not Personal Representative. When the personal representative is not the surviving spouse, is administering all of the joint management community property, including the surviving spouse's one-half community property interest, and the personal representative has a personal beneficial interest in the estate, serious problems will arise if there are any disputed issues involving the surviving spouse's interest (e.g., characterization of property as community or separate). The personal representative owes fiduciary duties to the surviving spouse and, therefore, the duty of loyalty prevents her from acting in a manner adverse to the surviving

spouse or using her position to gain any personal benefit at the expense of the surviving spouse. This conflict of interest may disqualify the person from serving as personal representative.

D. Disposition of Community Estate at Termination of Administration. Once the administration of the community estate is completed, the Independent Executor is required to turn over to the surviving spouse his or her share of the community property. Likewise, the surviving spouse is to transfer to the Independent Executor of the estate, the decedent's interest in the community property administered by the surviving spouse, once community administration on that property is complete. The Independent Executor should work with me closely in making the partition, particularly if the community estate is to be partitioned in any manner other than an equal split of each asset.

E. Early Partition and Distribution of Community One-Half. It frequently simplifies the administration and ultimate disposition of the community estate if all or part of the community estate is partitioned, or divided, soon after the death of the first spouse. Generally, funds that are spent by the surviving spouse will need to come from the surviving spouse's share (unless classified as a family allowance). Similarly, some of the estate expenses will be properly chargeable only to the decedent's estate (such as funeral expenses, estate taxes, if any, and legal fees relating solely to the settlement of the estate). By making an early division of the community estate, the Independent Executor will

not have to reclassify and allocate expenses among the surviving spouse and the estate at a later date. An early division is practical only if there are adequate liquid funds to pay all of the debts and expenses for the estate. In many cases, the Independent Executor may want to only divide a portion of the community estate. For example, if the Independent Executor believes that each of the surviving spouse and the estate will need no more than \$50,000 during the course of administration, the Independent Executor might simply divide \$100,000, setting aside \$50,000 to the surviving spouse as her share of that community property, and the remaining \$50,000 to an estate bank account through which the estate expenses will flow. Joint expenses of the spouse and the decedent can continue to be paid through other accounts which have not yet been partitioned. The surviving spouse can then utilize the funds set aside for her benefit to pay for her expenses until the rest of the community is divided. Likewise, the Independent Executor can pay expenses which should not be divided with the surviving spouse from the account established for the estate. Please consult me in connection with any partition of the community estate.

XI. Obtaining Consents from Beneficiaries.

A. Disclosure to Beneficiaries. An Independent Executor will be required to make many tax elections, decisions to sell assets or not sell assets, and other major decisions during the course of an estate administration. Because the Independent Executor owes the

beneficiaries a duty of full disclosure, it is incumbent on the Independent Executor to discuss with the beneficiaries transactions involving major assets of the estate. The Independent Executor is not required to obtain the approval of the beneficiaries, but prompt and full disclosure of items under consideration may prevent beneficiaries from later second guessing the propriety of transactions. For example, if the estate owns an interest in a closely-held business which is a substantial portion of the estate, the Independent Executor should inform and consult with the beneficiaries regarding any proposed sales of the closely held business.

B. Consents and Releases by Beneficiaries. Although the Texas Probate Code does not contain any specific provisions relieving an Independent Executor of liability if a beneficiary consents to an action or releases the Independent Executor from liability for an action, general fiduciary law holds that a beneficiary who has consented to a transaction or released a fiduciary from liability for a transaction cannot later complain of that transaction. Therefore, if the beneficiaries of the estate desire certain actions to be taken or not taken, the Independent Executor will be wise to obtain written documentation of the beneficiary's consent and release for the actions. In order for such a consent or release to be effective against a beneficiary, the Independent Executor needs to fully disclose all pertinent information to the beneficiary. However, an Independent Executor may not demand a waiver or release from a beneficiary as a condition of

delivery of property to which the beneficiary is entitled.

XII. Estate Taxes and Allocation of Estate Taxes to Beneficiaries.

A. Due Date for Estate Taxes. Except in rare circumstances, federal estate taxes will be due nine months from the date of the decedent's death. In many cases in which a decedent is survived by a surviving spouse, there will be no estate taxes due, but this should be carefully evaluated with me, based on the estate planning documents involved. When farm land or closely-held businesses are involved, there may be some ability to defer the payment of the taxes, but very specific requirements have to be met in order to do so. As a result, the Independent Executor needs to get an early estimate regarding the estate taxes that will be due, so that proper arrangements can be made for payment of the estate taxes by the nine month deadline.

B. Selling Assets to Pay Estate Taxes. If there will be significant estate taxes, the earlier the Independent Executor begins to focus on what assets will need to be sold in order to pay estate taxes, the better off the estate will be. For instance, if there is a residence which is desired to be sold, it should be put on the market fairly promptly, rather than waiting until near the nine month due date. Although stocks and bonds can be sold in a shorter period, an Independent Executor should begin taking into consideration what stocks and bonds will need to be sold, as well. An early determination gives the Independent Executor the ability to sell these assets over a period of time (rather than being forced to sell them during a market downswing),

and also leaves the Independent Executor adequate time for funds to be transferred and checks to be written. The Independent Executor should remember that even in the most liquid situation, it may take five trading days for a mutual fund or stock to sell, and may take several more days to actually get the funds into an appropriate account for tax payment. It is generally preferable for the money to be on hand two weeks prior to the tax payment due date, to ensure that the funds are available.

C. Personal Liability. An Independent Executor is personally liable for the payment of estate taxes to the extent of the assets of the estate. Therefore, the Independent Executor should not make distributions to beneficiaries unless it is absolutely clear that there will be sufficient assets remaining to pay the taxes.

D. Alternate Valuation Date Option. In connection with the estate tax returns, under certain circumstances an estate is offered an election to value the entire estate on the date of death or on the date six (6) months thereafter. This is referred to as "alternate valuation date." 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 I will discuss with you in greater detail after I have more information about the estate's investment assets.

XIII. Communications with Beneficiaries. One of the most important tasks of the Independent Executor, and one that will ultimately avoid many of the problems that arise in

administration of estates, is prompt and proper communication with the beneficiaries of the estate. Below are some of the types of communications that may be appropriate for the Independent Executor to have with the beneficiaries during the course of an estate administration.

- A. Send Pertinent Estate Planning Documents to the Beneficiaries. Although the Will is a public record, the Independent Executor should send to the beneficiaries of the estate a copy of the Will that was admitted to probate for their information. In addition, if an irrevocable trust or other instrument is involved which gives benefits to the beneficiaries, the beneficiaries should also receive from the Independent Executor (or directly from the Trustee) a copy of that document.
- B. Timetable of Estate Events. It will prevent frustration on the part of beneficiaries if the Independent Executor communicates with the beneficiaries at the outset the expected timetable for the estate. This needs to be a realistic timetable, which will allow for delays that may arise during the course of an estate administration.
- C. Regular Accountings. As mentioned in the section on accountings and record-keeping, an Independent Executor is not required to provide accountings until 15 months have expired from the time the Independent Executor is appointed. It may be unnecessary for the Independent Executor to provide early accountings in simple estates in which the entire estate administration will be wound up in a short time period. For estates that are expected to last several years, however, it is advisable for the Independent Executor to

communicate financial information to the beneficiaries of the estate throughout the administration through use of accountings prepared by the Independent Executor.

- D. Disclaimer Options. Many times the beneficiaries of the estate do not have counsel of their own. Beneficiaries have nine months following the date of the decedent's death during which they can "disclaim" (or refuse to take) benefits from the decedent's estate. There may be personal reasons, tax reasons or creditor reasons for utilizing disclaimers. The Independent Executor should communicate to the beneficiaries that they may have tax options which should be considered. Although disclaimer planning appears to fall outside of the duties of the Independent Executor, it could be beneficial to the family for this to be evaluated early. Once a beneficiary has accepted benefits, he can no longer disclaim the property. The beneficiaries should be encouraged to obtain counsel to evaluate planning that may be beneficial to them. This same consideration regarding the benefits of disclaiming assets should be made by the Executor, if the Executor is also a beneficiary.
- E. Tax Allocations. In some cases, beneficiaries will receive non-probate assets for which they may be liable for estate taxes. In these cases, the Independent Executor should notify the beneficiaries of that fact as early as possible (i.e., before the beneficiary has expended all the funds). When possible, the Independent Executor may want to encourage the family members to deposit funds for the taxes in escrow

with the Independent Executor so that they will be available when the time for payment of the taxes comes.

F. Important Estate Transactions. As discussed earlier, the Independent Executor should discuss with the beneficiaries any important estate transactions involving major assets of the estate.

G. Distribution Planning. The Independent Executor should make sure that the beneficiary understands the timing of any distributions that will be made to beneficiaries. For estates required to file an estate tax return, the most conservative route is for the Independent Executor not to make any significant distributions until the estate tax closing letter has been received from the IRS. That usually occurs after about two years. If the estate is under the estate tax return filing threshold, then the Independent Executor will want to confirm all debts and expenses are paid before making distributions. That usually occurs after six months to one year.

H. Income Tax Results. It is helpful for the Independent Executor to obtain information from the estate's accountant so the Independent Executor can inform the beneficiaries of the expected income tax results of interim and final distributions.

XIV. Final Settlement of Estate and Distribution to Beneficiaries. When all of the debts of the estate have been paid, and the estate taxes have been paid in full (and a "closing letter" received from the IRS), the Independent Executor will need to finalize the administration of the estate and distribute the estate assets to the beneficiaries of the estate. Please consult me before making any

final division of the community estate or distribution of estate assets. In many cases, trusts will be funded under the Will, and the Independent Executor will need my assistance and the assistance of the accountant in determining how to fund each trust.

XV. Closing the Estate Administration.

A. No Official Closing. In most "friendly" estate administrations, there will be no formal closing of the estate, other than the distribution of estate assets and signing of documents that reflect the division of the community estate and the distribution of estate assets. It is desirable for the Independent Executor to have all beneficiaries sign off on the administration of the estate by signing final estate settlement documentation (normally prepared by the attorney) and releasing the Independent Executor from further liability for her actions during the course of the independent administration. Documentation setting forth the final settlement and distribution of the estate is not only valuable in terms of providing the Independent Executor with a potential release from liability by the beneficiaries, but also because it provides a written record for the future which may be very useful. For example, if trusts are to be funded under the Will at the death of the first spouse, the Internal Revenue Service may question the manner in which trusts were established at the death of the second spouse. By having a record of the determinations that were made and the funding of the trusts, this can be easily provided. However, the Independent Executor

cannot demand a release from the beneficiaries.

- B. Closing of Estate by Affidavit. Texas does allow an Independent Executor to close an estate by filing an affidavit with the probate court. The effect of the affidavit is that it terminates the independent administration and the power and authority of the Independent Executor. It does not, however, relieve the Independent Executor from liability for any mismanagement of the estate or from liability for any false statements contained in the affidavit. The affidavit is required to include information showing the property of the estate which came into the hands of the Independent Executor, the debts that have been paid, the debts still owing, the property remaining on hand, and the names and residences of the persons to whom the property of the estate is to be distributed. Because this technique does not give the Independent Executor any protection from liability for acts undertaken during the course of the administration, it is not frequently used.
- C. Judicial Discharge. The Independent Executor may obtain a judicial discharge from her duties as Independent Executor. In order to obtain the discharge, the Independent Executor files an action for declaratory judgment seeking discharge from liability for any matters that have been fully and fairly disclosed. Each beneficiary of the estate will be personally served if an Independent Executor utilizes this process. A final account will typically be required prior to the time the court rules on the declaratory judgment action. The

court may audit, settle or approve the final account filed pursuant to these provisions. This will be an additional expense of an estate administration and, in many cases, may be considered to be an unnecessary expense. For an Independent Executor who wants to insure that the beneficiaries are satisfied and are not going to later make claims against the Independent Executor for her services as such, it will be advisable for the Independent Executor to proceed with a judicial discharge, or to obtain from the beneficiaries a release in lieu of the judicial discharge. In many cases, beneficiaries will be prepared to sign an appropriate release to avoid the additional time and expense of a judicial discharge. The Independent Executor who is concerned about future liability must be careful to disclose all pertinent information. The Independent Executor will not be discharged or released from transactions that are not disclosed to the beneficiaries or the court.

XVI. Executor's Fees and Compensation.

- A. Provisions of Will. The decedent's Will may specify the manner in which fees are to be computed, or may provide that no fees will be paid to the Independent Executor.
- B. Statutory Fees. The Texas Probate Code sets forth the compensation method for an Executor or administrator in absence of Will provisions governing compensation. Any fees to be taken by the Independent Executor should be reviewed with me.
- C. Court Approval. An Independent Executor may go to Court to obtain approval for fees if desired.

- D. Income Taxation of Fees. The estate will obtain an estate tax or income tax deduction for the fees. The fees will be taxable income to the Independent Executor.