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## **Independent Administration Checklist for New Practitioners**

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**Presented by Judge Guy Herman**

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# **Independent Administration**

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## I. Scope of Article.

The purpose of this article is to assist an attorney in representing an independent executor or the distributees of an estate who may wish to have an independent executor or administrator appointed. The materials that follow will guide the attorney through the mechanics of independent administration for estates and will point out possible problem areas and suggested solutions. In addition, the outline may be helpful in drafting wills to ensure orderly administration.

Estates Code §22.017 provides that “independent executor” in the Estates Code refers to “the personal representative of an estate under independent administration,” and further provides that the term “includes an independent administrator.” This paper does the same, except when quoting a statute or case or when specifically discussing whether the court appoints an executor or an administrator.

## II. Nature and Creation of Independent Administration.

Independent administration is the administration of an estate without judicial supervision. In most circumstances, it is a far less costly alternative to court-supervised dependent administration. The Uniform Probate Code, which almost one-third of the states have adopted, allows for independent administration. Prior to the development of the Uniform Code, however, only Texas and Washington used independent administration extensively.<sup>1</sup> Independent administration in Texas, like the community property system and the homestead exemption, is an outgrowth of Spanish civil law, which recognized a number of extrajudicial procedures for administering estates. The practice has existed in its present form in Texas since 1843 when the Seventh Congress of the Republic of Texas enacted a statute permitting testators to provide that the probate of a will would be the only action of the probate court in the administration of the estate.<sup>2</sup>

### A. Jurisdiction.

Estates Code § 402.001 provides that when an order appointing an Independent Executor has been entered and the inventory, appraisal and list of claims has been approved, no further action of any kind shall be had in the court except where specifically and explicitly provided by the Estates Code. For example, although the probate court generally has no authority to

require or approve an accounting by an independent executor, Tex. Est. Code §405.001 permits the probate court to order an accounting and distribution of the estate upon petition of an interested person, and to rule on objections to the accounting, if the independent administration of the estate has been pending for at least two years.<sup>3</sup>

The jurisdiction of the different probate courts in Texas is governed by Tex. Est. Code §§31.002 and 32.001-32.007.

In counties in which there is no statutory probate court, county court at law, or other statutory court exercising probate jurisdiction, all applications, petitions, and motions regarding probates and estate administration shall be filed and heard in the constitutional county court, unless the county judge decides to transfer a contested probate matter to the district court, or decides to request the assignment of a statutory probate judge to hear the contested matter.<sup>4</sup> In addition, if any party requests the transfer of the contested matter to a district court or the appointment of a statutory probate court judge, the county judge must either transfer the contested matter to the district court, or request the assignment of a statutory probate judge.<sup>5</sup> If a contested probate matter has not been transferred to the district court at the time a motion for the assignment of a statutory probate judge is filed, the county judge must grant the motion, and may not transfer the contested matter to the district court unless the party withdraws the motion.<sup>6</sup>

In counties in which there is no statutory probate court, but in which there is a county court at law or other statutory court exercising probate jurisdiction, all applications, petitions, and motions regarding probate and estate administration shall be filed and heard in those courts, and in the constitutional county court.<sup>7</sup> If a contested probate matter is pending in the constitutional county court, the county judge can transfer the contested matter to the county court at law or other statutory court exercising probate jurisdiction, and that court can hear the contested matter as if it had originally been filed in that court.<sup>8</sup> Such a transfer is mandatory if requested by any party to the proceeding.<sup>9</sup>

In counties in which there is a statutory probate court, all applications, petitions, and motions regarding probate and estate administration shall be filed and heard in the statutory probate court.<sup>10</sup> Estates Code §31.002(c) provides statutory probate courts with

<sup>1</sup> 17 M. Woodward & E. Smith, Probate & Decedents' Estates §492 (Texas Practice 1971). (Volumes 17 and 18 in the Texas Practice set will hereinafter be cited as “Woodward & Smith.”)

<sup>2</sup> McKnight, Spanish Influence on the Texas Law of Civil Procedure, 38 Tex. L. Rev. 24, 45-53 (1959).

<sup>3</sup> *Burke v. Satterfield*, 525 S.W.2d 950, 954-55 (Tex. 1975).

<sup>4</sup> Tex. Est. Code §§32.002 & 32.003.

<sup>5</sup> Tex. Est. Code §32.003.

<sup>6</sup> *Id.*

<sup>7</sup> Tex. Est. Code §32.002.

<sup>8</sup> Tex. Est. Code §32.004.

<sup>9</sup> *Id.*

<sup>10</sup> Tex. Est. Code §§32.002 & 32.005.

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the power to hear “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.” County courts at law, however, are not statutory probate courts.<sup>11</sup> When in doubt about the proper court in which to file an estate matter, read the statute that created a particular court, and refer constantly to §22 (for definitions and use of terms in the Estates Code), §32 and 31.002 (regarding probate jurisdiction), and §32.005 (regarding transfers of proceedings to a statutory probate court).

### ***B. Methods of Creating an Independent Administration.***

In Texas, an independent administration may be established (1) by will; or (2) by the probate court (with the consent of all “distributees”).

#### **1. By Will.**

The Estates Code provides that a “person ... may provide in the person’s will that no other action shall be had in the probate court in relation to the settlement of the person’s estate than the probating and recording of the will, and the return of any required inventory, appraisal, and list of claims of the person’s estate.”<sup>12</sup> (The “any required inventory” reference acknowledges the option of affidavits in lieu of inventory.)

In the 2019 Legislative session, new §254.006 allows a testator to grant to a named executor or other person the authority to name one or more persons to serve as administrator. By default, the designee(s) would act only if all named successors were unable or unwilling to act, but the will could provide otherwise.<sup>13</sup> The designee would have the same rights, powers, and duties of any named executor, including the rights to serve as independent administrator, unless the will or designation provides otherwise.<sup>14</sup>

**a. No Terms of Art Required.** Although most well-drafted wills track statutory language in directing that the estate be administered independently, Texas courts have allowed independent administration whenever a will manifested the testator’s intent that there be no judicial supervision of the administration of

his or her estate.<sup>15</sup> For example, a will need not name distributees, because the independent executor may distribute the estate according to the rules of intestate succession.<sup>16</sup> The mere use of the term “independent executor” is sufficient to establish an independent administration because the term has acquired a special meaning.<sup>17</sup>

**b. Intent Not Found.** Merely enlarging the powers of the executor beyond those normally found in the Estates Code or simply providing that the executor will serve without bond, however, is not sufficient to establish an independent administration.<sup>18</sup>

**c. Procedure.** The original of the will should be filed in the probate court together with an application setting forth the information required by Tex. Est. Code §256.052.<sup>19</sup> Always review the current statute, as the Legislature has modified the applications requirements in nearly every legislative session since the adoption of the Estates Code. For example, in the 2017 Legislative session, the following requirements were added for will-probate applications filed on or after 9/1/2017:

To the extent each is known to the applicant or can, with reasonable diligence, be ascertained by the applicant, the application must state and aver:

- the last three numbers of each applicant’s driver’s license number and social security number, if applicable, and
- the last three numbers of the testator’s driver’s license number and social security number.

Note that the above information about the applicant was already required in all courts other than statutory probate courts.<sup>20</sup>

Although not required by statute, at least one probate court judge (in Travis County) also requires the filing of a death certificate before the hearing on the application.

The application may be made by the independent executor named in the will, an independent administrator designated by all of the distributees of the

<sup>11</sup> Texas Government Code §25.0003 discusses the probate jurisdiction of statutory probate courts, statutory county courts, and other county courts. Texas Government Code §25.0026 enumerates the powers and duties of the judge of a statutory probate court.

<sup>12</sup> Tex. Est. Code §401.001; If a decedent properly provides for an independent administration in his will, the court exercising probate jurisdiction over the decedent’s estate may exert control over the independent executor only within the limitations of the Texas Probate Code, now Estates Code, notwithstanding complaints lodged by an estate beneficiary. *Collins v. Baker*, 825 S.W.2d 555 (Tex. App. – Houston [14th Dist.] 1992, no writ).

<sup>13</sup> Tex. Est. Code §254.006.

<sup>14</sup> *Id.* at (d).

<sup>15</sup> 17 Woodward & Smith §493.

<sup>16</sup> *Boyles v. Gresham*, 156 Tex. 106, 263 S.W.2d 935 (1954).

<sup>17</sup> *In re: Dulin’s Estate*, 244 S.W.2d 242, 244 (Tex. Civ. App. – Galveston 1951, no writ).

<sup>18</sup> 17 Woodward & Smith §493.

<sup>19</sup> For applications filed electronically, the original will must be filed with the clerk within three business days after the application is filed. Texas Rules of Civil Procedure Rule 21(f)(12).

<sup>20</sup> Tex. Civ. Prac. & Rem. Code §30.014

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