

**PROBATE AND GUARDIANSHIP
ADMINISTRATION-HOW TO AVOID
COMMON PITFALLS**

Monday, March 5, 2018
11:30 a.m.-1:30 p.m.
Belo Mansion
2101 Ross Avenue
Dallas, Texas 75201-2703

Speakers

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1. GETTING STARTED

Statutory Probate Courts have jurisdiction over all probate and guardianship matters. TEC 32.002. Venue is generally in the county of domicile of a decedent or of a proposed ward. TEC 33.001 et seq. It is the responsibility of the attorney filing an application in the probate courts to ascertain that it is filed in the right court.

Notices at Commencement of the Case. The attorney is also responsible to assure that all interested parties required to receive citation or other notice have been properly notified. The attorney must also first be certain his applicant is a proper interested party who can file the probate action.

Interested persons are defined in TEC 22.018 as (1) an heir, devisee, spouse, creditor, or any other having a property right or claim against an estate being administered; and (2) anyone interested in the welfare of an incapacitated person, including a minor.

The TEC outlines the proper method of notice in Chapter 51.

1. Posted Notice (TEC 51.053)
2. Published Notice (TEC 51.054)
3. Personal Service (TEC 51.051)
4. Certified Mail RRR (TEC 51.052)
5. Special Court Ordered Service (TEC 51.151)
6. Waivers (in most, but not all circumstances) are acceptable alternatives)

There are other specific notice requirements for certain kinds of probate applications.

1. Probate of a Copy of a Will – requiring notice to or waivers from all heirs at law. (TEC 258.002)
2. Probate of Will as Muniment of Title more than 4 years after death – requiring notice to or waivers from all distributees and heirs at law, with a statement that the heirs will inherit if the Will is not admitted to probate and that applicant must not be in default. (TEC 258.051)

It is the attorney's job to be sure that notice was sufficiently completed and in the court's record BEFORE the hearing. In heirship and guardianship cases (TEC 202.057 and 1051.104(b)), this includes a certificate or affidavit from the attorney outlining the method of notice that was accomplished and copies of the proof, such as return of citation, certified mail receipts, copies of waivers.

Counsel should also check local rules and guidelines and inquire of court staff to see if special notice requirements might apply, such as posted and published notice in addition to specific citations being served on designated persons. No Court can hear a case prior to proof that all due notice has been accomplished and many will not allow one to set a hearing until that is accomplished. See the checklists for various proceedings posted on the website for Judge Bonnie Robison, Probate Court of Denton County, which she requires to be submitted and approved prior to any hearing on uncontested matters to assure proper notice has been given for her court.

In cases with Ad Litem Appointments, be sure to coordinate the hearing setting with the Ad Litem Attorney.

Administration Checklists. Once the order is entered, a series of duties ensue from the oath and issuance of letters to the closure of the administration. It is critical to calendar deadlines for certain required notices and other actions that are based on the date of the order or qualification or issuance of Letters. A sample of an estate administration checklist is attached as Appendix 1. The Texas Probate Manual with forms published by the State Bar of Texas is also a great resource for keeping your administration on course and on time, with an extensive checklist of information to obtain and actions to take throughout the administration, with references to the related forms provided in that form book.

ETHICS NOTE: Candor with the Court, TDRPC 3.03. Fairness with unrepresented parties TDRPC 4.03.

Resources

Estate Administration Calendar and Checklist. Appendix 1

Denton County Probate Hearing Request Checklists, Judge Bonnie Robison, Probate Court of Denton County, Texas. <https://dentoncounty.com/Departments/County-Courts/Probate-Court/Hearing-Request-Checklists.aspx> Appendices 2-1 through 2-5

2. ISSUES RAISED IN HEIRSHIP CASES

Determination of heirs is a special proceeding with several statutory prerequisites. TEC Chapter 202. Among them is the requirement that an Ad Litem Attorney be appointed to represent the unknown heirs and/or heirs whose whereabouts are unknown (TEC 202.009) and that all heirs receive notice of the application (TEC 202.051 – 202.057). The standard of proof is generally thought to be clear and convincing evidence. But according to Judge Steven King of Probate Court No. 1 of Tarrant County, it is not so specific. In his Intestacy Manual 2016, presented at the State Bar of Texas Intermediate Estate Planning and Probate Course, June 21, 2016, he describes the evidentiary standard as follows: “The Estates Code fails to specify a standard of proof for heirship proceedings beyond requiring ‘that level of proof which would create in the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established’ *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 31 (Tex. 1994). Therefore the judge (or jury) in an heirship proceeding is guided by their own sense of what is right, just and true. *Ibid.*”

When a decedent dies intestate, the laws of descent and distribution identify the heirs. These provisions differentiate heirs for community property (TEC 201.003) and heirs for separate property (TEC 201.001, 201.002). Intestate succession statutes also can differentiate between rights to personal and real property of the decedent. A chart outlining the heirs in various situations under these statutes is attached as Appendices 3, 4. Professor Gerry W. Beyer at Texas Tech University Law School has also recently written about online intestacy calculators for each state. There are a number of them now online that might be helpful in assessing the shares of the known heirs in a case.

1. COMMON LAW MARRIAGE

One particularly vexing issue in heirship cases is the common law spouse (now codified and known as an “informal marriage”). Generally, a spouse is an interested person who may file a probate action. But since the rights of a common law spouse are dependent upon certain findings under the governing statutes, a common law marriage must be proven in court for a common law spouse to proceed. Most probate courts will make this determination applying the Family Code, but some may require application in Family Court prior to filing an application as an interested person.

The relevant statute is Family Code Section 2.401(a), which requires:

1. Agreement to be married
2. Living together in Texas as a married couple

3. Holding out to others that they are married

Marriage can certainly be established by a marriage license and by a Declaration of Informal marriage under Family Code Section 2.402. If no such documentation is completed an informal marriage is to be established by court order, such an action must be brought within two years from the date the couple ceased living together, otherwise there will be a rebuttable presumption that there was not an agreement to be married. Family Code Section 2.401(b).

Note, there is no “common law divorce.” If a common law marriage can be established, then a formal divorce proceeding is required to terminate the marriage.

2. ADOPTED HEIRS AND ADOPTION BY ESTOPPEL

Adopted children will take from a decedent's estate the same as his or her natural children, unless a Will provides otherwise. TEC 201.054. This provision also clarifies that an adopted child may inherit from a natural parent but that natural parent may not inherit from an adopted child. Establishing adoption may not be limited to formal adoption proceedings. Under TEC 201.054 the doctrine of adoption by estoppel or equitable adoption was codified, but its determination is still by common law. It requires (1) an agreement to adopt and (2) performance of the child. Similar to common law marriage the agreement must be established by more than a mere reference to being a parent or a child. But if equitable adoption is established by clear, convincing and unequivocal evidence, then the personal representative of the decedent and those in privity with the decedent in an heirship proceeding are estopped from disregarding the adoption. It is also important to note that while a child may be entitled to benefit as an heir of a decedent who had equitably adopted them per the statute, the equitable adoption status does not create a parent-child relationship. *Carpenter v. Carpenter*, 2011 Tex. App. LEXIS 8587, 10-14 (Tex. App. Fort Worth Oct. 27, 2011, pet. den.). Equitable adoption is also not binding on third parties, such that the trustee of a trust benefiting the descendants of a decedent would not be bound to honor the adoption by estoppel. *Ibid*.

3. PATERNITY

Inheritance by a child from his or her biological father can be established under TEC 201.052 in any one of the following ways:

1. the child is born under circumstances giving rise to the presumption of paternity established by Tex. Fam. Code § 160.204;
2. by execution of an acknowledgment of paternity by the man;

3. a court decree adjudicating the man's paternity by clear and convincing evidence in a court;
4. adoption of the child by the man;
5. the man's consenting to assisted reproduction by his wife under Tex. Fam.Code §§ 160.701 – 160.707, which resulted in the birth of the child.

A child may also petition the probate court for a determination of inheritance if not already presumed to be his child, and if proven by clear and convincing evidence, the child will be treated the same as any other child of the decedent and the child and the child's issue may inherit from the child's paternal kindred, both descendants, ascendants, and collateral kindred in all degrees, and they may inherit from the child and the child's issue. TEC 201.052 (c), (d).

4. AD LITEM DUTIES

The Ad Litem Attorney should endeavor to interview a variety of people who knew the decedent in different times and facets of his life and not just contact those on the applicant's list. When inquiring, be thorough in seeking possible other heirs by asking all persons questioned in the investigation about any viable possibility for additional heirs. Ad Litem Attorneys should consider further investigation into common law marriage, adoption by estoppel and paternity in fact patterns that lend themselves to such inquiries. Searching the local county records where marriage certificates, paternity acknowledgements and the like are filed is a must in any situation where such heirs might be found. The Ad Litem should also inquire of any living arrangements or significant relationships a male decedent might have had with women who were of child bearing age and might have given birth to a child of the decedent and pursue those leads, if any. Inquiries about children who lived in the home should be followed with questions about whom may be that child's biological parents and whether any agreement to adopt might have occurred.

ETHICS NOTE: The attorney must understand when jurisdiction attaches, when the client has standing and the proper venue, and assure all are in order prior to filing or attending a hearing.

Resources

1. ***Dallas County Probate Practice Manual 2017, with forms for Application for Determination of Heirs, Waivers for Heirs, and Judgement Determining Heirs. See also Chart of Judge Guy Herman on intestate heirs in Appendix K, page 31. Appendix 3***
2. ***The Intestacy Manual 2016 for Proceedings in Texas Probate Courts, Hon. Steven King, Probate Court No. 1 of Tarrant County, Texas. Presented at the State Bar of Texas Intermediate Estate Planning and Probate Course, June 21, 2016, San Antonio, Texas. Includes Chart of Intestate Heirs on page 1. Appendix 4***
3. ***The Ad Litem Manual for 2017 for Guardianship & Heirship Proceedings in Texas Probate Courts by the Honorable Steve M. King, Judge of Tarrant County Probate Court Number One, Fort Worth, Texas (revised July 2017), particularly Appendices Aa and Ao.***

3. SMALL ESTATE AFFIDAVITS AND ORDERS

Provided that an individual died without a Will more than 30 days ago, and that individual owned a probate estate all or a portion of which needs to be transferred to the heirs at law, who are referred to in the statute as the “distributees,” a small estate affidavit (“SEA”) *may* be an effective means to transfer that estate if, when the SEA and Order thereon is drafted pursuant to Texas Estates Code (“TEC”) Sections 205.001-205.009, these pitfalls are avoided:

! Pitfalls with the SEA Itself:

1. It fails to list all known estate assets and liabilities;
2. It fails to characterize the Decedent’s property as either community or separate;
3. It fails to list which assets of the Decedent are exempt;
4. It reflects that the value of estate assets on its date, excluding homestead and exempt property, exceed \$75,000;
5. It fails to fully trace relevant family history facts concerning heirship including, as applicable, relevant dates of birth and dates of marriage;
6. It is not signed and sworn to by-
 - (a) All of the distributees of the estate; and/or
 - (b) Two (2) disinterested witnesses; and
7. It contains math errors such that the asset values are not accurately tabulated, or if an accurate tabulation shows that liabilities exceed assets, excluding homestead and exempt property.

! Other Pitfalls:

1. A petition for the appointment of a personal representative is pending or has been granted;
2. Decedent died with a Will (Dallas County Probate Court 3 may recognize an exception);

3. Under TEC Section 205.009, the word “homestead” or “exempt property” means only a homestead or other exempt property that would be eligible to be set aside under TEC Section 353.051 if the Decedent’s Estate was being administered. Under the latter TEC Section, such property may be set aside if the homestead is for the use and benefit of the decedent’s surviving spouse and minor children, and if all other exempt property is personal property as described by TEC Section 42.002(a) for the benefit of the decedent’s surviving spouse and minor children, unmarried adult children remaining with the Decedent’s family, and for any other adult child who is “incapacitated” (a term defined in TEC Section 22.016). The effect of these qualifiers is that non-exempt personal property may be transferred only if its value on the date of the SEA does not exceed \$75,000 since it does not receive the exclusion provided for in TEC Section 205.001(3).

ETHICS NOTE: Lawyers need to verify what their clients are saying about the existence of Wills, debts and ownership of assets, and whether there might be other proceedings pending. Verification can be through checking the County Will Depository, online probate and deed records search.

Resources

1. **Article written by Judge Lincoln Monroe. Appendix 5.**
2. **Dallas and Neighboring County Probate Court Local Guidelines in Dallas Probate Section Estates Manual. Appendix 6.**

4. MUNIMENT OF TITLE

Chapter 257 provides that a Will may be probated as a Muniment of title (“Muniment”) so long as the testator’s estate did not owe an unpaid debt, other than any debt secured by a lien on real estate, or if there is another reason that there is no necessity for administration of the estate. Admission of a Will to probate without the appointment of an executor or administrator can save time and expense using Muniment procedures, provided that these pitfalls are avoided:

1. The Will is not in a form or has contents rendering it inadmissible for probate;
2. The application fails to state and aver the contents required by TEC Section 257.051;
3. Applicant cannot produce the Will in court and is also unable to meet the additional requirements for probate when no Will is produced required by TEC Section 257.053;
4. At the hearing, the Applicant cannot provide all the facts required to the Court’s satisfaction as required by TEC Section 257.054;
5. More than four years have elapsed since the death of a testator and the applicant fails to provide notice as required by TEC Chapter 258 Subchapter B; and
6. Even if the foregoing statutory notices are provided for a will offered for probate more than four years since the testator’s death, Applicant fails to prove that Applicant was not at fault in failing to probate the Will as a Muniment within Texas’ four-year statute of limitations on admitting Wills to probate.

Other factual circumstances must be addressed when Muniment is contemplated:

1. If the Applicant is the sole distributee, the Court may waive the otherwise mandatory filing of a sworn affidavit otherwise required by TEC Section 257.103(a) if the waiver is included in the Order admitting the Will to probate;
2. If the Applicant is not the sole distributee, the Court may still waive the sworn affidavit requirement in certain circumstances provided that all devisees are Applicants or that all devisees consent; and
3. Decedent cannot have applied for nor received Medicaid benefits on or after March 1, 2005.

A client may wish to have an independent executor appointed some time after the admission of the subject Will to probate as a Muniment. However, the appellate court that rendered the decision, *In re Jacky*, 506 S.W.3d 550 (Tex.App.-Houston [1st Dist.] 2016, no pet.), ruled that the Muniment order was a final order and that the two year period to file a bill of review under TEC Section 55.251 to revise or correct that prior order had elapsed prior to the Probate Court's appointment of an executor in that case. In *Jacky*, over three years had elapsed since the Will was admitted to probate as a Muniment of title.

ETHICS NOTE: Lawyers should consider at the outset whether an administration may be later needed and strongly advise clients to note the statutes of limitations for challenging and filing Wills. Good closing letter practice might also reference these deadlines at the close of the estate. Verification of the lack of debts should be part of each intake meeting and the registry for MERP can be checked if there may have been Medicaid benefits received by the decedent.

Resources

- 1. 2017-2018 Supplement to Volume 17 of *Texas Practice Series, Probate and Decedent's Estates* (issued in November 2017) by Dr. Gerry W. Beyer, Governor Preston E. Smith Regents Professor of Law at Texas Tech University School of Law.**
- 2. Dallas and Neighboring County Probate Court Local Guidelines in Dallas Probate Section Estates Manual. Appendix 6.**

5. COURT CREATED INDEPENDENT ADMINISTRATION

Dependent administration of estates with full court supervision is the default method of administration when there is no Will or when independent administration is not provided in the Will. Dependent administration requires court approval of several specific actions in the administration of the estate and generally. TEC 351.051 and 351.052. Essentially, a personal representative in a dependent administration is engaged in a game of “mother may I”, such that most actions must have the advance court-ordered approval.

When there is no Will or when the Will does not provide for independent administration, the court can order that the estate be independently administered under TEC 401.003. This statute requires that all distributees of the estate agree that it is in the best interest of the estate to be independently administered. When the decedent died intestate, then all heirs at law must so agree, and a determination of heirs will be required to assure the court that indeed all heirs at law have agreed. The applicant’s attorney should also carefully address the issues of waiving bond and allowing for additional powers for the independent administrator. Bond can only be waived in most courts when there is no minor or incapacitated heir, except in special circumstances. One important power that may be added by agreement under TEC 401.006 is the power of sale of estate property without court approval and a need to satisfy debts or expenses of the estate.

The Dallas County Probate Courts have established specific guidelines for obtaining an order for Court-Created Independent Administrations, which can be found on the Court’s Website and in Appendix K of the Dallas County Probate Practice Manual. A copy is attached as Appendix 7. This outlines the information to be provided in the Application for Court-Created Independent Administration and proof at the hearing.

Best practice would be to determine if all heirs at law in intestate estates or distributees of a Will without independent administration provisions will agree prior to filing. Then obtain waivers and consents to independent administration from each to be signed, notarized and filed shortly after filing the application. Such waivers can include the necessary consent of all to

powers of sale and waiver of bond, if appropriate. Note, under the court's guidelines and stated guidance in Appendix A of the Dallas County Probate Practice Manual, the Court will rarely waive bond when there is a minor or incapacitated heir or distributee. This means the attorney should be prepared to testify about bond and prequalify the applicant as early as possible, in case he or she might not qualify and another administrator needs to be requested. Failure to do so could cause an unnecessary cost and delay that could have otherwise been avoided

Attorneys advising applicants to seek court-created independent administration should first analyze whether there may be an advantage to dependent administration to settle debts of the estate or to get court orders setting aside exempt property and setting a family allowance. Caution should also be applied when there may be family discord or distrust that might be better managed by the supervision of a court and required accountings. Saving time and cost in administration of estates is not necessarily the most prudent course.

Aside from the cost savings and other efficiencies of unsupervised administration, many of the matters that would otherwise require court approval are actually decided by the Independent Administrator, such as exempt property set asides and family allowance determinations. While these determinations can be challenged on lack of impartiality and unreasonableness grounds, well-supported determinations can be hard to successfully challenge and require a complaining distributee to file an action asking the Judge to overturn for abuse of discretion with the initial burden falling on the complainant.

Even in a dependent administration, certain actions may be taken (and some are even required to be taken) without court approval. These include the power to: (1) release a lien on payment at maturity of the debt secured by the lien; (2) vote stocks by limited or general proxy; (3) pay calls and assessments; (4) insure the estate against liability in appropriate cases; (5) insure estate property against fire, theft, and other hazards; or (6) pay taxes, court costs, and bond premiums.

ETHICS NOTE: When an independent administrator is unsupervised it raises the attorney's responsibility to monitor and assure adherence to all fiduciary duties. This puts a burden on anyone seeking to administer an estate a duty to inquire about and collect all assets of the estate. This may require verification of the nontestamentary transfer of assets by survivorship account, transfer on death deed or auto title, and search of unclaimed property sites, such as the comptroller, pension funds, savings bonds, life insurance and IRS refunds, etc. Caution should also be exhibited when communicating with unrepresented distributees.

Resources

Dallas County Probate Court POLICY GUIDELINES AND REQUIREMENTS FOR APPLICATION FOR COURT CREATED INDEPENDENT ADMINISTRATIONS PURSUANT TO TEXAS ESTATES CODE §§401.002 AND 401.003. Appendix 7.

6. WHYS AND WHEREFORES OF CORPORATE SURETY BONDS

If a Will names an Independent Executor but is silent as to bond requirements, a pitfall arises if all the devisees do not agree to waive the bond of the Independent Executor.

If a court-created independent administration is sought, the Probate Court may appoint an Independent Administrator without a corporate surety bond under appropriate circumstances, but the following pitfalls may arise:

1. One of the heirs or distributees refuse to agree to the absence of a bond;
2. The debts of the Estate exceed the known value of its assets; or
3. The proposed Independent Administrator cannot furnish the bond in the amount required by the Probate Court.

Before filing any pleadings, it is good practice to have the proposed Independent Executor or Administrator (a) apply to a bonding company so as to pre-qualify for a bond and, if so pre-qualified, (b) have some idea of the largest amount of bond for which he or she can qualify.

Should a corporate surety bond be required, and even if the Independent Executor or Administrator can qualify for the bond, here are other pitfalls that may be lurking:

1. The bond is incorrectly completed by the bonding company or is not otherwise in compliance with Texas law (for probate cases, TEC Sections 305.101 through 305.207, and for guardianship cases, TEC Sections 1105.101 through 1105.204);
2. In a probate case, the bond is not approved by the Probate Court and filed with the Clerk before the 21st day after the date of either an order granting letters testamentary or of administration, as applicable, or before the 21st date of an order modifying the bond requirement, pursuant to TEC Section 305.004(a)(1);
3. In a guardianship case, the bond is not approved by the Probate Court and filed with the Clerk before the 21st day after either the date of the order granting letters of guardianship or the letters of guardianship are revoked for a failure to qualify within the time allowed, pursuant to TEC Section 1105.003(a);
4. The Independent Executor, Administrator, or Guardian is ordered to pay a new Bond for which he or she cannot qualify if it exceeds the estimated amount arrived at, above, before the Probate Court proceedings were filed; or

5. If a new bond is required, the new bond is not in compliance with Texas law (for probate cases, TEC Sections 305.251 through 305.257, and for guardianship cases, TEC Sections 1104.251 through 1104.257).
6. Prior to approval and filing of the bond and oath required by law, the Independent Executor, Administrator, or Guardian attempts to exercise the powers otherwise granted to such personal representative under the relevant Order or as authorized under Texas law.

Even after an individual has successfully bonded, he or she must sign an affidavit as part of any annual accounting stating that all the required bond premiums were paid for the relevant accounting period [for probate cases, TEC Section 359.001(b)(10), and for guardianship cases, TEC Section 1163.005(a)(2)]. At the conclusion of any case, final accounts must also state that all required bond premiums were paid for the final accounting period [for probate cases, TEC Section 362.004(b)(9), and for guardianship cases, TEC Section 1204.102(b)(5)].

Resources

Dallas and Neighboring County Probate Court Local Guidelines. Appendix 6.

7. SHOW CAUSE PRACTICE AND PROCEDURE (WITH FORMS)

Administrators and Executors are specifically directed by law to “...recover possession of the estate and hold the estate in trust to be disposed of in accordance with law.” TEC Section 101.003. Guardians of an Estate are similarly directed to “...use ordinary diligence to...recover possession of all property to which the ward has claim or title.” TEC Section 115.105(a)(2).

Immediately after receiving letters testamentary, letters of administration, or letters of guardianship, a personal representative (i.e., Administrator, Executor, and Guardian) is further directed by the statutes to collect and take possession of the estate’s or the ward’s personal property, record books, title papers, and other business papers. [For probate cases, TEC Section 351.102(b), and for guardianship cases, TEC Section 1151.152(a)].

Clearly, Texas law contemplates that as soon as a personal representative is qualified to act, he or she must carry out such recovery tasks in an expeditious and thorough manner.

If an impasse has been reached with any individual resisting a personal representative’s requests for delivery, then that personal representative should act fast to recover possession or face the consequences of such items disappearing, being damaged, or ultimately being unavailable for collection.

The best way to avoid this common pitfall is to aggressively pursue *show cause* relief once such an impasse is reached. Using a show cause order, obtained in an ex parte manner, a recalcitrant individual can be compelled to make a court appearance and “show cause” why he or she should not deliver estate property to the personal representative or should not do a myriad number of other tasks for which a show cause order may be requested.

Other pitfalls may also arise even *when* show cause relief is sought:

1. Failure to carefully describe the items sought to be recovered or other relief requested within the motion;
2. Failure to *personally* serve the individual cited pursuant to TEC Section 51.051(b) and, if that party is represented by an attorney of record, failure to serve his or her attorney pursuant to TEC Sections 51.051(a) and 51.055;
3. Failure to make sure that the return date of any citation is at least 10 days after the date of service, excluding the date of service. TEC Section 51.051(c); and

4. Even if service is obtained and a hearing is scheduled in an expeditious manner, failure to include as necessary in the pleadings a temporary restraining order or stay that would otherwise maintain the status quo as long as the case is on the Probate Court docket, or even request other relief in addition to the recovery of property.

Bear in mind that show cause relief is not going to result in a substantive ruling from the court on such legal issues as the characterization of estate property, its ownership or its value. Regardless, in cases where time is of the essence, obtaining the relief requested to appropriately analyze and maintain estate property. Moreover, imposing the contempt powers of the court may be the best manner of obtaining relief.

The foregoing allows a personal representative to use show cause procedures to benefit the estate under his or her administration. However, show cause relief is also available when it is alleged that the personal representative is at fault. Although it is beyond the scope of this paper to list all of the grounds of relief afforded by the TEC to obtain such relief against a personal representative, these grounds are cited by way of illustration only:

Independent Administration of a Decedent's Estate

1. Require an Executor or Administrator to file bond if he or she is mismanaging the estate property, or has betrayed or is about to betray his or her trust, or has in some other way become disqualified (TEC Section 404.002);
2. Fine an Executor who does not file the inventory, appraisement and list of claims or affidavit in lieu of an inventory, appraisement and list of claims in a timely manner (TEC Section 309.057);
3. Demand an accounting at any time after the expiration of 15 months after the date that the court clerk first issues letters testamentary or of administration (TEC Section 404.001); or
4. In addition to the foregoing demand for an accounting, at any time after the expiration of 2 years after the date that the clerk first issues letters testamentary or of administration, demand and compel a distribution from the estate as well. (TEC Section 405.001).

Dependent Administration of a Decedent's Estate

1. Require an Administrator to give a new bond upon adducing proof that the current bond is insufficient or defective (TEC Section 305.251);

2. Fine an Administrator who does not file the inventory, appraisalment and list of claims or affidavit in lieu of an inventory, appraisalment and list of claims in a timely manner (TEC Section 309.057);
3. Have the Administrator file a verified exhibit that sets forth fully the condition of the estate at any time after the expiration of 15 months from the date that the court clerk first issues letters of administration and, in the same proceedings, have the court determine if there are estate funds in the Administrator's possession that are subject to distribution among creditors of the estate (TEC Section 359.006); and
4. If the Administrator neglects on demand to deliver a portion of the estate or any money in the Administrator's possession to an individual entitled thereto, then upon proof of the fact of neglect, the date of such demand, and other relevant facts, the court will compel a distribution which bears interest until paid. (TEC Section 362.052)

Guardianship of a Ward's Estate

1. Require a Guardian to give a new bond upon adducing proof that the current bond is insufficient or defective (TEC Section 1105.251);
2. Require a Guardian to file the inventory, appraisalment, and list of claims not later than the 30th day after the date of the qualification of the Guardian [TEC Section 1154.051(c)];
3. If a Guardian has not filed a required account, demand its filing and, unless good cause is shown for the failure to file, revoke the Guardian's letters of guardianship, fine the Guardian in an amount not to exceed \$1,000, or revoke the Guardian's letters of guardianship and fine the Guardian in an amount not to exceed \$1,000 (TEC Section 1163.161); and
4. If the Guardian neglects on demand to deliver a portion of the estate or any money in the Guardian's possession to an individual entitled thereto, then upon proof of the fact of the neglect, the date of such demand, and other relevant facts, the court will compel a distribution which bears interest until paid. (TEC Section 1204.202).

In the case of *In re Davis*, 344 S.W.2d 153 (1961), the Texas Supreme Court noted that "The person charged may not ignore the show cause order as he might ignore citation in a civil suit." For this and other reasons, pursuing show cause relief can be a powerful tool for a personal representative or any interested person to use.

Resources

Show Cause in Probate & Guardianship Cases by Kathy Roux (August 24, 2017). Appendix 8.

8. CREDITORS AND NOTICES

Transfer of assets in probate is subject to the satisfaction of debts, expenses and taxes owed by the estate. It is important for the attorney to assess as early as possible whether the estate is insolvent, since many of the procedures and protective measures afforded by the Estates Code are dependent on whether the estate has sufficient assets to pay all debts, expenses and taxes. No assets after exempt property set-asides may also lead to immediate estate closure. Insolvency can also lead to personal liability of the personal representative when making payments of some but not all of the debt, expenses and taxes owed by the estate contrary to strict priority and proration rules.

In order to determine debts requiring payment and provide certainty in the ultimate distribution of estate assets, the statutory scheme for presentment, acceptance or rejection, and barring of claims was developed. This claim procedure is provided in Chapter 355 of the Estates Code for dependent administrations and in Sections 403.051 for independent administrations.

The primary difference in the procedures is that Independent Administrators or Executors make determinations of acceptance and approval without court involvement but do not enjoy a shortened 90 day statute of limitations on rejected claims not timely pursued by suit.

Required Notices. Notices required of all personal representatives are:

1. Publication of notice to creditors in a publication with circulation in the County within 30 days of issuance of Letters (TEC 308.051 and 403.051).
2. Notice to Texas Comptroller for state taxes owed by a decedent or his business (TEC 308.051 and 403.051).
3. Certified mail notice to all secured creditors within 60 days of qualification (TEC 308.053 and 403.051). Special elections are available only to secured creditors for payment of the debt out of the collateral as a preferred debt and lien (TEC 355.154), or payment in the due course of administration like other debts as a matured secured claim (TEC 355.153). This election must be made within the first 6 months of the administration or 4 months from the date the notice is received, whichever is later. If the election is not affirmatively made the default election is for treatment as a preferred debt and lien limiting recovery to only the collateral. Matured secured claims are paid as class 3 claims (after last illness and funeral priority claims and administration costs), with any deficiency paid as Class 8 unsecured claims.

Permissive Notice to Shorten Limitations Period on Unsecured Claims. Personal representatives can send a notice to any unsecured creditors and advise them claims just be presented in a particular manner within 121 days or be barred. TEC 308.054. This method of shortening the statute of limitations is usually successful in resolving many of the smaller, and sometimes large claims, of the estate for lack of diligence on the part of the creditor in response to the notice.

Acceptance or Rejection of Claims. Any properly presented claim must be accepted or rejected within 30 days of the date the personal representative receives the claim. TEC 355.051. Acceptance must be in writing, but rejection can be in writing or by default for failing to timely respond. Upon acceptance of a claim in a dependent administration, the memorandum of acceptance is filed in the court and the Judge will then need to determine if it is to be allowed and assign it to a class of priority for payment. Upon allowance, the personal representative can pay the claim, subject to rules for priority of payment. Absent allowance by the Court no claim can be paid.

Classification and Priority of Claims. Estates Code Section 355.102 sets the classification categories, Section 355.103 sets the order of priority of payment, and Section 355.108 dictates proration of claims within class (other than secured claims). Other priorities like the Family Allowance are provided in TEC 353. 101 et seq. The result is the following priority order of payment (but note the potential super priority of federal taxes and tax liens):

1. Class 1 Claims – last illness and funeral expenses up to \$15,000.
2. Family Allowance.
3. Class 2 Claims – expenses of administration and protecting property.
4. Class 3 Claims – Matured secured claims and tax liens from collateral proceeds.
5. Class 4 Claims – Delinquent child support.
6. Class 5 Claims - Certain state Tax Code and other statutory taxes.
7. Class 6 Claims – Costs of confinement owed to Department of Criminal Justice.
8. Class 7 Claims – Repayment of medical assistance payments like Medicaid.
9. Class 8 Claims – All other claims, primarily unsecured claims.

Abatement of Bequests. A Will should provide for the assets from which debts, expenses and taxes are to be paid and will control. In the absence of such a provision or in intestate estates, the priority of property against which such payments are charged is provided in Estates Code Section 355.109 (which excludes estate taxes apportioned under TEC 124.001 et seq., and preferred debt and lien secured claims under 355.151 et seq.). That order is as follows:

1. Property passing by intestacy.
2. Personal Property of the residuary estate.
3. Real property of the residuary estate.
4. General bequests of personal property.
5. General devises of real property.
6. Specific bequests of personal property.
7. Specific devises of real property.

Liability for Personal Representatives.

1. Failure to Give Required Notices. A personal representative's failure to give the required notices can result in personal liability for the fiduciary and sureties on the bond for damages suffered by persons resulting from the failure to give the notice. TEC 308.056. It is also grounds for removal (TEC 355.052(2)).

2. Failure to Timely Accept a Valid Claim. If a claim is rejected in writing or by expiration of the 30 day period, upon later successful suit by a creditor to collect the claim, the personal representative will be held personally liable for the costs incurred in pursuit of the claim. TEC 355.052(1). Note, after a claim is rejected a collection lawsuit not filed within 90 days in a dependent administration are barred (TEC 355.064), but the ordinary statute of limitations period applies to rejected claims in independent administrations.

3. Failure to Pay Taxes. Claims of the U.S. Government must be paid before all other debts of a decedent under 31 U.S.C.A Sec. 3713(a), with a few common law exceptions. Failure to give priority to such claims will result in the personal representative being personally liable. *See Schwartz v. Commissioner, 560 F.2d 311 (8th Cir. 1977).*

4. Costs of Removal or Compliance with Failed Duty. Anytime a personal representative fails to perform a required duty or is removed for cause, the he or she is personally liable for the costs of obtaining compliance or of the removal action, including reasonable attorney's fees. TEC 351.003.

Protections that should be established as early as possible.

1. Homestead Exemption for surviving spouse and minor children. The homestead is not liable for payment of unsecured debts as long as there is a surviving spouse or minor child. The homestead cannot be sold to pay expenses of the estate when being used as a homestead by the surviving spouse and minor children. TEC 353.155. Exceptions include purchase money liens, mechanic's or materialmen's liens, property taxes and federal tax liens.

2. Exempt Personal Property up to \$100,000 in value for a family or \$50,000 for a single adult. Property Code Section 42.002 and TEC 353.051(a)(2).

3. Set Asides of Homestead and Exempt Personal Property under TEC 353.051. After the approval of the Inventory, the Court shall set aside the homestead and any exempt personal property for the benefit of the surviving spouse and minor children. Upon application and a hearing the Court can set aside such exempt property sooner. If the estate is insolvent, the surviving spouse and minor children retain title to such set asides in the final account. TEC 353.153

4. Allowances in lieu of Homestead (Up to \$45,000, TEC 353.053 and 353.054) or in lieu of Exempt Personal Property (\$30,000, TEC 353.053).

5. Family Allowance under TEC 353.101. Surviving spouse and minor children of decedent entitled to one year's living expenses as a priority obligation of the estate after Class 1 priority claims. TEC 353.104.

a. Set by the court upon application in a dependent administration (TEC 353.104) or by the independent administrator filing a notice in an independent administration (TEC 402.002).

b. Amount is that which is sufficient to maintain the surviving spouse, minor children and adult incapacitated children for one year after death. TEC 353.105.

c. No allowance is awardable if the surviving spouse has sufficient separate property (as determined by the fact finder). According to one case, property passing to the surviving spouse from the decedent at death should not be considered as separate property for this determination. *See Churchill v. Churchill, 780 S.W.2d 913 (Tex App-Fort Worth 1989, no writ).*

d. Paid first out of community property of the estate (other than exempt property), and otherwise as directed by the court.

e. Paid to surviving spouse if no minor child or all are children of the surviving spouse. Paid to the guardian of a minor child who is not the child of the surviving spouse. TEC 353.105.

In many estates that are divided among blended families or in which the surviving spouse is not the sole beneficiary, the attorney should strongly consider seeking a family allowance for the spouse to protect against claims of creditors and other beneficiaries. When setting the family allowance in court, be prepared to present a budget of the expenses needed to be paid by the allowance.

ETHICS NOTE: The blended family and competing interests of surviving spouses and children can lead to conflicts that may impair the lawyer's ability to help the client who is both a beneficiary and administrator navigate between the spouse's personal interests and best interests of the estate and its beneficiaries. The lawyer also needs to be clear in the engagement letter and ongoing communications to identify who is the lawyer's client and that legal advice cannot be given to others.

Resources

Nathan Griffin, Creditor's Issues – Insolvency and the Estate, Dallas Bar Association Probate Trusts and Estates Section, February 26, 2013 (with forms). Appendix 9

9. ISSUES RAISED BY AN INVENTORY, APPRAISEMENT AND LIST OF CLAIMS IN A PROBATE COURT CASE

An attorney dealing with a decedent's Estate or the guardianship of an Estate must assist the personal representative draft an inventory, appraisal and list of claims ("inventory") of the Estate under administration.

The statutorily mandated contents of an inventory, all changes required, and the use of an inventory as evidence, can be found for probate cases in TEC Sections 309.051-309.151 and for guardianship cases in TEC Sections 1154.051-1154.151.

Many pitfalls may be avoided by particularly reviewing these Sections of the Estates Code and the required practice of the Probate Court in which the case is pending. However, pitfalls which occur both by reason of legal requirements and the required practice of Probate Courts include the following:

1. Failure to file the inventory in a timely manner [In probate cases, the due date is the 91st day after the date the executor qualifies pursuant to TEC Section 309.051(a), and, in guardianship cases, the 30th day after letters of guardianship of an estate are issued pursuant to TEC Section 1154.001(a), unless an extension is granted];
2. Failure to characterize estate property as community or separate;
3. Failure to use the correct "beginning date," that is, the decedent's date of death for probate cases, and the guardian's date of qualification for guardianship cases;
4. Failure to include the last 4 digits of accounts numbers and to make sure all of the math adds up within the inventory;
5. Failure to correctly describe real property of the Estate;
6. Failure to recognize that the contents of the "List of Claims" should include only claims owing *to* and not *by* the Estate;
7. If the personal representatives are Co-Executors or Co-Guardians, failure to have each of them sign the inventory;
8. Failure to timely request an extension of the date for filing the inventory;

9. Failure to have a supplemental or amended inventory sign by the personal representative;
10. Failure, in an appropriate decedent's estate, to use the provisions of TEC Section 309.056 concerning an affidavit in lieu of inventory, appraisement and list of claims; and
11. Failure to realize that a new corporate surety bond may be required if the value of the Estate under administration as reflected in the inventory exceeds the amount of the current bond.

ETHICS NOTE: The advent of the Affidavit in Lieu of Inventory together with unsupervised independent administration raises the risk of failing to diligently collect all assets of the estate and accurately value them for lack of accountability. This in turn raises the lawyer's responsibility to advise the client how to meet that duty of care.

Resources

Dallas and Neighboring County Probate Court Local Guidelines. Appendix 5.

10. LESS RESTRICTIVE ALTERNATIVES TO GUARDIANSHIPS OF THE PERSON AND ESTATE

As a matter of State policy, TEC Section 1001.001(a) directs a Probate Court to appoint a guardian with either full or limited authority over an incapacitated person by considering two overriding factors: **(a)** a person’s actual mental or physical limitations, and **(b)** the guardianship will promote and preserve the well-being of the incapacitated person.

An overarching concern of our law is that the Court “design a guardianship to encourage the development or maintenance of maximum self-reliance and independence in the incapacitated person, including by presuming that the incapacitated person retains capacity to make personal decisions regarding the person’s residence.” TFC Section 1001(b).

To avoid noncompliance with this important Texas policy, a careful practitioner will identify with the client any less restrictive alternatives to a guardianship of the person and/or estate before filing any pleadings.

Therefore, the following less restrictive alternatives set forth in TEC Section 1002.0015 should not be overlooked:

1. Medical power of attorney (see TEX. HLTH & SAF. CODE Section 166.151, *et seq.*);
2. Statutory Durable Power of Attorney (see TEC Section 751.001, *et seq.*);
3. Declaration for Mental Health Treatment (See Chapter 2137, Civil Practice and Remedies Code);
4. Appointment of a representative payee to manage public benefits (see 42 USC Section 1383(a)(2) for Representative Payee for Social Security benefits and see 38 USC Section 5502(a)(1) for Veteran’s Benefits Fiduciary);
5. Establishment of a joint bank account (see TEC Sections 113.102 and 113.106);
6. Creation of a management trust (see TEC Sections 1301.001, *et seq.*);
7. Creation of a special needs trust [see 41 USC 1396p(1)(d)(4)(A)];
8. Designation of a guardian before the need arises (see TEC Sections 1104.103 and 1104.151); and
9. Establishment of alternative forms of decision-making based on person-centered planning (see TEC Chapter 1357).

Financial exploitation and neglect of elderly citizens by a family member or other individual who is not looking after that elderly person's welfare in cases where the "bad actor" is misusing legally appropriate, less restrictive alternatives. In such dire situations, a full or limited guardianship may be more appropriate.

Avoid the pitfalls of either *always* recommending a guardianship without first considering all of the many less restrictive alternatives (including those cited above), or *never* recommending a guardianship when a prospective ward actually has no one who can responsibly look after his or her welfare.

ETHICS NOTE: Mind the duty to report physical and financial abuse as failure is a criminal offense. Be careful in assessing a client's capacity to hire you and for signing documents, as well as the potential for undue influence when exercising disability planning as an alternative to guardianship, lest the lawyer become complicit in the abuse.

Resources

1. ***Trends in Litigating and Administering Guardianships*** by Mark R. Caldwell and J. Ellen Bennett (March 22, 2016), presented to the Estate Planning and Probate Section of the Dallas Bar Association.
2. Guardianship information on the home page of the Dallas County Probate Courts at www.dallasgov.org.
3. ***The Ad Litem Manual for 2017 for Guardianship & Heirship Proceedings in Texas Probate Courts*** by the Honorable Steve M. King, Judge of Tarrant County Probate Court Number One, Fort Worth, Texas (revised July 2017), particularly Appendix D.
4. Elder Financial Safety Center, www.elderfinancialsafetycenter.org.
5. ***ABA ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR LAWYERS***, American Bar Association Commission on Law and Aging, Presented at the State Bar of Texas 21st ANNUAL ADVANCED ESTATE PLANNING STRATEGIES COURSE, Santa Fe, April 9-10, 2015.
6. National Guardianship Association Standards of Practice. www.guardianship.org

11. ETHICAL ISSUES IN PROBATE MATTERS

1. Am I competent to handle this representation and do I have time? Applies to initiation of new client representation and court appointments.
2. Establishing the attorney client relationship with the applicant/personal representative or with the distributee or other party and scope of representation.
3. Assessing your client's level of capacity. Does the client have capacity to hire you? If not, you may have to return any fees paid. Recognizing cognitive and judgement deficits and utilizing available alternatives to ethically continue representation.
4. Duty to report financial and physical abuse. Dallas County Financial Safety Center.
5. Clarifying in writing nonrepresentation of other parties, particularly distributees of the estate when representing the personal representative, and clarify with other lawyers.
6. Respecting confidentiality of client information and determining whether and how to disclose when necessary.
7. Exhibit care when communicating with distributees of the estate not represented. Avoid misrepresentation of law to anyone.
8. Candor with the tribunal: make sure all reports and representations are true and accurate and verify things your client tells you.
9. When your client is a fiduciary, carefully advise them of their fiduciary duties and advise them on how to fulfill those duties.
10. Fiduciaries may be prohibited from buying assets of the estate and transactions with the estate are presumed to be unfair. Burden is on fiduciary to establish fairness and best interest of the client in a transaction. TEC 356.651.
11. When assessing the "suitability" of proposed guardians and other personal representatives the attorney needs to inquire about and investigate potential conflicts, obligations to the estate or other potentially unsuitable practices or facts prior to the hearing and be able to explain to the court why they do not render the applicant "unsuitable."