
Synopsis

The job of an executor is an important one and can be daunting, especially to someone with no prior experience with probate or estate matters. The role can be easier to manage by understanding what is required, at least in the typical estate, in order to be prepared for what the job entails.

I. Introduction

You have been named in a friend or family member's Will to serve as the Independent Executor¹ of his or her estate. This outline is intended to give you an overview of the responsibilities with which all independent executors in Texas are charged. While it should not be treated as a do-it-yourself manual or as a substitute for legal or tax advice, it should give you a feel for the duties you will perform, and it should make you a more informed client when you hire professional assistance.

II. Independent Executor

An "Executor" is a person appointed in the Will of a decedent to carry out the desires of the decedent as expressed in the Will and to administer the decedent's estate. The word "Independent" means that the Executor may act independently of control by the probate court, except for the filing of an Affidavit as required by Section 308.004 of the Texas Estates Code and an Inventory, Appraisal and List of Claims for the estate. Without the use of the word "Independent" virtually all of your duties and actions would be subject to prior approval of the probate court, which would be a cumbersome and expensive procedure. However, since you are an Independent Executor, probate court approval will not need to be sought for your actions.

As the Independent Executor of an estate, you have broad powers, limited only by the Will and by the Texas Probate Code. You are the estate's representative for the purposes of concluding the decedent's affairs. This process will involve the collection of his or her assets (or his or her one-half interest in community assets), the payment of his or her debts, the payment of the estate's administration expenses and any death tax liabilities, and the distribution of the remaining assets to the beneficiaries named in the Will.

*Davis & Willms, PLLC has compiled the *Basics* series to provide plain-English, summary explanations of fundamental estate planning techniques and concepts. As a result, our discussions may gloss over some of the more complex topics. The Basics memoranda are *not* legal advice. Instead, they are generalized, educational tools designed to help our clients and potential clients develop an understanding of the estate planning process. Before engaging in any estate planning, you should consult a qualified estate planning attorney.

¹ This discussion focuses on the responsibilities of an Independent Executor. It does not address the additional responsibilities of an Independent Administrator or when someone is serving as a Dependent Executor or Dependent Administrator.

III. Estate Administration and Accounting

The attorneys representing you in your capacity as the Independent Executor will handle all of the estate's probate matters, as well as any other legal matters regarding the estate. In addition, the attorneys or an accountant will prepare the Federal Estate Tax Return (Form 706) for the estate if one is required. Typically, your attorneys do not prepare income tax returns and will recommend that you retain an accountant to prepare the final any required Individual Income Tax Returns (Form 1040) for the decedent, as well as any Fiduciary Income Tax Returns (Form 1041) which may be required for the estate.

All of the following matters will be handled either by your attorneys or by your accountant, but your assistance will be needed in order to gather the required documents and information. You may be given checklists to help you in connection with these matters.

IV. Notice to Creditors

The first step in the administration of an estate is to have the Will admitted to probate. Once this step is accomplished, the administration phase of the estate begins. This administration requires the completion of the matters discussed below.

The next step in the probate process is to publish a statutory notice to the general creditors of the estate. This notice must be published within 90 days after the Will is admitted to probate. Your attorneys will prepare this notice and have it published in a local newspaper on your behalf.

Within two months of the issuance of the Letters Testamentary, you are required to give actual notice to all known creditors of the estate having a claim for money secured by real or personal property ("Secured Creditors"). By way of example, Secured Creditors include any person or entity that holds a lien against real or personal property belonging to the decedent's estate.

In contrast, an executor is no longer required to give an unsecured creditor notice of his appointment. However, an executor may choose to give unsecured creditors notice to force them to either establish their claim for payment or be permanently barred from seeking payment from the estate. This does not prevent the creditor from seeking payment from any other party or parties liable for the debt. Generally with regard to any other potential debtors, the creditor can proceed to attempt to collect the debt from such a person unless it is barred by an applicable statute of limitations.

Texas law requires that the notice to unsecured creditors include (i) the date of the executor's appointment, (ii) the address where the claim may be presented, (iii) to whom the claim should be addressed, and (iv) a statement that the claim must be presented prior to the 121st day after the date of the receipt of the notice² or the claim is barred. This notice may be given at any time before the estate is closed.

The advantage in giving unsecured creditors notice is that doing so expedites the process of identifying any potential creditors and settles the debts as promptly as possible. This will

² Prior to January 1, 2014, the time period is within four (4) months after the date of the receipt of the notice.

allow you, as Executor, to distribute the remaining estate assets without the concern that a creditor will attempt to collect on a debt later. 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 four (4) years until the debt is barred by the applicable statute of limitations. It is generally better to address any potential claims in the initial stages of the administration versus waiting to see when and if the creditor will independently attempt to collect the debt.

V. Section 308.002 Notice and 308.004 Affidavit

Within sixty (60) days after the probate hearing, you are required to provide a copy of the Will to each beneficiary of the Will or the trusts created by the Will. There are two options. You can provide the copy of the Will to each beneficiary by certified mail, return receipt requested, or for each beneficiary who you believe would respond quickly and be willing, you can provide the copy of the Will along with a Waiver to be executed by the beneficiary (to avoid the expense of certified mail and photocopying the Will). The Waiver and copy of the Will can even be emailed to the beneficiaries. Within ninety days of the probate hearing, you must file a sworn affidavit with the Court showing the name and address of each beneficiary to whom you provided notice or who signed a Waiver. Your attorneys will handle the preparation of these documents on your behalf.

VI. Inventory, Appraisal and List of Claims

Another step in the probate process is the preparation of an Inventory, Appraisal and List of Claims for the decedent's estate. To facilitate the efficient preparation of this inventory, you will provide documents and information requested by your attorneys. Your attorneys will prepare the Inventory for your signature from information that you furnish. The inventory is due within 90 days from your qualification as Independent Executor. If necessary, an extension of time to file the inventory may be sought from the probate court. Although you must prepare a complete inventory, in most cases, Texas law no longer requires that the inventory be put on file with the court. Once the inventory is complete, you would have the option of (i) filing it with the court, thereby making it a matter of public record, or (ii) providing a copy of the inventory to each beneficiary of the estate, and filing with the court an affidavit stating that you have done so. Once the inventory is complete, you can decide whether you want to file it or simply provide a copy to the beneficiaries and file your affidavit.

VII. Estate and Income Tax Returns

A final Individual Income Tax Return (Form 1040) for the decedent must be filed and the income taxes which are due must be paid on or before April 15 of the year following the decedent's death. In addition, a Form 1041, U.S. Income Tax Return for Estates and Trusts, is required to be filed by the estate for any year of the administration during which the gross income of the estate exceeds \$600.00. If required, the return is due on the fifteenth (15th) day of the fourth (4th) month following the close of the estate's tax year. The estate may elect as its tax year either a calendar year or a fiscal year. The fiscal year may end on the last day of any other month as long as the first tax year does not exceed one year from the date of death. You should consult your accountant to assist you in preparing this return, if one is required.

If the total value of the decedent's estate exceeds the Estate Tax Exclusion Amount a Federal Estate Tax Return (Form 706) must be filed and any death taxes which are due must be

paid within nine months after the date of death. For 2015, the Estate Tax Exclusion Amount is \$5,430,000 and this amount is adjusted each year for inflation. No estate tax is due on any amount passing to a surviving spouse or charity. Amounts passing to others in excess of the Estate Tax Exclusion Amount are taxed at 40% of the value of the excess. This tax must be paid by the estate prior to making distributions to the beneficiaries of the estate.

An IRS Form 56 (Notice Concerning Fiduciary Relationship) will be provided to the IRS so that all correspondence sent by the IRS with regard to the decedent's estate will be forwarded to you. In addition, your attorneys will also provide an IRS Form 2848 (Power of Attorney and Declaration of Representative) to the IRS which will allow the IRS to speak to your attorneys on behalf of you as the representative of the Estate concerning any personal income, gift or estate tax matters.

VIII. Estate Bank Account

You may establish a separate checking account for the estate to be administered by you as Independent Executor. The account would serve as a depository for estate funds, and all debts and obligations of the estate would be paid from this account. You also may choose to open a savings account for the estate to hold any surplus funds. Both the checking and the savings accounts may be opened at the bank of your choice. To establish a bank account for the estate, you will need to obtain a tax identification number for the estate and your attorneys can assist you in obtaining this number.

Before you pay a bill for any debts or estate administration expenses, you should determine whether it is a valid debt of the decedent. Those debts are the estate's responsibility. If you establish an estate bank account and represent the estate of a decedent who was married at the time of death, the estate's one-half portion of all community debts outstanding at the time of the decedent's death should be paid from the estate's bank account. Similarly, if there are continuing community obligations, such as mortgage or promissory note obligations, the estate's one-half portion of such obligations would be paid from the estate's bank account. Of course, the other one-half of such continuing community obligations, as well as one-half of all community debts outstanding at the date of death, should be paid by the surviving spouse. If you are not certain how a claim or bill should be handled, you should consult with your attorneys.

IX. Life Insurance

The proceeds of any insurance policies on the decedent's life which are payable to a named beneficiary will not be deposited in the estate's account since the proceeds belong entirely to the named beneficiary. The proceeds of any insurance policies which are payable to you in your capacity as Executor of the estate belong entirely to the estate and, therefore, should be deposited in the estate's account.

You should request an Internal Revenue Service "Form 712" from each insurance company which will disclose the owner, beneficiary, and amount of the proceeds of each policy insuring the decedent's life.

X. Distribution of Estate Assets

After all of the estate's debts and administration expenses have been paid, and after the estate's tax liabilities, if any, have been paid and settled with the Internal Revenue Service, you will be able to distribute the remaining assets in accordance with the provisions of the Will.

When the assets are distributed and there is a surviving spouse, any assets that were formerly community property will be retitled one-half in the name of the beneficiary or trust provided for in the Will and one-half in the name of the surviving spouse individually. Or, in most cases, if desired, some of the community property assets may be set aside entirely to the surviving spouse in exchange for other community property assets that are set aside for distribution to the other beneficiaries or trusts under the Will.

XI. Miscellaneous

Your insurance advisor should be contacted to be certain that there is continuing and adequate fire, casualty, and/or liability insurance coverage for all property comprising the estate.

Furthermore, if appropriate, you should discontinue any or all of the following: telephone services, cable television, Internet computer service providers, utilities, periodicals, credit cards, club memberships, and any other services, etc. which might otherwise cause the estate to incur ongoing, unnecessary expenses. In some cases, the estate may receive a refund for prepaid services. If interest is accruing on any unpaid credit card balances, you should request that the interest accrual be suspended. Most credit card companies will comply with this request after the death of a customer.

XII. Conclusion

In summary, the foregoing information is intended as a general guide concerning the administration of an estate by an Independent Executor. If you have any questions regarding the foregoing matters or as you proceed with administering the estate, your attorneys should be available to assist you.