TEN PESKY PROBATE PROBLEMS

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INTRODUCTION

While the area of probate and estates is generally a landmine for the unwary, there are particular "pesky" issues which seem to crop up regularly. This article attempts to identify and discuss ten of these "pesky" issues and how the practitioner might address or resolve them.

PESKY PROBLEM #1:

ATTEMPTING TO OBTAIN POSSESSION OF ESTATE ASSETS

Upon his appointment and qualification, a personal representative of an estate (administrator or executor, independent or dependent) has a right to possession of all assets belonging to the Decedent's estate. Tex. Estates Code §101.003 (West 2017). In fact, the personal representative is required to "collect and take possession of the estate's personal property, record books, title papers, and other business papers". Tex. Estates Code §351.102 (West 2017). With respect to property jointly owned by the Decedent with another party, the personal representative of the estate is entitled to possession of the property in common with the other part owner or owners in the same manner as other owners in common or joint owners are entitled to possession of the property. Tex. Estates Code §351.103 (West 2017). It often occurs that family members (and sometimes non-family members) rush to the Decedent's house after (or before) the funeral and begin dividing up the Decedent's property. Although title to the Decedent's assets vests in the rightful beneficiaries (if there is a will) or heirs (if the decedent died intestate), their right to possess those assets is subject to the right of the personal representative to possess the assets during the period of the estate administration. Tex. Estates Code §§101.001, 101.003 (West 2017). In addition to the instance described above when the Decedent's personal property is divided pre-maturely, there are instances when there is an heir or often a third party in possession of the Decedent's property who refuses to turn over possession of the property or relinquish control.

In light of the personal representative's duty to take possession of the personal property belonging to the estate, the personal representative is generally required to take some affirmative action to get possession of the property. If the person has no right to the property, a suit for conversion is one possibility. However, a lawsuit is not really required for the personal representative to exercise his statutory right of possession of estate property. *See In re Estate of Hutchins* , 391 S.W.3d 578, 588 (Tex. App.- Dallas 2012, no pet.). A better option is for the personal representative to file a "motion to show cause" in the court which is exercising jurisdiction over the estate. A show cause order is a creature of the common law. *See Texas Mexican Ry. Co. V. Locke*, 63 Tex. 623, 1885 WL 7097 (1885); *Turner v. Turner*, 576 S.W.2d 452 (Tex. App. - Houston [1st Dist.] 1978); *Green v. Green*, 424 S.W.2d 479 (Tex. Civ. App. - Tyler 1968, no writ). The motion requests the court enter a show cause order *ex parte*, requiring the party in possession of the property to appear before the court at a date and time certain to show cause why he should not be required to relinquish possession of the property to the personal representative. The order is then served by

constable or process server upon the party in possession. Often, the filing of the motion and service of the show cause order alone will bring the issue to a head. The party is possession often contacts the representative or his attorney and works out the details of turning over possession of the property. Unfortunately, many parties in possession dig in and appear in court to attempt to justify their possession of the property. However, if there is evidence the decedent owned the property at the time of his death and did not gift the property or lease the property to the person, the court will grant a "turnover order" which will then require the party to turn over possession of the property to the personal representative by a date certain. Note that this is not the same "turnover over" sought by a judgment creditor pursuant to Section 31.002 of the Texas Civil Practice and Remedies Code. *See In re Estate of Hutchins* , 391 S.W.3d 578, 588 (Tex. App.- Dallas 2012, no pet.).

Taking possession of real estate requires the personal representative to consider other issues. If there is surviving spouse or minor child who has chosen to exercise the probate homestead right over the property, then that person is entitled to possession of the property regardless of the administration of the estate. Tex. Estates Code §353.051(West 2017)(homestead shall be set aside for the use and benefit of the surviving spouse and minor children); Tex. Estates Code. §403.001(same rule made applicable to independent executors). Texas does not require designation of a probate homestead; it arises automatically. *Blake v. Fuller*, 184 S.W. 2d 148 (Tex. Civ. App.-Dallas 1944, no writ); *Good v. Good*, 293 S.W. 621 (Tex. Civ. App. Waco 1927, no writ) (homestead rights vests immediately on death and continues until abandoned) . The homestead rights and the respective interests of the surviving spouse and children of a decedent are the same whether the homestead was the decedent's separate property or was the community property of the surviving spouse and the decedent. Tex. Estates Code §102.002 (West 2017). The homestead of a decedent who dies leaving a surviving spouse descends and vests on the decedent's death in the same manner as other real property of the decedent and is governed by the same laws of descent and distribution. Tex. Estates Code §102.003 (West 2017). The probate homestead forms no part of the estate to be administered by the probate court, and an attempted sale by the probate court of the homestead for any purpose other than permitted by the Constitution is void. *Thompson v. Thompson*, 236 S.W. 2d 779, 788 (Tex. 1951). However, the probate court has jurisdiction to determine a surviving spouse's homestead rights despite the appointment of an independent executor. *Womack v. Redden*, 846 S.W. 2d 5, 9 (Tex. App.- Texarkana 1992, writ denied). The homestead right is not merely during the widowhood of the surviving spouse, but so long as she might elect to use or occupy the same as the homestead. Tex. Const. Art. 16, §52 (West 2017). Property that has been designated as a homestead will only lose that character through abandonment, death, or alienation. *Majeski v. Estate of Majeski*, 163 S.W.3d 102, 107 (Tex. App.-Austin 2005, no pet.).

However, there is often real estate, such as rental properties, which is not protected by the probate homestead right. The personal representative is entitled to possession of such properties unless the person in possession has a legal right of possession. *Donald v. Bankers Life Co.*, 133 S.W.2d 171, 174 (Tex. Civ. App.- Dallas 1939, writ dism'd) (an administrator's right to possession of the estate of a deceased as it existed at time of death does not authorize him to assume possession of property which was not in possession of decedent at time of death and to the possession of which he was not then entitled). If the party is possession does not have a legal right to possession and refuses to relinquish possession, the representative often pursues an eviction or forcible entry and detainer suit in the justice court. *See* Tex. Prop. Code §24.004 (West 2017) (a justice court in the

precinct in which the real property is located has jurisdiction in eviction suits). However, in light of a personal representative's statutory right to possession of the property, the personal representative can also use the motion to show cause procedure outlined above. This procedure may also be more suitable in situations where the party in possession claims some sort of ownership right in the property. The justice court can determine only the immediate right of possession and does not have jurisdiction to determine title to real property. *Goodman-Delaney v. Grantham*, 484 S.W. 3d 171, 173 (Tex. App.-Houston [14th Dist.] 2015, no pet.). Although the statutory probate court can determine property ownership, the show cause procedure does not dispose of the issue of ownership of the money or not; it merely places the items under the care and control of the court (or independent executor) until a final determination of ownership be made. *Powell v. Hartnett*, 521 S.W.2d 896 (Tex. App. – Eastland, 1975, no writ).

PESKY PROBLEM #2:

DETERMINING THE PROPER PARTY RESPONSIBLE FOR EXPENDITURES WITH RESPECT TO JOINTLY OWNED PROPERTY OR HOMESTEAD PROPERTY AND ENFORCING THE ESTATE'S RIGHTS

There are two common instances which usually put the estate "in business" with another party. In one instance, the Decedent may have owned property jointly with another person as a joint tenant. As previously mentioned, with respect to property jointly owned by the Decedent with another party, the personal representative of the estate is entitled to possession of the property in common with the other part owner or owners in the same manner as other owners in common or joint owners are entitled to possession of the property. Tex. Estates Code §351.103 (West 2017). Note that the fact of Decedent's death does not give the personal representative "greater" rights to the property. He simply stands in the shoes of Decedent. The general rule for co-tenants in Texas is that they are required to share any income or rents generated from the jointly-owned property according to their respective interests, but they also must share the reasonable and necessary expenditures for preservation of the property. *I-10 Colony, Inc. v. Chao Kuan Lee*, 393 S.W.3d 467, 478-79 (Tex. App.—Houston [14th Dist.] 2012, pet. denied). Therefore, if the Decedent would have been responsible for one-half (or whatever percentage) of the taxes, insurance, maintenance, the Decedent's estate will continue to be responsible for those expenditures as a co-tenant. *See id.* Therefore, the rights and duties of the joint owners essentially stay the same.[1]

Another common instance is when the estate involves a property in which someone can assert a probate homestead right. If there is a surviving spouse or minor child who chooses to exercise her homestead right, then that person is entitled to possession of the property regardless of the administration of the estate. Tex. Estates Code §§ 353.051, 403.001 (West 2017). However, the person exercising the probate homestead right has certain duties and responsibilities. The homesteader is chargeable with expenses of upkeep of the property, meaning ordinary repairs.

[1]Note that the recent Texas legislature passed the Uniform Partition of Heirs Property Act (Prop. Code Ch. 23A) which was intended to address problems faced by many low to middle-income families who inherit property with relatives as tenants-in- common. In a nutshell, the act places limits on the ability of any tenant-in-common to seek a partition of family-owned real estate.

Sargeant v. Sargeant, 15 S.W.2d 589, 593 (Tex. Comm. App. 1929). The homesteader is not entitled to reimbursement for improvements made voluntarily. *Id.* However, reimbursement for improvements may be allowed if the spouse makes the improvements with the "bona fide belief" that the spouse is the fee simple owner of the property. *Williams v. Davis*, 133 S.W. 2d 275, 279 (Tex. Civ. App.- Ft. Worth 1939, no writ). The homesteader is liable for payment of ad valorem and other property taxes. *Daken v. Daken*, 83 S.W.2d 620, 625 (Tex. 1935); *Hill v. Hill*, 623 S.W. 2d 779, 781 (Tex. App.- Amarillo 1981, writ ref'd n.r.e.) However, a surviving spouse who holds a life estate in marital residence holds an "ownership interest" entitling the spouse to homestead exemption from property taxation. *Copeland v. Tarrant Appraisal Dist*., 906 S.W.2d 148, 151 (Tex. App. Fort Worth 1995, writ denied);Tex. Tax Code Ann. §11.13 (West 2017). The homesteader is liable for payment of mortgage interest. *Hill v. Hill*, 623 S.W. 2d 779, 780 (Tex. App.- Amarillo 1981, writ ref'd n.r.e.). However, the homesteader is not responsible for payment of mortgage principal. *Id.* at 780, 781. Further, the responsibility of payment of casualty insurance premiums is on the holder of the underlying title. *Id.* Therefore, unless the homesteader also owns all or part of the underlying interest, she is not responsible for insuring the property. *Id.* If the homesteader is also a joint owner (either as joint tenant or by assertion of her one-half community interest), then she will be responsible for one-half of the insurance on the property. *See, e.g., I-10 Colony, Inc. v. Chao Kuan Lee*, 393 S.W.3d 467, 478-79 (Tex. App.—Houston [14th Dist.] 2012, pet. denied)

There are instances in which the homesteader fails to comply with her obligation to pay taxes, insurance, or maintenance. This often places the personal representative in a difficult position because he does not want to risk losing property to the taxing authorities by failing to keep taxes current. The homesteader cannot be found to have abandoned her homestead right by failing to pay taxes. *Williamson v. Kelley,* 44 S.W.2d 311, 314 (Tex. Civ. App.-Fort Worth 1969, writ ref'd n.r.e.)(homesteader did not forfeit homestead rights by failing to pay taxes); *Hunter v. Clark*, 687 S.W.2d 811, 815 (Tex. App.-San Antonio 1985, no writ)(payment of taxes by the devisee of the property under the deceased spouse's will is not a showing of abandonment by the surviving spouse occupying the property). Therefore, if the surviving spouse is also one of the heirs or beneficiaries of the estate, the personal representative may choose to pay the taxes out of the estate and then deduct those expenses from the share of the homesteader upon close of the estate. If the personal representative does not choose to handle it as a reimbursement, then the personal representative will likely have to institute legal action against the homesteader in order to force her to satisfy her obligations. The downside of this course of action is that it is slow, sometimes expensive, and may only result in obtaining a judgment against the person if the person does not have funds to satisfy her obligation. Another option may be the "show cause" motion mentioned in Section 1 of this article.

PESKY PROBLEM #3:

DEALING WITH DEBT COLLECTORS IN INDEPENDENT ADMINISTRATIONS

Almost everyone dies with some unpaid debts. Creditors are often eager to be paid following the death of a debtor so as not to have to become entangled in the probate process. Almost every executor or administrator has received a debt collection letter from DCM Services or similar debt

collection agency which usually begins, "We are sorry for your loss." Many personal representatives believe that all debts must be paid, and some beginning paying the decedent's bills even before they are appointed as executor. This is usually a bad decision. An executor often mistakenly believes he owes a duty to the creditors. An executor owes a fiduciary duty to the *beneficiaries* of the estate but not to unsecured creditors of an estate in the management of the estate's assets. *Mohseni v. Hartman*, 363 S.W.3d 652, 657 (Tex. App.- Houston [1st Dist.] 2011, no pet.)(emphasis added). The executor holds the property in trust for the benefit of the title holders, not for the creditors. *Id.* at 658. There is almost always an opportunity to reduce the amount of the debt or to defeat the collection attempt altogether.

As with most things in law, notice is the key. There may be both secured creditors, such as a mortgage company or bank or automobile finance company, and unsecured creditors, such as credit card companies and medical providers. Each personal representative is required to give certain notices to creditors. Within one month of her appointment, a representative must publish in a newspaper a general notice to any creditors of the estate. Tex. Estates Code §308.051; Tex. Estates Code §403.051(a)(1) (West 2017). The representative must send actual notice by certified mail to secured creditors within two months after he is appointed. Tex. Estates Code § 308.053; Tex. Estates Code §403.051(a)(1) (West 2017). If the representative fails to give the required notices, the representative and the surety on the representative's bond shall be liable for any damage which any person suffers by reason of such neglect, unless it appears that such person had notice otherwise. Tex. Estates Code §308.056 (West 2017).

With respect to unsecured creditors, Texas law also allows for what is known as a "permissive notice". Tex. Estates Code §308.054(b)(1);Tex. Estates Code §403.051(a)(2)(West 2017). The representative may send any potential unsecured creditor a notice by certified mail notifying them of the representative's appointment and informing them they must present their claim in a certain manner before the 121st day after the date of the receipt of the notice or the claim is barred, even if the claim would not otherwise be barred by the general statute of limitations. Tex. Estates Code §403.051, §403.056 (West 2017). This is a powerful tool often overlooked by the representative because the unsecured creditor often fails to respond timely or in the proper manner. The forms of notice by the unsecured creditor who receives the permissive notice letter are as follows:

> (1) a written instrument **that complies with the form of affidavit required for dependent claims** and is *hand-delivered with proof of receipt, or mailed by certified mail, return receipt requested* with proof of receipt, to the independent executor or the executor's attorney;
>
> (2) a pleading filed in a lawsuit with respect to the claim; or
>
> (3) a written instrument **that complies with the form of affidavit required for dependent claims** or **a pleading** filed in the court in which the administration of the estate is pending.

Tex. Estates Code §403.056 (West 2017) (emphasis added) (bold portion referring to Tex. Estates

Code §355.004 (West 2017)). Inevitably, the creditor, or a collection agency on the creditor's behalf, will only continue to send an unsworn bill or demand letter by regular U.S. mail, thus failing to comply with the statute. Once the 121 days has passed, the claim will be barred. This should allow the executor's attorney to seize the opportunity to send the debt collector his own, "I am sorry for *your* loss" letter!

Many attorneys who represent independent executors in estate administrations become confused, or at least concerned, as to what to do if the unsecured creditor, after receiving the permissive notice letter, actually properly and timely presents a claim. Then, the independent executor must make a decision as to whether to allow the claim the claim, reject the claim, or do nothing. If the independent executor rejects the claim, or does nothing, the ninety day statute of limitations applicable to dependent administrations does not apply. *See* Tex. Estates Code §403.058(1) (West 2017). However, the presentation of the claim alone to an independent executor does not toll the statute of limitations with respect to that claim. Tex. Estates Code §403.057 (West 2017). Therefore, assuming the claim is not allowed, the unsecured creditor would have until the end of the statute of limitations applicable to his particular claim to file suit to prosecute his claim. The 121 day notice statute does not otherwise alter the statute of limitations, and it does not change the fact that the only way for an unsecured creditor to enforce a claim in an independent administration is to file suit. Tex. Estates Code §403.059 (West 2017).

PESKY PROBLEM #4:

DEALING WITH THE INTERNAL REVENUE SERVICE REGARDING THE DECEDENT'S UNPAID TAXES OR DELINQUENT TAX RETURNS

In addition to claims of secured and unsecured creditors, many decedents pass away with unresolved tax issues. While it is a given that there may be a final Form 1040 income tax return due for the year of the Decedent's death, there is often the need to address the decedent's tax delinquencies such as unpaid income taxes or, even worse, unfiled income tax returns. To make matters worse, the decedent's estate is sometimes insufficient to satisfy unpaid taxes, penalties, and interest. Therefore, it is incumbent upon the personal representative to deal with the Internal Revenue Service. Furthermore, the personal representative must be careful with respect to funds disbursed from the estate because she could be exposing herself to personal tax liability.

This article previously addressed the issue of giving notices to creditors in an attempt to bring claims to a head and, in the best case scenario, defeat or reduce the claims. However, the question arises as to whether the United States Government is subject to the same rules as other unsecured creditors. State statutes of limitation do not apply to the United States. *United States v. Summerlin*, 310 U.S. 414 (1940); *United States v. Bushlow*, 832 F. Supp. 574 (E.D.N.Y. 1993); see also *Bresson v. Commissioner, 213 F.3d 1173 (9th Air. 2000), affirming 111 T.C. 172 (1998).* Internal Revenue Code section 6324 provides that on the day someone dies a federal estate tax lien comes into existence. The lien attaches to all assets of the decedent's gross estate that are typically reported on Form 706, United States Estate Tax Return. This estate tax lien does not have to be publically recorded in order to be valid. An "assessment lien" arises when tax is assessed and may be recorded

in addition to the lien provided by Internal Revenu Code Section 6324. IRC §6321. That section provides that if a person liable for taxes fails to pay taxes and penalties after demand, a lien arises in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. *Id.* The Internal Revenue Service may file a public document, the Notice of Federal Tax Lien, to alert creditors that the government has a legal right to the person's property.

A statutory lien that arises against property of a taxpayer before a taxpayer's death continues to attach to the property after the taxpayer's death. *United States v. Bess*, 357 U.S. 51 (1958). An estate must pay a claim of the federal government before all other debts of a deceased debtor. 31 U.S.C. §3713(a). A personal representative who does not give priority to the claims of the federal government is personally liable. 31 U.S.C. § 3713(b). However, federal government claims do not take priority over funeral and administrative expenses because these are not debts of the decedent. *United States v. Weisburn*, 48 F. Supp. 393, 397 (E.D. Pa. 1943); Rev. Rul. 80-112, 1980-1 C.B. 306. The family allowance also takes priority over government claims. *Schwartz v. Comm'r*, 560 F.2d 311, 319 (8th Cir. 1977). However, expenses of last illness are debts of the decedent and are inferior to claims due to the federal government. Rev. Rul. 80-112. In addition, the United States has the right to file suit under state law in state district court or file suit in United States district court, which has concurrent jurisdiction under 28 U.S.C. § 1345; *United States v. Slate's Estate,* 304 F. Supp. 380, 382 (S.D. Tex. 1969). To the extent that the federal court enters a final order before a state court does, the state court will be bound by the federal court's order.

Therefore, it is important for the personal representative to seek to resolve all pending federal tax issues before distrubtion and closing of the estate.

PESKY PROBLEM #5:

DEALING WITH TITLE COMPANIES REGARDING SALE OF REAL PROPERTY IN AN INDEPENDENT ADMINISTRATION

Most clients who are appointed as independent executors believe they have very broad powers to take any action which the decedent could take. While an executor may have broad powers, one must first look to the terms of the will under which the executor is serving to determine just how broad those powers are. When it comes to the sale of real estate, a title company will look to see if the will contains a power to sell real estate and, if so, whether the real estate can be sold for any reason whatsoever. However, before closing, an independent executor is often surprised, and certainly frustrated, when the tile company requests either a court order of sale or that the devisees of the estate sign off on the deed. Sometimes the title company requires certain actions because of the law, but many times, the title company is taking extra pre-cautions to control risk. A title policy is, after all, an insurance policy. Like any other insurance company, an underwriter of a title policy wants to minimize or eliminate as much risk as possible.

To determine whether the title company's request is actually based on the law, a good starting place is Section 402.052 of the Texas Estates Code, which provides:

> Unless limited by the terms of a will, an independent executor, in addition to any power of sale of estate property given in the will, and an independent administrator have the same power of sale for the same purposes as a personal representative has in a supervised administration, but without the requirement of court approval.The procedural requirements applicable to a supervised administration do not apply.

Tex. Estates Code §402.052 (West 2017).

From the looks of this section, it would appear that so long as the terms of the will do not limit the power of sale, the independent executor should have the power to transfer title to real property in the decedent's name without a court order and without joinder of the devisees or heirs. However, Section 402.053 of the Texas Estates Code provides, in part:

> (a) A person who is not a devisee or heir is not required to inquire into the power of sale of estate property of the independent executor or independent administrator or the propriety of the exercise of the power of sale if the person deals with the independent executor or independent administrator in good faith and:
>
> (1) a power of sale is granted to the independent executor in the will;
>
> (2) a power of sale is granted under Section 401.006 in the court order appointing the independent executor or independent administrator; or
>
> (3) the independent executor or independent administrator provides an affidavit, executed and sworn to under oath and recorded in the deed records of the county where the property is located, that the sale is necessary or advisable for any of the purposes described in Section 356.251(1).

Tex. Estates Code §402.053 (West 2017).

A third party purchaser is often totally oblivious to whether an executor has the power or authority to sell him the property. The title company, however, is not. The title company will try to ensure that the the terms of the will are clear that the executor has the power of sale for any reason, that there is a court order of sale if the will does not give the executor the power or the will is unclear about the nature and extent of the power of sale, or that the property is being sold for reasons stated in Section 356.251 of the Texas Estates Code, which provides:

> An application may be made to the court for an order to sell estate property if the sale appears necessary or advisable to:
>
> (1) pay:
>
> (A) expenses of administration;
> (B) the decedent's funeral expenses;

(C) expenses of the decedent's last illness;
(D) allowances; and
(E) claims against the estate.

Tex. Estates Code §356.251(1) (West 2017).

Therefore, if there is not clear language in the will or there is not a court order of sale, the title company will be very leery of the executor's power to sell unless the property is being sold to pay expenses associated with the decedent or his estate. In other words, the sale of the property must be "necessary" and not just something the executor wants to do. This makes sense when one considers that title to property vests in the beneficiaries at the time of death, subject only to the payment of debts and the estate administration. Tex. Estates Code §§ 101.001, 101.003 (West 2017). If there are not sufficient debts requiring the property to be sold, and if there is no need for further administration of the property, then the property should not be sold without the joinder of the devisees. Because title companies are skittish about relying on an affidavit of the executor, they will often require the joinder of the devisees in the deed. If the title company does not require the joinder of the devisees, they will often seek some form of indemnification from the executor that the sale is for one of the purposes stated under the statute. Any executor should be leery of signing any form of indemnification because at the time any claim for indemnification will be made, the estate property will have been distributed to the devisees and the executor will likely stand alone facing liability.

As can be seen from above, there is usually not a "legal" need for the beneficiaries to join in the deed in order to protect the purchaser or the title company from liability. In actuality, whether or not the beneficiaries join in a deed is relevant in two different situations. *Selected Real Estate Issues in Estate Planning and Probate"*, Richard Melamed, Texas State Bar 41st Advanced Estate Planning and Probate Course (2017). In the first situation, there may be a question as to whether there is a continued necessity for administration of the estate. *Id.* If the debts have been paid and the assets have been distributed, the comment to §11.49 of the Texas Title Examination Standards (Appendix to Title 2 of the Texas Property Code) suggests that, if there is any doubt as to whether continued administration is necessary, the beneficiaries should join the executor in the conveyance. *Id.*

The second situation relates to what kind of warranty deed, special or general, is bargained for. *Id.* There is authority that a personal representative of an estate may only give a special warranty in a deed. *Burlerson v. Whaley*,299 S.W. 718 (Tex. Civ. App. – Austin 1927, no writ history). A special warranty limits the grantor's warranty of title to defects arising "by, through or under" the grantor, but does not warrant title "back to the sovereign." *Owen v. Yocum*, 341 S.W. 2d 709 (Tex. App. – Fort Worth 1960, no writ). As the court in *Burlerson* explained, the policy of the law is to require an estate to be administered and the administration closed with as little delay as possible. *Selected Real Estate Issues in Estate Planning and Probate"*, Richard Melamed, Texas State Bar 41st Advanced Estate Planning and Probate Course (2017). To permit the administrator to bind the estate by a general warranty would be to impose a new contingent liability upon the estate and to delay indefinitely the close of the administration. *Id.* As a result, an administrator of an estate cannot bind the estate by a general covenant of warranty, but can only convey the interest of decedent in the

property belonging to his estate. *Burlerson*, 299 S.W. at 721. (Also note that, according to Section 5.008(e)(5) of the Texas Property Code, a fiduciary in the course of administering a decedent's estate or a trust does not need to provide the Seller's Disclosure Notice which relates to the condition of the property.) If the purchaser of property from an estate bargains for a general warranty deed instead of a special warranty deed, then all of the beneficiaries need to join in the deed to make the general warranty effective. *Id.* If the purchaser is reluctant to accept a special warranty deed, another option would be for the personal representative to give a special warranty deed, but to also assign without recourse any covenants of general warranty that the estate may have running in favor of the decedent included in the deed to the decedent. *Id.* If a general warranty were not part of the bargain, the executor may sign alone and there would be no need for the beneficiaries to join in the deed.

Further, the executor should be mindful that during the two year period after the date of the order admitting the will to probate, the order is subject to contest by bill of review filed in the proper court by any interested person. Tex. Estates Code §55.251 (West 2017). Moreover, any interested person may institute suit to cancel a will for forgery or other fraud within two years after the discovery of the forgery or fraud, and persons non compos mentis and minors have two years after the removal of their disabilities within which to commence such a suit. Tex. Estates Code §256.204 (West 2017). During the two year period after a decision, order, or judgment, the decision, order, or judgment is subject to attack by any interested person by bill of review filed in the same court, and if error is shown, the decision, order, or judgment can be revised or corrected. Tex. Estates Code §55.251 (West 2017).

Therefore, for the executor, or his attorney, to scream up and down that joinder of the heirs is not required by law rarely persuades a title company who has nothing to lose by requiring the devisees to join in the sale. Although the author has been among those attorneys for executors who has screamed up and down, if one thinks about it, one is protecting the executor from a later suit for breach of fiduciary duty regarding the sale of the property if the devisees have joined in the sale.

PESKY PROBLEM #6:

DEALING WITH MINOR BENEFICIARIES IN INDEPENDENT ADMINISTRATIONS AND HEIRSHIPS PROCEEDINGS

It is always challenging dealing with estates or situations where a minor owns an interest. Two of the areas, discussed in this section, relate to consent to an independent administration and obtaining waivers of service on an heirship application.

A. Dealing with Minors in Establishing Independent Administration

Under most wills, the testator appoints an executor and provides for an independent administration without bond. However, when there is no will, or the will does not provide for an independent administration, all is not lost. The beneficiaries can agree on the advisability of an independent administration. But what if one of the beneficiaries is a minor? Section 401.004 of the Texas Estates Code provides that if a distributee is an incapacitated person, the guardian of the

person of the distributee may consent to the creation of an independent administration on behalf of the distributee. Tex. Estates Code §401.004(c) (West 2017). If the court finds that either the granting of independent administration or the appointment of the person, firm, or corporation designated by the distributees as independent executor would not be in the best interest of the incapacitated person, then the court can refuse to enter an order granting independent administration of the estate. *Id.* If a distributee who is an incapacitated person has no guardian of the person, the court may appoint a guardian ad litem to act on behalf of the incapacitated person if the court considers such an appointment necessary to protect the interest of the distributees. *Id.* Alternatively, if the distributee is a minor and has no guardian of the person, the natural guardian or guardians of the minor may consent on the minor's behalf, if there is no conflict of interest between the minor and the natural guardian or guardians. *Id.*

The bond, however, is another issue. Most courts are leery about allowing an independent administration without bond when there is a minor beneficiary. Some courts will appoint an independent administrator with bond, but this is usually a headache for the underwriter since the personal representative still must take some action to obtain an order releasing him and the surety from the bond upon the conclusion of the administration of the estate. Therefore, even though there is authority for a guardian to consent to an independent administration on behalf of a minor, many intestate estates involving minors end up as dependent administrations due to the bond issue.

The requirement of a bond causes even further problems if the potential executor cannot be bonded due to the executor's poor credit. In that instance, the bonding company will either refuse to bond the person or have the person get a credit-worthy person to co-sign the bond. One possible way to navigate through the bond problem is to request the court to bond only on the amount of the minor's interest in the property under the executor's management. The reduced bond may solve the problem of an executor with poor credit. Depositing some of the assets under management into an account subject to a safekeeping agreement is another option to reduce the bond and give the Court some comfort the minor's assets are being protected. *See* Tex. Estates Code §305.154 (West 2017).

B. Dealing with Minors in Heirship Proceedings

Upon filing an application to determine heirship, the applicant must serve all purported heirs with notice of the application. Tex. Estates Code §202.051 (West 2017). Unless the court requires personal service, citation in a proceeding to declare heirship must be served by registered or certified mail on each distributee who is 12 years of age or older and whose name and address are known or can be ascertained through the exercise of reasonable diligence; and the parent, managing conservator, or guardian of each distributee who is younger than 12 years of age if the name and address of the parent, managing conservator, or guardian are known or can be reasonably ascertained. *Id.* Many times, the applicant will seek to obtain a waiver of citation from the heirs to avoid the time and expense associated with serving notice. A distributee may waive citation. Tex. Estates Code § 202.056(a) (West 2017).A parent, managing conservator, guardian, attorney ad litem, or guardian ad litem of a minor distributee who is younger than 12 years of age may waive citation on behalf of the minor distributee. Tex. Estates Code § 202.056(b) (West 2017). The recent Texas Legislature has amended Section 202.057 of the Texas Estates Code, effective September 1, 2017, to clarify that if someone is waiving service on behalf of a minor younger than 12, both the minor's name and the

person waiving, and that person's relationship to the minor, should be included in the required affidavit or certificate of service on heirs. However, a parent, managing conservator, guardian, attorney ad litem, or guardian ad litem of a minor distributee who is 12 years of age or older may not waive citation required on behalf the distributee. *Id.* Therefore, when the minor is between the ages of 12 and 18, the applicant must make an effort to serve the minor or have the minor appear in court.

PESKY PROBLEM #7:

DISTRIBUTING ESTATE ASSETS BELONGING TO MINORS

Another challenge associated with minor beneficiaries of estates surfaces when it is time to distribute the estate since the personal representative cannot distribute the estate directly to the minor distributees. However, there are a number of options from which to choose to distribute the property.

A. Deposit of Funds Owed to Resident Creditor into Court Registry

With respect to a "resident creditor", meaning (1) a resident of the state of Texas, (2) who is incapacitated, (3) who does not have a legal guardian, and (4) who is entitled to receive the amount of $100,000.00 or less [Tex. Estates Code §1355.001(a),(b) (West 2017)], the debtor may pay the money to the county clerk of the county in which the creditor resides to the account of the minor . Tex. Estates Code §1355.001(c) (West 2017). On receipt of the referenced payment, the county clerk is required to invest the money as authorized under the Texas Estates Code under court order in the name and for the account of the minor or other person entitled to the money. Tex. Estates Code §1355.051(a) (West 2017). The county clerk is required to credit any increase, dividend, or income from an investment to the account of the minor or other person entitled to the investment. Tex. Estates Code §1355.051(b) (West 2017). The terms for withdrawal of the funds are set out in the statute.

B. *Deposit into Uniform Transfers to Minors Act Account*

Texas has adopted the Uniform Transfers to Minors Act. Tex. Prop. Code §141.001 *et. seq*. (West 2017). Custodial property is created and a transfer is made when, among other things, money is paid or delivered, or a security held in the name of a broker, financial institution, or its nominee is transferred, to a broker or financial institution for credit to an account in the name of the transferor, an adult other than the transferor, or a trust company, followed in substance by the words: "as custodian for ___ (name of minor) ___ under the Texas Uniform Transfers to Minors Act" or an interest in real property is conveyed by instrument recorded in the real property records in the county in which the real property is located to the transferor, an adult other than the transferor, or a trust company, followed in substance by the words: "as custodian for ___ (name of minor) ___ under the Texas Uniform Transfers to Minors Act". Tex. Prop. Code §141.010 (West 2017).

A legal representative or trustee may make an irrevocable transfer to a custodian for a minor's benefit as authorized in the governing will or trust. Tex. Prop. Code §141.006(a) (West 2017). If the testator or settlor has nominated a custodian under Section 141.004 of the Texas Property Code to receive the custodial property, the transfer must be made to that person. Tex. Prop. Code §141.006(b)

(West 2017). If the testator or settlor has not nominated a custodian under Section 141.004 of the Texas Property Code, or all persons nominated as custodian die before the transfer or are unable, decline, or are ineligible to serve, the legal representative or the trustee shall designate the custodian from among those persons eligible to serve as custodian for property of that kind. Tex. Prop. Code §141.006(b) (West 2017).

In addition, Subject to Subsections (b) and (c) of Section 141.007 of the Texas Property Code, a guardian, legal representative, or trustee may make an irrevocable transfer to another adult or trust company as custodian for a minor's benefit in the absence of a will or under a will or trust that does not contain an authorization to do so. Tex. Prop. Code §141.007(a) (West 2017). With the approval of the court supervising the guardianship, a guardian may make an irrevocable transfer to another adult or trust company as custodian for the minor's benefit. Tex. Prop. Code §141.007(b) (West 2017). However, a transfer under Subsection (a) or (b) of Section 141.007 of the Texas Property Code may be made only if:

> (1) the legal representative or trustee considers the transfer to be in the best interest of the minor;
>
> (2) the transfer is not prohibited by or inconsistent with provisions of the applicable will, trust agreement, or other governing instrument; and
>
> (3) the transfer is authorized by the court if it exceeds $25,000 in value.

Tex. Prop. Code §141.007(c) (West 2017).

A custodian, acting in a custodial capacity, has all the rights, powers, and authority over custodial property that unmarried adult owners have over their own property, but a custodian may exercise those rights, powers, and authority in that capacity only. Tex. Prop. Code §141.014(a) (West 2017). However, the custodian may still be held liable for breach of duty. Tex. Prop. Code §141.014(b). (West 2017).

A custodian may deliver or pay to the minor or expend for the minor's benefit as much of the custodial property as the custodian considers advisable for the use and benefit of the minor, without court order and without regard to:

> (1) the duty or ability of the custodian personally or of any other person to support the minor; or
>
> (2) any other income or property of the minor that may be applicable or available for that purpose.

Tex. Prop. Code §141.015(a) (West 2017).

On petition of an interested person or the minor if the minor is at least 14 years of age, the court may order the custodian to deliver or pay to the minor or expend for the minor's benefit as much

of the custodial property as the court considers advisable for the use and benefit of the minor. Tex. Prop. Code §141.015(b) (West 2017). Further, a custodian may, without a court order, transfer all or part of the custodial property to a qualified minor's trust. Tex. Prop. Code §141.015(b-1) (West 2016).

The custodial arrangement terminates on the earlier of the date:

(1) the minor attains 21 years of age, with respect to custodial property transferred under Section 141.005 or 141.006;

(2) the minor attains the age of majority under the laws of this state other than this chapter, with respect to custodial property transferred under Section 141.007 or 141.008; or

(3) the minor's death.

Tex. Prop. Code §141.021 (West 2017).

(c). Establish a Chapter 1301 Management Trust

A person interested in the welfare of an alleged incapacitated person who does not have a guardian, among other persons, may apply for the creation of a management trust under chapter 1301 of the Texas Estates Code. Tex. Estates Code 1301.051(3) (West 2017). The court with jurisdiction over the proceedings may enter an order that creates a trust for the management of the funds of the person with respect to whom the application is filed if the court finds that the creation of the trust is in the person's best interests. Tex. Estates Code §1301.053 (West 2017). The court exercising probate jurisdiction may enter an order that creates a trust for the management of the estate of an alleged incapacitated person who does not have a guardian if the court, after a hearing, finds that:

(1) the person is an incapacitated person; and

(2) the creation of the trust is in the incapacitated person's best interests.

Tex. Estates Code §1301.054 (West 2017).

The court is required to appoint a financial institution to serve as trustee of a management trust, other than a management trust created for a person who has only a physical disability, except that a court may appoint an individual if the court finds:

(1) that the appointment is in the best interests of the ward or incapacitated person for whom the trust is created; and

(2) if the value of the trust's principal is more than $150,000, that the applicant for the creation of the trust, after the exercise of due diligence, has been unable to find a financial institution in the geographic area willing to serve as trustee. Tex. Estates Code 1301.057(b), (c) (West

2017). The Court may also enter an order keeping the property in trust until the beneficiary's 25th birthday.

Tex. Estates Code §1301.203(a)(2) (West 2017).

(d) Appoint a Guardian over the Minor's Estate

Any person may commence a proceeding for the appointment of a guardian by filing a written application in a court having jurisdiction and venue. Tex. Estates Code §1101.001(a) (West 2017). Before appointing a guardian, the court must find by clear and convincing evidence:

(A) the proposed ward is an incapacitated person;

(B) it is in the proposed ward's best interest to have the court appoint a person as the proposed ward's guardian;

(C) the proposed ward's rights or property will be protected by the appointment of a guardian;

(D) alternatives to guardianship that would avoid the need for the appointment of a guardian have been considered and determined not to be feasible; and

(E) supports and services available to the proposed ward that would avoid the need for the appointment of a guardian have been considered and determined not to be feasible;

Tex. Estates Code §1101.001(b) (West 2017).

A guardianship cannot be created for a minor if the primary purpose of enabling the minor to establish residency for enrollment in a school or school district for which the minor is not otherwise eligible for enrollment. Tex. Estates Code §1101.001(c) (West 2017). The Court is authorized to appoint a guardian with limited powers. Tex. Estates Code §1101.152 (West 2017). An individual guardian is required to be bonded. Tex. Estates Code §1105.101 (West 2017).

PESKY PROBLEM #8:

DEALING WITH JOINT BANK ACCOUNTS ON THE DEATH OF AN ACCOUNT HOLDER

A decedent often has a joint account with another party. If the other party is not the decedent's spouse, the decedent usually does not wish to set up the account as joint with right of survivorship. However, many banks set up accounts as joint with right of survivorship even if the decedent did not request the account to be set up in that way. One banker told the author that they automatically set up all joint accounts with the right of survivorship designation. This is very convenient for the bank since all that is required upon the death of the party is the presentation of a death certificate. However, it is very problematic for the surviving account holder, particularly if the decedent intended to pass the

account pursuant to the terms of her will to parties other than the joint account holder or to other parties in addition to the joint account holder.

While it may be tempting for the joint account holder to keep the account for herself, in most instances, the account holder wishes to honor the decedent's intent. In most cases, the surviving account holder simply divides the proceeds with the other beneficiaries per the terms of the will. However, if the amount divided with the others exceeds $14,000.00 per recipient (or $28,000.00 if her spouse joins in the gift), then the surviving account holder had just made taxable gifts requiring her to file a gift tax return. *See* 26 U.S.C. §2501 (West 2017). The best way to deal with this situation, however, is for the joint account-holder to execute a partial disclaimer pursuant to Chapter 240 the Texas Property Code. The account holder can disclaim any benefit she receives as a result of the right of survivorship designation, but not disclaim any benefit she receives as a beneficiary under the decedent's will. Tex. Prop. Code §§ 240.006(a), 240.052 (West 2017). Assuming there is not another joint account holder, the partial disclaimer should causes the account to pass to the decedent's probate estate. *See* Tex. Prop. Code §240.051(d) (West 2017). Since the effect of a disclaimer is as if the person never received the property, the surviving account holder can salvage the intent of the testator without having to bear the burden of filing a gift tax return and cutting in to her life-time exemption.

In other instances, the decedent dies with a joint account that is not set up to pass to the joint account holder by right of survivorship. In that instance, the decedent's interest in the account does not survive to the remaining account holder and passes by will or intestacy from the decedent as if the decedent's interest had been severed. Tex. Estates Code §101.002 (West 2017). However, once the bank learns of the death of a joint account holder, the bank often "freezes" the account and prevents access to the account. The executor or her attorney is usually required to deal with bank's legal department in order to access the account. The bank should be reminded that a multiple-party account may be paid, on request, to any one or more of the parties. Tex. Estates Code §113.202 (West 2017). Further, amounts in a joint account may be paid, on request, to any party without regard to whether any other party is incapacitated or deceased at the time the payment is demanded. Tex. Estates Code §113.203(a) (West 2017). The executor has a right to possession of the account. Tex. Estates Code §101.003 (West 2017). It is generally a good idea to bring not only current letters testamentary, but a death certificate, and a certified copy of the order appointing the executor or administrator. If the still bank refuses to pay over the account upon presentation of the referenced items, the executor should consider resort to the "show cause" procedure discussed in Section 1 of this article.

PESKY PROBLEM #9:

DEALING WITH SMALL ESTATES OR ESTATES WITH LIMITED ASSETS

Many people die owning few assets. If there are no assets which require re-titling, probate can generally be avoided altogether. However, there is often a small bank account in the Decedent's name only which no one can access. One might think the answer is to file a small estates affidavit. However, if the Decedent has a will, the small estate affidavit statute cannot be used. Tex. Estates

Code §205.001 (West 2017). One can also file an application to probate the will as a muniment of title. Tex. Estates Code §257.001, *et seq.* (West 2017). However, it is often difficult to get a bank to release funds without presentation of letters testamentary.

A. Probate of Will as a Muniment of Title

A will can be probated as a muniment (or record) of title if the decedent had no unpaid debts, other than that secured by a lien on real estate, and there is no other necessity for administration of the estate. Tex. Estates Code §257.001, *et seq.* (West 2017). Such situations usually occur when the decedent leaves only a residence and one or more bank accounts that do not pass by survivorship or other beneficiary designation. In that case, all that is really needed is some documentation from the court acknowledging that the Will is valid and provides the basis for a transfer of title to the relevant asset.

With a muniment of title, there is no administration of the estate. Though the applicant may have been named as the personal representative in the Will, the court does not appoint an executor or administrator. The probate process is completed at the hearing to admit the Will; there is no requirement to notify creditors or beneficiaries, or to prepare and file an inventory of the estate. The order admitting the Will to probate may be used to document the chain of title necessary to close a sale of real property passing under the Will or the transfer of funds in a bank account. A person who is entitled to property under the provisions of a will admitted to probate as a muniment of title is entitled to deal with and treat the property in the same manner as if the record of title to the property was vested in the person's name. Tex. Estates Code §257.102(b) (West 2017). However, in spite of this clear statutory language, banks sometime remain reluctant to honor the order. Therefore, it is advisable to track the statutory language in the order such as the following:

> "This order shall constitute sufficient legal authority for each person who owes money to the testator's estate, has custody of property, acts as registrar or transfer agent of any evidence of interest, indebtedness, property, or right belonging to the estate, or purchases from or otherwise deals with the estate, to pay or transfer without administration the applicable asset without liability to [specifically name the persons described in the will] as entitled to receive the asset".

Tex. Estates Code §257.102(a) (West 2017).

There is recent legislative change of note. Section 257.001 of the Texas Estates Code authorizes a muniment proceeding if there are no unpaid debts, other than those secured by real estate, or if the court "finds for another reason that there is no necessity for administration of the estate." However, the second basis for a muniment proceeding is not listed in the required contents of the application or the required proof. The recent Texas legilature has amended the statute, effective September 1, 2017 to fix that.

B. Small Estate Affidavit

The Small Estate Affidavit, once approved by the court, serves as a legal document to identify

a decedent's heirs and their respective shares of the decedent's property. The Small Estate Affidavit is most often used for estates with small bank accounts and few debts and perhaps homestead real property.

The distributees of the estate of a decedent who dies intestate are entitled to the decedent's estate without waiting for the appointment of a personal representative of the estate to the extent the estate assets, excluding homestead and exempt property, exceed the known liabilities of the estate, excluding any liabilities secured by homestead and exempt property, if:

(1) 30 days have elapsed since the date of the decedent's death;

(2) no petition for the appointment of a personal representative is pending or has been granted;

(3) the value of the estate assets, excluding homestead and exempt property, does not exceed $75,000.00 (*the recent legislature has increased the amount from $50,000.00 to $75,000.00, effective September 1, 2017*);

(4) an affidavit that meets the requirements of Section 205.002 is filed with the clerk of the court that has jurisdiction and venue of the estate;

(5) the judge approves the affidavit as provided by Section 205.003; and

(6) the distributees comply with Section 205.004.

Tex. Estates Code §205.001 (West 2017).

The requirements of the affidavit are as follows:

Sworn to by:

(A) two disinterested witnesses;

(B) each distributee of the estate who has legal capacity; and

(C) if warranted by the facts, the natural guardian or next of kin of any minor distributee or the guardian of any other incapacitated distributee; and

Include the existence of the conditions prescribed by Sections 205.001(1), (2), and (3); and include:

(A) a list of all known estate assets and liabilities (and an indication of whether they are exempt);

(B) the name and address of each distributee; and

(C) the relevant family history facts concerning heirship that show each distributee's right to receive estate money or other property or to have any evidence of money, property, or other right of the estate as is determined to exist transferred to the distributee as an heir or assignee.

The judge shall examine an affidavit filed under Section 205.001. The judge may approve the affidavit if the judge determines that the affidavit conforms to the requirements of this chapter. Tex. Estates Code §205.003 (West 2017).

If a decedent's homestead is the only real property in the decedent's estate, title to the homestead may be transferred under an affidavit that meets the requirements set forth herein. Tex. Estates Code §205.006(a) (West 2017). The affidavit used to transfer title to the homestead must be recorded in the deed records of a county in which the homestead is located. *Id.* A bona fide purchaser for value may rely on an affidavit recorded under this section. Tex. Estates Code §205.006(b) (West 2017). A bona fide purchaser for value without actual or constructive notice of an heir who is not disclosed in the recorded affidavit acquires title to a homestead free of the interests of the undisclosed heir, but remains subject to any claim a creditor of the decedent has by law. *Id.* A purchaser has constructive notice of an heir who is not disclosed in the recorded affidavit if an affidavit, judgment of heirship, or title transaction in the chain of title in the deed records identifies that heir as the decedent's heir. *Id.* An heir who is not disclosed in an affidavit recorded under this section may recover from an heir who receives consideration from a purchaser in a transfer for value of title to a homestead passing under the affidavit. Tex. Estates Code §205.006(c) (West 2017).

A person making a payment, delivery, transfer, or issuance under an affidavit described herein is released to the same extent as if made to a personal representative of the decedent. Tex. Estates Code §205.007(a) (West 2017). The person may not be required to see to the application of the affidavit or inquire into the truth of any statement in the affidavit. *Id.* The distributees to whom payment, delivery, transfer, or issuance is made are answerable for the payment, delivery, transfer, or issuance to any person having a prior right and accountable to any personal representative appointed after the payment, delivery, transfer, or issuance. Tex. Estates Code §205.007(b) (West 2017). Each person who executed the affidavit is liable for any damage or loss to any person that arises from a payment, delivery, transfer, or issuance made in reliance on the affidavit.Tex. Estates Code §205.007(c) (West 2017). If a person to whom the affidavit is delivered refuses to pay, deliver, transfer, or issue property as provided by this section, the property may be recovered in an action brought for that purpose by or on behalf of the distributees entitled to the property on proof of the facts required to be stated in the affidavit. Tex. Estates Code §205.007(d) (West 2017).

C. Affidavit of Heirship for Motor Vehicles

If a decedent dies intestate and there has been no judicial proceeding involving the decedent's estate and none is anticipated, an affidavit of heirship may be used to transfer title of the motor vehicle to decedent's heirs without court proceedings. Tex. Transp. Code §501.074(3) (West 2017). The Affidavit must be signed by all of decedent's heirs and submitted to the Texas Department of Motor Vehicles. The Texas Department of Motor Vehicles has a form that can be used specifically

for this purpose. The form can be found at Texas Department of Motor Vehicles website: http://txdmv.gov . It is form VTR-262.

PESKY PROBLEM #10:

OBTAINING A RELEASE FROM LIABILITY IN AN INDEPENDENT ADMINISTRATION

One potential disadvantage of an independent administration is that the independent executor or administrator is not required to formally "close" the estate. Therefore, if an executor wants to truly close the book on the administration, he has to seek out a release from liability from the distributee. An independent executor may not require a waiver of release from a distributee as a condition of delivery of the property. Tex. Estates Code §405.002(b) (West 2017). However, settlement agreements are highly favored by Texas courts. An agreement will not be disturbed because of ordinary mistake of law or fact, and will be upheld when all parties have the same knowledge or a means to obtain the same knowledge provided there is no fraud, misrepresentation, concealment or other inequitable conduct. *See Crossley v. Staley*, 988 S.W.2d 791 (Tex. App.—Amarillo 1999, mand. denied). But a release, like any contract, is subject to avoidance on grounds of fraud or material misrepresentation. *See Williams v. Glash*, 789 S.W.2d 261 (Tex. 1990). Unfortunately, some beneficiaries are not willing to enter a family settlement agreement or give the executor a release.

Section 405.004 of the Texas Estates Code provides that a personal representative may file a report with the Court that has the effect of terminating the representative's authority and closing the estate**.** This procedure is seldom taken advantage of because it deprives the personal representative from later obtaining letters testamentary if an additional asset is discovered and needs to be transferred. A closing report may be used to terminate bond liabilities and release sureties where a bond has been required of the independent executor, independent administrator, or community administrator. Tex. Estates Code §405.007(d) (West 2017). However, the closing report does not release the independent personal representative "from liability for any mismanagement of the estate or from liability for any false statements contained in the report or notice." Tex. Estates Code §405.007(b) (West 2017). Therefore, a closing report is not the answer when the independent personal representative seeks a release from liability.

Texas Estates Code Section 405.003 was enacted to confirm that an independent personal representative may seek a judicial discharge from liability relating to the administration of the decedent's estate. Tex. Estates Code §405.003 (West 2017). Section 405.003 provides that after an estate has been administered and if there is no further need for an independent administration of the estate, the independent personal representative of the estate may file an action for declaratory judgment under Chapter 37, Civil Practice and Remedies Code, seeking to discharge the independent personal representative from any liability involving matters relating to the past administration of the estate that have been *fully and fairly disclosed*. Tex. Estates Code §405.003(a) (West 2017) (emphasis added). Thus, the independent personal representative may effectively initiate a lawsuit against the beneficiaries of the estate. Each estate beneficiary must be personally served with citation or agree to waive such service. Tex. Estates Code §405.003(b) (West 2017). Effective September 1, 2017, the

recent Texas legislature has amended this section to provide that the *distributees* of an estate, rather than the beneficiaries, must be personally served with an action for declaratory judgment seeking a judicial discharge. Once filed, the court may require the independent personal representative file a final account that includes any information the court considers necessary to adjudicate the independent personal representative's request for a discharge of liability. Tex. Estates Code §405.003(c) (West 2017). If approved and any objections are overruled, the personal representative may be discharged in a final order.

On or before filing the petition, the independent personal representative must distribute to the beneficiaries of the estate any of the remaining assets or property of the estate that remains in the hands of the independent personal representative after all of the estate's debts have been paid, except for a reasonable reserve of assets that the independent personal representative may retain in a fiduciary capacity pending court approval of the final account. Tex. Estates Code §405.003(d) (West 2015). Prior to finalizing the judicial discharge, the court may order the independent personal representative to distribute a portion of the remaining assets. *Id.*

The potential advantages of invoking the procedure to obtain a judicial discharge is that it forces a resolution of any matters which are "fully and fairly" disclose in the accounting. Further, the order judicially discharging independent personal representative is a final judgment after thirty days if not appealed. *See Crowson v. Wakeham*, 897 S.W. 2d 779, 781 (Tex. 1995). The approval of a final accounting may be *res judicata* of all issues actually litigated and considered by the Court. *Coble Wall Trust Co. Inc. v. Palmer*, 859 S.W.2d 475, 480-81 (Tex. App.—San Antonio 1993, writ denied). In addition, this procedure allows the independent personal representative to retain a defense fund to settle up his or her accounts. Tex. Estates Code §405.003(d) (West 2017).

Potential disadvantages of closing the estate by seeking a judicial discharge are that the filing of a petition for judicial discharge may cause a beneficiary to bring counterclaims to the pending petition once they are joined as a party. Further, there can be no release or discharge as to false or undisclosed material information. *Thomas v. Hawpe,* 80 S.W. 129 (Tex.Civ. App— Dallas1904, writ ref'd) (*res judicata* did not bar claims against former temporary administrator who furnished false information in accounting). There are also potential claims by beneficiaries for assessment of legal fees and expenses. *See* Tex. Civ. Prac. & Rem. Code. § 37.009 (West 2015). The independent personal representative is personally liable to refund any amount not approved by the court as a proper charge against the estate. Tex. Estates Code §405.003(e) (West 2017). Finally, the order of discharge may be appealed, as in any other judgment. *See Crowson v. Wakeham*, 897 S.W. 2d 779, 781 (Tex. 1995).

CONCLUSION

The author hopes the foregoing discussion of certain "pesky" problems often confronted in estates will assist the practitioner in successfully navigating through the problem and achieving a satisfactory and expeditious resolution for the client.