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Estate Administration: Opening and Closing the Estate and Resolving Related Issues

Managing Fiduciary Powers and Duties, Distribution of Assets, Claims Against the Estate, and Tax Issues

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ESTATE ADMINISTRATION: OPENING AND CLOSING THE ESTATE AND RESOLVING ISSUES

HANDLING ASSETS AND CLAIMS AGAINST THE ESTATE

BY: J. BRIAN THOMAS[1]

I. Handling Assets

At the heart of any personal representative's administration are the assets that he or she is obligated to manage for the benefit of others. In many cases, these assets are easily known and recognizable. The executor or administrator might be a family member that is intimately familiar with the assets owned by the decedent at death. On occasion, however, a representative finds the decedent's estate simply landing in their lap, and the assets that comprise the Trust may not be so readily known.

Identification, inventorying and control are the threshold issues for a representative under either end of the spectrum. A representative is only as capable as the information that they receive themselves, and in turn report to beneficiaries, creditors and the Court. Enhancing that information to the point that it is accurate and reliable is critical to the key three steps of any administration:

- Marshal assets;
- Pay debts; and
- Distribute the remainder.

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A. The Inventory

An inventory an appraisement must be filed in virtually every type of probate administration. At least, that has been the law of many jurisdictions for quite some time. In response to concerns mostly focused on privacy, the Texas legislature amended its Inventory requirement in 2011, carving out an exception that is gaining some popularity, and may mark a significant change in the efficiency of administrations ranging from simple to complex. The amended statute in Texas now permits the filing of an affidavit in lieu of an inventory in certain cases.

Even in the case of another document, like an affidavit or certificate used as a substitute, the representative's obligation to create an inventory for the beneficiaries of the estate remains a vital element of estate administration. Under the new Texas statute, for example, beneficiaries and interested parties are still entitled to an Inventory, and the personal representative remains obligated to create and produce one – just not necessarily file it among the public records with the county clerk. As a result, it is absolutely necessary to have a thorough intake and client interview procedure, in order to begin addressing asset-specific issues as promptly as possible. Addressing the assets and claims owned by the estate early in the representation allows the attorney (and their client) to adequately prepare for any challenges related to those assets or claims.

Some of the initial common concerns for various types of assets include:

1. Real Estate

- Is the property secured?

- What is the property worth?
- Is the property adequately insured?
- Are there any agreements or terms attached to the use of the property (e.g. rental contracts or leases?)

2. Personal Property

- Are there items of significant value, or is this really just the decedent's "stuff?"
- Are these the assets that are going to invite or avert litigation?

3. Cash Accounts

- Are all of my eggs in one basket, or several?
- Is an estate bank account, or several, necessary?

4. Stocks and Bonds

- Do I have adequate records of ownership?
- Am I limited by the decedent's stated desires (e.g. "Don't ever sell the Exxon or IBM stock.")

5. Business Interests

- Will it continue, or will it wind up?
- What decisions will be made during the administration?

6. Notes and Receivables

- Is the Estate a creditor?

II. Claims Against the Estate

A. General Considerations

Many states supervise estate administrations at every step. The matters are rigid, structured, and frequently so marred by inefficiency and increased cost that estate planners openly tout the virtues of avoiding probate. Other jurisdictions may permit a more relaxed administration, one that permits a personal representative to act largely free of supervision, and often resulting in greater efficiency and lower cost.

Texas estate administrations can follow either of these two paths – independent administration or dependent administration. Most often, the type of administration is determined by whether or not the decedent died leaving a Last Will and Testament. Other circumstances, including the agreeability of the heirs or distributees, can dictate whether the estate is administered with strict supervision or only modest oversight. The type of administration created often bears significantly on the treatment of claims for money against the estate.

Whether or not the administration proceeds independently or dependently has a far-reaching impact on potential creditors of the Estate, as one of the largest distinctions between the two types centers on the rules governing the presentation and payment or rejection of a creditor's claim for money against the Estate. Likewise, creditors waiting in the wings can have a sizable impact on that part of the estate that actually passes to heirs and beneficiaries. These individuals are thus

significantly affected by the choice of administration, and accompanying rules, as well. Here's how the game often looks in Texas:

Client	Goal
Estate Creditor	Present valid claim for money against the estate, and settle debt for full amount with minimal cost of recovery. **Translation: Get paid.**
Estate Beneficiary / Distributee	Pay as few claims against the estate as possible, and force creditors to either settle debts for less than full value or lose their right to otherwise make a valid claim. **Translation: Make sure the creditors don't get paid.**

Clearly, our clients may have very different goals in the administration. Even in the analysis of the claims procedures, it is imperative that counsel understands who the client is, and more importantly who the client is not. Who we represent determines how we do our job.

The circumstances may present the attorney with as many as three (3) different types of clients, all arriving with their own legal goals and intentions and each presenting a unique set of ethical considerations. Most estate administrations involve only three classes of parties:

(1) The Fiduciary (What have I gotten myself into, and how do I get out of it?)

(2) Beneficiaries or Heirs (Quis custodiet ipsos custodies?: Who will guard the guards?)

(3) Creditors of the Estate (Is there any chance that we might get paid someday?)

1. The Fiduciary

The nominated personal representative is the most likely of the three classes a probate attorney encounters. In most cases, someone has died, a Will has been discovered (or not) and there is work to do. Property needs to be safeguarded, debts need to be addressed (and paid or ignored) and anxious beneficiaries need to be quieted and eventually satisfied – maybe. In nearly every case I encounter, the nominated fiduciary is almost immediately overwhelmed with the magnitude of their task. Put simply, they are often in a panic. A potentially life-changing event has just occurred, emotions are at their peak and the Decedent picked *them* to handle the final affairs.

How does their role define how they address the claims procedure? The personal representative's chief concern with regard to the payment of claims boils down to a single word – liability. "Have I done what the law requires of me, such that neither creditor nor beneficiary can hold me liable for a result they find unsatisfactory?" These clients are simply looking to keep their skin, and conclude the administration without incurring some liability to the other two types of clients.

When I take on representation of a nominated fiduciary, I make it very clear to my client that I represent *them*. I do not represent their relatives, Estate creditors, beneficiaries or "the Estate." I represent an individual, and we probably anticipate that individual invoking at least some form of judicial process and assuming specific fiduciary duties. My job is to guide them through those duties unscathed.

Many non-lawyers, and even some mistaken lawyers, believe that the Texas lawyer represents the "Estate," or the "Trust," as though these legal fictions were living, breathing beings capable of hiring an attorney. To make it more confusing, I'm told by some of my colleagues in other states that this line of thinking is actually adopted in many jurisdictions. In Texas, it isn't true.[2] Based on this misconception, many people, from creditors to beneficiaries to family members of the decedent will believe that the lawyer represents *them* by virtue of representing an entire group of "thems." Not only is this false, but it can become terribly confusing and conflicting for everyone involved. You should strive to be as clear as possible when taking on representation of a nominated fiduciary, and clarify the limit and scope of your role as counselor in the manner commensurate with your jurisdiction.

2. Beneficiaries or Heirs

Let's be brutally honest. Every probate and trust practitioner's world would be immeasurably simpler if it were not for beneficiaries. In jokes where I'm only half-kidding, I generically describe these individuals as the "getters," and they rarely cease to amaze me. More often than I care to count, the getters have the biggest

[2] ***Chapman Children's Trust v. Porter & Hedges L.L.P***, 32 S.W.3d 429 (Tex. App. – Houston [14th Dist] 2000, ***pet denied***.)

complaints, the largest demands, the shortest of fuses and the wildest of imaginations. Everything is drama, and their brother/sister/aunt/uncle/neighbor is always "hiding something." All that is often added to the fact that they are, in the end, simply lining up to "get" whatever they believe they've been entitled to from birth.

Often, these individuals will not be the nominated or appointed as a fiduciary, and so while these clients are along for the ride, they are not the ones driving. In an independent administration, or in even a dependent administration, it may be months (or possibly years) before certain rights of these clients even mature, and this fact alone can cause many clients to lose confidence in the probate system as the good-for-nothing brother/step-mother/etc. gets to act without deferring to the client's desires.

In the context of these clients, the attorney's representation will likely take a very different tone than one where the nominated fiduciary is the client. Whereas the latter is concerned with meeting deadlines, fulfilling obligations and administering the decedent's estate, the attorney for the beneficiaries often takes on the role of the watchdog or enforcer. An example of this type of representation that I often encounter might be something like this:

"Mom left a Will dividing her Estate among us three children. My sister is in charge, and I trust her about as far as I can throw her. I used to know what was happening, but she hasn't returned my calls or e-mails in months, and I think she's up to something. To make it worse, I received a letter from the attorney telling me that he only represents <u>my sister</u>, and not me. What can I do to make sure that she's doing her job?"

Here, the client might not anticipate a dispute, but he probably wouldn't be too surprised if one occurred. In sum, he wants someone in his corner to keep an eye

on things -- to enforce some accountability and bring some transparency to the administration. He wants someone to guard the guards. The scope of even this representation should be clearly defined, though it may involve some unknowns. In contrast to the known events of representing the fiduciary (appointment, preparing an inventory, dealing with debts, applying ascertainable standards, making distributions, etc.,) this kind of client should understand that the attorney is taking on more of a consulting and communicating role than anything else. Competent representation might involve simply passing along communication from the attorney representing the fiduciary, or it may involve invoking a statutory demand for an accounting, distribution, modification, termination, or a number of other beneficiary actions.

3. Creditors

The attorney representing a potential or known creditor should pay careful attention to the procedural stature of the administration. Has my client received the proper notice? Do I have a certain time within which I need to present or file my client's claim? Is there an order to payment? Are certain assets exempt? Failing to act in compliance with the relevant provisions of the statutes may result in a creditor's claim being barred from collection altogether. This does not produce a happy creditor-client.

B. Notices

1. Types of Notice

a. Notice by Publication

In every probate administration (in Texas, anyway) the administrator is required to publish a notice to creditors in a newspaper of general circulation in the county in which the probate administration is pending within one (1) month of the date the administrator is qualified. Tex. Prob. Code §294. This basic notice must provide:

- The name of the administrator;
- The name of his attorney; and
- The attorney's address for delivery of any claims for money.

Once the notice has been published, the administrator must file a Proof of Publication with the Probate Court, which includes a verification from a newspaper representative that the notice has been published in that paper. Tex. Prob. Code §294(b). Many times, this is as simple as filing a photocopy of the newspaper clipping, or the clipping itself in some counties. As counsel for the personal representative, the attorney should see to the timely preparation and publication of this notice. As counsel for a creditor of the Estate, the attorney should review the

Court's file to determine if the Proof of Publication has been filed in a timely manner.

b. Mandatory Notice to Secured Creditors

Likewise, in every probate administration, the administrator is required to send notice to each creditor holding a secured claim against the Decedent's estate within two (2) months of the date of qualification. The notice must be sent by certified mail and must inform the creditor that the Decedent died, that the administration has been opened, the name of the administrator and the address where a claim can be filed. Tex. Prob. Code §295. Proof of this notice should be filed as well.

c. Permissive Notice to Unsecured Creditors

At the election of the Texas administrator, notice may be sent to any creditor holding an unsecured claim against the Estate. This notice is generally known as the Permissive Notice. This notice must be sent by certified mail and must include the same information as required for the secured creditors, though it carries an added bonus to the watchful representative, and a ticking time-bomb for the unwary unsecured creditor. The notice bears the addition of its own limitations window within which a creditor must act. Sending the permissive notice can have the effect of barring the creditor's claim if they fail to respond timely. Tex. Prob. Code 294(d).

When representing the personal representative of the Estate, the attorney may wish to utilize the Permissive Notice in order to demand that a potential creditor provide form and substance to their claim. Often, the personal representative is aware

only that a potential claim exists. He or she may have notice a stack of mail addressed to the decedent from a bank or credit card company. These statements may provide some structure to a claim for money, but counsel should provide the Permissive Notice if for no other reason than to compel the potential creditor to take a position on the matter. Upon receipt of the notice, the potential unsecured creditor is forced to liquidate an alleged debt and make a demand for a sum certain from the Estate.

Many times, the Permissive Notice may also prompt the creditor to offer to settle the debt for an amount less than full value. Often, unsecured creditors understand that their claim will fall last on what could be a very long list, and they will seek to receive whatever they can get from the Estate. This tendency may permit the personal representative to settle an unsecured debt for significantly less than the full amount, which may in turn translate into a greater Estate to distribute to anxious beneficiaries or heirs.

The Permissive Notice also has the powerful feature of prompting quick action from an unsecured and potentially under-represented creditor. Under Section 294(d), a creditor has four months from receipt of the permissive notice to perfect and present their claim to the personal representative. In a dependent administration, this presentation requires very specific compliance with form and substance. In an independent administration, no particular form is required, though the creditor may not realize it. Regardless, the unsecured creditor is put on the hot seat and must act quickly in order to have any hope of having any part of the claim satisfied. If the

claim is not properly presented to the personal representative within the four-month window, the claim is barred – period.

Understandably, many unsecured creditors are reluctant to accept this outcome when informed of it by counsel for the personal representative. The policy behind the Permissive Notice, however, is simple and just. Courts desire the orderly and timely administration of the estate of a decedent, and the Permissive Notice furthers that prompt administration, even if unsecured creditors must ultimately suffer for failing to comply with the time requirements of Section 294.

2. Variance in Administration Types (Independent versus Dependent)

A. Independent Administration Procedures

Within an independent administration, little is required of a creditor with respect to presentation of a claim. The creditor need only demand satisfaction of the debt from the independent representative, and this may be accomplished without the filing of a sworn document in the court. Typically, there is not an applicable limitations period for creditors in these scenarios, as the debt must only be presented before the administration is closed. However, independent personal representatives have at their disposal the same accelerating mechanism of Sections 294(d), and this can often act to bar a creditor's claim quickly even in an independent administration.

Once an unsecured creditor's claim is timely presented to the independent representative, the burden falls on the representative to act. The independent

representative is required to approve, classify, pay or reject claims against the Estate in accordance with the classification structure found in later provisions of the Probate Code. Upon submission of the claim, if not before, counsel for the unsecured creditor should seek a copy of the Inventory and the Order approving it. Early in the process, the creditor should know whether or not there is a possibility that the unsecured debt could be repaid even the representative wanted to do so. Many unsecured claims fall so low on the classification provisions of Section 322 of the Code that their debts may never be satisfied in full, and so the Inventory will prove a document worthy of review in order to ascertain early whether the unsecured creditor should seek a reduced payment in full satisfaction, write the debt off altogether, anticipate full payment or batten down the hatches for a lawsuit.

In certain cases, the independent representative might ignore or refuse to pay what the creditor perceives as a valid debt. In the context of an independent administration, the creditor need not wait long for the representative's answer, as suit can be filed on the debt at any time after presentment, so long as six (6) months have lapsed from the original grant of authority to the representative. Tex. Prob. Code 147. From the filing of suit forward, the litigation involved will center on the debt just as the decedent was still living, and the representative will simply be a substitute party. The debt, contract, agreement, etc., must be proven, and evidence must be offered to establish the damage to the creditor if the debt is left unpaid.

B. Dependent Administration Procedures

Texas enjoys two variations of estate administrations – independent and dependent. As outlined, independent administrations move forward significantly free from the supervision, oversight and the burdensome process of approval that hallmark their dependent cousin. Dependent administrations proceed very much like bankruptcy proceedings, with each step carefully planned and structured in order to affirm at each turn that it is the *Court*, through the dependent administrator, making each decision affecting the Estate. The rigid framework of the dependent administration is arguably never as omnipresent as in the claims process. Creditors (secured and unsecured) pursuing money from a dependently administered estate are at the mercy of a very unforgiving process that is wrought with fatal pitfalls.

1. Presentation: Section 298

In order for the dependent administrator to even consider a claim for money against the estate, the Claim must be properly presented to them. Specific requirements apply to timing, form and the substance of the Claim itself. Generally speaking, a Claim may be presented to the administrator at any time before the estate is closed, if suit on the claim has not been barred by the general statute of limitation.[3] This means, for example, that a Claim based upon a contract could theoretically be presented to the administrator at any point prior to the approval of the

[3] Tex. Prob. Code §298(a).

administrator's Final Account, so long as the Claim is presented before the four-year limitations statute operates to bar the claim.

But Section 298 does not stop there. The Code also provides that under no circumstance can an administrator allow a Claim that is time-barred.[4] Even if the administrator makes the mistake of allowing a Claim that was presented past its time, the Court is not allowed to approve such a Claim.[5] Very clearly, the Code imposes upon unsecured and secured estate creditors an affirmative obligation to move quickly on their claims.

2. Authentication and Administrator Action / Inaction

Claims for money against a dependent estate must be "authenticated."[6] This means that in order to even qualify as presentable, the Claim must be supported by an affidavit that spells out specific facts.[7] Additionally, if the Claim for money is not founded on a written instrument, the affidavit must set forth the facts that demonstrate why the Decedent's Estate is liable for the debt.[8] The Court generally overlooks minor defects in form, unless the administrator makes specific objection within thirty (30) days of the Claim's presentation.[9]

When an administrator is presented with a Claim, he or she has four choices. They may (1) allow the Claim, (2) reject the Claim, (3) allow part and reject part of the

[4] Tex. Prob. Code §298(b); See also Tex. Prob. Code §§313, 317(a).
[5] *Id.*
[6] Tex. Prob. Code §301.
[7] *Id.*
[8] *Id.*
[9] Tex. Prob. Code §302.

Claim, and (4) ignore the Claim.[10] Allowing all or part of a Claim requires only that the administrator file a memorandum explaining the action taken on the Claim.[11] For thirty (30) days following presentation, all four choices are available to the administrator. If, within those thirty (30) days, the administrator does nothing, Texas law presumes that the administrator has rejected the Claim.[12]

3. Rejected Claims: Limits on Creditors' Right to Sue

Recall that an administrator is not permitted to allow a time-barred Claim.[13] This prohibition becomes especially important in the context of Claims that are rejected (either affirmatively by the administrator, or by operation of law.) When a Claim has been rejected, the creditor has ninety (90) days to file suit on the Claim in the court exercising original probate jurisdiction.[14] If the creditor fails to initiate suit within that time, the Claim becomes time-barred, and it **cannot be paid**.[15] Put into practice, this means that from the date that the claimant presents his or her Claim for money, if the administrator does nothing, the claimant has only 120 days to file a lawsuit on the Claim, or risk the entire Claim being wiped out.

[10] Tex. Prob. Code §309.
[11] *Id*.
[12] Tex. Prob. Code §310.
[13] Tex. Prob. Code §298(b); *See also* Tex. Prob. Code §§313, 317(a).
[14] Tex. Prob. Code §313.
[15] *Id*.