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A GUIDE FOR THE INDEPENDENT EXECUTOR

Dear Client,

The purpose of this Guide is to provide you with basic information concerning the administration of the Decedent's estate and with a "roadmap" to help you understand the overall process. Although these materials are intended to be thorough, they are not exhaustive, and cannot address every contingency.

If the information provided is overwhelming or just "too much"—don't panic. In most cases, administration is a fairly quick and painless process. Just be aware of the potential issues, and pay special attention to the things in **bold** print. Your attorney will help you take care of the essentials and is always a resource for any questions you may have.

General Matters

The probate court has signed an order "admitting the Decedent's Will to probate", *i.e.* confirming that it is a valid Will and allowing it to have legal effect. The judge has also appointed you as administrator of the Decedent's estate. The term *administrator* refers to a person appointed by a probate court to take care of a Decedent's property after his or her death. An administrator may be independent, meaning that s/he acts largely free of court supervision and control; or dependent, meaning almost completely under the court's supervision and control. An *executor* is a person designated in a Will to serve as the administrator of the testator's estate according to the instructions in that Will. You have qualified as independent executor of the Decedent's estate by filing your oath of office and posting any required bond.

An *independent executor*, such as yourself, may act almost entirely without supervision or control by the probate court. Other than probating the Will, the only remaining duties to the court are to file an *Inventory, Appraisal, and List of Claims* of the estate, to give public notice of the probate, and to file proof that you have notified the beneficiaries of the Will that it has been admitted to probate.

Independent administration is an innovation of Texas law. As executor, you have a role very similar to that of a **trustee**, with broad powers and discretion, limited only by the terms of the Will and a few provisions of the Texas Estates Code. If you had not been appointed independent executor, virtually all of your duties and actions would be subject to prior approval by the court, which is a cumbersome, time-consuming, and expensive process.

Your qualification as executor entitles you to receive *Letters Testamentary* from the County Clerk. The “Letters” are an official certificate from the Clerk’s office verifying your appointment and qualification as executor and your authority to manage estate property.

Estate Administration

The term *estate* means the property (real and personal, tangible and intangible) owned by the Decedent at his or her death. The *administration* of an estate means the process whereby the executor carries out **six basic duties**:

- (1) take possession, custody, or control of the estate property;
- (2) safeguard the property from loss, theft, damage, or destruction, as by securing it, storing it, or insuring it;
- (3) set aside the homestead, family allowance, and other property that is exempt from creditor claims;
- (4) settle all claims against the estate, including payment of debts and taxes;
- (5) pursue any claims owing to the estate, including recovery of money or other property; and
- (6) distribute the remaining estate property to the beneficiaries named in the Will.

Much of the remainder of this Guide will discuss the administration process in further detail.

Fiduciary Powers and Duties

Your appointment as executor grants you broad powers and discretion, but these are coupled with a strict *fiduciary duty* to protect the interests of the estate’s beneficiaries. Put simply, a fiduciary duty means that you hold a position of great trust and confidence, with a duty to put the interests of another person(s) ahead of your own interests, wishes, and preferences. At times, a fiduciary duty may even require you to act against your own interests. To assist in compliance with your duty, you should **observe the following guidelines**:

- **Set up a new bank account (checking account) for the estate and route all transactions through it.**
- **Keep receipts for all estate transactions.**
- **Do not mix estate property or funds with your own or with anyone else’s.**
- **Do not borrow money from the estate account.**

- **Do not lend money from the estate account.**
- **Do not make cash withdrawals from the estate account.** Write a check for expenses, with its purpose noted on the memo line, or obtain a cashier's check or money order with an identified payee written on it.
- **Maintain complete, accurate, and up-to-date records of all funds received or disbursed, assets sold or purchased, and all other matters related to the administration.** (Even if you provide your attorney with copies, it is *your* responsibility to maintain complete and accurate records.)
- **Do not sell any estate property without checking with your attorney to make sure you have the authority to do so.**
- **Do not engage in any self-dealing, including the purchase of estate assets, unless you have discussed this with your attorney first.** (An executor may only purchase assets of the estate if authorized by the Will or a court order.)
- **Keep the beneficiaries reasonably informed of the administration and use your best efforts to promptly administer the estate.**
- **Engage the services of a qualified tax professional to assist you with any tax questions affecting the estate.**
- **If you are unsure about your powers or responsibilities in a particular situation, contact your attorney before acting.**

If you fail to comply with your fiduciary duty, you can be subject to **personal liability**, and in extreme cases, to criminal prosecution.

Tax Identification Number

Unless you are the sole beneficiary of the Will, it will be necessary to obtain a Taxpayer Identification Number (TIN) by filing an Application for Employer Identification Number, Form SS-4, with the Internal Revenue Service. (If you are the sole beneficiary, you can use your Social Security number as needed.) We will prepare this Application and obtain the TIN for you. The TIN is used primarily for estate bank accounts and for any tax returns filed on behalf of the estate.

Estate Bank Account

Unless you are the sole beneficiary of the Will, as soon as possible after receiving Letters Testamentary, you should open a checking account, at a bank of your choice, to be registered as “[Your Name], Independent Executor, Estate of [Decedent]”. If possible, you should open the account with funds that belonged to the Decedent. Other bank accounts in the Decedent's name

should be closed and the funds transferred into the estate account. Certificates of deposit may be re-registered in the estate's name without penalty. When opening the estate bank account, use the TIN assigned to the estate by the IRS. Do not use any other number.

As estate revenue is received, in any form, the revenue should be deposited in the estate account, and the exact nature of the deposit should be identified in the account ledger or in some other way.

All estate disbursements, whether for debts, expenses, or distributions to beneficiaries, should be made from the estate account, and a detailed record should be maintained of each disbursement.

If you **consistently follow this routine** throughout the administration of the estate, you will be able to use the account statements as the primary resource for information regarding estate receipts and disbursements, and for preparation of any accountings that may be demanded by a beneficiary of the Will.

Notice to Beneficiaries

With certain exceptions, the Estates Code requires that executors give notice to all beneficiaries that the Will has been probated. The contents of this notice are prescribed by law and proof of the notice must be filed with the court. Please provide us with the addresses of the beneficiaries, and we will send the necessary notices on your behalf and make sure the proof is properly filed.

Inventory

Within 90 days after appointment, the executor must prepare an *Inventory, Appraisal, and List of Claims*, sworn to be accurate to the best of your knowledge. The Inventory is essentially a catalog of estate properties which must be carefully prepared. It must include proper and complete descriptions of the various estate assets together with reasonably accurate valuations of such assets as of the date of death. We will prepare the Inventory for you using information that you provide to us. The Inventory must be filed with the County Clerk for the court's approval before the 90-day deadline.

There is an exception to the filing rule for independent executors. If there are no unpaid debts owed by the estate, except for secured debts, taxes, and administration expenses, and if the decedent's Will does not require the Inventory to be filed, then the executor may file an *Affidavit In Lieu Of Inventory* with the County Clerk before the deadline, swearing that there are no unpaid debts (except secured debt, etc.) and that all estate beneficiaries have received a copy of the Inventory. The purpose of this exception is to protect the decedent's privacy and to keep his/her assets from appearing in a public record.

Even if the Affidavit is filed, the Inventory must still be prepared and kept on file. The executor must show the Inventory to a beneficiary of the estate or, upon request, to a creditor who later appears.

Non-Probate Assets

This term refers to property that normally passes to a new owner after death by terms of a contract, without being controlled by the Decedent's Will and without coming under the control of the executor. Examples of such assets are life insurance proceeds, retirement accounts, and pay-on-death (POD) bank accounts. Sometimes, however, a person intentionally directs that such assets be paid to the executor so that they can be distributed in accordance with the person's Will.

Additionally, a person may have transferred some of their property to a living trust. Such property is not part of the person's estate and passes to the new owners through the trustee, according to the instructions in the trust documents.

Unless non-probate assets are paid into the estate, they do not have to be reported on the Inventory. But we do request that you inform us of their existence, for several reasons. Non-probate assets may be subject to claims from a surviving spouse if paid to a third party, and some are subject to creditor claims. Further, they are counted as part of the Decedent's estate for federal estate tax purposes.

Note that if the Decedent owned an interest in life insurance on the life of another person, the interest is a probate asset and must be reported on the Inventory.

Creditors of the Estate

Unfortunately, our debts do not go away after we die, and most of our assets pass to the beneficiaries subject to creditor claims. This means that if the executor fails to pay or settle all of the Decedent's debts, a creditor might sue the executor and anyone else in possession of estate property, to obtain payment for the debt.

Administrators must give notice of the Decedent's death and of the administration of his estate to his or her creditors. Within one month from the date you were appointed administrator, you must publish a general *public notice* to creditors in a newspaper and file proof of the notice with the court. We will prepare and publish this notice on your behalf and make sure everything is properly filed with the court.

You are also required to give direct notice to the Decedent's *secured creditors*, if any. We will not send this notice on your behalf, unless you retain us to do so. Secured creditors are those whose loans to the Decedent are secured by a lien on his or her property, such as a home mortgage or a car loan. The notice to each secured creditor must be given within two months of your appointment as executor. If the notice is not given, it is possible for you to be held

personally liable for any financial loss suffered by the creditor as a result of the failure to give such notice. The notice to secured creditors must be sent by certified mail, return receipt requested, but this should be supplemented with a courtesy phone call so that you can more quickly identify a contact person for the creditor.

As to *unsecured creditors*, such as credit card companies, an executor is not required to give any notice other than the public notice. You may, however, send a “permissive” notice to any unsecured creditor by certified mail, return receipt requested, that requires the creditor to establish their claim to payment within four months, or else the claim will be permanently barred. Texas law requires that the notice to unsecured creditors include the following: (i) date of executor’s appointment; (ii) address where the claim may be presented; (iii) person to whom the claim should be addressed; and (iv) a statement that the claim must be presented within four months after the date of the receipt of the notice or the claim is barred.

The advantage of giving unsecured creditors permissive notice is that help the estate to be settled as quickly as possible. Without sending the notice, a creditor can have up to six years to pursue a debt claim, and may pursue estate assets that have been given to beneficiaries. The disadvantage is that the notice may prompt a creditor to file a claim that would have been forgotten without the notice.

Please talk to your attorney if you wish to engage our services in sending permissive notices or otherwise communicating or negotiating with estate creditors.

Sales of Estate Property

Texas law prohibits an executor from selling any property in the decedent’s estate, with the following two exceptions: (1) the decedent’s Will gives the executor a “power of sale”, or (2) it is necessary to raise cash to pay to pay expenses of administration, funeral expenses, expenses of last illness, family allowances, or claims against the estate.

Talk to your attorney before selling estate property, especially real property (land) or mineral rights. If you sell estate property without authorization from the decedent’s Will or from a court, you may be subject to liability to the estate’s beneficiaries.

Homestead, Family Allowance, and Exempt Property

Although our debts don’t go away when we die, a significant part of a person’s estate can be exempt from creditor claims. If the Decedent is survived by a spouse, or a child who is a minor or disabled, then the homestead is exempt from most creditor claims, as well as up to \$60,000 worth of tangible personal property (household furnishings, jewelry, a motor vehicle, etc.). We recommend that you talk to your attorney if you think that it may be necessary to sell estate property to pay debts.

Tax Matters

NOTICE: The following information is intended to make you aware of basic tax issues that face an executor. This firm does not render advice on most tax matters. WE THEREFORE ADVISE YOU TO CONSULT WITH A TAX ATTORNEY OR ACCOUNTANT REGARDING THE ESTATE.

As personal representative, you will need to ensure that a final *individual income tax return* for the Decedent is filed (Form 1040), if the Decedent was unmarried at the time of death. If the Decedent was married, the surviving spouse should file the return. If the surviving spouse files the return, be aware that part of any tax liability or refund may be chargeable to or payable to the estate, and not to the surviving spouse. If applicable, discuss the situation with your accountant and attorney.

If the estate generates any income after death and before distribution to beneficiaries, including capital gains, this income must be reported to the IRS, usually by filing an *estate income tax return* (Form 1041). Some tax professionals merge the information required on the estate income tax return with the personal income tax return, to avoid filing two returns; but these are things to discuss with an accountant. If the estate's value is large, it may be necessary or advisable to file an *estate tax (a/k/a "death tax") return* (Form 706). (Do not confuse the estate *income tax* return with an *estate tax* return; the latter is required only if the estate exceeds \$5.3 million—very uncommon, unfortunately.)

Even if the estate has had no taxable income, you may need to file a tax return (showing no tax liability) if a Form 1099 is issued to you as executor showing proceeds from the sale of estate property, such as real estate.

If a Decedent has a surviving spouse, **it may be advisable to file an estate tax return (Form 706) even if there is no estate tax liability**, in order to preserve the maximum estate tax exemption for the surviving spouse.

Any debt owed by the Decedent that is reduced, forgiven, or written off by a creditor may constitute taxable income to the Estate that must be reported to the IRS. You may receive a Form 1099 documenting the amount of debt reduced or forgiven, but even if not, Federal law may require the "phantom income" to be reported. Typical examples of such "phantom income" or "imputed income" include negotiated settlements of credit card debt and short sales of real property that have negative equity. Creditors can have imputed income, too. When a creditor charges no interest to the debtor, federal law imputes interest income, at a default rate, to the creditor. Be aware of this possibility if the Decedent lent money to anyone, such as to a family member in an informal transaction.

It is prudent to withhold final distributions to the beneficiaries of the estate until you are certain that all Federal taxes have been paid.

If any of these contingencies arise in the context of this estate, make sure to discuss the matter with your attorney and with a qualified tax professional. The expenses for these services can and should be paid out of estate funds.

Expenses and Compensation

An independent executor may reimburse himself for any expenses advanced on behalf of the estate, without court approval, but should take care to keep careful records of such expenses. Keep receipts for all expenses you incur on behalf of the estate or in the performance of your duties. If you do a significant amount of driving in the course of your duties, keep a mileage log.

An executor is also entitled to financial compensation for their time, unless prohibited by the decedent's Will. The amount of compensation is determined by the Will. If the Will is silent on this subject, the executor can be compensated according to a statutory formula upon prior approval by the probate court, which must make a determination that the executor has properly taken care of and managed the estate.

If you intend to seek compensation, you should keep a logbook describing the work you have performed on behalf of the estate as well as the time spent on each task. You should also **discuss any compensation with your attorney** beforehand.

Yours sincerely,

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This information is not intended to be a substitute for the legal advice of a licensed attorney. If you have any questions regarding a particular issue or topic we suggest you seek legal counsel.