



LEGAL HOTLINE FOR TEXANS

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THE DUTIES OF AN INDEPENDENT EXECUTOR

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Depending on individual circumstances and local availability, such a referral may be to an organization providing free attorneys to low income persons, or may be to an attorney on the Legal Hotline for Texans' reduced-fee panel, or may be to a statewide or local lawyer referral service.

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THE DUTIES OF AN INDEPENDENT EXECUTOR

What are the duties of an independent executor?

An executor (female: executrix) is the person appointed in the will of a decedent, to administer the decedent's estate. If the decedent died without a valid will, the term "administrator" is used. When the court appoints an independent executor, the court issues "letters testamentary" to the appointed person. In the case of an administrator (if the decedent had no valid will), the court issues "letters of administration." Either type of letters tells third parties that the executor or administrator has been authorized by the court to administer the affairs of the decedent.

The general duty of an executor is to administer the estate of the decedent, in accordance with the terms of the will, unless otherwise directed or permitted by the court.

An "independent" executor is permitted to act without court control, although an Inventory, Appraisement, and List of Claims must be filed with the court. An executor who is not "independent" is a "dependent" executor and must obtain court approval prior to virtually every step in settling an estate.

The court before which an estate is administered is usually called the "Probate Court." This is a state court (as opposed to a federal court), located in the courthouse for the county where the decedent resided (usually). Texas Probate Code § 6

As noted, the independent executor is responsible for the administration of the decedent's estate - - which means terminating the affairs of the decedent. This involves:

- Locating and valuing the decedent's assets;
- Preparing an inventory of the assets;
- Paying debts owed by the decedent;
- Paying expenses of administration;
- Paying taxes owed by the decedent or by the estate (and filing any necessary returns, including a personal income tax return if the decedent owed income tax or would have received a refund);
- Distributing the assets of the estate which remain after payment of debts, expenses, and taxes. The remaining assets are distributed according to the will (or if there was no will, according to the law of "intestate succession").

There are several important deadlines that an independent executor must meet.

These deadlines can be divided into two general categories:

(1) Probate court deadlines (which must be adhered to, when applicable, in every independent administration); and

(2) Tax law deadlines (which may apply or not, depending on the value of the estate, the decedent's income in the last year of life, and how much income (if any) the estate earns during its existence after the death of the decedent).

The next part of this pamphlet discusses probate court matters.

The second part of this pamphlet discusses tax matters.

Probate court matters.

The **Oath**.

- Within 20 days after the court has issued letters testamentary (or of administration) the executor (or administrator) should take and subscribe his or her oath (and give and have approved any required bond). This is required by Texas Probate Code § 192.

Notice to general creditors.

- Within one month of the date the executor files his or her oath, notice to general creditors of the estate must be published.

This is required by Texas Probate Code § 294.

Notice to secured creditors.

- Within two months after receiving letters, the executor must send notice of the issuance of the letters, to each "secured creditor" of the estate. "Secured creditor" means a creditor:

(1) Whose claim is secured by a deed of trust, mortgage, vendor's, mechanic's or other contractor's lien upon real estate belonging to the estate, and

(2) in regard to which, the instrument creating, extending, or transferring the lien was duly recorded before the decedent's death (or before the time at which title vested in the heir or devisee); the recording is required to have occurred in the county in which the real estate affected, is situated.

This notice to secured creditor within four months of the receipt of letters, must be sent by certified mail or registered letter, return receipt requested, addressed to the record holder of the indebtedness or claim at his or her last known post office address.

This notice to secured creditors is required by Texas Probate Code § 295.

Notice to persons having money claims against the estate.

- At any time before an estate administration is closed, the personal representative may give notice by certified or registered mail, with return receipt requested, to an unsecured creditor having a claim for money against the estate expressly stating that the creditor must present a claim within four months after the date of the receipt of the notice or the claim is barred, if the claim is not barred by the general statutes of limitation. This is required by Texas Probate Code § 294.

Inventory -- contents and due date.

- Within ninety (90) days after qualifying (by taking the oath and making any required bond, all as provided for by Texas Probate Code § 189), the executor must file with the clerk of court a verified, full, and detailed inventory, in one written instrument, of all property of the estate which has come to the possession or knowledge of the executor.
- The inventory must include:
 - (a) All real property of the estate situated in the State of Texas;
 - (b) All personal property of the estate wherever situated.

The inventory must include the executor's appraisal of the fair market value of each item in the inventory, valued as of the date of the decedent's death. If the court has appointed an appraiser or appraisers (as provided for by Texas Probate Code § 248), the executor must determine the fair market value of each item in the inventory "with the assistance of such appraiser or appraisers." The inventory must specify what portion (if any) of the property is separate property, and what portion (if any) is community property. If any property is owned in common with others, the estate's interest must be shown, together with the names, and relationship, if known, of the co-owners.

After the inventory has been filed, the court reviews it, and if it is in order, the court approves it. The court can require that the inventory be filed earlier than 90 days from the date of qualification, for "good cause shown."

These requirements for the filing of an inventory within 90 days of qualifying are set forth in Section 250 of the Probate Code. Failure to comply can lead to removal of the executor -- including removal without notice -- under Texas Probate Code § 222.

- Attached to the Inventory must be a "List of Claims." The list of claims must be a full and complete list of all claims due or owing to the estate, and must state:

- (a) the name of each person indebted to the estate and his or her address if known;
- (b) the nature of the debt (whether by note, bill, bond, or other written obligation, or by account or verbal contract);
- (c) the date of the indebtedness and the date when it was or will be due;
- (d) the amount of each claim, the rate of interest thereon, and the time for which the claim bears interest;
- (e) which of the claims are separate property, and which are property of the marital community; and
- (f) what portion of the claims, if any, is held in common with others, giving the names and relationships, if any, of other part owners, and the interest of the estate in the claim(s) held with others.

This list of claims is required by Texas Probate Code [§ 251](#).

[Texas Probate Code § 252](#) requires that the executor swear to the inventory and list of claims, by means of an affidavit attached to the inventory and list of claims. The affidavit must state that the inventory and list of claims are a true and complete statement of the property and claims of the estate that have come to the knowledge of the executor. This, of course, being an attachment to the inventory and list of claims, must be sworn to within 90 days of qualification.

Final settlement -- contents and deadline.

The executor must conclude the estate -- make "final settlement" -- within three years after the grant of the letters, unless the court extends this time for "sufficient cause." This three year time limit is provided for by Texas Probate Code [§ 222\(b\)\(6\)](#).

NOTE: If the estate is one that filed fiduciary income tax returns (see discussion below in the Tax part of this pamphlet), the IRS requires an explanation for the delay in closing an estate that has been open for more than two years.

To accomplish final settlement, the executor must present to the court a verified account. The verified account may refer to the previously filed inventory without describing each item of property in detail, and it may refer to any and all proceedings that occurred in court, during the administration of the estate, concerning sales, renting or hiring, leasing for mineral development, or any other transactions on behalf of the estate, without restating the particularities of those proceedings. But, every final account must be accompanied by

vouchers supporting each item not already accounted for, and must show (either by reference to previous court proceedings, or by statement of facts):

- (a) the property belonging to the estate;
- (b) the disposition made of such property;
- (c) the debts that have been paid;
- (d) debts and expenses (if any) still owing by the estate;
- (e) property of the estate (if any) still remaining on hand;
- (f) the persons entitled to receive such remaining property, their relationship to the decedent, their residence (if known), whether they are adults or minors; and if minors, the names of their guardians, if any;
- (g) all advancements or payments that have been made (if any) by the executor from the estate to any such person.
- (h) the tax returns due that have been filed and the taxes due and owing that have been paid and a complete account of the amount of taxes, the date the taxes were paid, and the governmental entity to which the taxes were paid;
- (i) if any tax return due to be filed or any taxes due to be paid are delinquent on the filing of the account, a description of the delinquency and the reasons for the delinquency; and
- (i) the personal representative has paid all required bond premiums.

These requirements for the Account for Final Settlement of Estates (due within three years of the grant of letters), are set forth at Texas Probate Code § 405. Texas Probate Code § 407 requires that, when the Final Account is filed, a copy of the Final Account be sent to each heir or beneficiary, stating the time and place when and where the court will consider the Final Account, and requiring that the persons so notified at that time and place appear and contest the Final Account "if they see proper." The Court may waive this notice of the account for final settlement "in its discretion," according to Texas Probate Code § 407.

Notice to governmental beneficiaries.

One further -- short -- time limit must be met, if the will devises property to the state, a governmental agency of the state, or a charitable organization. Not later than 30 days after the probate of the will, the executor must send notice by registered or certified mail to such entity, stating the county in which the will was admitted to probate, and including a copy of:

the will, the application to have it admitted to probate, and the order admitting it to probate. This is all required by Texas Probate Code § 128A.

Tax matters.

Depending on the value of the decedent's estate, and on his or her income during the year of death, there may be several tax deadlines to be met:

Individual federal income tax return of the decedent.

If the decedent's income was high enough to either:

- (1) require the filing of a federal income tax return had he or she lived, or
- (2) cause income taxes to be withheld, a federal income tax return should be filed to either:
 - (a) pay the tax due, or
 - (b) claim any refund that is owing from the government.

If the decedent is survived by a spouse, this can be a joint return. It must be filed, and any taxes owing must be paid, by April 15th of the year following the year the decedent died. For instance, if the return is required to be filed (to pay a tax) or should be filed (to claim a refund), and if the decedent died any time during last year, the return should be filed with the IRS by April 15th of this year. If the decedent died anytime during this year, the return should be filed by April 15th of next year.

Federal estate tax return.

If the decedent's estate (all property in which the decedent had an ownership interest, including the full value of separate property, one-half the value of all community property, the decedent's share of jointly owned property, and the value of includable "lifetime transfers" (such as gifts of more than \$11,000 per donee per year) exceeds the federal estate tax exemption on the date of death, a federal estate tax return must be filed, and a federal estate tax must be paid within nine months after the date of death. The estate -- as described above -- can be valued either as of the date of death or (if the taxes will be lower) as of six months from the date of death. This six month "alternate valuation date" is extremely important if it applies, because it can allow for significant tax savings. If a federal estate tax return is due (because the estate is worth more than \$1.5 million for 2004-05), then within the same nine months of the date of death, there must be filed with the State of Texas a Texas Inheritance Tax Return (and any state inheritance tax due must be paid). The federal estate tax exemption will increase to \$2 million for 2006-08 and to \$3.5 million in 2009.

Fiduciary income tax return of the estate.

If, after death, the decedent's estate itself has income (in a tax year) of more than \$600 (from interest, dividends, rents, and/or other income), then a federal fiduciary income tax return will be due. This is due by the 15th day of the fourth month following the end of the estate's tax year. The estate's first income tax year starts with the date of death of the decedent, and ends no later than the last day of the eleventh month after the month in which the decedent died. For instance, if the decedent died on January 31, the estate's first income tax year can run to no longer than December 31, of that same year. If the decedent died on February 28, the longest first income tax year for the estate would end on January 31 of the next year. A shorter year can be chosen, if this provides tax advantages. (An estate only has a \$600 exemption; other undistributed income is taxable; income that is distributed to beneficiaries is deducted by the estate, but taxable to the beneficiaries). If an executor makes a distribution which is partly the result of income earned by the estate, the executor must issue to the beneficiary a K-1 form, stating how much of the distribution is taxable. The beneficiary, of course, needs this in time to file his or her personal income tax return -- which is due on April 15th of the year following the distribution of such a taxable item.

If an estate is open during more than one year, a second fiduciary income tax return will be required if one was required in the first year, or if there are further earnings in the second year. This second fiduciary return will either be the final one, or merely a second one. However, the IRS requires that reasons be given as to why an estate needs more than two years in which to conclude its affairs. If there is a second income tax year of the estate, it starts the day after the end of the first tax year, and ends no more than twelve months later. The second return is due by the 15th day of the fourth month after the close of the second tax year of the estate.

Notices to the IRS.

If the estate may have to (or definitely must) file a fiduciary income tax return or a federal estate tax return, two initial types of communication to the IRS will be necessary:

- (1) An "Application for Employer Identification Number" (this is the equivalent of a "social security number" for the estate) and
- (2) A "Notice Concerning Fiduciary Relationship." The Application for Employer Identification Number is IRS Form SS-4 and is due "as soon as possible." The identification number must be included, states the IRS, "in returns, statements, or other documents" sent to the IRS by the executor. The Notice Concerning Fiduciary Relationship is IRS Form 56 and is due "as soon as all of the necessary information is available" to complete it, according to the IRS.

VERY IMPORTANT NOTICE: As stated at the beginning, this pamphlet provides only general information and is NO SUBSTITUTE for the services of an individual lawyer to represent an executor in administering an estate. The Legal Hotline for Texans can provide information about how to obtain the services of a lawyer, for administration of estates.