

CHOOSING THE CORRECT PROBATE PROCEDURE

- I. Is there an urgent and immediate need for a personal representative of the estate?
- A. *Yes* Seek a **Temporary Dependent Administration**. (TEX. PROB. CODE §131A.) *See* Special Instruction 57.
- B. *No* Continue.
- II. Does the decedent's estate own real property outside of Texas?
- A. *Yes* Consider the necessity for an ancillary probate in another jurisdiction, then continue with III below.
- B. *No* Continue.
- III. Does the decedent's estate own real property situated in Texas or personal property situated anywhere with title to be cleared and transferred to an appropriate distributee?
- A. *No* There is presently nothing to be done. If there is a valid Will it might still be probated as a **Muniment of Title** in case property is later discovered.
- B. *Yes* Continue.
- IV. Did the decedent have a will that is valid in Texas?
- A. *No* Is an administration necessary?
1. *No*
- If the amount of a family allowance payable exceeds the value of the entire assets of the estate, excluding homestead and exempt property, then one may seek a **Family Allowance and Order of No Administration**. (TEX. PROB. CODE §§139-142.)
 - If the nonexempt assets exceed the known liabilities of the estate and the gross value of the estate does not exceed \$50,000 excluding homestead and other exempt property, then one may use a **Small Estate Affidavit**. (TEX. PROB. CODE §137.) *See* Special Instruction 63.
 - If the decedent died intestate, if four years have not elapsed since the decedent's death, and if there are no unsecured debts

at the time the application is filed, then one may use a **Proceeding to Determine Heirship** coupled with a **Determination of No Necessity for an Administration**. (TEX. PROB. CODE §§48(b).) *See* Special Instruction 60.

2. *Yes.*

- If all distributees agree, one may seek an *independent administrator* in connection with an **Independent Administration**. (TEX. PROB. CODE §145(e).) Also pursue a **Proceeding to Determine Heirship**. (TEX. PROB. CODE §§48-56 and 145(g).) *See* caveat 1 below.
- Otherwise, seek a **Regular Dependent Administration** and pursue a **Proceeding to Determine Heirship**. (TEX. PROB. CODE §48-56.) *See* Special Instructions 60 and 69.

B. *Yes.*

1. Does the Will dispose of all of the decedent's property?

- a. *No* Go to part IV(A) above for such property.
- b. *Yes* Continue.

2. Have four years elapsed since the decedent's death?

- a. *Yes* Probate Will as **Muniment of Title**. (TEX. PROB. CODE §§89A-89C.) *See* Special Instruction 73. For a Will to be probated as a muniment of title only, there can be no unpaid debts (including debts to the Medicaid Estate Recovery Program) except for those secured by a lien on real estate.
- b. *No* Continue.

3. Does the Will name an executor who is alive and qualified, able, and willing to serve?

- a. *No* Is an administration necessary?
 - i. *No* Probate Will as a **Muniment of Title**. (TEX. PROB. CODE §§89A-89C.) *See* Special Instruction 73. For a Will to be

probated as a muniment of title only, there can be no unpaid debts (including debts to the Medicaid Estate Recovery Program) except for those secured by a lien on real estate.

ii. *Yes.*

- If all distributees agree, then one may seek the appointment of an *independent administrator* in connection with an **Independent Administration with Will Annexed**. (TEX. PROB. CODE §§145(d) and 178(b).) *See* Special Instruction 67. *See* caveat 1 below.
- Otherwise, seek the appointment of a *dependent administrator* in connection with a **Dependent Administration with Will Annexed**. (TEX. PROB. CODE §178(b).) *See* Special Instructions 17 and 67.

b. *Yes* ➡ Continue.

4. Is an administration necessary?

a. *No* ➡ Probate Will as a **Muniment of Title**. (TEX. PROB. CODE §§89A-89C.) *See* Special Instruction 73. For a Will to be probated as a muniment of title only, there can be no unpaid debts (including debts to the Medicaid Estate Recovery Program) except for those secured by a lien on real estate.

b. *Yes* ➡ Continue.

5. Is the executor appointed to be “independent”?

a. *No.*

- If all distributees agree then one may seek appointment of an *independent executor* in connection with an

Independent Administration. (TEX. PROB. CODE §145(c).) *See* caveat 1 below.

- Otherwise, seek the appointment of a *dependent executor* in connection with an **Administration with a Dependent Executor**. *See* Special Instruction 65.

b. *Yes* ☞ Continue.

6. Is the estate heavily indebted?

a. *Yes* ☞ Consider whether to seek the appointment of a *dependent executor* in connection with an **Administration with a Dependent Executor** in order to force creditors to follow strict claims procedures.

b. *No* ☞ Probate will and seek the appointment of an *independent executor* and the issuance of **Letters Testamentary**. *See* caveat 1 below.

Caveats:

1. Before seeking the appointment of an independent administrator or independent executor, consider the following:
 - a. If real property must be sold, then, if necessary, include in the order appointing the independent administrator, any general or specific authority regarding the power of the independent administrator to sell real property that may be consented to by the beneficiaries who are to receive any interest in the real property. (TEX. PROB. CODE §145A.)
 - b. If the decedent was a lawyer in a private practice who left client matters for which no other attorney licenced to practice law in Texas has, with the consent of the client, agreed to assume responsibility, then, if necessary, file a petition in a statutory probate court requesting the court to assume jurisdiction over the decedent's law practice. *See* TEX. R. DISCIPLINARY P. 13.02. Any such petition, however, should be heard before an independent executor or independent administrator is appointed and the court loses jurisdiction over the case.

2. All references to special instructions are to the special instructions found in the State Bar of Texas, *Texas Probate System*, James E. Brill, ed., 3rd rev. ed. (2003).