

DEPENDENT ADMINISTRATION

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DEPENDENT ADMINISTRATION

I. INTRODUCTION

The general tendency of probate attorneys in Texas is to avoid a dependent administration, if at all possible. This is understandable, given the time, attention to detail and deadlines, and the expense that is usually associated with dependent administrations. But often a dependent administration is unavoidable, and in some cases, even preferable to an independent administration. Instead of dreading the dependent administration, the probate attorney should regard the dependent administration as another tool that can be used to serve the client's best interests.

This article attempts to focus on the practical considerations an attorney should take into account in dealing with dependent administrations. The first part of the article is an overview of the Texas Probate Code provisions (referred to in this article as "TPC" when specific sections are mentioned) governing dependent administrations. The reason for this overview is to provide you with a reference to the statutes which govern certain aspects of the dependent administration process (and to let you know when there is a statute that relates to an action you are about to take). This is by no means a substitute for reviewing the Texas Probate Code for every step you take in a dependent administration. The Texas Probate Code is your best friend in this situation and the content of every application and order should be checked and double checked against the relevant Probate Code sections before filing.

The second part of this article concentrates on special considerations relating to specific situations involving dependent administrations. Most of the scenarios in which you may encounter a dependent administration will be a variation on the following:

"The Family That Can't Agree"

"The Debt-Ridden Estate"

"The Creditor of the Estate"

"The Creditor Initiated Estate Administration"

The second part of this article includes suggestions on dealing with these different situations, depending on whom you represent.

References to "administrator" in this article shall be to a dependent administrator. Matters relating to temporary administrations are outside of the scope of this paper.

II. OVERVIEW OF THE TEXAS PROBATE CODE PROVISIONS GOVERNING DEPENDENT ADMINISTRATIONS

A. The Decision to Open a Dependent Administration.

1. **Situations Requiring a Dependent Administration.**

Let's assume that your client has requested that you open an administration of his father's estate. You determine that a dependent administration may be necessary. (We should distinguish "necessary" from "desirable" in this discussion. There could be reasons not described below when a dependent administration may not be necessary, but could be in the best interests of your client.) There are a several reasons why you have determined that a dependent administration may necessary:

- a. The decedent died without a Will; or
- b. There is a Will, but no executor is named or no person named is able to act; or
- c. The beneficiaries are unable to agree on an administrator of the estate for an independent administration under Section 145 of the Texas Probate Code.

2. **Time Frame for Opening an Estate.**

You have satisfied yourself that four years have not passed since the decedent's death, so you are within the time frame allowed for opening an administration. TPC § 74.

3. **Preliminary Considerations.**

You need to do some preliminary investigation before embarking on this course of action. Before filing the application to open a dependent administration you should:

- a. **Determine that there is a necessity for the administration of the estate.**
This is an element that must be alleged in the application for the appointment of an administrator. TPC § 82(h). Administration is necessary if two or more debts exist against the estate. TPC § 178(b). The court may also determine if any other necessity for administration exists. *Nelson v. Neal*, 787 S.W. 2d 343 (Tex. 1990). If there is no necessity for administration, one can do an heirship with an order stating there is no necessity of administration. TPC § 48(b).
- b. **Determine that your client has standing to request the appointment of an administrator.**
According to TPC §76, any "interested person" may apply for the appointment of an administrator. TPC § 3(r) defines an "interested person" as an heir, devisee, spouse, creditor or any others having a property right in, or claim against, the estate being administered.

- c. Determine that your client has priority to be administrator.**
- i. If the person named as executor is unable to serve, or there is no will, the order of priority for persons to act as administrator under TPC § 77 is:
 - 1. The surviving husband or wife
 - 2. The principal devisee or legatee of the decedent
 - 3. Any devisee or legatee of the decedent
 - 4. The next of kin of the deceased
 - 5. A creditor of the deceased
 - 6. Any person of good character residing in the county who applies
 - 7. Any other person who is not disqualified to act as administrator.
 - ii. If applicants are equally entitled to be administrator, the court may appoint co-applicants, or the one the court determines is the most likely to “administer the estate advantageously.” TPC § 77. If your client is one of a class of individuals, each of whom has priority, you should determine whether it is possible to obtain from the other individuals with equal priority a Waiver of Right to Serve under TPC § 79.
- d. Determine that your client is not disqualified to serve as administrator.**
- i. TPC § 78 states that no person is qualified to serve as administrator if that person is:
 - 1. Incapacitated,
 - 2. A convicted felon (unless such person has been pardoned or has had his civil rights restored),
 - 3. A non-resident of Texas who has not appointed a resident agent to accept service of process for matters relating to the estate,
 - 4. A corporation not authorized to act as a fiduciary in Texas, or
 - 5. A person whom the court finds unsuitable. The term “unsuitable” is not defined in the Texas Probate Code. As a result, courts have concluded that “the legislature intended for the trial court to have wide latitude in determining who

would be appropriate for the purpose of administering estates.” *Dean v. Getz*, 970 S.W.2d 629, 633 (Tex. App. – Tyler 1998, no pet.). Examples of an applicant being found to be unsuitable by a court include *Formby v. Bradley*, 695 S.W. 2d 782 (Tex. App. – Tyler 1985, writ ref’d n.r.e.) (the court found that the appointment of a surviving spouse, who had not kept a record of the proceeds from the sale of assets of the deceased spouse’s estate and who had neglected to insure property of the estate, as personal representative “would be inimical to the interests of the Estate”); *Ayala v. Martinez*, 883 S.W. 2d 270 (Tex. App. – Corpus Christi 1994, writ denied) (the court found a surviving spouse asserting a community property claim with respect to assets of the deceased spouse’s estate to be unsuitable).

- ii. You ask your client questions concerning whether your client lent money or borrowed from the decedent, whether your client is claiming any assets to which the estate may also be entitled, or whether your client had any other dealings with the decedent which may constitute a conflict of interest. You assure yourself that no situation exists which may cause a court to find your client to be unsuitable to be appointed as administrator.

e. Determine that your client can qualify for a bond.

You might want to review your client’s credit history and financial background to avoid going through all of the trouble of getting your client appointed administrator, only to find that the client cannot get a bond.

B. Appointment of Dependent Administrator

1. Filing the Application. You decide to proceed with opening an administration of the estate.

- a. TPC § 82 sets forth the requirements of an application for letters of administration when a decedent dies without a Will. The application must contain:
 - i. Name and domicile of applicant,
 - ii. Relationship of applicant to decedent, if any,
 - iii. That applicant is not disqualified to act as administrator,
 - iv. The name of the decedent and a statement that the decedent died intestate,
 - v. The fact, time and place of death of the decedent,
 - vi. Facts necessary to show that the court has venue,

- vii. Whether the decedent owned real or personal property, with a statement of its probable value,
- viii. The name, age, marital status, address, and relationship (if any) of each heir to the decedent,
- ix. Whether any children were born to or adopted by the decedent, with the name, date and place of birth of each child,
- x. Whether the decedent was ever divorced, and if so, when and from whom, and
- xi. That a necessity exists for the administration of the estate, alleging the facts which show such necessity.

2. Citation.

After the application is filed with the clerk, the clerk issues citation by posting. TPC § 128(a). The court also has the discretion to require additional notice and may prescribe the form and manner of service. TPC § 33(a). If you wish to comply with the citation requirements for an heirship proceeding at this time, remember that citation must be served by certified or registered mail upon all distributees of the estate twelve years of age or older. If a distributee is younger than twelve years of age, citation may be served on the parent, managing conservator, or guardian of such distributee. TPC § 50

3. Hearing.

The court cannot hear the application until after the first Monday following ten (10) days from the date of posting and the return of citation. TPC § 33(f) and (g).

a. Proof. At the hearing, TPC § 88 requires that the following be proved to the satisfaction of the Court:

- i. That four years have not passed since the decedent's death,
- ii. That the court has jurisdiction and venue over the estate,
- iii. That citation has been served and returned in the manner and for the length of time required by the TPC §.
- iv. That the person for whom letters of administration are sought is entitled thereto and is not disqualified.

b. Bond. At the hearing, the Court will set the bond in an amount necessary to protect the assets of the estate and the creditors of the estate. The amount should equal the value of the personal property of the estate and the anticipated revenue for the next twelve months. The amount of the bond can be reduced if the administrator agrees to deposit the estate's cash, securities, or other personal property in safekeeping with corporate depository. TPC § 194(4). The administrator should keep in mind that the bond may

be increased or decreased during the course of administration, depending on the fluctuations in the value of the personal property of the estate. For example, an increase in the required bond amount could occur if real estate were sold, resulting in additional cash to the estate.

4. **Order.** The Order granting letters of administration which you present to the court should, according to TPC § 181, include the following:
 - a. Name of the decedent
 - b. Name of the person to whom the grant of letters is made
 - c. If bond is required, the amount thereof, and
 - d. The names of disinterested appraiser or appraisers (not less than one nor more than three) appointed by the court, if any interested person has applied to the court for an appointment of appraisers or if the court had deemed that an appraisal is necessary.
 - e. That the clerk shall issue letters in accordance with the Order when the person to whom the letters are granted qualifies according to the law.
5. **Qualification of Administrator.** Your client will qualify as administrator upon the taking of his oath and the posting of his bond. Evidence of his qualification will be the issuance of the letters of administration.

C. Duties of Administrator

1. **In General.** The dependent administrator must:
 - a. Use ordinary diligence to collect all claims and debts due the estate and to recover possession of all property of the estate. TPC § 233(a).
 - b. Take care of the property of the estate as a prudent man would take care of his own property. TPC § 230. (This duty includes making sure that there is insurance on estate assets. *See Frost Nat'l Bank v. Kayton*, 526 S.W. 2d 654 (Tex. Civ. App. – San Antonio 1975, writ ref'd n.r.e.)).
2. **Statutory Duties.**
 - a. **Notices to Creditors.** There are varying time deadlines for giving notices to different kinds of creditors of the estate.
 - i. **One Month After Receiving Letters.**

1. Notice of the administrator's appointment must be published in a newspaper printed in the county where the letters were issued. The notice must also include the date of issuance of letters of administration and the address to which claims may be presented. TPC § 294(a).
 2. If the decedent paid taxes to the Texas Comptroller of Public Accounts, notice of the administrator's appointment must be sent to the comptroller by certified or registered mail. TPC § 294(a).
 3. Copies of these notices, along with the publisher's affidavit should be filed with the court. TPC § 294(b).
- ii. Two Months After Receiving Letters.** Notice of the administrator's appointment must be given by registered or certified mail to every person known by the administrator to have a claim for money against the estate that is secured by real or personal property of the estate. If, in the course of administration, the administrator discovers other secured debts of the decedent, notice should be given to those creditors within a reasonable time after the administrator receives actual notice of the debts. TPC § 295(a) and (b). A copy of each notice must be filed with the clerk of the court, along with a copy of the return receipt and an affidavit of the administrator stating that the notices were mailed as required by law. The affidavit should include the name of the person to whom notice was mailed, if not shown on the notice or receipt. TPC § 295(c).
- iii. Any Time Before Estate Administration is Closed.** The administrator may, but is not required to, give notice of the administrator's appointment by certified or registered mail to unsecured creditors having a claim for money against the estate. The notice should state that the creditor must present a claim within four months after the date of the receipt of the notice or the claim is barred. TPC § 294(d).
- b. Inventory.** An inventory of the estate's assets (including any claims of the estate) should be filed within ninety days of the administrator's qualification. TPC § 250. An extension may be requested if more time is needed to identify the assets of the estate. If a federal estate tax return is to be filed for the estate, it may be prudent early in the administration to request an extension of time for filing the inventory so that it may be coordinated with the estate tax return. The court may request a copy of the granting of the extension by the IRS. The inventory should include:

- i. A description of all real and personal property in Texas and its fair market value as of the date of death, and whether the property is separate, community, or held in common with others. TPC § 250.
- ii. A description of all claims owed to the estate, including the name and address of the debtor, nature of the debt, date of debt and due date, amount of debt and rate of interest, and whether the claims are separate, community, or property held in common with others. TPC § 251.
- iii. An affidavit sworn to by the administrator that the inventory is complete. TPC § 252. If the administrator subsequently discovers more assets of the estate, a supplemental inventory must be filed. TPC § 256.

The inventory will be examined and approved or disapproved by the court. If the court does not approve the inventory, a revised inventory must be filed within twenty days. TPC § 255.

- c. Annual Accounts.** Twelve months after qualifying as administrator, the administrator must file with the court a sworn accounting. TPC § 399. The administrator must continue to file an annual account for every year that the administration is ongoing. Each annual account should show the following:

- i. A list of all claims against the estate that were presented during the period covered by the account, along with information as to the action taken with respect to each claim (which have been allowed, which have been rejected and when, which have been sued upon and the status of the suit, and which have been paid).
- ii. All property that has come to the administrator's knowledge or possession not reflected on the inventory or previous account.
- iii. Any changes in the property of the estate not previously reported.
- iv. The amount, source and nature of all receipts and disbursements for the period covered by the account. Receipts of principal and income must be shown separately.

- v. A detailed description of the property currently being administered, including information relating to the use of such property, its condition, and the terms of any rental of such property.
- vi. The cash balance on hand and the location and the name of any depository holding such cash.
- vii. A description of personal property of the estate, including with respect to bonds, notes, and other securities, the names of obligor and obligee, the date of issue and maturity the rate of interest, serial or other identifying numbers, in what manner the property is secured and whether held for safekeeping.
- viii. A statement that all tax returns due during the period covered by the account have been filed and all taxes due and owing have been paid and information relating to such taxes.
- ix. A description of any tax delinquency.
- x. A statement that the administrator has paid all the required bond premiums for the period covered by the account.

The annual account should include supporting vouchers, letters from the depositories in which cash is deposited showing the amounts on deposit, and proof of safekeeping arrangements, if applicable. TPC § 399(c).

Failure to file the annual account could result in the revocation of letters of administration and a fine not to exceed \$500. TPC § 400.

The annual account must be on file with the clerk for ten days before it may be considered by the court. TPC § 401(b). After approving the account, the court may order the bond increased or decreased depending on the nature of the estate's assets. An order approving an annual account is not final and is subject to being corrected in the final account. *Anderson v. Armstrong*, 120 S.W. 2d 444 (Tex. 1938).

3. **Other Duties.**

- a. **Setting Aside Exempt Property and Allowances.** After the inventory has been approved (or before the approval of the inventory, if an application and affidavit are filed by the surviving spouse or a person authorized to act on behalf of the minor children of the deceased), the court shall set apart for the use and benefit of the decedent's surviving

spouse, minor children, and unmarried children remaining with the family of the decedent, all of the estate property that is exempt from execution. TPC § 271. If no homestead or exempt property is part of the estate, the court can provide an allowance of up to \$15,000 in lieu of the homestead, and up to \$5,000 in lieu of exempt property. TPC § 273. It is the duty of the administrator to deliver the exempt property, homestead, and/or allowance to those entitled thereto under TPC § 272 and TPC § 275.

b. Allowing or Rejecting Claims. All claims for money must be properly presented for payment. TPC § 298. The administrator then decides whether to allow or reject the claim.

i. Claims Not Subject to Presentation Requirement. The Probate Code makes a distinction between a claim for money which accrued during the decedent's lifetime, and other claims against the decedent. TPC § 298. The process involving the presentment of claims does not apply to "unliquidated claims" such as, for example, tort claims and claims for breach of fiduciary duty (*Wilder V. Mossler*, 583 S.W. 2d 664 (Tex. Civ App. -- Houston [1st Dist.] 1979, no writ)), and claims under some guaranties (*National Guaranty Loan & Trust Co. v. Fly*, 29 Tex. Civ. App. 533, 69 S.W. 231 (1902, no writ)), claims for a breach of warranty (*Donaldson v. Taylor*, 713 S.W. 2d 716 (Tex. App. -- Beaumont 1986, no writ)). Other claims not subject to the presentment requirement include claims subject to pending litigation (see Section 152 of the Texas Rules of Civil Procedure which allows an administrator to be substituted as a party in a suit that was initiated against a decedent during the decedent's lifetime, thereby rendering unnecessary the presentment of a claim), administration expenses, and claims of any heir, devisee or legatee who claim in that capacity (TPC § 317(c)). The Texas Supreme Court has also declared that a bank may offset a debt owed to the bank by the decedent against the decedent's other accounts at the bank. *Bandy v. First State Bank*, 835 S.W. 2d 609 (Tex. 1992). Presumably, no presentment is necessary in such a case. A word of caution to the administrator: While an administrator with a claim against the decedent need not formerly present his claim, notice of the claim must be filed with the court in an affidavit within six months after the administrator's date of qualification, or the claim is barred. TPC § 317(a).

ii. Manner of Presentation. A claim may be presented to the administrator (TPC § 298) or filed with the clerk (TPC § 308).

iii. Requirements of Claim. A claim must be supported by an affidavit that the claim is just and that all legal offsets, payments,

and credits known to the creditor have been allowed. If the claim is not based upon a written instrument, the creditor must set forth in an affidavit the facts upon which the claim is founded. TPC § 301. An authorized officer or representative of a corporation or other entity shall make the affidavit required to authenticate a claim of the corporation or entity. TPC § 304. If an instrument upon which a claim is based provides for attorney fees, the claimant may include attorney fees as a part of the claim, to the extent the claimant has paid or contracted to pay an attorney to prepare, present, and collect such claim. TPC § 307. An administrator will be deemed to have waived any defects in the form of the claim, unless the administrator has filed written objections to the form of the claim with the county clerk within thirty days after presentation of the claim. TPC § 302.

- iv. **Claims That Cannot Be Allowed by the Administrator.** An administrator may not allow a claim barred by the statute of limitations or barred as a result of an unsecured creditor's failure to present a claim within four months of receipt of the permissive notice provided for in TPC § 294(d). TPC § 298(b). The statute of limitations on a claim is tolled by a decedent's death for a period of twelve months, unless a personal representative of the decedent's estate qualifies before the end of the twelve month period, in which case, the statute of limitations begins to run again upon the qualification of the decedent's personal representative within that twelve month period. Tex. Civ. Prac. & Rem. Code 16.02. The statute of limitations is not tolled by the filing of a lawsuit to establish a claim which has not been properly presented. *Furr v. Young*, 607 S.W. 2d 532, 536 (Tex. Civ. App. – Fort Worth 1979, no writ).
- v. **Allowing the Claim.** If the administrator decides to allow the claim, the administrator must, within thirty days after the claim is presented, state the allowance of the claim in writing, either on the claim itself, or on a memorandum attached to the claim or filed with the clerk. The writing must include the date of presentation or the date the claim was deposited with the clerk, and the portion of the claim allowed. TPC § 309. The creditor should be informed that the claim has been allowed. After the claim has been allowed, the claim must be filed with the clerk who enters the claim on the claims docket. TPC § 311.
- vi. **Time to Contest Allowed Claim.** Any person interested in an estate may, at any time before the court has acted upon a claim, appear and object in writing to the approval by the court of the

same. In such case, the court shall hear proof and render judgement. TPC § 312.

- vii. Court's Action on Allowed Claim.** An allowed claim must sit on the claim docket for ten days before it may be acted upon by the court. The court will then review the claim and either approve or reject the claim. The court will classify an approved claim (placing it in a class described in TPC § 322 which will affect its priority of payment). TPC § 312. The court, not the administrator, classifies the claim. TPC § 312(b). A claimant or any other person interested in the estate may appeal the action of the court on a claim. TPC § 312(e). A creditor should appeal an order of the court disapproving an allowed claim, as opposed to instituting a lawsuit on the disapproved claim (as would be the case if the claim were merely rejected by the administrator). WOODWARD & SMITH 929.
- vii. Rejecting the Claim.** If the administrator decides to reject the claim, in whole or in part, the administrator may execute a memorandum rejecting the claim (TPC § 309), or do nothing, in which case the claim will be deemed rejected if no action has been taken by the administrator within thirty days of the presentation of the claim. TPC § 310. An administrator may reject a claim at any time during the thirty day period following presentation. No actual notice of rejection must be given to the creditor. *Russell v. Dobbs*, 163 Tex. 282, 354 S.W. 2d 373 (1962). If an administrator takes no action on a claim and the claim is then established by suit, the costs shall be taxed against the administrator, individually, or the administrator may be removed on the written complaint of a person interested in the claim. TPC § 310.
- viii. Suit on a Rejected Claim.** A creditor must file a suit on a rejected claim within ninety days after the rejection of the claim, or the claim is barred. TPC § 313. If the claim is then established by suit, no execution on the judgment may issue, but the judgment is entered upon the claim docket and classified by the court and handled as if originally allowed and approved.
- c. Paying Claims.** After six months from the date of the administrator's qualification, the administrator may apply to the court to pay the claims against the estate which have been allowed and approved. The administrator must state in the application that the administrator has no actual knowledge of any other outstanding enforceable claims against the estate. TPC § 320(d). The Probate Code sets forth the order of paying approved claims if the estate has sufficient funds. TPC § 320 and 322. When there is a deficiency of assets to pay all claims of the same class,

other than secured claims for money, the claims in such class shall be paid pro rata, as directed by the court. TPC § 321. The order of paying claims is as follows:

- i. Funeral expenses and expenses of last sickness, in an amount not to exceed Fifteen Thousand Dollars.
- ii. Allowances made to the surviving spouse and children.
- iii. Expenses of administration and the expenses incurred in the preservation, safekeeping, and management of the estate.
- iv. Secured claims for money payable to secured creditors who have elected "mature secured claim" status (see discussion on elections that need to be made by secured creditors in Section III(C)(7) of this article) to the extent of the proceeds of the property subject to the lien (paid in order of priority if there is more than one secured creditor with respect to specific property).
- v. Principal and accrued interest on delinquent child support and child support arrearages that have been confirmed and reduced to money judgment.
- vi. Taxes, penalties, and interest due under various state tax provisions.
- vii. Claims for the cost of confinement in prison.
- viii. Claims for the repayment of medical assistance provided by the state.
- ix. All other claims against the estate.

d. Failure of Administrator to Pay Approved Claims.

- i. **Application Requesting Order Directing Payment.** A creditor with an approved claim may, after twelve months from the grant of letters, apply to the court for an order directing that payment of the claim be made. The creditor must prove that the estate has sufficient funds on hand to pay the claim (subject to its classification). If there are no available funds, and if to wait for the receipt of funds from other sources would unreasonably delay payment, the court shall order sale of property of the estate sufficient to pay the claim. The personal representative of the estate may be cited to appear and show cause why such an order shall not be made. TPC § 326. (Please note that TPC § 326

references twelve months from the granting of “letters testamentary” which indicates a situation involving a Will, but later refers to “representative of the estate,” and not an executor. The context of the statute seems to imply that it is applicable to a situation involving an administrator, as well as an executor.)

- ii. **Administrator’s Liability for Nonpayment of Claims.** If the administrator fails to pay the money ordered by the court to be paid, and there are funds of the estate available, a claimant entitled to payment may submit to the court an affidavit outlining the demand for payment and the failure of the administrator to pay the claim, after which the claimant is authorized to have execution issued against the property of the estate. TPC § 328(a). In the alternative, the court may cite the administrator (and the sureties on the administrator’s bond) to show cause why they should not be held liable for the debt, interest, costs, and damages. TPC § 328(b).
- iii. **Rights of a Preferred Debt and Lien Claimant.** A preferred debt and lien claimant is a creditor with a secured claim who has chosen to have the claim paid according to the terms of the contract which secured the lien, but whose claim is limited to the value of the property securing the lien. In other words, if the value of the property securing the lien is less than the claim, the preferred debt and lien claimant cannot recover a deficiency out of the other assets of the estate. (See discussion of secured creditor elections in III(C)(7) of this article). TPC § 306(a)(2). If the property securing the claim of a preferred debt and lien claimant has not been sold or distributed within six months from the date letters are granted, the administrator shall pay all maturities which have accrued on the debt according to its terms. If the administrator fails to do so, the claimant may ask the court to (1) require the sale of the property and apply the proceeds to the maturities, (2) require the sale of the property free of the lien and apply the proceeds to the payment of the whole debt, or (3) authorize foreclosure by the claimant. TPC § 306(e).
- e. **No Claims Allowed After Order for Partition and Distribution.** If the court has entered an order for final partition and distribution of the estate, the owner of a claim that is not barred by the statute of limitations must go against the heirs, devisees, legatees, or other creditors of the estate to recover on its claim. TPC § 318. The administrator may not allow such a claim after the entry of the order for final partition and distribution, nor may a suit be instituted against the estate on the claim. The claimant is limited in its recovery to the value of the property of the estate received by the heirs, devisees, legatees or other creditors. TPC § 318.

D. Powers of the Administrator.

1. **Powers With Court Order** (TPC § 234(a)). The following powers may be exercised by an administrator only after applying to the court and obtaining an order authorizing the exercise of such powers:
 - a. Purchase or exchange property.
 - b. Take claims or property for the use and benefit of the estate in payment of any debt due or owing to the estate.
 - c. Compound bad or doubtful debts due or owing to the estate.
 - d. Make compromises or settlements in relation to property or claims in dispute or litigation.
 - e. Compromise or pay in full any approved secured claim by conveying to the holder of the claim the property securing the lien in full satisfaction of the claim.
 - f. Abandon the administration of property of the estate that is burdensome or worthless.

2. **Powers Without Court Order.** The following powers may be exercised by an administrator without court order (TPC § 234(b)):
 - a. Release liens upon payment at maturity of the debt secured thereby.
 - b. Vote stocks by limited or general proxy.
 - c. Pay calls and assessments.
 - d. Insure the estate against liability in appropriate cases.
 - e. Insure property of the estate against fire, theft, and other hazards.
 - f. Pay taxes, court costs, bond premiums.

In addition, the administrator may, without order of court, rent any of the estate's real property or hire out any of the estate's personal property as may be deemed in the best interests of the estate, for a period not to exceed one year. TPC § 359. Even if no court order is sought, the administrator must file a report with the court when property worth \$3,000 or more is rented or hired. The report should be filed within five days of the rental. TPC § 365.

3. Other Powers Requiring Court Order.

- a. Operating a Business.** The administrator, upon order of the court, shall carry on the operations of a farm, ranch, factory or other business; provided that, the business is not required to be sold for the payment of debts. TPC § 238.
- b. Borrowing Money.** The administrator may apply to the court for authority to borrow money for 1) the payment of taxes, 2) the payment of administration expenses, 3) the payment of approved claims, or 4) the renewal and extension of a valid, existing lien. TPC § 329(a). If it is necessary to borrow money for any of these purposes, the administrator must file an affidavit with the court stating why it is necessary to borrow the money. Citation to all interested persons shall be done by posting, which would require such persons to appear and show cause why the application to borrow money should not be granted. TPC § 329(b).
- c. Contingency Fee Agreements.** An administrator may enter into a contingency fee arrangement with an attorney to pay not more than one-third of the value of the estate recovered subject to the approval of the court. TPC § 233(b). The approval of the court is required **before** the administrator may enter into a contingency fee arrangement which would pay the attorney in excess of one-third of the value of the estate recovered. TPC § 233(c). A contract in violation of TPC § 233(c) is void, unless ratified by the court or reformed to meet the requirements of TPC § 233(c).
- d. Contracts Entered Into By Administrator.** Contracts entered into by an administrator in connection with the administration of the estate may give rise to personal liability on the part of the administrator. *See Corpus Christi Bank & Trust v. Cross*, 586 S.W. 2d 664 (Tex. Civ. App. – Corpus Christi 1979, writ ref'd n.r.e.) (in the absence of a stipulation to the contrary, accountants who were hired to furnish services to decedent's estate could choose to look solely to the personal representative for their compensation, rather than to the estate). This may be especially true if court approval was not sought before the administrator entered into the contract. In such a case, the administrator should be able to be reimbursed from the estate for reasonable and necessary administration expenses.

E. Sale of Property of Estate. No sale of the property of the estate shall be made without an order of the court authorizing the same. TPC § 331.

- 1. When Administrator Must Apply to Sell Property.** After the approval of the inventory, an administrator **must** apply to the court for authority to sell all of the estate that is liable to perish, waste, or deteriorate in value, or that will be an expense or disadvantage to the estate if kept. Property exempt from forced sale

and personal property necessary to carry on a farm, ranch, factory, or other business which it is in the best interests of the estate to operate shall not be included in such sales. TPC § 333.

2. **When Administrator May Apply to Sell Property.** Upon application by the administrator, or any interested person, the court may order the sale of any real or personal property of the estate (other than exempt property and specific legacies) if it would be in the best interests of the estate to do so to pay expenses of administration, funeral expenses, expenses of last illness, allowances, or claims against the estate, from the proceeds from the sale of such property. TPC § 334 and TPC § 341(1). Easements may be sold by court order regardless of whether the proceeds of such sale are required to pay charges or claims against the estate. TPC § 351.
3. **Finding that Property is Incapable of Division.** When the court finds that any portion of an estate is not capable of a fair and equal partition and distribution, the court shall order the sale of such property. TPC § 381(b).
4. **Four Step Procedure for Sale of Estate Assets.** All sales of real and personal property of the estate are governed by a four step procedure consisting of an application, order of sale, report of sale and confirmation of sale. TPC § 334, 341, 346, 353, 355.
 - a. The application may be made by the administrator, creditor or any other person interested in the estate. The application shall describe the property to be sold, include a sworn exhibit detailing the condition of the estate, and show the necessity or advisability of the sale. TPC § 342. Citation must be issued and posted. TPC § 344. When an application to sell property is filed, the court should designate in writing a day for hearing the application and any opposition thereto. TPC § 343.
 - b. The court shall order the sale if it finds that the sale of the property is necessary or advisable. TPC § 346. The order should include a description of the property to be sold, whether the sale should be by public or private sale, the necessity or advisability of the sale and its purpose, whether or not the bond needs to be increased, that the sale shall be made and the report returned in accordance with law, and the terms of the sale. Because sale terms can often change, it may be advisable to be as general as possible so as to avoid having to ask the court for another order if there is a change.
 - c. The report of sale must be filed within thirty days after the sale and should include the date of the order of sale, a description of the property sold, the time and place of the sale, the name of the purchaser, the amount for which each parcel of property or interest therein was sold, the terms of the

sale, and a statement that the purchaser is ready to comply with the order of sale. TPC § 353.

- d. The report of sale must be on file for five days before the confirmation of sale may be signed by the judge. After the five days, the court shall inquire into the manner of the sale, whether the bond is sufficient, and whether the sale was for a fair price. If the court is satisfied, the decree confirming sale is entered and title can pass. TPC § 355.

5. **Delivery of Deed.** A conveyance of real property by an administrator is usually in the form of special warranty deed which should refer to the decree confirming sale. TPC § 356. If the sale is made partly on credit, the deed must include a vendor's lien. TPC § 357.
6. **Credit Sales.** No more than six months credit may be allowed when personal property is sold at public auction. TPC § 337. When real estate is sold partly on credit the cash payment shall not be less than 20% of the purchase price and the purchaser shall execute a note for the balance, secured by a vendor's lien retained in the deed.

F. Partition and Distribution of Estate.

1. **Timing.** Any time after the expiration of twelve months after the original grant of letters, the administrator, or the heirs, devisees, or legatees of the estate, may request the court for a partition and distribution of the estate. TPC § 373(a). At any time after the filing and approval of the inventory, the administrator, or heirs, devisees, or legatees of the estate may request the court for a partial distribution of the estate. TPC § 373(b).
2. **Application.** The application should state the decedent's name, the names and residences of all persons entitled to shares of the estate and whether they are adults or minors, and the reasons why partition and distribution should be had. TPC § 373(b).
3. **Citation.** Personal citation is required on all persons residing in the state entitled to a share of the estate whose address is known. Publication may be used for non-resident or unknown heirs and for persons whose addresses are not known. TPC § 374. The administrator shall be cited to appear if the application is made by one other than the administrator. TPC § 375.
4. **Distribution to Less Than All Heirs.** If the requested distribution is to less than all the heirs or devisees, the court shall require a refunding bond to be filed, unless this requirement is waived in writing by all interested parties. TPC § 373(c).

5. **Hearing on Application for Partition and Distribution.** At the hearing on the application, the court shall ascertain the residue of the estate available for partitioning and distribution, the persons entitled to a share of the estate and their respective shares, and whether advancements have been made to any persons entitled to a share. TPC § 377.
 6. **Decree of the Court.** If the court finds that the estate should be partitioned and distributed, it shall enter a decree stating the name and address of each person entitled to a share of the estate, the proportionate share to which each person is entitled, a full description of the estate to be distributed, and that the representative retain a certain amount of money to pay future debts, claims, taxes and expenses. TPC § 378.
 7. **Partitioning Estate.** The way an estate is partitioned depends upon what is in the estate.
 - a. If the estate consists of money or debts only, the administrator, on order of the court, may make payment and delivery of the estate to those entitled. TPC § 379.
 - b. If the estate consists of property other than money or debts, and the court has not determined that the estate is incapable of partition, the court will appoint three or more disinterested persons as commissioners, to partition and distribute the estate. TPC § 380. The procedure governing the commissioners' partition of the estate is included in TPC § 380.
 - c. If the court has determined that the estate (or a portion of the estate) is incapable of a fair and equal partition and distribution, the court shall order a sale of such property. The administrator is charged with the responsibility of selling such property in the same manner as when sales or real estate are made for the purpose of satisfying the debts of the estate. TPC § 381.
- G. Compensation of Administrator and Reimbursement of Expenses.** The administrator is entitled to a commission of 5% of all cash received or paid out during the administration, not to exceed 5% of the gross fair market value of the estate, upon a finding by the court that the administrator has taken care of and managed the estate in compliance with the Probate Code. Commissions are not allowed for funds on hand in a financial institution or brokerage firm, nor for collecting the proceeds of any life insurance policy, nor for paying cash to the heirs or legatees. If the administrator manages a farm, ranch, factory, or other business, or if the amount of compensation is unreasonably low, the court may act on an application filed by the administrator and allow the administrator reasonable compensation. TPC § 241(a). The administrator is also entitled to recover all reasonable and necessary expenses incurred by the administrator in the preservation, safe-keeping and management of the estate. TPC § 242.

H. Closing the Administration.

1. **When Administration Should Be Closed.** The administration of the estate should be closed when all of the debts known to exist against the estate have been paid (or when they have been paid to the extent of the assets in the hands of the administrator) and there is no further need for administration. TPC § 404. In any event, the administration should be closed within three years following the grant of letters, unless good cause can be shown why it should continue. TPC § 222(b)(6).

2. **Final Account.** When the administration of the estate is to be closed, the administrator must present to the court a verified account for final settlement. TPC § 405. The final account may incorporate, without restating, all prior accounts exhibits, and vouchers previously filed and approved. Either before or at the same time the final account is filed, the administrator should apply to the court for a declaration of the decedent's heirs so that they may be included in the final account.
 - a. The final account should show:
 - i. The property belonging to the estate which has come into the hands of the administrators.
 - ii. The disposition that has been made of such property.
 - iii. The debts that have been paid.
 - iv. The debts and expenses still owing by the estate, if any.
 - v. The property of the estate, if any, still remaining on hand.
 - vi. The persons entitled to receive such estate, their relationship to the decedent, and their residence, and whether adults or minors, and, if minors, the names of their guardians.
 - vii. All advancements or payments that have been made, if any, by the administrator.
 - viii. A complete description of the tax returns that have been filed and the taxes paid.
 - ix. If any tax returns or taxes are delinquent and the reasons for the delinquencies.
 - x. The administrator has paid all required bond premiums.

- b. **Citation on Final Account.** Notice of the filing of the final account shall be given by the administrator to each heir or beneficiary by certified mail, unless the court directs another form of notice. The notice must include a copy of the final account. TPC § 407.
- c. **Court Action on Final Account.** After citation has been served, the court shall examine and audit the final account, and hear any objections thereto. The final account should be restated, if necessary. TPC § 408(a). The judge will sign an order approving the final account and, if any part of the estate is remaining in the administrator's hands, the court shall order partition and distribution be made among the persons entitled to receive the estate. TPC § 408(b).
- d. **Discharge When Estate Is Administered.** The administrator should obtain and file receipts showing the full distribution of the estate. Once the assets have been distributed, the administrator should apply to the court for an order releasing the administrator and discharging the sureties on his bond. TPC § 408(d).

III. SPECIFIC CONSIDERATIONS IN VARIOUS DEPENDENT ADMINISTRATION SCENARIOS

There seem to be certain fact patterns that arise again and again in dependent administration situations. It is helpful to identify these fact patterns and to prepare for the issues which tend to develop in these situations.

A. The Family That Can't Agree

This is the situation where an independent administration would be possible, but the beneficiaries cannot agree on who should act as independent administrator. In most cases, the beneficiaries' inability to agree on an independent administrator also indicates that there will more disagreements among the beneficiaries during the course of the administration. This scenario could occur when there is sibling rivalry after the death of the surviving parent, or a contentious relationship between a second spouse and the children of a first marriage. Be prepared for the following in most of these cases:

- 1. **Contest Over Who Should Be Administrator.** A contest over who should be administrator involves issues relating to priority and suitability. If a person with a high priority, for example, a spouse, files to be an administrator, she would have to be shown to be "unsuitable" (see discussion in II(A)(3)(d)(i)(5) of this article) in order to be disqualified as an administrator. Family situations, by their nature, are fertile grounds for what could later be perceived as "conflicts of interest." Innocent (and sometimes not so innocent) arrangements, such as informal loans, the use of a power of attorney without accounting to the principal or poor record

keeping resulting in confusion as to what is separate and community property, can later be characterized as claims of the estate against a potential candidate to be administrator. The existence of the estate's potential claim could be enough to cause a court to find the requisite conflict of interest necessary to disqualify the person from being an administrator. Depending on which side you are on, you must either defend against allegations that your client should be disqualified or review the family situation before the decedent's death to determine whether a conflict of interest exists with respect to the person whose grant of letters of administration you are contesting. If you are representing a client with a possible conflict of interest, you may want to take actions to rectify that situation, for example, by paying back a loan or relinquishing a community or separate property claim.

2. **Identify Your Client.** If your client does succeed in being appointed dependent administrator, make sure that all the beneficiaries know that you represent the administrator and not the beneficiaries. Avoid actions that may allow the beneficiaries to later claim that they thought you were their attorney. If there must be correspondence with the beneficiaries, have the letter come from the administrator, or confirm in the correspondence that you are not the attorney for the beneficiaries and encourage the beneficiaries to consult their own attorneys.
3. **Contest of the Inventory and Accounts.** If you are the attorney for the administrator, use extra caution in the preparation of the inventory and the annual and final accounts. Make sure there is substantiation for the characterization of assets as separate and community. Be prepared to defend expenses and attorney fees. If you are representing a beneficiary, review the inventory and accounts and contest them, if necessary.
4. **Removal of Administrator.** TPC § 222 includes the provisions relating to the removal of a personal representative, including an administrator. If you are the attorney for the administrator, try to make sure that your client does not open the door to an action to remove. If you represent a beneficiary, be on the lookout for any of the following situations which may allow you to request that the administrator be removed.
 - a. **Without Notice to the Administrator.** An administrator may be removed, upon motion of the court or any interested person, without receiving notice, if the administrator
 - i. neglects to qualify in the manner and time required by law (remember, the oath and bond should be filed within twenty days of being appointed);

- ii. fails to return within ninety days after qualification, unless such time is extended by order of the court, an inventory of the property of the estate and list of claims that have come to the administrator's knowledge;
- iii. fails to give a new bond, if required to do so;
- iv. removes from the state, or absents himself from the state for three months at one time without permission of the court;
- v. cannot be served with notices or other processes because the administrator has not appointed a resident agent, is eluding service or the administrator's whereabouts are unknown; or
- vi. has misapplied, embezzled, or removed (or is about to misapply, embezzle, or remove) from the state any part of the property of the estate under the administrator's care. This must be based upon clear and convincing evidence given under oath.

b. With Notice to the Administrator. A court, on its own motion, or upon the complaint of an interested person, after personal service on the administrator, may remove the administrator if:

- i. sufficient grounds appear to support the belief that the administrator has misapplied, embezzled or removed from the State (or the administrator is about to do so) any property of the estate committed to the administrator's care;
- ii. the administrator fails to return any account which is required by law to be made;
- iii. the administrator fails to obey any proper order of the court regarding the performance of the administrator's duties;
- iv. the administrator is proved to be guilty of gross misconduct or mismanagement in the performance of his duties;
- v. the administrator becomes incapacitated, is sentenced to the penitentiary, or is otherwise incapable of performing the duties of an administrator;
- vi. the administrator fails to close the estate within three years of qualification, unless the court extends such time;

vii. the administrator fails to give the notices, if required, set forth in TPC § 128A (to the state, a governmental agency of the state, or a charitable organization) that such entity is a beneficiary under a will.

5. **Self-Dealing.** If you are the attorney for the administrator, counsel the administrator to avoid instances of self-dealing, unless authorized under TPC § 352. If you are the attorney for the beneficiary, you may wish to object to any self-dealing on the part of the administrator.

B. The Debt-Ridden Estate. It is imperative, before opening the administration of any estate, that the extent of the estate's debts be ascertained. If the estate has more debts than assets, and an independent administration is opened, the estate is essentially being administered for the benefit of the creditors. The independent administration also allows for a creditor "free for all" with no court supervision of the classification and payment of the estate's debts. A dependent administration (or no administration) may be an option for the insolvent estate.

1. **Consider Not Opening an Estate.** If the estate is insolvent and there is no will, or if there is a will and the beneficiaries are the same as the decedent's heirs, it may be in the beneficiaries' best interests not to open an administration of the estate. A creditor would have to initiate an administration itself in order to enforce payment of its debt. Unless the creditor is a secured creditor, or the debt is large, it is unlikely that a creditor would go to the expense of opening an estate. The creditor who opens an estate administration also runs the risk of having to finance the procedure for other creditors to be paid. (See discussion in III(D)(2)(c).) After the four year statute of limitations on the debts has passed, an application for heirship (or an heirship affidavit if the estate consists only of real estate) can be filed so that title to whatever assets are left in the estate can pass to the heirs without the burden of the debts. If a creditor did start the proceedings to open an estate, an heir with priority could defeat the creditor's appointment as administrator and continue a dependent administration of the estate. Another option would be for the beneficiaries to wait to probate the will until just before the four year statute of limitations for probating the will expires. The statute of limitations on the debts should probably expire shortly after the will is admitted to probate, thereby reducing the probability of creditors' asserting their claims.

2. **When a Dependent Administration is Preferable.** A dependent administration would be preferable from the beneficiaries' point of view if there is a will and the beneficiaries are not the same as the decedent's heirs at law. The dependent administration would provide an orderly

classification and payment of the estate's debts under the court's supervision.

C. The Creditor of the Estate.

The law holds many pitfalls for the creditor of an estate under a dependent administration. Creditors are often caught off guard by the time frames and the requirements of making a claim in a dependent estate. As a result, creditors are often surprised to find that their claims are barred or unfavorably classified because they failed to strictly follow the rules set out in the Probate Code.

1. **Administrator's Fiduciary Duty to Creditors.** Administrators should keep in mind (and creditors should keep reminding them) that they have a fiduciary duty to the creditors of an estate, as well as to the beneficiaries.
2. **Calendar All Deadlines.** It is imperative that the attorney for the creditor calendar all deadlines relating to the claim.
 - a. **Respond Within Four Months of Permissive Notice.** If the administrator gave the permissive notice to secured creditors under TPC § 294(d), make sure that the creditor presents its claim within four months of the date of receipt of notice. Failure to do so will result in the claim being barred.
 - b. **File Suit on Rejected Claim Within Ninety Days of Rejection.** The deadline for filing a suit on a rejected claim is ninety days from the date of rejection. Some creditors can be lulled into a false sense of thinking they have more time than they do to file a lawsuit because they think that the administrator's rejection or approval of the claim comes at the end of thirty days. The administrator does not have to wait thirty days before rejecting a claim. The claim can be rejected the day it is presented and that is the day that starts the ninety day countdown to filing a lawsuit. The creditor must keep on top of the status of the claim after it is presented so as not to miss the ninety day deadline.
3. **File a Request for Notice Under TPC § 33(j).** The creditor can keep himself informed as to the status of the estate by filing with the clerk a request in writing that the creditor be notified of any and all motions, pleadings, or applications filed in the estate. The creditor can then review, and object to, if necessary, the inventory, accounts, applications to sell property, and any other actions filed in the estate. The goal here is to make sure that the assets of the estate are preserved and maintained so that the claim may ultimately be paid.
4. **Make Sure That Bond is Adequate.** The creditor should periodically review the assets of the estate to make sure that the bond is adequate. If

the bond is not adequate, this should be brought to the attention of the court.

5. **Object to Extensions to File Inventory.** The course of action a creditor chooses, especially a secured creditor, depends on what assets are in the estate and the nature of those assets. The creditor needs the information in the inventory to make an informed decision. If the administrator tries to obtain an extension, the creditor should object and request the court to at least require the administrator to file a preliminary inventory.
6. **Review Expenses and Other Debts of Estate.** The creditor should object to unreasonable expenses, commissions and other disbursements requested by the administrator. The claims of other creditors should be examined to make sure the expenses associated with collecting the claim are reasonable.
7. **Election By Secured Creditor.** Within six months after the date an administrator qualifies, or within four months of the date the TPC § 295 permissive notice is received by the creditor (whichever is later), the secured creditor must, in addition to presenting its claim, specify whether the claim should be allowed as a “matured secured claim” or a “preferred debt and lien.” A matured secured claim is paid in the course of the administration, but the claimant gives up priority with respect to the property securing the claim. A preferred debt and lien gives the claimant priority as far as the property securing the claim is concerned, but the claimant cannot recover a deficiency out of the other assets of the estate. It is hard for the creditor to make this decision without adequate information regarding the assets of the estate. If there are sufficient assets in the estate to satisfy all creditors, the matured secured claim status is preferable. The matured secured claim status is also preferable if the collateral is unmarketable because the creditor may be paid out of other assets of the estate. But if the value of the estate declines, the matured secured claim creditor loses its priority status with regard to the property securing the claim. If the estate is in financial trouble, the creditor should choose preferred debt and lien status to be sure that the creditor will at least obtain the value of its collateral. But the more the collateral loses value, the less the preferred debt and lien claimant recovers. If the creditor does not make a choice within the time frame allowed, the claim will be treated as a preferred debt and lien.
8. **Foreclosure of Preferred Liens.** A fairly recent addition to the Probate Code is the provision in TPC § 306(e)(3) creating a foreclosure process for preferred debt and lien claims. In the past, when a preferred debt and lien creditor obtained an order for the sale of the property securing the claim, the sale was treated as a judicial sale, instead of a foreclosure, which meant that, if there were any junior liens, they were not extinguished by

the sale. This created another impediment for the preferred debt and lien creditor to collect on its claim, especially if the creditor wished to purchase the collateral at the judicial sale by bidding the amount of the debt. TPC § 306(f)-(k) sets out the procedure a preferred debt and lien claimant must follow in order to take advantage of this foreclosure option.

9. **Administration of Surviving Spouse's Community Property.** The personal representative of a deceased spouse is authorized to administer all of the community property which was under the joint control of the spouses during the marriage, as well as the deceased spouse's separate property and sole management community property. TPC § 177(b). This power of the administrator is useful in selling or disposing of the whole community property interest in an asset to satisfy a claim. For example, in a judicial sale or foreclosure under TPC § 306(e), the surviving spouse's half of the community property can be included in the sale as well as the deceased spouse's half.

D. The Creditor Initiated Administration.

A creditor is included in the class of interested persons for the purposes of participating in the probate proceedings of the decedent debtor. If no other person with higher priority opens an estate for the decedent debtor, the creditor may decide that it is necessary to initiate administration of the decedent debtor's estate. This most likely to happen if the creditor is a secured creditor. The opening of the estate would be necessary for the creditor to regain its collateral.

1. **Effect of Nonjudicial Foreclosure After Death, But Before Administration.** If a nonjudicial foreclosure occurs after the debtor's death, but before an administration has been opened for the decedent debtor's estate, the foreclosure is valid, subject to being voided by an administrator who is subsequently appointed by the court. *Pearce v. Stokes*, 155 Tex. 564, 291 S.W. 2d 309 (Tex. 1956). If an administrator voids the foreclosure sale, the administrator may recover from the creditor the value of the use of the property during the time the purchaser at the foreclosure sale held possession of the property. *American Sav. & Loan Assoc. v. Jones*, 482 S.W. 2d 62 (Tex. Civ. App. – Houston [14th Dist.] 1972, writ ref'd n.r.e.). For practical purposes, in this situation, a creditor has two choices: wait until the end of four years (the time frame during which an administration may be opened), and then foreclose, or foreclose well before the four year time period has expired and hope that no administrator is later appointed. The first choice may result in the statute of limitations having expired with respect to the debt. The second choice makes it difficult to sell the property that was the subject of the foreclosure because of the possibility that it may need to be returned to the estate.

2. **Application by the Creditor Open to An Estate.** The safest way for a creditor to proceed in such a situation is to apply to the court for the appointment of an administrator of the decedent debtor's estate.

a. **Defeating a Creditor Administration.** TPC § 80 states that other interested persons may defeat a creditor's application to open an estate by (i) paying the creditors claim, (ii) proving to the satisfaction of the court that the claim is fictitious, fraudulent, illegal, or barred by limitation, or (iii) executing a bond in double the amount of the creditor's debt, conditioned on the debt of the creditor being paid upon the establishment of the creditor's claim by suit.

b. **The Administrator in a Creditor Initiated Estate.** It is very unusual for a creditor to request to be appointed administrator of the decedent debtor's estate. The creditor usually wants to be free of the self-dealing restrictions of TPC § 352 in the event the creditor wishes to purchase collateral during a sale conducted by the administrator. The most common scenario is for the creditor's attorney to ask another independent attorney to act as administrator. Courts would prefer to see waivers from persons with higher priority in this situation, but often this is impossible, especially when the only asset of the estate is the property securing the creditor's claim. Often the family will not cooperate out of fear that they will be held liable for the debt. Some courts will require proof that the creditor attempted to give notice of the request for the appointment of an administrator. Other courts will allow the creditor to rely on the case law holding that conduct indicating consent to the appointment of another constitutes waiver. *See WOODWARD AND SMITH* 667, footnote 66. That conduct may be the mere failure of one with higher priority to contest the appointment of another. *See Mayes v. Houston*, 61 Tex. 690 (1884) (a son's silence and failure to contest the appointment of an unrelated person as administrator of his mother's estate constituted waiver). Even if a person has no knowledge of the proceedings initiating an administration, failure of such person to promptly contest the appointment of one with inferior priority when the administration proceedings are discovered results in waiver. *Vannoy v. Gibson*, 102 S.W. 2d 492, 493 (Tex. Civ. App. – Dallas 1937, no writ).

Usually the creditor pays the expenses associated with opening the administration, including the administrator's fees. Even though the creditor is paying for the administrator, the administrator must take care to exercise independent judgment in the course of administering the estate. All of the Probate Code provisions

applying to the administration of a decedent's estate apply in the case of a creditor initiated administration.

- c. **Effect of Other Creditors.** The creditor should think carefully before opening an estate of a decedent debtor. Increased expenses could occur if the decedent had other creditors who decide to present their claims. The creditor initiating the administration could end up financing the estate administration for all of the decedent's other creditors, at least in terms of compensating the administrator. But, if another creditor in this situation is a secured creditor, and there are no other assets of the estate (or the other assets in the estate are also assets securing claims for which preferred debt and lien elections have been made), the charges directly relating to the preservation and sale of the collateral securing the other creditor's claim can be charged against the proceeds of the sale of that collateral. *San Antonio Savings v. Beaudry*, 769 S.W. 2d 277, (Tex. Civ. App. – Dallas 1989, writ denied).
- d. **Closing the Estate.** In most cases there is no need to file an application to determine heirs in a creditor initiated administration because generally in such situations there are no assets left to distribute to the heirs after the creditor's claim is paid or the collateral securing the claim is sold. The administrator would follow the procedures set forth in the Probate Code for closing the estate.

III. CONCLUSION

In dealing with dependent administrations, whether as an administrator, beneficiary/heir, or a creditor, great attention needs to be paid to making sure that the procedures outlined in the Probate Code are followed. The failure to meet deadlines or otherwise comply with the provisions of the Probate Code may result in adverse consequences for the client. But dependent administrations should not be feared. In certain situations, a dependent administration may be the best tool for achieving your client's goals. Just keep your Probate Code at your side and all should go well.