

TEXAS COLLEGE OF PROBATE JUDGES

SAN ANTONIO, TEXAS

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DEPENDENT ADMINISTRATION and HEIRSHIP

FROM

THE PERSPECTIVE OF THE BENCH

Presented By:

**Honorable Russell Austin
Harris County Probate Court No. I**

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I. Introduction

You have been elected to a County Court bench and the public simply assumes you have a comprehensive working knowledge of criminal, juvenile, family and probate law. The local attorneys know better but it is a wiser course of action to suggest that you have the patience of Job and the intellect of Plato. However, the aura of the robes and office will never substitute for practical knowledge, research and continuing legal education. I will attempt to explain the dependent administration process from the bench's point of view. There will be copious citations to code provisions and cases but they will be minimally used. I have found from years of teaching that continual reference to citations tend to glaze over the eyes of students to the point of distraction, edible eraser consumption and sleep.

II. Purpose of This Paper

The purpose of this paper is to assist you through the labyrinth of a dependent administration. The process is probably the most abhorred by attorney and jurist alike. The complexity of the process, required court approvals and scrutiny yields frustration and delay for all concerned. My paper is intended as a *quick reference guide* to assist you in concluding estate matters within the three (3) year rule.

III. Dependent Administration Time Requirements

I strongly suggest you skip immediately to Exhibit A at this article's end and review the succinctly stated tasks and time requirements associated with a dependent administration, in the event, you do not wish to read this paper or stay awake during its presentation. Obviously, every problem can not be addressed in an outline, but, the essential and salient tasks are therein addressed.

IV. Why Begin The Nightmare?

A. Preserve The Estate

1. **Prudent Man Rule.** You must appoint someone to be charged, as a *prudent man*, to use ordinary diligence to collect and care for estate assets, e.g. real and personal

property, estate records and claims. T.P.C. §§230, 232 and 233. See Gordon v. Terrence, 633 S.W.2d 649 (Tex. Civ. App. - Houston [14th Dist.] 1982) holding personal representative shall be liable if he willfully neglects to use ordinary diligence, and Goodwin v. Southtex Land Sales, Inc. 243 S.W.2d 721 (Tex. Civ. App. – San Antonio 1951, writ ref'd. n.r.e.) holding personal representative liable for acts of another to whom administration authority was delegated.

2. **Operate Business** - You may have to appoint someone to directly or constructively operate a farm, ranch, factory or other business. You must consider the estate's condition; any necessity for a future sale of the farm, ranch, factory or other business to pay estate debts, claims or administration costs; and, the need to rent estate property while requiring the estate's speedy settlement. T.P.C. §238
3. **Satisfy Debts** - You must appoint someone to pay estate debts to the extent of available assets; distribute assets to the proper heirs; and thereafter close the estate. T.P.C. §§404, 405. See Lesikar v. Rappaport, 809 S.W.2d 246 (Tex. Civ. App. - Texarkana 1991) holding for purposes of determining if estate assets are sufficient to pay creditors, value of entire estate, not just cash, is to be considered.
4. **Defective Will Problems** - You must appoint someone to administer the estate because the decedent died with a will but pursuant to T.P.C. § 178 it:
 - a. named no executor; or,
 - b. the executor predeceased the decedent and no successor is named;
 - c. the named executor fails to qualify; or,
 - d. the named executor neglects to present the will for probate within 30 days of the decedent's death.

Caveat: I am not going to concern ourselves with will related problems in this paper. I direct your attention to T.P.C. §154, et. seq. - Dependent Administration with Will Annexed and/or T.P.C. §145(d)(e) Independent Administration, for other

resolutions to bad wills. See T.P.C. §178b for comprehensive review of when an administrator is to be appointed.

5. **Administer Estate** - You must appoint someone to administer the estate, e.g. two (2) or more estate debts need to be paid, and/or someone has to divide up (partition) the estate among the heirs. You may determine other instances of necessity. T.P.C. §178(b). Review Nelson v. Neal, 787 S.W.2d 343 (Tex. 1990) determining probate court's determination of necessity to appoint administrator included wrongful death action and Dickerson v. Yarbrough, 223 S.W.2d 535 (Tex. Civ. App. 1949) holding that your order appointing an administrator is not subject to collateral attack.
6. **Statute of Limitations** - You must appoint someone because the applicant has proven that four (4) years are ***about to elapse*** since the decedent died and the estate will be time barred. T.P.C. §74; or,
 - a. four (4) years ***have elapsed*** but the purpose in opening administration is to receive or recover money or other property due the estate. T.P.C. §74. See Chovanec v. Chovanec, 881 S.W.2d 135 (Tex. Civ. App. - Houston [1st Dist.] 1994) holding that meaning of default under statute prohibiting will from being offered for probate outside of four year limitations period means failure due to absence of reasonable diligence on part of party offering the will.
7. **Distribute Estate** - You must appoint someone to distribute the net estate after the expiration of twelve (12) months and be prepared to partially distribute a portion of the estate after your approval of the inventory upon request of an heir. T.P.C. § 373(a)(c).

V. How It All Begins!

- A. **Necessity For Administration** - A dependent administration may be opened when a necessity for its administration exists. T.P.C. § 82(h). A presumption exists that an administration is necessary when two or

more debts exist against the estate or when the distributees desire the estate's partition. T.P.C. § 178(b). See, Nelson v. Neal, 787 S.W.2d 343 (Tex. 1990).

B. The Application Process

1. **Who May Apply and When** – Any interested person may make application to the court of a proper county for the appointment of an administrator. The term “interested person” includes a creditor of the decedent. T.P.C. § 76. The application must be filed within four (4) years after the decedent's death. T.P.C. §§ 73,74. An heirship proceeding pursuant to T.P.C. §§ 48-56 is not an application for administration and can be heard after four (4) years have elapsed since the decedent's death.
2. **Filing** - An interested person files an Application For Letters of Administration in your Court satisfying the eight (8) requirements of T.P.C. §82. The 75th Legislature has dispensed with the requirement for social security numbers in estates created after September 1, 1997. However, the court may require this information as part of its judicial record but not filed with the clerk as public information. T.P.C. § 36(b).
3. **Interested Party** - You must ascertain that the applicant is an interested party, e.g. an heir, spouse or creditor. T.P.C. §76. See Daniels v. Jones, 224 S.W.2d 476 (Tex. Civ. App. 1920), Fortinberry v. Fortinberry, 326 S.W.2d 717 (Tex. Civ. App. - Waco 1959) and, Logan v. Thomason, 202 S.W.2d 212 (Tex. 1947) defining parties in interest to bring application for administration.
4. **Priority** - You must ascertain what priority to give the applicant among all persons entitled to be appointed by you. T.P.C. § 77. Persons disqualified by statute include an incapacitated person, a convicted felon, a non resident who has not appointed a resident agent for service, a corporation not authorized to act as a fiduciary in Texas or a person you find unsuitable. T.P.C. § 78. See Monson v. Betancourt, 818 S.W.2d 499 (Tex. Civ. App. - Corpus

Christi 1991) holding burden of proof is on party opposing application.

A helpful hint: If you are going to appoint someone with lesser priority than another, e.g. a creditor over a surviving spouse, you should triple check citation to be sure service is properly returned in your file.

Also, a person with higher priority, e.g. surviving wife over nephew, can file a Waiver of Right to Serve in lieu of other citation.

5. **The Application** - You must ascertain that the application contains answers to ***all*** eight paragraphs of the application. T.P.C. §82. Their completion is jurisdictional and failure in this regard will not confer jurisdiction. See, Marrs v. Estate of Marquis, 927 S.W.2d 304 (Tex. Civ. App. – El Paso 1996, no writ).

You should give particular attention to paragraph(s)...

- (d) what is the estate’s probable value.
- (e) is there full information on each heir.
- (f) the existence of natural or adopted children.
- (g) information on who, when and where decedent divorced.

Your scrutiny of these allegations facilitates your establishing a bond and assists the attorney ad litem in the heirship proceeding to follow. See, George v. George, 813 S.W.2d 236 (Tex. Civ. App. – Tyler 1991, no writ).

6. **Qualification** - You must ascertain that the applicant has plead he is not disqualified. T.P.C. §82(a). Obviously, you must never appoint a minor, incompetent or felon as administrator. T.P.C. §78. See Smith v. Christley, 684 S.W.2d 158 (Tex. Civ. App. - Houston [14th Dist.] 1984) discussing term “convicted felon” and disqualification, and Spies v. Milner, 928 S.W.2d 317 (Tex. Civ. App. - Fort Worth 1996) discussing term “unsuitable.”

- a. You must not appoint a non-resident administrator, e.g. applicant lives in East Elephant's Breath, Wyoming, unless he files a designation of Resident Agent with your Court. T.P.C. §78(c)

Caveat: You should take testimony only at the hearing and await signing the Order Appointing Administrator until the attorney files the resident agent Designation with your Court.

VI. Citation

A. Court Discretion – The court may, in its discretion, require that notice be given and prescribe the form and manner of service and the return thereof where the Texas Probate Code is silent. T.P.C. § 33(a).

B. Notice and Jurisdiction Established

1. **Issuance** - You must ascertain that citation was properly issued before granting letters of administration, i.e. appointing an administrator.
 - a. **Why?** Because proper citation establishes your jurisdiction and gives notice to all concerned parties.
 - b. The citation on the application must be by posting and its contents are outlined in T.P.C. §128(a).
2. **Hearing Date** - You must not conduct a hearing on the application until after the first (1st) Monday following ten (10) days from the date of posting, publication or personal service. T.P.C. §33(f)(g). See Watson v. Dingle, 831 S.W.2d 834 (Tex. Civ. App. - Houston [14th Dist.] 1992) holding that without proper service of citation an application for probate cannot be acted upon and, Wagner v. Urban, 170 S.W.2d 270 (Tex. Civ. App. – Amarillo 1943, no writ).

VII. The Court's Hearing

A. Proof Time

1. **Application Contents** - You must make the applicant's attorney prove, inter alia, (fancy Latin meaning "among other things") that pursuant to T.P.C. §88
 - a. The death of the decedent and four years have not elapsed;
 - b. The Court has jurisdiction and venue;
 - c. The citation has been served and returned;
 - d. The applicant is not disqualified; and,
 - e. The estate needs to be administered.

See In Re: Estate of Touring, 775 S.W.2d 39 (Tex. Civ. App. - Houston [14th Dist.] 1989) discussing T.P.C. §88(e) non-applicability to the Texas Substitute Fiduciary Act.

2. **Witness Testimony** - You may require that the witnesses testimony be reduced to writing and subscribed (signed) and sworn to (clerk's acknowledgment) in open court in uncontested matters. The District or Probate court may dismiss this requirement in contested matters because the testimony will be recorded by the Court Reporter. T.P.C. §87.

Caveat: You should take testimony only and not sign the Order Appointing Administrator unless the attorney has produced the written testimony of the witness. Although the witness' testimony is not required to be reduced to writing, it is the better practice to follow. T.P.C. § 87.

3. **Appraisers** – The court may appoint appraisers to evaluate the decedent's estate after the appointment of an administrator. The court has wide discretion in this regard and will normally waive their appointment if the estate is nontaxable. T.P.C. § 248.

VIII. Opposition To Letters of Administration

A. **The Ultimate Nightmare** – Any person may, at any time, before the application for letters of administration is granted file an opposition thereto in writing and may apply for his or another’s appointment. T.P.C. § 179.

1. **When** - You should determine when the contest was filed. It must be filed before you grant the application. T.P.C. §179.
2. **Hearing** - The District or Probate Court must conduct a trial and grant letters “*to the person that may seem best entitled to them.*” T.P.C. §179. See Davis v. Cayton, 214 S.W.2d 801 (Tex. Civ. App. 1948) holding that the necessity for an administration is presumed in every case.

B. **A Backdoor Contest - Preventing a Creditor Administration**

1. **How** - The estate may defeat a creditor’s application by simply paying his claim; proving the claim is fictitious, fraudulent, illegal or barred by limitations; or, by executing a bond twice the amount of the claimed debt conditioned that the obligors on the bond will satisfy the debt when established by suit. T.P.C. §80

IX. The Court’s Order

A. **When Presented** – The applicant should present a proposed order at the hearing. A judicial reputation for enforcing this requirement will allow your staff to expeditiously resolve qualification and bond issues.

B. **Contents**

1. **You must specify in your Order (T.P.C. § 184)**
 - a. The name of the decedent.

- b. The name of the administrator you appoint.
- c. The amount of the bond you set.
- d. The name of the court appointed appraiser, if any.
T.P.C. §181

Appraisers – Again, you have broad discretion to appoint appraisers. The appointment of an appraiser is usually waived if the estate is not taxable. You can subsequently appoint someone upon application of any interested person. T.P.C. §§181, 248, 249.

X. **Qualifying The Administrator**

I. **A. General Rule** – The applicant is not empowered to act on behalf of the estate until such time as the oath has been given and the prescribed bond has been approved by the court. The court has no discretion to determine whether a bond is necessary unless the Texas Probate code eliminates this need or the personal representative is a corporate fiduciary. T.P.C. §§ 194,195.

B. **Oaths and Bonds**

1. **When Oath Taken** - You should ascertain that the applicant's oath was taken within twenty (20) days after you sign the Order Appointing Administrator. T.P.C. §192
 - a. **Form of The Oath** - The form of the oath will vary according to the type of administration requested. These differences are set forth in T.P.C. §190(a), Administrator With Will Annexed; (b) Administrator; and (c) Temporary Administrator.
 - b. **Where Oath Taken** - The oath may be taken before any officer authorized to administer oaths, hence, it need not always be taken before the Court's clerk, but the oath must be filed with the Court's clerk.
2. **Bond Requirements** - You must determine the amount of the bond to be set to protect the estate. T.P.C. §194(1)

- a. **When Not Necessary** - You may determine that no bond is necessary because the personal representative (administrator) is an exempted corporate fiduciary. T.P.C. §195
 - b. **Personal Surety** - You may allow a personal surety to underwrite the bond although corporate sureties are usually required. T.P.C. §194(10)
 - c. **Bond Amount** - You should establish the amount of the bond at the hearing based upon cash on hand, twelve (12) months of anticipated revenue, the value of the personal property and the estimated value of stock, bonds, notes, securities, bank accounts and the face value of insurance policies payable to the decedent. T.P.C. §194(3)(4).
 - d. **Safekeeping Agreement** - You may reduce the amount of the bond with a ***safekeeping agreement*** that provides for money to be placed with a corporate surety, i.e. bank, and not thereafter withdrawn without your Order. T.P.C. §194(5).
 - e. **Creditor Bond Only** - You may establish the bond in an amount to protect creditors only when the administrator is also the only heir entitled to the decedent's estate.
 - f. **Bond Increase or Decrease** - You may decide to reduce or increase the bond after the administrator files the Inventory, Appraisement and List of Claims and/or the Annual Accounting. T.P.C. §203(d). See T.P.C. §§204, 208 for other bond changes.
3. **Letters Issued** - You should Order the clerk to issue Letters of Administration when the applicant has taken his oath and posted his bond. When two or more administrators qualify letters shall issue to each of them so qualifying. T.P.C. §182.

- a. **Non-performing Co-Administrator** – A non-performing co-administrator and his sureties are liable for all the costs associated with his removal. See, Gaines v. Northwestern National Casualty Company, 1997 W L 194754 (Tex. App. – Dallas).
- b. **Issuance** - The clerk may issue any number of Letters to the person qualified. T.P.C.§187.
- c. **B.F.P. Status** - Any person who has purchased estate property from an administrator with letters is protected if the purchaser paid a valuable consideration without notice of the illegality or malfeasance of the administrator. T.P.C.§188. See Dallas Services v. Broadmore, 635 S.W.2d 572 (Tex. Civ. App. - Dallas 1982).

XI. The Administrator’s General Duties

- A. **General Duties:** The administrator is entrusted with the care of the estate’s property as a prudent man would take care of his own property. T.P.C. § 230.
 1. **Collect Property** - The administrator you just appointed must collect the personal property, records, title papers and other business records immediately after his qualification. T.P.C. §232.
 2. **Prudent Man Rule** - The administrator must take care of the estate’s property as a prudent man would care for his own keeping buildings in good repair unless you direct otherwise. T.P.C.§230. See Lawyers Surety Corp. v. Snell, 617 S.W.2d 750 (Tex. Civ. App. - Houston [14th Dist.]1981) holding administrator is not insurer of estate assets and standard of review regarding purchase of insurance is one of negligence; and Gordon v. Terrence, 633 S.W.2d 649 (Tex. Civ. App. - Houston [14th Dist.] 1982, no writ.)

Caveat: The *prudent man rule* applies to the administrator’s care of the estate property once collected. Hence, you should ascertain from the annual account whether the administrator

has insured estate realty and kept personal property safely and harmlessly stored. T.P.C. §230

3. **Collection of Estate** - Your administrator must use **ordinary diligence** to collect claims, debts due the estate and recover possession of estate property. T.P.C. §233.
 - a. **Contingent Fee Agreements** - The administrator may enter into a contingent fee agreement for a one-third interest but must obtain your approval if same exceeds one-third before legal services are performed and any contract so entered is void unless you ratify it. You should review the criteria of T.P.C. §233 before approving any contingent fee contract.
 - b. **Expenses** - An administrator is entitled to all reasonable and necessary expenses in recovering estate property. T.P.C. §233(e).
 - c. **Abandonment of Property** - The administrator may abandon burdensome or worthless property with your approval. T.P.C. §234(a)(6).
 - d. **Other Powers** - Other court supervised powers of the administration, e.g. purchase property, compound bad debts, etc. are outlined in T.P.C. §234(a).
4. **Independent Actions** - Your administrator can take a number of steps to protect estate assets without your approval, e.g. insure estate property against fire, theft and other hazards and, pay taxes, court costs and bond premiums. T.P.C. §234(b). See Bailey v. Cherokee County Appraisal District, 862 S.W.2d 581 (Tex. 1993) where heirs not personally liable for ad valorem taxes accrued during administration.
5. **Notify Creditors** - Your administrator must notify **general creditors** within one (1) month of his letters; within four (4) months to **secured creditors** with a deed

of trust, vendor's lien or contractor's lien (M&M Lien); and, within two (2) months to ***other secured creditors*** with a security interest in specific estate real and personal property. T.P.C. §294(a), 295(a).

- a. **Form and Time of Notice** - Your administrator should notify the creditors as follows and your Court's file should reflect the following...
 - i) Certified mail notice to the Comptroller of Public Accounts. T.P.C. §294(a).
 - ii) Publication notice to unsecured creditors. T.P.C. §294(a) or by certified mail under T.P.C. §294(d) compelling creditor to present claim within 4 months or its barred. See Gilbert v. Jennings, 890 S.W.2d 116 (Tex. Civ. App. - Texarkana 1994) holding publisher's affidavit could be filed after estate was closed.
 - iii) Certified mail (R.R.R.) or registered mail to secured creditors. T.P.C. §295
- b. **Contents of Notice** - Your administrator's *notice* must state ***when*** the letters were issued; ***where*** their claim can be mailed to; and, ***how*** the claim is to be addressed, e.g. in the name of the administrator or attorney for the estate.
- c. **Return of Notice** - You should ascertain that the Court's file reflects a copy of the notice to secured creditors; the return receipt; and, an affidavit stating that notice was properly made. T.P.C. §295(c).
 - i) Your file should also evidence the return of citation by publication on unsecured creditors. This is easy to spot because the actual newspaper notice should be attached to the return. See Gilbert v. Jennings, *supra*.

- d. **Consequences of No Notice** - You will rue (fancy French word meaning “miserably regret”) the day for not reviewing notice because the consequences include bonding company and administrator’s liability for damages to any person. Your consequences include a surcharge action trial at a later date in the administration. T.P.C. §297.

6. **File Inventory, Appraisement and List of Claims**

- a. **Purpose** – The purpose of the inventory, appraisement and list of claims is to protect estate creditors and the estate’s heirs by identifying those assets that are available to satisfy creditor claims and/or to be distributed to the decedent’s heirs. Corollary benefits include a proper bond determination and administrator compensation.
- b. **When to File** - You should ascertain that the administrator has filed the estate’s inventory within ninety (90) days of issuance of letters. T.P.C. §250.
- c. **Extension** - You may allow an extension up to nine (9) months from the date of death to allow a reconciliation between the inventory and the federal estate tax return. You may, for good cause, require the inventory be filed earlier than ninety (90) days. T.P.C. §250.
- d. **Contents** - You should ascertain that the inventory is detailed and reflects all the decedent’s property, including by way of description;
 - i) All real and personal property in Texas and its fair market value on the date of death.
 - ii) Whether the property is separate, community, common, or held in joint tenancy with right of survivorship. T.P.C. §250. See Cain v. Church, 131 S.W.2d 400 (Tex. Civ.

App. 1939) requiring entire community estate be inventoried.

A helpful hint: If the property is held in a joint tenancy with right of survivorship, it is probably ***not*** an asset needing administration, i.e. a non-probatable asset. See, T.P.C. §439-Multiple Party Accounts. See Stegall v. Oaora, 868 S.W.2d 290 (Tex. 1993) and Banks v. Browning, 873 S.W.2d 763 (Tex. App. Ft. Worth, 1994).

- iii) A list of claims due the estate must be attached to the inventory. The specifics of what must be evidenced are outlined in T.P.C. §251(a)-(f).

- e. **Affidavit Requirement** - You should ascertain that the inventory has a sworn affidavit attached stating the truth and completeness of the inventory. T.P.C. §252. A co-representative who does not sign the inventory loses his power to act on behalf of the estate. T.P.C. § 260.

- f. **Court Action** - You must approve or disapprove the uncontested inventory. If disapproved, a revised inventory must be filed not later than twenty (20) days from your Order. T.P.C. §255. See Anderson v. Anderson, 535 S.W.2d 943 (Tex. Civ. App. - Waco 1976) holding court's modification of inventory is appealable; and, McKinley v. McKinley, 496 S.W.2d 540 (Tex. 1973) holding court's approval of inventory is not an adjudication of title to the property.

- g. **Supplemental Inventory** - The administrator must file a verified and detailed supplemental inventory of subsequently discovered estate assets. T.P.C. §256.

- h. **Contest** - The court must hear any contest to the inventory made by any ***interested person***, e.g. heir or creditor. The court may order another inventory and/or appraisal to be filed within twenty (20) days

of that Order. T.P.C. §257, regarding items not included in the inventory; and, T.P.C.§258, regarding items erroneously appraised in the inventory.

- i. **Removal** - You shall enter an order removing any joint administrator and cancel the letters thereof when the co-administrator fails to file his inventory within sixty (60) days of the other unless he offers a reasonable excuse in writing and under oath. T.P.C.§260.
 - j. **Inventory As Evidence** - The inventory's content should be diligently and thoroughly completed by the estate's administrator and attorney because it can be used as evidence in any suit by or against the administrator. T.P.C. §261, See Republic National Bank of Dallas v. Fredericks, 283 S.W.2d 39 (Tex. 1955).
7. **Perishable Assets** - You must promptly hear and rule on an application to sell estate assets that are liable to perish, waste or deteriorate in value after the inventory has been approved by yourself. T.P.C. §333. See McInnis v. Corpus Christi Nat'l. Bank, 621 S.W.2d 451 (Tex. Civ. App. - Corpus Christi 1981) upholding sale of low yield stock subject to rapid market fluctuations.
8. **Set Aside Homestead And Exempt Property** - You should promptly hear an application to set aside the homestead and exempt property for the benefit of the surviving spouse, minor children and/or unmarried children living at home. T.P.C. §271.
- a. **Hearing Date** - You should hear this application immediately *after* your approval of the inventory. T.P.C. §271(a).
 - b. **Verified Pleadings** - You must ascertain that the application is verified by affidavit listing all of the property claimed as exempt if the application is

filed *before* your approval of the inventory. T.P.C. §271(b).

A helpful hint: Try as you may a listing of exempt personal property *will not* be found in the Texas Probate Code. See §42.001, et seq. (fancy Latin meaning “and thereafter”), Texas Property Code. Remember, a homestead is accorded all Constitutional protections, hence, it is not liable for any estate debts except for its mortgage, taxes (county, school, etc.) and construction liens (M&M liens for improvements, e.g. roof, siding, driveway).

- c. **Homestead Allowance** - You must make a reasonable allowance of not more than \$15,000.00 when there is no homestead to set aside; and, not more than \$5,000.00 for non-existent exempt personal property. T.P.C. §273.
- d. **How Allowance Paid** - You may order the allowance paid in cash from assets reflected in the inventory. T.P.C. §274.
- e. **Sale To Raise Allowance** - You may order the sale of estate assets upon application if there are insufficient funds to pay the allowances. T.P.C. §§276 & 293. See Ward v. Braun, 417 S.W.2d 888 (Tex. Civ. App. - Corpus Christi 1967) reciting fact that surviving spouse owns separate property does not affect entitlement to exempt property to be set aside for her use.
- f. **Delivery of Exempt Personal Property** - You should order the administrator to deliver exempt personal property or its substituted money allowance in the following priority:

Exempt Personal Property

T.P.C. §272

Allowance

T.P.C. §275

Surviving spouse
with no children

same

Surviving spouse and Decedent's children	same
No surviving spouse but surviving adult children and/or guardian of minor children	same and in equal money shares
Surviving step-parent spouse takes ½ and ½ to children of decedent living at home or minors	½ to surviving spouse; and, ½ equally divided among all children, i.e. step and natural

- g. **Exempt Property In A Solvent Estate** - You may allow, in a **solvent estate**, exempt property to be used by persons entitled thereto during the administration. The right to use such property terminates when the estate is closed with the property being distributed to the heirs or devisees of the decedent. T.P.C.§278. See Kelly v. Shields, 448 S.W.2d 135 (Tex. Civ. App. - San Antonio 1969, writ ref'd, n.r.e.)
- h. **Exempt Property In An Insolvent Estate** - You must order, if the estate is **insolvent**, title to the exempt personal property to pass to the spouse and children free of all debts, except those debts secured by existing liens, or claims for funeral and last illness expenses presented within sixty (60) days of the issuance of letters of administration. T.P.C.§277. See American Bonding Co. of Baltimore v. Logan, 106 Tex. 306, 166 S.W. 1132 (1914)

Caveat: You should ascertain there are no outstanding debts or claims for last illness or funeral expenses before you sign the order, because exempt personal property is liable for these debts. T.P.C. §281

9. **Family Allowance** - You should promptly hear a motion to establish a family allowance for the surviving spouse and children for one (1) year from the *decedent's date of death*. T.P.C. §287.
- a. **Evidentiary Standards** - You should not approve the allowance if the surviving spouse has adequate separate property for her maintenance. T.P.C. §288. See Noble v. Noble, 636 S.W.2d 551 (Tex. Civ. App. - San Antonio 1982) discussing numerous examples of case law in this area.
 - b. **Burden of Proof** - Your evidentiary test is by a preponderance of the evidence. The application must be accompanied by a verified affidavit describing the amount needed if filed before the inventory is approved. T.P.C. §286(b). See Churchill v. Churchill, 780 S.W.2d 913 (Tex. Civ. App. - Fort Worth 1989, no writ).
 - c. **How Paid** - You may order the allowance paid in a lump sum or in installments. T.P.C. §287.
- Remember:** The law prefers the family allowance be paid in preference to all debts except last illness and funeral expenses. T.P.C. §290.
- d. **Priority of Payment** - The priority of payment is outlined in T.P.C. §291 and step children are excluded.
 - e. **Sale of Assets** - You may order the sale of estate assets to raise funds for the family allowance. T.P.C. §293.
10. **Creditor Claim Filing** - Your administrator must approve or reject a creditor's claim within thirty (30) days of its presentment. T.P.C. §309. See Carter v. Kahler, 902 S.W.2d 85 (Tex. Civ. App. - Houston [1st Dist.]1995) holding the filing of a lawsuit meets the requirements of presentment.

- a. **When Rejected** - If the administrator takes *no action* for 30 days the claim is deemed rejected. T.P.C. §310
- b. **Suit On Claim** - The creditor must file suit on the claim within ninety (90) days of its rejection or the claim is barred. T.P.C. §313. Conversely, see Lusk v. Mintz, 625 S.W.2d 774, Tex. Civ. App., 1981, a vendors lien case.
- c. **Administrator's Liability** - The court should tax the litigation costs against the administrator, *individually*, if the creditor prevails at trial and the administrator may be removed on the written complaint of any interested person to the claim. T.P.C. §310
- d. **Statutes Of Limitations** - You should disapprove any creditor claim barred by a general statute of limitation even if the administrator has approved it. T.P.C. §298(c). The two (2) and four (4) year statute of limitations is found in §16.003(a) and §16.004 Civ. Prac. Rem. Code, respectively.

Caveat: Civ. Prac. Rem. Code §16.062 suspends the statute of limitations period for one (1) year or until an administrator qualifies.

- e. **Authenticated Claims** - You should disapprove any claim that is not authenticated, i.e. supported by an affidavit that the claim is just, all offsets, payments and credits have been allowed. T.P.C. §301. See Bandy v. First State Bank, Overton, 835 S.W.2d 609 (Tex. 1992) allowing offset by bank against other accounts without following claims procedure; and, Furniture Dynamics, Inc. v. Estate of Harley, 560 S.W.2d 486 (Tex. Civ. App. - Dallas 1977) holding your disapproval is final and appealable but does not bar another claim on the same account.

- f. **Objection To Exhibits** - You should not allow the administrator to object to the form or insufficiency of exhibits to a claim after thirty (30) days from its presentment. T.P.C. §302.

- g. **Election By Secured Creditor** - You can approve a secured claim presented *within* six (6) months as a matured secured claim to be paid...
 ...in the *due course of administration*, i.e. paid to the extent of available estate cash which may mean timely or untimely payment but its possible for eventual payment in full to the creditor; or,
 ...as a *preferred debt and lien* to be paid according to the terms of the contract. T.P.C. §306(a).
 - i) You should approve a secured claim presented *after* six (6) months as a preferred debt and lien against the property. Hence, the real world consequences are that the creditor will be paid only to the extent of the property's value when sold or foreclosed. T.P.C. §306(b). See Texas Commerce Bank Nat. Assn. v. Geary, 938 S.W.2d 205 (Tex. Civ. App. - Dallas 1997) discussing preferred debt and lien status.

- h. **Payment** - You may order the administrator to pay any approved claim *after* six (6) months upon his application stating he knows of no enforceable claims not already approved. T.P.C. §320(d).

- i. **Funeral Expense Apportionment** - You must apportion all claims for funeral expenses against the decedent's one-half (1/2) community share and not the surviving spouse's. T.P.C. §320A.

- j. **Multiple Claim Pro-ration** - You must order the pro-rata payment of multiple claims of the same class when there is a deficiency of assets to pay all claims in full. T.P.C. §321.

- k. **Classification** - You must classify the claims approved by the administrator in accordance with T.P.C. §322 and, Order their payment per their priority in accordance with T.P.C. §320. Succinctly stated, you must approve or disapprove and classify any claim by the administrator which has been on file for the ten (10) day posting period. Your disapproval of the claim is final and appealable; however, it does not bar another claim on the same account. Furniture Dynamics, Inc. v. Estate of Harley, 560 S.W.2d 486 (Tex. Civ. App. – Dallas 1977, no writ).
- l. **Claims Post Partition And Distribution** - You must not allow any claims to be approved after you enter your Order For Final Partition and Distribution. The creditor's remedy is to institute suit against the heirs but his recovery is limited to the value of the property received by them in distributions from the estate. T.P.C. §318.
- m. **Court Approval** - You must not allow any claim to be paid unless you have approved it or it was established by judgment after trial. T.P.C. §319.
- n. **Show Cause To Effect Payment** - You may show cause an administrator upon application after twelve (12) months from the issuance of letters and proof of sufficient funds in the estate to show cause why payment of the claim should not be made. T.P.C. §326.
- o. **Show Cause For Non Payment** - You may cite the administrator and his sureties to show cause why ordered claims have not been paid. If the administrator cannot show good cause, judgment may be rendered against the administrator for the unpaid claim, plus interest, costs and damages of 5% per month. T.P.C. §328.
- p. **Procedure For An Administrator's Claim** - You must require an administrator who has a claim

against the estate which accrued before he received letters to file the claim verified by affidavit with the Court within six (6) months after he has qualified or such claim will be barred. T.P.C. §317. Conversely, see, Anderson v. Oden, 780 S.W.2d 463 (Tex. App. – Texarkana 1989, no writ).

XII. Administrator’s Court Ordered Powers

A. General Powers – The estate’s administrator has the general powers to collect, preserve, maintain, partition and distribute a decedent’s estate. He has the power and authority to incur expenses and to expend funds for the maintenance and upkeep of all estate assets. Dyer v. Winston, 77 S.W. 227 (Tex. App. 1903, no writ).

B. Court Ordered Powers – The estate’s administrator has the following powers pursuant to T.P.C. § 234(a):

- (a) Renew or extend a debt owed by or to the estate.
- (b) Purchase or exchange property.
- (c) Accept claims or property in payment of debts.
- (d) Compound bad or doubtful debts.
- (e) Compromise or settle disputed claims or litigation.
- (f) Compromise or pay in full any approved secured claim.

A. C. Special Powers By Court Order

1. **Operate Business** - You must authorize the administrator to operate the decedent’s farm, ranch, factory or other business before he can take operational control. T.P.C. §238.
2. **Pay Distributees** - You may authorize the administrator to directly pay to the estate’s distributees the net income from bonuses, rentals and royalties from oil, gas and mineral leases during the estates administration. T.P.C. §239.
3. **Mortgaging** - You must authorize the mortgaging or pledging of estate assets to pay taxes, administration costs and approved claims. T.P.C. §329.

4. **Property Sales** - You must authorize any sale of real or personal property in the estate. T.P.C. §331, 333 and 334. See Pearce v. Stokes, 291 S.W.2d 309 (Tex. 1956) holding a sale without authority is void and passes no title and a non judicial foreclosure during administration under a deed of trust is invalid; and Howell v. Murray Mfg. Co., 890 S.W.2d 78 (Tex. Civ. App. - Amarillo 1994) holding that a power of sale under a due on sale clause was suspended during administration.
 - a. **The Four Step Process To Sell Real Property** - The four (4) step process for selling real property is found in T.P.C. §342 (Application), T.P.C. §346 (Order of Sale), T.P.C. §353 (Report of Sale) and, T.P.C. §355 (Confirmation of Sale).
 - b. **The Process To Sell Personal Property** - The sale of personal property should closely follow the four (4) step realty sale process. T.P.C. §334. Unfortunately, case law is contradictory. See Walker v. Sharp, 807 S.W.2d 448 (Tex. Civ. App. - Corpus Christi 1991) holding Court can not confirm sale when no prior Order of Sale was entered; and, San Antonio Savings Association v. Palmer, 780 S.W.2d 803 (Tex. Civ. App. - San Antonio 1989) holding that the lack of a Report and Confirmation did not void sale.
5. **Livestock Sales** - You must authorize any sale of livestock and approve their sale through a bonded livestock commission merchant or auction house. T.P.C. §335.
6. **Credit Sales** - You must not allow any sale of personal property on credit terms exceeding six (6) months. T.P.C. §337.
7. **Realty Credit Terms** - You must not allow any sale of real property on credit unless the purchaser makes a 20% down payment and the note balance is secured by a vendor's lien and deed of trust. T.P.C. §348.

8. **Self Dealing** - You must not allow your administrator to purchase property from the estate without first determining that the sale is in the best interest of the estate. T.P.C. §352(c)(d).
9. **Rentals** - You must approve the renting of real and personal property when the rental period exceeds one (1) year. T.P.C. § 361.
 - a. **Court Order To Rent** - You determine whether the property is rented with public or private involvement and whether notice is published or posted if rented at public auction. T.P.C. §361
 - b. **Report Of Renting** - The administrator must file a report with your Court when any property worth \$3,000.00 or more is rented. T.P.C. §365.
 - c. **Court Action On Report** - You will either approve or disapprove the rental after five (5) days of the report's filing. T.P.C. §366.
10. **Mineral Leases** - You must approve any mineral lease executed by the administrator. T.P.C. §§367(5), 369(3)(4).
 - a. **General Requirements** - The application and order requirements for mineral leases, pooling or unitization of royalty or mineral interests, and the validation of certain mineral leases can be found in T.P.C. §§367-372.

XIII. Annual Accounting To Court

- A. **Twelve (12) Month Rule** - You must ascertain that the administrator has filed his annual account with your Court at the expiration of twelve (12) months from his qualification. T.P.C. §399.
 - a. You must ascertain that an annual account is filed at the end of each twelve (12) month period thereafter. T.P.C. §399(b).

1. **Posting** - You should not act on the annual account until it has been posted for ten (10) days. T.P.C. §401(b).
2. **Verified** - You should not approve the annual accounting unless it is verified under oath. The contents of the annual accounting are found in T.P.C. §399(a). The accounting must include a statement by the administrator that all the required bond premiums for the accounting period are included. T.P.C. §399(a)(9).
3. **Bond Changes** - You may require an increase or decrease in the estate's bond due to disclosed asset information and approve the accounting. T.P.C. §401(e).
4. **Claims Payment** - You should Order the payment of all claims in full if the estate is *solvent*, i.e. estate assets are equal or greater than approved claims and costs of administration. T.P.C. §401(e)(1). If *insolvent*, order a pro-rata payment schedule. T.P.C. §401(e)(2).
5. **Failure To File Annual Account** - You should promptly show cause the administrator for any failure to file his annual account. You can revoke his letters and fine him up to \$500.00 if the accounting remains unfiled. T.P.C. §400.
6. **Penalty For Failure To File Exhibits** - You should promptly show cause the administrator for any failure to file any necessary or required exhibit to the annual account. You can revoke his letters and fine him up to \$1,000.00 for such failure. T.P.C. § 403.

XIV. The Court's Partition And Distribution Of Estate

- A. **By Whom And When** - The administrator or any heir may request you to partition and distribute the estate at any time after twelve (12) months from the original grant of letters. A request for a partial distribution may be made at any time after letters are granted and the inventory has been filed. T.P.C. §373.

Caveat: You should *never, never*, partition and distribute an estate before the administrator has completed the heirship process outlined in T.P.C. §§48-56.

B. Citation - You must ascertain that citation has been properly completed. You should review the Court's file and determine if:

1. Personal citation was made on all in-state heirs;
2. Personal service was made on all know creditors;
3. Publication was made on all non-resident or unknown heirs; and,
4. Personal service was made on the administrator if the application to partition and distribute the estate was filed by an heir. T.P.C. §§374-375.

C. Attorney and Guardian Ad Litem - You must appoint an attorney ad litem to represent non-resident and unknown parties; and/or, a guardian ad litem for know minors and/or N.C.M.'s having no guardian. T.P.C. §53.

D. Hearing - You must ascertain the following facts at the hearing. T.P.C. §377.

1. **Property Available For Partition** - The residue (what's left after paying claims and administration costs) of the estate available for partition and distribution;
2. **Persons Entitled** - The persons entitled to take a share and their respective percentage of the estate; and,
3. **Effect Of Advancements** - Whether advancements (early gift or payment by decedent when alive to a person who is now an heir) have been made to anyone entitled to a share. T.P.C. §44 requires that proof of the advancement must be in writing by the donor (decedent) contemporaneously with the gift. Conversely, the writing by the donee (heir) can be made at any time, either before or after the gift.

E. Contents Of Order - You may enter an order to partition and distribute the estate if convinced thereof and your Order should state, pursuant to T.P.C. §378;

1. **Persons To Receive** - The name and address of each person entitled to a share of the estate;
 2. **Share Received** - The proportional share each heir is entitled to;
 3. **Share Description** - A full description of the estate to be distributed; and,
 4. **Funds Retained** - That the administrator retains sufficient funds to pay any future debts, claims, taxes and/or estate expense.
- F. Direct Distribution** - You should Order the administrator to directly distribute any estate consisting only of money and debts due. T.P.C. §379.
- G. Commissioners** - You may appoint three (3) disinterested persons to partition and distribute the estate if it doesn't consist only of money and/or debts due. T.P.C. §381. This procedure assumes you have not earlier found the estate incapable of partition. T.P.C. §§380(a), 381.
1. **Property Sale Process** - When you have found the estate property incapable of division your Order should direct the sale of same which process will include the four step process of T.P.C. §§342,346,353 and 355.
- H. Expenses Apportioned** - You should apportion the partition expenses on a pro-rata basis among all distributees. T.P.C. §387.
- I. Damages** - You should Order the administrator, after a show cause hearing, to satisfy any damages suffered by the distributee(s) for his neglect to deliver estate property. T.P.C. §384. The damages suffered should bear interest at 10% of the amount or appraised value, *monthly*. See Bilek v. Tupa, 549 S.W.2d 217 (Tex. Civ. App. - Corpus Christi 1977) holding that T.P.C. §384 is penal in nature and must be strictly construed.

J. Administration Expenses Satisfied - Lastly, you should have ascertained that administration expenses were satisfied before you ordered the distribution of the estate's property. See Garcia v. Garcia, 878 S.W.2d 678 (Tex. Civ. App. - Corpus Christi 1994) determining that administrators failing to file proper inventories and accountings bear the burden to prove validity of charging estate with expenses.

1. **Administrator's Commission** - You may allow the administrator a commission of 5% of all cash actually received and/or paid out during the estate's administration, but in no event more than 5% of the gross estate value. T.P.C. §241.

Caveat: You should not allow a commission for funds on deposit at decedent's death, i.e. held in a bank, trust company, S. & L., credit union, etc. in the form of cash, checking/savings account, C.D., money market account, and/or life insurance proceeds. T.P.C. §241(a)(b).

2. **Compensation In Lieu Of Commission** - You may allow reasonable compensation in lieu of the 5% rule if the administrator managed the decedent's farm, ranch, factory or other business or the 5% rule is unreasonably low. T.P.C. §241(a). See Burton v. Bean, 549 S.W.2 48 (Tex. Civ. App. - El Paso 1977) allowing legal fees to attorney acting as the administrator.

XV. Institute Heirship Proceedings

A. Why Require This Proceeding - You will find that this proceeding should be required in your Court for five (5) reasons.

1. **Intestate Decedent**- The decedent passed away intestate, i.e. no will, and it is imperative to determine who are the decedent's heirs and their respective percentage of the estate before you order the estate's partition and distribution.
2. **Testate Decedent With Residuary Heir** - The decedent died testate, i.e. with a will, but the will does not dispose of all the estate assets by its terms. Otherwise

stated, the will make specific provisions for estate assets to be devised to certain beneficiaries, i.e. specific bequests, but thereafter a residue remains to be distributed to the decedent's heirs not mentioned in the will. Hence, this proceeding to determine their identity and percentage share.

3. **Statute Of Limitations Has Expired** - More than four (4) years have elapsed since the decedent's death and the applicant can not request an independent administration for the reasons above sated; because your applicant is also barred by the statute of limitation; that even if good cause could be shown for the will's probate as a Muniment of Title, a determination of heirs to take the residuary is necessary.
 4. **No Necessity For Administration** - Four (4) years have not elapsed but there is no reason to administer the estate. The estate consists only of real estate, stocks or bonds and the transfer agent, e.g. title company, stock broker, requires a court judgment determining the heirs (who will also execute necessary transfer documentation) and the percentage each heir is to receive from the sale.
 5. **Determine Heirs Of Deceased Ward** - A ward has passed away intestate and no administration has been requested, hence, this proceeding to determine the heirs of the ward's estate.
- B. Who Initiates The Action** - You should allow an administrator, heir, *secured creditor*, guardian, or other interested party to file an application. T.P.C. §49
- C. Limitations** - The probate code does not provide a limitation period for bringing an action to determine heirship. Generally, when there is no specifically applicable limitation period, the limitations period is four years. Civ. Prac. Rem. Code §16.051 Smith v. Little, 903 S.W.2d 780 (Tex. App. - Dallas 1995, no writ).

D. Information Required In The Application - You should require that complete answers be given to T.P.C. §49(a)(1)-(8) with particular scrutiny to sub-paragraphs:

(2) The name and address of every heir; the heir's relationship to the decedent, e.g. spouse, son, niece, etc.; the heir's percentage interest in the estate.

(4) The name and address of every child born to or adopted by the decedent.

(5) The name and address of each spouse; and, when and where they were married or divorced.

1. **Verified Pleading** - You must ascertain that the application contains the applicant's affidavit that his allegations are *true in substance and in fact and no material fact or circumstance has been omitted*. The affidavit is a mandatory requirement to acquire proper jurisdiction. *Rose v. Burton*, 614 S.W.2d 651, Civ. App. 1981, ref. n.r.e.

E. Notice

1. **Form of Notice** - You should ascertain that all distributees have received certified or registered mail service or you may require personal service in lieu thereof. T.P.C. §50(a). An heirship proceedings after September 1, 1997 allows citation to a distributee under age 12 to be served on the child's parent, managing conservator or guardian.

2. **Publication To Unknown Heirs** - You should ascertain that unknown heirs or known heirs whose addresses are unknown are served by publication. T.P.C. §50(b).

3. **Posted Citation** - You should ascertain that posted citation is made in your county and where the decedent last resided. T.P.C. §50(c).

F. Ad-Litem Appointment - You should appoint an attorney ad litem for all the unknown heirs or living heirs whose

whereabouts are unknown or for any incapacitated person. T.P.C. §53b.

G. Evidence - Unknown Parties - You should be certain that the hearing is on the record, i.e. utilize a court reporter or approved recording device.

1. **Disinterested Witness** - You may hear the applicant's testimony as to the application and you should hear testimony from two (2) disinterested witnesses.

2. **Reduced To Writing** - You should have the testimony of the witnesses reduced to writing, signed by the witness, acknowledged by the court clerk and placed in the Court's file. T.P.C. §53(a).

3. **Admission Of Evidence** - You may receive as prima facie evidence of the facts therein stated an affidavit of heirship or court judgment if same have been recorded in the deed records for at least five (5) years. T.P.C. §52.

H. The Court's Judgment - You should ascertain that your judgment declares the name and address of each heir; and, the percentage interest of each heir. T.P.C. §54.

Caveat: Double check the total of the percentage interests stated in the judgment. Amazingly, lawyers arrive at totals exceeding 100%.

1. **Effect Of Judgment** - Your judgment is final and appealable as other judgments. T.P.C. §55.

2. **Right To Appeal** - Any heir may appeal by bill of review within four (4) years of the judgment if not properly served; and, any heir may appeal at anytime upon proof of actual fraud and recover from the other heirs. T.P.C. §55(a).

3. **Benefit Of Heirship Procedure** - This relatively simple procedure allows the attorney to file an application and obtain a judgment within thirty (30) to sixty (60) days. It allows the court to conclude an administration that may

otherwise grow stale on the court's docket. The usual delay revolves around the attorney ad litem's ascertaining the existence or whereabouts of unknown heirs. The responsibilities of an attorney ad litem are great and coupled with much liability for the generally low fees received in these instances.

XVI. The Court's Closing The Estate

- A. When To Close** – The estate's administrator should close the estate when all the debts are paid in full or to the extent assets will permit payment, and when no further necessity exists for the continuation of the administration. T.P.C. § 404.

- B. The Three Year Rule** - Every administration *must be closed within three (3) years* of the grant of letters unless good cause is shown for its continuance. T.P.C. §222(b)(6). See Lesikar v. Rappaport, 809 S.W.2d 246 (Tex. Civ. App. - Texarkana 1991) holding that an administrator may not indefinitely prolong the administration simply by delaying the payment of debts.
 - 1. **Debts Paid** - You may Order the estate closed when all debts have been paid or satisfied to the extent of know assets. T.P.C. §404(a)(1). You may order on your own motion that the administrator close the estate. T.P.C. §406(a) and 222(b)(6).

 - 2. **Final Accounting** - You must receive and approve a verified final accounting from the administrator before ordering the estate closed. T.P.C. §405.
 - a. **Pleading Requirements** - You should ascertain that all ten (10) items required in T.P.C. §405 are evidenced in the final accounting paying particular attention to paragraph 10 requiring the administrator to give proof that all bond premiums have been paid.

 - b. **Vouchers Required** - You should ascertain that the administrator attached vouchers in support of any item not earlier accounted for.

3. **Notice** - You must ascertain that the administrator has given notice to each heir by certified mail, R.R.R. and that the notice included a copy of the final account. T.P.C. §407(1).
 - a. **Waiver Of Citation** - You may allow an heir to waive service of notice of the final account. T.P.C. §407(2).
4. **Citation** - You should order the estate's partition and distribution to the heirs if satisfied with the application and return of citation. T.P.C. §408(b).
5. **Receipts** - You should ascertain that the administrator has filed with the Court receipts from all heirs before entering the Order Closing the Estate and Discharging Surety. T.P.C. §408(c)(d).
6. **Discharge and Release** - Once all assets of the estate are distributed, the administrator should apply to the Court for an Order releasing him/her and discharging the sureties on his/her bond. T.P.C. §408(d). You must release him if all requirements of the Order have been met. The orders approving the final account and discharging the administrator are not subject to collateral attack if the court had jurisdiction to issue such orders. Coppock & Teltschick v. McLaughlin, 857 S.W.2d 631 (Tex. Civ. App. - Houston [1st Dist.] 1993, writ denied).
7. **Closing Estate Without Final Accounting** - You can *close* an estate after four (4) years *without* a final accounting or appointing a successor administrator if the whereabouts of the administrator and heirs are unknown. This scenario will almost guarantee there is no Application to Determine Heirship in the court's file. T.P.C. §406(a).
8. **Escheat** – The estate's administrator should sell estate assets for cash and hold same for six (6) months when estate distributees can not be located; and, thereafter the cash proceeds will escheat to the State Treasurer. T.P.C. §§ 427-432.

XVII. What Is Involved In A Temporary Administration And When Is One Appropriate?

- A. When** – A temporary administrator should be opened when the interest of the estate requires the immediate appointment of a personal administrator. T.P.C. § 131A, or during the pendency of a Will contest. TPC § 132.
- B. Duration** – The appointment will vary according to the rationale underlying the application.
1. **Appointment Of Temporary Administrator** - Under TPC § 131A, the appointment will last for the period specified in the Court Order but not to exceed 180 days unless the appointment is made permanent.
 2. **Appointment Pursuant To Will Contest** - Under TPC § 132, the appointment will last until the Will contest is settled or resolved by the Court.
- C. Application.** TPC § 131A. May be filed by any person, must be verified and must contain all the information required for administration under TPC § 82 and an affidavit containing the following:
1. The name, address, and interest of the applicant;
 2. Facts showing immediate necessity;
 3. Requested powers and duties of the temporary administrator;
 4. Statement that applicant is entitled to letters and not disqualified by law;
 5. Description of real and personal property of the estate.

TPC § 77 which establishes a priority of persons qualified to serve has been held not to apply to the appointment of a temporary administrator pending a Will contest because neither the executor or the principal devisee could be determined until after the Will contest was decided. The only requirement for a "temporary administrator" is that the appointee be a "suitable person." Cravey v. Hennings, 705 S.W.2D 368 (Tex. App.--San Antonio 1986, no writ).

- D. Ex Parte Proceeding.** The appointment of a temporary administrator is ex-parte, without notice, citation, or opportunity to object and so the Court is given broad powers to determine the necessity for the administration, the powers to be granted, and the power to appoint a "suitable" person as administrator.
- E. Order of Appointment.** The order of appointment must name the person appointed, define the powers granted, and set the amount of bond. TPC § 131A(c). A temporary administrator has no powers except those that are specified in the Order.
- F. Notice.** The clerk will post notice of appointment on the day the letters are granted. The appointee must notify all known heirs of the appointment by certified mail, return receipt requested. The notice must state that an interested person or heir may request a hearing within 15 days after the letters are issued, that the appointment will continue for a certain time, and that it may be made permanent.
- G. Contest and Hearing.** If the appointment is contested an evidentiary hearing will be held within 10 days of the request date, but the appointee can continue to act during this time. The person seeking the appointment has the burden to prove facts showing jurisdiction, venue, and necessity for immediate appointment.
- H. Powers and Duties**
1. Primary purpose is to preserve and protect estate assets.
 2. May be allowed to take possession of all estate assets.
 3. All acts beyond powers granted in the Court's Order are void.
 4. Powers are broader for those temporary administrators appointed under TPC § 132 pending a Will contest.
 5. The temporary administrator should notify creditors and file an inventory in the same manner as other dependent administrators. The filing of an inventory by a temporary administrator is debatable. Therefore, if an inventory is

desired, it should be included in the Order as part of the temporary administrator's powers.

- I. **Ancillary Administration.** A temporary administrator may be appointed in Texas even though an executor has been appointed and is serving in another state.
- J. **Removal.** A temporary administrator may be removed for cause or upon the appointment of a permanent administrator.

1. K. Closing Temporary Administration

- 1. **Accounting.** Upon expiration of his appointment, the temporary administrator must file an account of all property acquired and a full account of all his acts.
- 2. **Closing.** Upon approval of the temporary administrator's account, the court may order the delivery of all estate property to the permanent administrator, and will release the temporary administrator and his/her sureties when the proof of delivery is shown.

XVIII. Administrator Compensation

A. Commissions.

- 1. **General Rule.** The administrator is entitled (in the Court's discretion) to a commission of 5% of all cash received or paid out during the administration, but such amount shall not exceed 5% of the gross fair market value of the estate. TPC § 241(a). Commission aren't chargeable on funds (not just cash) on hand in a financial institution or brokerage firm including cash or cash equivalents held in checking, savings, money market, or C.D. accounts. TPC § 241(a). Further, commissions are not generally allowed for the collection of life insurance proceeds.
- 2. **Extra Compensation.** The Court may allow compensation above the 5% commission if the administrator performs extraordinary services such as managing a farm, factory, other business, or when the 5%

commission is unreasonably low. TPC § 241(a). The administrator may also apply for extra compensation for unusual efforts to collect funds or life insurance.

3. **Reduced Commission.** The Court has the authority to disallow the full 5% commission if the administrator fails to show that he is entitled to it, has failed to care for or manage the estate properly, or if the administrator is removed under TPC §§ 149C or 222.
4. **Temporary Administrators.** The 5% commission applies to temporary administrators. TPC § 241(a).

B. Expenses. The administrator is entitled to recover all reasonable and necessary expenses incurred in the preservation, safekeeping, and management of the estate, and in collecting or attempting to collect debts. TPC § 242. The administrator can also recover reasonable attorneys fees necessarily incurred in the management of the estate. These expenses shall be acted upon in like manners as other claims against the estate. TPC §§ 242-244.

C. Removal.

1. **Who May Institute.** The Court on its own motion or any interested person pursuant to T.P.C. § 222.
2. **Grounds Without Notice.** If administrator:
 - a. Neglects to qualify in the manner and time required;
 - b. Fails to file an inventory within 90 days of appointment unless extended;
 - c. Fails to give a new bond when ordered;
 - d. Leaves the state for over 3 months without Court permission, or leaves the state;
 - e. Cannot be served with notices because he disappears or eludes services.
3. **Grounds With Personal Service Notice.** If personal service is necessary, actual service on the administrator is required (not service on the attorney for the

administrator). Wetsel v. Estate of Perry, 842 S.W.2D 374 (Tex. Civ. App.--Waco, no writ). Under TPC § 222, the administrator may be removed when:

- a. Sufficient grounds appear to show that he has misapplied, embezzled, or removed from the state, or is about to do these acts to, any property of the estate;
- b. Fails to file any account;
- c. Fails to obey court orders with respect to his duties;
- d. He is proven to be guilty of gross misconduct or mismanagement in the performance of his duties;
- e. He becomes incompetent or imprisoned or becomes otherwise incapable of performing his duties;
- f. Fails to make a final settlement of the estate within 3 years of appointment; or
- g. Fails to notify governmental or charitable devisees as required by TPC § 128A.

4. **Order of Removal.** The court shall sign an order of removal which states:

- a. The cause of removal;
- b. Letters issued should be surrendered and canceled; and
- c. That all assets shall be delivered to the new administrator.

D. Attorneys as Administrators. Attorneys may accept an appointment as administrator of an estate. Burton v. Bean, 549 S.W.2D 48 (Tex. App.--El Paso 1977, no writ).

XIX. Last Thoughts

I have found from twenty three (23) years of active practice, fourteen (14) years of teaching and five (5) years as a statutory probate court judge that I can generally convince anyone that I know what I am talking about if I have the following five (5) books at my disposal:

- A. Johanson's Texas Probate Code Ann. 1999, Professor Stanley M. Johanson. Lawyers Cooperative Publishing, Aqueduct Building,

Rochester, New York 14694. This book has become the probate practitioner's bible and is a "must have" book for your chambers.

- B. O'Connor's Texas Rules - Civil Trials, 1999, Justice Michael M. O'Connor. Jones McClure Publishing, Inc., P.O. Box 540546, Houston, Texas 77254, telephone number 1-800-OCONNOR. This wonderful softbound desk reference gives you all the Texas Rules of Civil Procedure, Evidence and Appellate Procedure. Most importantly, the rules are accompanied by commentaries that make otherwise difficult material really, really simple to understand.
- C. O'Connor's Annotated C.P.R.C. Plus, 1999, same author and publisher as item A. above. Again, Justice O'Connor makes the Civil Practice and Remedies Code so simple to understand you will want to take it as light reading on your next vacation.
- D. Courtroom Handbook On Texas Evidence - 1995, Goode, Wellborn & Sharlot, West Publishing Co., 610 Opperman Drive, St. Paul, MN 55164, telephone number 1-800-328-9352. Do you remember that this softbound desk reference on evidence was given to you at "*baby judges school!*" Chapter 7 - "*Common Objections And Responses*" is an excellent quick reference guide to objections and what your response should be. Give it a try and I promise the local bar will eventually think you are related to Clarence Darrow.
- E. Texas Evidentiary Foundations - Civil and Criminal, Schlueter, Onion, Barrow & Imwinketried, 1992, The Mische Company - Law Publishers, Charlottesville, Virginia. This is an excellent hardback reference book on evidence in the event you do a great deal of trial work. Excerpts from trials are presented so you can get a true, first hand feeling for the objection and the court's ruling.

XX. Conclusion

I have diligently attempted to present dependent administration material that you should encounter in your day to day role as a County Court Judge. I have tried to present dependent administration matters that require *your* thought process and action thereon and not necessarily that of a court clerk or staff member. I have made every

effort to rid my presentation and this article of the ever present and admittedly boring legalese/verbiage.

The use of references to code sections and case law was de-minimis in my presentation. However, this article abounds with references for your future use. I have steadfastly refused to recite complete code provisions for (i) I am not particularly interested in padding this article, (ii) the recitation of whole code provisions without any analysis doesn't help anyone, (iii) to do so is an insult to your intelligence as you can read them in the Texas Probate Code as well as I can, and, (iv) this article is intended as a quick reference guide for over worked, understaffed, intellectually and emotionally taxed judges awaiting the economic largesse of our exalted county commissioners.