

**HANDBOOK FOR THE FIDUCIARY ADVISING  
AND COUNSELING EXECUTORS AND TRUSTEES**

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**CHAPTER \_\_\_\_**



**General.** *This article contains two Handbooks: Handbook for Independent Executors and Handbook for Trustees.\* These Handbooks are designed for lawyers to use as a guide in advising their clients as to their fiduciary duties when serving in these capacities. They do not cover every possible issue that can arise; that would take volumes and render any “handbook” unwieldy. Rather, these Handbooks are designed to cover the most common duties, responsibilities, and powers of an Independent Executor during the course of the administration of a solvent estate and of a Trustee during the administration of a trust.*

**Duplication.** *Because trustees and executors have largely the same duties, these Handbooks cover a great deal of the same material. Where their roles differ, each has been customized to apply to the fiduciary in question. Both are included so that the Handbooks can be duplicated by attorneys if they think it is appropriate to share them with their clients.*

\* *These documents were originally prepared by H. Kate Hopkins, then were revised and presented by Mary C. Burdette in 2005, 2007, and 2010.*



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## HANDBOOK FOR THE FIDUCIARY

### I. DUTIES OF A TRUSTEE

#### A. Texas Trust Code Section 113.051

The Texas Trust Code provides that the trustee shall “administer the trust according to its terms and [The Texas Trust Code]. In the absence of any contrary terms of the trust instrument or contrary provisions of [The Texas Trust Code], in administering the trust the trustee shall perform all of the duties imposed on the trustees by the common law.” TEX. PROP. CODE § 113.051. All references to the Texas Property Code are to the Texas Trust Code, which is codified in Article 9 of the Texas Property Code.

#### B. Common Law

Case law has categorized fiduciary duties in various ways, but generally, they fall into four main categories: (1) duty of loyalty, (2) duty of competence, (3) duty to reasonably exercise discretion, and (4) duty of full disclosure. For a comprehensive discussion of fiduciary duties, see Joyce Moore, *Litigation Involving Fiduciaries. Trial Handbook 2000*, Advanced Estate Planning and Probate Course, June 7-9, 2000.

Probably the most famous, and eloquent, description of a “fiduciary” was penned by Justice Cardozo in the case of *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 54546, 62 A.L.R. 1 (1928):

Many forms of conduct permissible in a workaday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties. A (fiduciary) is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the “disintegrating erosion” of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.

Furthermore, the Restatement (Third) of Trusts, Sections 76-84, published in 2007, address the trustee’s duties during trust administration. RESTATEMENT (THIRD) OF TRUSTS, Ch. 15 Intro. Note (2007). This Restatement references three fundamental standards by which a trustee shall act: the duty of prudence, duty of loyalty, and duty of impartiality.

The following is a discussion of the well-established common law fiduciary duties owed by a trustee.

#### 1. Duty of Loyalty

The duty of loyalty is the hallmark of a fiduciary relationship. The trustee must at all times place the interests of the beneficiary above her own. *Slay v. Burnett Trust*, 187 S.W.2d 377 (Tex. 1945). The trustee is not permitted to “place himself in a position where it would be for his own benefit to violate his duty to the beneficiaries.” AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 17.2 (5th ed. 2007); see also RESTATEMENT (THIRD) OF TRUSTS § 78 (2007). A trustee engages in “self-dealing” when she utilizes or takes trust property for her own benefit. The self-dealing transaction is presumed unfair and the trustee bears the burden of proving the fairness of the transaction. *Tex. Bank & Trust Co. v. Moore*, 595 S.W.2d 502 (Tex. 1980); *Pace v. McEwen*, 574 S.W.2d 792 (Tex. Civ. App. □ San Antonio 1978, writ ref’d n.r.e.); *Johech v. Clayburne*, 863 S.W.2d 516 (Tex. App. □ Austin 1993, writ denied).

Texas Trust Code Section 117.007 expressly provides that a trustee “shall invest and manage the trust assets solely in the interest of the beneficiaries.” TEX. PROP. CODE § 117.007. Section 117.008 expressly requires a trustee to act impartially in investing and managing trust assets if the trust has two or more beneficiaries, taking into account any differing interests of the beneficiaries. TEX. PROP. CODE § 117.008; see also AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 19.1.2 (5th ed. 2007); RESTATEMENT (THIRD) OF TRUSTS § 79 (2007).

#### 2. Duty of Competence

The Trustee has an affirmative duty to administer the trust. TEX. PROP. CODE §§ 113.006, 113.051. The fundamental duties of a trustee include the use of the skill and prudence which an ordinary, capable and careful person would use in conducting his own affairs. *Interfirst Bank Dallas, N.A. v. Risser*, 739 S.W.2d 882, 888 (Tex. App. □ Texarkana 1987, no writ). The duty of competence encompasses many “sub-duties,” some of which are described below.

##### a. Duty to Comply With Prudent Investor Rule

Effective January 1, 2004, the Texas Trust Code adopted the “prudent investor” rule. Texas Trust Code Section 117.003 provides that a trustee owes a duty to the beneficiaries of the trust to comply with the prudent investment rule, unless the trust agreement provides otherwise. The standard of care for the prudent investor is stated in Texas Trust Code Section 117.004 as follows:

A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

A trustee's investment decisions regarding individual assets must be evaluated in the context of the trust portfolio as a whole and as part of an overall strategy having risk and return objectives reasonably suited to the trust. *See* Section II *infra*.

*b. Duty Not to Delegate*

The trustee is generally obligated to personally administer the trust and to not delegate to others acts that the trustee should personally perform. *See* AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 17.3 (5th ed. 2007); RESTATEMENT (THIRD) OF TRUSTS § 80 (2007). There are exceptions to this rule.

It is permissible for a trustee to employ attorneys, accountants, and agents, including investment agents and brokers, whose services are reasonable and necessary to administer the trust estate. TEX. PROP. CODE § 113.018. A trustee may also delegate investment decisions under certain circumstances. TEX. PROP. CODE § 117.001. *See* Section II.A.7. *infra*.

*c. Duty to Keep and Render Accounts*

A trustee is under a duty to the beneficiaries of a trust to keep full accounts of the trust estate that are clear and accurate. AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 17.4 (5th ed. 2007); RESTATEMENT (THIRD) OF TRUSTS § 83 (2007). A beneficiary may demand a written statement of accounts covering the trust's transactions since the creation of the trust or since the last accounting, whichever is later. TEX. PROP. CODE § 113.151.

*d. Duties at Inception of Trusteeship*

Within a reasonable time after receiving trust assets, a trustee shall review the trust assets and implement decisions concerning whether to retain or dispose of certain assets to bring the trust portfolio in compliance with the Trust Code, the trust's purposes, terms and distribution requirements. TEX. PROP. CODE § 117.006; *see also* RESTATEMENT (THIRD) OF TRUSTS § 92 (2007).

*e. Duty to Exercise Reasonable Care and Skill*

For matters other than investments, "a trustee is under a duty in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property." *See* AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER

ON TRUSTS § 17.6 (5th ed. 2007); *see also* RESTATEMENT (THIRD) OF TRUSTS § 77 (2007).

*f. Duty to Take and Retain Control of Trust Property*

The trustee is under a duty to take all reasonable steps to obtain and control the trust property. *See* AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 17.7 (5th ed. 2007); RESTATEMENT (THIRD) OF TRUSTS § 76 (2007).

*g. Duty to Preserve Trust Property*

A trustee must use the same care and skill that a person of ordinary prudence would use to preserve trust property. *See* AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 17.8 (5th ed. 2007); RESTATEMENT (THIRD) OF TRUSTS § 76 (2007).

*h. Duty to Enforce Claims*

A trustee is under a duty to take reasonable actions to collect claims that are due to the trust estate. *See* AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 17.9 (5th ed. 2007); RESTATEMENT (THIRD) OF TRUSTS § 76 (2007).

*i. Duty to Defend*

The trustee is under a duty to do what is reasonable, under the circumstances, to defend actions by third parties against the trust estate. *See* AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 17.10 (5th ed. 2007); RESTATEMENT (THIRD) OF TRUSTS § 78 (2007).

*j. Duty Not to Co-Mingle Trust Funds*

The trustee has a duty to keep trust property separate from other property, and to properly designate it as trust property. Not only is it the trustee's duty to keep the trust property separate from the trustee's own property, but also to keep that property separate from other trusts the trustee may administer. *See* AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 17.11 (5th ed. 2007); RESTATEMENT (THIRD) OF TRUSTS § 84 (2007). Joint investments may be proper, but each trust's interest must be kept separate.

*k. Duty With Respect to Bank Deposits*

Although a trustee may deposit funds in a bank, he is under a duty to use reasonable care in selecting the bank and to properly designate the deposit as a trust deposit. He may not subject the deposit to unreasonable restrictions on withdrawal or leave the property in non-interest bearing accounts for unduly long periods of time. *See* AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 17.12 (5th ed. 2007); RESTATEMENT (THIRD) OF TRUSTS § 77 (2007). *See also* Section 113.007 of the Texas Trust Code,

which authorizes the trustee to deposit trust funds that are “being held pending investment, distribution, or the payment of debts in a bank that is subject to supervision by state or federal authorities.”

#### 1. Duty With Respect to Co-Trustees

Unless the trust provides otherwise, all trustees are under a duty to participate in the trust administration. Therefore, a trustee cannot properly delegate the acts required of the trustee to co-trustees. It is also the duty of a trustee to use reasonable care to prevent other trustees from committing a breach of trust. See AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 17.16 (5th ed. 2007); RESTATEMENT (THIRD) OF TRUSTS § 81 (2007).

#### 3. Duty of Full Disclosure

A fiduciary has an affirmative duty to make a full and accurate disclosure of all material facts. *Montgomery v. Kennedy*, 669 S.W. 2d 309 (Tex. 1984); *Kinszbach Tool Co. Inc. v. Corbett-Wallace Corp.*, 160 S.W.2d 509 (Tex. 1942). This rule is further described in Scott and Ascher on Trusts:

The trustee is under a duty to give the beneficiaries, upon request, complete and accurate information as to the administration of the trust, unless the request is, under the circumstances, unreasonable. The beneficiaries are entitled to know what the trust property is and how the trustee has dealt with it. Indeed, they are ordinarily entitled to examine the governing instrument, the trust property, the trustee’s accounts, and any other documents that relate to the trust or its administration. When a trust is for the benefit of several beneficiaries, each is generally entitled to information about the trust. When the trust is in favor of successive beneficiaries, a beneficiary who has a future interest, as well as a beneficiary who is presently entitled to receive income, is ordinarily entitled to this information, whether the interest is vested or contingent, though increasingly this is not true as to beneficiaries whose interests are subject to a right of revocation, a general power of appointment, or an unrestricted right of withdrawal.

AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 17.5 (5th ed. 2007).

A beneficiary has the right to demand information, but the trustee has a duty to provide information to the beneficiary absent a demand. A trustee must promptly disclose the very existence of a trust to its beneficiaries in addition to informing the

beneficiaries of their status and right to obtain further information. RESTATEMENT (THIRD) OF TRUSTS § 82(1)(a)-(b) (2007). If the status of a beneficiary changes, the trustee must inform the beneficiary and keep the beneficiary reasonably informed of any changes regarding the trusteeship, significant developments involving the trust or its administration. RESTATEMENT (THIRD) OF TRUSTS § 82(1)(2) (2007).

A trustee has a fiduciary duty, upon demand by the beneficiary, to furnish the beneficiaries with a formal trust accounting; to inform a beneficiary of the nature and amount of the trust property, the trustee’s management actions, and the intent of the trustee regarding the future administration of the trust estate; and to allow the beneficiary to inspect the books and records of the trust. *Shannon v. First Nat’l Bank*, 533 S.W.2d 389 (Tex. Civ. App.1976, writ ref’d n.r.e.); AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 17.5 (5th ed. 2007); RESTATEMENT (THIRD) OF TRUSTS § 82-83 (2007). The fiduciary duty of full disclosure operates before and after litigation has been filed and is in addition to any obligations of disclosure imposed by the “discovery” provisions of the Texas Rules of Civil Procedure. *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996); *In re Peterson*, 2004 WL 88872 (Tex. App. Amarillo). For a detailed discussion of a trustee’s duty of disclosure, see Frank N. Ikard, Jr., *Disclosure by a Fiduciary/Trustee Outside Formal Discovery: Non-Traditional Rules and Alternative Methods*, Advanced Estate Planning and Probate Course, June 2-4, 1999.

In 2005, The Texas Legislature enacted Texas Trust Code Section 113.060, effective January 1, 2006, which required a trustee to keep trust beneficiaries reasonably informed concerning (1) the administration of the trust; and (2) the material facts necessary for the beneficiaries to protect their interests. Recognizing problems with the provision, it was repealed effective June 15, 2007. Accordingly, trustees operate under the common law duty of disclosure.

#### 4. Duty to Reasonably Exercise Discretion.

A trustee must exercise a discretionary power “reasonably.” See *Sassen v. Tanglegrove Townhouse Condo. Assoc.*, 877 S.W.2d 489 (Tex. App. Texarkana 1994, writ denied); see also RESTATEMENT (THIRD) OF TRUSTS § 87, cmt. (a) (2007). Effective January 1, 2004, Texas enacted the Uniform Principal and Income Act of 1997. Former Trust Code Sections 113.101 through 113.111 were repealed. The Uniform Principal and Income Act is contained in Chapter 116 of the Texas Property Code. In exercising a discretionary power of administration regarding a matter covered by the Uniform Principal and Income Act, “a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable

to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries. A determination in accordance with this chapter is presumed to be fair and reasonable to all of the beneficiaries.” TEX. PROP. CODE § 116.004(b).

*a. Power to Adjust Between Principal and Income.*

New Texas Trust Code Section 116.005 authorizes a trustee to adjust between principal and income if the trustee is in compliance with the prudent investor rule, the trust provides for distributions to a beneficiary by reference to the trust’s “income” and the trustee cannot otherwise administer the trust impartially, based on what is fair and reasonable to all of the beneficiaries. The power to adjust specifically includes the power to allocate all or part of a capital gain to trust income. This section lists nine factors that a trustee may consider in deciding whether or how to exercise the power to adjust and prohibits a trustee from making an adjustment under certain circumstances.

*b. Judicial Control of Discretionary Power.*

New Section 116.006 provides that a court may not question a trustee’s exercise or non-exercise of the power to adjust unless the court determines that the decision was an abuse of the trustee’s discretion. If a court determines that a trustee has abused its discretion, the court may place the income and remainder beneficiaries in the positions that they would have occupied if the discretion had not been abused. TEX. PROP. CODE § 116.006(c). If the trustee reasonably believes that one or more beneficiaries will object to the exercise of a discretionary power, the trustee may petition the court to determine whether the proposed discretionary act will result in an abuse of the trustee’s discretion. TEX. PROP. CODE § 116.006(d). In such a suit, the trustee is directed to advance from the trust principal all costs incident to the judicial determination, including attorney’s fees of the trustee, any beneficiary who is a party and any guardian ad litem. At the conclusion of the proceeding, however, the court may award costs and attorney’s fees as the court deems to be “equitable and just” as provided in Texas Trust Code Section 114.064, including awarding costs against the trust, a beneficiary and/or the trustee in its individual capacity if the court determines that the trustee’s exercise of the discretionary power would have resulted in an abuse of discretion or that the trustee did not have reasonable grounds for believing that a beneficiary would object.

The remaining sections of the Uniform Principal and Income Act generally provide for allocation of specific receipts and disbursements between income and principal. For a detailed discussion of these

provisions see Michael J. Cenatiempo, *What Have Six Years of the UPIAs Done, If Anything? Should We “Draft Around,” “Modify,” or Just Punt?*, Advanced Estate Planning and Probate Course, June 23-25, 2010; Debbie Cox, *UPIA Twins*, Advanced Estate Planning and Probate Course, June 9-11, 2004. CHANGES MADE IN 2013 TO DISBURSEMENTS FROM INCOME AND PRINCIPAL – SEE IF UPDATED ARTICLES - GIVES TRUSTEE MORE LATITUDE IN ALLOCATION; E.G. CAN COMPENSATION CAN BE ½ FROM INCOME UNLESS TRUSTEE DECIDES OTHERWISE

*c. There is no “Absolute” Discretion.*

Regardless of the language used in a trust instrument, a trustee’s exercise of discretion in the performance of his duties is always subject to review by Texas courts under an “abuse of discretion” standard. *Corpus Christi Bank & Trust v. Roberts*, 597 S.W.2d 752, 754 (Tex. 1980).

*d. Petitioning Court for Instructions.*

A trustee may seek court clarification of ambiguous terms in the trust instrument or of issues relating to discretionary decisions (other than the trustee’s power to adjust between principal and income, judicial control over which is now provided in Section 116.006). An action may be filed under the Declaratory Judgment Act, Texas Civil Practice & Remedies Code Sections 37.001 et seq. An action also may be filed under Texas Trust Code Section 115.001(a) to:

- (1) construe a trust instrument;
- (2) determine the law applicable to a trust instrument;
- (3) appoint or remove a trustee;
- (4) determine the powers, responsibilities, duties and liability of a trustee;
- (5) ascertain an officary;
- (6) make determinations of fact effecting the administration, distribution, or duration of a trust;
- (7) determine a question arising in the administration or distribution of a trust;
- (8) relieve a trustee from any or all of the duties, limitations, and restrictions otherwise existing under the terms of the trust instrument or of this subtitle;
- (9) require an accounting by a trustee; review trustee fees, and settle interim or final accounts; and
- (10) surcharge a trustee.

## II. TRUST MANAGEMENT AND INVESTMENTS - THE PRUDENT INVESTOR STANDARD

### A. Texas Trust Code Chapter 117 – Uniform Prudent Investor Act (UPIA)

#### 1. Application of UPIA

Effective January 1, 2004, Texas adopted the Uniform Prudent Investor Act (“UPIA”), which is contained in Chapter 117 of the Texas Trust Code. Section 117.003 of the Texas Trust Code provides that a trustee owes a duty to the beneficiaries of the trust to comply with the “prudent investor rule.” The prudent investor rule is a default rule, but the trust’s provisions may expand, restrict, eliminate or otherwise alter the prudent investor rule. TEX. PROP. CODE § 117.003(b). A trustee is not liable to a beneficiary if the trustee acted in reasonable reliance on the provisions of a trust.

#### 2. Standard of Care

Under the prudent investor rule, a trustee is required to invest and manage trust assets just as a prudent investor would. The trustee shall consider the purposes, terms, distribution requirements, and other circumstances of the trust in determining the most prudent way to invest the trust assets. TEX. PROP. CODE § 117.004(a). In satisfying this standard, the trustee shall exercise reasonable care, skill and caution. *Id.* A trustee’s investment and management decisions regarding individual assets should not be evaluated in isolation; rather, an individual investment must be evaluated in the context of the overall investment strategy having risk and return objectives reasonably suited to the trust. Section 117.004(c) identifies eight (8) circumstances among others that a trustee “shall consider” in making investment and management decisions as relevant to the trust and its beneficiaries:

- (1) General economic conditions;
- (2) The possible effect of inflation or deflation;
- (3) The expected tax consequences of investment decisions or strategy;
- (4) The role that each investment plays within the overall trust portfolio;
- (5) The expected total return from income and the appreciation of capital;
- (6) Other resources of the beneficiary;
- (7) Needs for liquidity, income and preservation or appreciation of capital; and
- (8) An assets special relationship for special value, if any, to the trust or a beneficiary.

A trustee may invest in any kind of property or type of investment consistent with the standard of the UPIA. TEX. PROP. CODE § 117.004(e). A trustee, who has special skills or expertise, has a duty to use those

special skills or expertise. TEX. PROP. CODE § 117.004(f).

#### 3. Diversification

Section 117.005 of the Texas Trust Code mandates that a trustee diversify the investments. No guidance is provided regarding what is a proper diversification of investments. If the trustee “reasonably determines that, because of special circumstances, the purpose of the trust are better served without diversifying,” then the trustee is not required to diversify. TEX. PROP. CODE § 117.005. The Comments suggest some possible special circumstances could include tax considerations, ownership of a family business, and securities law issues.

#### 4. Duties at Inception Of Trustee-Ship

Section 117.006 requires a trustee “within a reasonable time after accepting a trusteeship or receiving trust assets,” to “review the trust assets and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements and other circumstances of the trust, and with the requirements of [the UPIA].” TEX. PROP. CODE § 117.006; *see also* RESTATEMENT (THIRD) OF TRUSTS § 92 (2007).

Former Section 113.003, which allowed a trustee to retain property constituting initial trust corpus without regard to diversification, has been repealed. Whether to retain the initial trust assets must be determined in the context of the UPIA’s rules and guidance.

#### 5. Duty of Loyalty

Section 117.007 of the Texas Trust Code provides that a “trustee shall invest and manage the trust assets solely in the interest of the beneficiaries.”

#### 6. Duty of Impartiality

“If a trust has two or more beneficiaries, the trustee shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries.” TEX. PROP. CODE § 117.008; *see also* RESTATEMENT (THIRD) OF TRUSTS § 79 (2007). In particular, if multiple beneficiaries in succession of one another and the rights of such beneficiaries are “defined with reference to trust income,” as part of the trustee’s duty of impartiality, the trustee must invest and administer the trust such that the trust estate will produce income reasonably appropriate given the trust’s purposes of the trust and the diverse present and future interests of the trust’s beneficiaries. RESTATEMENT (THIRD) OF TRUSTS § 79(2) (2007).

### 7. Investment Costs

A trust must consider costs associated with its investments and only incur those costs that are reasonable and appropriate in light of the assets, the trust's purposes, and the trustee's skills. TEX. PROP. CODE § 117.009.

### 8. Reviewing Compliance

"Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight." TEX. PROP. CODE § 117.010.

### 9. Delegation of Investment And Management Functions

Under prior law, a trustee was permitted to delegate investment and management functions, but the trustee remained primarily responsible for the activities of the trust. Section 117.011 permits the trustee to avoid liability for the actions of the trustee's agent if such duties are properly delegated.

#### a. *Duties When Delegating*

"A trustee may delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances." TEX. PROP. CODE § 117.011(a). The trustee must use "reasonable care, skill and caution in (1) selecting an agent; (2) establishing the scope and terms of the delegations, consistent with the purposes and terms of the trust; and (3) periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation."

#### b. *Duty of Agent*

An agent to the fiduciary assumes the statutory obligation to the trust to exercise reasonable care to comply with the terms of the delegation. TEX. PROP. CODE § 117.011(b). Further, in accepting the role of agent to the trustee, the agent submits to the jurisdiction of the courts of the State of Texas. TEX. PROP. CODE § 117.011(d).

#### c. *Avoidance of Liability*

A trustee, who delegates investment and management functions in accordance with Section 117.011(a), is not liable for the decisions or actions of the agent, provided that:

- (1) the agent is not an affiliate of the trustee, or
- (2) the agent does not have a binding arbitration clause in its agreement and the generally applicable statute of limitations under Texas law for any action against the agent is not shortened. TEX. PROP. CODE § 117.011(c).

### 10. General Standard of Prudent Investment Under Restatement

Section 90 of the RESTATEMENT (THIRD) OF TRUSTS (2007) provides for a "general standard of prudent investment" in which it espouses the following fundamental principles to prudent investing:

#### a. *Prudent Investor*

The trustee has a duty to invest and manage the trust assets as a prudent investor in consideration of the purpose, terms, requirements for distribution, and other circumstances of the trust.

#### b. *Diversification*

Trustees have a duty to diversify the investments of the trust estate, unless it would not be prudent to do so given the circumstances.

#### c. *Risk/Return Analysis*

Trustees "have a duty to analyze and make conscious decisions concerning the levels of risk appropriate to the purposes, distribution requirements, and other circumstances of the trust they administer."

#### d. *Cost Avoidance*

Trustees have a "duty to avoid fees, transaction costs and other expenses that are not justified by needs and realistic objectives of the trust's investment program."

#### e. *Balancing*

A Trustee has the duty (because of the duty of impartiality) to balance the elements of return between production of current income and protection of purchasing power.

#### f. *Delegation*

A Trustee may have a duty (as well as having the authority) to delegate some of his investment duties, as a prudent investor would.

## III. EVALUATION OF TRUST ESTATE

### A. **Initial Evaluation**

Upon accepting a trust, the trustee must promptly review all trust investments. Although it may take a trustee a significant period of time to fully evaluate all assets and to dispose of assets that are not appropriate for the trust estate to retain, the trustee should perform an immediate review of the trust assets to spot potential problems and to take steps to begin dealing with the problems. In the case of a corporate trustee, the Comptroller of the Currency Regulations requires that a national bank review the account in advance of accepting the role as trustee to determine whether it can administer the account properly. 12 C.F.R. § 9.6(a). Once accepted, a national bank trust department must make a prompt review of the assets to



determine their appropriateness and each year thereafter. 12 C.F.R. § 9.6(b)-(c).

### **B. Review of Prior Trustee's Actions**

Section 114.002 of the Texas Trust Code provides that a successor trustee is liable for a breach of trust by a predecessor trustee only if he “knows or should know of a situation constituting a breach of trust committed by the predecessor” and the successor permits the breach to continue, fails to make reasonable effort to compel the predecessor trustee to deliver trust property, or fails to make reasonable efforts to compel the predecessor trustee to redress a breach of trust. In trusts in which there have been conflicts between the beneficiary and the trustee (or other beneficiaries), including litigation with regard to a trust estate, the trustee may find it advisable to obtain a judicial settlement of the trust accounts. More frequently, this is an expense that seems excessive to impose on the trust estate. In those cases, the trustee may ask all of the beneficiaries to consent to not obtaining a judicial settlement of accounts, even if the trust instrument itself contains exculpatory clauses that authorize a trustee to accept a predecessor's accounts. If the former trustee is resigning, the beneficiaries should approve the resigning trustee's actions and relieve the successor trustee of any responsibility for reviewing the prior trustee's actions. The trustee should review the predecessor trustee's accounts in any event and verify that there do not appear to be any improper transactions. A judge or jury may find that a successor trustee who fails to take any steps to review prior accountings, and the acts of the trustee as reflected on the accounts, “should have known” of the information or breaches of trust which were contained in those accounts.

### **C. Periodic Evaluation**

The trustee should review the trust estate on a periodic basis, but generally at least once a year. A review of the trust estates includes the trust investments, performance, projected cash flow, distribution levels and needs of the beneficiaries. Regular and prudent review may protect the trustee from liability. A bank administering a trust which declined in value from \$940,000 to \$93,000 in a three- year period was found not liable for the loss. The bank was protected by its extensive records, which showed the trust was reviewed on over 40 occasions during that period, and several meetings were held with the beneficiaries. *Stark v. U.S. Trust Co. of New York*, 445 F. Supp 670 (S.D.N.Y. 1978).

### **D. Evaluation of Assets**

The trustee should evaluate the entire trust corpus for asset diversification and allocation. The trustee should keep or bring the trust estate into conformity

with the investment policy (discussed in Section V) determined by the trustee. The trustee should develop a plan for liquidation and shifting of assets among categories over a period of time, to effectively implement the trustee's investment policy.

## **IV. SPECIAL ISSUES WITH TRUST ASSETS**

### **A. Real Estate**

#### **1. Environmental Risk Evaluation**

The trustee should take steps to evaluate and minimize any potential environmental risks associated with holding real estate. A full discussion of environmental risks and possible steps that can be taken to minimize that risk is beyond the scope of this article, but the trustee should take steps to identify any environmental exposure, minimize that exposure and set up procedures to avoid environmental problems arising in the future. Potential protective environmental actions include carefully selecting the tenants and managers responsible for maintaining property (including the financial ability of those persons to rectify any environmental problems created by them), performing environmental audits, and carefully drafting property management and lease agreements to deal with environmental issues. With regard to property that the settlor or another party desires to add to the trust, or which may be purchased by the trustee at a later date, the trustee should perform due diligence before accepting or purchasing the property, to insure that the trustee is not taking on environmental liabilities and thus exposing the remainder of the trust estate to liability. In some cases, taking these steps may also give the trustee a defense that will prevent the imposition of liability on the trustee or the trust estate, even if environmental contamination is later found to exist. An excellent discussion of a fiduciary's risks and possible defenses in the environmental area can be found in *Environmental Liability*, by Michael L. Graham and Philip M. Lindquist, Advanced Estate Planning and Probate Course, 1992.

**2. Evaluation of Casualty and Liability Insurance** The trustee should confirm that there is current and appropriate casualty and liability insurance for all real estate owned by the trust. The trustee should reach each policy in its entirety to ensure that each policy's coverage will be effective and adequate. Any exclusions to the policy's coverage, such as vacant dwellings, should be noted and carefully considered.

#### **3. Review of Lease Terms and Their Compliance**

Each lease on each piece of real property owned by the trust should be read in its entirety. The trustee should make note of applicable notice provisions regarding the lease termination date and any notices that may need to be given or received. The books

should be reviewed to confirm that the tenant is paying the proper amount (particularly in a net lease, where taxes or other expenses that are to be borne by the tenant may change). With respect to leases that are nearing their expiration, the trustee should evaluate whether the lease is on market terms and whether to enter into a new lease with the current tenant or actively attempt to lease the property to a new tenant before it becomes vacant. Any improved real estate that is not leased should be carefully reviewed and appropriate steps should be taken to protect the property from vandalism or other damage, to lease the property, if possible, or to dispose of the property, if appropriate.

#### 4. Personal Site Evaluation

The trustee should schedule time shortly after taking over the trust to personally inspect all real property held in the trust. For property located at a great distance from the trustee, the trustee may hire an agent to inspect the property and provide a report of the inspection for the trustee's records. As part of the evaluation, the trustee should consider taking photographs of the interior and exterior of the property. If the property is very valuable (and thus the travel expense can be justified), the trustee should make the inspection personally. An inspection of the property can expose a number of potential problems, such as possible environmental or other hazards that may expose the trust estate to liability, the use of the property by unauthorized persons, lack of compliance by the tenants with lease requirements, maintenance needs, potential zoning changes, and possible changes in the area around the property which may affect the value and use of the property in the future.

#### 5. Review of Property Tax Appraisals

Property tax appraisals from each taxing authority should be reviewed to ensure that the value of the property is not overstated. The trustee should take steps to reduce any overstated values to appropriate levels. Even if the property is specially valued for agricultural purposes, the trustee should nonetheless make sure that the property tax appraisal reflects true value, rather than an overstated value. An overstated value will have an effect on roll-back taxes, if and when the property is sold. The trustee should also verify that the property taxes on the property are current, and that any appropriate exemptions or special use valuations available to the trust estate are being utilized.

### **B. Mineral Interests**

#### 1. Review Division Orders

All division orders should be reviewed to ensure they properly reflect the trust ownership and that the

trust is receiving the royalties and other payments to which it is entitled.

#### 2. Notify Operators and Lessees Of Trust Information And Address

The operators, lessees and other parties who may be making payments as a result of mineral interests (as well as the appropriate taxing authorities) should be notified of the change of trustee and the trust address.

### **C. Business Interests**

The presence of a business interest in a trust estate, whether originally contributed to the trust or purchased by the trustee, presents significant risks and issues for the trustee. An excellent article by Dennis I. Belcher entitled Management of Assets by a Fiduciary: Avoiding Surcharge Litigation, which was presented at the 14th Annual Advanced Estate Planning and Probate Course (1990), gives significant guidance to a trustee with regard to handling business assets in a manner designed to avoid fiduciary liability.

#### 1. Evaluation Of Type Of Interest Held

The trustee should identify the type of business interest held, and the restrictions, voting rights, management rights and other characteristics of the interest held. The trustee should also determine whether the interest is marketable.

#### 2. Review Buy-Sell Agreements, Business Continuation Agreements or Other Shareholder Agreements

The trustee should request and review all buy-sell agreements, voting agreements, business continuation agreements and other shareholder agreements to which the trust is a party, or which impose restrictions on, or give rights to, the business interests held by the trust. The trustee should note the substantive provisions of the documents. Notice of the trustee's current address should be given to the other parties in the manner specified in those documents to ensure that the trustee receives all required notices. In addition, consider having the agreements reviewed by a business attorney to determine whether they are still appropriate to the current circumstances of the trust and, if not, whether those documents can be re-negotiated. In connection with reviewing these agreements, the trustee should also review any insurance on owners or other key employees designed to fund payments under those agreements and should verify that the insurance is in place, is owned by the proper entity, and is payable to the proper beneficiary.

#### 3. Evaluation of Continuation of Business Versus Sale or Winding Down of Interest

In the context of an interest in a closely-held business of which the trust holds a controlling interest,

the trustee's initial determination should be whether the business should be continued, liquidated or sold.

*a. Factors to be Considered in Making Determination*

In determining whether to sell or continue a business, the trustee should take into account the following factors:

- (1) Whether the trustee is authorized under the trust instrument to continue a business;

(Note: Section 113.008 of the Texas Trust Code authorizes a trustee to invest in, continue, or participate in the operation of any business or other investment enterprise in any form.)

- (2) Whether holding the business will allow the trust to be adequately diversified;
- (3) Whether sufficient funds are on hand to operate the business;
- (4) Whether there is a market (or a market can be created) for selling the business interest;
- (5) Whether the expected returns of the business are sufficient to offset the risks associated with the business;
- (6) Whether competent people are running the business, or can be hired to do so at an acceptable cost (a business which has generated a nice income for the founder of the business may not be of sufficient size to provide a reasonable return to the trust estate while also having to pay an outside person to run the business);
- (7) Other pertinent factors.

**4. Structure of Business**

If the trustee decides to continue the business (whether indefinitely or for some winding up period), the current structure of the business should be evaluated and any appropriate changes in structure made. Possible types of entities to be used for business interests include a sole proprietorship, general partnership, limited partnership, limited liability company, and corporations (including S corporations, assuming that the trust will qualify as a QSST under Section 1361 of the Internal Revenue Code of 1986). In making the determination of which entity should be used, the trustee should consider the cost associated with changing the current business structure, limiting the liability of other trust assets to exposure from the business risks, providing the fiduciary appropriate control of the business, minimizing negative income tax consequences, and limiting adverse effects to beneficiaries upon termination of the trust.

**5. Subchapter S ("QSST") Filing Requirements, If Necessary**

If a trust acquires stock in a corporation that will be treated as an S corporation for federal tax purposes, and if the trust is not a grantor type trust for income tax purposes, a QSST election must be made. This election must be filed within 75 days of the date the trust acquires the stock. See Regulations Section 1.1361-1(j)(6)(iii)(A). If the trust cannot qualify as a QSST, the trustee must make a prompt decision whether to dispose of the stock (by sale or distribution) in order to allow the corporation to continue as an S corporation, or to continue to hold the stock, thereby terminating the corporation's S status. Any agreements which may impose liability on a shareholder for terminating the corporation's S-election should be carefully reviewed and evaluated.

Note: If the trustee is also a shareholder of the business, the trustee must put the beneficiary's interests ahead of his own in making all decisions regarding selling or distributing stock to preserve the S election. Any benefits to the trustee derived from retaining S corporation treatment may subject the trustee's action to second-guessing by the beneficiaries and the courts.

**D. Review Cash Accounts**

**1. Insured Accounts**

The trustee should determine whether all cash in bank accounts is within the insured limits in an FDIC insured institution. The current limit is \$250,000 per depositor, per FDIC-insured bank, per ownership category. If not, the trustee should evaluate the strength of the financial entities in which the accounts are held and should take appropriate steps to protect the cash assets of the trust estate.

**2. Interest-Bearing Accounts**

A trustee who fails to maintain all cash funds in interest-bearing accounts may be questioned by beneficiaries at a later date. If the trustee determines that holding operating funds in non-interest-bearing accounts is prudent, records should be kept which indicate the reason for this choice (i.e. monthly fees or other charges would exceed any possible interest earned). Daily "sweeping" of cash in brokerage accounts can be set up, so that as cash is earned or deposited, it is swept into an interest-bearing account.

**3. Excess Cash**

To the extent cash is not needed for the regular trust operations, the trustee should carefully evaluate alternatives to cash, such as short-term debt instruments, certificates of deposits, T-bills and other investment alternatives with high liquidity, minimal volatility and rates superior to those obtained in bank accounts or money markets.

## E. Stocks and Bonds

The trustee should evaluate individual issues of stocks, bonds and mutual funds that may be held by the trust estate to determine whether these should be maintained as investments for the trust estate. Immediate attention should be given to any issues which are known to be “troubled” to determine whether it is prudent to retain those while implementing the investment policy, or whether prompt action is required to sell any such securities.

## F. Life Insurance Policies

### 1. Due Diligence/Investigation of Company

The trustee should perform due diligence to determine whether the company providing the insurance is financially sound. There are several rating agencies for life insurance companies, including A.M. Best Co., Fitch, Kroll Bond Rating Agency (KRBA), Standard & Poors, Moody’s, and Weiss Research. A trustee would be well advised to maintain policies with insurance companies that have high ratings by at least three of the ratings firms. Before purchasing a new policy, the trustee should consider the impact of the “load” (the commissions payable) on the expected performance of the policy, and whether there are comparable policies available with a lower load.

### 2. Appropriateness of Investment in Life Insurance

The Trustee should evaluate whether a life insurance policy is an appropriate asset to hold in the trust. If insurance comprises the entire trust estate (such as with a traditional irrevocable life insurance trust), the trustee may be questioned about his failure to diversify the trust estate. Life insurance policies, over time, have not traditionally performed as strongly as a more traditional well-diversified portfolio. Nonetheless, life insurance may be an entirely appropriate investment to own considering the purposes of the trust. In fact, the grantor of a trust frequently intends the trust to be solely for the purpose of owning such policies, and does not intend, at least until the proceeds are paid, for the trustee to create a diversified trust estate. The trustee, however, is required to look at the overall trust estate (and not the overall estate plan or assets of the grantor) in determining the prudence of trust investments. Barring protective language in the trust instrument, the trustee should, at a minimum, obtain all of the beneficiaries consent to invest solely in life insurance. Consider whether retention of the original policy in the trust estate is protected under Section 113.003 of the Texas Trust Code because the policy was an original trust investment. Even if the policy is an original trust investment, however, the trustee is making an investment decision separate and apart from the original contribution to the trust estate when he uses future contributions to the trust estate to pay additional

premiums on that policy, which could result in liability.

## G. Notes

The Trustee should review all notes due and owing to the trust estate, including determining the current balance due and whether the payments are current or in default. The trustee should also review any security agreements or deeds of trust securing the payments under the note. If the note is in default, the trustee should take steps to get the maker to bring the note current. The trustee should take appropriate action on a note in default before the collection of the note is barred by the applicable statute of limitations. Note: If the note is secured by real estate, any environmental risk should be evaluated before the trustee forecloses upon the property.

## V. DEVELOPING APPROPRIATE INVESTMENT POLICY

### A. Setting the Investment Policy

#### 1. Factors To Consider

An investment policy is a “blueprint” for trust investments and all investment decisions shall be made within the context of that “blueprint.” The policy should assist the trustee in implementing, monitoring and evaluating the trust’s investments. While failure to follow an investment policy may subject a fiduciary to liability if the fiduciary fails to document the reasons for the deviation, liability frequently arises because there is no clearly articulated investment policy. Without an investment policy in place, investment decisions are far too frequently made on an *ad hoc* basis, without adequate thought given to the investment in the context of the overall financial plan for the trust. Since a poor investment policy or an investment policy which is not followed can be used against a trustee, the policy must be prudently developed and should be one that the trustee can and will follow.

#### 2. Information To Be Received Before Setting Investment Policy

In setting an investment policy, the trustee should communicate with the beneficiaries regarding their projected needs for distributions (which will impact the amount of income or cash flow to be generated by the trust, as well as the amount of assets appropriate to hold in cash or similar investments for upcoming distributions), and the beneficiaries’ (including remainder beneficiaries) tolerance for risk. The trustee should also consult with investment advisors or study investment philosophies and trends before developing the policy.

### 3. Components Of Investment Policy

#### a. *Performance Goals*

The trustee should set up a desired long-term rate of return on assets. This would typically be defined as some percentage above the rate of inflation (usually determined by the Consumer Price Index). The goal should be a rate that is achievable and reasonable in light of historical returns of well-diversified portfolios (e.g. 3% to 5% above inflation) and should not be set at a rate that encourages speculative investment, as opposed to a plan of long-term investing for growth and income. For shorter term trusts and trusts which have to generate a certain amount of income to be able to satisfy obligations or distribution needs, the target rate of return may be adjusted downward as appropriate. In setting a performance goal for the trust, the trustee should look at historical long-term performance of various classes of assets. The investment policy should also make note of when those goals may not be achievable. For example, most investment plans indicate that the goals may not be met during extended periods of high inflation.

#### b. *Asset Allocation*

Recent research indicates that the long-term performance of a portfolio is more dependent upon the asset allocation of the portfolio (i.e., how much of the portfolio is invested in each class of asset), rather than upon the performance of the individual assets comprising the portfolio. That is, long-term performance is more influenced by the percentage of the fund devoted to equities versus fixed-income investments, than it is by the individual issues of stock owned by the trust. See *Determinants of Asset Allocation II: An Update*, by Gary Brinson, Brian B. Singer, and Gilbert Beebower, *Financial Analysts Journal*, May/June 1991. The authors reviewed data from 82 pension plans over the period of 1977-1987 in formulating their opinion that an asset allocation policy is the "overwhelmingly dominant contributor to total return." The authors determined that 91.5% of the variation in performance between the pension plan trust funds studied was due to investment policy i.e. asset allocation, and only 8.5% to timing and individual security selection. Asset classes might, when prudent, include cash, fixed-income (including taxable and non-taxable bonds) securities, domestic equities (large companies), foreign equities, small or mid cap equities, real estate, oil and gas interests, and business or venture capital investments. All classes should be evaluated to determine if appropriate and prudent to hold in the trust estate. The trustee should select among the asset classes appropriate for investment by the trust and should determine the percentage of the trust estate to be devoted to each asset class, based on the trust's investment time-frame, the risk tolerance of the beneficiaries, and the trust's

overall performance goals. Some permissible variation among percentages of asset classes may be specified (i.e., domestic large company equities shall comprise 15% of the trust estate, plus or minus 5%). This allows the trustee to adjust percentage holdings when market conditions indicate this is appropriate, without changing the basic investment policy.

#### c. *Guidelines for Investments*

Part of the investment policy should be the establishment of appropriate guidelines for investments in the various asset classes. For example, for bonds the trustee may set minimum quality requirements set by the ratings agencies and maximum maturity periods that will be required for trust investment. Similar criteria should be developed for other asset classes. In addition, setting limits on the percentage of the trust estate invested in any one security (or any one industry) should be specified. The trustee should carefully document any deviations from guidelines and the reasons for that deviation.

#### d. *Procedure for Evaluation of Investments on an On-going Basis*

On a regular basis, the performance of the trust estate should be evaluated against the performance goals set for the trust estate. In doing so, the trustee should stay mindful of the fact that short-term performance may not be indicative of long-term performance. If the trustee adjusts asset allocations and investment approach based on short-term information, the long-term investment plan of the trust estate is likely to be jeopardized. Nonetheless, benchmarks should be used to determine whether the investments are performing well within their particular class. For example, if the equity portion of the portfolio is performing substantially below the S&P 500, the trust portfolio, and the equity manager, if any, should be reviewed, but not necessarily changed (a value-oriented equity manager may under-perform the market in some time-frames and out-perform it in others). If funds are invested with a money manager or a fund that is performing at levels significantly below other funds or money managers with similar philosophies and goals, the fund or money manager should be reevaluated. For small companies, performance can be compared to the New York Stock Exchange Small Capitalization Index, the Dimensional Fund Advisors Company Fund, or the Russell 2000. The Morgan Stanley EAFE Index can be used for foreign equity performance comparisons. Bond indexes are more varied, due to different maturities, backing and infrequency of trading. Nonetheless, Smith Barney Shearson, Salomon Brothers World Equity Index (SBWEI) or others may be used for fixed-income comparisons. Tax-Exempt bonds can be compared to the Bond Buyer Municipal Index.

Donoghue's Money Market Index can be used for money market comparisons.

## VI. IMPLEMENTING THE INVESTMENT POLICY

### A. Investment Consultants, Advisors and Managers

#### 1. Advisability of Hiring

The cost of hiring investment consultants, advisors, or money managers may be an unnecessary expense for a trustee of a small trust with limited assets to invest or for the trustee with significant investment expertise. For trusts with substantial assets, however, unless the trustee is willing to spend significant amounts of time on the trust investments and has the expertise necessary to analyze the investments, the requirement of prudence may necessitate hiring persons or entities to assist with devising and implementing the investment policy. In fact, the RESTATEMENT (THIRD) OF TRUSTS takes the position that in order to conform to the prudent-man standard, in some circumstances the trustee may be required to obtain professional investment advice or delegate investment authority as a prudent man would. *See* RESTATEMENT (THIRD) OF TRUSTS § 90, cmt. j (2007).

#### 2. Cost of Professional Advice

Careful attention should be paid to the cost associated with obtaining professional advice and/or money management. Wrap accounts and similar arrangements that layer several types of investment fees may generate fees of 3% or higher on the investment assets. The trustee should carefully consider whether the anticipated returns from using such an arrangement will be large enough to make up the expense differential as compared to other alternatives.

#### 3. Selecting the Advisor

If the trustee determines that it is advisable to obtain professional advice in some form, the trustee should take steps to ensure that the selection of the advisor is prudent. This would normally include obtaining a number of referrals to brokers, investment consultants, and/or money managers. It is advisable for the trustee to interview several of these individuals to be certain that the trustee is selecting an advisor with a similar philosophy, who understands the parameters of the trust, and the needs and philosophy of the trustee. The trustee should also review the advisor's performance data. The trustee should be cautious in selecting advisors who obtain their compensation by commissions on products sold, rather than those whose fees are based on hourly rates or percentage of assets under management. Although many provide quality investment advice, there are also a number of individuals and entities who offer "financial and

investment services," when in fact they are merely salesmen or sales organizations for particular products.

#### 4. Issue of Impermissible Delegation

##### a. Duty Not to Delegate

Section 113.018 of the Texas Trust Code provides that a trustee "may employ attorneys, accountants, agents, including investment agents, and brokers reasonably necessary in the administration of the trust estate." (The 2017 legislature added the "investment agent" to the list of acceptable persons a trustee may employ.) A trustee cannot, however, hire agents or otherwise delegate authority to a third person to carry out the trustee's powers that require the exercise of discretion on the part of the trustee. *King v. Tubb*, 551 S.W.2d 436 (Tex. Civ. App. 1977, writ ref. n.r.e). Previously, the general rule was that a trustee must *not* delegate the administration of the trust or the performance of acts that the trustee could reasonably be required personally to perform, making the idea of non-delegation the norm. AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 17.3 (5th ed. 2007). More recently, the idea of delegation has been more readily embraced such that a trustee may now be under a duty to delegate that which the trustee cannot prudently undertake personally. *Id.*

##### b. The Restatement View

Section 80 of the RESTATEMENT (THIRD) OF TRUSTS provides "a trustee has a duty to perform the responsibilities of the trusteeship personally, except as a prudent person of comparable skill might delegate those responsibilities to others. In deciding whether, to whom, and in what manner to delegate fiduciary authority in the administration of a trust, and thereafter in supervising or monitoring agents, the trustee has a duty to exercise fiduciary discretion and to act as a prudent person of comparable skill would act in similar circumstances."

##### c. Ability of Texas Trustee to Delegate Investment Decisions

Under the Texas Trust Code, the trustee may delegate investment decisions provided the trustee uses reasonable care, skill and caution in selecting the agent, establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust, and regularly monitoring the agent's performance. The trustee cannot select an agent whose contract contains a binding arbitration clause. Since most national brokerage companies' account agreements contain binding arbitration clauses, they must be carefully scrutinized. The agent should also put in writing that it recognizes its duty to the trust to exercise reasonable care to comply with the terms of the delegation and that by accepting the delegation, it submits itself to the jurisdiction of the Texas courts.

## B. Mutual Fund Investments

### 1. Advantages

One method of obtaining professional investment management at a reasonable cost may be through purchasing shares of mutual funds. It may not be cost-effective for trusts under \$250K (or \$500K for many money managers) to utilize an individual money manager. Since mutual funds are managed by professional money managers, the purchaser of the fund shares gains the benefit of that expertise. In addition, the utilization of mutual funds provides one of the primary components of prudent investing, which is diversification. A trust estate which is too small to cost-effectively diversify on its own (i.e., does not have enough funds to buy the number of stocks and other investments necessary to comprise a well-diversified portfolio) can nonetheless acquire a well-diversified portfolio by holding shares in a mutual fund or funds.

### 2. Cost

A mutual fund with costs and 12b-1 expenses in excess of similar mutual funds must out-perform those funds in an amount sufficient to overcome those higher costs and expenses. A trustee should carefully evaluate funds with high expenses before purchasing those funds and should give careful consideration to similar funds with lower costs. Similarly, a fund must out-perform other funds significantly if it has a front-end load (a sales charge) or back-end redemption cost. The impact of those costs on long-term performance should be carefully reviewed by the trustee before purchasing a “load” fund versus a “no-load” fund. In general, brokers (at least at full-service brokerage firms) can only purchase funds with loads. Therefore, the trustee needs to do independent research if the trustee is using a full-service broker for the other investment purchases of the trust and should make the investment in mutual funds directly with the fund, so that the trust estate has access to the no-load funds. Another alternative (which has the benefit of providing a consolidated statement reflecting all the mutual funds held by the trust) is for the trustee to purchase no-load funds through a discount broker such as Charles W. Schwab, which will purchase no-load mutual fund shares for a set dollar fee (and will purchase shares in certain families of funds for no fee). Since discount brokers do not provide investment advice, this will still require independent research by the trustee.

### 3. Selecting The Funds

In selecting a mutual fund, the trustee should evaluate the long-term performance (as well as the recent performance compared to other similar funds) of the fund in question. The trustee should also look at the volatility of the fund in question. An aggressive fund which stays fully invested at all times may perform very well over the long-term, but with greater

fluctuations (and thus greater downside risk) over the shorter term. For a trust with a twenty-year time horizon, this fund may be an appropriate investment, but may not be an appropriate investment for a trust with a two to three-year time horizon, when the trustee might be required to sell in a “down” market. A number of publications provide annual “report cards” or evaluations of mutual funds as well as ongoing evaluations on their websites. These include U.S. News, Morningstar, Forbes, American Association of Individual Investors, Money Magazine, and other investment and business journals. Mark Hulbert’s website, hulbertratings.com, rates the performance of investment advisory newsletters.

### 4. Types And Number Of Funds

Although a mutual fund is diversified in terms of holding a number of individual securities, a mutual fund typically is not invested in all asset classes in which a trustee may find it appropriate to invest trust funds. Therefore, multiple mutual funds may be used. For example, the trust estate could be diversified among the following types of funds: a small-cap or large-cap mutual fund, a fund specializing in more mature (but still growth oriented) companies, a growth fund, a fund specializing in foreign equities, a fund specializing in income-oriented equities (utilities, oil and gas companies, and other high yield companies) and a fund specializing in fixed-income investments (or possibly several different funds specializing in fixed-income securities, with different maturity ranges). Likewise, funds having managers with different philosophies can be utilized.

5. Combining Funds With Individual Securities Even if a trustee is purchasing individual securities for the trust estate, the trustee may want to use mutual funds for some of the asset classes. For example, even if the trustee is comfortable with his ability as a prudent investor to invest in domestic securities, the trustee may want to use mutual funds for the foreign equities portion or the small cap portion of the trust estate.

## C. Index Funds Solution

Another possibility (and one that seems to be favored by the RESTATEMENT (THIRD) OF TRUSTS) is for the trustee to purchase index funds that track major stock exchanges or public listings of publicly traded stock such as the S&P 500, the Wilshire 5000, the Russell 2000, the Value Line Composite, the Bloomberg Barclays US Aggregate Bond Index, etc. This assures that the trustee will not “under perform” those indexes by more than the expenses of the fund in question. The Vanguard family of funds (a no-load family of funds with low expense ratios) offers numerous index funds. Other families of funds offer

index funds as well. Once again, the trustee must take care to allocate the trust estate appropriately between the various fund types.

#### **D. Regular Review of Portfolio and Performance**

The trustee should set a procedure for periodic review of the portfolio and its performance.

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Section 9.6 require a national bank trust department to review all investments *at least* once a year. Non-corporate fiduciaries would be wise to follow the same guidelines (at a minimum). The size and complexity of the trust estate may determine the frequency of the review. Yearly or more frequent reviews can help spot small problems before they develop into major ones and will give the trustee the opportunity to readjust the portfolio as appropriate and in keeping with the investment policy. If a particular asset class has experienced significant appreciation as compared to the other asset classes, the trustee should use the periodic review as an opportunity to sell some of the investments within that asset class, to bring the portfolio asset classes back within the investment policy parameters. The investment policy itself should articulate how frequently the portfolio review and reallocation among assets will occur. Underperforming investments or money managers should also be reviewed and changed, if appropriate.

### **VII. DISTRIBUTION GUIDELINES AND POLICIES**

#### **A. Provisions of Trust Instrument**

The importance of reading and re-reading the trust instrument with regard to distributions cannot be overstated. The trust agreement should be read when the trustee initially begins serving, and also at each yearly review of the trust. In addition, the trustee should review the distribution provisions of the trust at any time a distribution request is being evaluated. The trustee should not only review the portion of the trust which actually grants the distribution powers, but should also review the entire trust instrument for other statements and clauses which indicate the settlor's intent with regard to distributions and the relative priority or preference to be given to beneficiaries.

#### **B. Discretionary Distributions**

##### **1. Extent of Discretion Granted**

The trustee should determine the extent of discretion and the limits on discretion granted to him under the terms of the trust document. Even if the trust instrument uses terms such as "absolute," "sole" or "uncontrolled" to describe the discretion granted to the trustee, the Trust Code requires the trustee to exercise discretion in "good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries." *See* TEX. PROP. CODE § 113.029. Thus,

the trustee may not have total and unqualified discretion. In general, however, a court will not substitute its judgment for that of a trustee, so long as the trustee is acting in good faith, from proper motives and within the bounds of reasonable judgment. *AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS* § 18.2 (5th ed. 2007); *RESTATEMENT (THIRD) OF TRUSTS* § 87 (2007).

##### **2. Monthly or Periodic Distributions**

If a trust provides that distributions are to be made for a beneficiary's health, education, maintenance and support (or other purposes), the trustee, after receiving information from and consulting with the beneficiary, may find it less cumbersome to set a monthly or quarterly allowance rather than paying the expenses of the beneficiary directly or only upon request. In setting the allowance, the trustee should consider the income of the beneficiary (and **must** consider the income, if required by the document), the beneficiary's monthly budget of expenses (and the reasonableness of the monthly budget) and proof of expenses. In addition, the trustee should evaluate whether the trust will be able to continue providing that level of support and maintenance for the beneficiary for as long as the trust is required to do so (i.e. for the beneficiary's lifetime) or whether making distributions at that level will require invasions into corpus which will ultimately deplete the trust's ability to provide for the support of the beneficiary. The trustee should document the facts and circumstances and the basis for its decision to make or not to make distributions at a certain level. Trusts which allow a trustee to look at a beneficiary's needs in light of his or her accustomed standard of living may give the trustee additional guidance. If the beneficiary's budget includes items that are reasonable support for that beneficiary in light of his or her accustomed standard of living (such as expensive vacations, clothing or club dues), the trustee should maintain records reflecting that these are similar to the expenses previously incurred by the beneficiary. The trustee should retain in its records the beneficiary's request for the periodic allowance and the amount requested. The trustee should also retain the beneficiary's personal income tax returns, proof of expenses, and budgets submitted by the beneficiary in the file. The allowance should be reviewed periodically (at least annually) and, the actual expenses of the beneficiary over that time period should be confirmed. Updated information and change in circumstances should be recorded in the file.

If a minor is a current beneficiary of the trust, special consideration must be given to the parent's legal obligation to support the child. Under Texas Family Code Section 151.001, a parent of a minor child has the duty to provide the child with clothing, food, shelter, medical and dental care, and education.



A parent who fails to discharge the duty of support is liable to anyone who provides necessities to the minor child. Distributions from a trust of which a minor is the beneficiary that discharge a parent's support obligation primarily benefit the parent, rather than the child. Unless the trust instrument expressly provides otherwise, a minor beneficiary's support should be provided by the parents rather than the trust.

### 3. Additional Distributions

In addition to a periodic allowance or distribution amount, the beneficiary may make requests for additional discretionary distributions. All such requests should be made in writing by the beneficiary and retained in the trustee's file. If a request is made orally, and time requirements are such that the beneficiary cannot deliver to the trustee a written request, the trustee should obtain confirmation of the beneficiary's request in writing from the beneficiary as soon as possible after the distribution is made. In addition, the trustee should keep records of the telephone conversation or conference at which the request was made.

### 4. Communicating Distribution Decisions

Although the trustee's relationship with the beneficiary will be more comfortable (at least in the short term) if the trustee is able to grant all of the beneficiary's requests, this is not always possible. For example, if a beneficiary, who is intended by the trust estate to be supported for lifetime, is requesting distributions at a level that will deplete the trust estate, or if one beneficiary is requesting distributions to the detriment of other beneficiaries, the trustee may be required to reject one or more distribution requests. If the trustee does an adequate job of explaining to the beneficiary, from the outset, the purposes of the trust and the funds available in the trust to satisfy those purposes, the trustee can further explain to the beneficiary in a meaningful way the reasons that a requested distribution cannot be made. Unless the beneficiary is a minor, the beneficiary deserves (and ultimately will demand) to be treated as an adult. The trustee who is willing to spend the time and effort to ensure that the beneficiary understands both the benefits of the trust and the constraints that the trustee is operating under, and is able to present those to the beneficiary in a non-condescending and non-arbitrary manner, will find the beneficiary to be more reasonable in the requests that the beneficiary makes, as well as in response to the trustee's denial of requests. A correlation between the level of communication and involvement of beneficiaries and their satisfaction level was found in a recent study of twenty-two full-service banks and the satisfaction of their trust beneficiaries. Those beneficiaries who were "highly satisfied" noted that they "often tended not to agree with the decisions

of the trust administrator. Nonetheless, they recognized the 'bind' he or she is in." This is important to the trustee, since "highly-satisfied" beneficiaries are much less likely to institute legal action against a trustee.

### 5. Responsiveness

The trustee should have an internal policy on how quickly the trustee will respond to the distribution requests of a beneficiary. A beneficiary who waits several weeks or months to receive a response of any sort from the trustee with regard to a request will question whether the trustee is devoting the proper attention to the trust estate and the beneficiary's needs. This is especially true if the response is ultimately a negative one. Although major changes in distribution patterns or significant special distribution requests may require additional time in terms of obtaining the documentation necessary from the beneficiary, and evaluating the ability of the trust estate to satisfy that distribution request, the trustee should nonetheless promptly (certainly within ten days, unless the distribution request is of the nature that requires a more urgent response) discuss with the beneficiary the request, the additional information that will be needed and should set a time for a definite response to the request.

### 6. Tax Impact

The trustee should take into consideration the tax impact that distributions from a particular trust will have. For example, if trusts are created for children and grandchildren, some of which are grandfathered or otherwise exempt from generation-skipping taxes and others of which are not, the trustee should obviously strive to make distributions to the children's generation (as well as distributions to the grandchildren for tuition or medical expenses that will also be protected from those taxes), from the non-exempt trust while reserving the exempt trust (where possible) to the grandchildren and younger generation beneficiaries. Likewise, a trustee should generally make distributions to a surviving spouse from a marital trust that will be included in the spouse's estate, before making distributions to the spouse from a bypass or credit trust.

### C. Proper Weighing of Beneficiaries Interests

The trustee of a trust that has more than one beneficiary, whether the beneficiaries are current beneficiaries or have successive interests in the trust, must attempt to properly weigh the interests of the various beneficiaries. Obviously, if the settlor has provided that one beneficiary should have priority (such as a surviving spouse) the trustee should take this into account and give priority to that beneficiary. In other trusts, the trustee must consider the ability of the trust estate to provide for all of the beneficiaries and

carefully weigh the distributions to beneficiaries in light of their various interests. The trustee should document and make notes on reasons for making or denying distributions to beneficiaries and should reflect the rationale for the decision. Courts will not “step into” the shoes of a trustee to alter or question a discretionary decision for the trustee in most cases. If there is no evidence that the trustee has in fact, however, considered the various issues appropriate to the decision, if the decision appears clearly arbitrary, or if the communications to the beneficiary are harsh or poorly thought-out, then a court is far more likely to substitute its judgment for the judgment of the trustee, and to find that the trustee acted improperly.

#### **D. Loans to Beneficiaries**

A trustee may consider loaning funds to a beneficiary for certain purposes instead of making a distribution for those purposes. In a multiple beneficiary or “pot” trust this is sometimes seen as a way to satisfy a beneficiary’s needs, without giving one beneficiary “too much” of the trust estate. For a trust that will divide into shares at some date (i.e. a surviving spouse’s death, or when the youngest child reaches a certain age), it is sometimes intended that the loan will simply be offset against the beneficiary’s ultimate share. The trustee should be as cautious about making loans to beneficiaries as making distributions. Before loaning trust funds, the trustee should first determine if the trust document permits loans to beneficiaries. If permitted, the trustee should evaluate the security for the loan and the beneficiary’s ability to repay the loan. Too often decisions to loan funds to beneficiaries in fact become decisions to make a distribution because the beneficiary can’t or won’t repay the loan. The trustee who loans trust funds to a beneficiary must be prepared to deal with default, if it occurs. All loans should be properly evidenced by a note and include any appropriate security agreements executed as well.

### **VIII. ACCOUNTING**

#### **A. Duty to Prepare Accounts**

##### **1. Texas Trust Code**

Section 113.151 of the Texas Trust Code states that a beneficiary has the right to demand a written statement of accounts covering the trust’s transactions. If the trustee fails or refuses to provide an accounting, the beneficiary may go to court to compel the trustee to provide an accounting. Except in unusual circumstances, however, the trustee is not required to provide an accounting more frequently than once every 12 months. An “interested person” can also file a suit to compel an accounting, which includes any person having an interest or claim against the trust or any person who is affected by the trust’s administration in

addition to a trustee and beneficiary. TEX. PROP. CODE § 111.004(7).

##### **2. Statute of Limitations**

An action against a Trustee for breach of fiduciary duty and most other actions must be brought within four years after the day the cause of action accrues. TEX. CIV. PRAC. & REM. CODE §§ 16.004, 16.051. The statute may not begin running until the facts constituting a cause of action are discovered, however. In addition, the statute may be tolled during a beneficiary’s minority or disability. Thus, it is important that the trustee retain all trust records from the time the trustee begins administering the trust (together with any accountings or records supplied by any predecessor trustee). In addition, it is important that the trustee’s annual accountings contain enough detail about the transactions that have occurred to put the beneficiaries on notice of the trustee’s acts. If a transaction has been fully disclosed in an accounting, the accounting may be used to bar claims made as a result of the transaction, if four years have elapsed.

##### **3. Contents of Accounting**

Section 113.152 provides that a written statement of accounts must show: (1) the trust property that has been received and was not previously listed in a prior accounting, (2) a list of receipts and disbursements, allocated between income and principal, including their source and nature, (3) an adequately described list of all property being administered, (4) cash accounts, their balance, and where they are deposited, and (5) a list of all known trust liabilities. TEX. PROP. CODE § 113.152. In the interest of providing full disclosure to the beneficiary, it may be necessary to provide more than a “bare bones” accounting. First of all, the accounting should be in understandable form and should include any information necessary for the recipient of the accounting to get a complete picture of the trust administration during the time period covered. The detail required on an accounting and the amount of time required to prepare the accounting will depend on the nature of the trust assets and the activity (receipts of income, sales of assets, investments, payment of expenses and distributions to beneficiaries) of the trust.

##### **4. Accounting for Smaller Trusts**

An accounting for a trust that has limited assets and few distributions can be quite simple, but it nevertheless should be prepared and distributed to beneficiaries on an annual basis. For a trust that holds its property in a money market account or in mutual funds, it may be sufficient to simply provide the beneficiary with the bank or mutual fund statements. If the bank or mutual fund sends out a yearly summary, this can be used. Otherwise, each month’s account statements should be collected and sent regularly. If

expenses have been paid out or distributions have been made, copies of checks should be included, with sufficient notation in the memorandum section of the check to fully describe the purpose of the expenditure or distribution. For simple trusts with more than one asset, the trustee may want to use a statement of accounts that is more detailed but can be prepared on a one-or-two page form. If multiple mutual funds are to be held, for ease in record-keeping, the trustee may want to buy these through a discount broker such as Charles Schwab, which will purchase no-load funds for a small cost (or at no cost for some families of funds), so that all accounts will be consolidated on one statement. If few transactions are involved, a simple handwritten or typewritten summary can be prepared.

#### 5. More Complex Trusts

For trusts that have a number of properties or trusts that are engaging in many transactions during the year, the trustee must have a system that is adequate to properly record and reflect these transactions. The trustee may consider hiring an accountant or trust attorney to prepare annual accounts in these circumstances. Alternatively, (or in addition) the trustee may utilize a computer program to adequately prepare the accounting. Even when an accountant is used to provide tax advice for the trust estate or to prepare the final accounting reports and tax returns for the trust, the trustee would be well advised, in a trust with numerous transactions, to utilize a computerized accounting package to keep a record of all of the transactions. These can be delivered to the accountant. There are various computer programs that a trustee could use to perform its accounting functions.

### **B. Frequency and Distribution of Reports**

#### 1. Annual or More Frequent Reporting

Reports should be prepared at least annually. Even if the beneficiaries do not request yearly accountings, the trustee should prepare the accounting each year as a matter of course. For larger trust estates, with many transactions, quarterly reports may be advisable.

#### 2. Distribution of Reports

For any minor or incapacitated beneficiary, the report should be delivered to the parent, guardian or person having custody of the minor or incapacitated individual. The trust instrument should be reviewed for report requirements and the trustee should comply with any specific provisions regarding the timing and distribution of reports.

### **C. Audited Financials**

In most trust estates, the annual accountings will not be audited. For a large trust estate, however, or for a trust estate with litigious beneficiaries, the trustee

may determine that the expense of providing the beneficiaries with audited financials is justified.

### **D. Summary of Important Trust Transactions and Projections**

When the accountings are distributed and sent to the beneficiaries, the trustee should include a written summary. If significant transactions (i.e. sales of major assets, significant changes in the trust estate, significant changes in value, etc.) occurred during the trust year, the trustee should give details on those. The summary should also include information regarding the performance of the trust over the past year. The trustee may also want to include information about the trust performance over a longer period of time. The trustee should also summarize any actions that are foreseen in the course of the upcoming year. For example, if the trust is selling or plans to sell a major asset or make a major investment, this should be noted in the summary. If the trustee is still in the process of implementing the investment policy, the trustee should inform the beneficiaries of the additional investments and sales that are likely to be made during the course of the year to implement the policy.

## **IX. RECORD KEEPING**

### **A. Tickler Calendar for Important Dates**

A trustee must keep track of recurring events requiring action. These would include, among other things, due dates of payments that must be made by the trust, tax returns or filings that must be made, mandatory distribution dates and termination dates. In addition to monthly, quarterly or annual reminders, the trustee should set up reminders for events to occur in future years. If the trustee does not have a reliable system to provide reminders in future years, notation of the anniversary date of those events may be made on the current year (e.g. on a calendar note "10 years until trust terminates," then on the next year's calendar, note "9 years until trust terminates").

### **B. Receipts, Bank Statements and Cancelled Checks**

It is imperative that the trustee save all receipts (or billing statements, with the check to be used as a receipt), bank statements and cancelled checks. The trustee should use a checking account or money market account that returns cancelled checks or provides downloadable images for record-keeping purposes. Cancelled checks may contain useful information (especially if the trustee makes a habit of using the memorandum portion of the check), as well as acting as proof of payment. In general, the beneficiary is entitled to inspect the trust bank accounts and "vouchers." In order to be able to satisfy inspection rights of the beneficiary, and to prove that amounts paid were properly paid, the trustee should retain all

receipts, copies of bills paid and other documents which will establish the purpose and propriety of the payment. Retaining all of those documents may also “save” a trustee that has been remiss in the duties of preparing annual accounts. A trust accounting can generally be reconstructed (although sometimes at considerable cost) if all bills, bank statements, deposits slips checks and other records are retained.

### C. Written Broker’s or Advisor’s Reports and Recommendations

Reports and recommendations of brokers and investment advisors should also be retained, since they will help document the trustee’s prudence in buying or selling an investment.

### D. Written Correspondence To and From Beneficiaries and Telephone Memoranda

The trustee should retain a written record of all communication with the beneficiaries. A written record of all communications serves two valuable purposes. First, it helps the trustee reconstruct a history of the trust and provides additional information that may not be immediately reflected from the accountings and other financial documents for the estate. In reviewing the actions that were taken and the reasons for those actions, the records of these communications can be used to help refresh the memory of the trustee and help establish the trustee’s “prudence.” In addition, the natural tendency of a beneficiary who becomes unhappy with a trustee is to develop a somewhat “selective” memory. Retaining written documentation of all communications can assist with refreshing the beneficiary’s memory. The trustee should make sure, however, that his communications are ones that will not haunt the trustee. Hostile, arbitrary or poorly thought-out communications can and will be used against the trustee.

## X. TAX REPORTING REQUIREMENTS

In addition to reporting to the beneficiary, the trustee has a duty to file tax returns with the Internal Revenue Service. 26 U.S.C. § 6012(b)(4).

### A. 1041 ES

A 1041 ES is used to make estimated payments for the trust and must be filed when the trust is required to make estimated tax payments. A trust is required to make estimated tax payments when it: expects to owe \$1,000.00 or more of tax for the year (after subtracting withholding and credits) AND expects its withholding and credits to be less than the smaller of: 90% of the current years tax or 100% of the prior years tax (within certain limitations). An accountant should be consulted regarding the need for filing form 1041ES.

### B. 1041

#### 1. Filing Requirements For Trusts

Internal Revenue Code Section 6012(a)(4) requires a trust with \$600 or more of gross income, or any taxable income, to file a Form 1041 (a fiduciary income tax return).

#### 2. Exceptions To Filing Requirements

Certain grantor-type trusts are not required to file a Form 1041. Generally, a trust is a grantor-type trust if the grantor has the power to control the enjoyment of trust income or is otherwise treated as the owner of the trust under Internal Revenue Code Sections 671-678. Treasury Regulations § 1.671-4(b)(7) sets forth the types of grantor trusts that will **not** be required to file a Form 1041:

- a. Grantor is trustee (or co-trustee) of the trust and grantor (or a non-adverse party) has the power to return the trust property to grantor (such as by revoking the trust).
- b. If grantor and grantor’s spouse are the sole grantors, at least one is a trustee and at least one (or a non-adverse party) has the power to return the trust property to the grantor or grantor’s spouse (such as by revoking the trust).
- c. If a grantor-type trust does not come within the categories described above, a Form 1041 for each year showing the income, deductions, and credits of the trust must be filed. Form 1041 should be completed and a schedule of the trust’s income to the grantor’s individual income tax return - Form 1040.

### C. Notice of Fiduciary Relationship - Form 56

The trustee must notify the Internal Revenue Service of the creation, change, or termination of a fiduciary relationship through Form 56. This form should be filed upon the creation, termination, or change of a fiduciary relationship. This ensures that the IRS will have the proper information on file and that the trustee will receive the notices sent by the IRS (or at least will have a defense if the notice is sent improperly). The form should be filed at the Internal Revenue Service Center where the trust files its tax return.

### D. Taxpayer Identification Number

Form SS-4 is used to obtain a taxpayer identification number for a trust. Any trust that is required to file a tax return must have a taxpayer identification number. The easiest way to obtain an EIN for the trust is to go online to [www.irs.gov](http://www.irs.gov) and select “Apply for an Employer ID Number.”

## E. Generation-Skipping Distributions Form 706 GS(D-1)

If distributions are made to a “skip person,” as defined in Section 2613 of the Internal Revenue Code of 1986, the trustee must report the distribution on Form 706GS(D-1), Notification of Distribution from a Generation-Skipping Trust. This must be filed with the Internal Revenue Service (with Copy B to the distributee) by April 15 of the year following the calendar year of the distribution.

## F. Generation-Skipping Transfer Tax Return for Terminations - Form 706GS(T)

The trustee must calculate and report the tax due from a trust termination subject to the generation-skipping tax on Form 706GS(T) by April 15 of the year following the year in which the termination occurs.

## XI. SELF-DEALING AND OTHER CONFLICTS OF INTEREST

### A. Texas Trust Code Provisions

#### 1. Loans

Section 113.052 of the Texas Trust Code prohibits a trustee from loaning trust funds to the trustee, to an affiliate of the trustee, director, officer or employer of the trustee or affiliate; to a relative of the trustee or to the trustee’s employer, employee, partner or other business associate. If the trustee is also a beneficiary, loans may be made to the trustee/beneficiary only if permitted by the trust instrument.

#### 2. Purchases or Sales

Section 113.053 of the Texas Trust Code prohibits the trustee from selling trust property to or purchasing trust property from, the persons listed in XI.A.1 above. A trustee may, however, comply with the terms of a written contract signed by the settlor.

#### 3. Sale of Trust Assets to Another Trust

Section 113.054 of the Texas Trust Code prohibits a trustee from, directly or indirectly, selling assets from one trust to another trust of which the trustee is also a trustee, unless the assets are bonds, notes, bills or other obligations fully guaranteed by the United States and sold for fair market value.

#### 4. Additional Restrictions

Additional restrictions on corporate trustees are covered in Sections 113.055 (purchase of trustee’s securities), 113.056 (investment in bank-managed funds) and 113.057 (deposits with corporate trustee) of the Texas Trust Code.

### B. Federal Provisions

For national bank trust departments, Comptroller of Currency Regulations prohibits similar transactions

outlined above. In addition, a national bank trust department is prohibited from self-dealing with individuals or organizations that have a relationship with the trustee that may affect the exercise of the best judgment of the trustee in the interest of the beneficiaries. 12 C.F.R. § 9.12. An individual trustee should act as though these restrictions apply as they may be imposed by common law. *See, Risser*, discussed in Section C below.

### C. Trust Instrument Provisions Authorizing Self-Dealing

Following the Texas Supreme Court decision in *Texas Commerce Bank, N.A. v. Grizzle*, 96 S.W.3d 240 (Tex. 2002), the legislature amended Section 114.007 of the Trust Code to prohibit the enforcement of an exculpation clause that would relieve a trustee of liability for a breach of trust committed in bad faith, intentionally or with reckless indifference to the interest of the beneficiary. A trust instrument also may not relieve the trustee for liability for any profit derived by the trustee from a breach of trust.

### D. Some Common-Sense Advice to the Trustee

1. If you have to ask if it creates a conflict of interest, don’t do it.
2. If you will receive a benefit (or if someone could think you will benefit) that you would not if you weren’t trustee, don’t do it.
3. If you think it would look back in front to a judge or jury, don’t do it.
4. If you’d rather not fully disclose it in advance to all beneficiaries, don’t do it.
5. If a beneficiary objects, and a potential conflict exists, don’t do it.
6. Poor judgment is sometimes forgiven by a judge or jury. Self-interest never is.

## XII. RIGHTS AND LIABILITIES TO THIRD PARTIES

### A. Torts

Subject to the rights of exoneration and reimbursement, a trustee is personally liable for a tort committed by the trustee or the trustee’s agents or employees in the course of employment. *See* TEX. PROP. CODE § 114.083. In general, the trustee can obtain exoneration on reimbursement from the trust estate if: the trustee was properly engaged in a business activity and the tort one that is common in that business activity; the trustee is properly engaged in a business activity and neither the trustee nor an officer or employee of the trustee is guilty of actionable negligence or intentional misconduct; or the tort increases the value of the trust property. If, however, the trustee is entitled to exoneration or reimbursement because of an increase in value to the trust property,

the amount of the exoneration or reimbursement is limited to the increased value of the trust property. *See also* TEX. PROP. CODE § 114.062.

#### **B. Contracts of the Trustee**

If a trustee makes a contract in his capacity as the trustee of the trust, and a cause of action arises on the contract, the plaintiff may sue the trustee in his representative capacity and may collect the judgment against the trust estate. In addition, the trustee may be sued individually, if the contract does not exclude the trustee's personal liability. *See* TEX. PROP. CODE § 114.084. That same section of the Texas Trust Code does, however, provide that use of the word "trustee" or "as trustee" after the signature of the trustee is *prima facie* evidence of intent to exclude the trustee from personally liability.

### **XIII. SUMMARY**

The assets of a trust estate, and the circumstances of the beneficiaries, are not static. As a result, the decisions that a trustee is required to make, and the duties imposed upon the trustee, are constantly changing. Nonetheless, a trustee will avoid most of the problems which result in the trustee being sued or having confrontational relationships with beneficiaries, if the trustee: (1) views himself as responsible to all of the beneficiaries, and to the terms of the trust, (2) is able to "step into" the beneficiary's shoes and at least view things from the beneficiary's perspective (even if he does not ultimately agree with it), (3) devotes the time, energy and expertise necessary for the trust estate in question, (4) handles (even if the trust contains exculpatory clauses) the trust estate not only as he would want a trust estate handled for himself, but also as a prudent person would and (5) sets appropriate policies and procedures. If the trustee has not set up adequate procedures and policies with regard to the trust estate, however, or has not followed the policies and procedures that are in place, the trustee is likely to find that he is in effect personally guaranteeing the success of the decisions made. A trustee who is unwilling to take the steps outlined above would be well advised to decline to accept the trusteeship, or to resign as trustee.

## APPENDIX 1

INTERVIEW QUESTIONNAIRE (FOR SELECTING INVESTMENT ADVISOR)

	<u>Yes</u>	<u>No</u>
I. Advice includes:	_____	_____
A. A review of trust and beneficiary investment goals	_____	_____
B. Advice regarding:	_____	_____
1. Management/Budgeting/Accounting	_____	_____
2. Investment review/planning	_____	_____
3. Asset allocation	_____	_____
4. Liquidity needs/cash flow projections	_____	_____
5. Tax planned investments	_____	_____
6. Other:	_____	_____
II. Provide written analysis of trust financial status and recommendations for meeting specific needs of trust estate and beneficiaries?	_____	_____
III. Does advice include recommendation for specific investments?	_____	_____
Does advice include implementation assistance in purchasing investments?	_____	_____
IV. Monitor on-going investments and provide advice and suggestions when situation warrants change?	_____	_____
V. Take possession of or have access to trust assets?	_____	_____
Optional?	_____	_____
Mandatory?	_____	_____
VI. Compensation based on:	_____	_____
Fee only	_____	_____
Hourly rate \$	_____	_____
Flat Fee or %	_____	_____
Commission Only	_____	_____
Fee and Commission	_____	_____
Note: Trustee may want to determine from what source bulk of advisor's commissions are derived and whether advisor has interest in investment	_____	_____
Fee offset (commissions are offset against flat fee)	_____	_____
VII. Investment Advice regarding:	_____	_____
Real Estate Investments	_____	_____
Securities - Equities	_____	_____
Bonds	_____	_____

	<u>Yes</u>	<u>No</u>
Mutual Funds	_____	_____
Insurance Load No-Load	_____	_____
Cash Management	_____	_____
Oil and Gas Investments	_____	_____
Other:		
_____		
_____		
_____		
_____	_____	_____
Attach copy of Advisor's resume, showing education and experience.	_____	_____



APPENDIX 2

TRUST DISCRETIONARY DISTRIBUTION REQUEST FORM

Date: \_\_\_\_\_

Beneficiary: \_\_\_\_\_

Trust Name: \_\_\_\_\_

Trustee: \_\_\_\_\_

Request: (Amount requested, and purpose of the distribution)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Date Distribution Needed: \_\_\_\_\_

Anticipated additional distribution requests in next 12 months: \_\_\_\_\_

\_\_\_\_\_

Attach all relevant information, copies of estimates, or expense statements, if applicable.

Signature of Beneficiary:

\_\_\_\_\_



APPENDIX 3

DISCRETIONARY DISTRIBUTION CHECKLIST

Date: \_\_\_\_\_

Beneficiary: \_\_\_\_\_

Trust Name: \_\_\_\_\_

Trustee: \_\_\_\_\_

Is this a request for discretionary distribution \_\_\_\_\_ or loan \_\_\_\_\_

Funds needed for: \_\_\_\_\_

Date needed: \_\_\_\_\_

Total amount requested: \_\_\_\_\_

From income \_\_\_\_\_ Principal \_\_\_\_\_

How will income generated be affected by this payment, if principal distribution made?

\_\_\_\_\_  
\_\_\_\_\_

What other trust accounts, or outside funds, does the beneficiary have which could be used instead of those requested?

\_\_\_\_\_

List any other potential beneficiaries of this trust and their interest: \_\_\_\_\_

\_\_\_\_\_

Distributions to this beneficiary in prior 12 months: \_\_\_\_\_

\_\_\_\_\_

Distributions to all beneficiaries in prior 12 months: \_\_\_\_\_

\_\_\_\_\_

Income: Attach list

Principal: Attach list

Review income and principal provisions: and attach copy of language

\_\_\_\_\_

\_\_\_\_\_

What are the income tax consequences of this distribution, if authorized?

---

---

What are the estate tax or generation-skipping tax consequences of this distribution, if any?

---

Attach Distribution Request and copies of all relevant information.

Distribution approved: \_\_\_\_\_ Rejected: \_\_\_\_\_

Date: \_\_\_\_\_

Signature of Trustee:

---

APPENDIX 4

AUTHORIZATION FORM FOR LOAN FROM TRUST

Date Requested: \_\_\_\_\_

Name of Beneficiary Requesting Loan:

\_\_\_\_\_

Purpose of Loan:

\_\_\_\_\_  
\_\_\_\_\_

Date Loan Needed: \_\_\_\_\_

Financial Status of Beneficiary: Attach copy of most recent financial statement.

Terms of Loan:

\_\_\_\_\_

Principal Amount of Loan:

\_\_\_\_\_

% Interest \_\_\_\_\_ Collateral:

\_\_\_\_\_

Due Date: \_\_\_\_\_

List Other Outstanding Financial Obligations:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Trust provisions allowing loan:

\_\_\_\_\_

(attach copy of loan)

Loan Granted: \_\_\_\_\_ Loan Rejected: \_\_\_\_\_

\_\_\_\_\_  
Signature of Trustee

\_\_\_\_\_  
Date



## APPENDIX 5

SIMPLE TRUST ACCOUNTING

1. Assets Comprising Trust Corpus at beginning of Accounting Period (list)
 

Total Assets		\$ _____
--------------	--	----------
  
2. Liabilities of Trust Corpus at beginning of Accounting Period (list)
 

Total Liabilities		\$ _____
-------------------	--	----------
  
3. Total Receipts During Accounting Period (list)
 

Income Receipts		\$ _____
Principal Receipts		\$ _____
Total Receipts		\$ _____
  
4. Total Disbursements During Accounting Period
 

Disbursements chargeable to income		\$ _____
Principal Disbursement		\$ _____
Total Disbursements		<\$ _____>
  
5. Reconciliation
 

Total Starting Assets		\$ _____
Total Starting Liabilities		\$ _____
Total Receipts During Period		\$ _____
Total Disbursements During Period		<\$ _____>
Total Trust Corpus at end of Accounting Period		\$ _____





## APPENDIX 6

TRUST ESTATE EVALUATION CHECKLIST

Completion  
Date

1. Real Estate
  - A. Determine necessity of obtaining environmental risk evaluation.
  - B. Evaluate casualty and liability insurance on property.
  - C. If any real estate is leased, review lease terms and tenants compliance with lease terms.
  - D. Personally inspect property.
  - E. Review property tax appraisals for each property. Take steps to reduce overstated values, insure that property taxes are paid current, obtain appropriate exemptions.
2. Mineral Interests
3. Review division orders to ensure that trust is reflected as owner.
  - A. Notify operators and lessees of name and address of trustee.
4. Business Interests
  - A. Evaluate viability of business.
  - B. Evaluate business structure. Are changes necessary?
  - C. Subchapter S filing requirements, if applicable.
  - D. Review buy-sell agreements associated with business as well as business continuation agreements and/or shareholder agreements.
5. Cash Accounts
  - A. Determine if cash in banks is adequately insured.
  - B. Insure all funds maintained in interest bearing accounts. Utilize sweep accounts where appropriate.
  - C. Evaluate alternatives to cash.
6. Stocks and Bonds  
Evaluate individual stocks and bonds.
7. Life Insurance
  - A. Investigate company.

- B. Determine appropriateness of life insurance as trust investment.
  - C. Determine if beneficiary correctly designated.
8. Notes: \_\_\_\_\_
- Insure payments are current, or if in default, determine appropriate action.
9. Portfolio Review
- A. Review investment policy.
  - B. Review asset allocation of trust
  - C. Evaluate performance of assets, advisors and money managers.

APPENDIX 7

SALE OF SIGNIFICANT ASSETS CHECKLIST

I. Beneficiaries Informed

II. Appraisal Obtained

III. Sales Price and Terms

\* Attach records relating to marketing efforts, offers received.



## HANDBOOK FOR THE INDEPENDENT EXECUTOR

### I. INTRODUCTION.

This Handbook is designed to assist you in performing your duties as Independent Executor, by providing you with a resource for reference and general information. We encourage you to use it as a reminder of matters that need to be handled, as well as a springboard for discussion with your attorney. It is not designed to be a comprehensive discussion of the matters involved in an independent administration in Texas, nor is it intended to substitute for legal advice that you should obtain in the course of the estate administration. You should continue to work closely with your counsel and accountants in administering the estate, as each estate will have its own specific issues. There are a few general recommendations for you as you begin your duties. These are: Read the Will and discuss its provisions with your counsel and follow the terms of the Will. It is your guide, road map and rule book.

#### A. Follow the Independent Executor's Golden Rule.

Treat estate beneficiaries as you would want an Independent Executor to treat you if you were the beneficiary.

**B.** Be prompt in performing your duties and responsive to your attorney and the estate beneficiaries. If your personal or business situation is likely to prevent this, it may be advisable for you to decline to serve.

### II. THE APPOINTMENT PROCESS.

#### A. Probate of Will.

Before an Independent Executor can assume his or her duties as such, the will must be admitted to probate and the court must appoint the Independent Executor. The will cannot be admitted to probate until the Monday following ten days after the posted notice is issued on the application to probate the Will. This means that applications filed on or before Thursday of a given week can be admitted to probate on or after the second Monday following the filing date. Some courts may require the filing to be made by a certain time of day on that Thursday in order to ensure that notice can be posted for the requisite period of time. Additionally, some courts will require that the original be delivered to the county clerk before setting a hearing on the application. The attorney may file the application to probate the Will on behalf of any person interested in the estate (such as a beneficiary or creditor of the estate), or any person named in the will as executor. If an executor named in the will makes

application for a will to be admitted to probate in good faith with just cause, the reasonable expenses of the applicant are to be paid from the estate, even if the will is not ultimately admitted to probate. TEX. ESTATES CODE § 352.052.

#### B. Notices.

Pursuant to the Texas Estates Code, the only notice that is required is the posted public notice, which is prepared by the clerk's office. *See* TEX. ESTATES CODE §§ 303.001, 301.151(4), 51.053.

Therefore, heirs and beneficiaries of the estate do not generally need to be notified prior to the hearing date. Some counties, however, may have local rules of law that require additional notices, which may need to be prepared by the attorney. Prior to setting the hearing on the application, ensure that the posted public notice has been completed and is correct.

#### C. The Probate Hearing.

The attorney will set a hearing for the probate of the will to occur on or after the Monday following ten days from the filing of the will. A special setting may be scheduled for this hearing, or the court may require the hearings to occur during "open court" when a number of uncontested matters will be before the court. The hearing typically does not exceed five to ten minutes. Testimony must be given by someone familiar with the decedent who is familiar with the will and the circumstances of the decedent's death. Testimony does not have to be given by the person named as executor in the will, but it is frequently most convenient for the person named as executor in the will to be present because someone will need to testify as to the executor qualifications.

#### D. Issuance of Letters Testamentary.

After the court has signed the order admitting the will to probate, and appointing the Independent Executor named in the will, the Independent Executor will sign an oath, typically administered by the Judge after signing the order admitting will to probate. Once this oath has been filed with the clerk's office, the clerk will issue Letters Testamentary (or Letters of Administration in the case of a person not named as executor in the will). These Letters will be proof to third parties dealing with the executor that he or she has powers as Independent Executor of the estate. In many cases, the Independent Executor will be required to supply original Letters Testamentary to the third party. Therefore, when Letters Testamentary are obtained, enough copies should be purchased to allow the Independent Executor to deal with the various entities that hold assets belonging to the decedent. Additional Letters Testamentary can be easily obtained by the Independent Executor or his or her attorney through the clerk's office. For certain types of

transfers, such as stock transfers, Letters Testamentary must be dated within 60 days of the date they are issued. As a result, it may be necessary for an Independent Executor to obtain “fresh” Letters Testamentary at some point during the administration when transfers are being made.

#### **E. Bond.**

In most independent administrations, no bond will be required. This is because Wills typically relieve an executor of the requirement to post a bond. If a bond is required, no Letters Testamentary of Letters of Administration can issue until the bond has been filed and approved by the court.

### **III. GENERAL DUTIES OF INDEPENDENT EXECUTORS.**

#### **A. Overview.**

In very broad terms, the duty of the Independent Executor is to collect all of the assets due to the estate, pay all of the debts and expenses of the estate, set aside exempt property and allowances for the family, and distribute the estate to the beneficiaries of the estate.

#### **B. Application of General Fiduciary Duties.**

An Independent Executor is a fiduciary for the beneficiaries and persons interested in the estate. Under Texas law, an executor is generally held to the same fiduciary standard as a trustee. *Humane Society of Austin & Travis Co. v. Austin Nat'l Bank*, 531 S.W.2d 574, 577 (Tex. 1975). This means that the Independent Executor owes the beneficiaries of the estate fiduciary duties similar to those owed by a trustee to the trust beneficiary. Generally, a trustee's duties (and therefore the duties of an Independent Executor) include the following:

##### 1. Duty of Loyalty.

It is the duty of the fiduciary to administer the estate solely in the interest of the beneficiaries. The fiduciary is not permitted to place himself in a position where it could benefit him thereby violating his duty to the beneficiaries.

##### 2. Duty Not to Delegate.

The fiduciary is under an obligation to personally administer the estate and is under a duty not to delegate to others acts that the fiduciary should personally perform.

##### 3. Duty to Keep and Render Accounts.

A fiduciary is under a duty to the beneficiaries to keep full accounts that are clear and accurate. Sections 404.001 and 405.001 of the Texas Estates Code give a beneficiary the right to demand a written statement of accounts covering the estate's transactions at certain times.

##### 4. Duty to Furnish Information.

A fiduciary is under a common law duty to the beneficiaries at reasonable times to give complete and accurate information regarding the estate.

##### 5. Duty to Exercise Reasonable Care and Skill.

A fiduciary is under a duty in administering the trust or estate to exercise the same care and skill as a man of ordinary prudence would use in dealing with his own property.

##### 6. Duty to Take and Retain Control of Estate Property.

The fiduciary is under a duty to take all reasonable steps to obtain and control the estate property.

##### 7. Duty to Preserve Estate Property.

A fiduciary must use the same care and skill that a person of ordinary prudence would use to preserve estate property.

##### 8. Duty to Enforce Claims.

A fiduciary is under a duty to take reasonable actions to collect claims that are due to the estate.

##### 9. Duty to Defend.

The fiduciary is under a duty to do what is reasonable, under the circumstances, to defend actions by third parties against the estate.

##### 10. Duty Not to Co-Mingle Estate Funds.

The fiduciary has a duty to keep estate property separate from other property, and to properly designate it as estate property. Not only is it the fiduciary's duty to keep the estate property separate from the fiduciary's own property, but also to keep that property separate from other estates or trusts the fiduciary may administer.

##### 11. Duty With Respect to Bank Deposits.

Although a fiduciary may deposit funds in a bank, he is under a duty to use reasonable care in selecting the bank and to properly designate the deposit as an estate deposit. He may not subject the deposit to unreasonable restrictions on withdrawal or leave the property in non-interest bearing accounts for unduly long periods of time.

##### 12. Duty With Respect to Investments.

Because an Independent Executor's primary responsibility is to collect estate assets, pay creditors and distribute the estate, the Executor will not typically actively manage investments. The Independent Executor cannot ignore the investments, however, as he or she does have the duty to preserve estate property. If the assets of the estate require active

management in order to preserve value, or when the estate administration will continue for a lengthy time, the Independent Executor should oversee the management required in a prudent manner.

13. **Duty to Deal Impartially With Beneficiaries.** When there are multiple beneficiaries of an estate, it is the duty of the fiduciary to deal impartially among the beneficiaries. An executor will face tax elections and other situations that will require careful attention to impartiality.

14. **Duty With Respect to Co-Fiduciaries.**

Unless the will provides otherwise, all fiduciaries are under a duty to participate in the estate administration. Therefore, a fiduciary cannot properly delegate the acts required of the fiduciary to co-fiduciaries. It is also the duty of a fiduciary to use reasonable care to prevent other fiduciaries from committing a breach of trust. Pursuant to Texas law, any Executor can act alone to bind the estate, except that all executors must execute any conveyance of real estate. TEX. ESTATES CODE § 307.002. Nonetheless, co-executors should act in concert whenever possible.

#### **C. Collection of Information.**

The Independent Executor will collect information regarding the estate for the preparation of the Inventory and Estate tax return (when required). A Questionnaire is attached as Exhibit D, which can be used for this purpose.

### **IV. DUTY TO KEEP RECORDS AND ACCOUNTS.**

It is imperative that the Independent Executor maintain detailed records for the estate from the time that the Independent Executor first assumes his or her duties. Establishing proper accounts and record-keeping procedures at the outset will greatly simplify the Independent Executor's job.

#### **A. Setting Up the Books and Records of the Estate.**

It will be difficult and time consuming for an Independent Executor satisfy his duty to supply accountings if adequate books and records have not been established and maintained during the administration of the estate. There are a variety of ways that this record-keeping can be accomplished enabling the Independent Executor to provide regular accountings with minimum effort. These are discussed in more detail in the following sections.

#### **B. Quicken or Similar Program.**

There are a number of financial software packages (such as Quicken by Intuit) that can assist the Independent Executor in the record-keeping process.

Although Quicken and similar financial programs are not specifically designed for estate administration, they can be modified very easily to provide meaningful reports to the beneficiaries and maintain detailed records for the Independent Executor. There are fiduciary accounting packages that provide more traditional fiduciary accountings for estates, but their cost tends to be significantly more than Quicken and other more general programs. In addition, they tend to be far less user-friendly. Once the assets of an estate have been set up on Quicken or a similar program, checks can be entered and printed directly from the program, thus recording and categorizing expenses, income and sales or dispositions of property as they occur. Reports can then be produced quite easily as needed.

#### **C. Custodianship Accounts.**

For larger estates, estates in which there are likely to be complex or large numbers of transactions, or estates in which there may be potentially contentious beneficiaries, the Independent Executor may want to consider setting up a custody account at a financial institution to hold the liquid assets of the estate. The financial institution will then produce monthly or quarterly statements showing the assets, disbursements, disposition of assets and other transactions, which can be disseminated to beneficiaries as well as to the Independent Executor. For beneficiaries who treat the Independent Executor with suspicion, holding the liquid assets in this manner can provide comfort to the beneficiaries and therefore may reduce discord with the Independent Executor.

#### **D. Record-keeping By Hand.**

This method is generally not recommended unless the estate is very simple and will entail limited transactions. Although there is no requirement that records be kept on a computer, reconstructing the estate transactions from hand-maintained records can be time-consuming. Nonetheless, as long as the Independent Executor keeps copies of all of the checks written, account statements from all financial institutions in which assets are held, records of any sales of assets and disposition of proceeds, etc., the Independent Executor will be able to produce an accounting if and when one is demanded by a beneficiary, and at the close of the estate.

#### **E. Maintenance of Records.**

Because the Independent Executor has a duty to keep and render accounts, it is imperative that the Independent Executor maintain adequate records during the course of the administration, and in some cases for a number of years thereafter. All statements from banks, financial institutions and other entities holding assets of the estate should be maintained. In

addition, invoices or other evidence of debts or expenses paid by the estate should be maintained in the file. Copies of stock certificates that are surrendered should be maintained, together with copies of checks or wire transfers indicating the proceeds received from the disposition of those items. It would be prudent to maintain an electronic copy of the records to avoid loss of records due to water, fire, or just regular deterioration.

#### **F. Required Accountings.**

Section 404.101 of the Texas Estates Code allows a beneficiary to demand an accounting of the estate from an Independent Executor at any time after 15 months has expired from the date the Independent Executor qualifies as such. The information required to be included the following:

1. The property belonging to the estate that has come into the hands of the Independent Executor.
2. The disposition that has been made of such property.
3. The debts that have been paid.
4. The debts and expenses still owing, if any, by the estate.
5. The remaining property of the estate.
6. Such other facts as may be necessary to a full and definite understanding of the exact condition of the estate.
7. Such facts, if any, that show why the administration should not be closed and the estate distributed.

In addition, Section 405.001 of the Texas Estates Code also gives a beneficiary the right, after two years from the date that an independent administration is created, to require a similar accounting and distribution of the estate unless the court finds there is a continued necessity for administration. This right is in addition to the right to an accounting under Section 405.001.

#### **G. Accountings Required by Will.**

The Independent Executor must always comply with the terms of the will. If more frequent accountings are required by the Will, the Executor must supply them.

#### **H. Additional Accountings.**

Beneficiaries of estates frequently become disgruntled because of lack of information about estate matters. In estates whose administration will take considerable time, regularly supplied accountings to the beneficiaries keeping them apprised of the administration progress will be time and effort well spent by the Independent Executor.

### **V. TAX RELATED FILINGS.**

For most estates, the Independent Executor will be required to make a number of tax-related filings. The Independent Executor should consult with his or her accountant and attorney with regard to the applicability of these in any given estate, but these may include the following:

#### **A. Application for Taxpayer Identification Number (Form SS-4).**

Immediately after appointment as Independent Executor, the Independent Executor should obtain from the Internal Revenue Service a Taxpayer Identification Number (Form SS-4), which will be used for the estate during the course of the administration of the estate. The simplest way to obtain a taxpayer ID number is through the IRS's website at [www.irs.gov](http://www.irs.gov).

#### **B. Notice of Fiduciary Relationship (Form 56).**

It may be advisable to file a Form 56 notifying the Internal Revenue Service that the Independent Executor is serving in that capacity. The purpose of this is to put the Internal Revenue Service on notice as to the proper party to notify should there be a tax issue that arises with respect to the decedent. If the Service is not on notice that a fiduciary has been appointed, and if a deficiency or similar tax notice is sent to the last address used by the decedent on a tax form, and is not forwarded to the Independent Executor, the rights of the decedent's estate to challenge actions by the IRS may be jeopardized. In cases in which there is a surviving spouse who has been filing joint income tax returns with the decedent, or in cases in which a responsible party will remain at the decedent's last address to receive any notices, this potential problem is less likely to arise. Nonetheless, it is fairly simple for the Independent Executor or his or her accountant or attorney to fill out the Form 56 so that the Internal Revenue Service is on notice as to the proper party to receive notices on behalf of the decedent.

#### **C. Decedent's Final Income Tax Return.**

The Independent Executor will have the responsibility for filing the decedent's final income tax return. Typically, a certified public accountant will be hired by the Independent Executor to perform this duty, but in some simpler estates, the Independent Executor may prepare this return. This tax return will cover January 1 through the date of decedent's death.

#### **D. Income Tax Returns for the Estate.**

During the course of the administration of the estate, a fiduciary income tax return (Form 1041) must be filed for the estate for each year if the estate generates more than \$600 in income for the year. These returns will be due on April 15 in the year following the close of the estate's fiscal year. A



certified public accountant normally prepares these returns for the Independent Executor. There may be some tax benefit to selecting a fiscal year-end other than December 31 in some cases, but in many cases, the simplicity of using a calendar year end will outweigh these benefits. Estimated tax payments will not be required for the estate unless the estate administration lasts longer than two years.

#### **E. Federal Estate Tax (and Generation-Skipping Tax) Return (Form 706).**

If an estate meets the filing requirement, a Form 706 must be filed for the decedent's estate, even if no taxes will be due. The estate tax return is typically prepared by the attorney. In some cases, accountants who do a substantial amount of work in the estate area will prepare the return instead. This return is required to be filed nine months following the date of the decedent's death. An extension can be obtained for up to six months following that original due date (15 months from the date of the decedent's death). If the decedent has a gross estate of more than \$11,400,000 in 2019, the return must be filed. The Independent Executor should carefully review with the estate's attorney and/or the accountant the assets of the decedent that would be considered to be included in the estate for estate tax purposes. Assets passing outside of probate (such as life insurance and retirement benefits) will be included in the gross estate, so the Independent Executor will need to obtain information regarding the non-probate assets as well. In addition, if taxable gifts were made during lifetime (gifts in excess of \$15,000 per person per year), those gifts will have to be taken into consideration in determining whether the filing requirement is met.

#### **VI. REQUIRED COURT FILINGS.**

An Independent Executor is generally free from court supervision, and thus may act on behalf of the estate without additional court authority. Nonetheless, in addition to the original court filings for the Independent Executor's appointment, there are a few court filings that are required or may be advisable.

##### **A. Notice to Beneficiaries.**

An executor must notify each named beneficiary in the Will within 60 days after the Will is admitted to probate. TEX. ESTATES CODE § 308.002.

##### **B. Inventory, Appraisal and List of Claims or Affidavit in Lieu of Inventory, Appraisal and List of Claims.**

###### 1. Deadline to File.

The Independent Executor is required to file an Inventory, Appraisal and List of Claims (the "Inventory") or an Affidavit in Lieu of Inventory,

Appraisal and List of Claims within 90 days of the date the Independent Executor qualifies. *See* TEX. ESTATES CODE §§ 309.051(a), 309.056. Qualification occurs when the Order appointing the Independent Executor has been signed by the court, and the Independent Executor has filed his or her oath with the court (and posted bond, if applicable).

###### 2. Contents of Inventory.

The attorney representing the Independent Executor will prepare the Inventory based upon information provided by the Independent Executor. TEX. ESTATES CODE § 309.051. The Inventory must list all probate assets that has come into the possession or knowledge of the Independent Executor, including all real property in the State of Texas and all personal property wherever situated. The Inventory must reflect the fair market value of each item as of the date of death, which are typically determined by the Independent Executor with information from appraisers hired by the Independent Executor or the attorney for the estate, where appropriate. The court does have the authority to appoint an appraiser of the estate, in which case those appraisers assist the Independent Executor in determining the value of the property. (Court-appointed appraisers are very rarely, if ever, utilized in independent administrations.) The Inventory must specify the property as being separate or community. In addition, if property is co-owned with others, the interest owned by the estate must be shown, together with the names and relationship of co-owners. The Inventory must also contain a list of claims setting out all claims due or owing *to* the estate. These are not claims that the estate owes, but rather are owed to the estate. The Inventory must contain an affidavit by the Independent Executor sworn before a notary public that the Inventory is a true and complete statement of the property and claims of the estate that have come to the Independent Executor's knowledge. The Independent Executor is not required to list non-probate assets on the Inventory (assets that pass outside of the probate estate, such as life insurance and other assets that pass by beneficiary designation or contract rights, and property in revocable management trusts or living trusts).

###### 3. Contents of Affidavit in Lieu of Inventory, Appraisal and List of Claims.

In 2009, the Legislature provided personal representatives with the option to file an Affidavit in Lieu of Inventory, Appraisal, and List of Claims ("Affidavit in Lieu") when certain criteria were met. The criteria include that, at the time the inventory is due, there are no unpaid debts, except for secured debts, taxes, and administration expenses. TEX. ESTATES CODE § 309.056(b). In addition to the criteria, the personal representative must also swear

that a verified, full, and detailed inventory and appraisal has been provided to all of the beneficiaries. *Id.* However, when the beneficiary is entitled to less than \$2,000 in estate assets, has received all benefits under the will, or has waived the right to an accounting, unless a request is made, the personal representative may forego providing an inventory to that beneficiary. The desire for privacy was a main factor in the addition of this provision.

#### 4. Extension of Time to File Inventory.

Most courts will routinely grant extensions of time to file inventories in independent administrations, particularly when an estate tax return is required to be filed. Some courts may require the consent of beneficiaries for an extension request. In cases in which an estate tax return will be filed, it is common for the attorney to request an Inventory extension so that appraisals can be obtained prior to the time the Inventory is filed and items of the estate can be treated consistently on the Form 706 (estate tax return) and the Inventory. While a personal representative may seek an extension to file the Inventory, some courts have taken the position that the personal representative is not entitled to an extension to file the Affidavit in Lieu. In 2019, legislation is proposed to require any extension granted for an Inventory is considered an extension to file an Affidavit in Lieu.

#### C. **Notice to Charitable Beneficiaries and Certain Other Entities.**

The Independent Executor is required to give the state, a governmental agency of the state, or a charitable organization named as a devisee in a will, if the address of the entity can be ascertained with reasonable diligence, notice that the charity or other entity is named as a devisee in the will. A copy of the Application, Order admitting the will to probate and copy of the will must be attached. The notice must be sent by registered or certified mail, return receipt requested. Following the notice, the applicant's attorney must file a copy of the notice with the court in which the will was admitted to probate. A sample notice is attached as Exhibit A.

#### D. **Notice to Creditors.**

Within one month after receiving Letters Testamentary, an Independent Executor must publish in a newspaper of general circulation in the county in which Letters were issued, a notice requiring all persons having claims against the estate to present those claims within the time prescribed by law. TEX. ESTATES CODE § 308.053. The Independent Executor's attorney will file a copy of the printed notice, together with an affidavit of the publisher, in the court in which the cause is pending.

#### E. **Closing the Estate.**

In many independent administrations, the estate will never be officially "closed" with the court. In some cases, however, the Independent Executor may utilize one of the closing methods described in Section XV of this Handbook.

### VII. **SPECIFIC RECOMMENDED STEPS THAT MAY BE NEEDED.**

Although the actions listed below will not be appropriate or necessary in every estate administration, the Independent Executor should consider the following to determine if action is required.

#### A. **Securing the Personal Residence of the Decedent.**

If a spouse survives the decedent, the surviving spouse (absent a premarital agreement) has the sole and exclusive right to continue occupying the residence until the surviving spouse's death or abandonment of the residence. If there is no surviving spouse (and no minor children with similar rights), the Independent Executor should take steps to secure the residence. These might include the following:

1. Change locks so that persons who may have had access keys during the decedent's lifetime are no longer able to enter the residence without the consent of the Independent Executor. To avoid creating adversarial situations where none exist, the Independent Executor should communicate this to the beneficiaries of the estate so that the beneficiaries do not feel unnecessarily shut out of the administration. Although it is the Independent Executor's duty and responsibility to administer the estate and safeguard the property, this needs to be done with sensitivity to the beneficiaries and their needs, if the Independent Executor does not want to create a hostile situation that may ultimately lead to claims being made against the Independent Executor.
2. Stop deliveries and utilities, where appropriate. Newspaper deliveries and other deliveries that may be made to the house should be stopped. It may be advisable for utilities such as water, gas and electric to be left on to protect the house. The Independent Executor may want to evaluate whether phone service continues to be necessary. Items such as cable television should be discontinued. Consider having the mail forwarded to the Independent Executor; otherwise, regular visits to obtain the mail will be necessary, which may be prudent if the house is vacant.

**B. Secure Valuables.**

If any cash, jewelry or other valuables are found in the residence or other premises, they should be carefully inventoried by the Independent Executor and placed in a safe deposit box or other appropriate place for safekeeping.

**C. Insurance.**

The Independent Executor should confirm that insurance is in place on all real property, automobiles and other valuables. The Independent Executor should review the homeowner's policies to determine how long the residence may remain vacant without jeopardizing insurance coverage. Contact the insurance agents to make sure any invoices are directed to the Independent Executor and to obtain copies of the policies in the event they are not easily located.

**D. Mortgage Information.**

The Independent Executor should determine whether there are any mortgages on the residence or other property, and if so, determine their status and the proper method for payment.

**E. Dealing with Personal Property.**

1. The Independent Executor should determine how the personal property of the estate will be handled. Frequently, items such as furniture, furnishings, jewelry, clothing, etc., are left to a specified individual or group of individuals. If there is a surviving spouse and/or minor children, the Texas Estates Code provides that the property of the estate that is exempt from execution or for sale under Texas law (which would generally include items of personal use, such as furniture, furnishings, cars, etc.) be set apart for the use and benefit of the surviving spouse and minor children and unmarried children remaining with the family during the administration. If the estate is determined to be solvent at the final settlement of the estate, then those items will be subject to distribution among the heirs and distributees of the estate.
2. After the temporary setting aside of exempt property as discussed above, the Independent Executor should follow carefully the provisions of the will in terms of distributing the personal property of the decedent. For personal property not disposed of by the will, and assuming the Independent Executor has authority pursuant to the will to sell property, the Independent Executor may want to arrange an estate sale to dispose of the personal property of the estate. In order to

avoid problems, this is something the Independent Executor should discuss with the beneficiaries of the estate prior to selling items that may have sentimental value to the beneficiaries.

**F. Inventory of Personal Items.**

In any event, the Independent Executor may want to obtain an early inventory of items in the residence and other places in which there is property belonging to the decedent. There are appraisers available who for a relatively small fee will inventory the assets of the house. If an Independent Executor anticipates any problems with the family, it would be wise to have an immediate inventory made to avoid questions arising at a later date from the beneficiaries.

**G. Automobiles.**

The Independent Executor should make arrangements for the automobiles of the estate to ensure that they do not create liability for the estate. Insurance should be checked to make sure that it is still in effect. The automobiles should be stored in as secure a manner as possible without undue cost. If the automobiles are left to a specific individual or individuals, and if they are not set aside as exempt property to a spouse or surviving spouse, it would be advisable for the Independent Executor to distribute these as soon as possible in a solvent estate, so that the expense of maintaining the automobiles passes to the beneficiaries. To do this, the car title should be changed with the Department of Motor Vehicles.

**H. Dividing Personal Property Among Beneficiaries.**

In many cases, the personal property of the estate will be left to multiple beneficiaries (such as the children of the decedent). In this case, the will may state how the property is to be divided. In many cases, however, the will simply states that the property will be distributed as determined by the executor, or as agreed upon by the beneficiaries. Even if the executor is to make the determination, it is wise to do this with the participation of the beneficiaries. If the beneficiaries are unable to agree between themselves as to the disposition of the personal property, the executor may want to devise a system to govern the distribution of items. For example, the beneficiaries could have a meeting at which each draws a number and selects items in the order drawn. Alternatively, the executor may want to ask for a list from each beneficiary of the items that they want in the order that they desire the items and compare lists and priorities and make a determination between the beneficiaries. Once again, the executor should make sure that whatever method he or she selects is not at odds with the terms of the will, unless all of the beneficiaries

have agreed that they wish to have it distributed in some way other than as provided in the will.

#### **I. Credit Cards and Bank Debit Cards.**

The Independent Executor should notify any financial institutions who have issued credit cards or bank debit cards to the decedent of the decedent's death. The cards should be destroyed by the Independent Executor. In addition, the Independent Executor may wish to give the discretionary notice to creditors discussed in Section VIII.C.3, to all credit card companies and banks with whom the decedent has known to have done business.

#### **J. Safe Deposit Box.**

The Independent Executor should gain access to any safe deposit boxes held by the decedent for the purpose of determining whether any valuable items are in those safe deposit boxes. If any safe deposit boxes permit joint access by persons other than the Independent Executor, the Independent Executor may find it advisable to move any such valuable items that belonged to the decedent to a safe deposit box accessible only by the Independent Executor. In visiting the safe deposit box, the Independent Executor may want to take the beneficiaries with him to view the contents as they are opened or may want to take another credible person who can testify as to the contents of the box. It is not uncommon for beneficiaries to believe that items were kept in a safe deposit box or were held by the decedent that had been disposed by the decedent many years ago (or are simply missing). Credible third parties or beneficiaries who will witness and inventory the box the first time that it is entered by the Independent Executor can be valuable allies if a question is later raised with regard to missing valuables. A written inventory can be prepared at that time, signed by the third party.

#### **K. Set Up Estate Bank Accounts.**

Shortly after appointment, the Independent Executor will need to set up accounts at banks or other financial institutions to transact the business of the estate. In general, the estate will need an account on which checks can be written for the payment of expenses and debts of the estate. Unless size of account and account fees makes this unwise, it is typically desirable to set this up in an interest-bearing account. In addition, the Independent Executor is likely to need to set up one or more additional accounts to hold the more significant assets of the estate. To the extent assets are in financial institutions, the deposits should be fully covered by the FDIC or should be otherwise evaluated for safety of the principal. The Independent Executor may want to consider setting up a custodianship account with a financial institution. It is generally advisable to set up the minimum number

of accounts that will allow the Independent Executor to effectively manage the estate. It is easier for record-keeping purposes if all debts and expenses flow through a single account, such as the estate's checking account. Money can be periodically moved to this account from investment accounts as needed.

#### **L. Consolidation of Accounts.**

If the decedent held multiple accounts at a variety of financial institutions, such as brokerage houses and mutual funds, the Independent Executor may want to consolidate these accounts for ease in administration. However, the Independent Executor should take care not to sell investments in order to effect the consolidation. This should be discussed with the beneficiaries in order to determine whether they want to keep the investments or will the assets sold.

#### **M. Setting Aside Family Allowances and Exempt Property.**

In the vast majority of estates, no property will be set aside to the surviving spouse and minor children as exempt property, homestead, or family allowance. This is because in most cases, the estate will in fact pass to the person or persons who would be entitled to have these set asides. Nonetheless, the Independent Executor should be aware that there are cases in which exempt property (such as personal effects, cars, furniture, etc.), the primary residence of a decedent, and property sufficient to support the family for a year, may be required to be set aside to the spouse and/or minor children. The Independent Executor will need to consult with his or her attorney regarding the appropriate amounts and procedure for setting aside such property, as well as to whom it is properly paid.

#### **N. Review Assets Held by the Estate.**

Although an Independent Executor's job is more limited than a trustee's job, since it is the Independent Executor's primary obligation to collect assets, pay bills and then distribute the assets (rather than investing them for a long period of time), the Independent Executor should nonetheless review the investments and assets of the estate to determine that there are no "problem" assets which need to be dealt with by disposition or otherwise. In most cases, an Independent Executor will have the power to sell assets. If the Independent Executor continues to maintain assets that are highly risky for the estate, the Independent Executor may find that the beneficiaries attempt to hold him or her liable for not behaving prudently with respect to the asset.

#### **O. Funding Specific Bequests.**

The Independent Executor should discuss with his or her attorney when specific bequests made in the will should be funded. If gifts of cash or dollar amounts are

not funded within twelve months, the estate may need to pay interest to the beneficiary when the gifts are finally funded. Additionally, if a charitable foundation or gift is to be made under the terms of the will, discuss with counsel whether this can be done in stages or must be made in one transaction so as not to affect the tax-savings to the estate.

### VIII. DEALING WITH CLAIMS BY CREDITORS.

One of the initial determinations that should be made by the Independent Executor is whether or not the estate appears to be solvent. In most cases, the debts owed by the decedent will be small in relation to the overall value of the estate, and it will be clear that there are sufficient liquid assets in order to be able to pay all creditors. In cases in which it appears that there may be more debts than assets in the estate, or in cases in which there is an issue as to whether the estate will be solvent or not, the Independent Executor should work closely with the attorney regarding the administration of the estate and the payment of debts. In addition, some debts may need to be paid from separate property, and some from community. The Independent Executor should work with his or her attorney in making these determinations.

#### A. Ability to Pay Claims when Estate is Solvent.

In general, an Independent Executor will classify and pay claims in the same order of priority, classification and proration described in the Texas Estates Code for dependent executors. TEX. ESTATES CODE § 403.051(a)(3). An Independent Executor is, however, free from personal liability from paying a claim at any time (to the extent it is approved and classified by the personal representative), if the claim is not barred by limitations and at the time of payment, and the Independent Executor reasonably believes the estate will have sufficient assets to pay all claims against the estate. TEX. ESTATES CODE § 403.0585.

#### B. Classification of Claims.

Claims against an estate are classified and shall have priority of payment in the following order under Section 355.102:

1. Class 1 - funeral expenses and expenses of last sickness up to \$15,000 (the balance of which will be paid as Class 8 claims);
2. Class 2 - expenses of administration and expenses incurred in the preservation, safekeeping and management of the estate, and unpaid expenses awarded in a guardianship of the decedent;
3. Class 3 - secured claims for money (such as mortgages, car liens, etc.), so far as the

claims can be paid out of the proceeds of the property subject to the lien;

4. Class 4 - claims for delinquent child support and child support arrearages;
5. Class 5 - claims for taxes, penalties and interests due to the state of Texas;
6. Class 6 - claims for the cost of confinement through the Texas Department of Criminal Justice;
7. Class 7 - claims for repayment of medical assistant payments made by the state to or for the benefit of the decedent;
8. Class 8 - all other claims.

Note: A federal statute gives claims of the United States government priority before all other debts of a deceased debtor. 31 U.S.C.A. § 3713(a). Debts to the United States (such as tax payments) are not listed in the Texas statute, but an independent executor who fails to give priority to claims of the United States over other creditors is personally liable for those claims. It is permissible to pay funeral and administration expenses first because they are not considered debts of the decedent. In addition, family allowances are not considered debts and therefore take priority over debts due to the United States as well.

#### C. Notices to Creditors.

##### 1. Published Notice to Creditors.

The Independent Executor must publish a notice to all persons having claims against the estate within one month after being appointed as Independent Executor. This is normally handled by the attorney. Proof of publication is filed in the court.

##### 2. Notice to Holders of Secured Claims.

Within two months of receiving letters testamentary, the Independent Executor shall give notice of the issuance of the letters to all persons having a claim for money against the estate that is secured by real or personal property of the estate. In addition, if the personal representative obtains actual notice of additional secured claims following that two-month period, the personal representative is to give notice to the person having the claim.

##### 3. Permissive Notice to Unsecured Creditors.

At any time before an estate is closed, an Independent Executor may give notice by certified or registered mail, return receipt requested, to an unsecured creditor having a claim for money against the estate, stating that the creditor must present a claim within the 121<sup>st</sup> day after the date of the receipt of the notice or the claim is barred. Certain information must be included in that notice (a sample copy of which is attached as Exhibit B). TEX. ESTATES CODE § 308.054. This is a very useful method for the

Independent Executor to notify credit card companies and other persons who might have claims against the decedent's estate. It enables the Independent Executor to know for certain whether claims will be made by any of the persons notified within the four-month period following notice. Otherwise, claims can continue to be made until the statute of limitations runs on the claim.

#### **D. Duty with Regard to Non-Probate Assets.**

In some cases, substantial assets will pass outside of the probate estate. The Independent Executor generally does not have access to these non-probate assets, but some of them may be subject to the debts of the decedent. If the probate estate is insolvent, but there are other assets subject to the creditors of the decedent, the Independent Executor may be required to proceed against certain types of non-probate assets. For example, if an Independent Executor receives a written demand by a surviving spouse, a creditor, or a person acting for a minor child of the decedent, within two years of the death of the decedent, the Independent Executor may be required to collect from a beneficiary who receives funds from a multiple party account (such as a joint and survivorship account) amounts owned in the account by the decedent immediately before his death, to the extent necessary to discharge debts, taxes, expenses of administration, and statutory allowances to the surviving spouse and minor children.

### **IX. SALE OF ESTATE ASSETS.**

#### **A. Sale of Real and Personal Property.**

In most cases in which an Independent Executor is appointed, the will provides that the Independent Executor has the power of sale over the estate assets. This enables the Independent Executor to sell estate assets without court order. *See* TEX. ESTATES CODE § 356.002. Even in absence of a power of sale in the will, the Independent Executor will generally be able to sell assets, if necessary, to pay the debts of the decedent, or if it is otherwise in the best interest of the estate. TEX. ESTATES CODE § 356.001. In absence of a power of sale, the Independent Executor should consult with his or her attorney regarding the propriety of selling estate assets.

#### **B. Direct or Indirect Sales to Independent Executor.**

There are strict restrictions upon the ability of an Independent Executor to purchase, directly or indirectly, any property of the estate that he sells during the course of administration. An Independent Executor may purchase property from the estate only if:

1. The will admitted to probate and appointing the Independent Executor expressly authorizes the sale.
2. The sale is in compliance with the terms of a written executory contract signed by the decedent, including contract for deed, earnest money contract, buy/sell agreement, or stock purchase or redemption agreement.
3. The court makes a determination that the sale is in the best interest of the estate, after proper notice is given.

Even if an Independent Executor is authorized to make a sale to himself of estate property, he should be very careful in doing so. Beneficiaries and a court will tend to scrutinize any transaction in which the Independent Executor (or a family member or related entity) benefits.

### **X. PROPERTY SUBJECT TO ADMINISTRATION BY THE INDEPENDENT EXECUTOR.**

#### **A. General.**

In general, an Independent Executor has control and access over the separate property of the decedent, the property subject to the sole management, control and disposition of the decedent (which would typically be assets acquired by the decedent during marriage which are not separate, and which have stayed within the decedent's sole management and control). The Independent Executor is also entitled to joint management community property. *See* TEX. ESTATES CODE § 453.009. This is generally community property that was acquired by either spouse during marriage and which has been jointly managed or which has been placed into their joint names. The Independent Executor does not have control over the sole management property of the surviving spouse. The surviving spouse is entitled to administer that community property. *Id.*

#### **B. When Spouse is Independent Executor.**

When the spouse is the Independent Executor, this will generally be immaterial, since the surviving spouse will control all of the property, either as Independent Executor or as the surviving spouse. If the surviving spouse is not the Independent Executor, in a friendly executor/surviving spouse situation, the surviving spouse may choose to let the Independent Executor administer all of the community estate.

#### **C. When Surviving Spouse is not Personal Representative.**

When the personal representative is not the surviving spouse, is administering all of the joint management community property under Section 453.009, including the surviving spouse's one-half

community property interest, and the personal representative has a personal beneficial interest in the estate, serious problems will arise if there are any disputed issues involving the surviving spouse's interest (e.g., characterization of property as community or separate). The personal representative owes fiduciary duties to the surviving spouse with respect to the Section 453.009 property and, therefore, the duty of loyalty prevents him from acting in a manner adverse to the surviving spouse or using his position to gain any personal benefit at the expense of the surviving spouse. This conflict of interest may disqualify the person from serving as personal representative. For a more in-depth discussion of the potential problems in these situations, see John L. Hopwood & Gina D. Patterson, *Probate Disposition - Community Administration*, Advanced Estate Planning and Probate Course, June 4-6, 2003; and Thomas M. Featherston, Jr., *Representing the Surviving Spouse: A Handbook for the Lawyer of the Decedent's Spouse*, Advanced Estate Planning and Probate Court, June 23- 25, 2010.

#### **D. Disposition of Community Estate at Termination of Administration.**

Once the administration of the community estate is completed, the Independent Executor is required to turn over to the surviving spouse his or her share of the community property. Likewise, the surviving spouse is to transfer to the Independent Executor of the estate, the decedent's interest in the community property administered by the surviving spouse, once community administration on that property is complete. The Independent Executor should work with his or her attorney in making the partition, particularly if the community estate is to be partitioned in any manner other than an equal split of each asset.

#### **E. Early Partition and Distribution of Community One-Half.**

It frequently simplifies the administration and ultimate disposition of the community estate if all or part of the community estate is partitioned, or divided, soon after the death of the first spouse. Generally, funds that are spent by the surviving spouse will need to come from the surviving spouse's share (unless classified as a family allowance). Similarly, some of the estate expenses will be properly chargeable only to the decedent's estate (such as funeral expenses, estate taxes, if any, and legal fees relating solely to the settlement of the estate). By making an early division of the community estate, the Independent Executor will not have to reclassify and allocate expenses among the surviving spouse and the estate at a later date. An early division is practical only if there are adequate liquid funds to pay all of the debts and expenses for the estate. In many cases, the Independent Executor may

want to only divide a portion of the community estate. For example, if the Independent Executor believes that each of the surviving spouse and the estate will need no more than \$50,000 during the course of administration, the Independent Executor might simply divide \$100,000, setting aside \$50,000 to the surviving spouse as her share of that community property, and the remaining \$50,000 to an estate bank account through which the estate expenses will flow. Joint expenses of the spouse and the decedent can continue to be paid through other accounts that have not yet been partitioned. The surviving spouse can then utilize the funds set aside for his or her benefit to pay for her expenses until the rest of the community is divided. Likewise, the Independent Executor can pay expenses that should not be divided with the surviving spouse from the account established for the estate. The attorney for the estate should be consulted in connection with any partition of the community estate.

### **XI. OBTAINING CONSENTS FROM BENEFICIARIES.**

#### **A. Disclosure to Beneficiaries.**

An Independent Executor will be required to make many tax elections, decisions to sell assets or not sell assets, and other major decisions during the course of an estate administration. Because the Independent Executor owes the beneficiaries a duty of full disclosure, it is incumbent on the Independent Executor to discuss with the beneficiaries transactions involving major assets of the estate. The Independent Executor is not required to obtain the approval of the beneficiaries, but prompt and full disclosure of items under consideration, may prevent beneficiaries from later second guessing the propriety of transactions. For example, if the estate owns an interest in a closely-held business which is a substantial portion of the estate, the Independent Executor should inform and consult with the beneficiaries regarding any proposed sales of the closely-held business.

#### **B. Consents and Releases by Beneficiaries.**

Although the Texas Estates Code does not contain any specific provisions relieving an Independent Executor of liability if a beneficiary consents to an action or releases the Independent Executor from liability for an action, general fiduciary law holds that a beneficiary who has consented to a transaction or released a fiduciary from liability for a transaction cannot later complain of that transaction. Therefore, if the beneficiaries of the estate desire certain actions to be taken or not taken, the Independent Executor will be wise to obtain written documentation of the beneficiary's consent and release for the actions. In order for such a consent or release to be effective against a beneficiary, the Independent Executor needs to fully disclose all pertinent information to the

beneficiary. However, an Independent Executor may not demand a waiver or release from a beneficiary as a condition of delivery of property to which the beneficiary is entitled. TEX. ESTATES CODE § 405.007.

## **XII. ESTATE TAXES AND ALLOCATION OF ESTATE TAXES TO BENEFICIARIES.**

### **A. Due Date for Estate Taxes.**

Except in rare circumstances, federal estate taxes will be due nine months from the date of the decedent's death. (The Texas inheritance tax was repealed effective September 1, 2015.) In many cases in which a decedent is survived by a surviving spouse, there will be no estate taxes due, but this should be carefully evaluated with the attorney for the estate, based on the estate planning documents involved. When farmland or closely-held businesses are involved, there may be some ability to defer the payment of the taxes, but very specific requirements have to be met in order to do so. As a result, the Independent Executor needs to get an early estimate regarding the estate taxes that will be due, so that proper arrangements can be made for payment of the estate taxes.

### **B. Selling Assets to Pay Estate Taxes.**

If there will be significant estate taxes, the earlier the Independent Executor begins to focus on what assets will need to be sold in order to pay estate taxes, the better off the estate will be. For instance, if there is a residence which is desired to be sold, it should be put on the market fairly promptly, rather than waiting until near the nine-month due date. Although stocks and bonds can be sold in a shorter period, an Independent Executor should begin taking into consideration what stocks and bonds will need to be sold, as well. An early determination gives the Independent Executor the ability to sell these assets over a period of time (rather than being forced to sell them during a market downswing), and also leaves the Independent Executor adequate time for funds to be transferred and checks to be written. The Independent Executor should remember that even in the most liquid situation, it may take five trading days for a mutual fund or stock to sell and may take several more days to actually get the funds into an appropriate account for tax payment. It is generally preferable for the money to be on hand two weeks prior to the tax payment due date, to ensure that the funds are available.

### **C. Personal Liability.**

An Independent Executor is personally liable for the payment of estate taxes to the extent of the assets of the estate. Therefore, the Independent Executor should not make distributions to beneficiaries unless it is absolutely clear that there will be sufficient assets remaining to pay the taxes.

## **XIII. COMMUNICATIONS WITH BENEFICIARIES.**

One of the most important tasks of the Independent Executor, and one that will ultimately avoid many of the problems that arise in administration of estates, is prompt and proper communication with the beneficiaries of the estate. Below are some of the types of communications that may be appropriate for the Independent Executor to have with the beneficiaries during the course of an estate administration.

### **A. Send Pertinent Estate Planning Documents to the Beneficiaries.**

Although the will is a public record, the Independent Executor should send to the beneficiaries of the estate a copy of the will that was admitted to probate for their information. In addition, if an irrevocable trust or other instrument is involved which gives benefits to the beneficiaries, the beneficiaries should also receive from the Independent Executor (or directly from the Trustee) a copy of that document.

### **B. Timetable of Estate Events.**

It will prevent frustration on the part of beneficiaries if the Independent Executor communicates with the beneficiaries at the outset the expected timetable for the estate. This needs to be a realistic timetable, which will allow for delays that may arise during the course of an estate administration. Counsel for the Independent Executor can help the Independent Executor determine the timetable that is appropriate, given the assets of the estate, whether an estate tax return will be required to be filed, whether assets are such that an audit may be likely, as well as whether there are creditor or other issues that may impact the length of time for the estate administration.

### **C. Regular Accountings.**

As mentioned in the section on accountings and record-keeping, an Independent Executor is not required to provide accountings until 15 months have expired from the time the Independent Executor is appointed. It may be unnecessary for the Independent Executor to provide early accountings in simple estates in which the entire estate administration will be wound up in a short time period. For estates that are expected to last several years, however, it is advisable for the Independent Executor to communicate financial information to the beneficiaries of the estate throughout the administration through use of accountings prepared by the Independent Executor.

### **D. Disclaimer Options.**

While the Independent Executor is (or should be) represented by counsel, the beneficiaries of the estate generally do not have counsel of their own.



Beneficiaries have nine months following the date of the decedent's death during which they can "disclaim" (or refuse to take) benefits from the decedent's estate. There may be personal reasons, tax reasons or creditor reasons for utilizing disclaimers. The Independent Executor should communicate to the beneficiaries that they may have tax options, which should be considered. Although disclaimer planning appears to fall outside of the duties of the Independent Executor, it could be beneficial to the family for this to be evaluated early. Once a beneficiary has accepted benefits, he can no longer disclaim the property. The beneficiaries should be encouraged to obtain counsel to evaluate planning that may be beneficial to them.

#### **E. Tax Allocations.**

In some cases, beneficiaries will receive non-probate assets for which they may be liable for estate taxes. In these cases, the Independent Executor should notify the beneficiaries of that fact as early as possible (i.e., before the beneficiary has expended all the funds). When possible, the Independent Executor may want to encourage the family members to deposit funds for the taxes in escrow with the Independent Executor so that they will be available when the time for payment of the taxes comes.

#### **F. Important Estate Transactions.**

As discussed earlier, the Independent Executor should discuss with the beneficiaries any important estate transactions involving major assets of the estate.

#### **G. Distribution Planning.**

The Independent Executor should make sure that the beneficiary understands the timing of any distributions that will be made to beneficiaries. If the estate is likely to last a lengthy period of time, interim distributions to beneficiaries may be made when appropriate. Again, the Independent Executor should discuss with his or her attorney the timing of distributions and the effect of any distributions.

#### **H. Income Tax Results.**

It is helpful for the Independent Executor to obtain information from the estate's accountant so the Independent Executor can inform the beneficiaries of the expected income tax results of interim and final distributions.

### **XIV. FINAL SETTLEMENT OF ESTATE AND DISTRIBUTION TO BENEFICIARIES.**

When all of the debts of the estate have been paid, and the estate taxes have been paid in full (and a "closing letter" received from the IRS), the Independent Executor will need to finalize the administration of the estate and distribute the estate assets to the beneficiaries of the estate. Counsel should

assist the Independent Executor in making any final division of the community estate and distribution of estate assets. In many cases, trusts will be funded under the will, and the Independent Executor will need the assistance of the attorney or the accountant in determining the amounts to fund in each trust. In most situations, the attorney will prepare a document that sets forth all of the distributions and assets funding trusts, which can be agreed to by the beneficiaries of the estate.

### **XV. CLOSING THE ESTATE ADMINISTRATION.**

#### **A. No Official Closing.**

In many "friendly" estate administrations, there will be no formal closing of the estate, other than the distribution of estate assets and signing of documents that reflect the division of the community estate and the distribution of estate assets. It is desirable for the Independent Executor to have all beneficiaries sign off on the administration of the estate by signing final estate settlement documentation (normally prepared by the attorney) and releasing the Independent Executor from further liability for his or her actions during the course of the independent administration. Documentation setting forth the final settlement and distribution of the estate is not only valuable in terms of providing the Independent Executor with a potential release from liability by the beneficiaries, but also because it provides a written record for the future which may be very useful. For example, if trusts are to be funded under the will at the death of the first spouse, the Internal Revenue Service may question the manner in which trusts were established at the death of the second spouse. By having a record of the determinations that were made and the funding of the trusts, this can be easily provided. However, the Independent Executor cannot demand a release from the beneficiaries.

#### **B. Closing of Estate by Report.**

Texas permits an Independent Executor to close an estate by filing a report verified by affidavit with the probate court. The effect of the affidavit is that it terminates the independent administration and the power and authority of the Independent Executor. It does not, however, relieve the Independent Executor from liability for any mismanagement of the estate or from liability for any false statements contained in the affidavit. The affidavit is required to include information showing the property of the estate which came into the hands of the Independent Executor, the debts that have been paid, the debts still owing, the property remaining on hand, and the names and residences of the persons to whom the property of the estate is to be distributed. Because this technique does not give the Independent Executor any protection from

liability for acts undertaken during the course of the administration, it is rarely used.

### **C. Judicial Discharge.**

The Independent Executor may obtain a judicial discharge from his duties as Independent Executor. TEX. ESTATES CODE § 405.003. In order to obtain the discharge, the Independent Executor files an action for declaratory judgment seeking discharge from liability for any matters that have been fully and fairly disclosed. Each beneficiary of the estate will be personally served if an Independent Executor utilizes this process. A final account will typically be required prior to the time the court rules on the declaratory judgment action. The court may audit, settle, or approve the final account filed pursuant to these provisions. This will be an additional expense of an estate administration and, in many cases, may be considered to be an unnecessary expense. For an Independent Executor who wants to ensure that the beneficiaries are satisfied and are not going to later make claims against the Independent Executor for his services as such, it will be advisable for the Independent Executor to proceed with a judicial discharge, or to obtain from the beneficiaries a release in lieu of the judicial discharge. In many cases, beneficiaries will be prepared to sign an appropriate release to avoid the additional time and expense of a judicial discharge. The Independent Executor who is concerned about future liability must be careful to disclose all pertinent information. The Independent Executor will not be discharged or released from transactions that are not disclosed to the beneficiaries or the court.

## **XVI. EXECUTOR'S FEES AND COMPENSATION.**

### **A. Provisions of Will.**

The decedent's will may specify the manner in which fees are to be computed or may provide that no fees will be paid to the Independent Executor.

### **B. Statutory Fees.**

Section 352.002 of the Texas Estates Code sets forth the compensation method for an executor or administrator in absence of will provisions governing compensation.

### **C. Review With Counsel.**

Any fees to be taken by the Independent Executor should be reviewed with the estate's attorney.

### **D. Income Taxation of Fees.**

An Independent Executor will pay personal income taxes on the fees paid to the Independent Executor. The estate will obtain an estate tax or income tax deduction for the fees.

EXHIBIT A

Jane Doe,  
Independent Executor  
100 Main Street  
Dallas, Texas 75201  
214-555-0000

VIA CMRRR

Jane Beneficiary  
12324 Sherry Lane  
Dallas, Texas 75210

Re: Estate of John Doe, Deceased

As required by Section 308.002 of the Texas Estates Code, you are hereby given notice that you are named as a devisee under the Will of John Doe, Deceased. The Will was admitted to Probate in Dallas County, Texas, on February 4, 2019.

Enclosed for your files are copies of:

1. Will of John Doe
2. Application for Probate of Will and Issuance of Letters Testamentary
3. Order Admitting Will to Probate and for Issuance of Letters Testamentary

If you have any questions, please call me.

Sincerely,

Jane Doe

Enclosures



## EXHIBIT B

Jane Doe,  
Independent Executor  
100 Main Street  
Dallas, Texas 75201  
214-555-0000

CERTIFIED MAIL-  
RETURN RECEIPT REQUESTED

Name of Creditor  
Address of Creditor

Re: Estate of John Doe, Deceased (the "Estate")  
Cause No. 00-1340-P, Probate Court of Dallas County, Texas  
Account No. \_\_\_\_\_

Dear Sir or Madam:

Notice is hereby given that original Letters Testamentary were issued to Jane Doe (the "Independent Executor") on February 4, 2000, in the referenced cause, pending in the Probate Court of Dallas County, Texas. Pursuant to Section 403.055 of the Texas Estates Code, you must present your claim to the Independent Executor within the 121<sup>st</sup> day months from the date hereof at the following address or the claim is barred, or earlier, if the claim would be barred prior to that time by the general statutes of limitation:

Estate of John Doe, Deceased  
c/o Jane Doe, Independent Executor  
100 Main Street  
Dallas, Texas 75201

No claims for money against John Doe, Deceased, or against the Estate, on which a suit is barred under Section 403.055 of the Texas Estates Code, or by a general statute of limitation applicable thereto shall be allowed by the Independent Executor.

Sincerely yours,

Jane Doe  
Independent Executor of the  
Estate of John Doe

ESTATE ADMINISTRATION  
QUESTIONNAIRE



EXHIBIT C  
TIMETABLE OF IMPORTANT ESTATE FUNCTIONS

ESTATE OF [DECEDENT]

Date of Death: [DOD]

Cause No. [CAUSE#]

	FUNCTION	REQUIREMENT DATE	DONE
1.	Filing will for probate	Filed: _____	_____
2.	Probate hearing, filing of Oaths and issuance of Letters Testamentary	On Monday after expiration of ten days from filing of will: _____	_____
3.	Publish Notice to Creditors	Within 1 month after issuance of Letters Testamentary: _____	_____
4.	Mail Notice to Secured Creditors	Within 2 months after issuance Letters Testamentary _____	_____
5.	File Inventory, Appraisal and List of Claims or Affidavit in Lieu of Inventory, Appraisal and List of Claims (or get extension of time)	Within 90 days after issuance of Letters: _____	_____
6.	File Final Individual Income Tax Return Form 1040 (or joint return with surviving spouse)	By the 15 <sup>th</sup> of the fourth month after the close of the calendar year (or decedent's fiscal year): _____	_____
7.	Consider use of alternative valuation	Six months after the date of death: _____	_____
9.	File Federal Form 706 - Federal Estate Tax Return and pay tax (consider making request of early determination of tax)	Within 9 months of date of death: _____	_____
10.	File with State Comptroller a report of the value of the estate as so determined	Within 90 days after receiving notice of final determination of Federal Estate Tax: _____	_____

ESTATE ADMINISTRATION  
QUESTIONNAIRE

11.	File Fiduciary Income Tax Return	By the 15 <sup>th</sup> of the fourth month after the close of the fiscal year of the estate: _____	_____
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EXHIBIT D

ESTATE ADMINISTRATION

QUESTIONNAIRE

PERSONAL & CONFIDENTIAL

ESTATE ADMINISTRATION  
QUESTIONNAIRE

ESTATE ADMINISTRATION QUESTIONNAIRE

## A. GENERAL INFORMATION

1. Full Name of Decedent:

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2. Date of birth:

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3. Place of birth:

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City                      State

4. Decedent's Social Security Number:

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5. Date of Death:

---

6. Place of Death:

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Address

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---

City                      County                      State

7. Decedent's Domicile at Death:

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8. Year in which domicile established:

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9. Address of Decedent at date of death:

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Address

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City                      County                      State

10. Decedent's occupation, or if retired, former occupation:

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ESTATE ADMINISTRATION  
QUESTIONNAIRE

11. Citizenship of Decedent at time of death:  
\_\_\_\_\_
12. Decedent's Marital Status at time of death (Check one):
- Married:
- a. Name of surviving spouse:  
\_\_\_\_\_
- b. Social Security number of surviving spouse:  
\_\_\_\_\_
- c. Citizenship of surviving spouse:  
\_\_\_\_\_
- Widow or Widower:
- a. Name of deceased spouse of Decedent:  
\_\_\_\_\_
- b. Date of death of deceased spouse:  
\_\_\_\_\_
- Single.
- Legally Separated:
- Full name of legally separated spouse:  
\_\_\_\_\_
- Divorced:
- a. Name of ex-spouse:  
\_\_\_\_\_
- b. Date of divorce:  
\_\_\_\_\_
13. Death certificate number:  
\_\_\_\_\_  
Please attach copy of death certificate.

**B. MISCELLANEOUS INFORMATION**

ESTATE ADMINISTRATION  
QUESTIONNAIRE

1. Did Decedent maintain a safe deposit box at the date of death?

Yes  No

If Yes, state:

a. Location:

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b. Owner(s):

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ESTATE ADMINISTRATION  
QUESTIONNAIRE

SCHEDULE A

REAL ESTATE

Did Decedent own a community or separate property interest in any real estate (including mineral interests) in any state?                     Yes  No

If no, go to Schedule B. If yes, go to following page.

ITEMS TO PROVIDE ATTORNEY

Copies of all deeds, deeds of trust, or other documents evidencing liens, for all real estate (including mineral interests). Include copy of most recent property tax statements.

If the property is leased to another, copy of the lease.

For mineral interests, copies of all royalty agreements, leases, division order, and other documents evidencing rights or interest in the mineral interests, etc.

Copies of any environmental studies done on real estate.

ESTATE ADMINISTRATION  
QUESTIONNAIRE

SCHEDULE A-1

REAL ESTATE

PLEASE COMPLETE A SCHEDULE FOR EACH PARCEL OF REAL ESTATE  
OR MINERAL INTEREST

1. Street address (if applicable):

\_\_\_\_\_

2. Legal description:

\_\_\_\_\_

(You may attach deed in lieu of legal description)

3. Was the property being occupied as Decedent's primary residence? [ ] Yes [ ] No

4. Name(s) in which property title held:

\_\_\_\_\_

5. Community or separate property?

\_\_\_\_\_

6. Approximate amount owed on property mortgage at date of death:

\$ \_\_\_\_\_

Mortgage Company:

\_\_\_\_\_

Address of Mortgage Co.:

\_\_\_\_\_

7. Estimated or appraised value at date of death:

\_\_\_\_\_

Attach appraisal, if any.

ESTATE ADMINISTRATION  
QUESTIONNAIRE

SCHEDULE B

STOCKS AND BONDS

Did Decedent own a community or separate property interest in any corporate stocks, bonds, stock in closely held corporations, or United States Government securities (e.g., savings bonds, treasury notes, bills, or bonds) at the date of death? [ ] Yes [ ] No

If no, go to Schedule C. If yes, go to following pages.

ITEMS TO PROVIDE ATTORNEY

Copy(ies) of all stock certificate(s) if held by Decedent.

Copy(ies) of all corporate or municipal bond(s) and other security(ies).

Copy(ies) of buy-sell agreement(s) for closely held corporation(s).

Copy(ies) of most recent brokerage account statement(s).

ESTATE ADMINISTRATION  
QUESTIONNAIRE

SCHEDULE B-1

SCHEDULE OF STOCK  
(INCLUDING MUTUAL FUNDS)

Stock Name	Number of Shares Owned	Registered Owner(s)	Par Value	Type of Stock	CUSIP Number	Community or Separate Property

ESTATE ADMINISTRATION  
QUESTIONNAIRE



SCHEDULE B-2

SCHEDULE OF BONDS  
(INCLUDING U.S. GOVERNMENT)

Type of Bond	Registered Owner(s)	Description (Including amount, issue date, maturity date and interest rate)	Community or Separate Property?

SCHEDULE C

## MORTGAGES, NOTES, AND CASH

1. Cash in Decedent's possession at date of death: \$
2. Did Decedent own a community or separate property interest in any bank accounts, notes, or mortgages (due the Decedent) at date of death?  Yes  No

If no, go to Schedule D.

3. Did Decedent own an interest in any bank accounts, notes, or mortgages (due the Decedent) with another person as joint tenants with right of survivorship?

Yes  No

If yes, go to following page.

ITEMS TO PROVIDE ATTORNEY

Copy of all mortgages together with any notes owned by or payable to Decedent.

Copy of all outstanding promissory notes owned by or payable to Decedent.

Copies of all bank signature cards.

Copy(ies) of most recent bank statement(s) for all accounts.

ESTATE ADMINISTRATION  
QUESTIONNAIRE

SCHEDULE C-1

MORTGAGES, NOTES, AND CASH

1. Please complete the following table for all checking and savings accounts, certificates of deposit, and like cash accounts in which Decedent possessed an interest at date of death.

Account No.	Balance at Date of Death	Description (Including type of account, name of financial institution, name in which account held)	Community or Separate Property?	Joint Tenants with Right of Survivorship

2. If Decedent had a community or separate property interest in any mortgages and notes (as assets, not liabilities) at date of death, please complete the following schedule:

Value at Date of Death	Description (including date of note, maturity date, interest rate, maker, original amount)	Community or Separate Property?

ESTATE ADMINISTRATION  
QUESTIONNAIRE


ESTATE ADMINISTRATION  
QUESTIONNAIRE

SCHEDULE D

INSURANCE ON DECEDENT'S LIFE

1. Was Decedent insured under any life insurance policies payable to the estate?

Yes  No

2. Was Decedent insured under any other life insurance policy?

Yes  No

If no to both, go to Schedule E. If yes, continue on following page.

ITEMS TO PROVIDE ATTORNEY

Forms showing current beneficiary (original beneficiary designation or most recent change of beneficiary).

IRS Forms 712, if any.

ESTATE ADMINISTRATION  
QUESTIONNAIRE

SCHEDULE D-1

SCHEDULE OF INSURANCE  
ON DECEDENT'S LIFE

Name of Life Insurance Company	Owner(s)	Policy Number	Face Amount	Beneficiary	Proceeds Paid	Community or Separate Property?

ESTATE ADMINISTRATION  
QUESTIONNAIRE

SCHEDULE E

JOINTLY OWNED PROPERTY

Did Decedent, at date of death, own any property either as a joint tenant with right of survivorship or as a tenant by the entirety, which is not disclosed on any other schedule?

Yes     No

If no, go to Schedule F. If yes, go to following page.

ESTATE ADMINISTRATION  
QUESTIONNAIRE

SCHEDULE E-1

## JOINTLY OWNED PROPERTY

Please complete the following table for all property held by Decedent at the time of death as a joint tenant with right of survivorship or tenant by the entirety, which is not disclosed on any other schedule. Include all applicable account numbers, legal descriptions, etc. for each interest.

Description of Property	Name(s) of Surviving Tenants

ESTATE ADMINISTRATION  
QUESTIONNAIRE



SCHEDULE F

OTHER MISCELLANEOUS PROPERTY

1. If Decedent owned a community or separate property interest at date of death in any automobile(s), boat(s), airplane(s), or other vehicle(s), please provide the following information:

Description of vehicle, including make, model, type, and name in which held	Value at Date of Death	Community or Separate Property?

2. Estimated or appraised value of Decedent’s personal effects at date of death?  
\$ \_\_\_\_\_  
  
Attach copy of appraisal, if any.
3. Estimated or appraised value of all household goods and furnishings in which Decedent had an interest at date of death? \$ \_\_\_\_\_  
  
Attach copy of appraisal, if any.
4. Estimated or appraised value of Decedent’s interest in any coin, stamp, or other collections at date of death? \$ \_\_\_\_\_. Please describe collection.

ESTATE ADMINISTRATION  
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5. Did Decedent own an interest in any life insurance policies on the life of a third party? If yes, describe on the following schedule:

Company Name and Policy No.	Description, including insured, owner, face amount of policy	Community or Separate Property?

6. Salary or commissions payable but not received at date of death: \$\_\_\_\_\_
7. Social Security payments of Decedent accrued but unpaid as of the date of death?  
\$\_\_\_\_\_
8. If Decedent owned an interest in any partnership (general or limited) or proprietorship at the date of death, other than interests in corporations disclosed on Schedule B, please describe on following schedule:

ESTATE ADMINISTRATION  
QUESTIONNAIRE

Name of Partnership	Address	Percentage Owned	Names and Address of Other Owners	Value of Interest	Community or Separate Property?

9. List all other property and its value in which Decedent had an interest and which is not listed in other schedules.

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SCHEDULE G

GIFTS AND OTHER TRANSFERS DURING DECEDENT'S LIFETIME

1. Transfers to Trust

Has Decedent during his or her lifetime ever transferred property to a trust?

Yes       No

If yes, give details and provide a copy of the trust or trusts.

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2. Have any Federal gift tax returns ever been filed?  Yes  No

If yes, attach copies of return(s) or name, address, and telephone number of person to contact to obtain copies:

Name: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

Telephone No.: \_\_\_\_\_

SCHEDULE H

POWERS OF APPOINTMENT

1. At the time of Decedent's death, was the Decedent a beneficiary of, a trustee of, or have any beneficial interest in a trust created by someone other than the Decedent?

Yes  No

If yes, provide a copy of the trust.

2. At the time of Decedent's death, did Decedent have any power to consume, invade, or obtain property not owned by the Decedent or be distributed to himself, his estate or his creditors?  Yes  No

If yes, provide details.

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SCHEDULE J

## FUNERAL AND ADMINISTRATION EXPENSES

## 1. Funeral Expenses:

a. Cost of funeral \$ \_\_\_\_\_

b. Cost of flowers \$ \_\_\_\_\_

c. Contribution to:

Minister \$ \_\_\_\_\_

Organist \$ \_\_\_\_\_

Soloist \$ \_\_\_\_\_

d. Amount of telephone expense to notify relatives: \$ \_\_\_\_\_

e. Other expenses incurred with regard to the funeral:

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## 2. Administrative Expenses:

a. Appraiser's fee or fees (list individually):  
\$ \_\_\_\_\_b. Cost of Death Certificates:  
\$ \_\_\_\_\_c. Other:  
\$ \_\_\_\_\_ESTATE ADMINISTRATION  
QUESTIONNAIRE

SCHEDULE K

## DEBTS OF DECEDENT, MORTGAGES, LIENS AND BANK NOTES

1. Please provide the following information regarding all debts of Decedent, including all charge account bills, utility bills, household bills, Medicare bills, taxes due, unsecured notes and other debts of Decedent incurred but unpaid at date of death.

Creditor Name and Address	Description of Debts, including amount due and description of service

2. Describe all mortgages and notes payable below:

Name and Address of Oblige	Description (including date, term, face amount, interest and amount owed at date of death)



SCHEDULE L

CERTAIN NET LOSSES DURING ADMINISTRATION AND EXPENSES INCURRED  
IN ADMINISTERING PROPERTY NOT SUBJECT TO CLAIM

Certain Net Losses During Estate Administration. Describe below all losses arising from fire, storm, or other casualty or from theft if any which occurred during the administration of the estate to property in Decedent’s estate, and, in connection therewith, indicate the extent (including amount) to which the loss was compensated for by insurance or otherwise.

Description of Loss (including date and amount of compensation)	Amount of Loss

SCHEDULE M

CREDIT FOR FOREIGN TAXES

Describe below any property owned by Decedent in any foreign country at the date of death.

ESTATE ADMINISTRATION  
QUESTIONNAIRE

SCHEDULE N

CREDIT FOR TAX ON PRIOR TAX TRANSFERS

**Describe below any property inherited by Decedent from any person within ten years of his death. Please attach copy of Federal Estate Tax Return.**

Handbook for the Fiduciary.6.18.19.wpd

ESTATE ADMINISTRATION  
QUESTIONNAIRE

