Non-Judicial Administration of Estates in Texas
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I. INTRODUCTION

The elaborate system of administration of decedents' estates under court control found in the United States is a legacy from the English common law and has been attributed to the sovereign's desire to protect creditors and to secure the payment of fees and taxes. With primary concern for creditors, English administration resembled the procedure used for the liquidation of a company or of a bankrupt's affairs, i.e., all assets and liabilities of the estate were administered by a representative before any benefit passed to the testate or intestate successors. Moreover, the executor or administrator was vested with the title to personal property. On the other hand, continental European systems reflected less concern for creditors and emphasized the practice under the Roman law of the immediate transmission of property to the decedent's successors. Thus, the entire estate passed to the intestate heir without formal administration, or similarly under a will, to a universal successor who assumed the legal personality of the testator burdened with all of testator's debts.

A. Simplified Estate Transfers In Europe

In France, the heir simply assumes the personality of the decedent and is entitled to immediate possession of the entire assets, subject to the payment of all the decedent's debts. Under a will, an appointed heir assumes this personality without formal administration. Thus, the heir presents himself to the holder of the decedent's asset with a certificate that has been duly drawn by a French lawyer, called a notary; thereupon the holder must deliver the asset to the heir indicated in the certificate or otherwise deal with it as the heir directs. Change of title to immovables is accomplished by the filing of an attestation setting out the devolution of the property. If there

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1 See generally Basye, Streamlining Administration under the Texas Probate Code, 35 Texas L. Rev. 165 (1956); Simes & Basye, Organization of the Probate Court in America (pts. 1-2), 42 Mich. L. Rev. 965, 974-78, 43 Mich. L. Rev. 113 (1944).

2 Marschall, Independent Administration of Decedents' Estates, 33 Texas L. Rev. 95 (1954).


5 Brown, supra note 3, at 646.

6 Rheinstein, supra note 4, at 432.
are a number of heirs, a formal document called an acte de partage is used. In the instances in which the decedent has accumulated a large number of debts unknown to the heir who receives the assets, the results may be catastrophic. Thus, even in France, there has developed a special proceeding available to the heir. An accounting, called an acceptance with the benefit of an inventory, is compiled in the presence of all interested parties. As a result, the heir's liability is limited to the extent of the amount of assets inventoried. However, the heir remains personally liable for all death duties.7

B. Simplified Administration In England

Supervision of the streamlined administration systems of continental Europe is generally entrusted to the lawyers representing the heirs and creditors rather than to the courts.8 In actual practice, modern estate administration in England is very much like the independent administration in Texas.9 However, the English have extended this concept to ordinary administrations which would be under court control in Texas. Subsequent to the grant of letters testamentary or administration by an English court, the work of getting in the estate, agreeing to the payment of taxes, and distributing the residue is done privately and entirely out of court; no accounts of any kind have to be filed.10 The court is not at all concerned with the matter when letters of administration are involved as well as in cases of probate.11

C. Developments In The United States

Despite the contrary development in England toward simplification and expedition of administration, the trend in the United States has been to retain and, in some instances, to refine some of the more undesirable features of English common-law administration. Generally, the state systems are characterized by detailed formality and thorough judicial supervision. The successful operation of simplified out-of-court administration systems in continental Europe and present-day England, as well as in Texas13 and Washington, indicates

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7 Brown, supra note 3, at 635-42.
8 Id. at 642.
10 Burrows, supra note 9, at 14; George, supra note 9, at 42.
11 Burrows, supra note 9, at 14.
13 Texas probate law in particular owes much to the law of Louisiana which in turn was derived from the civil law and continental Europe. See generally Stayton, Texas' Approaches to the Parker Ideal, 37 Texas L. Rev. 845 (1959),
that many of the formalities required by the states are unnecessary. The problems involved in many of the over-articulated, tedious, and expensive systems developed in the United States have influenced both laymen and attorneys to avoid administration altogether, to utilize out-of-court techniques, or to shorten formal court administrations.¹³

D. Purposes Of Administration, Heirship, And Creditors

The fundamental purposes of an administration are: (1) the collection of the assets belonging to the decedent’s estate, (2) the payment of debts and claims due from his estate, and (3) the distribution of the remaining property to the person or persons entitled to it as promptly as practicable consistent with the foregoing.¹⁴ In the absence of a will designating specifically who is entitled to the decedent’s property, it is necessary to determine the heirs in accordance with the state’s statutes of descent and distribution. In a formal court administration, the designation of these distributees is expressed in a decree of distribution by the probate court.¹⁵ Alternative means for determining such distributees usually require a court proceeding. In Texas, for example, if there has been no administration, affidavits of heirship are often used.¹⁶ By statute, such affidavits are prima facie evidence in heirship proceedings when recorded for five years or more in the county in which the property affected by the statement is situated.¹⁷ Under sections 48-56 of the Texas Probate Code, the statutory heirship procedure is detailed and made applicable to both real and personal property in nonadministration cases as well as those cases in which property has been omitted from administration or rights in such property have not been declared.

Most states provide for the tolling of the statute of limitations on creditor claims until the appointment of a representative of the decedent’s estate. In Texas, the statutes of limitation are tolled for one year unless and until the representative is sooner qualified.¹⁸ In addi-

¹³ Discussion of the important development of avoiding administration in many situations by contract, such as life insurance and profit-sharing plans with their designation of beneficiaries other than the decedent’s representatives or estate, joint tenancies, co-ownership bonds, inter vivos trust agreements, and the like has been omitted. Suffice it to say that by means of these arrangements, a tremendous amount of property in this country has been put beyond the jurisdiction of probate and nonjudicial administration. Accordingly, this study is concerned only with those items of estate property which would come within the jurisdiction of a probate court if the estate were administered under court control.

¹⁴ Such entitled persons, whether devisees or legatees under a will or the heirs and next of kin in cases of intestacy will hereafter, as in the Texas Probate Code § 3(j), be sometimes referred to as “the distributees.”


¹⁶ See Basye, supra note 1, at 170 n.19.


tion, non-claim statutes protect the personal representatives in making distributions after one year of administration. However, these statutes do not prevent creditors who failed to file their claims in time from pursuing the estate assets in the hands of the distributees, although the more modern view would extinguish claims not filed during such period, even though within the normal period of limitations.

II. AVOIDING ADMINISTRATION

A. Informal Family Settlement In Texas

The informal family settlement is the method generally used in this country to avoid administration. Such a settlement is satisfactory if the distributees can gain possession or transfer of the decedent’s property. Under Texas law, it is clear that the devisees and heirs may by mutual agreement partition the property among themselves subject to the rights of creditors, and thus dispense with the necessity of probating the decedent’s will. Moreover, the distributees may by agreement validly waive the provisions of the decedent’s will and permit the property to pass under the law of descent and distribution. It has been said that the law favors such “family settlements.” However, if there is any possible question about the identity of the proper heirs or devisees, or their capacity to make a binding agreement, such distributees may encounter the plea that the personal representative is the only proper party to enforce payment or transfer and give a binding release to one owing a debt to the decedent. Such a plea has been sustained when the heirs brought suit within the four-year period allowed for administration, but failed to plead and prove that no administration was pending and that none was necessary. This was so despite the fact that under Texas law both real and personal property vest immediately upon the decedent’s death in his heirs or devisees, subject to the payment of his debts. Texas courts have been more lenient, however, if the existence of creditors was doubtful. A problem arises if the distributees cannot gain possession or transfer of the property after their informal agreement.

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19 Blinn v. McDonald, 92 Tex. 604, 46 S.W. 787 (1899).
20 See Model Probate Code § 135, Comment (Simes 1946).
24 Atkinson, Wills 567-68 (2d ed. 1953); Basye, supra note 1, at 171.
27 Duncan v. Veal, 49 Tex. 601 (1878).
B. Other Methods Of Avoiding Administration In Texas

One of the leading writers in the United States on streamlining administration has stated that "it may be said without reservation that Texas has more methods than any other state to simplify or dispense with the process of administration." Therefore, the discussion which follows examines these methods, viz., of avoiding administration entirely, in limiting administration, in permitting out-of-court administrations, and in shortening and closing formal court administrations already begun.

1. Order of No Necessity If there is no need for administration, section 180 of the Probate Code should be used to obtain a probate court order of no necessity. Such an order constitutes sufficient legal authority to any person for payment or transfer to the decedent's "distributees" of any property belonging to the estate. If the person entitled to the decedent's asset is clearly designated in a will, the only problem is satisfactory identification. Furthermore, the existence of several distributees, if all are of age and join in the request for transfer or payment with proper identification, does not complicate the problem. If an intestacy is involved, an heirship proceeding to ascertain the distributees will probably be required by transfer agents or other persons having custody of the property. In instances in which the heirs purporting to be the distributees are well known to the transfer agent or custodian, such distributees may be permitted to obtain possession of the property without an heirship proceeding upon giving a corporate surety bond, or in a few instances, upon executing an indemnity agreement.

The compiler of the Texas Probate Code in his interpretative commentary indicates that section 180 was drafted with out-of-state attorneys and transfer agents in mind. However, a recent decision held that if a Texas bank refuses to make distribution in accordance with an order of the probate court entered under section 180 when no adverse claim has been made to the bank for the property, the bank has no right to invoke the doctrine of stakeholder, and thus it is not entitled to attorney's fees or court costs in bringing an interpleader suit.

2. Satisfaction of Creditor Seeking Administration If a creditor

\[\text{footnote text here}\]
insists on administration to pay his claim, section 80 can be used by
an interested party to prevent administration by (a) paying the
claim, (b) proving to the satisfaction of the probate court that the
claim is illegal, fraudulent, fictitious, or barred by limitations, or
(c) filing a bond double the amount of the claim. In this connec-
tion, deed of trust holders should be cognizant that the Texas Supreme
Court has clearly stated that any sale made under a deed of trust
"after the death of the mortgagor and within four years thereof
will be canceled if an administration is opened and the administrator
seeks cancellation, and they will thus be encouraged to pursue their
remedy in an administration proceeding in the first instance." The
court pointed out that "where there is a necessity therefor the
mortgagee can force the opening of an administration or the payment
of his claim and thus avoid the expense and trouble of a sale under
the deed of trust."

3. Collection of Estates Under 1,000 Dollars by Affidavit If an estate
is under 1,000 dollars in value exclusive of the homestead and exempt
property and no application for administration has been granted or
is pending, section 137 can be used to collect the estate by filing an
affidavit with the county clerk. The payment, delivery, transfer, or
issuance to the distributees named therein has the same effect as if
made to the decedent's personal representative.

4. Summary Disposition of Estates to Pay Year's Family Allowance
A particularly valuable technique, although not extensively used,
is available in situations in which the value of the estate exclusive of
the homestead or allowance of 5,000 dollars in lieu thereof and
exempt property or allowance up to 1,000 dollars in lieu thereof is
less than what the surviving spouse and the children are entitled to
as a family allowance. In such a situation, section 139 can be used
to obtain an order of no administration and of assignment of the
entire estate to the surviving spouse and children immediately after
the approval of an inventory and appraisement. Since there is no
limit upon the court's determination of the family allowance for
one year except reasonableness and lack of separate property owned
by the wife and minor children adequate for their maintenance,

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36 Id. at 310-311.
by this provision, see Basye, supra note 1, at 175-78.
this section could be used very effectively in the situation in which
the value of the estate other than the homestead and other exempt
property is less than the decedent's annual income. Thus, it would
be possible that the surviving wife and minor children of a man
having an income of $15,000 dollars a year, a $40,000 dollar mortgage-
free home, $12,000 dollars in securities or cash, personal property ap-
praised at $5,000 dollars, and funeral and last illness expenses of
$1,000 dollars could have the benefit of this section irrespective of a
large amount of debts. An order of no administration, an assignment
to the wife and children by the representative of such securities and
money promptly after the husband's death, the filing of an inventory,
and the payment of the preferred funeral and last sickness expenses42
could be obtained if the court would allow a reasonable family allow-
ance in the amount of decedent's annual income.43

5. Intestacy Situations Involving Community Property and No Sur-
viving Children If there are no surviving children of an intestate,
all community property passes to the surviving spouse charged with
community debts, and no administration is necessary.44 This is
similar to the continental European system of avoiding formal ad-
ministration except that the surviving spouse will not be liable for
any community property claims against the decedent in excess of the
amount of the community property involved.

6. Lapse of Time Of course, lapse of time may also constitute a
means of avoiding administration. Under section 74, a creditor's
right to administer decedent's estate is lost if an application for ad-
ministration is not filled within four years after the decedent's
death.45

7. Probate of Will as Muniment of Title Texas is an unique juris-
diction in that before administration of any estate can be granted,
the necessity for administration must be shown to the satisfaction
of the court.46 A 1961 amendment to section 89 of the Probate Code
provides, in conformity with previous practice, that if the court is
satisfied that the estate owes no unpaid debts other than debts
secured by liens on real estate, or for other reasons that there is no
necessity for administration, it may admit such will to probate as
a muniment of title. The court's order shall constitute sufficient legal

authority for payment or transfer of the estate assets to the persons entitled thereto under the will without administration.\footnote{Tex. Prob. Code Ann. § 89 (Supp. 1962).}

No person having a will in his possession should fail to file the will unless, as previously mentioned, all the distributees agree not to probate same. Under section 75, such a person, upon the filing of a sworn written complaint and citation, may be arrested and imprisoned by the probate judge until he delivers the will or other papers belonging to the decedent’s estate. Moreover, such a person is, as a matter of law, liable to any person damaged as a result of the refusal to deliver the will.\footnote{Tex. Prob. Code Ann. § 75 (1956).}

### III. Temporary Administration

No discussion of abbreviated forms of court administration would be complete without mention of temporary administration. A temporary administration is available upon a finding by the probate judge that the interest of a decedent’s estate requires an immediate appointment of a personal representative, which may be made with or without written application and without notice or citation.\footnote{Tex. Prob. Code Ann. §§ 131(a), (b) (1956).} Contrary to the permanent administration situation, the probate judge has broad discretion in setting the amount of bond of a temporary administrator.\footnote{Tex. Prob. Code Ann. § 133(a) (1956).} One point that may be overlooked, particularly in relation to the subsequent liability of the temporary administrator, is that the rights and powers of such administrator must be specifically expressed since any act not so expressly authorized is void.\footnote{Tex. Prob. Code Ann. § 133(b) (1956).} Thus, a detailed list of powers is desirable and necessary.

Under section 131(c), a temporary administration is not made permanent unless found by the court to be necessary. Another disadvantage removed by the new Code is that with respect to temporary administrations granted pending a will contest or a contest on application for letters of administration, the probate court may confer on such temporary administrator all the powers of a permanent administrator with respect to claims against the estate, including power to sell real or personal property for the payment of such claims.\footnote{Tex. Prob. Code Ann. § 133(b) (1956).} The temporary administrator is entitled to a discharge upon delivery to the distributees in accordance with a court order following the filing of a final account.\footnote{Tex. Prob. Code Ann. § 133 (1956).}
IV. Advantages and Disadvantages of Particular Out-of-Court Administrations

A. Independent Executors

A method of out-of-court administration commonly used in Texas is the independent executorship which is invoked by certain special words in the will or their equivalent. 54

1. Scope of Independent Executor's Authority

In Texas, an independent executor can do every act in relation to the settlement of the estate that an ordinary executor under court supervision may be authorized to do only by court order. 55 "Settlement of estate" has been defined in a leading case 56 as including the adjustment and payment of debts against the estate, the sale of decedent's property for payment of his debts, the setting aside of exempt property to the widow and minor children, and the distribution of the estate to the distributees entitled thereto.

2. Areas in Which Probate Court's Jurisdiction Can Be Reasserted

Significantly, it has been held that the resignation provisions apply to an independent executor; thus, the probate court may receive his resignation. However, court action is necessary for the resignation to be effective. 57 Other areas in which the jurisdiction of the probate court has been invoked include:

1. Requiring the executor to post bond when he is mismanaging the estate or has otherwise become disqualified, subject to removal for failure to do so. 58

2. Upon application by a creditor, requiring all persons entitled to any portion of the estate to file a bond, subject to administration under court order for failure to do so. 59

54 Tex. Prob. Code Ann. § 145 (1956), states: "Any person capable of making a will may provide in his will that no other action shall be had in the county court in relation to the settlement of his estate than the probating and recording of his will, and the return of an inventory, appraisement, and list of claims of his estate...." The independent executorship is also known to the jurisdictions of Washington, Arizona, Idaho, and Puerto Rico. However, Washington is the only jurisdiction, other than Texas, which extensively utilizes this form of administration. Marschall, supra note 2, at 91. For a history of the Texas independent administration, see Marschall, supra note 2, at 97-99. In Washington, an independent executorship is called an "administration under a non-intervention will." Contrary to the Texas practice, the latter administration must apparently remain under court direction until the estate is declared solvent. Comment, 34 Wash. L. Rev. 263, 266 (1959). Attempts by testators in other jurisdictions to deprive courts of jurisdiction over the settlement of their estates have been declared violative of public policy. Marschall, supra note 2, at 96 n.15.


56 Roy v. Whitaker, 92 Tex. 357, 49 S.W. 367 (1899), modifying 92 Tex. 346, 48 S.W. 892 (1898).


3. Partition and distribution of the estate upon the executor's application with his final account if the will fails to provide directions for its full distribution. Furthermore, it is clear that an independent executor, absent authority in the will, can never partition the testator's estate. This is so because the exercise of such power could substantially change a testator's will and thereby force the beneficiaries to accept specific property rather than the undivided interests given them by the will.

4. Approving the final account filed with a proper application for partition and distribution by the executor or by the distributees to close the independent administration. This was the law prior to the Probate Code of 1956, and it is probably still true today.

5. Compelling the independent executor to sell land in accordance with directions in the will. Although this was judicially sanctioned prior to the Code, this probably no longer exists because of a 1957 amendment to section 145 which provides that after the will has been probated and the inventory, appraisement, and list of claims has been filed and approved by the court, no further action of any nature shall be had in the probate court as long as the estate is represented by an independent executor, except where the Code specifically and explicitly provides for some action in the court.

6. Annulling provisions of the will. Although this was done prior to the enactment of the Probate Code, such practice would appear to be of doubtful validity because of the 1957 amendment to section 145.

3. Caveats Concerning Independent Executors

a. Classification of Creditors' Claims.—In view of the provision that independent executors shall observe all provisions relevant to the priority classification and pro rata payment of creditor's claims, it appears that a creditor has to make formal presentation of his claim in authenticated form before the independent executor can pay it. If the claim is rejected either expressly or by inaction of the independent executor for thirty days after presentation and the

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62 McDonough v. Cross, 40 Tex. 251 (1876).
63 Shiner v. Shiner, 90 Tex. 414, 38 S.W. 1126 (1897).
66 Prather v. McClelland, 76 Tex. 174, 13 S.W. 543 (1890).
creditor fails to bring suit within ninety days thereafter, the creditor is subjected to the penalty of complete loss of the claim. Prior to the enactment of the 1956 Code, it was held that such a penalty was not applicable to a claim that had been rejected by an independent executor. Moreover, one outstanding authority has stated that it "seems probable that the creditor does not have to present an authenticated claim to an independent executor before suing thereon." This opinion is based upon the statutory requirement of judicial approval of the claim and the useless formality of such an action if the court has no jurisdiction to approve it.

b. Personal Liability for Negligent Losses.—The independent executor is personally liable for any losses resulting from failure to use ordinary diligence in collecting all claims and debts due the estate and in recovering possession of property belonging to the estate. Solvent independent executors should view this possibility with caution. Such an action would, like other suits against independent executors, generally be brought in the district court and subjected to the test of reasonableness by a jury or judge without the protection afforded the executor acting under probate court supervision.

c. Notice to Creditors.—The required one month or four month notice to creditors should be published or given by the independent executor if he is to be secure from the penalty for damages suffered by a creditor because of lack of notice. Those sections of the Probate Code referring to such notices use the terms "personal representative" and "representative," which in turn are defined by section 3(aa) of the Code to include an independent executor. Although the 1957 amendment to section 3(aa) provided that "the inclusion of independent executors herein shall not be held to subject such representatives to control of the courts in probate matters with respect to settlement of estates except as provided by law," there is

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68 For an ordinary representative under court control, see Stamps v. Varelas, 313 S.W.2d 141 (Tex. Civ. App. 1958). But see Chandler v. Prichard, 321 S.W.2d 891 (Tex. Civ. App. 1958) error ref. n.r.e., and the related case of Chandler v. Warlick, 321 S.W.2d 897 (Tex. Civ. App. 1958) error ref. n.r.e., holding that the representative had a reasonable time to investigate the claim before the ninety-day period begins to run.
70 Woodward, supra note 64, at 699.
72 Tex. Prob. Code Ann. § 147 (1956), which also provides that the independent executor does not have to plead to any suit for money until one year after the probate of the will appointing him.
nothing in such amendment which would exclude the requirement of
such notice by the independent executor.\footnote{78}

d. Oil and Gas Leases and Unitization Agreements.—Because of
the wording of section 367(b) which empowers executors acting
solely under court order to execute oil and gas leases extending be-
yond the termination of administration, it is uncertain whether
the independent executor has such a power. However, under general
principles, the section should serve as a source of such power for
him.\footnote{77} The same problem exists with respect to pooling or unitiza-
tion under existing leases.\footnote{78} According to a recent decision, a probate
court has no power to authorize an independent executor to execute
an oil and gas lease.\footnote{77} Logically, this would also be true regarding
pooling or unitization agreements.

e. Posting Bond Upon Proof of Mismanagement and Removal for
Disqualification.—Although the 1957 amendment to the Probate
Code now seems to clarify the point that section 222, providing for
the removal by the probate court of “any personal representative”
for gross neglect or other stated reasons, does not apply to the in-
dependent executor,\footnote{77} there is still an area of question about the qualifi-
cations of the independent executor. For example, section 149 pro-
vides that the probate court may in the case of mismanagement of
the property by the independent executor or upon his betrayal of
trust require him to post bond. That same section also provides for
such action by the court if the independent executor “has in some
other way become disqualified.” Does this mean that a court may
require an independent executor to post bond when there is a finding
that the executor is “unsuitable” under section 78 which lists the
grounds for disqualification of executors or administrators? This
point will be discussed hereafter.

f. Application to Independent Executors of Terms Such as “Execu-
tors” and “Representatives.”—Prior to the 1957 amendment, section
146 provided that “the provisions of this Code shall not apply to
independent executors except where specifically made applicable thereto.”\footnote{81} As a result, serious problems of interpretation were raised
as to what extent the other provisions relating to “executors,”
“representatives,” or “personal representatives” were affected by
such a statement in those sections which were not specifically made
applicable to independent executors. For example, section 77 established the order of priority for applicants for letters testamentary or of administration with the “executor” named in the will having the highest priority. Because such provision was not made specifically applicable to independent executors, it could have been literally construed to mean that the section was inapplicable to an independent executor and that the surviving spouse would prevail in a contest for letters as against the independent executor—a ridiculous result.

As already mentioned, the 1957 amendment eliminated the second sentence of section 146 and added a sentence to section 145 to the effect that after probate and the filing of an inventory, as long as the estate is represented by an independent executor, “further action of any nature shall not be had in the court except where this Code specifically and explicitly provides (therefore).” Thus, the term “executor” as used in the code will probably apply to an independent executor unless it would involve some action in the probate court. As already mentioned, the 1957 amendment eliminated the second sentence of section 146 and added a sentence to section 145 to the effect that after probate and the filing of an inventory, as long as the estate is represented by an independent executor, “further action of any nature shall not be had in the court except where this Code specifically and explicitly provides (therefore).” Thus, the term “executor” as used in the code will probably apply to an independent executor unless it would involve some action in the probate court.

Also, under the 1957 amendment, the inclusion of an independent executor within the definition of “personal representative” or “representative” will “not be held to subject such representative to control of the courts in probate matters with respect to settlement of estates except as provided by law.” Thus, an independent executor may still resign by action in the probate court under section 221 which provides such a procedure for “personal representatives.” This would be true because Roy v. Whitaker held that resignation is not a matter “relating to the settlement of the estate.”

Possibility of Disqualification as an “Unsuitable Person.”—A most important case involving the disqualification of an independent executor to receive letters testamentary is the 1958 Texas Supreme Court case of Boyles v. Gresham. In a prior case, it had been held that even though a will made neither a devise nor a bequest, it was entitled to probate because it appointed an independent executor. In the Gresham case, however, it was held that the independent executor named in the will was not disqualified to receive letters as an “unsuitable person” under section 78 merely because he asserted a claim to all or part of the property of the estate as a devisee, heir, trustee for other beneficiaries named in the will, or creditor of the estate. A logical conclusion to be drawn from the latter case is that

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3 Woodward, supra note 64, at 693.
3 Woodward, supra note 69, at 836.
4 Ibid.
5 92 Tex. 357, 49 S.W. 367 (1899), modifying 92 Tex. 346, 48 S.W. 892 (1898).
6 158 Tex. 106, 309 S.W.2d 50 (1958).
if the interest of the personal representative is adverse to the estate as an entity—to the extent that the applicant would be tempted to fail in his duty to collect and preserve the assets owned or claimed by the decedent—then that interest is enough to disqualify a representative, including an independent executor. As a result, jurisdiction of the probate court is invoked and bond is required; furthermore, if the representative neglects to post the bond, this subjects the representative to removal. But if the applicant for letters has no interest that would encourage him to neglect his fiduciary duty, he is not disqualified if he asserts a claim as a devisee, heir, trustee for other beneficiaries named in the will, or creditor of the estate. There may also be a difference between an executor and an administrator in this respect. Apparently, stronger indications of bad faith are necessary to disqualify an “executor” than an “administrator.”

h. Powers of an Administrator Succeeding an Independent Executor.—Unless a specific appointment of a successor as independent executor is made in a will, the successor does not have the powers of an independent executor. To remedy this matter, at least in part, the legislature in 1935 enacted what is now section 154 of the Probate Code entitled “Powers of an Administrator Who Succeeds an Independent Executor.” However, this section merely permits the administrator to exercise under court order the powers conferred upon the independent executor; therefore, this practice does not constitute a nonjudicial administration.

B. Qualified Community Administrators

Independent executorships are available only upon the use of certain special words or their equivalent in a will. Intestate situations, however, also present opportunities for out-of-court administration, particularly with respect to the powers of a surviving spouse over community property. If an interest in community property passes by intestacy to someone other than the surviving spouse, such survivor may upon qualification administer all of the community property for at least one year. However, in order to qualify, the administrator must post a bond in response to a court order. Pursuant to qualification, the surviving spouse may administer the entire community estate free of court control under very broad powers

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69 Woodward, supra note 69, at 844.
71 Woodward, supra note 69, at 844.
until the distributees force termination. Parenthetically, the original bill that established the present Probate Code would have permitted the survivor to qualify as community administrator when an interest in community property passes to a third party by will. However, this provision was eliminated by a House amendment.

Qualified community administration had a number of disadvantages prior to the enactment of the Texas Probate Code, viz.,

1. If a qualified survivor sold the original community assets and reinvested the proceeds, he and his bondsmen became insurers and thus liable without fault.

2. The powers of such administrators were extended to allowing mortgages of the entire community to secure the administrator's personal debt and to preferring one creditor over another.

3. In many instances, there was no provision for closing such a qualified administration and obtaining a discharge.

4. This form of community administration was apparently applicable only when the decedent's spouse left a child.

5. The bond was required to be in the amount of the value of the entire community property.

However, a number of new changes have been made under the new Code making community administration more advantageous; thus:

1. The qualified survivor and his bondsmen are liable for estate losses only where the survivor is guilty of gross negligence or bad faith.

2. The administrator may not mortgage community property to secure a personal debt or appropriate community property for his own use.

3. The qualified administration may be terminated after one year from the filing of the administrator's bond at the instance of the
qualified survivor or by an owner of the decedent’s share, either in the district court or by proceedings as in other independent administrations. 106

4. The corporate surety bond of the administrator has been reduced to one-half the gross value of the community estate. 107

5. The remarriage of a wife acting as a qualified administrator does not terminate her powers; this is also true as to a wife acting as an unqualified administrator. 108

6. The administration is now applicable “whenever an interest in community property passes by intestacy to someone other than the surviving spouse.” 109

Several things should be noted about a qualified administration: (1) the requirement of a full accounting to the court upon application of any creditor who has not been paid in full one year after the filing of the required inventory by the administrator, 110 (2) the requirement of payment of community debts within the time and in the order prescribed in other administrations with pro rata payment of all claims of the same class in cases of a deficiency of assets to pay all in full, and (3) the unavailability of such an administration if the decedent’s community interest passes by will. 111

C. Unqualified Community Survivors

Even if the community survivor does not qualify as community administrator, the surviving spouse retains extensive powers over the community property. Until a personal representative of the decedent has qualified, the surviving spouse may sue and be sued, mortgage, lease, dispose of property for the purpose of paying community debts, collect claims, discharge community obligations, and wind up community affairs. 112 The unqualified survivor is really a fiduciary having essentially the same powers and duties as a personal representative. Neither a bond nor a formal account is required. But, the unqualified survivor is responsible for keeping a full account of all community debts and expenses paid and the disposition of community property. 113 One disadvantage of this method is that the survivor’s rights terminate upon payment of the community debts. Moreover, the necessity of debts may constitute an obstacle to the

113 Basye, supra note 1, at 185.
purchase of assets from the survivor. Therefore, the purchaser must satisfy himself that there are in fact community debts existing; the size of the debts is immaterial. On the other hand, the powers of a qualified community administrator do not depend upon the existence of any community debts; in fact, sales by a qualified community administrator have been upheld although they occurred thirty-two years after his qualification.

The 1956 Code did not change other extensive powers of the unqualified community survivor, some of which are greater than those of an ordinary personal representative. For example, the survivor may sell community property to pay a community debt even though the debt has been barred by limitations. Furthermore, the survivor can raise money to pay community debts by a mortgage, by an oil and gas lease, and by an outright sale. Moreover, he can even sell the community homestead to pay community debts although the creditors would not otherwise be able to reach it.

V. DISTRIBUTION OF POWERS BETWEEN SURVIVING SPOUSE AND DECEDENT'S REPRESENTATIVE

There are a number of possible variations in regard to the allocation of powers between a surviving spouse and the personal representative of the decedent spouse. The principle established in the case of Moody v. Smoot is particularly important since that principle was accepted in the 1956 Probate Code. The Smoot decision was that the husband, as unqualified community survivor, was entitled to be the administrator of the community estate in preference to the decedent wife's administrator, but that the wife, as surviving spouse, does not have preference over the husband's personal representative in administering the community estate.
A. Wife's "Special Community"\footnote{Editor's comment. Subsequent to the date of this speech and immediately prior to the publication, H.B. No. 403 was passed by the Texas Legislature and approved on June 10, 1963. The act, effective 90 days after May 24, 1963, is designed to remove the disabilities of coverture of a married woman in connection with her contracts and her management and control of her separate property. The act expressly amends Tex. Rev. Civ. Stat. arts. 4614, 4618, 4621, 4624, and 4626. Article 4623 was repealed. The amended art. 4626, Tex. Gen. & Spec. Laws 1963, ch. 472, § 4626, at 1189, now provides:

A married woman shall have the same powers and capacity as if she were a feme sole, in her own name, to contract and be contracted with, sue and be sued, and all her separate property, her personal earnings and the revenues from her separate estate which is not exempt from execution under the laws of Texas shall thereafter be subject to her debts and be liable therefor, and her contracts and obligations shall be binding on her.

Any consideration of the wife's special community should definitely take into account H.B. No. 403.}{\footnote{Bearden v. Knight, 149 Tex. 108, 228 S.W.2d 837 (1950). In this case, the court attached no significance to the statutory omission in 1925 of the express statutory provisions giving the wife power to manage the rent from her real estate.}{\footnote{Pottorff v. J. D. Adams & Co., 70 S.W.2d 745 (Tex. Civ. App. 1934) error ref. At least one writer has suggested that the statutory omission may have been inadvertent. Huie, supra note 94. It is to be noted that the Pottorff case was not overruled, but tacitly approved by the Texas Supreme Court in Strickland v. Wester, 131 Tex. 23, 112 S.W.2d 1047 (1938).}{The course there held that decedent husband's creditor could reach the personal earnings of the wife when such earnings had been invested in land. The holding may have been unnecessarily broad. Apparently, two days before a forced sale was ordered to satisfy a judgment against the husband, he tried to put his land beyond his creditor by selling it to his wife who bought it with her personal earnings. In The Community Property Law of Texas, Commentary, 11 Tex. Rev. Civ. Stat. Ann. 44 (1960), Huie has said the Strickland holding is "inconsistent with the purposes of the 1913 plan and should be overruled." Huie also points out that the 1925 compilers saw no need for a special provision for the wife's management of income from her separate property since such items had been made expressly her separate property over which she had been given power of management, this being prior to the decision in Arnold v. Leonard, 114 Tex. 535, 273 S.W. 799 (1925), declaring the attempt to change the community property nature of such items unconstitutional.}{See Tyler, Federal Taxation and Community Property: the Wife's Rights in Her Earnings, 16 Sw. L.J. 643, 651 (1962). At that page, note the reference to the conflict among the writers as to whether the Pottorff case is right or wrong.}{See Huie, supra note 94.}{\footnote{Helm v. Campbell, Civil No. 9043, N.D. Tex., ________, 1962, not yet}{1963]} NON-JUDICIAL ADMINISTRATION 401

The term "special community" is herein used to refer to all items of community property which are under the management and control of the wife. It is clear that the wife has the management and control not only of her separate property, but also the revenues therefrom even though such revenues are community property.\footnote{See Huie, supra note 94.}{However, it is possible that the wife does not have the right to control her personal earnings.\footnote{Pottorff v. J. D. Adams & Co., 70 S.W.2d 745 (Tex. Civ. App. 1934) error ref. At least one writer has suggested that the statutory omission may have been inadvertent. Huie, supra note 94. It is to be noted that the Pottorff case was not overruled, but tacitly approved by the Texas Supreme Court in Strickland v. Wester, 131 Tex. 23, 112 S.W.2d 1047 (1938).}{However, in line with the reasoning of an outstanding authority in this field,\footnote{Bearden v. Knight, 149 Tex. 108, 228 S.W.2d 837 (1950). In this case, the court attached no significance to the statutory omission in 1925 of the express statutory provisions giving the wife power to manage the rent from her real estate.}{the United States Court for the Northern District of Texas held that the wife, not the husband, has control over her personal earnings.\footnote{Pottorff v. J. D. Adams & Co., 70 S.W.2d 745 (Tex. Civ. App. 1934) error ref. At least one writer has suggested that the statutory omission may have been inadvertent. Huie, supra note 94. It is to be noted that the Pottorff case was not overruled, but tacitly approved by the Texas Supreme Court in Strickland v. Wester, 131 Tex. 23, 112 S.W.2d 1047 (1938).}
In summary, the wife's personal earnings may or may not be a part of the "special community," but all revenue from her separate property may be considered as such, and probably all reinvestments of such revenue will be treated similarly. The importance of this determination is that the reasoning of Moody v. Smoot has been extended by the Probate Code to the special community so that the wife as "surviving spouse . . . is entitled to retain possession and control of all community property which was legally under the management of the surviving spouse during the continuance of the marriage. . . ."

B. Various Situations Calling For Distribution Of Powers

In determining the distribution of powers over the community property between the decedent's personal representative and the decedent's surviving spouse, several situations should be considered in connection with section 177 of the Texas Probate Code:

1. When the Husband Dies First and Names an Executor Other Than His Wife.—Under the Moody v. Smoot principle, the husband's executor is entitled to administer the entire general community. The surviving wife is entitled to retain possession and control of her special community free of control by the husband's executor. Of course, as previously mentioned, the wife cannot qualify as general community administrator if the husband's community interest passes by will, nor can she administer any of the community as unqualified survivor if either an executor or administrator of the husband's estate qualifies.

2. When an Intestate Husband Dies First.—If the husband dies intestate, the surviving wife is entitled to qualify as community administrator over both the general and special community, even against the administrator of the husband's estate. However, the surviving wife waives this right as to the general community if reported. It would appear, however, that investments made with revenue from the wife's separate property are exempt from the husband's debts and thus apparently under the management and control of the wife. Hawkins v. Britten State Bank, 122 Tex. 69, 52 S.W.2d 243 (1932) (equipment purchased with income from the wife's separate farm), citing Emerson-Brantingham Implement Co. v. Brothers, 194 S.W. 608 (Tex. Civ. App. 1917) (automobile purchased by wife with her personal earnings) (decided prior to the 1925 statutory omission when the wife had express power to manage her personal earnings); Mercantile Nat'l Bank v. Wilson, 279 S.W.2d 650 (Tex. Civ. App. 1955) (US Savings Bonds purchased with income from the wife's separate property). See Note, 34 Texas L. Rev. 477 (1956).

See generally Hadaway, supra note 119, at 1015-1026.

125 General community property is defined as all community property other than the special community of which the husband is the manager during his life. See Commentary, supra note 123,
she knowingly allows a third party actually to qualify as permanent administrator and take possession of such community. If the surviving wife has not qualified as community administrator, the husband's administrator is entitled to administer the general community, but the wife can retain possession and control of her special community.

3. When the Wife Dies First Testate and Names an Executor Other Than the Husband.—The wife's executor is entitled to administer her "special community" as well as her separate property, but the surviving husband is entitled to continued possession and control of all of the general community, including the wife's one-half.\textsuperscript{130}

4. When the Intestate Wife Dies First.—If the wife dies intestate, the surviving husband is entitled to administer the entire community estate either as qualified community administrator or as unqualified survivor. However, if the wife had accumulated revenues from her separate property during the marriage, the surviving husband waives the right as to the wife's special community if he knowingly consents to a third party qualifying as permanent administrator and taking possession of such special community. If the surviving husband has not qualified as community administrator, the wife's administrator is entitled to administer the special community, but the husband is entitled to retain possession and control of the general community. As previously stated, the husband cannot qualify as community administrator if the wife's community interest passes by will.

VI. SHORTENING AND CLOSING ADMINISTRATION

Texas has also provided a number of methods, both judicial and nonjudicial, for shortening and closing an administration.

A. Summary Closing If The Estate Is Insufficient To Pay Family Allowance And General Claims

If at any time after the filing of an inventory, appraisement, and list of claims, it is established that the estate, even though a very large one,\textsuperscript{131} is insufficient to pay the family allowance and the claims of general creditors, the court administration may be summarily closed.\textsuperscript{132} Upon order of the court, the representative may pay the claims to the extent permitted by the estate assets in the order of priority provided by section 322; \textit{i.e.}, funeral and last illness expenses, administration expenses, secured claims so far as they can be paid

\textsuperscript{130} Tex. Prob. Code Ann. § 177(b) (1956).

\textsuperscript{131} Basye, \textit{supra} note 1, at 179.

out of the proceeds subject to the security, all claims presented within
one year of the original grant of letters; and thereafter account to
the court. Thereupon, the court, with or without notice, may allow,
adjust, or disallow such account. If the account is allowed, the court
will decree final distribution, discharge the representative, and close
the administration.

B. Withdrawing Estates From Administration By Posting Bond:
Partition And Distribution

After the return of an inventory and appraisement, any distri-
butee may upon filing a written complaint cause the executor or
administrator to render under oath an exhibit of the condition of
the estate. Thereafter, any one or more of the distributees may
execute and deliver a bond in double the gross appraised value of the
estate; thereupon, the court shall order the representative to deliver
the estate forthwith to the distributees, discharge the representative,
and declare the administration closed. Creditors may bring an
action on the bond or alternatively an action against any or all of
the distributees, who shall be liable for their just proportion of
the distributed estate against which a lien shall exist to secure the
payment of the bond and the claims and debts secured thereby.

In connection with this proceeding, any distributee may, by
written application to the court, obtain an order of partition and
distribution. Such an order can also be required without any
special bond by the distributee or by the representative twelve months
after the original grant of letters upon written application there-
for.

C. Partition Of Survivor's Share Of Community Property Or
Joint Owner's Share Upon Posting Bond

Subsequent to the grant of letters and the return of an inventory,
appraisement, and list of claims, an application for community
property partition may be filed and effectuated by a surviving spouse
on posting bond in an amount equal to the survivor's interest in the
estate against which creditors may obtain judgment. Under section
386, any time after grant of letters, the joint owners of property
with the decedent may require partition between the applicant and
the decedent's estate.

D. Termination Of Independent Administration
After One Year Upon Proper Showing

Pursuant to section 152, any distributee may make application to terminate an independent administration and the authority of the independent executor to act as such if he can show no further necessity for such administration. Furthermore, the presumption exists that an independent administration of an estate is closed after one year. However, as stated in a recent Texas Supreme Court case, the administration of the estate should not be in effect ordered closed if it is clearly indicated that the estate has not been fully administered.

E. Termination Of Qualified Community Administration
After One Year

A qualified community administration may be terminated after one year from the filing of bond at the instance of the qualified survivor or the owners of the decedent's share by an action in either an appropriate district court or by a proceeding similar to those used in other independent administrations.

F. Grounds Of Removal To Terminate Authority Of
Representatives To Act

As previously mentioned, an independent executor cannot be removed unless he fails to give bond upon a showing of mismanagement, betrayal of trust, or other disqualification. An administrator under court supervision is treated differently. The probate court may remove, without notice, a representative under its control for the following reasons: (1) failure to qualify in the manner and time required by law, (2) failure to return an inventory and list of claims within sixty days of qualification, (3) failure to give a new bond in the time required by law, (4) absence from the state without the court's permission or removal from the state, and (5) inability to be served because of unknown whereabouts or eluding service. There are numerous circumstances in which the administrator can be removed upon notice, including failure to settle the estate within three years after the grant of letters unless extended by the court on a showing of sufficient cause supported by oath.

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130 Jones v. Jimmerson, 302 S.W.2d 161 (Tex. Civ. App. 1957) error ref. n.r.e.
131 Davis v. East Texas Sav. & Loan Ass'n, ___ Tex. ___, 334 S.W.2d 926 (1962).
G. Replacement Of Independent Executor By Receiver

Although there have been intimations in the cases that the district court, in the exercise of its inherent equity powers, may remove the independent executor for mismanagement or other breaches of fiduciary duties, the matter does not appear to be particularly important. This is so because a district court may, in effect, replace an independent executor with a receiver as an incident to a suit for an accounting. Although the independent executor is not actually removed, the receiver takes over possession and management of the estate.

VII. Protection Of Representatives in Closing Out-of-Court Administrations

A. Pre-Probate Code Era

Under the old law, the probate court had no jurisdiction to close an independent administration. The estate was, in fact, closed and the authority of the independent executor terminated by his distribution to the distributees, but this could not be made to appear of record. Thus, it was often difficult for a purchaser, a stock transfer agent, or a plaintiff in an action against an estate to dispense with the joinder of the executor, even though the administration might have been terminated. Moreover, some county judges took the position that although they had no jurisdiction to receive a final account and discharge the independent executor, it was necessary for the executor to continue paying bond premiums indefinitely.

B. Under Texas Probate Code

Under the 1956 Texas Probate Code, a change has been effectuated. An independent executor may now terminate an independent administration and end his authority by filing a final account verified by affidavit with the probate clerk. Thereafter, third parties may deal directly with the distributees, and the latters’ action shall be valid and binding, notwithstanding any false statement in the final account. Thus, after such filing, it is unnecessary to require the joinder of the independent executor in any conveyance of estate.

143 Woodward, supra note 69, at 839-41.
145 In O’Connor, supra note 146, the district court had removed the independent executor, but the appellate court had treated such order as surplusage while sustaining the appointment of a receiver.
146 Ibid.
147 Ibid.
properties. But it is to be noted that the independent executor is not relieved "from liability for any mismanagement of the estate or for liability for any false statement made in the affidavit." Therefore, a purchaser buying property from the distributees in reliance on a statement in the affidavit that all debts have been paid would be protected from the claims of any unpaid creditors, but the independent executor would be personally liable to such creditors for any false statements or any mismanagement of the estate.

As already mentioned, any distributee may, by action in the probate court after notice and hearing, obtain an order closing the administration and terminating the independent executor's powers to act at any time after the estate has been fully administered. There is no provision in the Code, however, for an independent executor to secure discharge on his own motion. But other procedures may be available, viz.,

1. Upon action initiated by a distributee to close the independent administration, the court could probably approve the executor's final account and discharge him.

2. The past practice has been for the independent executor to rely on receipts or releases from distributees when all are of age and competent and no trouble is anticipated. This practice is probably still available since there is nothing in the Code to the contrary.

3. If the will fails either to distribute the entire estate or to provide a means of partition, the independent executor may file a final account in the probate court; the court may then partition and distribute the estate and can probably also discharge the independent executor. However, if the will distributes the entire estate and also provides a means of partition, the probate court has no jurisdiction to examine the account of the independent executor and grant a discharge.

4. It is also probable that the district court may, in the exercise of its general equitable powers, receive the independent executor's final account and discharge him.

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113 Ibid.
114 Woodward, supra note 64, at 696. Section 151 is probably applicable to estates pending before January 1, 1956, since section 2 makes the Code procedure applicable to pending cases except where the court is of the opinion that its application in particular proceedings would not be feasible or would work an injustice. Section 26 prevents the impairment of any existing right. Neither of such sections would prevent a closing by affidavit.
116 Woodward, supra note 64, at 697.
117 Ibid.
118 Ibid.
120 Woodward, supra note 64, at 697.
121 This possibility is strengthened by Tex. Rev. Civ. Stat. Ann. (Uniform Declaratory
5. The resignation procedure is available for the independent executor. It is settled that the old statutes concerning resignation included the independent executor. Furthermore, under principles previously discussed, the present definition of "personal representative" in the resignation provisions of the Code includes an independent executor. Although the administration would not be terminated in a technical sense, the final account would show all debts paid, proper distribution of remaining assets, and no necessity for further administration. The court can enter an order accepting the independent executor's resignation, approving his final account, and discharging his bondsmen and him. Such an order is a final judgment which is not subject to collateral attack.

VIII. Conclusion

Among American jurisdictions, Texas has led the way in streamlining the administration of decedents' estates and in dispensing with formal court administration. Texas methods could well be used to advantage by other jurisdictions in the United States. However, in order to provide a complete system of expeditious procedures for estate administration, Texas should revise its methods for non-testamentary, non-community property situations. The English system furnishes an example by which the administrator or executor, now under probate court control in Texas, might operate entirely free of court supervision after grant of letters of administration. Upon the application of an interested party, the court might assert control. This procedure would focus the probate court's concentration on the situation in which it can furnish its greatest assistance, namely, the contested situation. Although the Texas community property system often complicates estate administration by creating dual representatives, formal judicial administration requirements create additional complications and unnecessary expense. Creditors and distributees have many means of protection; their interests are not irreparably imperiled by such out-of-court arrangements because formal court administration or proper bonding arrangements are available under certain circumstances.

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Judgments Act) art. 2524-1, §§ 1, 4 (1951). See Pressler v. Wilke, 84 Tex. 344, 19 S.W. 436 (1892).

160 Roy v. Whitaker, 92 Tex. 357, 46 S.W. 367 (1899), modifying 92 Tex. 346, 48 S.W. 892 (1898); Woodward, supra note 64, at 698.


162 Woodward, supra note 64, at 698.


164 Simkins, Administration of Estates in Texas § 283 (1d ed. 1914).
Regarding the out-of-court executor's or administrator's release from future liability, there is need for an express provision that will permit an independent executor to seek a discharge from his fiduciary position. However, in view of the numerous methods available upon the closing of the estate, satisfactory protection from liability generally exists.