

INSTRUCTIONS TO INDEPENDENT EXECUTORS

Congratulations on being appointed Independent Executor. As an Independent Executor, you have assumed a major responsibility. The law imposes upon you certain powers, duties and responsibilities. These legal requirements have developed over the last 150 years in Texas and are designed to protect the beneficiaries of an estate, while at the same time allowing for freedom of action by the independent executor. These instructions will attempt to introduce you to basic aspects of the law. If you have any questions, please contact our office at any time.

I. INTRODUCTION

You have been appointed "independent" executor. The term "independent" means that you are largely free of court control. Except in limited circumstances, your decisions cannot be changed by the judge. In naming you as "independent executor", the decedent has placed his or her trust in you that you will follow his or her last wishes.

Independent administration is a direct result of the Spanish influence upon the history of Texas. It existed as early as 1873 and until recent years, only the states of Washington and Texas allowed it. However, its advantages have been recognized by many states in the union. Today, over one-third of the states in the United States have adopted systems based upon Texas law developed well over 100 years ago.

II. POWERS

(a) **Introduction.** You are to be guided in the exercise of your powers by the terms of the decedent's will. As independent executor, you can obtain assistance from others but you may not delegate your ultimate decision making power. The responsibility for making decisions is yours and yours alone.

(b) **The Power to Sell Real Estate.** If the decedent's will grants you the power of sale, you may sell real estate belonging to the decedent at a public or private sale on such terms as you deem best or as the will directs. If the will does not include a power of sale you may sell real property only when necessary to pay certain expenses, allowances and claims or if you deem it to be in the best interest of the estate. Without a power of sale, the law establishes the requirement that at least 20 percent of the sale price must be paid in cash and that any notes received by the estate earn interest of at least 4 percent per annum.

Special forms of deeds are required to convey property from an estate. It is not acceptable for you to use the common general warranty deed. If you decide to sell real estate, you will need to contact our office so that we can review the sales contract and so that we can prepare a special warranty deed to accurately reflect your powers to sell the property. Finally, Section 6324 of the Internal Revenue Code establishes a lien upon all real estate for the payment of estate taxes. If you desire to sell real property, you should contact us so that we can explain to you the consequences and liability of estate taxes. The transfer of real property without the payment of estate taxes can

render you personally liable for this tax.

(c) **Sales of Personal Property.** You may find that your estate has in it certain things that will perish, waste or deteriorate in value if not immediately sold. Examples include perishable items in inventory, stocks which are subject to price fluctuations, or race horses and livestock which require substantial amount of day to day attention. As soon as possible you should sell items of this nature and deposit the proceeds in the estate's account. You may sell other items of personal property if the will authorizes it or if the sale is in the best interest of the estate. If possible, you should consult with the beneficiaries of the estate before selling any items of personal property in order to preserve for the family, items of a historical nature or of sentimental value.

(d) **Purchase of Estate Property by the Executor.** You may purchase property from the estate for your own use if it is in the best interest of the estate. Special notice provisions apply and you should contact our office before you make any such purchases. As a general rule, because of the potential for conflict, we discourage executors from purchasing items from the estates they handle.

(e) **Collecting Assets.** You have the power to gather all of the assets belonging to the decedent. If necessary, you may file lawsuits on behalf of the estate to collect property or money due it. Special rules apply to attorney's fees in this situation so before you hire a lawyer to file a lawsuit, please contact us. You have the right to possess all of the items of the estate pending distribution to the individuals named in the will. If necessary, you can enforce your right to possession through court order. A common problem occurs when the decedent's property is already in the hands of the distributees. Since you are responsible for the property, you may compel the distributees to return it to you if you deem it to be in the best interest of the estate.

(f) **Operation of a Business.** You may continue to operate the decedent's business, farm, ranch, factory and may act in the place of the decedent who is a partner in a general partnership if allowed by the terms of that partnership. Operating a business is usually a substantial undertaking and you will need frequent assistance from our office.

(g) **Borrowing Money and Pledging Estate Assets.** You may borrow money and pledge estate assets if necessary to raise money to pay taxes or valid expenses of administration. You should let us review any loan documentation before you execute it.

(h) **Purchase Insurance.** You have the power to purchase liability insurance for the estate and insurance for the assets of the estate. Further, you have the power to negotiate and settle claims and to vote stocks.

III. DUTIES

(a) **Duty to Collect Assets.** The law requires that you use diligence in recovering possession of the property of the estate and in collecting any debt owed to the estate. You must insure the property of the estate and you should not allow any claims of the estate to be barred by

the statute of limitations.

(b) **Notice to Creditors.** The law requires that you notify creditors of the death of the decedent and your appointment as independent executor. Notice is given in several ways depending upon the type of creditor. *The failure to give notice may result in you becoming personally liable for any damages suffered by the creditor.*

1) **Publication.** After appointment our office will arrange for a notice to be published in the Commercial Recorder giving general notice to all creditors of your appointment.

2) **Special Notice to Unsecured Creditors.** An unsecured creditor is one who does not have a lien upon estate property. For a person dying on or after September 1, 1991, you must give notice by registered or certified mail, return receipt requested within four months of your appointment to all creditors of the estate. You must inform creditors of the creation of the estate and direct them to present their claims within the time period prescribed by law. Our office will prepare the notices for you if you wish, or you may do it yourself.

3) **Special Notice to Secured Creditors.** A secured creditor is one who has a lien upon estate property. Within four months after receiving your appointment, you must give notice by registered or certified mail, return receipt requested to all creditors whose claims are secured by a deed of trust, mortgage, vendor's lien, mechanic's lien, or other contractor's lien which was duly recorded prior to the decedent's death. Moreover, a copy of your notice and a signed and sworn affidavit executed by you must be filed with the court. Contact our office promptly if you discover that the decedent had any secured debts.

4) **Estate Taxes.** If the decedent owed any taxes to the Texas Comptroller of Accounts, (unemployment taxes or sales taxes) a special notice must be sent to the Comptroller. Contact our office for assistance.

5) **Taxes owed to the Internal Revenue Service.** You must notify the Internal Revenue Service of your appointment as independent executor by filing Internal Revenue Service Form 56. We strongly advise all of our clients to immediately retain a Certified Public Accountant (CPA) to assist you in preparing the decedent's last tax return as well as in managing any estate taxes. If you do not have a CPA, please contact our office and we will refer you to several who have the experience necessary to properly handle these matters. *The penalties and interest levied by the IRS for late or erroneous filings can be substantial. Professional advice is strongly recommended.*

6) **Charities.** Effective September 1, 1989, special notice provisions apply if the decedent left property to a charitable organization. The notice provisions are

strict and you should contact our office for assistance with these matters.

7) **Inventory.** Within 90 days of your appointment you must file an inventory. The inventory will summarize the property in the estate and any claims owed to the estate (not against the estate). It should indicate the fair market value of each asset on the date of death and must be signed by you under oath. Our office will assist you in the preparation and filing of the inventory. It is your responsibility to assist us in locating the assets.

8) **Locating Assets.** Often times it is difficult to locate all of the assets of an estate. The decedent may have been the type of person who made a habit of hiding the assets or the assets may be so extensive and the investments so wide spread that it is difficult to be sure that you have identified and located all of them. The best way to find assets is to conduct a thorough search of every drawer and box in the decedent's home and office. Look for ad valorem tax statements, financial statements, bank statements, income tax returns, safe deposit box keys or receipts and mail. All of these documents or items may lead you to assets of the estate. If necessary, professionals can be hired to assist in tracing assets. However, these experts are usually very expensive and should be used only as a last resort.

If you cannot locate the decedent's bank, the best way to find it is to visit in an ever widening circle, every bank within a certain radius of the decedent's home or business. Most people tend to do their banking at a convenient location. Usually you will be able to locate the decedent's bank by following this method. Be sure and take with you copies of your letters testamentary. Without them, bank officials are prohibited by privacy statutes from sharing any information with you.

9) **Allowances.** Allowances are special provisions in the will made to protect surviving spouses and children of the decedent. If the decedent had a surviving spouse and children and did not provide for them in the will, you may be required to set aside certain assets as an "allowance" for them. Our office will advise you if the allowance statutes apply to your situation. If you have any questions do not hesitate to contact us.

10) **Payment of Debts and Expenses.** Hopefully your estate has sufficient assets to pay all of the decedent's debts and expenses of administration. If so, you can be flexible in the order in which you pay debts. However, if the decedent owed more than he has in his estate, you must classify the creditors and pay them in order of their classification. The law establishes the following classes and payment should be made in the following order:

Class 1	Funeral expenses and expenses of the last illness up to \$5000;
Class 2	Expenses of administering and preserving the estate;

- Class 3 Claims secured by mortgage or other lien, up to the value of the property subject of the lien;
- Class 4 Claims for estate taxes, penalties and interest;
- Class 5 Claims for cost of confinement established by the Texas Department of Corrections;
- Class 6 Claims for repayment of medical assistance payments made by the state under the Human Resources Code;
- Class 7 All other claims presented within six months of your appointment as independent executor; and
- Class 8 Claims presented to you after six months from your appointment.

If the assets are insufficient to pay all of the claims in a particular class, the claims in that class should be paid prorata.

In addition to paying the claims in a certain order, you will have to identify what portion of the estate to use to pay the claims. This is often difficult since it may eliminate or limit a bequest in the will. Assets from the estate should be used in the following order to pay the debts described above:

1. Property passing by intestacy;
2. Personal property in a residuary state;
3. Real property in a residuary state;
4. General bequests of personal property;
5. General devises of real property;
6. Specific bequests of personal property; and
7. Specific devises of real property.

Handling an estate with more debts than assets can be a difficult and trying experience. You will need extra legal help to insure that all of the rights of the creditors and the heirs are properly protected.

11) **United States Taxes.** You are responsible to ensure that the estate prepares and files the decedent's last tax return, an income tax return for subsequent years if the estate earns any income, and an estate tax return, if necessary. The failure to properly pay taxes may make you personally liable for the tax, penalty and interest owed to the United States. We strongly advise that you hire a Certified Public Accountant experienced in these matters to assist you. The fees of the CPA are expenses of administration and can be paid from the estate.

12) **Compensation and expenses.** You are entitled to be paid for your services as independent executor of the estate. The law allows you to receive a five percent commission on the income of the estate and expenses paid by the estate. No commissions are paid on the initial principal of the estate or on life insurance proceeds. If the work you perform on behalf of the estate is extensive and your

commission would be unreasonably low, the court has the authority to increase it. Contact our office for assistance in presenting these matters to the court.

You should keep track of all of your expenses in administering the estate including your long distance phone calls, mileage and parking, professional fees for attorneys and certified public accountants, copying expenses, and any other expenses. You are entitled to reimbursement from the estate for all of these expenses.

It has been our experience that people who are being paid for their work generally do a better job. Being an executor is difficult, demanding work which involves substantial responsibility. For these reasons, we recommend that you do not waive your commission and right to reimbursement.

IV. PRACTICAL CONSIDERATIONS

(a) **Bank Accounts.** Immediately after receiving your letters testamentary, you should visit each of the decedent's banks and have the decedent's bank accounts restyled from the decedent's name to your name. The accounts should be styled "Estate of (*Name of Decedent*), by (*Your Name*), Independent Executor". Order new checks for the estate. Sign each check with your name followed by the words "independent executor". All expenses of estate administration should be paid for with estate checks, no matter how small the expense. Carefully notate on each check the purpose for the expenditure so if there is ever a question you will have written documentation to back up the expenditure. Also, indicate on each deposit slip the source of any income to the estate.

(b) **Secure the Property.** Immediately visit the decedent's home and other properties and make sure that they are secured. As a precautionary measure, we recommend that you have all of the locks to the decedent's home or property rekeyed and that the new key be delivered to you. If the decedent has property that could be damaged or lost, you may wish to find off-site storage for it. Generally, storage facilities where you keep the key are adequate; however, if the property is particularly valuable you may wish to consider a bonded storage company.

(c) **Insurance.** Make sure that the decedent's home and possessions are insured. If you can identify the decedent's insurance agent, contact him immediately to verify insurance. If not, immediately arrange your own insurance on the premises and the property of the decedent.

(d) **Life Insurance.** Life insurance proceeds generally pass outside of probate unless the benefits are made payable to the estate. You will need to write each life insurance company and send them a copy of the life insurance policy, your letters testamentary and the death certificate of the decedent. After receiving your letter, the insurance company will pay the life insurance proceeds to the named beneficiary.

(e) **Pets, Livestock and Other Animals.** If the decedent had any pets, livestock or other animals, you will need to make immediate arrangements for their care and welfare. Dogs and cats can usually be boarded with a nearby veterinarian or entrusted to a family member. Larger animals, such as horses and livestock, require less attention than pets and usually it is possible to

locate and hire an experienced ranch hand to supervise them. Eventually, you may find it more practical to sell the animals at auction or private sale rather than continuing to incur expenses to maintain them.

(f) **Social Security, Veteran's Administration and Other Benefit Checks.** Checks issued to the decedent after the date of death should not be cashed. Return them by certified mail, return receipt requested to the government agency that issued them. You will have to repay any checks that have already been cashed or placed in the decedent's account by direct deposit after the date of death. Notify the government agency of the decedent's death and send them a copy of the death certificate and letters testamentary. Follow their instructions for refunding the excess funds to the government. You should always keep in mind that the right to receive government entitlements ends with the decedent's death. Any post-death payments are mistakes that must be corrected. The estate has no legal claim to these funds.

V. DISTRIBUTIONS

(a) **Distributions.** After you have paid the debts of the estate, you will want to distribute its remaining assets to the individuals or organizations named in the will.

- 1) **Specific Bequests.** Specific items of property should be delivered to the devisees named in the will. Get a receipt for the delivery of these items.
- 2) **Joint Bequests.** Many times wills leave property to people jointly. If they cannot agree upon a way to divide the property, you cannot partition it for them unless the will specifically gives you powers of partition. Without agreement, it will be necessary to have the court review and partition the property.
- 3) **Real Property.** Land can be conveyed from the estate by affidavit or by deed of distribution. Deed of distribution is preferable and this office can assist you in its preparation. If the property is to be sold, it is generally preferable to convey it directly from the estate to the purchaser rather than from the estate to the beneficiary under the will and then to the purchaser. Conveyances directly from the estate in this situation save title and closing costs.
- 4) **Stocks and Bonds.** Procedures for transferring these documents are too numerous to describe. You have to work closely with the stock transfer agent and with your broker to take care of the necessary paperwork.
- 5) **Automobiles.** Contact the local tax assessor-collector for information regarding transferring title to motor vehicles. At a minimum you will need the original title, letters testamentary and a completed Application for New Title form. In Bexar County, the tax assessor's office is located in the Vista Verde building and branch offices are located on the north, south and west sides of town.

VI. CLOSING THE ESTATE

There is no statutory requirement that the estate be closed. As a general rule, we recommend that it never be closed. In this way, the estate is in place to handle any problems that may develop in the years ahead or to accept and distribute any property that might not have been located at the time of the decedent's death.

VII. CONCLUSION

We hope that these instructions have been helpful to you in understanding some of your rights and obligations as independent executor. The majority of estates are handled in a very routine and straight-forward manner. The likelihood that you will run into difficulties is remote, especially if you follow the procedures outlined.

The secret to success as an independent executor is to handle all matters promptly and conscientiously. If you have a question about how something is to be handled, don't guess - call our office for proper legal advice. It is much easier to avoid a problem in the first place than it is to correct one that has already occurred.

We look forward to working with you and you may be assured that this office stands ready to assist you in any way.

Respectfully,

MARK STANTON SMITH
HEARD & SMITH, L.L.P.
3737 Broadway, Suite 310
San Antonio, Texas 78209
(210) 820-3737
(210) 820-3777 (Facsimile)