

COACHING AN OLYMPIC SPRINTER: GUIDING A PERSONAL REPRESENTATIVE IN DISTRIBUTING A DECEDENT'S ESTATE

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I. INTRODUCTION

Training a personal representative is not unlike training an athlete.¹ Prior to the 2024 Paris Summer Olympics, U.S. sprinter Noah Lyles declared he would take “all the medals.”² At the 2023 World Athletics Championships in Budapest, Lyles became the first man since Usain Bolt to win gold medals

1. See discussion *infra* Part I.

2. Olympic Talk, *Noah Lyles Crushes Personal Best and Is Coming for All the Olympic Medals*, NBC SPORTS (Feb. 4, 2024, 8:00 PM), <https://www.nbcsports.com/olympics/news/noah-lyles-60-meters-new-balance-indoor-grand-prix> [https://perma.cc/UXP8-XCLY].

in the 100 meter, the 200 meter, and the 4x100 meter relay.³ Unfortunately, Lyles did not achieve his goal at the Olympics.⁴ However, what he did achieve may have been more inspiring: he earned the gold medal in the 100 meter, tested positive for COVID-19 two days later, and somehow managed to earn a bronze in the 200 meter while ill.⁵

While we, as spectators, tend to view the sprinter as the one who accomplished the amazing feat, the sprinter's coach merits accolades as well.⁶ Unlike football and basketball coaches, whose names may be familiar to many Americans, the coaching GOATs (greatest of all time) of the sprinting world, such as Tom Tellez, Charlie Francis, Bud Winter, and Bob Kersee, may be virtually unknown to the reader.⁷ A sprinter does not just wake up and run as fast as they can on race day but instead must be coached to achieve greatness.⁸

Like a sprinter, many personal representatives just want to run fast.⁹ Our job as attorneys is to coach them to run their best race.¹⁰ This Article sets out the steps to coach the personal representative of a decedent's estate, including: (1) focusing on the big picture; (2) teaching the fiduciary duties;

3. See ZK Goh, *World Athletics Championships 2023: Noah Lyles Completes Hat-trick of World Titles, Anchoring USA to Men's 4x100m Relay Win*, OLYMPICS (Aug. 26, 2023, 2:57 PM), <https://www.olympics.com/en/news/world-athletics-championships-2023-noah-lyles-budapest-usa-mens-4x100m-relay> [https://perma.cc/L9PU-BL4Z].

4. See Nick Zaccardi, *Noah Lyles Reflects on Paris Olympics: Shock, Pride and Unfinished Business*, NBC SPORTS (Aug. 21, 2024, 1:35 PM), <https://www.nbcsports.com/olympics/news/noah-lyles-olympics-track-and-field-100-meters> [https://perma.cc/7WLJ-SM55].

5. See *id.*

6. See generally Tom Schad, *Why Noah Lyles' Coach Didn't Give a (Expletive) About His 100-Meter Time at Olympics*, USA TODAY (Aug. 4, 2024, 6:35 PM), <https://www.usatoday.com/story/olympics/2024/08/04/noah-lyles-coach-100-meters/74667888007/> (discussing the training and expectations that Noah Lyles's coach had) [https://perma.cc/CR5T-PGU3].

7. See generally *Houston Track & Field to Honor Legendary Coach Tom Tellez with Bust*, UNIV. HOUS. (Nov. 7, 2024, 12:00 PM), <https://uhcougars.com/news/2024/11/7/track-and-field-houston-track-field-to-honor-legendary-coach-tom-tellez-with-bust> (discussing the history and career of Tom Tellez) [https://perma.cc/A2SF-SPNT]; see generally Noah Kaminsky, *30 Years Later: A Review of Speed Trap by Charlie Francis*, SIMPLIFASTER, <https://simplifaster.com/articles/speed-trap-charlie-francis-review/> (last visited Jan. 28, 2025) (discussing the training system developed by Charlie Francis) [https://perma.cc/2KH4-MPYK]; see Lloyd "Bud" Winter, USATF, <https://www.usatf.org/athle-bios/lloyd-bud-winter> (last visited Jan. 28, 2025) (discussing the history and fame of Bud Winter) [https://perma.cc/QMP8-FUFE]; see Pat Graham & Eddie Pells, *Bobby Kersee Coaches Some of Biggest Stars in Track History with "Mad Scientist" Training Methods*, AP NEWS (Aug. 3, 2024, 5:54 AM), <https://apnews.com/article/2024-olympics-bobby-kersee-mclaughlin-4350c4f00907f478ccevfd47da8> (discussing the training methods of Bob Kersee) [https://perma.cc/9SP2-E9VA].

8. Rather than use the term executors and administrators, the author will refer to personal representative herein. See Lauren Monsen, *What it Takes: How U.S. Olympians Train*, SHARE AM. (July 19, 2024), <https://share.america.gov/what-it-takes-how-us-olympians-train/> [https://perma.cc/4E3U-KZTS].

9. See generally *Personal Representative Mistakes in Probate*, STONE LEGAL GRP., <https://stonelegallgroup.com/blog/personal-representative-mistakes-in-probate> (last visited Jan. 28, 2025) (examining the mistakes that can be made by personal representatives) [https://perma.cc/5X7E-6MF9].

10. See *Three Ways a Probate Lawyer Helps a Personal Representative Avoid Mistakes*, COMITER SINGER (Mar. 14, 2022), <https://www.comitersinger.com/blog/three-ways-a-probate-lawyer-helps-personal-representatives-avoid-mistakes/> [https://perma.cc/N8DC-U4E4].

(3) informing how to not get stuck in paying off claims and allowances; (4) determining who receives distributions; (5) funding testamentary trusts; (6) dealing with certain challenging assets; and (7) documenting the distribution.¹¹ Because a dependent personal representative has more court oversight and well-defined steps that must be accomplished, this Article focuses on coaching the independent personal representative, which may require a little more finesse.¹² The objective of this Article is to give each lawyer the tools to coach personal representatives not only to “Olympic gold” but to avoid getting sued.¹³

II. DISCUSSING THE BIG PICTURE

There are four parts to a sprint: (1) the start, (2) the acceleration, (3) the drive, and (4) the deceleration.¹⁴ During the start, the sprinter is in the iconic four point stance with their feet in the starting blocks.¹⁵ The center of gravity is low on the leading leg.¹⁶ The sprinter can trip up here by moving prior to the starter’s gun.¹⁷ This false start can lead to an automatic disqualification.¹⁸

Next, the sprinter leans forward during the acceleration to a forty to fifty degree angle to achieve minimal contact with the ground at the same time as they get maximum force production in the same direction.¹⁹ During the drive, the sprinter is fully vertical and achieves top speed with their eyes locked on the finish line while ensuring their foot strikes under their hip at each stride to minimize the braking force.²⁰ The drive is usually between forty to eighty meters.²¹

The deceleration phase is the last phase, although the name is a bit misleading because the sprinter should not purposely slow down until after the finish line.²² But in the last twenty meters, the sprinter’s body is running low on power and fighting off fatigue.²³ This is where many races are won or lost.²⁴

11. See discussion *infra* Parts III–X.

12. TEX. EST. CODE ANN. § 351.

13. See discussion *supra* Part I.

14. See Josh Tatsuno, *The 4 Main Phases of Sprinting Mechanics*, COMPETITIVE EDGE (Oct. 7, 2021), <https://compedgept.com/blog/four-phases-of-sprinting-mechanics/#:~:text=Once%20your%20position%20is%20set,now%2C%20you're%20off!> [https://perma.cc/JK4D-Q85D].

15. *Id.*

16. *Id.*

17. See Sarah Klein, *What are the Rules for the 100-Meter Sprint?*, LIVESTRONG (Jan. 27, 2024), <https://www.livestrong.com/article/132087-what-rules-100m-sprint/> [https://perma.cc/F4J9-TLH9].

18. See *id.*

19. See Tatsuno, *supra* note 14.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

In any part of the last three phases, a sprinter can be disqualified by stepping on the left lane line or running into the lane on their inside.²⁵ Coaching a sprinter requires focusing on each phase and not just telling them to run fast and then faster.²⁶

Likewise, the coach for the personal representative must train the personal representative for similar phases.²⁷ The start occurs at the courthouse.²⁸ Many personal representatives come out of the blocks strong, but some stumble immediately thinking they can handle it all from the courthouse or trip while getting bonded.²⁹

During the acceleration, the personal representative begins collecting or gathering the assets.³⁰ During the drive, the personal representative discovers the debts and expenses and gets them paid or barred.³¹

During the deceleration, the personal representative cannot gas out but must push through to distribution.³² Just as a sprinter cannot go from phase one to four without going through phase two and three, the personal representative must also go through phases two and three.³³ Coaching the personal representative through each phase will give them the tools to succeed.³⁴

III. THE START—FIDUCIARY DUTIES

After the hearing, where the will is admitted to probate and the personal representative is appointed, most probate attorneys meet with their clients to drill down the phases of the administration and duties.³⁵ First and foremost, the probate attorney should emphasize that the personal representative is a statutory agent of the court, and any rights, powers, or duties they have are established by statute and common law.³⁶ In other words, the personal representative cannot do whatever they want to get to distribution.³⁷

The Texas Supreme Court has held an executor to the same fiduciary standard in estate administration as a trustee, even though the provisions of

25. See Klein, *supra* note 17.

26. See generally Tatsuno, *supra* note 14 (highlighting the importance of understanding each phase).

27. See TEX. EST. CODE ANN. § 351.

28. See generally *How to Get Started as a Personal Representative*, STIMPSON L., <https://www.stimpsonlaw.com/how-to-get-started-as-a-personal-representative/> (last visited Jan. 28, 2025) (discussing the beginning steps of being a personal representative) [<http://perma.cc/85JG-2H45>].

29. Author's original thought.

30. *How to Get Started as a Personal Representative*, *supra* note 28.

31. See generally IRM 5.5.2.2(1) (Feb. 1, 2011) (discussing that personal representatives must get the debts and expenses paid).

32. See *id.*

33. See discussion *supra* Part II.

34. See discussion *supra* Part II.

35. Maya Powers, *What is a Probate Attorney – A Complete Guide*, TR. & WILL, <https://trustandwill.com/learn/probate-attorney> (last visited Jan. 27, 2025) [<https://perma.cc/N6ZK-GRXT>].

36. See TEX. EST. CODE ANN. § 351.352.

37. *Id.*

the Trust Code are not applicable to estate administration unless provided otherwise in the will.³⁸

A. Duty of Care

The personal representative has a duty of care, which means they must take the same reasonable care of all estate property as a prudent person would do.³⁹ If any buildings belong to the estate, the personal representative shall keep those buildings in good repair, except for extraordinary casualties.⁴⁰

To satisfy this duty, the personal representative must first discover all of the assets.⁴¹ The personal representative may start with little knowledge of what assets are in the estate.⁴² In this digital world where statements may no longer come in the mail and even bills come electronically, this duty is sometimes a reason our clients stumble.⁴³ Accessing the decedent's e-mail may help, but now even e-mail has become somewhat obsolete.⁴⁴

Checking the bookmarks in a web browser and the apps on a decedent's smart phone may provide some guidance on their financial assets.⁴⁵ While advising a personal representative to insure the buildings and vehicles may seem obvious, many buildings may not be insurable, and many insurance companies will not insure an estate vehicle.⁴⁶ In 2023 and 2024, many insurance companies no longer write homeowners' policies in Texas and those that do have drastically increased their rates.⁴⁷ A personal representative will need to collect rejection letters or e-mails from different insurance companies.⁴⁸

For any vehicles, the personal representative should contact the insurer to confirm if the policy allows them to drive the car for maintenance and for possible sale.⁴⁹ Some policies may cover the legal representative of the

38. Humane Soc'y of Austin & Travis Cnty. v. Austin Nat. Bank, 531 S.W.2d 574, 577 (Tex. 1975).

39. TEX. EST. CODE ANN. § 351.101.

40. *Id.*

41. Abigail V. Poole, *What Are Five Duties of a Probate Estate's Personal Representative*, SAMUEL, SAYWARD & BALER LLP (June 8, 2021), <https://ssbllc.com/what-are-five-duties-of-a-probate-estates-personal-representative/#:~:text=Find%20the%20Assets,estate%2C%20and%20dividends%20from%20stock> [https://perma.cc/YH9N-CM9T].

42. *See id.*

43. See Herb Weisbaum, *Switching to digital billing statements? Here's what you need to know*, BETTER BY TODAY (Jan. 23, 2019, 7:30 AM), <https://www.nbcnews.com/better/lifestyle/switching-digital-billing-statements-here-s-what-you-need-know-ncna961176> [https://perma.cc/9BWW-3VTL].

44. *Is Email Becoming Obsolete? The Future of Communications*, GROWLEADY (Jan. 29, 2024), <https://www.growleady.io/blog/is-email-becoming-obsolete> [https://perma.cc/YK2V-7S96].

45. *See id.*

46. *See id.*

47. *See e.g., Why Are Insurance Rates Increasing in Texas?*, OFF. OF PUB. INS. COUNS. (Oct. 24, 2024), <https://www.opic.texas.gov/news/why-are-insurance-rates-increasing-in-texas/#:~:text=There%20are%20many%20reasons%20why,activity%20increases%2C%20operating%20costs%20increase> [https://perma.cc/5FDS-SZEK].

48. *See* TEX. EST. CODE ANN. § 351.101.

49. *See generally, Does Car Insurance Follow the Car or the Driver*, TRAVELERS, <https://www.>

decedent, which is called “extended non-owned.”⁵⁰ However, other insurers will not allow the policy to stay open.⁵¹ The personal representative should request that the insurer provide written confirmation of the refusal to change the insured to the personal representative or the estate.⁵²

While the personal representative can shop around with other insurers to see if a policy can be issued for the vehicle, the personal representative may be forced to add the vehicles to their personal policy.⁵³ The heirs or beneficiaries could argue that the personal representative has breached their duties and they must start a new insurance policy solely for the estate vehicles.⁵⁴ Again, getting communication from the insurer in writing will assist with this stumbling block.⁵⁵

If the personal representative knows the estate is liquid, getting rid of the vehicle by distribution pursuant to a specific bequest by sale or by distribution to a residuary beneficiary may be the most prudent course of action.⁵⁶ Beware, however, when several heirs or beneficiaries want the vehicle that is in the residue.⁵⁷

B. Duty to Collect Personal Property and Records

The personal representative has a duty to collect and take possession of the estate’s personal property, record books, title papers, and other business papers.⁵⁸ Often, this can be a challenge when a child of the decedent is the personal representative and a surviving spouse is still in the house who is not the child’s parent.⁵⁹

Similarly, banks will sometimes inform the personal representative that they are not entitled to a copy of the account agreement or bank statement showing the value as of the date of death.⁶⁰ Even if the bank will provide

travelers.com/resources/auto/insuring/does-car-insurance-follow-the-car-or-the-driver (last visited Jan. 27, 2025) (stating car insurance will cover whoever is listed on your policy) [https://perma.cc/SL5M-CAP3].

50. Jack Hungelmann, *Managing Personal Automobile Insurance Risks Following Death*, IRMI (Apr. 18, 2008), <https://www.irmi.com/articles/expert-commentary/managing-personal-automobile-insurance-risks-following-death#:~:text=If%20you%20are%20not%20the,for%20follow%form%20umbrella%20coverage> [https://perma.cc/W5VB-MC3G].

51. *See id.*

52. *See* TEX. EST. CODE ANN. § 351.101.

53. *See id.*

54. *See id.*

55. *See id.* § 405.001.

56. *See id.*

57. *See id.*

58. *Id.* § 351.102(a).

59. *See id.*

60. *Does an Executor Have to Show Accounting to Beneficiaries?*, KEYSTONE L. GRP., P.C., <https://keystone-law.com/does-an-executor-have-to-show-accounting-to-beneficiaries> (last updated Jan. 5, 2025) [https://perma.cc/ZKB3-EBSN].

records, sometimes it will charge a fee pursuant to the account agreement.⁶¹

While a personal representative can arguably show cause as required by Section 252.202 of the Texas Estates Code, the court may cite a surviving spouse in possession of the estate papers to get this information; however, it is possible that the papers have been destroyed before or after death, leaving the personal representative with nothing to show for cause.⁶² If the judge is satisfied that the surviving spouse had custody of the papers at the time the complaint was filed, the judge may arrest the surviving spouse and confine them until the spouse delivers the papers.⁶³ Additionally, the personal representative can recover damages from the surviving spouse or other party holding estate papers.⁶⁴

C. Duty of Good Faith and Loyalty/Impartiality

A personal representative owes the beneficiaries or heirs an unwavering duty of good faith, fair dealing, loyalty, and fidelity.⁶⁵ The duty of loyalty requires a fiduciary to act in the best interests of the beneficiaries (above the fiduciary's own interests) while remaining fair and impartial to all of them.⁶⁶

The Texas Trust Code clearly provides that a trustee has a duty of impartiality between two or more beneficiaries.⁶⁷ The trustee must consider, potentially, beneficiaries' many differing interests when investing and managing trust assets.⁶⁸

While this duty seems basic, the duty of loyalty can be difficult when there are income beneficiaries and principal beneficiaries or life estate and remainder interests.⁶⁹

D. Duty of Full and Complete Disclosure

Personal representatives owe beneficiaries and heirs a fiduciary duty to fully disclose all material facts known to them that might affect the rights of beneficiaries or heirs.⁷⁰ Texas law is well established that the mere existence

61. René Bennett, *7 Little-Known Bank Fees That Could Be Costing You Big*, BANKRATE (Apr. 13, 2023), <https://www.bankrate.com/banking/costly-little-known-bank-fees/> [<https://perma.cc/YH4F-9FQW>].

62. TEX. EST. CODE ANN. § 252.202.

63. *Id.* § 252.203.

64. *Id.* § 252.204.

65. *Herschbach v. City of Corpus Christi*, 883 S.W.2d 720, 735 (Tex. App.—Corpus Christi 1994, writ denied).

66. *See Slay v. Burnett Tr.*, 187 S.W.2d 377, 387–88 (Tex. 1945).

67. TEX. PROP. CODE ANN. § 117.008.

68. *Id.*

69. *Helping Trustees Avoid Liability – The Duty of Impartiality*, FAEGRE DRINKER (Apr. 8, 2019), <https://www.faegredrinker.com/en/insights/publications/2019/4/helping-trustees-avoid-liability-the-duty-of-impartiality> [<https://perma.cc/ZHD8-E3EK>].

70. *Montgomery v. Kennedy*, 669 S.W.2d 309, 313 (Tex. 1984); *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996).

of a strained relationship between parties does not lessen the duty of full and complete disclosure.⁷¹ The duty to disclose arises from common law.⁷²

IV. THE ACCELERATION—GATHERING AND SECURING THE ASSETS

The phases of gathering and securing assets may be the shortest in many administrations when the assets of the decedent are largely in banks or brokerage accounts.⁷³ However, securing assets like real property, manufactured homes, vehicles, and stock can often slow the administration process down.⁷⁴

Sometimes, the personal representative needs to evict a tenant who no longer pays rent or remove a tenant whose presence endangers the estate.⁷⁵ If the estate is in danger, the proceeding may be brought in the probate case.⁷⁶

The homestead can be even more problematic than a rental property.⁷⁷ Even if the decedent was not ceremonially married at death, a common law marriage claim may be asserted by the live-in partner; however, if the decedent bought the property with someone else, a personal representative may have to start a partition suit to sell the property when a joint owner does not have the assets to buy out the estate and refuses to sell.⁷⁸

In administrations involving a manufactured home, the personal representative may need to fix issues that existed during the life of the decedent.⁷⁹ If the land on which the manufactured home sits is owned by the decedent, the personal representative can elect to treat the manufactured home as real property.⁸⁰ Treating it as real property will protect the manufactured home from creditors of the decedent during life and at death,

71. *Montgomery*, 669 S.W.2d at 313.

72. *Id.*

73. *How to Claim a Deceased Person's Bank Accounts*, KEYSTONE L. GRP., <https://keystone-law.com/how-to-claim-deceased-bank-accounts> (last updated Jan. 4, 2025) [<https://perma.cc/L9WC-6SJR>].

74. Cara Hartley, *How Long Do You Have to Transfer Property After Death*, LEGALZOOM (Aug. 7, 2024), <https://www.legalzoom.com/articles/how-long-to-transfer-property-after-death> [<https://perma.cc/WQM8-V6JM>].

75. *Eviction After Death of Owner*, ATTY'S REAL EST. GRP., <https://attorneysre.com/eviction-after-death-of-owner/#:~:text=Payment%20of%20rent,belongs%20in%20their%20sole%20name> (last visited Jan. 27, 2025) [<https://perma.cc/GA2T-43ZW>].

76. *Evicting a Beneficiary from Probate Property*, KREIG, <https://austin-probate.com/evicting-beneficiary-from-probate-property/> (last visited Jan. 27, 2025) [<https://perma.cc/F7TF-D5QF>].

77. *Probate Law*, TEX. STATE L. LIBR., <https://guides.sll.texas.gov/probate/family-protections#:~:text=Texas%20Estates%20Code,.Homestead%20Property,a%20list%20of%20such%20debts> (last updated Feb. 4, 2025, 3:44 PM) [<https://perma.cc/GBL2-D2TC>].

78. David J. Willis, *Partition of Texas Property*, LONE STAR LAND L., <https://lonestarlandlaw.com/partition-of-texas-property/> (last visited Jan. 27, 2025) [<https://perma.cc/2GP-D-75GP>].

79. Matthew M. Wallace, *At Death, What do you do with a Manufactured or Mobile Home?*, MANUFACTURED HOME LIVING NEWS, <https://www.manufacturedhomelivingnews.com/at-death-what-do-you-do-with-a-mobile-or-manufactured-home/> (last visited Jan. 27, 2025) [<https://perma.cc/YY8G-Y5KD>].

80. *Id.*

as well as reduce the property tax burden because it can be treated as a homestead.⁸¹ The personal representative can complete Form 1023, an Application for Statement of Ownership from the Texas Department of Housing and Community Affairs, and pay \$55 to fix these issues during administration.⁸²

If the decedent did not elect to treat the manufactured home as real property, can the personal representative do so now for a surviving spouse who has a life estate?⁸³ Does helping an elderly surviving spouse breach the duty of impartiality because the benefit is only to the surviving spouse and not to the remaindermen kids that do not plan to move into the house at the death of the surviving spouse?⁸⁴

In administrations in which there may be numerous vehicles and the personal representative has no titles, they may have to start by sending a letter to the Texas Department of Motor Vehicles (DMV) inquiring whether the decedent is the owner of a list of vehicles.⁸⁵ This can take several weeks to get a response.⁸⁶ If the DMV confirms the decedent owned certain vehicles, the personal representative will then need to request a copy of the titles.⁸⁷

Securities to which the decedent has certificates can pose issues for the personal representative.⁸⁸ The personal representative may struggle to find the originals.⁸⁹ While affidavits of lost stock can be completed, they do not make the process move faster.⁹⁰ Also, many companies do not want to transfer the securities into the estate which may be necessary to pay debts and expenses of administration.⁹¹

Further, the personal representative may be best served by moving the securities out of the estate as quickly as possible due to the ups and downs of the stock market.⁹² However, the beneficiaries may refuse to sign the paperwork the security company needs to transfer the securities to the

81. *Id.*

82. *Frequently Asked Questions: Statement of Ownership*, TEX. DEP'T OF HOUS. & CMTY. AFFS., <https://www.tdhca.texas.gov/frequently-asked-questions-statement-ownership> (last visited Jan. 27, 2025) [<https://perma.cc/T6YE-LXAS>].

83. *See Eviction After Death of Owner*, *supra* note 75.

84. *Id.*

85. Jenna Mendelsohn, *How to distribute a deceased person's car to an estate beneficiary*, TRUSTATE, <https://www.trustate.com/post/how-to-distribute-a-deceased-persons-car> (last visited Jan. 27, 2025) [<https://perma.cc/4NU2-SJWC>].

86. *Id.*

87. *Id.*

88. Daniel Woska, *Navigating a Probate: A Primer for the Personal Representative*, OKLA. BAR ASS'N (Nov. 2024), <https://www.okbar.org/barjournal/novembewr-2024/navigating-a-probate/> [<https://perma.cc/N4U9-CKBJ>].

89. Will Kenton, *Affidavit of Loss Explanation and Use Cases*, INVESTOPEDIA (last updated Jun. 30, 2022), https://www.investopedia.com/terms/a/affidavit_of_loss.asp [<https://perma.cc/3KGF-R6JK>].

90. *Id.*

91. *When a Brokerage Account Holder Dies—What Comes Next?*, FINRA (Jan. 11, 2023), <https://www.finra.org/investors/insights/when-brokerage-account-holder-dies> [<https://perma.cc/Y3XP-5UTN>].

92. *Id.*

beneficiaries.⁹³ Attorneys may help the personal representative by ensuring they send a written request for the beneficiaries to sign paperwork by letter, e-mail, text, or snap to try to protect their client from the downside of the market.⁹⁴

V. THE DRIVE—PAYING DEBTS AND EXPENSES

During the drive phase, the personal representative may feel like they are hitting their stride and can handle things without attorney guidance.⁹⁵ This is likely true for a personal representative who is the surviving spouse and is familiar with the debts or when there really are no debts.⁹⁶ However, if the personal representative is not familiar with the debts and liabilities of the decedent, this phase may take some time.⁹⁷

Running the notice to creditors in the newspaper may flush out some creditors, but the personal representative is often still in the dark.⁹⁸ While the postal service used to greatly assist a personal representative who was not familiar with all of a decedent's assets or debts, the postal service is of less use for a decedent who is under sixty.⁹⁹ If the personal representative does not have access to the decedent's e-mail, computer, or smartphone they may be driving blind on debts.¹⁰⁰ A letter to one of the credit reporting bureaus not only informs the bureau of the decedent's death and the appointment of the personal representative but also a request for a credit report may help the personal representative in identifying creditors.¹⁰¹ More detail on coaching your personal representative through paying debts and expenses will be discussed in Part VI.¹⁰²

93. Robert Dowling, *How to Transfer Stocks Owned by the Decedent*, COMMON EX'R (Oct. 11, 2016), <https://www.thecommonexecutor.com/how-to-transfer-stocks-owned-by-the-decedent/> [https://perma.cc/S9H2-H9ZJ].

94. See generally *Personal Representative's Checklist*, SHAILA BUCKLEY L., https://www.shailabuckleylaw.com/uploads/1/2/6/2/126286075/personal_representative_checklist_-_shaila_buckley_law.pdf (last visited Feb. 28, 2025) (discussing actions that should be taken immediately after the death of the decedent) [https://perma.cc/SAJ5-TPPQ].

95. Oni Harton, *How To Be a Personal Representative of an Estate Without a Will*, FINDLAW (June 20, 2024), <https://www.findlaw.com/estate/probate/how-to-file-to-be-executor-of-an-estate-without-a-will.html> [https://perma.cc/F5VC-UKLR].

96. *Id.*

97. Christopher Alfonso, *Risks personal representatives face during probate proceedings*, WEALTH PLAN. L. (June 3, 2024), <https://www.wealthplanninglaw.com/blog/2024/06/risks-personal-representative-s-face-during-probate-proceedings/> [https://perma.cc/6Z4S-YD4Q].

98. Nathan Phelps, *6 Steps to File Notice to Creditors During Probate (and Not Go Bankrupt)*, ATTICUS (Aug. 12, 2022), <https://www.weareatticus.com/learn/probate-notice-to-creditors> [https://perma.cc/BR72-JASR].

99. *Id.*

100. *Id.*

101. *Id.*; see discussion *infra* Part VI.

102. See discussion *infra* Part VI.

VI. STUCK IN STEP THREE—PAYING CLAIMS, ALLOWANCES, AND EXPENSES

A. Immediate Vesting . . . But Wait

When a person dies, if a will exists all of their estate vests immediately in the devisees or if no will exist, in the heirs at law.¹⁰³ However, a personal representative has the right to possess the estate as it existed at death to pay estate debts and court-ordered child support payments that are delinquent on the date of the decedent's death.¹⁰⁴

Oftentimes, the claims of the decedent can devour most or even all an estate.¹⁰⁵ When this occurs, a personal representative needs a lot of coaching.¹⁰⁶

B. Who Pays the Claims

1. Classify and Prioritize

When deciding how to pay the claims, the personal representative must first classify and prioritize them.¹⁰⁷ Section 355.101 of the Texas Estates Code sets out the classification and order of priority of payments.¹⁰⁸ While tax liens are a Class 3 claim, federal tax liens do not fall in this category, as discussed in Part C.¹⁰⁹

2. Read the Will

Now that the personal representative has categorized the claims (with the assistance of the coach, of course), they should look at the will to determine who should pay them.¹¹⁰ Many wills dictate what assets should be used first to pay the debts; the generic boilerplate generally states the debts and expenses should be paid from the residual.¹¹¹ If the will is silent on what assets to use first to pay the debts, the personal representative must follow the statutory abatement of bequests as set out in Section 355.109 of the Texas

103. TEX. EST. CODE ANN. § 101.001.

104. *Id.* §§ 101.003, 101.051.

105. *Claims Involving a Decedent's Estate*, L. OFF. OF DENNIS A. FORDHAM, <https://dennisfordhamlaw.com/claims-involving-decedents-estate/> (last visited Feb. 28, 2025) [<https://perma.cc/AL8P-7F5U>].

106. *Id.*

107. *Id.* § 355.101.

108. *Id.*

109. *See id.* § 352.001; *see discussion infra* Section VI.C.

110. Mark Caldwell & J. Ellen Bennett, *Compensation of Personal Representatives*, CALDWELL, BENNETT, THOMAS, TORAASON & MEAD, PLLC (May 14, 2020), <https://probatetrialawyers.com/compensation-of-personal-representatives/> [<https://perma.cc/LCD8-GXUM>].

111. *See Estate of Sobota v. Comm'r*, 71 T.C.M. (CCH) 3217, 3222 (T.C. 1996).

Estates Code.¹¹² Section 355.109 of the Texas Estates Code, states:

[A] decedent's property is liable for debts and expenses of administration, other than estate taxes, and bequests abate in the following order:

- (1) property not disposed of by a will, but passing by intestacy;
- (2) personal property of the residuary estate;
- (3) real property of the residuary estate;
- (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.¹¹³

If a secured creditor elects to have its claim continued as a preferred debt and liens against specific property, the personal representative cannot pay another creditor with that specific property.¹¹⁴

Unfortunately, there is no clear guidance on what is a general devise of real property versus the residuary real estate.¹¹⁵ The Texas Supreme Court in *Hurt v. Smith* held that a bequeath of one-half of the decedent's mineral interest was a specific devise of real property.¹¹⁶ Additionally, it held that a devise of "all real estate not specifically bequeathed" in earlier clauses of the will was a real property residuary clause.¹¹⁷

While there are four categories of bequests or devises (specific, demonstrative, general, and residuary), the statute does not mention demonstrative legacies.¹¹⁸ "Demonstrative legacies are bequests of sums of money, or of quantity or amounts having a pecuniary value and measure, not in themselves specific, which the testator intended to be charged primarily to a particular fund or piece of property."¹¹⁹ An example of a demonstrative devise would be if a decedent left \$50,000 to their son from the sale of their home.¹²⁰ Such classification depends upon the testator's intent throughout the entire will.¹²¹ The court should look at the whole dispositive scheme to determine the testator's intent rather than classifying bequests based on certain language.¹²²

While there is no court case addressing how a demonstrative legacy fits in the abatement statute, a court decision made prior to the statute's enactment noted that demonstrative legacies should be treated as "true specific legacies" if the asset used to pay the demonstrative legacy is part of

112. TEX. EST. CODE ANN. § 355.109(a).

113. *Id.*

114. *Id.*

115. *See Hurt v. Smith*, 744 S.W.2d 1, 4–5 (Tex. 1987).

116. *Id.*

117. *Id.*

118. *Id.* at 4.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

the testator's estate at death.¹²³

3. Bringing in the Non-Probate Assets

If probate assets are insufficient, certain non-probate property is subject to pay debts of the decedent, administration taxes that are not estate taxes, administration expenses, and statutory allowances.¹²⁴ If the probate property is insufficient to pay creditor's claims, multiple party accounts and real property passing pursuant to a transfer on death deed (TODD) are available to pay the claims of creditors.¹²⁵ A personal representative has two years from the date of the decedent's death to commence a proceeding to assert liability against a beneficiary of non-probate property.¹²⁶ A personal representative may only commence a proceeding to assert liability against a co-owner or beneficiary of a multiple party account if they receive a written demand by a surviving spouse, creditor, or person acting on behalf of a minor child of the decedent.¹²⁷ No such written demand is mentioned in the statutes to commence a proceeding under a TODD.¹²⁸

However, the statute does not give guidance on what satisfies the requirement of a written demand.¹²⁹ Is merely filing a claim in the probate matter in the manner required by law sufficient to be a written demand of a creditor?¹³⁰ Or, must the creditor specifically request that all multiple party accounts be used to satisfy its debts if the probate assets are insufficient?¹³¹ "If a personal representative does not commence a proceeding to enforce liability" against the beneficiary of a TODD within ninety days "after the date the personal representative receives a demand for payment, a creditor, a distributee of the estate, a surviving spouse of the decedent, a guardian or other appropriate person of a minor child or adult incapacitated child of the decedent, or taxing authority" may bring suit to enforce the liability against the TODD beneficiary.¹³² No similar exception applies to multiple party accounts.¹³³

123. *Hous. Land & Tr. Co. v. Campbell*, 105 S.W.2d 430, 433 (Tex. Civ. App.—El Paso 1937, writ ref'd).

124. *What to know about paying debts on Texas estates*, EMPATHY, <https://www.empathy.com/probate/what-to-know-about-paying-debts-on-texas-estates> (last visited Jan. 28, 2025) [<https://perma.cc/LA9J-H2WX>].

125. TEX. EST. CODE ANN. §§ 113.252(b), 114.106.

126. *Id.* §§ 113.252(c)(2), 114.106(e).

127. *Id.* §§ 113.252(c), 114.106.

128. *Id.*

129. *Id.*

130. *See id.*

131. *See id.*

132. *Id.* § 114.106(c).

133. *What to know about paying debts on Texas estates*, *supra* note 124.

4. Nobody Gets Paid but the Creditors

Probate proceedings may be necessary to stop theft or prevent squatters from taking over real property, which could expose the estate to liability.¹³⁴ There may be little left for the beneficiaries or heirs in situations in which there is no solvent defendant to pursue.¹³⁵

In one case I had, the decedent had died without a will nearly twenty years prior to one of the decedent's sons coming into my office.¹³⁶ Apparently, the decedent's only remaining asset was a house that was rented to a third party by another son who did not share the rental money with the other heirs.¹³⁷ Additionally, this son was not paying the property taxes on the house, so the house was in danger of foreclosure.¹³⁸ Further, there was also danger of losing the house in a lawsuit because the son was not repairing the house.¹³⁹

After filing a determination of heirship and then an eviction, the proceeds from the sale of the house left about \$2,000 per heir.¹⁴⁰ While some heirs might balk at moving forward if they only stand to receive about \$2,000, theft and liability can be powerful motivators for personal representatives, beneficiaries, and heirs with a strong moral compass.¹⁴¹

C. Who Pays the Estate Taxes

While the estate tax may be just another debt of the decedent, the federal government is not an ordinary creditor.¹⁴² Rather, it is a super creditor.¹⁴³ Accordingly, special rules apply to estate taxes.¹⁴⁴ If the will does not provide otherwise, the personal representative shall charge each person interested in the estate a portion of the total estate tax.¹⁴⁵ However, property that qualifies for a marital or charitable deduction is not included in the apportionment of the tax because those gifts are not subject to estate taxation.¹⁴⁶ The tax is apportioned among both probate and non-probate assets.¹⁴⁷

134. Joseph Oluwatukesi, *Understanding Probate and Vacant Property in Texas*, L. OFF. OF BRYAN FAGEN, PLLC (Sept. 10, 2024), <https://txprobatelawyer.net/handling-vacant-properties-in-texas-probate/> [https://perma.cc/3MM3-QUES].

135. *See id.*

136. Author's original thought.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *See Oluwatukesi, supra* note 134.

142. Jason B. Freeman, *The Federal Priority Statute*, FREEMAN L., <https://freemanlaw.com/the-federal-priority-statute/> (last visited Jan. 28, 2025) [https://perma.cc/WRX4-4MPT].

143. *Id.*

144. *See id.*

145. TEX. EST. CODE ANN. § 124.005.

146. *Id.* §§ 124.005, 124.007.

147. *Id.* § 124.001(2).

1. Read the Will Carefully

When determining which assets should count toward estate taxes, the Texas Supreme Court took a holistic view, holding that a specific bequest of “all cash, checking accounts, certificates of deposit, savings certificates, and money market certificates” should be utilized to pay the estate taxes before using the general bequests of certain sums of cash.¹⁴⁸ This was likely due to the language in the will that stated that the specific bequeath of cash, checking accounts, etc. would be used to pay just debts, funeral expenses, expenses of last illness, and costs and expenses incurred in the probate of the will.¹⁴⁹ So, a strict reading of the will should be tempered against the discernable intent of the testator.¹⁵⁰

2. Liability of Non-Probate Assets

Federal law requires the personal representative to pay the estate taxes regardless that part or nearly all the tax may come from assets the personal representative does not have control of.¹⁵¹

The personal representative has the right to recover against any person who receives nonprobate property that creates a tax liability.¹⁵² Due to timing, the personal representative may be better off paying the Internal Revenue Service (IRS) solely from probate assets if the beneficiary of a nonprobate asset does not willingly turn over their share of the estate taxes.¹⁵³ If the personal representative has to bring a lawsuit, that lawsuit will likely not be resolved by the time the estate tax is due.¹⁵⁴ Remember, even if the timing to file the estate tax return has been extended to fifteen months, the personal representative must pay the tax owed within nine months of the decedent's death.¹⁵⁵

If the personal representative determines, in good faith, that an attempt to recover the amount owed from one or more nonprobate beneficiaries is economically impractical, they shall apportion the amount not collected “among the other persons interested in the estate who are subject to apportionment.”¹⁵⁶ Those beneficiaries who pay an apportioned amount of another beneficiary's estate tax obligation may enforce the right to reimbursement against that beneficiary.¹⁵⁷

148. *Hurt v. Smith*, 744 S.W.2d 1, 5 (Tex. 1987).

149. *Id.*

150. *Id.* at 7.

151. 26 U.S.C. § 2002; Treas. Reg. § 20.2002-1.

152. See TEX. EST. CODE ANN. § 124.014; see also § 113.252(a)(1)(A) (discussing that survivor on a multiple party account, POD payee, or beneficiary of the account is responsible).

153. See 26 U.S.C. § 2002; see also Treas. Reg. § 20.2002-1.

154. See 26 U.S.C. § 2002; see also Treas. Reg. § 20.2002-1.

155. 20 U.S.C. §§ 6075, 6081.

156. TEX. EST. CODE ANN. §§ 124.014(b), 124.015(b).

157. *Id.* § 124.015(c).

The personal representative may not be required to file suit to recover the unpaid amount of estate tax apportioned to persons interested in the estate until the expiration of the ninetieth day after the date of the final IRS determination of estate taxes due.¹⁵⁸ The personal representative who initiates an action within a reasonable time after the expiration of the ninety-day period is not subject to any liability or surcharge because the portion of estate tax apportioned to an interested person in the estate was collectible during a certain time after the death of the decedent but thereafter becomes uncollectible.¹⁵⁹

Conversely, if a personal representative does not initiate the suit to recover the apportioned estate tax within a reasonable time of the ninety-day period, they may be subject to liability or surcharge.¹⁶⁰ This Section of the Texas Estates Code seems to run counter to Section 124.015(a), which does not require a representative to recover if they determine, in good faith, that an attempt to recover the amount would be economically impractical.¹⁶¹ The IRS does not assess an estate tax until nearly three years later, and there is a period of negotiating the tax; so, if the personal representative files the estate tax return fifteen months after the decedent dies believing no estate tax is due, it is entirely possible that a beneficiary no longer has funds to pay their share of the estate tax.¹⁶² If the personal representative determines that an attempt to recover the unpaid amount is economically impractical and a beneficiary does not like this decision, will the beneficiary argue the converse of Section 124.016(b) and just wait for seven months or so to pass after the final determination of the estate tax by the IRS and then sue the personal representative?¹⁶³

In a suit to recover estate taxes from a beneficiary to whom estate taxes were apportioned, “[t]he court shall award necessary expenses, including reasonable attorney’s fees, to the prevailing party.”¹⁶⁴

D. The Taxman Cometh: Personal Liability for the Personal Representative

Getting out of phase three quickly may be tempered by the fact that the Department of the Treasury may hold the personal representative personally liable to pay federal taxes.¹⁶⁵

158. *Id.* § 124.016(a).

159. *Id.* § 124.016(b).

160. *Id.*

161. *Id.* § 124.015(a).

162. *Id.* §§ 124.015(a), 124.016(b).

163. *See id.* § 124.016(b).

164. *Id.* § 124.018.

165. 31 U.S.C. § 3713(b).

1. *Paying Other Creditors First*

Federal law requires the United States to be paid first if a decedent's estate is insufficient to pay all of the decedent's debts.¹⁶⁶ If the personal representative pays any part of a debt prior to paying a claim by the United States government, the personal representative can be held personally "liable to the extent of the unpaid [claim] of the [g]overnment."¹⁶⁷ For purposes of this section of the Code, distributions to beneficiaries qualify as "debts."¹⁶⁸ Therefore, the personal representative can be held personally liable for any distribution made in the amount of unpaid taxes.¹⁶⁹

However, a personal representative may pay certain expenses prior to paying the IRS.¹⁷⁰ Government claims do not take priority over funeral and administrative expenses because they are not debts of the decedent.¹⁷¹ However, one cannot state that Class 1 and 2 claims can be paid prior to the United States because expenses of last illness are debts of the decedent that cannot be paid prior to the United States.¹⁷²

Further, courts generally recognize that the personal representative must have actual or constructive knowledge of the government's tax claim when the estate had sufficient assets and chose to pay other debts first.¹⁷³ A personal representative has constructive knowledge if they have notice of facts that would put a reasonably prudent person on inquiry of the existence of an unpaid claim.¹⁷⁴

2. *Time to Assess and Collect*

With personal liability on the line, the personal representative should be concerned with how long the IRS has to assess and collect the tax.¹⁷⁵

a. *Statute of Limitations*

Generally, the IRS has three years after a return is filed to assess taxes

166. *Id.*

167. *Id.*

168. Treas. Reg. § 20.2002-1; *Want v. Comm'r*, 280 F.2d 777, 783 (2nd Cir. 1960).

169. Treas. Reg. § 20.2002-1.

170. *Id.*

171. *United States v. Weisburn*, 48 F. Supp. 393, 397 (E.D. Pa 1943); *see Champlin v. Comm'r*, 6 T.C. 280, 285 (1946) (discussing exception for estate administration expenses); Rev. Rul. 80-112, 1980-1 C.B. 306 (discussing exceptions for funeral expenses and widows' allowance).

172. Rev. Rul. 80-112, 1980-1 C.B. 306.

173. *See United States v. Coppola*, 85 F.3d 1015, 1020 (2nd Cir. 1996); *Want*, 280 F.2d at 783; *Viles v. Comm'r*, 233 F.2d 376, 380 (6th Cir. 1956); *Leigh v. Comm'r*, 72 T.C. 1105, 1109 (1979).

174. *Coppola*, 85 F.3d at 1020.

175. *See How to Limit a Estate Executor's Personal Liability for Taxes*, SPIGNER L., [https://www.spignerlaw.com/resources-articles-faq/how-to-limit-a-estate-executors-personal-liability-for-taxes/#:~:text=An%20estate's%20executor%20or%20administrator,b\)%20and%20IRS%20Manual%205.17](https://www.spignerlaw.com/resources-articles-faq/how-to-limit-a-estate-executors-personal-liability-for-taxes/#:~:text=An%20estate's%20executor%20or%20administrator,b)%20and%20IRS%20Manual%205.17) (last visited Jan. 23, 2025) [<https://perma.cc/P6XX-EKZ7>].

or file suit against the taxpayer to collect it.¹⁷⁶ However, there is no statute of limitation on a false or fraudulent return with the intent to evade tax or on not filing a return.¹⁷⁷ After the tax is assessed, the IRS may collect it by levy or by a court proceeding so long as the levy is made or the proceeding begins within ten years after the assessment of the tax.¹⁷⁸ The ten-year statute of limitation runs from the date the tax was assessed against the estate and not from the date of the assessment against the personal representative.¹⁷⁹

b. Requesting Prompt Attention or Shortening the Statute of Limitations

Generally, the personal representative may file a written request to have the tax assessed after the return is filed and for any in-court proceeding without assessment for collection of the tax to begin within eighteen months rather than three years for all taxes other than estate taxes.¹⁸⁰ The personal representative may file this written request by submitting Form 4810 or a written request that includes all the information required by the form.¹⁸¹

c. Request Closing Letter

While the personal representative cannot shorten the statute of limitations on the estate tax, they can request a closing letter and pay the fee.¹⁸² The closing letter cannot be requested until nine months after the estate tax return has been filed.¹⁸³ If the return is under examination, the request for a closing letter cannot be made until thirty days after the completion of the examination.¹⁸⁴ However, the personal representative can immediately submit the form and pay the fee of \$67.¹⁸⁵

If the request for the closing letter is made before the Transaction Code (TC) 421 appears on the transcript (signifying the return was accepted as filed or if the return was examined, the examination has concluded), the request will be held and monitored every sixty days until the TC 421 posts.¹⁸⁶ A personal representative can instead request an account transcript in lieu of a closing letter to confirm that the return has been accepted as filed or an IRS

176. See 26 U.S.C. § 6501(a).

177. See *id.* § 6501(c).

178. See *id.* § 6502(a).

179. *United States v. Motsinger*, 123 F.2d 585, 589 (4th Cir. 1941).

180. See 26 U.S.C. § 6501(d).

181. Treas. Reg. § 301.6501(d)-1(b).

182. See *Frequently asked questions on the Estate Tax Closing Letter*, I.R.S., <https://www.irs.gov/businesses/small-businesses-self-employed/frequently-asked-questions-on-the-estate-tax-closing-letter> (last updated Jan. 22, 2025) [<https://perma.cc/4L46-TXNL>].

183. See *Estate Tax Closing Letter User Fee*, PAY.GOV, <https://www.pay.gov/public/form/start/940783687> (last visited Jan. 23, 2025) [<https://perma.cc/U6VR-Q894>].

184. See *id.*

185. See *id.*

186. See *Frequently asked questions on the Estate Tax Closing Letter*, *supra* note 182.

examination is completed and closed, which is indicated by TC 421.¹⁸⁷

3. Discharging the Personal Representative

The personal representative may request a discharge from personal liability for income, estate, and gift tax liability.¹⁸⁸

For income and gift taxes, the personal representative makes a written application for discharge under Section 6905.¹⁸⁹ The IRS *may* notify the personal representative of the amount of taxes due.¹⁹⁰ Of course, the tax return has to have been filed.¹⁹¹ Once the personal representative pays the amount the IRS notifies is due or if the IRS does not notify the personal representative nine months after the application is filed the personal representative is discharged from personal liability for any deficiencies later found.¹⁹² The personal representative is entitled to a receipt or writing showing the discharge.¹⁹³

For estate taxes, the personal representative “makes a written application . . . for the determination of the amount of the tax and [is] discharge[d] from personal liability” under Section 2204.¹⁹⁴ Once the application is made, the Secretary shall notify the personal representative of the amount of the tax as soon as possible within the nine months after the application is made.¹⁹⁵ However, if the application is made before the estate tax return is filed, the Secretary shall notify the personal representative of the amount of the tax “within [nine] months after the return is filed, but not after the expiration of the period prescribed for the assessment of the tax in section 6501.”¹⁹⁶ On payment of the amount of which the personal representative is notified, “and on furnishing any bond . . . required for any amount for which the time [to pay is] extended, . . . [the personal representative] shall be discharged from personal liability for any deficiency . . . in tax thereafter found to be due and shall be entitled to a receipt or writing [showing] such discharge.”¹⁹⁷

The personal representative may file a Form 5495 to request a discharge under Sections 2204 or 6905.¹⁹⁸ However, the form must be filed in the office

187. See I.R.S. Notice 2017-12, 2017-5 I.R.B. 742.

188. See *About Form 5495, Request for Discharge from Personal Liability Under I.R. Code Sec. 2204 or 6905*, I.R.S., <https://www.irs.gov/forms-pubs/about-form-5495> (last updated Mar. 26, 2024) [<https://perma.cc/8ZH8-TLSN>].

189. 26 U.S.C. § 6905(a).

190. *Id.*

191. See *id.*

192. *Id.*

193. *Id.*

194. *Id.* § 2204(a).

195. *Id.*

196. *Id.*

197. *Id.* § 2204(b).

198. *About Form 5495, Request for Discharge from Personal Liability Under I.R. Code Sec. 2204 or 6905*, *supra* note 188.

where the original return was required to be filed, and a separate form must be sent to discharge liability for each type of tax.¹⁹⁹ However, the same address is used for seeking discharge for both gift and estate tax liability.²⁰⁰

E. Personal Liability for Creditors

Because the United States government can hold the personal representative personally liable for distributing the estate prior to paying it, may other creditors do the same?²⁰¹ While it is true the United States government is a creditor, it is really a super creditor because it leaps ahead of all debts of the decedent.²⁰² Further, there is a statute authorizing its ability to assess personal liability against a personal representative.²⁰³ There is no similar statute for creditors under Texas law.²⁰⁴

Personal representatives do not owe duties to creditors like they do to beneficiaries and heirs, so using common law to assess liability seems remote.²⁰⁵ In 2023, the Texas Supreme Court attempted to clear up confusion over whether a personal representative owes fiduciary duties to creditors of the decedent.²⁰⁶ The Court rejected the appellant's contention that an independent executor owes a fiduciary duty to the estate's creditors, confirming the assessment of the Fifth Circuit Court of Appeals in *United States v. Marshall*.²⁰⁷

There, in the context of an independent administration, the court found no language in the statutes suggesting that the executor holds the estate's assets in trust for the benefit of creditors; this reasoning should similarly apply to a dependent administration, indicating that no such duty exists in that context either.²⁰⁸ Without statutory authorization and without a duty to creditors, it would be unlikely for a court to find a personal representative personally liable for distributing the estate prior to paying a creditor.²⁰⁹

199. See Forrest Baumhover, *IRS Form 5495 Instructions*, TEACH ME! PERS. FIN. (Nov. 27, 2023), <https://www.teachmepersonalfinance.com/irs-form-5495-instructions/> [<https://perma.cc/ZG5V-3HE9>].

200. See *Where to File Form 5495*, I.R.S., <https://www.irs.gov/pub/irs-pdf/f5495.pdf> (last visited Jan. 29, 2025) [<https://perma.cc/4KH9-NWF2>].

201. See Maya Powers, *Role of Personal Representative in Probate*, TR. & WILL, <https://trustandwill.com/learn/personal-representative> (last visited Jan. 30, 2025) [<https://perma.cc/FD64-5N82>].

202. See 31 U.S.C. § 3713.

203. *Id.* § 3713(b).

204. See generally TEX. EST. CODE. ANN. § 355.113(a) (providing that “[a] person or claimant, except the state treasury, entitled to payment from an estate of money the court orders to be paid is authorized to have execution issued against the estate property for the amount due, with interest and costs . . .” rather than assessing personal liability against the personal representative).

205. See 24 William V. Dorsaneo III, *Texas Litigation Guide* § 400.01 (2024).

206. *Austin Tr. Co. v. Houren*, 664 S.W.3d 35, 46 (Tex. 2023).

207. *Id.*; see also *United States v. Marshall*, 798 F.3d 296, 315 (5th Cir. 2015) (agreeing with the appellate court's reasoning, the Texas Supreme Court held that an independent executor has a fiduciary duty to the estate's creditors).

208. *Marshall*, 798 F.3d at 315.

209. Author's original thought.

F. Temporarily Insolvent Estate with Expenses – Slow Pay?

What happens when there are no liquid assets in an estate but there is a modest income stream?²¹⁰ Can the personal representative for that estate use this stream to pay debts, funeral expenses, taxes, and family allowances?²¹¹ Generally, yes.²¹²

However, income accruing after death and before distribution, “including income from property used to discharge liabilities, shall be: (1) determined according to the rules applicable to a trustee under the Texas Trust Code . . . and (2) distributed as provided by Subsections (b) and (c) and by Chapter 116 [of the] Property Code.”²¹³ Section (b) provides:

[i]ncome from property devised to a specific devisee shall be distributed to the devisee after [deducting] property taxes[,] other taxes, including taxes imposed on income that accrues during the period of administration and that is payable to the devisee[,] ordinary repairs[,] insurance premiums[,] interest accrued after the testator’s death[,] and other expenses of management and operation of the property.²¹⁴

Section (c) provides:

[t]he balance of net income shall be distributed to all other devisees after reduction for the balance of property taxes, ordinary repairs, insurance premiums, interest accrued, other expenses of management and operation of all property from which the estate is entitled to income, and taxes imposed on income that accrues during the period of administration and that is payable or allocable to the devisees, in proportion to the devisees’ respective interests in the undistributed assets of the estate.²¹⁵

Chapter 116 of the property code provides:

[That a fiduciary] shall determine the amount of net income and net principal receipts received from property specifically given to a beneficiary under the rules in Subchapters C, D, and E which apply to trustees and the rules in subdivision (5)

[The] fiduciary shall determine the remaining net income of a decedent’s estate . . . under the rules in Subchapters C, D, and E which apply to trustees and by: (A) including in net income all income from property used to discharge liabilities; (B) paying from income or principal, in the fiduciary’s discretion, fees of attorneys, accountants, and fiduciaries; court costs and

210. See TEX. EST. CODE ANN. §§ 310.003, 310.004.

211. See *id.*

212. *Id.* § 310.003.

213. *Id.* § 310.004(a).

214. *Id.* § 310.004(b).

215. *Id.* § 310.004(c).

other expenses of administration; and interest on death taxes, but the fiduciary may pay those expenses from income of property passing to a trust for which the fiduciary claims an estate tax marital or charitable deduction only to the extent that the payment of those expenses from income will not cause the reduction or loss of the deduction; and (C) paying from principal all other disbursements made or incurred in connection with the settlement of a decedent's estate . . . including debts, funeral expenses, disposition of remains, family allowances, and death taxes and related penalties that are apportioned to the estate . . . by the will . . . or applicable law.²¹⁶

So, if the principal is sold at current fair market value and is not enough to pay the debts and funeral expenses, can the personal representative continue to hold the asset until the income pays those off if there are no separate income beneficiaries?²¹⁷ In one case, a decedent owned only mineral interests that paid under \$1,000 per year and personal items with little to no value at her death.²¹⁸ The decedent's will left everything to her grandchildren, skipping her only child.²¹⁹ The grandchildren were all minors, and the will included a contingent trust until the beneficiaries each turned twenty-one.²²⁰

The executor and her sister had paid for the funeral and the cost for probate.²²¹ While the minerals had some value, they would not be enough to reimburse the sisters of the decedent who had paid for the funeral and administrative expenses.²²² Further, selling the minerals would likely turn the minor beneficiaries into plaintiffs.²²³ Instead, the executor received the royalty income until she was able to reimburse her sister and herself.²²⁴

Two of the minors turned twenty-one around that time, so instead of funding a trust for them, they received their interest in the mineral estate outright.²²⁵ Due to funeral and administrative expenses, the estate was open for over five years.²²⁶

What if, instead, the will provided a bequest for a certain amount in cash and the remainder to the grandchildren?²²⁷ After the funeral and administration expenses were paid, should the personal representative have to sell the mineral interests to fund the cash bequest?²²⁸ The bequest of cash

216. *Id.* § 116.051(1–2).

217. Author's original thought.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

is a general bequest, therefore, the doctrine of ademption does not apply.²²⁹ Rather than sell the mineral interest and leave the grandchildren with nothing, could the personal representative continue to receive the royalty payments until the cash bequest was funded?²³⁰ Will the beneficiary of the cash bequest have an argument that the personal representative is breaching their duty of impartiality by not selling right away and possibly extending the estate for five to ten years to fund the bequest?²³¹

What if, instead, the will provided a bequest of \$100,000 to one beneficiary, a bequest of the royalty income for life to another beneficiary, and the remainder of the royalty and remaining mineral estate to yet another beneficiary?²³² Can the personal representative, who only has the mineral estate in the probate estate, use the royalty income to fund the \$100,000 bequest?²³³

G. Allowances for Surviving Spouse and/or Children

Although not a debt, any allowance to a decedent's surviving spouse and children must be satisfied right after Class 1 claims.²³⁴ The allowance in lieu of a homestead may not exceed \$45,000, and the allowance in lieu of other exempt property may not exceed \$30,000.²³⁵ Property specifically devised to another may be sold to raise cash to pay the allowance in lieu of exempt property if other estate property is insufficient to pay the allowance.²³⁶

Additionally, a surviving spouse, a minor child, or an adult incapacitated child can receive a family allowance sufficient for their maintenance for one year from the date of the decedent's death.²³⁷ A family allowance may not be made for the surviving spouse if they have separate property adequate for their maintenance; similarly, a family allowance may not be made if a minor child or adult incapacitated child have property adequate for their maintenance.²³⁸

Like the prior allowances, only Class 1 claims shall be paid prior to the family allowance.²³⁹ The irony of the family allowance is that a surviving spouse can be a multi-millionaire after the decedent's death due to receiving life insurance proceeds and the decedent's 401(k) but may still receive a

229. See *The Rules of Last Wills and Testaments: Ademption Abatement and Lapse*, L. SHELF, <https://www.lawshelf.com/shortvideoscontentview/the-rules-of-last-wills-and-testaments-ademption-abatement-and-lapse> (last visited Jan. 31, 2025) [<https://perma.cc/W62S-SNU4>].

230. Author's original thought.

231. *Id.*

232. *Id.*

233. *Id.*

234. TEX. EST. CODE ANN. § 355.103.

235. *Id.* § 353.053.

236. *Id.* § 353.056(c).

237. *Id.* § 353.101.

238. *Id.* § 353.101(d).

239. *Id.* § 353.104.

family allowance.²⁴⁰ In a case on the matter, the Texas Supreme Court found that the assertion that the funds the wife received after her husband's death were separate property had no merit.²⁴¹ Funds received after the death of the spouse are not "separate property" as that term is used in connection with a family allowance in the Texas Estates Code.²⁴²

H. "To Everything, There Is a Season"

As the reader may be starting to understand, a personal representative can easily get stuck in step three for years.²⁴³ While it is true that to "to everything there is a season, and a time to every purpose under heaven," many beneficiaries and heirs do not seem to get the meaning of that bible verse or 1965 song performed by the Byrds.²⁴⁴ Coaching your client to continue careful communication with the beneficiaries during this time, perhaps quarterly, will hopefully keep your personal representative from getting sued.²⁴⁵

For example, if there is an estate tax liability, getting to a final determination with the IRS may take three or more years after the death of the decedent.²⁴⁶ Several more years may pass as the personal representative tries to recover the unpaid amount of estate tax apportioned against the beneficiaries of nonprobate assets.²⁴⁷

However, even when there is no estate tax due, there can be long delays.²⁴⁸ I am still working to resolve a matter where the IRS owes a decedent's estate an income tax refund from the 2017 tax year.²⁴⁹ The decedent died in August of 2018, and prior to the personal representative getting appointed, one of the beneficiaries filed the decedent's 2017 income tax return after the decedent's death the following year.²⁵⁰ When the personal representative filed an income tax return a week or two later, the IRS marked the returns as fraudulent.²⁵¹ The personal representative sent IRS Form 1310, a death certificate, and the letters testamentary in 2019 and again in January

240. *Barnett v. Barnett*, 67 S.W.3d 107, 111–26 (Tex. 2001) (finding wife entitled to family allowance even though she received pension and savings plan from her deceased husband's employer).

241. *See Barnett v. Barnett*, 985 S.W.2d 520, 532 (Tex. App.—Houston [1st Dist.] 1998, pet. granted) (reversed on other grounds); *Barnett*, 67 S.W.3d at 107 (affirming the lower court's ruling, the Texas Supreme Court held that the wife's funds received, designated as separate property, lacked merit).

242. *See Estate of Wolfe*, 268 S.W.3d 780, 783 (Tex. App.—Fort Worth 2008, no pet.).

243. *See discussion supra* Sections VI.A–G.

244. *See Ecclesiastes* 3:1 (King James Version); *See generally Powers, supra* note 201 (discussing the duties of a personal representative).

245. Author's original thought.

246. *See generally Frequently asked questions on Estate Tax Closing Letter*, I.R.S., <https://www.irs.gov/businesses/small-businesses-self-employed/frequently-asked-questions-on-the-estate-tax-closing-letter> (last visited Jan. 28, 2025) (discussing timelines for closing letters) [<https://perma.cc/LL3L-QENB>].

247. *Id.*

248. *Id.*

249. *Id.*

250. Author's original thought.

251. *Id.*

2020.²⁵²

Then COVID-19 happened; once the IRS began working remotely, finding anyone to answer the phone became an issue.²⁵³ The IRS did not respond to the personal representative's numerous attempts to get the refund.²⁵⁴ Finally, the IRS admitted to the taxpayer advocate that the income tax return had been deleted.²⁵⁵ My last communication from the taxpayer advocate indicates that the IRS has finally processed the 2017 income tax return, but now "more work must be done" before the refund is issued.²⁵⁶ This estate was solvent and large distributions had been made.²⁵⁷ However, the refund has held up the final distribution of the estate for almost six years and some of the beneficiaries are understandably not happy.²⁵⁸

VII. THE DECELERATION PART 1—TO WHOM TO DISTRIBUTE

Once the personal representative has secured the assets and paid all debts and expenses, it is time to consider distribution.²⁵⁹ As the personal representative enters the first meter of the twenty-meter distribution phase, the attorney of the personal representative may need to constantly refocus the personal representative.²⁶⁰ The personal representative is tired, ready to be done, and likely just wants to run at the top speed to the finish line.²⁶¹ However, if they lose their form, an estate perfectly administered up to this point, can fall apart.²⁶²

A. The Will

The first refocus opportunity will be to review the will again.²⁶³ While this may seem basic, it is critical to not misstep.²⁶⁴ Of course, the personal

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. TEX. EST. CODE ANN. § 355.103.

260. *Id.* § 351.151.

261. Author's original thought; lindsay@formyplan.com, *Thoughts on Being a Personal Representative*, EST. PLAN. & ELDER L. SERVS. (Aug. 9, 2022), <https://www.formyplan.com/shared-thoughts-on-being-a-personal-representative/> (noting "[c]arrying out those duties can be time-consuming, confusing, and frustrating, especially if you're not familiar with the probate process.") [<https://perma.cc/W43G-4UQ9>].

262. Author's original thought.

263. *Id.*; see generally *A Handbook to Guide Personal Representatives*, COUNCIL PROB. CT. JUDGES STATE BAR GA. 1, 6–7 (2007), <https://rockdalecoprobatecourt.gov/uploads/files/72/handbook-to-guide-personal-representatives.pdf> (discussing revisiting the will to ensure the proper distribution of assets aligns with the decedent's intentions is an important step for the personal representative after addressing administrative tasks like paying debts and handling taxes) [<https://perma.cc/S3PH-HVWG>].

264. *Id.*

representative should almost have the will memorized at this point because they should have reviewed it in detail prior to becoming the personal representative and throughout the administration while paying debts and estate taxes.²⁶⁵ The will may have specific instructions on the timing of a distribution, the manner in which a distribution will be made, and the contingencies that must be met prior to distributions.²⁶⁶

Additionally, while the will may distribute personal property, there may be something outside the will indicating a different disposition.²⁶⁷ For instance, the decedent may have taped a slip of paper on an item indicating who they want the property to go to.²⁶⁸ Sometimes there is a writing indicating how the property should be distributed.²⁶⁹ Often, the individuals named are not the ones who will get the property under the will.²⁷⁰

The personal representative should study the writing carefully to determine if it constitutes a holographic will.²⁷¹ If so, the writing should be offered for probate.²⁷² Of course, ideally, that would have occurred prior to the initial application, but the additional writing often may be discovered later.²⁷³

If the writing does not constitute a holographic will, the personal representative should raise the issue with the beneficiaries of the estate to see if they agree to honor the precatory writings.²⁷⁴ Often, the will states that such a writing may exist and asks that the executor and beneficiaries honor it.²⁷⁵ If the beneficiaries agree to honor the precatory writing, the personal representative should get an agreement of the same in writing before distributing the items.²⁷⁶ If not, then the personal representative should disregard the precatory writing.²⁷⁷

265. Harry Adelman, *The Power to Carry on the Business of a Decent*, 36 MICH. L. REV. 185, 186–87 (1937).

266. See TEX. EST. CODE ANN. § 255.052.

267. See generally *A guide to probate and estate planning in Texas*, TEX. PROB. PASSPORT: TEX. YOUNG LAWS. ASS'N 1, 7–8 (2011), <https://www.depts.ttu.edu/sls/forms/Texas-Probate-Passport.pdf> (explaining that the decedent's intentions can be affected) [<https://perma.cc/GY3W-WP6A>].

268. Charles M. Davis, Comment, *A Lost Will, A Photocopy of the Original, and Two "Snakes in the Grass:" Is It Time to Update Sections of 85 of the Texas Probate Code?*, 40 TEX. TECH. L. REV. 89, 98 (2007).

269. See TEX. EST. CODE ANN. § 251.051.

270. *Holographic Wills in Texas: What You Should Know*, MASSINGILL (Dec. 14, 2021), <https://jm.legal/articles/estate-planning/holographic-will/> (noting “holographic wills open the door for beneficiaries of the estate or other interested parties to contest the will . . .”) [<https://perma.cc/RTU9-98CZ>].

271. See *id.* § 251.052.

272. See *id.* § 256.003(c).

273. See *id.* § 256.204.

274. See 74 TEX. JUR. 3D *Wills* § 411, Westlaw (database updated April 2025).

275. See *id.* § 408.

276. See *id.* § 411.

277. See *id.*

B. "I Will Survive"

An heir or beneficiary must survive the decedent to receive a distribution from an estate.²⁷⁸ A person who does not survive the decedent by 120 hours is considered to have predeceased the decedent for purposes of a homestead allowance, exempt property, and intestate succession.²⁷⁹ If the will does not state differently, a devisee must survive the decedent by 120 hours to receive estate property.²⁸⁰ If the will specifically addresses simultaneous death, death in a common disaster, requires the devisee to survive the testator, or defines the length of time a beneficiary must survive the testator, then the terms of the will apply.²⁸¹

Therefore, if the will states, "to my daughter Jane if she survives me," then Jane will inherit if she survives her mother, whether it is by one minute or 121 hours.²⁸² Similarly, if the will states "any beneficiary must survive by ninety days" and Jane merely survives by 120 hours, then Jane's estate will not get any share of her mother's estate.²⁸³ If property is to go to a beneficiary only if they survive another person, the beneficiary will only receive the property if they survive the other person by 120 hours.²⁸⁴

C. Partial Intestacy

Of course, the will may not dispose of all the property passing through probate, so there may be partial intestacy.²⁸⁵ Depending on the dynamics between the personal representative, beneficiaries, and heirs, this may be as simple as applying Chapter 201 of the Texas Estates Code and getting a written settlement agreement.²⁸⁶ Alternatively, the personal representative may need to file a proceeding to declare heirship within the same cause number.²⁸⁷ While the idea of another probate proceeding may frustrate your already-flagging personal representative, you must refocus them on the potential liability of not going through the proper steps.²⁸⁸

D. Income Tax Concerns in Distribution

While we often focus a lot of our energy on estate and gift tax, the

278. TEX. EST. CODE ANN. § 121.053.

279. *Id.* § 121.052.

280. *Id.* § 121.101.

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.* § 121.102.

285. Dying without a Will (Intestate Succession) in Texas, LEGAL MATCH, <https://www.legalmatch.com/law-library/article/intestate-succession-in-texas.html> (last visited Jan. 25, 2025) [<https://perma.cc/8RUN-PTDH>].

286. *Id.* § 201.151.

287. *Id.* § 202.002(2).

288. *Id.* § 351.0031.

income tax ramifications of decisions the personal representative will make must be considered prior to distribution.²⁸⁹

1. Gains and Losses

With certain exceptions, the decedent's estate receives a basis adjustment at death equal to: (1) the fair market value of the property on the decedent's date of death; (2) if the personal representative elects to use the alternate valuation date, the value of the property six months after the decedent's date of death; or (3) if the personal representative elects to use special use valuation, the property's value for special use valuation purposes.²⁹⁰

However, because it may take some time to administer the estate, the value at the time of distribution may be different from the decedent's adjusted basis.²⁹¹ While generally, no gain or loss is recognized from distributing to a beneficiary, the estate may recognize the gain or loss if the personal representative distributes an in-kind asset to satisfy a bequest of a specific dollar amount.²⁹²

For example, if the will leaves \$10,000 to Jane but the personal representative distributes \$10,000 worth of securities with a \$9,000 basis to satisfy the bequest, the estate will recognize a \$1,000 gain.²⁹³ This makes sense because, if the personal representative sold the securities and paid the proceeds to Jane, the estate would recognize a \$1,000 gain.²⁹⁴

Additionally, formula pecuniary bequests are treated as a specific dollar amount in determining whether gains or losses are recognized by the estate when the gift is funded in-kind rather than with cash.²⁹⁵

2. Non-Pro Rata Distributions

Non-pro rata distributions can also lead to income tax consequences.²⁹⁶ Unless authorized, the IRS will treat any non-pro rata division of property as a pro rata distribution followed by an exchange of interests by the distributees.²⁹⁷ Prior to September 1, 2017, the will had to expressly state that non-pro rata distributions were allowed.²⁹⁸ Since then, an independent

289. Carol Warley et al., *10 estate and income tax questions*, TAX ADVISER (Apr. 1, 2023), <https://www.thetaxadviser.com/issues/2023/apr/10-estate-and-income-tax-questions.html> [https://perma.Cc/9KT3-86KB].

290. 26 U.S.C. § 1014(a).

291. *Id.*

292. Treas. Reg. § 1.661(a)-2(f) (2004).

293. 26 U.S.C. § 1014(a).

294. *Id.*

295. Treas. Reg. § 1.1014-4(a)(3) (2017); Rev. Rul. 60-87, 1960-1 C.B. 286.

296. See Rev. Rul. 69-486, 1969-2 C.B. 159.

297. *See id.*

298. TEX. EST. CODE ANN. § 405.0015.

executor may make non-pro rata distributions of property not specifically devised that the independent executor is authorized to sell, unless the will or court provide otherwise.²⁹⁹

Non-pro rata distributions related to community property may be problematic because there is no clear guidance on whether this will lead to a gain in recognition.³⁰⁰ Extrapolating from technical advice memoranda in the divorce context suggests that a tax-free division is permissible if the personal representative and surviving spouse agree, although the most recent ruling indicates that the division must be permitted by the governing instrument or by local law.³⁰¹

Texas law may permit non-pro rata distributions of community property because Section 453.009 of the Texas Estates Code allows a personal representative to administer the entire community estate if the surviving spouse waives any right to exercise powers as community survivor, and Section 360.253 allows the surviving spouse to apply to the court for a partition of the community property into two equal moieties.³⁰² However, others disagree that Texas law permits non-pro rata distribution, asserting that a surviving spouse's community property interest is not automatically available for a non-pro rata distribution because it is not an estate asset.³⁰³

VIII. THE DECELERATION PART 2—WHO TOOK THE FUN OUT OF FUNDING TESTAMENTARY TRUSTS

As the personal representative flags, they now face what could be the most complicated part of the administration.³⁰⁴ Often, if there are testamentary trusts involved, there may be a need to file an estate tax return.³⁰⁵ So, prior to funding the trusts, the personal representative will need additional information.³⁰⁶ For instance, they will need to know: what gifts the testator made prior to death, what the nonprobate assets are, who the nonprobate assets went to and what their values are, how to identify the formula gift (if any), how to calculate the amount of the formula gift, determine how to fund the trust and choose a funding date, determine the

299. *Id.*

300. I.R.S. Tech. Adv. Mem. 80-16-050 (Jan. 23, 1980).

301. *See id.*; I.R.S. Priv. Ltr. Rul. 94-22-057 (June 3, 1994).

302. *Id.* §§ 453.009, 360.253.

303. Right of Survivorship Texas, TEX. PROP. DEEDS (Jan. 28, 2025), <https://www.texaspropertydeeds.com/property-deed-transfers/right-of-survivorship-in-texas/> (for a more thorough discussion of income taxation issues for estates, see Davis & Willms on Income Tax Issues in Estate Planning from the 2019 State Bar of Texas Advanced Estate Planning & Probate Course) [<https://perma.cc/4VHX-U8GV>].

304. 4 executor flags to watch out for, CUSHING & DOLAN, P.C. (Apr. 12, 2023), <https://www.cushingdolan.com/blog/2023/04/4-executor-red-flags-to-watch-out-for/> [<https://perma.cc/DT22-DXXM>].

305. *What Is a Testamentary Trust?*, W. & S. FIN. GRP. (Sept. 3, 2024), <https://www.westernsouthern.com/retirement/testamentary-trust> [perma.cc/RR7R-XZ7B].

306. Micah A. Bonaviri, *Duties of a Personal Representative/Executor*, STEIN SPERLING (July 1, 2020), <https://steinsperling.com/duties-of-a-personal-representative-executor/> [<https://perma.cc/9DTF-NSDQ>].

asset value for funding purposes, and consider the objective of the trust and how the assets chosen for funding impacts the objective.³⁰⁷

A. Identifying the Formula Clauses

When trying to identify the type of formula clause used, the personal representative and their coach will be pleased that, despite numerous ways to write a formula clause, they are all either pecuniary formula clauses or fractional share formula clauses.³⁰⁸

1. Pecuniary Formulas

Pecuniary formulas are common when dividing an estate between the bypass share and the marital share and sending a specific dollar amount to one trust.³⁰⁹ There are three types of pecuniary formulas that result in a marital deduction for the estate.³¹⁰

a. True Worth (Date of Distribution) Formulas

A “true worth” formula specifies that assets distributed in satisfaction of the formula gift must be valued at the date or dates of distribution.³¹¹ Texas law provides that pecuniary bequests are funded using the date of distribution values, unless the will provides otherwise.³¹² This funding method requires the personal representative to revalue the assets as of the distribution date or distribution dates.³¹³

The pros for this formula are (1) it is relatively simple to administer because the personal representative only has to revalue the assets distributed to satisfy the gift; (2) the personal representative has flexibility in deciding which assets to distribute; and (3) this formula freezes the value of the formula bequest, shifting all gain or loss to the other bequest.³¹⁴ The con of this formula is that if the gift is funded with assets, which have appreciated

307. TEX. EST. CODE ANN. § 351.051.

308. Jon J. Gallo, *Allocating Trust Assets Between a Bypass Trust and a Marital Trust*, FIN. PLAN. ASS’N (Aug. 2013), <https://www.financialplanningassociation.org/article/journal/AUG13-allocating-assets-between-bypass-trust-and-marital-trust> [<https://perma.cc/B8HU-K5J8>].

309. See generally David M. Grant, *Marital Deduction Funding Formulas for Revocable Trusts*, GRANT MORRIS DODDS: TR., PROB. & GUARDIANSHIP ATTY’S, <https://www.gmdlegal.com/revocable-trusts-funding-formulas/> (last visited Feb. 1, 2025) (explaining that pecuniary formulas are easier to draft) [<https://perma.cc/2ZEC-2JZV>].

310. See Rev. Proc. 64-19, 1964 C.B. 682.

311. Patrick J. Green, *Playing the Hand You are Dealt - Administering the Marital Funding Formula*, OR. STATE BAR 1, 9 (Nov. 20, 2009), https://www.dwt.com/files/uploads/documents/presentations/10-09_advisingtaxableestate_2.pdf [<https://perma.cc/K7G4-PMYL>].

312. TEX. EST. CODE ANN. § 124.051.

313. See Green, *supra* note 311, at 9.

314. 3 MICKEY R. DAVIS, DAVIS’S TEX. EST. PLAN. FORMS § 4.2.4(3)(c)[1][a] (2024 ed.).

in value during administration, the estate will have a taxable gift.³¹⁵ For assets with “income in respect of a decedent” (IRD), such as pensions, individual retirement accounts (IRAs), 401(k)s, etc., the IRD will be accelerated to the estate.³¹⁶ For non-IRD assets, this con can be mitigated by funding shortly after the date of death.³¹⁷

b. Minimum Worth Formulas

Formulas that provide for “minimum worth” funding state that once the amount of the gift has been computed, assets used to fund the gift are valued at the lesser of the estate tax value or the date of distribution value.³¹⁸ The pro of this formula is distribution of appreciated assets should not result in taxable income to the estate.³¹⁹ This formula’s cons are that the burden of depreciating assets falls on the residuary estate and that the personal representative can overfund the formula gift, thereby possibly breaching the duty of impartiality.³²⁰

c. Fairly Representative Formulas

Formulas that are fairly representative will state that assets distributed in satisfaction of the pecuniary gift should be valued at their estate tax values, but that the fiduciary must select assets that are “fairly representative” of the appreciation and depreciation in value from the date of death to the date or dates of distribution.³²¹ Texas law provides that if the personal representative is authorized to satisfy a pecuniary devise or transfer in trust in kind with assets at estate tax values then the formula is fairly representative, unless the will states otherwise.³²²

The pros of this approach are (1) the estate should not have taxable income from funding with this formula and (2) there is a more balanced sharing of appreciation and depreciation among the beneficiaries.³²³ So, this formula will be easier for the personal representative to fulfill the duty of impartiality.³²⁴ The con of this formula is that the personal representative has to revalue all estate assets to determine what is fairly representative of

315. *Id.*

316. See Julia Kagan, *Income in Respect of a Decedent (IRD): Definition and Taxes*, INVESTOPEDIA (May 16, 2024), https://www.investopedia.com/terms/i/income_respectof_decedent.asp [<https://perma.cc/EA2C-7VJG>].

317. 3 MICKEY R. DAVIS, DAVIS’S TEX. EST. PLAN. FORMS § 4.2.4(3)(c)[1][a] (2024 ed.).

318. See Green, *supra* note 311, at 10.

319. 3 MICKEY R. DAVIS, DAVIS’S TEX. EST. PLAN. FORMS § 4.2.4(3)(c)[1][b] (2024 ed.).

320. *Id.*

321. See Green, *supra* note 311, at 9.

322. TEX. EST. CODE ANN. § 124.052.

323. 3 MICKEY R. DAVIS, DAVIS’S TEX. EST. PLAN. FORMS § 4.2.4(3)(c)[1][c] (2024 ed.).

324. See *id.*

appreciation and depreciation.³²⁵

2. Fractional Share Formulas

A fractional share formula describes each portion of the estate as a fractional share of the remainder.³²⁶ Although these formulas initially envisioned fractional shares of each asset funding the different trust, generally, the language now allows non-pro rata funding once the fractions have been used to establish the date of distribution values.³²⁷ The pros of this formula are (1) no taxable gain is realized when the trusts are funded and (2) like with fairly representative formulas, the beneficiaries share the appreciation and depreciation of assets.³²⁸ Notably, this formula will cause the distributees to recognize gain unless the will expressly authorizes non-pro rata distributions.³²⁹ The con of this formula is computing and distributing assets in accordance with this fraction.³³⁰ Every time there is a distribution, income is accumulated, or administration expenses are paid, the fraction must presumably be recomputed.³³¹

B. Determining the Funding Date

Most of the time, when the personal representative is ready to fund the testamentary trusts they will have to revalue the assets.³³² Because the personal representative will not know the value of the assets on the actual date of funding, an effective date of funding will be chosen.³³³ Often, having the effective date of funding at the end of a month, quarter, or year makes the determination of assets easier.³³⁴ Any income earned and any change in value or form of any asset after the effective funding date is credited to the distributee.³³⁵

C. Crunching the Numbers

Preparing a funding spreadsheet allows the attorney and personal representative to see the impact of using different assets in the estate to fund

325. *Id.*

326. *See* Green, *supra* note 311, at 13.

327. 3 MICKEY R. DAVIS, DAVIS'S TEX. EST. PLAN. FORMS § 4.2.4(3)(c)[2] (2024 ed.).

328. *See* Rev. Rul. 60-87, 1960-1 C.B. 286; *see also* Grant, *supra* note 309.

329. *See* Rev. Rul. 69-486, 1969-2 C.B. 159.

330. *See* Grant, *supra* note 309.

331. *See id.*

332. 1 RONALD R. CRESSWELL ET AL., TEX. PRAC. GUIDE WILLS, TR. & EST. PLAN. § 4:305 (2025 ed.)

333. *Id.*

334. *See id.*

335. TEX. PROP. CODE ANN. § 116.102.

each gift.³³⁶ This spreadsheet shows the value of the assets at the time of the decedent's death; their value on the effective funding dates; and any changes that have occurred since death, such as consolidating accounts, establishing estate accounts, and asset sales, as well as the division of assets.³³⁷ The spreadsheet may also reflect the swapping of assets between the surviving spouse and personal representative.³³⁸

IX. THE DECELERATION PART 3—PROBLEMS WITH CERTAIN ASSETS

Certain assets present distinct problems for distribution that the personal representative must consider.³³⁹

A. Securities

A devise of securities may seem easy, but dividends, stock splits, mergers, and reorganizations pose some challenges.³⁴⁰ If the will devises securities owned on the date of the testator's death to a certain devisee, unless the will states otherwise, the personal representative will distribute the following additional securities subsequently acquired by the testator:

(1) securities of the same organization acquired because of an action initiated by the organization or any successor, related, or acquiring organization, including stock splits, stock dividends, and new issues of stock acquired in a reorganization, redemption, or exchange, other than securities acquired through the exercise of purchase options or through a plan of reinvestment; and (2) securities of another organization acquired as a result of a merger, consolidation, reorganization, or other distribution by the organization or any successor, related, or acquiring organization, including stock splits, stock dividends, and new issues of stock acquired in a reorganization, redemption, or exchange, other than securities acquired through the exercise of purchase options or through a plan of reinvestment.³⁴¹

So, if the decedent has purchase options for Exxon Mobil stock, the purchase options will not go to the devisee who is to receive "all Exxon Mobil stock."³⁴² The personal representative should consider exercising those purchase options, but they may then be part of the residuary estate.³⁴³ Further,

336. *Guide for Personal Representatives*, EAGLE CLAW CAP. MGMT., <https://www.eagleclawcapital.com/info-resources/guide-for-personal-representatives.html> (last visited Jan. 28, 2025) [<https://perma.cc/TQS9-YJHY>].

337. *Id.*

338. *See generally id.* (discussing guides for personal representatives).

339. *See discussion infra* Sections IX.A–D.

340. TEX. PROP. CODE ANN. § 255.252.

341. *Id.* §§ 255.252 (1)–(2).

342. *Id.* § 255.252(1).

343. *Id.* § 255.252.

any cash distributions that accrued prior to the testator's death are not included in the devise of the securities, regardless of whether the distribution is paid after the testator's death, absent contrary language in the will.³⁴⁴

B. Firearms

In many circumstances, the personal representative cannot just distribute a firearm to the beneficiary under the will.³⁴⁵ The personal representative cannot distribute a firearm to a minor nor can they distribute a firearm to a beneficiary or heir who is a convicted felon.³⁴⁶

Firearms regulated by the National Firearms Act, such as machine guns, suppressors and silencers, short barrel rifles and shotguns, and destructive devices, require the personal representative to jump through a couple of extra hoops in distribution.³⁴⁷ The personal representative must submit a form to the Bureau of Alcohol, Tobacco, Firearms, and Explosives to transfer and register the firearms to the beneficiaries of the estate.³⁴⁸

C. Closely Held Business Entities with Discounts

As estate planners set up limited liability companies (LLCs) and family limited partnerships (FLPs) in the hopes of estate tax minimization or elimination, as well as for numerous other reasons, the personal representative may face some issues in distributing such interests.³⁴⁹ While an undiscounted interest in an FLP may be worth \$1,000,000 due to lack of transferability and lack of control, the discounted value is \$700,000.³⁵⁰

If there are three beneficiaries of the estate who are to receive equivalent shares, the estate consists of an FLP and cash, and one beneficiary is not interested in the FLP, should the personal representative value the partnership at discounted values or not?³⁵¹ If the estate is taxable, the personal representative should probably not assert a discount on Form 706 or include

344. *Id.* § 255.253.

345. *Inheriting Firearms*, TEX. STATE L. LIBR. (Jan. 23, 2025), <https://guides.sll.texas.gov/probate/inheriting-firearms> [https://perma.cc/J7VS-BBP7].

346. 18 U.S.C. § 922(d).

347. *Transfers of National Firearms Act Firearms in Decedents' Estates*, DEP'T TREASURY: BUREAU ALCOHOL, TOBACCO, & FIREARMS (Sept. 5, 1999), <https://www.atf.gov/file/97596/download#:~:text=It%20is%20the%20responsibility%20of,licensee%2C%20for%20consignment%20or%20safekeeping> (for a thorough discussion of the issues involved with firearms in the estate, see the 44th Annual Advanced Estate Administration, by Craig S. Adams) [https://perma.cc/26DE-6PCN].

348. *Id.*

349. *Family limited partnerships 101*, WOLTERS KLUWER (Feb. 19, 2021), <https://www.wolterskluwer.com/en/expert-insights/family-limited-partnerships-101> [https://perma.cc/ARM3-DX9M].

350. *Discount Valuations for Family Limited Partnerships (FLPs)*, IRA FIN. GRP. (Nov. 12, 2024), <https://www.irafinancialgroup.com/learn-more/financial-success/discount-valuations-family-limited-partnerships/> [https://perma.cc/FN9F-HDCA].

351. Linda B. Trugman, *The Valuation of FLPs*, TAX ADVISER (Dec. 31, 2009), <https://www.thetaxadviser.com/issues/2010/jan/thevaluationofflps.html> [https://perma.cc/].

the discount at distribution.³⁵² However, if the estate is not taxable, is it fair to the beneficiary not receiving the partnership to value the partnership with the discount?³⁵³ Does discounting the partnership breach the duty of impartiality by putting the interest of the beneficiaries receiving the partnership over the beneficiary receiving just cash?³⁵⁴ What if there is only one beneficiary receiving the discounted entity?³⁵⁵ Since this beneficiary can easily remove the restrictions on control and transferability, is it fair to give them the entity at the discounted value used on Form 706?³⁵⁶

D. Property the Distributees Think Is Worth More

Short of cash and stocks and bonds, valuing most assets in an estate is subjective.³⁵⁷ There is a range of possible values, but until an item is actually sold, its exact value is debatable.³⁵⁸ It is not uncommon for beneficiaries to disagree with the value that the personal representative assigns to certain assets.³⁵⁹ It may be wise to advise the personal representative to get more than one appraisal in a contentious estate.³⁶⁰ The personal representative can provide the appraisals to the distributees prior to distribution.³⁶¹

X. THE DECELERATION PART 4—DOCUMENTING THE DISTRIBUTION

The personal representative has finally made it.³⁶² They have come up

352. Veronica Karas, *Valuation Discounts for Gift and Estate Tax Savings*, CAPTRUST (Apr. 30, 2024), <https://www.captrust.com/resources/valuation-discounts-estate-tax-savings/> [<https://perma.cc/RUN2-R2KQ>].

353. See *Family Limited Partnerships: Supporting Valuation Adjustments*, MERCER CAP., <https://mercercapital.com/article/family-limited-partnerships-supporting-valuation-adjustments/> (last visited Jan. 28, 2025) [<https://perma.cc/5E7E-8DZN>].

354. See *The Trustee's Duty to Deal Impartially with Beneficiaries of All Kinds*, L. OFF. OF STIMMEL, STIMMEL & ROESER, <https://www.stimmel-law.com/en/articles/trustees-duty-deal-impartially-beneficiaries-all-kinds> (last visited Jan. 28, 2025) [<https://perma.cc/X84N-TQP9>].

355. Author's original thought.

356. *Id.*

357. *Valuing Assets in an Estate & Legal Considerations*, JUSTIA (Nov. 2024), <https://www.justia.com/probate/probate-administration/the-duties-of-an-executor-of-an-estate/valuing-assets-in-an-estate/> [<https://perma.cc/3EME-RT76>].

358. Nicole M. Loughlin, *Valuing Hard to Value Assets*, LOUGHLIN L. P.A. (Oct. 27, 2023), <https://loughlinlawpa.com/valuing-hard-to-value-assets/> [<https://perma.cc/WL99-KZNT>].

359. *Minimizing conflicts between beneficiaries and estate executors & administrators*, TIMOTHY RICE EST. & ELDER L. FIRM (July 5, 2024), <https://www.timriceelderlaw.com/minimizing-conflicts-between-beneficiaries-and-estate-executors-administrators/> [<https://perma.cc/7FDH-FYMQ>].

360. See *The Role of Real Estate Appraisers in Texas Probate*, L. OFF. OF BRYAN FAGAN, PLLC (Aug. 19, 2024), <https://txprobatelawyer.net/the-role-of-real-estate-appraisers-in-texas-probate/> [<https://perma.cc/EE5Q-9AHM>].

361. See generally Powers, *supra* note 201 (discussing how the personal representative may hire professional appraisers).

362. Author's original thought.

with the distribution plan.³⁶³ Now they must prepare the documents to effectuate the distribution and share that planned distribution with the distributees.³⁶⁴

A. Documents Effectuating the Plan

Depending on what assets are left, many documents may be needed to effectuate the distribution plan or only a few.³⁶⁵ In an estate that has been liquidated to cash, checks may be all the personal representative needs.³⁶⁶ However, most estates will require more.³⁶⁷ Some of the possible documents needed include special warranty deeds for real property, transfer applications for stocks and bonds, Form 130-U from the Department of Motor Vehicles to transfer title for automobiles, Form 1023 from the Department of Housing and Community Affairs to transfer ownership of a manufactured home, Form PWD 143 from the Department of Parks and Wildlife to transfer title for boats, Form PWD 144 to transfer title to motors, assignments of ownership for closely held business, and change of ownership forms for life insurance the decedent owned that insured someone else.³⁶⁸

B. Sharing the Plan with the Distributees and Avoiding Liability

Unless the personal representative is the sole beneficiary, they will need to share the plan with the distributees.³⁶⁹ While in a dependent administration, the court absolves the personal representative from liability after the representative files the account for the final settlement, this step is not required in an independent administration.³⁷⁰ Of course, that does not mean you do not want your independent executor or administrator to be absolved from liability (because the last thing they want is to give the distributees a

363. See generally *Probate Law*, *supra* note 77 (explaining how probate is the legal process of distributing someone's property).

364. *Id.*

365. See generally *A Guide to Essential Estate Planning Documents*, COMERICA, <https://www.comerica.com/insights/wealth-management/wealth-preservation/estate-planning-documents.html> (last visited Jan. 21, 2025) (discussing potential additional documents that may be needed in an estate distribution) [<https://perma.cc/A6UX-DPM3>].

366. See generally *Understanding Probate Code: What is "All Cash"?*, SANBORN TEAM, <https://www.sanbornteam.com/understanding-probate-code-what-is-all-cash/> (last visited Jan. 21, 2025) (discussing what cash really means in an estate) [<https://perma.cc/ZY6D-BQPQ>].

367. See Powers, *supra* note 202.

368. See generally *Commonly Requested Legal Forms*, TEX. STATE L. LIBR. (Jan. 21, 2025), <https://guides.sll.texas.gov/legal-forms/wills-estates> (discussing how Texas has various forms that may be required) [<https://perma.cc/5S5K-GS4W>].

369. See *Guidelines for Individual Executors & Trustees*, AM. BAR ASS'N, https://www.americanbar.org/groups/real_property_trust_estate/resources/estate-planning/guidelines-individual-executors-trustees/ (last visited Jan. 21, 2025) [<https://perma.cc/K5UC-HRFW>].

370. See generally *Dependent Administration*, RIDDLE & BUTTS, LLP, <https://riddlebutts.com/probate/dependent-administration/> (last visited Jan. 21, 2025) (discussing dependent administration) [<https://perma.cc/VXC8-4G27>].

war chest to turn around and sue them for the trouble they had administering the estate).³⁷¹ Even if the personal representative did everything right, it is possible a disgruntled distributee who wanted the estate to be wrapped up sooner will find an attorney to file suit.³⁷² So, how can you coach your client to avoid that possibility in an independent administration?³⁷³

1. Receipt and Release

While a personal representative can require a receipt prior to distributing estate property, they cannot require a release.³⁷⁴ In an independent administration, the personal representative may want to send a detailed letter to the distributees advising that the estate administration is about wrapped up, except for the final income tax return and final administrative expenses.³⁷⁵ The letter can wrap things up easily if all beneficiaries will sign the attached receipt and release, which discharges the personal representative and all of their agents of liability.³⁷⁶ The letter recognizes that the distributees is under no obligation to sign it, but if it is not signed, the personal representative will likely avail themselves of the opportunity for a judicial discharge under Section 405.003.³⁷⁷

The personal representative should include with this letter either an informal accounting or bank statements with descriptions of what the debits and credits are for the entire estate or for the time period since they last provided an accounting to the distributees.³⁷⁸ Remember, the personal representative still has a duty of disclosure, so the information provided must be sufficient for the distributees to understand what occurred during the administration and, therefore, could object.³⁷⁹ An argument can be made that most bank statements, without copies of checks attached or descriptions written in, are insufficient to provide full disclosure.³⁸⁰

2. Judicial Discharge

If the distributees will not sign a receipt and release, the personal representative should consider filing a petition for judicial discharge.³⁸¹ This is a lawsuit and all distributees will have to be served with the petition, unless

371. See generally *Probate Law*, *supra* note 77 (discussing will contests).

372. See *id.*; Author's original thought.

373. Author's original thought.

374. TEX. EST. CODE ANN. § 405.001.

375. See generally *Final Distribution of Estate Letter with Sample*, U.S. WILL REGISTRY (July 24, 2024), <https://www.theuswillregistry.org/estate-articles/final-distribution-of-estate-letter/> (discussing what to do when the estate is over) [<https://perma.cc/NK37-YT87>].

376. *Id.*

377. TEX. EST. CODE ANN. § 405.003.

378. See *A Guide to Essential Planning Documents*, *supra* note 367.

379. *Id.*

380. Author's original thought.

381. See TEX. EST. CODE ANN. § 405.003.

they waive the issuance and service of citation.³⁸² The court may require the personal representative to file a final account.³⁸³ Of course, because the distributees will be served, they may choose to file a counterclaim against the personal representative.³⁸⁴ This is definitely an expensive remedy, but it may be necessary when the distributees will not absolve the personal representative from liability.³⁸⁵

3. Closing Report or Notice of Closing Estate

If the personal representative cannot get a receipt and release but does not want to risk the counterclaim or pay the fees for a judicial discharge action, they may choose instead to file a closing report or notice of closing estate.³⁸⁶ They must distribute before filing.³⁸⁷

XI. CONCLUSION

Coaching your personal representative through the steps of administration can be harrowing.³⁸⁸ Most of the personal representatives want to skip all the early stages of administration and even shortcut the distribution phase.³⁸⁹ While the administration can often bog down for one reason or another, helping your personal representative stave off fatigue and avoid potentially unhappy distributees from calling a false start or a lane line violation will lead to a happy client who does not get sued.³⁹⁰ May you succeed in your quest coaching your personal representatives to Olympic gold and becoming a GOAT of estate administration.³⁹¹

382. See *How Do I Get a Judicial Discharge of a Probate?*, KREIG LLC, <https://corpus-christi-probate.com/how-do-i-get-a-judicial-discharge-of-a-probate/#:~:text=A%20judicial%20discharge%20of%20a%20probate%20in%20Texas%20is%20a,further%20responsibility%20for%20the%20estate> (last visited Jan. 21, 2025) [<https://perma.cc/7465-FQ8K>].

383. See TEX. EST. CODE ANN. § 405.003.

384. See FED. R. CIV. P. 13.

385. Author's original thought.

386. See TEX. EST. CODE ANN. §§ 405.001, 405.004.

387. *Id.*

388. Author's original thought.

389. *Id.*

390. *Id.*

391. *Id.*