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128A NOTICE REQUIREMENTS: ADDING TO THE BURDEN OR PREVENTING FRAUD FOR THE TEXAS PROBATE SYSTEM?

By Catherine S. Curtis

I. INTRODUCTION

For more than a century, the Texas probate system has prized inexpensiveness, privacy, and the ability of a family to administer their loved one's estate without judicial intervention.[1] Section 128A, which

1. *See* Act approved Jan. 9, 1843, 7th Cong., R.S., art. 1246, § 5, 1843 Repub. Tex. Laws 14, *reprinted in* 2 *H.P.N. Gammel, The Laws of Texas 1822–1897*, at 834 (Austin, Gammel Book Co. 1898), *available at* http://texashistory.unt.edu/ark:/67531/metapth6726/m1/838/ ("[N]o other action than the probate and registration of the will

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appears to be an unobtrusive addition in the 2008 Supplement to Vernon's Texas Probate Code Annotated, requires a personal representative to give notice to all the beneficiaries named in a will within sixty days of admitting the will to probate.[2] However, these new notice requirements have already aroused a skeptical response from the legal community.[3] Even the senator who authored section 128A authored a new bill[4] that would have repealed section 128A's changes and replaced them with the previous requirements, citing the "overly burdensome" cost of the new notice requirements for practitioners and clients.[5] Ultimately, section 128A is the fruition of a collision course between public perceptions of the probate system[6] with the realities of making that system work.[7] Despite the potential problems, section 128A is beneficial for Texans.

The reasons for the outcry against procedures that subject an aspect of the probate system to judicial oversight are deeply rooted in the history and development of the Texas probate system, particularly in independent administrations. Independent administration allows a personal representative to distribute and manage estate assets largely without the supervision of the probate court.[8] In most cases, the Texas probate system operates more smoothly, efficiently, and cost-effectively than probate systems in a majority of other states in the country.[9] Ultimately, however, increasing judicial supervision, even in independent administrations, may simply be the "right thing to do" to

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shall be had in the [p]robate [c]ourts."); William I. Marschall, Jr., Comment, *Independent Administration of Decedents' Estates*, 33 TEX. L. REV. 95, 97 (1955) (stating that Texas was the first state to enact an independent administration statute).

2. TEX. PROB. CODE ANN. § 128A(b) (Vernon Supp. 2008).

3. Gerry W. Beyer, *Wills and Trusts*, 61 SMU L. REV. 1179, 1187 (2008) ("[Section 128A] will increase the time and monetary costs for many probates in Texas."); Johanson's Tex. Prob. Code Ann. § 128A cmt. (West 2008).

4. Tex. S.B. 319, 81st Leg., R.S. (2009) (left pending in committee in February 2009); *see also* WILLIAM D. PARGAMAN BASED ON PRIOR PRESENTATIONS AND PRESENTED BY GLENN M. KARISCH, 2009 LEGISLATIVE UPDATE: SUMMARY OF CHANGES AFFECTING TEXAS PROBATE, GUARDIANSHIP, AND TRUST LAW 16–17 (2009), *available at* http://www.texasprobate.com/articles/09update.pargaman.pdf (no action was taken on the bill after the Senate Jurisprudence Committee Meeting in mid-February 2009).

5. Sen. Jurisprudence Comm., Bill Analysis, Tex. S.B. 319, 81st Leg., R.S. (2009).

6. *See* Tony Plohetski, *Breach of Trust: Texas Estate Laws Make Stealing from the Dead an Easy Crime*, AUSTIN AM.-STATESMAN, June 27, 2008, at A1, *available at* http://www.statesman.com/search/content/news/stories/local/12/10/10probate.html ("[L]ack of oversight has created significant weaknesses in an area of the law that eventually affects almost every Texan.").

7. *See* Sen. Jurisprudence Comm., Bill Analysis, Tex. S.B. 319, 81st Leg., R.S. (2009) ("Since the new law was enacted it has become apparent that the requirements imposed are overly burdensome and costly . . . .").

8. TEX. PROB. CODE ANN. § 145(h) (Vernon 2003).

9. Posting of Gerry W. Beyer to Wills, Trusts & Estates Prof Blog: Proposal to Change Texas Probate Procedure, http://lawprofessors.typepad.com/trusts_estates_prof/2007/01/proposal_to_cha.html (Jan. 19, 2007).

protect families from unscrupulous executors who abuse the power given to them in the Texas Probate Code.[10]

The catalyst for the amendment to section 128A was a series of newspaper articles[11] that reported on an Austin lawyer who stole approximately $800,000 from three estates while serving as an independent executor of the will in those estates.[12] The people who were exploited were typically elderly with no living adult children.[13] In one instance, family members discovered years after their aunt's death that the lawyer administering her estate was driving her vehicle, had used money from the estate to add to his rare china collection, and had not sold or distributed her property.[14] The lawyer surrendered his law license in 2007 and pled guilty to felony theft charges in June of 2008.[15]

When the *Statesman* articles were written, only charitable beneficiaries or state agencies named as will beneficiaries were required to be notified of an interest in the testator's estate.[16] As a result, the family members in the *Statesman* articles, who were will beneficiaries, did not know of their interests, and the assets of the estates began disappearing without any knowledge of the relatives.[17] Because the *Statesman* articles touted the benefits of court-supervised administrations without any real context as to what the independent administration system in Texas is designed to do, some commentators are unconvinced that the new notice requirements are necessary.[18] The articles focused on what the author saw as a need for reform and more court supervision.[19] However, the well-respected Tarrant County Pro-

10. *See* Posting of Pam Parker to Wills, Trusts & Estates Prof Blog: Proposal to Change Texas Probate Procedure, http://lawprofessors.typepad.com/trusts_estates_prof/2007/01/proposal_to_cha.html (Jan. 19, 2007, 17:52:19 EST).

11. Johanson's Tex. Prob. Code Ann. § 128A cmt. (West 2008); GLENN M. KARISCH, 2007 LEGISLATIVE UPDATE: SUMMARY OF CHANGES AFFECTING PROBATE, GUARDIANSHIP AND TRUST LAW 2–3 (2007), *available at* http://www.texasprobate.com/07leg/2007update.pdf.

12. Plohetski, *supra* note 6; Tony Plohetski, *Laws, In-Laws Can Make Wills Difficult, Expensive to Execute*, AUSTIN AM.-STATESMAN, Dec. 10, 2006, at A14, *available at* http://www.statesman.com/search/content/news/stories/local/12/10/10probatelaw.html [hereinafter Plohetski, *Laws*]; Tony Plohetski, *Fighting the Touchy Battle of Estate Theft: Those Who Mishandle Funds Often Face Only Civil Challenge*, AUSTIN AM.-STATESMAN, Dec. 10, 2006, at A15, *available at* http://www.statesman.com/search/content/news/stories/local/12/10/10probatecrime.html; Tony Plohetski, *Austin Lawyer Pleads Guilty to Thefts From Three Estates*, AUSTIN AM.-STATESMAN, June 28, 2008, at B1 [hereinafter Plohetski, *Austin Lawyer*].

13. Plohetski, *supra* note 6.

14. *Id.*

15. Plohetski, *Austin Lawyer*, *supra* note 12.

16. *See* Act of May 23, 1989, 71st Leg., R.S., ch. 1035, § 7, 1989 Tex. Gen. Laws 4162, 4166 (amended 2007) (current version at TEX. PROB. CODE ANN. § 128A (Vernon Supp. 2008)).

17. Plohetski, *supra* note 6.

18. *See* Johanson's Tex. Prob. Code Ann. § 128A cmt. (West 2008).

19. *See id.*; Plohetski, *supra* note 6.

bate Judge Steve M. King (who was quoted in the "Breach of Trust" article) pointed out that extra hurdles will not necessarily keep executors from being untrustworthy.[20] The articles pointed to scant oversight by the statutory probate courts as a contributing factor that led to the fraud and also made it "alarmingly easy" for an executor to steal estate assets "with little chance of getting caught."[21]

At approximately the same time that the articles were published, the Senate Jurisprudence Committee held a between-sessions hearing on fiduciary oversight in the statutory probate courts.[22] One of the ideas discussed at the hearing was requiring notice to will beneficiaries.[23] After the appearance of the *Statesman* articles and the hearing testimony, the legislature amended the notice provision in 2007[24] to require the personal representative to give notice to all beneficiaries named in the will.[25]

Section 128A will have an immediate impact on probate attorneys.[26] The new notice requirements are considerably more intricate; complying with the new requirements in section 128A will require more time and may increase the cost of a typical probate case, even in independent administrations.[27] Essentially, independent administration is a way to free an estate from the costs and delays that are typically associated with the probate system.[28] It is worth noting that the estate theft covered by the *Statesman* articles occurred in independent administrations.[29] The issue becomes clear: Will requiring independent executors to notify beneficiaries conflict with the policy of independent administrations and create more problems than it solves, or do the benefits of notice outweigh these policy considerations?

This Comment will focus on the implications of requiring notice in the traditionally streamlined Texas probate system and explore the practical impact of the new notice requirements for attorneys and families. Because any analysis of the changes must begin with the text of the statute, Part II notes the previous notice requirements and explains what the new requirements are in section 128A. Part III begins with a brief history and overview of the probate system and the development of independent administrations in Texas. Next, Part IV examines the policy behind independent administrations, why the new

20. *See* Plohetski, *Laws*, *supra* note 12.
21. Plohetski, *supra* note 6.
22. KARISCH, *supra* note 11, at 3.
23. *Id.*
24. *Id.*
25. TEX. PROB. CODE ANN. § 128A(b) (Vernon Supp. 2008).
26. KARISCH, *supra* note 11, at 2.
27. *See* Beyer, *supra* note 3, at 1186–87.
28. *See* Roy v. Whitaker, 92 Tex. 346, 352, 48 S.W. 892, 895 (1898), *modified on other grounds*, 92 Tex. 346, 49 S.W. 367 (1899); Corpus Christi Bank & Trust v. Alice Nat'l Bank, 444 S.W.2d 632, 634 (Tex. 1969).
29. Plohetski, *supra* note 6.

notice requirements could pose a conflict and then considers the remedies already available to beneficiaries who feel that an executor has mismanaged estate assets. Finally, Part IV addresses why these remedies are inadequate without the new notice requirements.

This Comment concludes that even though the notice requirements pose a policy conflict and a potential for increased cost and inconvenience, the benefits of notifying beneficiaries outweigh these problems. Beneficiaries need to be in a position to demand an accounting or remove an executor who they feel has mismanaged the estate assets. Further, any policy considerations currently underlying the independent administration system are intended to benefit beneficiaries and family members of the testator, and a statute that requires notice to these individuals necessarily strengthens that policy.[30]

II. THE TEXT OF THE STATUTE: NEW REQUIREMENTS IN SECTION 128A

Prior to its amendment in 2007, section 128A of the Probate Code required a personal representative to notify the state, a state agency, or a charitable organization of its interest in the testator's estate within thirty days after admitting the will to probate.[31] The amended statute requires a personal representative[32] to give notice to each beneficiary named in the will within sixty days after admitting the will to probate.[33]

The statute defines a "beneficiary" as a "person, entity, state, governmental agency of the state, charitable organization, or trust entitled to receive real or personal property under the terms of the decedent's will. . . ."[34] Notice must be sent to the beneficiary personally unless the beneficiary is a trust, a minor, or a charity that could not be notified, or the beneficiary has a court-appointed guardian or conservator.[35] The personal representative usually satisfies the duty to notify trust beneficiaries by sending notice to the trustee.[36] If the beneficiary has a guardian, conservator, or is a minor, the personal representative must give notice to that guardian, conservator, or to at least one parent.[37] Finally, a charity that cannot be notified for some reason can be given notice through the attorney general.[38]

30. *See Corpus Christi Bank & Trust*, 444 S.W.2d at 634.

31. Act of May 23, 1989, 71st Leg., R.S., ch. 1035, § 7, 1989 Tex. Gen. Laws 4162, 4166 (amended 2007) (current version at TEX. PROB. CODE ANN. § 128A (Vernon Supp. 2008)).

32. The term "personal representative" includes an independent executor. TEX. PROB. CODE ANN. § 3(aa) (Vernon 2003).

33. § 128A(b).

34. *Id.* § 128A(a).

35. *Id.* § 128A(c)(1)–(4).

36. *Id.* § 128A(c)(1).

37. *Id.* § 128A(c)(2)–(3).

38. *Id.* § 128A(c)(4).

The strict requirement of personal notice poses some practical problems. The personal representative must assume for the purposes of giving notice that the beneficiary will outlive any survival provision in the will.[39] Thus, a beneficiary (without a guardian) on life support whose interest is contingent upon her surviving the testator or another person for more than sixty days would receive personal notice.[40] The statute does not contain an exception for gifts to the personal representative, so the personal representative must file a waiver or give herself notice.[41] Beneficiaries must receive notice of the bequest even if the bequest was a nominal gift, so the cost of sending the notice could conceivably outweigh the value of the bequest.[42] There are only two exceptions to giving the required notice: (1) if the beneficiary appeared in a proceeding relating to the estate; or (2) the beneficiary signed an instrument that acknowledged the beneficiary's receipt of the will.[43]

In order to comply with the statute, the written notice must contain: (1) the name and address of the beneficiary and the name and address of the person to whom the personal representative is giving notice (such as a guardian, if any); (2) the testator's name; (3) a statement that the testator's will has been admitted to probate; (4) a statement that the beneficiary is named as a beneficiary in the will; (5) personal representative contact information; (6) a copy of the will that was admitted to probate; and (7) a copy of the order admitting the will to probate.[44] The only permissible method to send the notice is by certified mail, return receipt requested.[45]

The personal representative must prove compliance with the statute by filing a sworn affidavit or certificate within ninety days after the date of the order admitting the will to probate.[46] The affidavit or certificate must contain the name and address of each beneficiary who was given notice, including those who filed waivers.[47] In addition, the personal representative must indicate in the affidavit the name of each beneficiary whose identity or address could not be ascertained despite exercising reasonable diligence.[48]

39. *Id.* § 128A(a).
40. KARISCH, *supra* note 11, at 4.
41. *See* § 128A(d).
42. *See id.* § 128A(d)(1)–(2); Beyer, *supra* note 3, at 1187.
43. *Id.*
44. *Id.* § 128A(e)(1)(a)–(e).
45. *Id.* § 128A(f).
46. *Id.* § 128A(g)(1)–(2).
47. *Id.*
48. *Id.* § 128A(g)(3).

III. Potential Problems Posed by the New Requirements

Because section 128A contains more detailed notice requirements than what was previously required,[49] certain problems may arise in practice when personal representatives attempt to comply with the new requirements. Most importantly: Do the notice requirements undercut the policy rationale of the layman-friendly probate system in Texas, particularly in the case of independent administrations? Beginning with a history of probate and the development of independent administrations, it becomes clear that even a small hurdle in the administration of an independent estate could represent a shift to more judicial oversight, which poses problems of its own.

Other practical problems may arise for attorneys and laypersons navigating the probate system. Of most importance to families, perhaps, is the potential for increased cost for probates in Texas.[50] Next, attorneys and personal representatives will be concerned with potential liability associated with actually ascertaining all applicable beneficiaries, especially in the case of class gifts.[51] Probate courts must interpret what "reasonable diligence" means for the personal representative in light of the lack of statutory guidance in this context.[52] Additionally, there are privacy concerns with the unprecedented release of beneficiaries' personal information in the sworn affidavit or certificate.[53]

A. *Perception or Reality: Probate as an Outdated System*

The power to transmit property to persons of your choosing at death is something that most people in the modern age take for granted and was only gradually recognized to become the norm that it is today.[54] Historically wills were useless or unknown, and children or other heirs were incapable of exclusion from the estate.[55] In medieval England, real property could be inherited only through the eldest son, but property acquired by conquest or purchase could be disposed of at will during life.[56] Wills devising personal property continued primarily

49. *Compare id.* § 128A(b), *with* Act of May 23, 1989, 71st Leg., R.S., ch. 1035, § 7, 1989 Tex. Gen. Laws 4162, 4166 (amended 2007).

50. *Beneficiaries Must Be Notified Under New Law*, For the Record (Jordan, Houser & Flournoy, LLP, Dallas, Tex.), http://www.jhflegal.com/index.php?option=com_content&view=article&id=35:beneficiaries-notified&catid=4:for-the-record&Itemid=5 (last visited Oct. 21, 2009).

51. *See* Karisch, *supra* note 11, at 4; *see also* Beyer, *supra* note 3, at 1187.

52. *See* Karisch, *supra* note 11, at 4; *see also* Beyer, *supra* note 3, at 1187.

53. Karisch, *supra* note 11, at 7.

54. *See* Jesse Dukeminier et. al, Wills, Trusts and Estates 2 (7th ed. 2005).

55. *See id.*; *see also* Frances & Joseph Gies, Marriage and the Family in the Middle Ages 188 (1987) (explaining that primogeniture was "designed to protect the integrity of the estate" although it limited the ability to distribute wealth among other children during the thirteenth century).

56. *See* Frances & Joseph Gies, *supra* note 55.

as a means to benefit the clergy.[57] The right to devise land at death was eventually revived by a statute under Henry VIII in 1541.[58]

Probate is the procedural means by which the law distributes the estate according to the testator's wishes.[59] In all states, probate performs three essential functions: (1) clears title to real and personal property; (2) protects creditors by allowing them to get paid from the assets of the estate; and (3) distributes the assets of the estate.[60] Even if all the beneficiaries are amicable and no contest is filed, the process of paying creditors, clearing titles to property, and paying taxes on the estate may prolong an administration.[61]

1. Perception: The Nonprobate Revolution and the Avoidance of Probate

Due to the costs of probate and the changing nature of wealth in the United States, however, there has been an increase in the use of will substitutes, the so-called "nonprobate revolution."[62] The administrative costs of probate primarily consist of court fees, commission of the personal representative, attorney fees, and when necessary, guardian ad litem or appraiser fees.[63] Fees can vary widely depending on the complexity of the estate, from $2,000 to $10,000 or more,[64] although the exemption for federal estate taxes rose to $3.5 million in 2009 and will rise to an unlimited amount in 2010.[65]

The four most common will substitutes are life insurance, pensions, joint accounts, and revocable trusts.[66] Each substitute is functionally indistinguishable from a will when properly created and allows the creator the ability to change the disposition or the beneficiaries until death.[67] Probate has historically accommodated the transfer of title to single-tenancy real estate and has become increasingly irrelevant and easy to avoid; today, wealth is typically accumulated using promissory instruments such as stocks, bonds, pensions, and insurance.[68] The increase in the use of will substitutes, like a transfer-on-death deed, has

57. 1 H.C. UNDERHILL, A TREATISE ON THE LAW OF WILLS: INCLUDING THEIR EXECUTION, REVOCATION, ETC. § 3 (Chicago, T.H. Flood & Company 1900).

58. *Id.*

59. *See* DUKEMINIER ET AL., *supra* note 54, at 33.

60. *Id.* at 34.

61. *Id.* at 36–37.

62. John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1116, 1119 (1984).

63. DUKEMINIER ET AL., *supra* note 54, at 37.

64. Michael Hatfield, *Pro Se Executors—Unauthorized Practice of Law, or Not?*, 59 BAYLOR L. REV. 329, 337 n.43 (2007).

65. DUKEMINIER ET AL., *supra* note 54, at 37.

66. *Id.* at 296.

67. *Id.*

68. Langbein, *supra* note 62, at 1119.

been as dramatic in some cases as to cause concern for the local probate bar.[69]

The public's dissatisfaction with the probate system was highlighted by the publication of Norman Dacey's book in the mid-1960s titled *How to Avoid Probate.*[70] Dacey bemoaned "extortionate legal fees" and the delays of probate and recommended creating revocable trusts to avoid probate entirely.[71] Despite, or perhaps because of, the harsh reaction from the legal field to Dacey's book,[72] probate remains unpopular.[73] However, lawyers who dismiss the groundswell of public opinion against probate appear preoccupied with the values of an adversarial legal system and do not address what is at the heart of the complaints about the probate system.[74] In most states, probate has a reputation for expense, delay, clumsiness, and is essentially the opposite of what someone desires upon the death of a family member; instead, people desire a system that is simple, inexpensive, and minimizes judicial interference in a deeply private matter.[75]

2. Reality: The Texas Independent Administration System is Ahead of the Curve

In contrast, Texas has a probate system that has long strived to maximize simplicity, inexpensiveness, and decrease the necessity of judicial interference.[76] Since the mid-nineteenth century, Texas has provided a "user-friendly" approach to probate that has resulted in less need for the substantial probate avoidance mechanisms, such as revocable trusts, used often in other states.[77] The heavily court-supervised and complex probate systems in most states virtually require attorneys there to counsel their clients to avoid it;[78] in contrast, it is unethical for Texas attorneys to advise their clients that the Texas pro-

69. *See generally* David Major, *Revocable Transfer on Death Deeds: Cheap, Simple, and Has California's Trusts & Estates Attorneys Heading for the Hills*, 49 SANTA CLARA L. REV. 285, 298–302 (2009) (discussing the impact of a transfer on death deed on estate planning in California).

70. Langbein, *supra* note 62, at 1116.

71. DUKEMINIER ET AL., *supra* note 54, at 306.

72. *See, e.g.*, Allan Howeth, *How to Avoid Probate—An Answer From Texas*, 29 TEX. B.J. 897, 898 (1966) (discussing the contentions in Dacey's book and refuting the universal need to avoid probate, particularly in Texas).

73. *See* Michael A. Kirtland & Catherine Anne Seal, *Beneficiary Deeds and Estate Planning*, 66 ALA. LAW. 118, 123 (2005) ("Rightly or wrongly, avoidance of probate is seen as a good thing by many people.").

74. *See* Langbein, *supra* note 62, at 1116.

75. *Id.*

76. *See* Hatfield, *supra* note 64, at 333; *see also* W.S. SIMKINS, THE ADMINISTRATION OF ESTATES IN TEXAS 8 (2d ed. 1914) (explaining that the Texas Legislature intended to design a layman-friendly probate system).

77. Hatfield, *supra* note 64, at 333.

78. *See* Johanson's Tex. Prob. Code Ann. § 128A cmt. (West 2008).

bate system is inherently cumbersome, expensive, complex, or to suggest that clients should strive to avoid it.[79]

The independent administration system in Texas is an excellent example of this "hands-off" approach that allows a family to achieve the goals of probate with minimum court supervision.[80] Most testate administrations in Texas are independent administrations.[81] In an independent administration, the executor selected by the testator or by the court may sell and distribute assets of the estate without express permission from the probate court;[82] conversely, in a dependent administration (which is far less common) the probate court must grant permission for most practical transactions.[83] A person may create an independent administration by providing for one in her will, or the distributees of the estate may agree to an independent administration.[84] Other than probating the will and filing an inventory, appraisement, and list of claims of the estate, no other judicial supervision is required in an independent administration.[85]

In 1848,[86] Texas became the first state to allow independent administration.[87] Beginning in 1843, the Texas legislature allowed a testator to provide in his will that "no other action than the probate and registration of the will shall be had in the Probate Courts."[88] Three years later, filing an inventory of the estate was added as a requirement.[89] The concept of an independent administration is one rooted in auton-

79. Hatfield, *supra* note 64, at 333–34.

80. *See* Howeth, *supra* note 72, at 898.

81. M.K. Woodward, *Some Developments in the Law of Independent Administrations*, 37 TEX. L. REV. 828, 828 (1959); Hatfield, *supra* note 64, at 335 (citing SHARON B. GARDNER & PATRICK J. PACHECO, *The Texas Probate Process from Start to Finish*, *in* 5TH ANNUAL BUILDING BLOCKS OF WILLS, ESTATES AND PROBATE 5.1, 5.1–12 (Texas Bar 2004)).

82. TEX. PROB. CODE ANN. § 145(h) (Vernon 2003).

83. *See id.* § 234(a) (Vernon 2003); Roy v. Whitaker, 92 Tex. 346, 352, 48 S.W. 892, 896 (1898), *modified on other grounds*, 92 Tex. 346, 49 S.W. 367 (1899). *See generally* Woodward, *supra* note 81, at 828 (discussing a brief history and developments in the law of independent administrations in Texas).

84. § 145.

85. *Id.* § 145(b).

86. Act approved Mar. 20, 1848, 2d Leg., R.S., § 110, Tex. Gen. Laws 275, *reprinted in* 3 *H.P.N. Gammel, The Laws of Texas 1822–1897*, at 275 (Austin, Gammel Book Co. 1898), *available at* http://texashistory.unt.edu/ark:/67531/metapth6728/m1/279/; Marschall, *supra* note 1, at 97.

87. David Patterson Smith, Note, *Fiduciary Administration—Administration of Estates—Texas Probate Courts Do Not Have Jurisdiction to Remove an Independent Executor For Mismanagement or Malfeasance*, 45 TEX. L. REV. 352, 352 (1967).

88. Act approved Jan. 9, 1843, 7th Cong., R.S., art. 1246, § 5, 1842–43 Repub. Tex. Laws 14, *reprinted in* 2 *H.P.N. Gammel, The Laws of Texas 1822–1897*, at 834 (Austin, Gammel Book Co. 1898), *available at* http://texashistory.unt.edu/ark:/67531/metapth6726/m1/838/. *See generally* Marschall, *supra* note 1, at 97 (discussing the origin of independent administration in Texas).

89. Act approved May 11, 1846, 1st Leg., R.S., § 26, 1846 Tex. Gen. Laws 317, *reprinted in* 2 *H.P.N. Gammel, The Laws of Texas 1822–1897*, at 1623, *available at* http://texashistory.unt.edu/ark:/67531/metapth6726/m1/1627/.

omy and the value of self-determination; independent administrations are built upon the idea that the decedent's estate can be best settled without judicial intervention.[90] Indeed, the independent administration system not only reflects a more streamlined approach but is also a way for families to avoid a majority of the delay and cost commonly associated with probate.[91]

Texas has adopted a probate system that reflects a policy choice to allow families to go through the difficult process of administering their deceased loved one's estate with as little court supervision as possible. As the *Statesman* articles pointed out, however, less court supervision can leave the door open for fraud. The question remains: How will notifying beneficiaries named in the will lessen this possibility for fraud, and was that possibility ever as much of a reality as these articles suggest?

B. *The Policy Conflict with the Purpose of Independent Administrations*

There has been a steady progression in the Texas probate system away from judicial supervision, particularly in independent administrations.[92] Originally, independent executors could act without a court order only in those matters relating to the "settlement of the estate,"[93] which included adjustment and payment of debts, sale of property, setting aside of exempt property, and distribution of the estate.[94] For other actions, such as effecting the resignation of the independent executor's resignation, a court order was necessary.[95] In 1955, the legislature amended the statute to expand the power of independent executors, explicitly removing independent administrations from judicial supervision unless the Probate Code required action in the probate court.[96] The purpose of removing an independent administration from "often onerous and expensive" judicial supervision was to allow the distribution of an estate with a "minimum of costs and delay."[97] Even in a dependent administration, the legislature simplified the process of selling real property of the estate by not requiring a

90. Marschall, *supra* note 1, at 98–99.

91. Howeth, *supra* note 72, at 898.

92. *See* Woodward, *supra* note 81, at 835.

93. *See* Roy v. Whitaker, 92 Tex. 346, 352, 48 S.W. 892, 895, *modified on other grounds*, 92 Tex. 346, 49 S.W. 367 (1899); Woodward, *supra* note 81, at 830.

94. *See Roy,* 92 Tex. at 352, 58 S.W. at 895; Woodward, *supra* note 81, at 830.

95. *Id.*

96. *See* Acts of Apr. 4, 1955, 54th Leg., R.S., ch. 55 §§ 145–146, 1955 Tex. Gen. & Special Laws 136, 218 (codified as amended at TEX. PROB. CODE ANN. § 145(b), (h) (Vernon 2003)).

97. Corpus Christi Bank & Trust v. Alice Nat'l Bank, 444 S.W.2d 632, 634 (Tex. 1969).

hearing on the sale unless opposition to the sale is filed in a timely manner.[98]

However, freedom from a court order hovering over every practical transaction in the administration of an estate is a double-edged sword. Notably, the *Statesman* articles pointed to this lack of oversight as a "weakness" in the Texas probate system and one of the main reasons that unscrupulous executors are able to exploit the system.[99] The assumption underlying the new notice requirements is that if beneficiaries are aware of their monetary interest in the assets of the estate they will ensure that those assets are not mismanaged by the personal representative.[100] Perhaps this assumption has some merit, as someone notified of an upcoming inheritance will obviously take a greater interest in the management of an estate than a person who is unaware of his interest. Nonetheless, the protective function served by the intricate new notice requirements seems at odds with the underlying policy of an independent administration—to lessen expense by removing as much as possible from the supervision of the probate court.[101]

C. *Limits Already in Place for Independent Executors*

Thus, it is worth examining whether current restrictions (or lack thereof) on independent executors really make it "alarmingly easy" for the executor to steal estate assets.[102] Despite the substantial power given to independent executors in the Texas Probate Code, an independent executor has never been "a law unto himself, absolutely freed from judicial supervision in all respects of administering an estate."[103] The independent executor's power is still tied to the powers granted in the Texas Probate Code, and when the code explicitly provides for judicial oversight she is subject to the jurisdiction of the probate court.[104]

1. The Executor's Fiduciary Duty

Moreover, the independent executor has fiduciary duties as a trustee of the estate and is held to a particularly high standard of conduct connoting fair dealing, good faith, fidelity, and integrity.[105] The executor will have duties that may not apply in ordinary business transactions, such as the duty of full disclosure, and the duty not to exploit

98. *See* TEX. PROB. CODE ANN. § 345A(b) (Vernon Supp. 2008).
99. *See* Plohetski, *supra* note 6.
100. *See* Sen. Jurisprudence Comm., Bill Analysis, Tex. S.B. 593, 80th Leg., R.S. (2007); KARISCH, *supra* note 11, at 3.
101. *See Corpus Christi Bank & Trust*, 444 S.W.2d at 634.
102. *See* Plohetski, *supra* note 6.
103. Woodward, *supra* note 81, at 830.
104. TEX. PROB. CODE ANN. § 145(b), (h) (Vernon 2003).
105. Geeslin v. McElhenney, 788 S.W.2d 683, 684–85 (Tex. App.—Austin 1990, no writ).

the fiduciary relationship for personal benefit.[106] As an added safety feature for the estate, the executor will be required to post bond.[107] Executors must post bond, unless the requirement is waived by the testator, because it is not presumed that the executor adequately represents the beneficiaries' interests.[108] Accordingly, the benefits of an approachable probate system must be balanced against the possibility of a personal representative stealing assets from an estate that she has been entrusted with either by the court or the testator.

2. Accounting and Removal

Although notifying beneficiaries arguably prevents fraud by allowing beneficiaries to monitor the independent executor's administration of the estate, existing provisions in the Probate Code allow beneficiaries to subject the executor to probate court supervision. The independent executor is an officer of the court who is required to probate the will and file an inventory, appraisement, and list of claims.[109] Filing an affidavit with the final accounting of the estate terminates the independent administration but does not relieve the executor from liability for mismanagement of estate assets or for any false statements in the affidavit.[110]

Fifteen months after an independent administration is created, any person interested in the estate may demand an accounting from the independent executor.[111] In addition to or in lieu of the right to an accounting after fifteen months, an interested person may petition the court for an accounting and distribution of the estate at any time two years from the date the administration was created and the order appointing the independent executor was entered.[112] Further, an independent executor may sell property only to pay for expenses of administration, funeral expenses, expenses of the last sickness, allowances, and claims against the estate.[113] To avoid these limitations,

106. *Id.* at 685.

107. § 145(p).

108. *In re* Estate of McGarr, 10 S.W.3d 373, 377 (Tex. App.—Corpus Christi 1999, pet. denied).

109. § 145(b), (h).

110. TEX. PROB. CODE ANN. § 151(b) (Vernon Supp. 2008).

111. TEX. PROB. CODE ANN. § 149A(a) (Vernon 2003). "Interested persons" include "heirs, devisees, spouses, creditors, or any others having a property right in, or claim against, the estate being administered," and anyone interested on behalf of an incapacitated person. TEX. PROB. CODE ANN. § 3(r) (Vernon Supp. 2008).

112. TEX. PROB. CODE ANN. § 149B(a) (Vernon 2003).

113. Haring v. Shelton, 103 Tex. 10, 13, 122 S.W. 13, 14 (1909) (absent the authority granted by the will, burden of proof is on purchaser to show existence of debts against the estate or other such conditions that would have authorized the probate court to have ordered the sale); Gatesville Redi-Mix, Inc. v. Jones, 787 S.W.2d 443, 445 (Tex. App.—Waco 1990, writ denied) (citing *Haring* for the same proposition).

the testator must explicitly grant broader authority to sell assets of the estate in his will.[114]

The remedies available to beneficiaries who feel that estate funds have been mismanaged or misappropriated include the removal of the executor altogether.[115] The independent executor may be removed for certain types of misconduct.[116] Specifically, the grounds for removal of the independent executor include: (1) failure to file the inventory; (2) sufficient grounds to support the belief that the executor has or is about to misapply or embezzle property of the estate; (3) failure to make an accounting; (4) failure to file the affidavit required by 128A to certify compliance with the notice requirements; (5) the executor is guilty of gross misconduct; or (6) the executor becomes incapacitated or is sentenced to a penitentiary.[117] Surely an executor, like the lawyer in the *Statesman* articles, who deposits the proceeds from the sale of a client's home into his personal bank account has "grossly mismanaged" estate funds.[118]

D. *Other Practical Problems Posed by the New Requirements*

1. Increased Cost

The cost in attorney's fees for an estate administration in Texas can vary widely, from about $1,200 in a simple case to $10,000 or more, depending on the complexity of the assets and the legal issues involved.[119] In most cases, the total attorney's fees and court costs for the probate hearing, one of the only court appearances (aside from filing the inventory) in an independent administration,[120] should not exceed $800.[121] Intuitively, the less time that an attorney or her staff must spend preparing documents or appearing in court, the attorney's fees and court costs should be less. If the personal representative is a family member, then she would be the best person to solicit waivers at no extra cost; however, an attorney would be likely to send out the written notice and incur legal fees and court costs for filing the affidavit or certificate.[122] Because even nominal gifts to beneficiaries must receive the same notice as all other gifts, the costs associated with complying with the notice requirements could exceed the cost of the gift.[123]

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114. *Haring*, 103 Tex. at 13, 122 S.W. at 14.
115. *See* TEX. PROB. CODE ANN. § 149C (Vernon Supp. 2008).
116. Geeslin v. McElhenney, 788 S.W.2d 683, 684 (Tex. App.—Austin 1990, no writ).
117. § 149C(a)(1)–(6).
118. *See* Plohetski, *supra* note 6; *Geeslin*, 788 S.W.2d at 684.
119. *See* Hatfield, *supra* note 64, at 337 n.43.
120. TEX. PROB. CODE ANN. § 145(b) (Vernon 2003).
121. *See* Hatfield, *supra* note 64, at 337 n.43.
122. *See* KARISCH, *supra* note 11, at 10.
123. Beyer, *supra* note 3, at 1187.

2. "Named in the Will": The Potential Problem of Class Gifts and Reasonable Diligence

Section 128A(b) requires the personal representative to give notice to each beneficiary named in the will.[124] Thus, if the will leaves property to "my descendants" without specifically naming the persons entitled to receive property, are the nameless descendants "named in the will" for purposes of the statute?[125] Notably, the statute requires notice to be given to each named beneficiary whose *identity* and address are known or could be ascertained using reasonable diligence.[126] By referencing the identity of a beneficiary named in the will, attorneys will likely have to use reasonable diligence to ascertain the identity of each person within a class gift.[127]

At the very least, the personal representative (more likely the personal representative's attorney) should ask known beneficiaries about the existence and whereabouts of others who by class, name, or status are beneficiaries under the will.[128] Unless there is a reason for the personal representative to suspect that there is a missing beneficiary, a reduced level of scrutiny regarding the "reasonable diligence" required by the statute should be accepted by the courts.[129] The statute lacks guidance regarding the precise standard for what is "reasonable diligence" on the part of the personal representative; thus, uncertainty remains as to how diligent a search the personal representative must conduct to ascertain the identity of beneficiaries.[130]

It is well established that the executor must use reasonable diligence to inform the beneficiaries of facts that would allow them to claim their bequest if she would profit by failing to notify beneficiaries of their upcoming interest.[131] Generally, an executor must exercise good faith and use ordinary care, prudence, skill, and diligence in the discharge of his trust.[132] Although the general rule represents a sound starting point, more detailed rules regarding what "reasonable diligence" means for an independent executor in this context is necessarily fact and jurisdiction-specific.[133]

It is instructive to examine how Texas courts have interpreted the exercise of reasonable diligence in a related context. The statute of limitations in cases involving fraud or a breach of fiduciary duty be-

124. TEX. PROB. CODE ANN. § 128A(b) (Vernon Supp. 2008).
125. KARISCH, *supra* note 11, at 4.
126. *Id.* (emphasis added); § 128A(b).
127. *See* KARISCH, *supra* note 11, at 4.
128. *Id.*
129. *Id.*
130. *See* Beyer, *supra* note 3, at 1187.
131. *See generally* J.D. Emerich, Annotation, *Duty and Liability of Executor With Respect to Locating and Noticing Legatees, Devisees, and Heirs*, 10 A.L.R. 3D 547 § 3[b] (1966).
132. *Id.* § 2.
133. *Id.*

gins to run when the claimant knew, or by exercising reasonable diligence should have known, of facts that would have led to the discovery of the wrongful act.[134] The "discovery rule" can toll the applicable statute of limitations, and the cause of action will not accrue until the plaintiff knows of the facts giving rise to the cause of action.[135] A person is also charged with constructive notice of facts that she could have learned by examining public records.[136] Consequently, a person exercising reasonable diligence should be aware of a logical conclusion that would be evident from examining the face of a public record.[137]

If public records in a probate proceeding give constructive notice to allegedly wronged beneficiaries,[138] then this provides some guidance for how reasonable diligence should be construed in the context of notice to beneficiaries. A personal representative conducting an internet search to find a beneficiary's address on her driver's license, for instance, should be exercising reasonable diligence. Moreover, if a beneficiary tells a personal representative that her sister who is included in the class gift lives somewhere in the Northern Hemisphere as opposed to somewhere in Texas, this information necessarily broadens the scope of the records available to reasonably search. In sum, the personal representative's exercise of reasonable diligence should be limited or expanded based on the information available by conducting a search of public records and using internet search engines.

3. Privacy Concerns

With more than twenty-five thousand victims of identity theft in Texas during 2007 alone,[139] any personal information that is made public record is of particular concern. The names and addresses of all beneficiaries, even those who signed waivers, must be included in the affidavit or certificate filed with the probate court.[140] The beneficiary's personal information is made a part of the public record, and depending on the size of the estate disclosed in the will (which is required to be filed with the clerk at the probate court),[141] this disclo-

134. *See* Little v. Smith, 943 S.W.2d 414, 420 (Tex. 1997).

135. Trinity River Auth. v. URS Consultants, Inc., 889 S.W.2d 259, 262 (Tex. 1994).

136. Mooney v. Harlin, 622 S.W.2d 83, 85 (Tex. 1981) (citing Salas v. Mundy, 59 Tex. Civ. App. 407, 410, 125 S.W. 633, 636 (Amarillo 1910, writ ref'd)). The Fifth Circuit has declined to extend this principal of constructive notice outside of the probate context. Kansa Reinsurance Co. v. Cong. Mortgage Corp. of Tex., 20 F.3d 1362, 1369 (5th Cir. 1994).

137. *See In re* Estate of McGarr, 10 S.W.3d at 378.

138. *Id.* at 377–78.

139. FED. TRADE COMM'N, CONSUMER FRAUD AND IDENTITY THEFT COMPLAINT DATA: JANUARY–DECEMBER 2007, at 63 (2008), *available at* http://www.ftc.gov/sentinel/reports/sentinel-annual-reports/sentinel-cy2007.pdf.

140. TEX. PROB. CODE ANN. § 128A(g)(1)–(2) (Vernon Supp. 2008).

141. TEX. PROB. CODE ANN. § 75 (Vernon 2003).

sure raises privacy concerns.[142] Because a will is already required to be filed with the clerk,[143] the privacy of beneficiaries may not be unduly threatened unless a trust is used. Even when a will disposes of the estate using a living trust, which is usually promoted to clients for privacy reasons, the beneficiary's name and address must be included in the affidavit if the personal representative and the trustee are the same person.[144]

As the statute does not state if the address used must be the beneficiary's physical address, a careful attorney will likely obtain a written request from the beneficiary to use the attorney's office address instead.[145] When the mode of distribution is a living trust, designating the personal representative and trustee as different people negates the requirement that the notice go to income beneficiaries and would prevent any unwanted disclosure.[146] Thus, to avoid disclosure with a trust, the attorney should simply recommend that the personal representative and trustee are made different people or entities.[147] If the case is appropriate, an attorney could also file the will as a muniment of title to avoid the notice requirements and disclosure of personal information altogether.[148]

IV. BENEFITS OF THE NEW REQUIREMENTS: WHY SECTION 128A IS GOOD FOR TEXANS

Despite a history of fierce independence from judicial oversight in the Texas probate system, judicial supervision of independent executors is neither unprecedented nor entirely contrary to the policy of independent administrations. Although there are limitations on independent executors in the Probate Code, the executor has expansive power to administer and distribute an estate.[149] The remedies available to interested persons under the Probate Code require, at the very least, that they are aware of their interest. Thus, the new notice requirements merely place beneficiaries, who are likely "interested persons" under the Code, in a position to exercise the remedies available to them to remove an independent executor or demand an accounting.

142. *See* KARISCH, *supra* note 11, at 7.

143. § 75.

144. KARISCH, *supra* note 11, at 9.

145. *See id.*

146. *See* TEX. PROB. CODE ANN. § 128A(c)(1) (Vernon Supp. 2008); KARISCH, *supra* note 11, at 9.

147. KARISCH, *supra* note 11, at 9.

148. *See id.* at 9–10.

149. *In re* Estate of Hanau, 806 S.W.2d 900, 904 (Tex. App.—Corpus Christi 1991, writ denied) (holding that the probate court does not have the power to look at the substance of the accounting to determine if it is accurate or whether the executor properly administered the estate), *superseded by statute*, TEX. PROB. CODE ANN. § 151 (Vernon 2003 & Supp. 2008) (prohibiting closing an estate when there is pending litigation).

A. *Existing Remedies Are Insufficient Without Notice to Persons Who Can Exercise Them*

When an independent administration closes, the probate court lacks the power to determine whether the executor properly administered the estate.[150] The statute of limitations begins running on the right of interested persons, which includes beneficiaries, to demand an accounting when the estate closes, and they are charged with constructive notice of all court records filed with the probate court.[151] If no objection is raised at the time of appointment, the independent executor may be removed for only those bases stated in section 149C or section 222.[152] If a beneficiary is never notified, she cannot take the steps to protect her interest by demanding an accounting or removal of the executor.[153] Given that the statute of limitations requires the beneficiary to at least be aware of their interest in order to assert any relief available under the Probate Code, concern over mismanagement of estate assets may justify notifying beneficiaries as a means to protect the estate.

B. *Freedom From Judicial Supervision in Independent Administrations Is Not All-Justifiable*

Beneficiaries do not want to simply remove the independent executor after their deceased loved one's assets have already been depleted; they want justice. Prior to the enactment of section 149C, which authorizes the removal of an independent executor based on grounds discussed *supra*, the Texas Supreme Court confronted a situation in which an independent executor could not be removed, even for mismanagement or malfeasance.[154] The court held that the probate court could not remove an independent executor unless he failed to post bond after having been required to do so, even if he had mismanaged assets of the estate.[155] The court expressed doubt as to the "wisdom of a policy under which an independent executor, accused of gross mismanagement of an estate, is not subject to removal. . . ."[156] The decision was criticized because the bond procedure is seldom adequate to

150. *Id.*

151. Geeslin v. McElhenney, 788 S.W.2d 683, 684 (Tex. App.—Austin 1990, no writ).

152. Sales v. Passmore, 786 S.W.2d 35, 36 (Tex. App.—El Paso 1990, writ dism'd) (holding that allegation that independent executor was a convicted felon stated no basis for removal under sections 149C and 222). *But cf.* Baker v. Hammett, 789 S.W.2d 682, 685 (Tex. App.—Texarkana 1990, no writ) (holding section 222 does not apply to independent executor unless Probate Code expressly provides for action in the probate court); Eastland v. Eastland, 273 S.W.3d 815, 824 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (holding the same).

153. *See* Sen. Jurisprudence Comm., Bill Analysis, Tex. S.B. 593, 80th Leg., R.S. (2007).

154. Bell v. Still, 403 S.W.2d 353, 353 (Tex. 1966).

155. *Id.*

156. *Id.*

protect beneficiaries from the abuses of a self-dealing executor or one that unduly prolongs settling the estate.[157] The need for re-examination of a rule that allowed independent executors free rein over an estate when the bond procedure was inadequate became apparent, particularly in light of the fiduciary relationship of the executor to beneficiaries.[158]

Similarly, if a beneficiary is unaware of his or her interest and not in a position to demand an accounting or petition for removal, the threat of removal is not sufficient to deter an executor. Perhaps keeping independent administrations out of probate courts as much as possible is not an all-justifiable premise if it comes at the expense of the assets of the estate and results in protracted legal battles.[159] Lawyers are often reluctant to advise their clients to report estate theft to their local district attorney because the client will not likely be made whole by putting the offender in jail.[160] After the enactment of section 149C, Texas courts acknowledged that even though removal might undercut the purposes of an independent administration, the legislature intended to subject even independent executors to removal for "gross mismanagement" or "gross misconduct."[161]

Texas courts have never totally freed independent administrations from court supervision.[162] The purpose of an independent administration is to reduce costs and delay, which is intended to benefit family members, who are usually beneficiaries, of the testator.[163] When this policy collides with the interest of beneficiaries who are taken advantage of by independent executors who abuse their power, the interests of the beneficiaries should prevail.

V. Conclusion: The Costs and Benefits of Section 128A Weigh in Favor of Beneficiaries

The probate system in Texas was designed from the outset to minimize judicial supervision.[164] Texas was the first state in the country to enact a statute that authorized independent administration;[165] a system meant to free an estate from the costs and delays of common-law

157. Smith, *supra* note 87, at 356.
158. *Id.* at 357–58.
159. *See* Geeslin v. McElhenney, 788 S.W.2d 683, 684 (Tex. App.—Austin 1990, no writ).
160. Debra Cassens Weiss, *Why Texas DAs Rarely Prosecute Estate Theft, and Why Lawyers Like It That Way*, ABA Journal—Law News Now, June 30, 2008, http://abajournal.com/news/why_texas_das_rarely_prosecute_estate_theft_and_why_lawyers_like_it_that_wa/ (referencing the Austin American-Statesman articles).
161. *Geeslin*, 788 S.W.2d at 684; *see also* Kappus v. Kappus, 284 S.W.3d 831, 835 (Tex. 2009).
162. Woodward, *supra* note 81, at 830.
163. *See* Corpus Christi Bank & Trust v. Alice Nat'l Bank, 444 S.W.2d 632, 634 (Tex. 1969).
164. *See* Simkins, *supra* note 76.
165. Smith, *supra* note 87.

probate.[166] Independent administration is an obvious example, then, of the policy decision to make probate in Texas simple and efficient.[167] In many ways, the approachable probate system in Texas runs contrary to the popularly conceived notions of what probate is—costly, lethargic, and unresponsive to the needs of a family in grief.[168]

As with any new statute, the amendment of section 128A brings with it the potential for challenges as well as positive change. Because the statute applies equally to dependent and independent administrations, a probate system that strives to maximize simplicity and reduce costs conflicts with a statute that adds another hurdle to the administration of an estate and will likely increase costs. Further, there are already remedies available under the code to remove an executor who mismanages estate assets,[169] as well as other safeguards, such as posting bond.[170]

However, these remedies fail beneficiaries in two important respects: (1) removal addresses the depletion of estate assets after it has already occurred;[171] and (2) posting bond is seldom required or an adequate deterrent to a dishonest executor.[172] Beneficiaries naturally want to ensure that estate assets are never depleted in the first place, and it is logical to assume that one who is aware of their interest is more likely to protect it than one who is not. Section 128A ensures that beneficiaries are aware of their interest at the outset so they can be in a position to utilize the remedies available under the code, such as the right to demand an accounting and removal.

The policy underlying independent administrations helps beneficiaries by retaining as much of the estate as possible through reducing costs and delays when removing the administration from judicial supervision.[173] It would bolster that policy, not undercut it, to allow beneficiaries to be in a position to protect their interest from self-dealing executors who would deplete the estate. Practical problems, such as what "reasonable diligence" means in this context, privacy concerns, and the potential for increased costs, will be solved with more developed case law and careful practitioners addressing the needs of their clients. Even if the notice requirements are more intricate and increase costs by adding another judicial step to the probate process, the interests of the beneficiaries and of protecting the assets of the estate ultimately weigh in favor of the new requirements.

166. *Corpus Christi Bank & Trust*, 444 S.W.2d at 634.
167. *See* Howeth, *supra* note 72, at 898.
168. *See id.*
169. *See* TEX. PROB. CODE ANN. § 149C (Vernon 2003).
170. *Id.* § 145(p) (Vernon 2003).
171. *See id.* § 149C.
172. Smith, *supra* note 87, at 356.
173. *See* Corpus Christi Bank & Trust v. Alice Nat'l Bank, 444 S.W.2d 632, 634 (Tex. 1969).