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# Power Failure: How the Texas Probate Code Leaves a Gap in the Ability to Preserve Estates After Death

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# POWER FAILURE: HOW THE TEXAS PROBATE CODE LEAVES A GAP IN THE ABILITY TO PRESERVE ESTATES AFTER DEATH

*By: Andrew G. Middleton\**

## ABSTRACT

*Upon a person's death in Texas, the decedent's heirs and beneficiaries are left without the legal power to preserve the separate probate estate. Although the Texas Probate Code provides for a temporary administration in the case of an immediate need to preserve an estate, the application and court process are not correspondingly responsive. This Comment focuses on the "gap" left behind by the Texas Probate Code and the statutory inadequacies that come to light in the face of current practical problems. Additionally, this Comment proposes amendments to the statute and describes an interim solution for practitioners with the goal of each to close this "gap" in order to better preserve decedents' estates.*

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## I. INTRODUCTION

### A. *Two Tales of Necessity in Preserving Estates*

John was a middle-aged man who lived in East Texas. He was not married, nor did he have any children. Some say he was a recluse, others described his behavior odd; however, all knew that he was wealthy, but they were not sure how. One day, John died intestate—without a will—so that his entire estate went to his only surviving heir, his niece Jessie. Upon realizing her windfall, Jessie learned that the vast majority of John’s estate was tied to a single investment in a lucrative, but increasingly unstable market. A few days later, understanding the potential for catastrophic loss to the estate, Jessie sought out an attorney to determine what, if anything, she could do to protect the estate.

Richard was the owner of a property development company. As a contractor, he hired other sub-contractors to perform certain aspects of each project. He also employed his own laborers to complete other portions of the projects. Richard owned his company outright and acted as the sole manager. As a matter of necessity, he used much of the income from previous projects to fund each coming project. So, any failing project could lead to financial ruin, because payment for the projects was conditioned on timely performance. In the middle of the busy summer season, Richard died from a heart attack, leaving behind his wife as the sole beneficiary under his will. As the sole manager of the company, no other employee could bind the company on decisions or pay the employees from the banking account. His wife, unsure of how to proceed, attempted to continue the business by paying the employees with her personal checking account, but she could not persuade them to remain. The subcontractors also refused to continue with further assurance. With no employees or subcontractors and a resulting halt in construction, his wife finally sought the advice of an attorney only after there were seemingly no other options.

Although these stories are fictitious, the potential for such occurrences is a reality. A person’s death gives rise to many actions, choices, and emotions by family members and friends. These actions and decisions vary from coping with the loss, arranging for the funeral, collecting and preserving the decedent’s property, and discussing the need for disposing the assets. Those persons close to the decedent may be interested to know what actions they may legally take with respect to the estate immediately after their loved one’s death, especially in the case of an emergency that affects valuable estate assets.

This Comment examines the issues surrounding the immediate need to preserve a decedent's estate, the remedies available under Texas law, and whether those remedies are sufficient in light of current problems. First, this Comment reveals the gap in protection between a decedent's death and the administration of the estate that exists under Texas law. A discussion of the law surrounding temporary administrations will follow. Thereafter, this Comment discusses the inadequacies of the law in light of current issues. Finally, this Comment proposes amendments to the law and a practical interim solution.

### B. *The Gap in Protection*

Upon a person's death in Texas, the legal power to preserve a decedent's separate probate estate is not transferred to any person, heir or otherwise.<sup>1</sup> Even though the Texas Probate Code<sup>2</sup> provides, and Texas Courts have held, that the estate shall pass to heirs or beneficiaries immediately upon the decedent's death, such possession is subject to an orderly administration.<sup>3</sup>

Because a non-probated will is ineffective for the purpose of proving title or right to possession because the specific rights have not been ascertained, the presumed heirs, beneficiaries, or creditors cannot exercise their right to the property.<sup>4</sup> This is so despite the fact that all of the decedent's estate that is devised or bequeathed by a will or that is distributed through descent and distribution by intestacy vests immediately in the beneficiaries or heirs at law.<sup>5</sup> Only when letters testamentary or letters of administration<sup>6</sup> are issued does a right arise by a court-appointed executor or administrator to possess such property for the benefit of the estate.<sup>7</sup> Even in presumably straightforward situations (the known existence of a single surviving heir, as described in the first narrative, or a devise of all property to the surviving spouse), issues such as a creditor's claim against the estate,<sup>8</sup> ademp-

1. See TEX. PROB. CODE ANN. § 131A (West 2011) (granting a judge with probate court jurisdiction the authority to appoint a personal representative to preserve an estate as the circumstances require).

2. In the 81st Regular Session, the Texas Legislature carried out a nonsubstantive recodification of the Texas Probate Code into the Texas Estates Code. The Texas Estates Code is set to go into effect on January 1, 2014. This Comment will refer to the sections found in the Texas Probate Code. A Disposition Table for the statutes found in the Texas Estates Code can be found at the end of this comment. See *infra* note 153. A full Disposition Table from the Texas Probate Code to the Texas Estates Code may be found at: <http://www.lrl.state.tx.us/legis/revisorsNotes.cfm?code=estates>.

3. PROB. § 37; *Welder v. Hitchcock*, 617 S.W.2d 294, 297 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.) (“It has been said that there is no shorter interval of time than between the death of a decedent and the vesting of his estate in his heirs.”).

4. PROB. § 94.

5. *Id.* § 37.

6. *Id.* § 183.

7. *Id.* § 37.

8. See *id.* § 301.

tion,<sup>9</sup> ambiguity,<sup>10</sup> or undue influence<sup>11</sup> have the potential to alter the disposition of the estate entirely. As a result, the questions become: (1) who may act to preserve a decedent's estate immediately after death; (2) when he or she may act; and (3) what powers he or she may execute.

## II. INTRODUCTION TO AND PURPOSE OF A TEMPORARY ADMINISTRATION

From the point of death until the administration of an estate, a gap exists in which numerous issues may arise that require the immediate need for action to preserve estate assets.<sup>12</sup> To address this problem, the Texas Legislature authorizes a county judge<sup>13</sup> (or more broadly, a "judge with probate jurisdiction") to appoint a temporary administrator to serve as a personal representative for an estate.<sup>14</sup> Sections 131A and 132 of the Texas Probate Code provide the judge with probate jurisdiction with the discretion to appoint a qualified person as a personal representative when facts demonstrate an immediate necessity for the preservation of the estate.<sup>15</sup>

The statutory requirements to apply for a temporary administration are similar to those for a dependent permanent administration. For example, both require bond, an application, and a description of the property believed to be contained in the estate.<sup>16</sup> However, a temporary administration is *ex parte*<sup>17</sup> and, unlike a dependent permanent administration, does not require submission of notice to interested persons and to all known heirs of the decedent before powers are granted.<sup>18</sup> This difference eliminates the ten-day waiting period that

9. See, e.g., *Shriner's Hosp. for Crippled Children of Tex. v. Stahl*, 610 S.W.2d 147, 148 (Tex. 1980).

10. See, e.g., *Cravens v. Chick*, 524 S.W.2d 425, 427 (Tex. Civ. App.—Fort Worth 1975, writ ref'd n.r.e.).

11. See, e.g., *Rothermel v. Duncan*, 369 S.W.2d 917, 922 (Tex. 1963).

12. Compare PROB. § 37, with PROB. § 131A. "A settlor's business or property may be of such character that it cannot endure even a short period of suspension of operations between death and probate." *Westerfeld v. Huckaby*, 474 S.W.2d 189, 194 (Tex. 1971); see generally Notes, *Use of Inter Vivos Trusts in Agricultural Estate Planning*, 55 IOWA L. REV. 1328 (1970).

13. Since either a county judge or a judge of a statutory probate court may appoint a temporary administrator, "County Judge," as the term is used in Texas Probate Code § 131A(a), will now be referred to as "judge(s) with probate jurisdiction" unless quoted from the Texas Probate Code.

14. PROB. § 131A(a).

15. *Id.* §§ 131A, 132.

16. Compare *id.* § 131A, with *id.* § 33(f)(1)-(3).

17. BLACK'S LAW DICTIONARY 291 (4th ed. 2011) (defining *ex parte*: "Done or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested; of or relating to court action taken by one party without notice to the other, [usually] for temporary or emergency relief.>").

18. PROB. § 131A(f)-(g).

is required for a permanent administration and decreases the period that the estate is unrepresented and thereby unprotected.<sup>19</sup>

Courts will appoint temporary administrators only when “the exigency requires some one to take charge of and protect the estate in the interim that necessarily arises between the death and a permanent administration.”<sup>20</sup> As a means of comparison, the Texas Supreme Court analogized the purpose of a temporary administration to that of a temporary injunction—both of which aim to preserve the status quo.<sup>21</sup> This limited application—a result of necessity—calls for a narrow interpretation of the statutes affecting the powers and duties of temporary administrators.<sup>22</sup>

From an earlier version of the law, a judge with probate jurisdiction need only to find that “the interest of the estate require[d] immediate appointment of an administrator” in order to grant letters to a temporary administrator.<sup>23</sup> This language tracks closely to the letter of the current version of Section 131A.<sup>24</sup> Further, neither the prior nor the current statutes require a notice period to interested persons.<sup>25</sup> Even though Sections 131A and 132 do not require the ten-day notice period that is necessary for a dependent permanent administration, the process of obtaining the ability to serve as a temporary administrator is not truly “immediate” and requires strict compliance with statutory stipulations before letters are granted.<sup>26</sup>

Sections 131A and 132 likely preempt many of the issues that arise; however, current practical problems might make the statute inadequate in certain circumstances. Chief among these problems are the rising—and potentially prohibitive—cost of applying for appointment as a temporary administrator<sup>27</sup> and the minimum length of time required when applying for appointment as a temporary administrator.<sup>28</sup>

19. *Id.* § 33(f)(1)–(3).

20. *Cruse v. O’Gwin*, 106 S.W. 757, 759 (San Antonio 1907, writ ref’d).

21. *Nelson v. Neal*, 787 S.W.2d 343, 346 (Tex. 1990) (“Hence, section 131A in the probate context serves the same purpose as the temporary injunction—to preserve the status quo.”).

22. *Cruse*, 106 S.W. at 759.

23. Act approved Aug. 9, 1875, 15th Leg., R.S., ch. 84, § 20, 1875 Tex. Gen. Laws 98, reprinted in 8 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 97–98 (Austin, Gammel Book Co. 1898) [hereinafter GAMMEL].

24. Compare *id.* (“whenever it may appear to the County Judge that the interest of an estate requires immediate appointment of an administrator . . .”), with PROB. § 131A(b)(2) (An applicant must demonstrate “facts showing an immediate necessity for the appointment of a temporary administrator.”).

25. PROB. § 131A(b)(2); GAMMEL, *supra* note 23.

26. PROB. §§ 33, 131A.

27. See STANLEY M. JOHANSON, JOHANSON’S TEXAS PROBATE CODE ANNOTATED, Texas Probate Code Annotated § 131A, commentary (2011 ed.) (citing Judge Mike Wood, *How to Get a “Yes” in Probate Court*, HOUSTON BAR ASS’N WILLS & PROBATE INST. 10 (Feb. 2000) (“The temporary procedure drastically increases the cost to an estate.”)); see also *supra* notes 117–20 (discussing the newly created position of public probate administrator in statutory probate courts).

28. See PROB. § 131A(b)–(e); see also *infra* notes 111–14.

Since the legal power to preserve an estate does not arise immediately at the decedent's death, heirs, beneficiaries, and creditors are left without immediate recourse in the preservation of assets they are legally entitled to by descent, devise, or debt until they are appointed such powers through a costly, time consuming, and uncertain legal process.<sup>29</sup>

In certain, but common, situations, emergencies may arise that require the immediate need for a personal representative of the estate to obtain legal rights in order to preserve the estate from a specific outside threat. An undoubtedly common issue is the conversion of assets post-death, but before administration of the estate, by family members who believe they are entitled to such assets.<sup>30</sup> Such feelings of entitlement may stem from a supposed legal right, collection of a debt, or oral representation made by the decedent.<sup>31</sup> The "race from the gravesite" may result in the conversion of assets, leaving those legally entitled to those assets without the immediate legal power to preserve; instead, they must resort to the legal process to enjoin further conversion.<sup>32</sup> Due to the law's inadequacy of timely and effectively preserving estate assets, statutory changes should be made to effectuate a decedent's purpose in ensuring that beneficiaries receive all assets as intended.

#### A. *What Property Is at Issue?*

Before presenting the statute's inadequacies, the formalities of temporary administrations must first be examined. Section 131A allows a judge with probate jurisdiction to determine whether immediate appointment of a personal representative is necessary in the interest of a decedent's estate.<sup>33</sup> Section 3 of the Texas Probate Code defines the "estate" as:

the real and personal property of a decedent, both as such property originally existed and as from time to time changed in form by sale, reinvestment, or otherwise, and as augmented by any accretions and additions thereto (including any property to be distributed to the representative of the decedent by the trustee of a trust which termi-

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29. See, e.g., PROB. § 131A (the requirement for application for preservation powers presupposes the initial absence of such powers).

30. See *Siblings Charged with Theft from Estate*, THE CHIPPEWA HERALD (Aug. 2, 2012), [http://chippewa.com/news/local/siblings-charged-with-theft-from-estate/article\\_190e358a-dcb8-11e1-b883-001a4bcf887a.html](http://chippewa.com/news/local/siblings-charged-with-theft-from-estate/article_190e358a-dcb8-11e1-b883-001a4bcf887a.html).

31. See *Rice v. Gregory*, 780 S.W.2d 384, 387 (Tex. App.—Texarkana 1989, writ denied) (discussing alleged oral agreement between decedent and executor regarding disregard of will provision).

32. See *Relatives Charged with Stealing Dead Aunt's Money*, PITTSBURGH POST-GAZETTE (Apr. 4, 2012), <http://www.post-gazette.com/stories/local/neighborhoods-east/relatives-charged-with-stealing-dead-aunts-money-629802/>.

33. PROB. § 131A(a).

nates upon the decedent's death) and substitutions therefor, and as diminished by any decreases therein and distributions therefrom.<sup>34</sup>

The estate is further classified as either belonging to "one of two separate and distinct categories: probate or non-probate. An asset is non-probate if, during the decedent's lifetime, the decedent entered into an inter vivos transaction, as opposed to a testamentary transaction, that controls the disposition of the asset at death" such as life insurance or a payable-on-death account.<sup>35</sup> Non-probate assets are not subject to disposition under a will or through intestacy, but are "governed by lifetime transfer rules," and therefore are not assets that may be preserved by a temporary administrator.<sup>36</sup> On the other hand, "Probate assets are those assets that are not controlled by an inter vivos arrangement and that pass at the owner's death through probate administration and on to the owner's heirs or devisees."<sup>37</sup>

If the decedent was married and did not have a marital property agreement governing the characterization of community property upon death, then the decedent's "probate estate consists of both the decedent's separate probate assets and his or her one-half of the community assets that are not subject to an inter vivos arrangement."<sup>38</sup> "The surviving spouse retains, not inherits, his or her one-half interest in the community probate assets."<sup>39</sup> However, "when the marriage terminates by . . . death, community property ceases to exist,"<sup>40</sup> and the probate court must "resolve the characterization, reimbursement, management, waste, fraud on the community, and liability issues that arose during the marriage."<sup>41</sup> Thus, the estate property at issue in Section 131A and 132 must be that property belonging to the estate of the decedent that would pass to heirs, including the surviving spouse, or beneficiaries. The estate property does not include the property that is retained by the surviving spouse as his or her one-half of the community assets that are not subject to an inter vivos arrangement.<sup>42</sup>

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34. *Id.* § 3(1).

35. Thomas M. Featherston, Jr. & Amy E. Douthitt, *Changing the Rules by Agreement: The New Era in Characterization, Management, and Liability of Marital Property*, 49 BAYLOR L. REV. 271, 286 (1997).

36. *Valdez v. Ramirez*, 574 S.W.2d 748, 750 (Tex. 1978) ("There are at least four categories of assets known as non-probate assets . . . . Examples are (1) property settled in an intervivos trust, where title remains in the trustee notwithstanding the settlor's death; (2) property passing by right of joint survivorship, as in a valid joint bank account; (3) property passing at death pursuant to terms of a contract, such as provided in life insurance policies, and under contributory retirement plans; and (4) property passing by insurance or annuity contracts created, funded and distributed as directed by federal statutes.").

37. Featherston & Douthitt, *supra* note 35, at 286–87.

38. *Id.* at 287.

39. *Id.* at 286–87.

40. *Id.* at 284.

41. *Id.*

42. *See, e.g.*, TEX. PROB. CODE ANN. § 131A; Featherston & Douthitt, *supra* note 35, at 284.



The court with probate jurisdiction must analyze the character of the property in need of preservation and determine whether it may grant a temporary administrator the power to preserve that property.<sup>43</sup> Such a determination can be time consuming and may require extensive investigation by both counsel and the court, thereby affecting the timeliness of the appointment for the purpose of preserving the estate.

### B. *The Flexibility of Temporary Administrations*

Courts with probate jurisdiction may impart temporary administrators with an array of powers for the preservation of the decedent's estate.<sup>44</sup> According to the Texas Supreme Court, the "principal object of the temporary appointment is to preserve and keep the estate together until it can pass into the hands of a person fully authorized to administer it for the benefit of creditors and heirs."<sup>45</sup> The only limitation imposed on the granting of a specific power by the Supreme Court and the Texas Probate Code is that it must be necessary for the preservation of the estate.<sup>46</sup> Examples of powers granted by courts in Texas include the ability to thwart the actions of a rogue executor,<sup>47</sup> to provide an agent of a decedent's estate in order to serve process for a negligence action to preempt the running of the statute of limitations,<sup>48</sup> to protect the estate in anticipation of a contest to a will,<sup>49</sup> and to procure extended coverage insurance on estate property.<sup>50</sup> By design, judges with probate jurisdiction have considerably wide discretion in determining the circumstances that constitute a necessity to preserve the estate.<sup>51</sup>

On the other hand, temporary administrators may not act in a manner beyond the rights and powers enumerated in the court order.<sup>52</sup> The court order granting the temporary administration "should specifically list all powers and duties of the temporary administrator because any act taken by the temporary administrator beyond these powers and duties is void."<sup>53</sup> Accordingly, Texas courts have voided

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43. See PROB. § 131A(b)(5).

44. See, e.g., *infra* notes 48–50; PROB. §§ 131A(a), 133.

45. *Dull v. Drake*, 4 S.W. 364, 365 (Tex. 1887).

46. *Id.*; PROB. § 131A(a), (b)(2).

47. Edward J. Patterson, Wesley L. Bowers, *Dealing with the Rogue Executor: A Page from the Fiduciary Litigation Playbook*, 48 THE ADVOC. (TEX.) 44 (Fall 2009).

48. *Nelson v. Neal*, 787 S.W.2d 343, 344 (Tex. 1990).

49. *Moser v. Norred*, 720 S.W.2d 869, 870 (Tex. App.—Beaumont 1986, writ ref'd n.r.e.).

50. *Frost Nat'l Bank of San Antonio v. Kayton*, 526 S.W.2d 654 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.).

51. *Moser*, 720 S.W.2d at 871.

52. TEX. PROB. CODE ANN. § 133 (West 2011).

53. Joshua J. White, *The Foreclosure Process in the Probate Context*, 48 THE ADVOC. (TEX.) 101 (Fall 2009); see also PROB. § 133 ("Any acts performed by temporary administrators that are not so expressly authorized shall be void.").

acts—such as the execution of an oil lease<sup>54</sup> and the sale of real estate<sup>55</sup>—when those actions were not provided within the power granted to the temporary administrator.

### III. THE INADEQUACY OF A TEMPORARY ADMINISTRATION AS A MECHANISM TO PROTECT ESTATE ASSETS

Section 131A of the Texas Probate Code provides for the “*immediate* appointment of a personal representative” when “facts showing an *immediate* necessity for the appointment of a temporary administrator” are provided.<sup>56</sup> However, contrary to the explicit objective to promptly clothe a personal representative with preservation powers, statutory hurdles and practical problems exist, which serve to make the appointment less immediate and more deliberate.<sup>57</sup>

A primary concern in the inadequacy of temporary administrations as a mechanism to provide protection to the estate is the potential for undue delay in emergency situations. At least five significant barriers exist that delay the issuance of letters of appointment: (1) discussing the immediate need of the preservation power with an attorney and acquiring sufficient information to complete the application; (2) filing the application for temporary administratorship with the court with probate jurisdiction;<sup>58</sup> (3) obtaining a hearing and receiving a favorable court order from the court with probate jurisdiction;<sup>59</sup> (4) posting bond;<sup>60</sup> and (5) waiting for the county clerk to issue letters of appointment.<sup>61</sup>

Initially, obtaining the preservation power requires an interested party to recognize an immediate need to preserve an estate asset, which may occur only after learning that one does not have the legal power to act.<sup>62</sup> While it is not clear whether a person interested in the estate may appear *pro se* to file for as a temporary administrator,<sup>63</sup> it is clear that certain statutory requirements must be met before the judge may order the issuance of letters.<sup>64</sup> On one hand, “The judge’s

54. See *Allar Co. v. Roeser*, 217 S.W. 442 (Tex. Civ. App.—Fort Worth 1919, no writ) (emphasis added).

55. See *Dull v. Drake*, 4 S.W. 364 (Tex. 1887); see also *Cruse v. O’Gwin*, 106 S.W. 757, 759 (San Antonio 1907, writ ref’d).

56. PROB. § 131A(a), (b)(2) (emphasis added).

57. See *id.* § 131A (providing for several steps to obtain the preservation power as a temporary administrator).

58. *Id.* § 131A(b).

59. *Id.* § 131A(a).

60. *Id.* § 131A(d).

61. *Id.* § 131A(e).

62. See, e.g., *id.* § 131A(b) (“Any person may file with the clerk of the court a written application for the appointment of a temporary administrator.”).

63. See *Steele v. McDonald*, 202 S.W.3d 926, 928–29 (Tex. App.—Waco 2006, no pet.) (per curiam).

64. PROB. § 131A(a).

power to make this decision is quite extensive.”<sup>65</sup> On the other hand, “[t]emporary administrations are sometimes ‘not viewed with total favor’ by some probate courts,”<sup>66</sup> and even “some probate judges are openly hostile to establishing a temporary administration especially if the only reason is because a plaintiff’s attorney has not been diligent.”<sup>67</sup> A survey of several cases appealed to the Texas courts of civil appeals that are reviewing a lower court’s appointment demonstrates that the potential for abuse is apparent.<sup>68</sup> However, the exigency of the situation nevertheless may require expedient approval in order to preserve the estate, despite an attorney’s lack of diligence.<sup>69</sup> Even if temporary administrations are not viewed in total favor with some probate courts, the existence of the temporary administration in the Texas Probate Code for over 100 years demonstrates that the Texas Legislature clearly understood the necessity underlying such an appointment.<sup>70</sup>

A. *Who May Apply to Become a Temporary Administrator?*

The attorney representing a client seeking appointment as a temporary administrator must initially determine whether the client is qualified under the Texas Probate Code to serve as a temporary administrator.<sup>71</sup> Section 131A(b) provides that “[a]ny person may file with the clerk of the court a written application for the appointment of a temporary administrator of a decedent’s estate . . . .”<sup>72</sup> But, Section 131A(b)(1) also requires an explanation of the applicant’s interest in appointment.<sup>73</sup> When reading these phrases together, an ambiguity becomes evident: must the applicant demonstrate an interest in preserving the estate to the court’s satisfaction, or must the applicant have a pecuniary interest in the estate?<sup>74</sup>

One interpretation of whom may submit an application could be those who are, by law, “interested persons.” The Texas Probate Code defines “interested person[s]” as “heirs, devisees, spouses, creditors, or any others having a property right in, or claim against, the estate

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65. Moser v. Norred, 720 S.W.2d 869, 871 (Tex. App.—Beaumont 1986, writ ref’d n.r.e.).

66. White, *supra* note 53, at 101.

67. Jerry Frank Jones, *Statute of Limitations Issues in the Probate, Guardianship & Trust Context*, 48 THE ADVOC. (TEX.) 82 (Fall 2009).

68. See Allar Co. v. Roeser, 217 S.W. 442 (Tex. Civ. App.—Fort Worth 1919, no writ.); Dull v. Drake, 4 S.W. 364 (Tex. 1887); Cruse v. O’Gwin, 106 S.W. 757, 759 (San Antonio 1907, writ ref’d).

69. See Nelson v. Neal, 787 S.W.2d 343 (Tex. 1990) (examining the appointment of a temporary administrator to serve as personal representative on which to serve process to file claim before running of statute of limitations).

70. GAMMEL, *supra* note 23, at 97–98.

71. TEX. PROB. CODE ANN. § 131A(b)(4) (West 2011).

72. *Id.* § 131A(b).

73. *Id.* § 131A(b)(1).

74. See *id.* § 131A(b), (b)(1).

being administered . . . .”<sup>75</sup> The Texas Supreme Court in *Logan v. Thomason* narrowed the definition of an interested person in the context of a will contest to include only persons with “some legally ascertained pecuniary interest, real or prospective, absolute or contingent, which will be impaired or benefited, or in some manner materially affected, by the probate of the will.”<sup>76</sup> The courts extended an interested person, in the context of a temporary administration, to include family members,<sup>77</sup> adverse litigants,<sup>78</sup> banks,<sup>79</sup> and creditors.<sup>80</sup> This range of potential persons and institutions who are capable of becoming a personal representative encompasses the notion that only a person or entity that is truly *interested* in the disposition or preservation of estate property has standing to apply as a temporary administrator.<sup>81</sup> This interpretation also extends continuity with the use of “interested person” found throughout the Texas Probate Code.

By contrast, several scholars<sup>82</sup> have argued that “the application may be made by ‘any person . . . .’” since “[i]t seems unlikely that there is any implied requirement that the applicant be ‘an interested person’ in the ordinary sense.”<sup>83</sup> The language of the statute seems to support their understanding: subsection (b) requires the name, address, and interest of the applicant and “a statement that the applicant is entitled to letters of temporary administration.”<sup>84</sup> Nowhere in the statute does there exist an explicit requirement that the applicant be an “interested person” as defined under § 3(r) of the Texas Probate Code; rather, the applicant must only demonstrate to the satisfaction of the court that his or her interest in the estate is sufficient to warrant the approval of the application.<sup>85</sup> This interest need not be pecuniary in the sense that the applicant has an expectancy interest in the estate, but may include “[a] neighbor who observes that livestock are in need of care” [even]

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75. *Id.* § 3(r).

76. *Logan v. Thomason*, 202 S.W.2d 212, 215 (Tex. 1947).

77. *Ex parte Lindley*, 354 S.W.2d 364, 364–65 (Tex. 1962).

78. *Nelson v. Neal*, 787 S.W.2d 343, 343–44 (Tex. 1990).

79. *Frost Nat’l Bank of San Antonio v. Kayton*, 526 S.W.2d 654, 657, 660 (Tex. Civ. App.—San Antonio 1975, writ ref’d n.r.e.).

80. *Wolford v. Wolford*, 590 S.W.2d 769, 771–72 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref’d n.r.e.).

81. TEX. PROB. CODE ANN. § 131A(b)(1) (West 2011) (requiring the application to provide “the name, address, and interest of the applicant”).

82. Professor M. K. Woodward, former Windfohr Professor of Law, the University of Texas at Austin; Professor Ernest E. Smith, Professor of Law, Rex G. Baker Centennial Chair in Natural Resources Law, the University of Texas at Austin; and Professor Gerry W. Beyer, Governor Preston E. Smith Regents Professor of Law, Texas Tech University School of Law.

83. 17 M.K. WOODWARD ET AL., TEXAS PRACTICE: PROBLEMS & DECEDENTS’ ESTATES § 461 (2013).

84. PROB. § 131A(b)(1), (b)(4).

85. *Id.* §§ 3, 131A(b)(1).

“though he or she has no financial interest in the estate.”<sup>86</sup> This “Good Samaritan” reading of the statute would support the policy of clothing “the probate court with authority to protect and preserve the estate by the appointment of a legal representative” when time is of the essence and an “interested person” as defined by the Texas Probate Code cannot be located.<sup>87</sup>

Another limitation on who may serve as a temporary administrator—and a personal representative in general—is found in section 78 of the Texas Probate Code, which requires that the applicant not be an incapacitated person, a convicted felon, a non-resident, a corporation not authorized to act as a fiduciary in Texas, or a person whom the court finds unsuitable.<sup>88</sup>

### B. *What Constitutes Necessity?*

Next, the judge with probate jurisdiction must determine “that the interest of a decedent’s estate requires the immediate appointment of a personal representative.”<sup>89</sup> Prior to the addition of subsection (b)(2) to section 131A of the Texas Probate Code in 1987 requiring an applicant to demonstrate explicitly the facts showing immediate necessity, the use of a temporary administration may not have been limited to emergency situations.<sup>90</sup> In *Houston & T.C. Railway Co. v. Hook*, the applicant sought appointment as temporary administrator for the purpose of bringing a negligence suit.<sup>91</sup> The Texas Supreme Court upheld the county court’s decision granting the letters even though no immediate need existed, such as the running of the statute of limitations.<sup>92</sup> The addition of subsection (b)(2) brought the requirement of “facts showing an immediate necessity” for appointment.<sup>93</sup> Now, what constitutes an immediate necessity falls within the discretion of the probate judge as demonstrated by the particular circumstances surrounding the immediate necessity described by the applicant.<sup>94</sup>

The Texas Supreme Court later addressed “necessity” in *Nelson v. Neal*.<sup>95</sup> After two men died in a plane crash, the widow of the dece-

86. WOODWARD ET AL., *supra* note 83, § 461 n.7.20. This reading is given further credence when it is noted that the term “interested person” is used in § 131A(i) for persons later contesting an application but is not used in the preceding subsections that provide the application requirements.

87. *King v. King*, 230 S.W.2d 335, 339 (Tex. Civ. App.—Amarillo 1950, writ ref’d).

88. TEX. PROB. CODE ANN. § 78 (West 2011).

89. *Id.* § 131A(a)–(b)(2).

90. Compare *id.* § 131A(b)(2), and Act of 1987, 70th Leg., R.S., ch. 460, § 2(b)(2), with GAMMEL, *supra* note 23, at 97–98.

91. *Houston & T.C. Ry. Co. v. Hook*, 60 Tex. 403, 403 (1883).

92. *Id.* at 408–09.

93. PROB. § 131A(b)(2).

94. *Id.* § 131A(a) (“If a county judge determines that the interest of a decedent’s estate requires the immediate appointment of a personal representative . . .”).

95. *Nelson v. Neal*, 787 S.W.2d 343, 343 (Tex. 1990).

dent Neal, in order to secure an agent for service of process for her wrongful death claim, sought a temporary administrator for the estate of the other decedent, Nelson.<sup>96</sup> Neal “alleged an immediate necessity for an administration because a policy of liability insurance” that covered the airplane crash involving her decedent spouse “could be depleted if other judgment creditors were allowed to reach it before [she] could actuate coverage by timely serving her claim on a qualified personal representative of [Nelson’s] estate.”<sup>97</sup> The Court found that it was necessary to appoint a temporary administrator and that the courts below did not err in granting the letters for this purpose.<sup>98</sup>

To aid the judge in the determination of necessity, an application containing specific information must include:

- (a) the name, address and interest of the applicant;
- (b) facts showing an immediate necessity for the appointment of a temporary administrator;
- (c) the requested powers and duties of the temporary administrator;
- (d) a statement that the applicant is entitled to letters of temporary administration and is not disqualified by law from serving as a temporary administrator; and
- (e) a description of the real and personal property that the applicant believes to be in the decedent’s estate.<sup>99</sup>

The property description of estate assets required in the application and affidavit may constitute a considerable burden since certain applicants may not have knowledge of the real and personal property belonging to the estate and the value of such property.<sup>100</sup> An applicant in need of this information may be a creditor or litigant, as in *Neal*, for example.<sup>101</sup>

Once the application is submitted, the judge with probate jurisdiction may issue an order of appointment designating the appointee as temporary administrator, defining the rights and powers conferred, and setting the amount of the bond to be posted.<sup>102</sup>

The process of posting bond requires another statutory hurdle that, although serving a legitimate purpose, increases the time and burden to acquire the legal preservation power for short-term, emergency sit-

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96. *Id.* at 344.

97. *Id.*

98. *Id.* at 346.

99. PROB. § 131A(b)(1)–(5).

100. *Id.* § 131A(b) (The affidavit must include “a description of the real and personal property that the applicant believes to be in the decedent’s estate.”); *id.* §§ 81(a)(4), 82(d) (The application required in § 131A requires a statement “[t]hat the decedent owned real or personal property, or both, describing the same generally, and stating its probable value.”).

101. *See generally* *Nelson v. Neal*, 787 S.W.2d 343 (Tex. 1990) (Texas Supreme Court upheld applicant’s request for temporary administration although she was unaware of will probated in California).

102. PROB. § 131A(c).

uations.<sup>103</sup> “If the attorney has not pre-cleared his client for a bond before seeking the appointment, it may become a problem to file bond ‘not later than the third business day after the date of the court order’” as required by law.<sup>104</sup> The judge may use discretion when setting the amount of bond, but Texas law does not explicitly allow for the removal of the bond requirement.<sup>105</sup>

After the applicant posts bond, the county clerk must issue letters of appointment to the applicant.<sup>106</sup> However, the county clerk is not bound to issue the letters immediately but only within three days after the court order.<sup>107</sup> As a result, a conflict arises regarding when an applicant may exercise the preservation powers granted in the court order. Since “a strict construction is always given to statutes prescribing the powers and duties of a temporary administrator,” it could be argued by extension that the applicant may act only upon receipt of the letters of administration from the county clerk.<sup>108</sup> Providing for both a court order and letters of appointment impliedly directs that the two are not independently effective but that both are required before a temporary administrator may legally act.

Alternatively, several scholars have argued that “the temporary administrator may properly act as soon as he has taken the oath and posted the required bond.”<sup>109</sup> Emergency situations “such as the need to sell perishable property,” they assert, “persuasively argue that there is no requirement that the temporary appointee’s exercise of power be postponed until his letters are actually issued.”<sup>110</sup> However, without clear authority in the form of a court order and letters from the county clerk, a temporary administrator has reason to delay before acting to preserve the estate out of fear of liability to the estate. Furthermore, third parties that rely on a temporary administrator’s alleged authority, even with knowledge of the emergency at hand, may require letters of administration and not solely the court order.

To summarize, an applicant must meet with an attorney who will then compile the necessary information regarding the decedent’s estate for the application.<sup>111</sup> Thereafter, the attorney must attempt to secure a prompt hearing with a judge with probate jurisdiction who must find that the immediate appointment is necessary, that the appli-

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103. *See id.*; Judge Gladys B. Burwell, *Suggestions for the First Time Litigator in Probate Court*, 48 *THE ADVOC. (TEX.)* 94, 97 (Fall 2009).

104. *PROB. § 131A(e)*; Burwell, *supra* note 103, at 97.

105. *PROB. § 194.13*; *PROB. § 131A(c)(3)* (requiring the judge with probate jurisdiction to “set the amount of bond to be given by the appointee”).

106. *Id.* § 131A(e).

107. *Id.*

108. *Cruse v. O’Gwin*, 106 S.W. 757, 759 (San Antonio 1907, writ ref’d).

109. *WOODWARD ET AL.*, *supra* note 83, § 461 n.2.

110. *Id.*

111. *See PROB. § 131A(b)(1)–(5)*.

cant is qualified, and the amount of bond to be set.<sup>112</sup> The attorney must acquire and file bond with the county clerk, who then has up to three days to issue the letters of appointment.<sup>113</sup> At the minimum, this process requires a full workday, and in all probability will occur over the course of several days to a week.<sup>114</sup> In a worst-case scenario, an emergency may arise on a Friday. By Monday, the opportunity to address the emergency situation may have passed, eliminating the need for the preservation powers of a temporary administrator, and thereby frustrating both the decedent's intent in the orderly disposition of his or her estate and the supposed right of the heir or devisee in receiving the estate property that he or she is entitled to. In this instance, it becomes clear that the process for obtaining a temporary administration is not adequately suited to estate preservation in every circumstance.

### C. Expense as Compared to the Value of the Asset to be Preserved

An ever-present concern with the ability to seek this legal remedy is the cost associated with affording legal counsel.<sup>115</sup> This problem, which is compounded by the present economic downturn and rising legal costs, may serve to prohibit persons with limited funds from seeking legal counsel to obtain the preservation power as a temporary administrator, even though their need for such power may be the same as those with means.

Further, there is a likelihood that a temporary administration must be made permanent. As a result, work and fees are effectively doubled because of the necessity for another application, bond, inventory, and another accounting that would normally accompany a single permanent administration.<sup>116</sup>

A new addition to the Texas Probate Code for 2014 is the position of public probate administrator, which may be created by the judge of one of eighteen statutory probate courts.<sup>117</sup> The public probate administrator has many of the powers and duties of an ordinary administrator including the right to take possession and control of the property when an estate lacks a personal representative and there is no known or suitable next of kin.<sup>118</sup> Furthermore, the public probate

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112. *Id.* § 131A(a), (b), (c)(3).

113. *Id.* § 131A(c)–(e).

114. *See, e.g., id.* § 131A(d), (e) (discussing the three day window in which an applicant must post bond and the county clerk must issue letters of appointment).

115. Chief Justice Warren E. Burger, *The State of Justice*, ABA J. April 1984, at 62, 66 (“Our litigation system is too costly, too painful, too destructive, too inefficient for a civilized people.”).

116. *See* STANLEY M. JOHANSON, JOHANSON’S TEXAS PROBATE CODE ANNOTATED, Texas Probate Code Annotated § 131A, commentary (2011 ed.).

117. Act of June 14, 2013, 83rd Leg., R.S., ch. 671, § 1, 2013 Tex. Sess. Law Serv. Ch 671 (West) (to be codified as TEX. GOV’T CODE ANN. § 25.00251 (eff. Jan. 1, 2014)).

118. *Id.* § 2 (to be codified as TEX. EST. CODE § 455.004(a) (eff. Jan. 1, 2014)).



administrator may take “prompt possession or control of the decedent’s property . . . that is considered to be subject to loss, injury, waste or misappropriation.”<sup>119</sup> This administrator may even act without issuance of letters testamentary or of administration if the estate assets do not exceed \$5,000.00.<sup>120</sup> Estates, however, are still subject to the payment of fees for services rendered on its behalf and the public probate administrator *may* tax the estate according to the 5% in, 5% out rule.<sup>121</sup> Although a new development in Texas law, the public probate administrator may prove to serve the interests of unrepresented estates that are subject to loss in the period between death and probate.

D. *Liability for Failure to Act as a Temporary Administrator*

One potential consequence of obtaining the power of a personal representative that may inhibit interested persons in seeking it is the liability that may result from undertaking the duty to preserve the estate as a temporary administrator. In *Frost National Bank of San Antonio v. Kayton*, a hurricane damaged an uninsured portion of estate property.<sup>122</sup> The court of civil appeals held that the bank, serving as temporary administrator, was negligent in its failure to procure extended coverage insurance for the real estate by failing to meet its duty of reasonable care to preserve the estate.<sup>123</sup> The court of civil appeals relied on § 230 of the Texas Probate Code that describes the standard of care for an administrator as follows:

The . . . administrator shall take care of the property of the estate of his testator or intestate as a prudent man would take care of his own property, and if there be any buildings belonging to the estate, he shall keep the same in good repair, extraordinary casualties excepted, unless directed not to do so by an order of the court.<sup>124</sup>

Even though a temporary administrator has the opportunity to demonstrate that insurance coverage was not obtainable,<sup>125</sup> a temporary administrator seeking power for a limited purpose may not consider the extensive duties attendant to preserving the entire estate. Shortsightedness, in this regard, can lead to disastrous consequences for a temporary administrator who, in good faith, seeks to preserve certain property of the decedent’s estate. Attorneys advocating for a temporary administration would be wise to counsel clients on the po-

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119. *Id.*

120. *Id.*

121. TEX. LOC. GOV’T CODE ANN. § 118.052(2)(F) (West 2011); TEX. PROB. CODE ANN. § 241 (West 2011).

122. *Frost Nat’l Bank of San Antonio v. Kayton*, 526 S.W.2d 654, 656 (Tex. Civ. App.—San Antonio 1975, writ ref’d n.r.e.).

123. *Id.* at 661.

124. PROB. § 230.

125. *Kayton*, 526 S.W.2d at 660.

tential liability for acting improperly through both affirmative acts and by omission.

### E. *Practical Insufficiencies*

As detailed above, courts may grant temporary administrators a variety of powers necessary to preserve the estate; applicants for the preservation power as a temporary administrator can range from a family member to an adverse litigant to a creditor of the deceased.<sup>126</sup> In addition, as will be demonstrated below, the need for a breadth of powers given to different parties depends on the individual circumstances.

One circumstance of current relevance that may arise is the risk of foreclosure on a decedent's real property. A possible scenario involves a person who is behind on his or her mortgage payments due to lack of liquid assets. At death, the mortgage could be one missed payment away from default before the creditor files for foreclosure on the property. The time-sensitive need to access the decedent's financial information and to sell certain estate assets in order to prevent default on the mortgage in this instance is evident. The loss of a home may, in many cases, be catastrophic to the estate since the home often represents many individuals' largest investment.<sup>127</sup>

The lack of insurance on real and personal property may warrant the preservation power since property damage as a result of fire, theft, or natural disaster may leave the estate virtually without value. A temporary administration for the limited purpose of securing property insurance would serve the purpose of preserving the decedent's estate.

Another circumstance involves the signing of paychecks for employees of a decedent's business. If the decedent alone held the power to authorize payments from the business account, employees may be left waiting for weeks while the will goes through administration. Heightened need to preserve a business may include the sale of valuable perishable goods by the temporary administrator in order to prevent loss to the decedent's business, and consequently the estate. This situation might further include the necessity of fulfilling contractual obligations that would otherwise leave the decedent's business in breach of contract, creating financial liability for the estate.

All of the emergencies illustrated—as well as the many other feasible scenarios—require immediate action to preserve the estate, which

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126. See, e.g., *Nelson v. Neal*, 787 S.W.2d 343, 343–44 (Tex. 1990); *Wolford v. Wolford*, 590 S.W.2d 769, 771–72 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.).

127. Paul Solman & Elizabeth Shell, *Latest U.S. Home Prices Show Your Largest Asset May be Withering Away*, PBS.COM (April 24, 2012), <http://www.pbs.org/news/hour/businessdesk/2012/04/latest-us-home-prices-show-you-1.html> (“If you’re a homeowner, you’re watching the value of one of your largest assets—if not your very largest asset—wither away.”).

is conditioned on the immediate and efficient approval by the court with probate jurisdiction. The question is whether the statute as written is an adequate means to provide the preservation power in an efficient manner, able to thwart most circumstances that jeopardize estate assets.

#### IV. PROPOSED SOLUTIONS

As statutory mechanisms providing interested persons with the ability to preserve a decedent's estate, Sections 131A and 132 and their precursors have proven to be effective in various circumstances.<sup>128</sup> Texas courts adapted *immediate necessity* to the various issues that arise concerning a decedent's estate. For example, an early decision granted the preservation power to maintain a decedent's farms,<sup>129</sup> while a more recent decision expanded the use to provide an agent for service of process.<sup>130</sup> Armed with the power of broad discretion, judges with probate jurisdiction are given wide latitude in their interpretation of what constitutes a necessity and the relevant rights and duties attendant to maintaining the status quo of the estate.<sup>131</sup> However, as demonstrated above, conflicting interpretations of the statutory language and practice insufficiencies demonstrate the need to amend these statutes to more effectively preserve decedents' estates.

##### A. Testator-Named Temporary Administrator

A testator, recognizing the future need for protection of his or her estate after death, should have the power to name a temporary administrator before such need should arise. As the law stands, both heirs and devisees have no preservation power in the interim under the Texas Probate Code.<sup>132</sup> If a will is supposed to be the testator's rightful determination of how he or she wishes his or her assets to be distributed,<sup>133</sup> the testator should also have the power to name a person to preserve the status quo of the estate until administration. As a result, the Legislature should amend the Texas Probate Code to more

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128. See *supra* notes 47–50.

129. *Bandy v. First State Bank, Overton, Tex.*, 835 S.W.2d 609, 611 (Tex. 1992).

130. *Nelson*, 787 S.W.2d at 345–46.

131. *Moser v. Norred*, 720 S.W.2d 869, 871 (Tex. App.—Beaumont 1986, writ ref'd n.r.e.).

132. *Id.*

133. See *In re Bartels' Estate*, 164 S.W. 859, 866 (Tex. Civ. App.—Galveston 1914, writ ref'd) (“The right of the owner of property to dispose of [his property] by will as he may please is one that is often of great value, . . . and this right should be as jealously guarded as any other property right.”); see also *Salinas v. Garcia*, 135 S.W. 588, 591 (Tex. Civ. App.—1911, writ ref'd) (quoting *Sloan v. Maxwell*, 3 N.J. Eq. 563, 581 (Prerog. Ct. 1831) (“The power of disposing of property is an inestimable privilege of the old. It frequently commands attention and respect when other motives have ceased to influence. How often, without it, would the hoary head be neglected, deserted and despised.”)).

effectively allow a testator to provide for the maintenance of his or her estate in the face of emergency situations.

Allowing testators to name their preferred temporary administrator in the will resembles a testator's power to name an executor in a will—an appointment that the court must prefer.<sup>134</sup> This designation would serve the policy of maintaining the status quo by the appointment of a person who is likely familiar with the estate and the testator's preferences.<sup>135</sup> Similar to a named executor, a testator should be able to dispense with the bond requirement for his or her nominated temporary administrator.<sup>136</sup> This power would allow for a more expeditious approval of the named temporary administrator, since it would lessen the preclearance burden.<sup>137</sup> In addition, the judge with probate jurisdiction should also be given the authority to determine whether a bond would serve a purpose under the specific circumstances.

These amendments would provide the testator with the ability to name his or her preferred temporary administrator, who in his or her estimation, would best serve the estate should an emergency situation arise. Further, this power would come at little extra cost to the estate, since it would simply require a provision added in the will.

#### B. *Immediate Exercise of Powers After Court Order*

As discussed above, a conflict of statutory interpretation exists as to whether an applicant may exercise preservation power immediately upon receiving the court order, or must wait until the county clerk issues letters of appointment.<sup>138</sup> Should the necessity be of such grave concern, common sense dictates that an applicant should not have to wait up to three days to exercise the powers granted in the court order. Through statutory amendment, judges with probate jurisdiction should have discretion to allow the newly appointed temporary administrator to act on the powers granted in the court order before the county clerks issue letters of administration. The court order itself may contain the temporary administrator's rights and duties and should effectively serve the intended purpose of demonstrating the administrator's powers to third parties.

This amendment would further the policy behind a temporary administration (to clothe the court with the ability to appoint a personal representative of an estate for the purpose of maintaining the status

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134. See TEX. PROB. CODE ANN. § 77 (West 2011).

135. See *Nelson*, 787 S.W.2d at 346 (Tex. 1990); see, e.g., MISS. CODE ANN. § 91-7-53 (West 2012) (“The person named as executor or the person apparently entitled to letters of administration may be appointed temporary administrator, unless the court shall find that the circumstances require the appointment of a different person.”).

136. See PROB. § 195.

137. See *supra* notes 99–114.

138. See *supra* notes 107–10.

quo<sup>139</sup>) by providing greater discretion, flexibility, and responsiveness in preserving the estate.

### C. *Inter Vivos and Testamentary Trusts*

*A settlor's business or property may be of such character that it cannot endure even a short period of suspension of operations between death and probate.*<sup>140</sup>

More complex, but effective, means to ensure the preservation of an estate after death are inter vivos and testamentary trusts. A person, who is aware of any number of situations that might arise after his or her death, may create a trust during his or her lifetime that provides for the immediate management and preservation of that person's estate after his or her death without court intervention.<sup>141</sup>

The settlor of a trust creates the trust by splitting title to the trust property, granting legal title to the trustee and equitable title to the beneficiary.<sup>142</sup> The Texas Property Code describes five manners to create a trust:

- (1) a property owner's declaration that the owner holds the property as trustee for another person;
- (2) a property owner's inter vivos transfer of the property to another person as trustee for the transferor or a third person;
- (3) a property owner's testamentary transfer to another person as trustee for a third person;
- (4) an appointment under a power of appointment to another person as trustee for the one of the power or for a third person; or
- (5) a promise to another person whose rights under the promise are to be held in trust for a third person.<sup>143</sup>

A key advantage in establishing a trust is that the settlor may appoint a trustee who is an expert in managing and preserving estates, such as a bank or trust company.<sup>144</sup> Trustees are held to certain standard of care and must act in good faith.<sup>145</sup> To act in good faith, a trustee must serve the interests of the beneficiaries.<sup>146</sup> This necessarily entails the preservation of estate assets that are to be used for the benefit of the beneficiaries, including preservation in the face of emergency situations that could devalue those assets.

139. See *King v. King*, 230 S.W.2d 335, 339 (Tex. Civ. App.—Amarillo 1950, writ ref'd).

140. *Westerfeld v. Huckaby*, 474 S.W.2d 189, 194 (Tex. 1971) (quoting Notes, *Use of Inter Vivos Trusts in Agricultural Estate Planning*, 55 Iowa L. Rev. 1328 (1970)).

141. See, e.g., Nathaniel W. Schwickerath, *Public Policy and the Probate Pariah: Confusion in the Law of Will Substitutes*, 48 Drake L. Rev. 769, 772 (2000).

142. *Perfect Union Lodge No. 10 v. Interfirst Bank of San Antonio, N.A.*, 748 S.W.2d 218, 220 (Tex. 1988).

143. TEX. PROP. CODE ANN. § 112.001 (West 2011).

144. Kathryn A. Johnson and Adam J. Wiensch, *Trustee Selection for Successful Trust Administration*, PROB. & PROP., May/June 1994, at 40.

145. PROP. § 113.029.

146. *Id.*

Finally, a trust is effective immediately upon the death of the settlor or upon some other event, unlike a will, which must go through probate, thereby eliminating the gap for preservation powers that exists under a will.<sup>147</sup>

In the landmark case of *Westerfeld v. Huckaby*, the settlor sought a “fiduciary to take over the management of the trust corpus in the likely event of [her] incompetency by reason of sickness or age.”<sup>148</sup> Even though the settlor retained control of the trust property and provided for a successor trustee only upon her incompetency, the Texas Supreme Court held that:

[a] document which can stand as a trust is not rendered invalid because it avoids the need for a will. Good reasons often exist for a presently operative trust in preference to a will, which cannot be operative until death and which can accomplish nothing during lifetime. If an owner of property can find a means of disposing it inter vivos that will render a will unnecessary for the accomplishment of his practical purposes, he has a right to employ it. The fact that the motive of a transfer is to obtain the practical advantages of a will without making one is immaterial.<sup>149</sup>

The Court held that the trust was effective, even during the lifetime of the settlor, and that retaining the use and enjoyment of the trust property as a beneficiary and maintaining the power to revoke the trust did not invalidate the trust.<sup>150</sup>

Since a trust may become effective at a point in time prescribed by the settlor, a trust is a viable means to avoid probate and to “fill in the gap” that would be left behind should a decedent’s estate be subject to administration.

## V. PROPOSED STATUTORY AMENDMENTS

Suggested statutory amendments to § 131A, as provided above, are as follows (amendments are shown underlined):

- (a) If a county judge determines that the interest of a decedent’s estate requires the immediate appointment of a personal representative, he shall, by written order, appoint a temporary administrator with limited powers as the circumstances of the case require. The duration of the appointment must be specified in the court’s order and may not exceed 180 days unless the appointment is made permanent as provided by Subsection (j) of this section.
- (b) Any person, including persons without a pecuniary interest in the estate, may file with the clerk of the court a written application for the appointment of a temporary administrator of a decedent’s

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147. See *Westerfeld v. Huckaby*, 474 S.W.2d 189, 193 (Tex. 1971).

148. *Id.* at 194.

149. *Id.* at 193–94 (quoting *Nat’l Shawmut Bank of Bos. v. Joy*, 53 N.E.2d 113, 122 (Mass. 1944)).

150. *Id.*

estate under this section. If a preferred temporary administrator is designated within the decedent's will, the court shall accept the application of the named person unless the court determines that the applicant is disqualified as provided by Section 78 of this code. If a preferred temporary administrator is not named, and there are more than one application before the court, the preference shall be given to the named executor. The application must be verified and must include the information required by Section 81 of this code if the decedent died testate or Section 82 of this code if the decedent died intestate and an affidavit that sets out:

- (1) the name, address, and interest of the applicant in the purpose of preserving the estate;
  - (2) the facts showing an immediate necessity for the appointment of a temporary administrator;
  - (3) the requested powers and duties of the temporary administrator;
  - (4) a statement that the applicant is entitled to letters of temporary administration and is not disqualified by law from serving as a temporary administrator; and
  - (5) a description of the real and personal property that the applicant believes to be in the decedent's estate.
- (c) An order of appointment must:
- (1) designate the appointee as "temporary administrator" of the decedent's estate for the specified period;
  - (2) define the powers conferred on the appointee; and
  - (3) set the amount of bond to be given by the appointee.
- (d) Not later than the third business day after the date of the order, the appointee shall file with the county clerk a bond in the amount ordered by the court. In this subsection, "business day" means a day other than a Saturday, Sunday, or holiday recognized by this state.
- (e) Not later than the third day after the date on which an appointee qualifies, the county clerk shall issue to the appointee letters of appointment that set forth the powers to be exercised by the appointee as ordered by the court. A reasonable attempt should be made to supply the appointee with letters of appointment at the time the court order is provided. The county judge may, in accordance with the necessity presented, provide in the court order that the appointee may exercise the powers granted immediately upon taking the oath and posting the required bond before letters of appointment are issued by the county clerk.
- Subsections (f)–(j) to remain as provided.

## VI. CONCLUSION

In the two narratives related in Part I of this Comment, the Author sought to demonstrate how an estate could suffer loss soon after the decedent's death. In the first narrative, the beneficiary sought counsel to begin the application process. With some luck, she will be appointed temporary administrator and receive the letter from the

county clerk in order to reinvest the estate assets into a more conservative investment before her uncle's investment fails.

In the second narrative, the decedent failed to provide for the continued operation of his business should he pass away and his wife was not diligent in seeking counsel. This delay increased the contractual and financial liability of the estate for the unfulfilled projects. Application to the court with probate jurisdiction in this narrative may provide the wife with the ability to continue business operations to prevent liability from accruing. However, an efficient and expedient judicial process is necessary for the preservation to occur.

Even though a testator may devise or bequeath his or her property through a will, and even though title to that property passes to the testator's devisees at death, there is no legal right to preserve that property before the estate is administered. This issue may be particularly troubling for family members who recognize an immediate need for the preservation of their loved one's estate but find themselves helpless in terms of legal power to solve the problem.

Since early statehood, Texas law has allowed for the appointment of a temporary administrator to maintain the status quo of the estate through specifically enumerated preservation powers granted by a court with probate jurisdiction.<sup>151</sup> But, statutory hurdles, similar to those for a permanent administrator who may disburse estate assets, are imposed on an applicant seeking the preservation power for what may be only a limited purpose in a limited timeframe.

This Comment called for an amendment of Texas Probate Code section 131A to more effectively allow for the preservation of decedents' estates. This Comment began by discussing the gap in protection under the current Texas Probate Code and later discussed the inadequacies in the current law. Two proposed solutions included amendments that allow a testator to name their preferred temporary administrator and that provide a judge with probate jurisdiction with the discretion to allow an applicant to exercise the powers granted before letters are issued. These statutory amendments seek to "close the gap" by allowing a more rapid response to emergency situations because the amendments provide the judge with probate jurisdiction with more flexibility in the appointment of a temporary administrator. These statutory amendments further seek to maintain the primary purpose of the statute—"to clothe the probate court with authority to protect and preserve the estate by the appointment of a legal representative . . ."<sup>152</sup>—without overstepping the bounds prescribed for a temporary administrator. Finally, this Comment explored and recommended the use of inter vivos and testamentary trusts as a mechanism to circumvent the need for probate, thereby allowing a trustee the

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151. *See supra* note 23.

152. *King v. King*, 230 S.W.2d 335, 339 (Tex. Civ. App.—Amarillo 1950, writ ref'd).



power to immediately act to preserve property without court intervention.

The burden to prevent both foreseeable and unforeseeable issues that may depreciate an estate's value after a person's death falls to the decedent and his or her attorney. A comprehensive estate plan should employ mechanisms to effectively preserve the estate both after death and before administration, should the need arise.

#### VII. DISPOSITION TABLE

Below is a table for converting the sections of the Texas Probate Code cited within this Comment to the Texas Estates Code.

<i>Texas Probate Code</i>	<i>Texas Estates Code</i>
§ 3(l)	§ 22.012
§ 3(r)	§ 22.018
§ 33	§§ 51.001–51.202
§ 33(f)(1)-(3)	§§ 51.051 (part), 51.101, 51.053, 51.054
§ 37	§§ 101.001, 101.003, 101.051
§ 59	§§ 251.051–.052, 251.101–.106
§ 77	§ 304.001
§ 78	§ 304.003
§ 94	§ 256.001
§ 131A	§§ 452.001–.008
§ 132	§§ 452.051–.052
§ 133	§§ 452.101–.102
§ 183	§ 306.005
§ 194.13	§ 305.153
§ 195	§ 305.101
§ 230	§ 351.101
§ 301	§§ 355.004, 355.059 <sup>153</sup>

153. TEX. LEGISLATIVE COUNCIL, REVISOR'S REPORT: A NONSUBSTANTIVE REVISION OF THE TEXAS PROBATE CODE App. D (2009), available at [http://www.tlc.state.tx.us/legal/estatescode/81st\\_revisors\\_report.pdf](http://www.tlc.state.tx.us/legal/estatescode/81st_revisors_report.pdf).