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Probate Court Lacks Authority to Remove an Independent Executor Adjudged Non Compos Mentis.

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defense or prosecution will be considered in determining "significant delay." To avoid confusion and possible reversals, more specific guidelines must be given to trial courts for use in determining when supplemental *voir dire* is required. Although problems remain to be solved, by requiring supplemental *voir dire* after significant delays *Price* has increased the possibility of a truly impartial jury.

Larry E. Reed

PROBATE—Independent Administration—Probate Court Lacks Authority To Remove an Independent Executor Adjudged Non Compos Mentis

Killgore v. Estate of Killgore,
568 S.W.2d 182 (Tex. Civ. App.—San Antonio 1978, no writ).

Read Killgore was named independent executor in his mother's will. Shortly after she died, Killgore was adjudged non compos mentis and a temporary guardian was appointed for him. Two months later, the probate court entered an order admitting the will to probate and authorizing issuance of letters testamentary. Killgore was named by the court to serve as independent executor without bond. Subsequently, the court removed Killgore as independent executor on the ground of mental incompetence and appointed another as temporary administrator. Killgore appealed to the San Antonio Court of Civil Appeals on the ground that the probate court erred in cancelling his letters testamentary, thus removing him as independent executor of his mother's estate. Held—*Reversed.* A probate court lacks authority to remove an independent executor even though he has been adjudged non compos mentis.[1]

The concept of independent administration was first codified in 1843[2] when the Seventh Congress of the Republic of Texas gave a testator the right to provide "that no other action than the probate and registration of the will . . . shall be had in the Probate Courts."[3] This concept is closely analogous to that of the Roman "instituted heir."[4] Under the civil law of

1. *See* Killgore v. Estate of Killgore, 568 S.W.2d 182, 183 (Tex. Civ. App.—San Antonio 1978, no writ). Killgore was ordered reinstated as independent executor of his mother's estate. *Id.* at 183.

2. *See* 45 TEXAS L. REV. 352, 352 (1966).

3. 1843 Tex. Gen. Laws, An Act to Amend the Probate Law §5, at 14, 2 H. GAMMEL, LAWS OF TEXAS 834 (1898). *See* Comment, *Independent Administration of Decedents' Estates,* 33 TEXAS L. REV. 95, 97 (1954).

4. *See* Comment, *Independent Administration of Decedents' Estates,* 33 TEXAS L. REV. 95, 98 (1954). In Roman law, the appointment of an instituted heir was necessary to the legality and existence of the will. The instituted heir assumed the legal position of the testator, and had to be named before the testator could make any dispositions of his estate.

Rome, the entire estate of a testator was distributed among the legatees; the instituted heir's only duty was to collect and distribute the estate, and his affirmative actions were not subject to judicial authority.[5] The origins of the independent executor are thus firmly rooted in civil rather than common law.[6] Indeed, the state's first legislators were so committed to the civil law concept of freedom from judicial supervision that only minimal restrictions were placed upon the powers and duties of independent executors.[7]

Early interpretations by Texas courts of the authority of the independent executor established that one acting under the power of a will could do so without interference from the probate court, so long as the duties were faithfully and actively performed.[8] This concept was further extended in *Roy v. Whitaker*,[9] in which the supreme court held that the authority of the probate court did not extend over an independent executor in matters regarding settlement of an estate.[10] The intention of the courts in so construing the concept of independent administration has been to permit an executor "to effect the distribution of an estate with a minimum of cost and delay."[11] Nevertheless, the Probate Code provides that if the independent executor is shown to be mismanaging the property or has become disqualified, he can be required by the probate court to post a bond.[12] By judicial decision, the failure of the independent executor to post such bond

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Since the instituted heir assumed the legal position of his testator, he was free to make distributions of his inherited portion of the estate as he wished. A. PRICHARD, LEAGE'S ROMAN PRIVATE LAW 260-262 (3d ed. 1961).

5. *See* Comment, *Independent Administration of Decedents' Estates*, 33 TEXAS L. REV. 95, 98 (1954).

6. *Cf.* Thompson v. Duncan, 1 Tex. 485, 488 (1846)(judicially recognizing influence of civil law upon early Texas probate legislation).

7. *See* Woodward, *Independent Administration Under the New Texas Probate Code*, 34 TEXAS L. REV. 687, 687 (1956). The common law concept of administration, on the other hand, dictates that the personal representative of the decedent is subject to the will and direction of the court as an extension of the sovereign's protection over all of its subjects. *See generally* Comment, *Independent Administration of Decedents' Estates*, 33 TEXAS L. REV. 95, 95-96 (1954).

8. *See* Lumpkin v. Smith, 62 Tex. 249, 251 (1884); Holmes v. Johns, 56 Tex. 41, 51 (1881).

9. 92 Tex. 346, 48 S.W. 892 (1898), *modified*, 92 Tex. 357, 49 S.W. 367 (1899).

10. *See id.* at 355, 48 S.W. at 896. The court stated in dicta, however, that under certain conditions, "the settlement of it could . . . be resumed in case the trust [confided in the executor] should lapse by the failure of the executor to discharge his duties, or from other causes." *Id.* at 352, 48 S.W. at 895.

11. Corpus Christi Bank & Trust v. Alice Nat'l Bank, 444 S.W.2d 632, 634 (Tex. 1969); *accord*, *In re* Bateman, 528 S.W.2d 86, 88 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.). *See also* Comment, *Independent Administration of Decedents' Estates*, 33 TEXAS L. REV. 95, 96-97 (1954).

12. TEX. PROB. CODE ANN. § 149 (Vernon 1956); *see* Cocke v. Smith, 142 Tex. 396, 401, 179 S.W.2d 954, 957 (1944); Perkins v. Wood, 63 Tex. 396, 399 (1885); Bell v. Still, 389 S.W.2d 605, 607 (Tex. Civ. App.—Waco 1965), *aff'd*, 403 S.W.2d 353 (Tex. 1966).

remains the only basis for his removal under the present Code.[13]

While the intent of successive Probate Code statutes has been to liberate the independent executor from control by the probate court,[14] it was assumed under the old Code that minority and insanity were without question sufficient to disqualify independent executors.[15] Indeed, early Texas decisions held that an independent executor was required to be of sound mind.[16] In the present Code, incompetents are specifically prohibited from serving as "an executor or administrator."[17] After 1957, however, when the limitation of *Roy v. Whitaker*[18] was included in the statutory language of the Code,[19] the right of removal of an independent executor once he had been appointed became uncertain.[20] In the present Code, section 3(aa), while grouping independent executors within the definition of "personal representative," excludes independent executors from the control of the probate court in matters regarding settlement of the estate except as expressly provided by law.[21] Section 145(h) provides that after an independent executor has been appointed and the inventory, appraisement, and list of claims approved, no further action can be had by the county court unless "specifically and explicitly" authorized by the Probate Code.[22]

Bell v. Still[23] was the first court of civil appeals review of the 1955 Probate Code revisions. The Waco court, confronted with the issue whether

13. *See* Corpus Christi Bank & Trust v. Alice Nat'l Bank, 444 S.W.2d 632, 636 (Tex. 1969); Metting v. Metting, 431 S.W.2d 906, 907 (Tex. Civ. App.—San Antonio 1968, no writ); Bell v. Still, 389 S.W.2d 605, 607 (Tex. Civ. App.—Waco 1965), *aff'd*, 403 S.W.2d 353 (Tex. 1966); O'Connor v. O'Connor, 320 S.W.2d 384, 391 (Tex. Civ. App.—Dallas 1959, writ dism'd).

14. *In re* Bateman, 528 S.W.2d 86, 89 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.).

15. *See* Cocke v. Smith, 142 Tex. 396, 400, 179 S.W.2d 954, 956 (1944); Journeay v. Shook, 105 Tex. 551, 556, 152 S.W. 809, 812 (1913); Tex. Rev. Civ. Stat. art. 3353 (1948). *See generally* Woodward, *Independent Administrations Under the New Texas Probate Code*, 34 TEXAS L. REV. 687, 692 (1956).

16. *See* Journeay v. Shook, 105 Tex. 551, 556, 152 S.W. 809, 812 (1913); Stevens v. Cameron, 100 Tex. 515, 517, 101 S.W. 791, 792 (1907).

17. TEX. PROB. CODE ANN. § 78 (Vernon Supp. 1978-1979) states in pertinent part: "No person is qualified to serve as an executor or administrator who is: . . . An incompetent . . . ."

18. 92 Tex. 346, 48 S.W. 892 (1898), *modified*, 92 Tex. 357, 49 S.W. 367 (1899). "[E]xcept to those articles which relate to . . . settlement of an estate, the term 'executors,' as used in our statutes, includes independent as well as other executors." *Id.* at 355, 48 S.W. at 896.

19. TEX. PROB. CODE ANN. § 3(aa)(Vernon Supp. 1978-1979) states: " 'Personal representative' or 'Representative' includes . . . independent executor . . . . The inclusion of independent executors herein shall not be held to subject such representatives to control of the courts in probate matters with respect to settlement of estates except as expressly provided by law."

20. As one commentator has written, "[A] testator is free to appoint a three-year-old idiot child as his independent executor . . . ." Woodward, *Independent Administrations Under the New Texas Probate Code*, 34 TEXAS L. REV. 687, 692 (1956).

21. *See* TEX. PROB. CODE ANN. § 3(aa)(Vernon Supp. 1978-1979).

22. *See id.* § 145(h).

23. 389 S.W.2d 605 (Tex. Civ. App.—Waco 1965), *aff'd*, 403 S.W.2d 353 (Tex. 1966), *noted in* 45 TEXAS L. REV. 352 (1966).

an independent executor could be removed for alleged mismanagement, was called upon to construe certain relevant sections of the Probate Code.[24] The court held that a probate court had no jurisdiction to directly remove an independent executor for mismanagement and malfeasance.[25] The amendments were held to have established two tests for determining the power of a probate court to remove an independent executor: first, whether the removal of an independent executor requires the probate court to take action in connection with the settlement of the estate, and second, whether the Code specifically provides for this action in the probate court.[26] The court considered both the amended section 3(aa), which groups independent executors with other personal representatives except with respect to matters regarding settlement of the estate, and section 145, which limits probate court action in independent administration. Finding these two sections to be in *pari materia,* the court concluded that when action was instituted in the probate court regarding settlement of the estate, if that action involved an independent executor, it must be "specifically and explicitly" authorized.[27] Although section 222 concerns the removal of "personal representatives,"[28] the court was compelled to apply its interpretation of sections 3(aa) and 145. Because section 222 does not "specifically and explicitly" apply to independent executors, the probate court was prohibited from removing them.[29] The Texas Supreme Court adopted the Waco opinion, noting that the Probate Code had not changed the preexisting rule that allowed removal only after the independent executor had been required to post bond and failed to do so.[30] *Bell v. Still* has since been cited in a number of decisions as establishing the rule that, unless there has been a failure to post bond, the probate court has no authority to remove an independent executor for mismanagement or malfeasance.[31]

In *Killgore v. Estate of Killgore*[32] the San Antonio Court of Civil Appeals

24. Bell v. Still, 389 S.W.2d 605, 605 (Tex. Civ. App.—Waco 1965), *aff'd,* 403 S.W.2d 353 (Tex. 1966) (construing predecessors of sections 3(aa), 145(h), and 222 of present Probate Code).

25. *See id.* at 607.

26. *Id.* at 606.

27. *Id.* at 606; *see* TEX. PROB. CODE ANN. §§ 3(aa), 145(h) (Vernon Supp. 1978-1979).

28. TEX. PROB. CODE ANN. § 222 (Vernon Supp. 1978-1979).

29. *See* Bell v. Still, 389 S.W.2d 605, 606 (Tex. Civ. App.—Waco 1965), *aff'd,* 403 S.W.2d 353 (Tex. 1966); 45 TEXAS L. REV. 352, 354 (1966).

30. *See* Bell v. Still, 403 S.W.2d 353 (Tex. 1966). The Supreme Court noted:

> [T]he matter is a difficult one because doubts exist as to the wisdom of such a policy under which an independent executor, accused of gross mismanagement of an estate, is not subject to removal by the probate court as any other executor or administrator. This, however, is a matter within the control of the Legislature.

Id. at 353.

31. *See* Corpus Christi Bank & Trust v. Alice Nat'l Bank, 444 S.W.2d 632, 636 (Tex. 1969); *In re* Bateman, 528 S.W.2d 86, 89 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.); Metting v. Metting, 431 S.W.2d 906, 907 (Tex. Civ. App.—San Antonio 1968, no writ).

32. 568 S.W.2d 182 (Tex. Civ. App.—San Antonio 1978, no writ).

was confronted with the question whether a probate court was empowered by the Probate Code to remove an independent executor who had been adjudged non compos mentis. The San Antonio court referred to *Bell v. Still* and chose to apply the tests developed by the Waco court.[33] The *Killgore* majority found that section 222 did not meet the second test because it did not specifically provide for removal of an independent executor.[34] In reaching this decision the San Antonio court seemed to require that both tests set out in *Bell* be met.[35] Thus, the court never inquired whether the first test was met: whether removal of an incompetent independent executor involved matters regarding settlement of the estate.[36] At the end of its opinion the court expressed serious reservations about its decision.[37]

In a strongly worded dissent, Chief Justice Cadena argued that in light of the distinctive facts of *Bell v. Still,* the majority erred in its application. Justice Cadena restated the *Bell* tests: if action does involve settlement of the estate a specific provision is indeed required.[38] He argued that since removal of an incompetent does not involve settlement of the estate, removal may be accomplished without a specific provision.[39] Thus, if the probate court is allowed to remove an incompetent pursuant to section 222, no conflict with *Bell* exists.[40] His conclusion, then, was that section 222 applies to independent executors and authorizes removal for incompetency.[41] The Chief Justice further sought to weaken the effect of section 145 with his argument that the established practice of requiring an independent executor to give bond for mismanagement surely necessitates inquiry into matters concerning settlement of the estate and allows to be done indirectly what may not be done directly.[42]

The majority in *Killgore* failed to distinguish the facts giving rise to the desired removal of the executor in *Killgore* from the situation in *Bell.*[43] In

33. *Id.* at 183; *see* Bell v. Still, 389 S.W.2d 605, 606 (Tex. Civ. App.—Waco 1965), *aff'd,* 403 S.W.2d 353 (1966).

34. Killgore v. Estate of Killgore, 568 S.W.2d 182, 183 (Tex. Civ. App.—San Antonio 1978, no writ).

35. *See id.* at 183.

36. *See id.* at 183.

37. "The fact that the probate court cannot remove an incompetent independent executor is of doubtful wisdom." *Id.* at 183.

38. *See id.* at 185 (Cadena, C.J., dissenting).

39. *Id.* at 187 (Cadena, C.J., dissenting).

40. *See id.* at 187 (Cadena, C.J., dissenting).

41. *See id.* at 187 (Cadena, C.J., dissenting).

42. *Id.* at 187 (Cadena, C.J., dissenting).

43. *See id.* at 184 (Cadena, C.J., dissenting). *Compare id.* at 182 (single question is jurisdiction of probate court to remove incompetent independent executor) *with* Bell v. Still, 389 S.W.2d 605, 605 (Tex. Civ. App.—Waco 1965), *aff'd,* 403 S.W.2d 353 (Tex. 1966)(single question is jurisdiction of probate court to remove independent executor accused of mismanagement and malfeasance).

Bell the independent executor was accused of mismanagement.[44] The *Bell* opinion was limited to examining whether the probate court had jurisdiction to inquire into the manner in which the executor was settling the estate.[45] The Texas Supreme Court was concerned with maintaining the autonomy of the independent executor when it affirmed *Bell.*[46] On the other hand, *Killgore* concerned the competency of an independent executor who had been adjudged incompetent to manage even his own affairs.[47] Although the independent executor was not legally capable, by statute, of managing property,[48] the *Killgore* majority determined that the probate court had no jurisdiction to remove him.[49] A totally different interpretation of the *Bell v. Still* tests from that applied by the *Killgore* majority could be reached without disrupting the balance between the policy underlying autonomous administration and the need for competence in independent administration.[50] The *Killgore* dissent views the *Bell* opinion as requiring only that when the probate court is about to take any action which touches upon settlement of the estate, that action must be specifically and explicitly provided for in the Code.[51] This interpretation is justified not only by the language of *Bell,* but also by the context of the case—a charge of mismanagement.[52] When removal of a mentally incompetent independent executor is sought the authority of the probate court should be broader. Since a mental incompetent has no capacity to manage property,[53] his removal does not concern settlement of the estate.[54] Consequently, the Code need not "specifically and explicitly" provide for such action; although section 222 does not expressly apply to independent executors, it is sufficient authorization for their removal.[55]

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44. *See* Bell v. Still, 389 S.W.2d 605, 606-07 (Tex. Civ. App.—Waco 1965), *aff'd,* 403 S.W.2d 353 (Tex. 1966).

45. *See id.* at 606.

46. *See* Bell v. Still, 403 S.W.2d 353 (Tex. 1966). *See generally* 45 TEXAS L. REV. 352, 354-55 (1966).

47. *See* Killgore v. Estate of Killgore, 568 S.W.2d 182, 182 (Tex. Civ. App.—San Antonio 1978, no writ).

48. *See* TEX. PROB. CODE ANN. § 3(y)(Vernon 1956). " 'Persons of unsound mind' are persons non compos mentis, idiots, lunatics, insane persons, and other persons who are mentally incompetent to care for themselves or to manage their property and financial affairs." *Id.*

49. *See* Killgore v. Estate of Killgore, 568 S.W.2d 182, 183 (Tex. Civ. App.—San Antonio 1978, no writ).

50. *See id.* at 184-85 (Cadena, C.J., dissenting).

51. *See id.* at 185 (Cadena, C.J., dissenting); Bell v. Still, 389 S.W.2d 605, 606 (Tex. Civ. App.—Waco 1965), *aff'd,* 403 S.W.2d 353 (Tex. 1966).

52. *See* Killgore v. Estate of Killgore, 568 S.W.2d 182, 185 (Tex. Civ. App.—San Antonio 1978, no writ)(Cadena, C.J., dissenting); Bell v. Still, 389 S.W.2d 605, 605 (Tex. Civ. App.—Waco 1965), *aff'd,* 403 S.W.2d 353 (Tex. 1966).

53. *See* TEX. PROB. CODE ANN. § 3(y)(Vernon 1956).

54. *See* Killgore v. Estate of Killgore, 568 S.W.2d 182, 187 (Tex. Civ. App.—San Antonio 1978, no writ)(Cadena, C.J., dissenting).

55. *See id.* at 187 (Cadena, C.J., dissenting); TEX. PROB. CODE ANN. § 222 (Vernon Supp. 1978-1979).

Texas courts have deferred to the legislative policy of non-interference with the actions of independent executors while settling the estate.[56] Probate courts are generally prohibited from removing the independent executor because removal allows the probate court to accomplish "by obliquity what is prohibited to be done directly."[57] Yet, it is now settled that a district court, through the exercise of its general equitable powers, can appoint a receiver to take control of an estate being administered by an independent executor in cases in which proof has been made of mismanagement or squandering, even though the independent executor has not first refused to post bond.[58] Although the result of the proceedings is to remove the independent executor, the court's order deletes as "duplicative and unnecessary" language that would state that the independent executor is being removed.[59] The probate court is prohibited from taking similar action for the protection of the estate.[60] It is incongruous that the probate court which takes direct action by removing an independent executor is accused of "obliquity,"[61] while a district court, which takes the identical action, but deletes the use of a few words in its decree, faces no such criticism.[62] If one assumes, as does the *Killgore* dissent, that inquiry into the competency of an independent executor who has been adjudged an incompetent in a separate proceeding[63] requires no examination by the probate court into the manner in which the executor settles the estate,[64] legislative intent is not compromised.

The majority opinion in *Killgore,* although following precedent in refus-

56. *See* Bell v. Still, 403 S.W.2d 353, 353 (Tex. 1966).

57. *See* Bell v. Still, 389 S.W.2d 605, 607 (Tex. Civ. App.—Waco 1965), *aff'd,* 403 S.W.2d 353 (Tex. 1966).

58. *See, e.g.,* Stanley v. Henderson, 139 Tex. 160, 164-65, 162 S.W.2d 95, 97-98 (1942); Metting v. Metting, 431 S.W.2d 906, 908 (Tex. Civ. App.—San Antonio 1968, no writ); O'Connor v. O'Connor, 320 S.W.2d 384, 389 (Tex. Civ. App.—Dallas 1959, writ dism'd); *cf.* TEX. REV. CIV. STAT. ANN. art. 2293 (Vernon 1971)(receivership available as action between partners or others jointly interested in property or fund when danger of injury proven).

59. O'Connor v. O'Connor, 320 S.W.2d 384, 391 (Tex. Civ. App.—Dallas 1959, writ dism'd).

60. *See* Killgore v. Estate of Killgore, 568 S.W.2d 182, 183 (Tex. Civ. App.—San Antonio 1978, no writ); Bell v. Still, 389 S.W.2d 605, 607 (Tex. Civ. App.—Waco 1965), *aff'd,* 403 S.W.2d 353 (Tex. 1966).

61. *See* Killgore v. Estate of Killgore, 568 S.W.2d 182, 185-86 (Tex. Civ. App.—San Antonio 1978, no writ)(Cadena, C.J., dissenting).

62. O'Connor v. O'Connor, 320 S.W.2d 384, 391 (Tex. Civ. App.—Dallas 1959, writ dism'd); *see* Metting v. Metting, 431 S.W.2d 906, 908 (Tex. Civ. App.—San Antonio 1968, no writ).

63. Approximately three and one-half months prior to Read Killgore's appointment as independent executor of the estate he had been adjudged non compos mentis. *See* Killgore v. Estate of Killgore, 568 S.W.2d 182, 182 (Tex. Civ. App.—San Antonio 1978, no writ). Under the Probate Code, Killgore was disqualified from serving as an independent executor prior to his appointment. *See* TEX. PROB. CODE ANN. § 78 (Vernon Supp. 1978-1979).

64. *See* Killgore v. Estate of Killgore, 568 S.W.2d 182, 186 (Tex. Civ. App.—San Antonio 1978, no writ)(Cadena, C.J., dissenting).

ing to permit affirmative inquiry into the handling of the estate,[65] failed to consider the ramifications of allowing one adjudged incompetent to independently administer an estate.[66] Persons non compos mentis are mentally and legally incompetent to manage their property or financial affairs;[67] they must be incompetent therefore to manage the affairs of another by serving as an executor.[68] Several jurisdictions, including Texas, have concluded that one who is incompetent lacks the ability to transact business,[69] or contract.[70] The intent of a testator who appoints a "trustee" to "manage" the affairs of his estate is not given effect when that person is allowed to transact business which he is not legally competent to perform,[71] particularly when the Probate Code specifically states that incompetents are not capable of managing their own affairs or transacting business.[72]

The Texas legislature could easily lift a burden from the state courts by expressly providing for the removal of independent executors who are not mentally competent to manage the affairs of the estate.[73] The legislature of the state of Washington, with a probate code which reflects a concept of independent administration akin to that of Texas,[74] has provided statu-

65. *See, e.g.*, Corpus Christi Bank & Trust v. Alice Nat'l Bank, 444 S.W.2d 632, 634 (Tex. 1969); Roy v. Whitaker, 92 Tex. 346, 355, 48 S.W. 892, 896 (1898), *modified*, 92 Tex. 357, 49 S.W. 367 (1899); Bell v. Still, 389 S.W.2d 605, 607 (Tex. Civ. App.—Waco 1965), *aff'd*, 403 S.W.2d 353 (Tex. 1966).

66. *See* Killgore v. Estate of Killgore, 568 S.W.2d 182, 187 (Tex. Civ. App.—San Antonio 1978, no writ)(Cadena, C.J., dissenting).

67. TEX. PROB. CODE ANN. § 3(y)(Vernon 1956). *See also* Judd v. Aiken, 497 S.W.2d 632, 634 (Tex. Civ. App.—Eastland 1973, writ ref'd n.r.e.); Lowery v. Lowery, 386 S.W.2d 194, 197 (Tex. Civ. App.—Tyler 1965, no writ).

68. *See* TEX. PROB. CODE ANN. § 78(b)(Vernon Supp. 1978-1979).

69. *See, e.g.*, Delafield v. Parish, 25 N.Y. 9, 103 (1862); *In re* Prince's Guardianship, 379 P.2d 845, 847 (Okla. 1963); Lowery v. Lowery, 386 S.W.2d 194, 197 (Tex. Civ. App.—Tyler 1965, no writ); Rattner v. Kleiman, 36 S.W.2d 249, 250 (Tex. Civ. App.—San Antonio 1931, no writ).

70. *See, e.g.*, Metropolitan Life Ins. v. Bramlett, 140 So. 752, 754 (Ala. 1932); *In re* Easton, 133 A.2d 441, 447 (Md. 1957); Manufacturers Trust Co. v. Podvin, 89 A.2d 672, 676 (N.J. 1952). In Texas, the contracts of an incompetent are voidable. *See, e.g.*, Williams v. Sapieha, 94 Tex. 430, 436, 61 S.W. 115, 118 (1901); Gaston v. Copeland, 335 S.W.2d 406, 409 (Tex. Civ. App.—Amarillo 1960, writ ref'd n.r.e.); Neal v. Holt, 69 S.W.2d 603, 608 (Tex. Civ. App.—Texarkana 1934, writ ref'd). *See generally* RESTATEMENT (SECOND) OF CONTRACTS §18(c) (1973).

71. *See* TEX. PROB. CODE ANN. § 78(b) (Vernon Supp. 1978-1979). *Compare* Roy v. Whitaker, 92 Tex. 346, 356, 48 S.W. 892, 897 (1898), *modified*, 92 Tex. 357, 49 S.W. 67 (1899) (independent executor serves as trustee of his testator) *with* Killgore v. Estate of Killgore, 568 S.W.2d 182, 187 (Tex. Civ. App.—San Antonio 1978, no writ) (Cadena, C.J., dissenting) (incompetent independent executor lacks legal capacity to serve).

72. *See* TEX. PROB. CODE ANN. § 3(y) (Vernon 1956).

73. *Cf.* Bell v. Still, 403 S.W.2d 353, 353 (Tex. 1966) (probate court intervention is matter properly within control of legislature). *See generally* Comment, *Removal of Independent Executors in Texas*, 8 HOUS. L. REV. 895 (1971); 45 TEXAS L. REV. 352, 352-54 (1966).

74. *Compare* TEX. PROB. CODE ANN. § 145 (Vernon Supp. 1978-1979) (estate may be represented by independent executor) *with* WASH. REV. CODE ANN. § 11.68.010 (Supp. 1977)

tory authority for the removal of an administrator who has later been adjudged incompetent.[75] Texas legislators enacted section 78 to prevent incompetents from assuming the role of an independent executor;[76] however, they have failed to provide a provision which allows the probate court to remove incompetent independent executors once appointed.[77] Perhaps the Washington legislators had the foresight to realize that a bonding procedure, even if a bonding company was willing to assume such a risk with an incompetent individual, would not provide any appreciable measure of protection to the legatees,[78] thus leaving a wrong without a remedy.

It is curious that courts have continued to insist on a bonding procedure before allowing a probate court to remove an independent executor. Bonding is an inadequate procedure even for a competent independent executor. Once the bond is given the independent executor can continue to misuse funds or delay the settlement of the estate for his own purposes[79] with the probate court powerless to impose any further sanctions upon the self-dealing independent executor.[80] Even less protection is provided for the legatees of an estate when the executor is incompetent, since no responsible bonding company, under the dictates of common sense, would ever assume substantial financial risk for an incompetent.[81] Although a failure on the part of the independent executor to obtain a bond will enable the probate court to remove him, it places the legatees in the hazardous position of being forced to pursue the independent executor through the process, while the estate may be severely depleted in the meantime.[82] Texas

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(estate may be represented by "administration under a non-intervention will"). *See generally* Fletcher, *Washington's Non-Intervention Executor—Starting Point for Probate Simplification*, 41 WASH. L. REV. 33 (1966); *see also* 45 TEXAS L. REV. 352, 352 (1966).

75. WASH. REV. CODE ANN. § 11.28.250 (1967) states, "Whenever the court has reason to believe that any personal representative . . . is incompetent to act . . . it shall have power and authority, after notice and hearing to revoke such letters."

76. *See* TEX. PROB. CODE ANN. § 78(b) (Vernon Supp. 1978-1979). The San Antonio Court of Civil Appeals did not address the fact that Read Killgore was incompetent prior to his appointment as independent executor, and therefore did not discuss the effect of section 78(b). *See* Killgore v. Estate of Killgore, 568 S.W.2d 182, 183 (Tex. Civ. App.—San Antonio 1978, no writ).

77. *Cf.* Killgore v. Estate of Killgore, 568 S.W.2d 182, 183 (Tex. Civ. App.—San Antonio 1978, no writ) (jurisdiction to remove independent executor must come from legislature); Bell v. Still, 403 S.W.2d 353, 353 (Tex. 1966) (legislature must authorize removal).

78. *See* Killgore v. Estate of Killgore, 568 S.W.2d 182, 187 (Tex. Civ. App.—San Antonio 1978, no writ) (Cadena, C.J., dissenting); 45 TEXAS L. REV. 352, 356 (1966). *See generally* Comment, *Removal of Independent Executors in Texas*, 8 HOUS. L. REV. 895, 905-09 (1971).

79. *See* 45 TEXAS L. REV. 352, 356 nn. 33 & 34 (1966). *See generally* Comment, *Self Dealing by Fiduciaries—A Texas Survey*, 39 TEXAS L. REV. 330, 331-32 (1961).

80. *See* Corpus Christi Bank & Trust v. Alice Nat'l Bank, 444 S.W.2d 632, 636 (Tex. 1969); Bell v. Still, 389 S.W.2d 605, 607 (Tex. Civ. App.—Waco 1965), *aff'd*, 403 S.W.2d 353 (Tex. 1966).

81. *Cf.* Killgore v. Estate of Killgore, 568 S.W.2d 182, 187 (Tex. Civ. App.—San Antonio 1978, no writ) (Cadena, C.J., dissenting). *See generally* Comment, *Removal of Independent Executors in Texas*, 8 HOUS. L. REV. 895, 905-09 (1971).

82. *See* 45 TEXAS L. REV. 352, 356. *See generally* Comment, *Removal of Independent*

legislators could end this meaningless process by enacting a statute which would allow Texas probate courts to extend protection to estates in the hands of an incompetent independent executor.[83]

Although it is clear that the majority opinion in *Killgore* was founded on the court's reluctance to diverge from prior case law and its perception of legislative intent,[84] the rights of testators in Texas may have been seriously damaged. A testator who places his confidence in an individual whom he expects will serve his interests after his death most likely assumes that individual will remain competent throughout the distribution of the estate. While the testator has no need of a remedy from the courts should his independent executor become incompetent, the legatees certainly do. The testator has trusted that his independent executor will properly manage the affairs of the estate as the latter sees fit;[85] he must certainly have assumed that his executor would have the competence to determine what must be settled.[86] *Bell* gave a competent independent executor discretion to make mistakes, since the testator apparently had sufficient confidence in the executor's abilities. *Killgore* gives free rein to an incompetent.[87]

Killgore v. Estate of Killgore dramatizes the need for the legislature to decide whether it is fair to the citizens of Texas to allow an independent executor who has been adjudged incompetent after the testator's death, to remain at the helm of the estate. With the added weight of *Killgore*, it should be evident to the legislature that Texas courts will not extend the authority of the probate courts beyond the strict letter of the law.[88] It is necessary now, therefore, for the legislature to clearly express its intent and to define the "spirit" of that law. The probate court should have the

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Executors in Texas, 8 HOUS. L. REV. 895, 905-09 (1971).

83. *Cf.* WASH. REV. CODE ANN. § 11.28.250 (1967) (courts may remove personal representative who is incompetent). The Texas courts have expressed deference to the legislature in this matter. *See* Bell v. Still, 403 S.W.2d 353, 353 (Tex. 1966) (legislature should resolve removal of an independent executor); Killgore v. Estate of Killgore, 568 S.W.2d 182, 183 (Tex. Civ. App.—San Antonio 1978, no writ) (legislature must resolve "doubtful wisdom" of policy prohibiting removal of incompetent independent executor). *But cf.* Fletcher, *Washington's Non-Intervention Executor—Starting Point for Probate Simplification*, 41 WASH. L. REV. 33, 74-92 (1966) (Washington courts have retained too much authority to interfere in "administration under a non-intervention will").

84. *See* Killgore v. Estate of Killgore, 568 S.W.2d 182, 183 (Tex. Civ. App.—San Antonio 1978, no writ).

85. *Compare* Roy v. Whitaker, 92 Tex. 346, 356, 48 S.W. 892, 897 (1898), *modified*, 92 Tex. 357, 49 S.W. 367 (1899) (independent executor is trustee of his testator) *with In re* Leland's Will, 114 N.E. 854, 856 (N.Y. 1916) (incompetent executor summarily denied letters testamentary for inability to fulfill trust).

86. *Cf.* Roy v. Whitaker, 92 Tex. 346, 355, 48 S.W. 892, 896 (1898), *modified*, 92 Tex. 357, 49 S.W. 367 (1899) (describing legal authority of independent executor to settle various matters of estate).

87. *See* Killgore v. Estate of Killgore, 568 S.W.2d 182, 183 (Tex. Civ. App.—San Antonio 1978, no writ).

88. *See id.* at 184; Bell v. Still, 403 S.W.2d 353, 353 (Tex. 1966).