St. Mary's Law Journal

Volume 44 | Number 1 Article 4

1-1-2012

Removal of Independent Executors: Examining the Standard in Texas after the Addition of Material Conflict of Interest to Section 149C of the Texas Probate Code.

Elizabeth R. Kopecki

Follow this and additional works at: https://commons.stmarytx.edu/thestmaryslawjournal

Part of the Environmental Law Commons, Health Law and Policy Commons, Immigration Law Commons, Jurisprudence Commons, Law and Society Commons, Legal Ethics and Professional Responsibility Commons, Military, War, and Peace Commons, Oil, Gas, and Mineral Law Commons, and the State and Local Government Law Commons

Recommended Citation

Elizabeth R. Kopecki, *Removal of Independent Executors: Examining the Standard in Texas after the Addition of Material Conflict of Interest to Section 149C of the Texas Probate Code.*, 44 St. Mary's L.J. (2012).
Available at: https://commons.stmarytx.edu/thestmaryslawjournal/vol44/iss1/4

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact egoode@stmarytx.edu, sfowler@stmarytx.edu.

COMMENT

REMOVAL OF INDEPENDENT EXECUTORS: EXAMINING THE STANDARD IN TEXAS AFTER THE ADDITION OF "MATERIAL CONFLICT OF INTEREST" TO SECTION 149C OF THE TEXAS PROBATE CODE

ELIZABETH R. KOPECKI*

I. Introduction 282
II. History of Independent Executors in Texas 284
- A. Removal Power of Texas Probate Courts Prior to the 1979 Adoption of Section 149C 287
- B. Court Authority to Remove Independent Executors After the Adoption of Section 149C 288

III. Introduction of Material Conflict of Interest to the Removal Process 292
- A. Conflicts of Interest in Other Jurisdictions 295
- B. When Does a Conflict of Interest Become Material? 299
- C. Problems Created for Courts Attempting to Honor a Testator's Intent in Texas 302
- D. Possible Benefits of the Recent Amendment 305

IV. Analysis 307

* The author would like to thank Katherine L. Chapman, Attorney at Law, for suggesting this topic. She would also like to thank her parents for their continued support and encouragement throughout her education.

Published by Digital Commons at St. Mary's University, 2012

St. Mary's Law Journal, Vol. 44 [2012], No. 1, Art. 4

A. Conflicts of Interest Under Section 78 of the Texas Probate Code . . . 310
B. Removal Under Section 149C of the Texas Probate Code . 312
V. Solution . . . 314
VI. Conclusion . . . 315

I. INTRODUCTION

The State of Texas allows independent executors to operate with minimal court supervision so executors can administer an estate with as little cost and delay as possible.[1] Executors, from time to time, abuse the limited court supervision and fail to manage estates appropriately. Fortunately, there are several particular circumstances enumerated in section 149C of the Texas Probate Code[2] that allow courts to step in and remove executors who would otherwise cause injury to an estate and its beneficiaries.[3] These enumerated grounds for removal facilitate the effective administration of estates in Texas by authorizing courts to remove executors who are not acting in the best interests of an estate.[4] However, each additional ground for removal under section 149C increases a beneficiary's ability to challenge the actions of an executor and consequently delays settlement of an estate.[5]

Since the adoption of section 149C to the Texas Probate Code in 1979, the grounds for removal have remained relatively specific.[6] Recently, however, the legislature added another ground for removal: "material

1. *See* Kappus v. Kappus, 284 S.W.3d 831, 837 (Tex. 2009) (emphasizing the importance of an independent executor acting with minimal judicial supervision to ensure the cost and delay of the probate process is kept under control (citing Corpus Christi Bank & Trust v. Alice Nat'l Bank, 444 S.W.2d 632, 634 (Tex. 1969)).

2. TEX. PROB. CODE ANN. § 149C (West 2003 & Supp. 2011).

3. *See id.* (providing courts with authority to remove an executor who fails to file an inventory within ninety days after becoming qualified; misapplies or embezzles estate property; fails to file an accounting; fails to timely file notice as required under Section 128A; is guilty of gross misconduct while performing executive duties or of gross mismanagement of the estate; becomes incapacitated; is sentenced to a penitentiary; or if there is "a material conflict of interest").

4. *See, e.g.*, Gross v. Needham, 7 Cal. Rptr. 664, 673–74 (Dist. Ct. App. 1960) (affirming the removal of an administrator based on his failure to render a proper accounting).

5. *See, e.g.*, *In re* Estate of Casida, 13 S.W.3d 519, 524 (Tex. App.—Beaumont 2000, no pet.) (discussing the beneficiary's attempts to remove the executor, but refusing to grant removal based on the mere dissatisfaction of the beneficiary).

6. *See* PROB. § 149C (West 2003) (listing the grounds for removing an independent executor).

Kopecki: Removal of Independent Executors: Examining the Standard in Texas

conflict of interest."[7] Arguably, this addition to section 149C will open the door to litigation because precisely what circumstances may give rise to a material conflict are not yet defined.[8] Fortunately, courts outside of Texas have considered conflicts of interest in suits brought for the removal of executors and disqualification of administrators for several years now.[9] Though no bright-line rule exists, there is precedent that Texas courts can rely on to determine the existence of a material conflict.[10] However, the legislature can reduce the superfluous litigation this amendment will inevitably create by removing the material conflict of interest provision from section 149C. Alternatively, the legislature should add another section to the probate code that clearly defines the situations that give rise to a material conflict.

This Comment will address the issue as follows: Examined first will be section 149C safeguards prior to the material conflict of interest amendment. Next, the amendment will be considered along with the possible consequences and benefits of providing courts with another tool to remove an executor. This Comment will conclude with the proposal that the material conflict of interest provision be either removed from section 149C, or refined with a new section to fulfill the goals of the Texas probate system better.[11]

---

7. *See id.* § 149C(a)(7) (West Supp. 2011) (adding material conflict of interest as a ground for removing an independent executor).

8. *See* STANLEY M. JOHANSON, JOHANSON'S TEX. PROB. CODE ANN. cmt. at 247 (2011) (arguing that the amendment to section 149C "is a litigation-breeding statute with no hope of a fine-tuning legislative fix as to what might constitute a 'material' conflict").

9. *See, e.g.*, Wardlaw v. Huff, 376 S.E.2d 366, 368 (Ga. 1989) (asserting that an executor may be subject to removal when his or her personal interests conflict with the interests of the estate, and the lower court did not abuse its discretion in removing an executor who claimed that estate property belonged to her to the exclusion of the estate).

10. *E.g.*, *In re* Estate of Kuhn, 231 N.E.2d 97, 102 (Ill. App. Ct. 1967) ("[W]e agree with the conclusions reached in most of those cases [decided in other jurisdictions]; namely, that where an executor's personal interests are so conflicting with and adverse to the interests of the estate that both such interests cannot fairly be represented by the same person, he may be removed as such executor.").

11. *See* Cunningham v. Parkdale Bank, 660 S.W.2d 810, 812 n.1 (Tex. 1983) (quoting Corpus Christi Bank & Trust v. Alice Nat'l Bank, 444 S.W.2d 632, 634 (Tex. 1969)) (describing the purposes of independent administrations: to decrease cost and delay through minimal court supervision).

Published by Digital Commons at St. Mary's University, 2012

St. Mary's Law Journal, Vol. 44 [2012], No. 1, Art. 4

II. HISTORY OF INDEPENDENT EXECUTORS IN TEXAS

Texas led the nation by being the first state[12] to implement a system of independently administered estates.[13] Over the years, this system has become a well-established part of the Texas Probate Code,[14] empowering independent executors with broad discretion when managing the estates under their control.[15] Accordingly, a testator's ability to select his or her own independent executor is an integral part of the Texas Probate Code.[16] When an executor offers a will for probate within the statutory period, and the court accepts the will to probate, the court does not have any discretion to refuse to issue letters to the named executor[17] unless the individual is a minor,[18] incompetent,[19] or section 78 of the Texas Probate Code disqualifies the executor.[20]

---

12. "In 1843 the Seventh Congress of the Republic of Texas authorized a testator to provide in his will 'that no other action than the probate and registration of the will shall be had in the Probate Courts.'" William I. Marschall, Jr., Comment, *Independent Administration of Decedents' Estates*, 33 TEX. L. REV. 95, 97 (1954) (quoting Act effective Jan. 1, 1956, 54th Leg., R.S., ch. 55, 1955 Tex. Gen. Laws 88, *amended by* Act effective Aug. 22, 1957, 55th Leg., R.S., ch. 31, § 2(a), 1957 Tex. Gen. Laws 53). Texas enacted the Probate Code in 1956, codifying the right to independent administrations in Texas. *In re* Estate of Roots, 596 S.W.2d 240, 243 (Tex. Civ. App.—Amarillo 1980, no writ). Before the enactment of the February 5, 1840 statute, Texas did not have a general probate code. Joseph Webb McKnight, *The Spanish Influence on the Texas Law of Civil Procedure*, 38 TEX. L. REV. 24, 45 (1959). Spanish laws use of the universal executor may have inspired the rise of independent administrators in Texas. *Id.* at 46. However, independent executors may have resulted from other sources of extrajudicial settlement of estates used in Spanish law. *Id.* at 49–50. Though it is uncertain where the inspiration truly originated, the system of independent administrations is undoubtedly an integral part of the probate system in Texas.

13. Paul E. Basye, *Streamlining Administration Under the New Texas Probate Code*, 35 TEX. L. REV. 165, 181 (1956) (citing Act effective Jan. 1, 1956, 54th Leg., R.S., ch. 55, 1955 Tex. Gen. Laws 88, *amended by* Act effective Aug. 22, 1957, 55th Leg., R.S., ch. 31, § 2(a), 1957 Tex. Gen. Laws 53). The purpose of independent administrations in Texas is to moderate the guidance and restraint placed on estates by the judicial system. *Id.* at 182. Probate courts are still required to provide some supervision over estates in the probate system, but the level of supervision required of courts in Texas is significantly less than in other states. *Id.* Further, the Texas probate system provided guidance to other states seeking to reduce the costs of estate administration. For example, twenty-five years after Texas developed its system of independent administrations, Washington followed by developing an "administration under a nonintervention will." *See* David Patterson Smith, Note, *Fiduciary Administration—Administration of Estates*, 45 TEX. L. REV. 352, 352 (1966) (quoting 1868 Wash. Sess. Laws 49) (describing Washington's system of independent administrations).

14. *See* TEX PROB. CODE ANN. §§ 145–154A (West 2003 & Supp. 2011) (providing the rules for independent administrations).

15. *See* Roy v. Whitaker, 92 Tex. 346, 48 S.W. 892, 897 (Tex. 1898) (stating "[a]ll executorships are personal trusts, in the sense that they are based upon the confidence of the testator reposed in the person named"). The public policy in Texas favors independent administrations. *See* Lee v. Lee, 47 S.W.3d 767, 795 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (discussing the public policy in Texas). In *Lee v. Lee*, the Houston Court of Appeals sought to balance the interests of the beneficiaries with the need to preserve the power of an independent executor to exercise discretion in the settlement of the estate. *Id.* The court explained the importance of allowing an executor to

An independent administration allows an independent executor to settle an estate without constantly reporting to the probate court.[21] Generally, the only interactions an independent executor has with the court are the filing of the initial application to probate the will, the hearing held to admit

---

maintain a level of discretion in making decisions regarding the estate property without constantly reporting to the beneficiaries. *Id.* By allowing beneficiaries to seek removal based on alleged conflicts of interest, the system may effectively "thwart the will of the testator" in choosing his or her own executor. Brief for Petitioner at 18, *In re* Roy, 249 S.W.3d 592 (Tex. App.—Waco 2008, pet. denied) (No. 08-0338). However, Texas courts recognize the need to place some restraints on the powers of independent executors in order to protect the rights of beneficiaries. For example, the Fourth Court of Appeals stated that:

> While he takes charge of and administers the estate of his testator without action of the county court in relation to the settlement of the estate, and may do, without an order, every act which an executor administering an estate under the control of the court may do with such order, he is uncontrolled, uninformed, unchecked, and untrammeled by orders of the court directing, informing, or commanding what he shall do in the management and administration of the estate. He is an executor at large, exercising his own judgment and discretion, acting and doing what he pleases, unless brought to account for his actions by [someone] interested in the estate or affected by the way it is being administered—he is an independent executor.

Altgelt v. Mernitz, 37 Tex. Civ. App. 397, 83 S.W. 891, 894 (Tex. Civ. App.—San Antonio 1904, no writ). While it is true that an executor requires some court supervision, the courts should design the supervision to protect against the actual misconduct of the executor, not mere allegations made by unsatisfied beneficiaries. *See In re* Estate of Casida, 13 S.W.3d 519, 524 (Tex. App.—Beaumont 2000, no pet.) (refusing to permit mere allegations of a dissatisfied beneficiary to form the basis for removing the executor).

16. *See* PROB. § 145 (West 2003) (illustrating several instances when an independent administration may be created and adding that "[a]ny person capable of making a will may provide . . . that no other action shall be had in the county court in relation to the settlement of his estate than the probating and recording of his will"); Boyles v. Gresham, 158 Tex. 158, 309 S.W.2d 50, 53 (Tex. 1958) ("The power and right of a testator to select his own independent executor had become well fixed in the Texas law."); *see also* Higginbotham v. Alexander Trust Estate, 129 S.W.2d 352, 356 (Tex. Civ. App.—Eastland 1939, writ ref'd) (describing the "absolute power in the testator to select his own [estate] representative"). The trend in recent years is toward a more expansive use of independent administrations of estates; however, there is another trend developing to increase the restrictions on independent executors. Jack M. Kinnebrew & Deborah Cox Morgan, *Community Property Division at Death*, 39 BAYLOR L. REV. 1035, 1068 (1987).

17. *See* PROB. § 3(aa) (West 2003) (detailing that courts are not to control the actions of an independent executor unless expressly permitted by law).

18. *See* Alford v. Alford, 601 S.W.2d 408, 410 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ) (specifying the limited discretionary power of a court to refuse issuance of letters testamentary).

19. *Id.* ("[T]he court has no discretionary power to refuse to issue letters to the named executor unless he is a minor, an incompetent, or otherwise disqualified under the provisions of [s]ection 78 [of the] Texas Probate Code.").

20. PROB. § 78 (West 2003); *see also Alford*, 601 S.W.2d at 410 (enumerating the instances when a court may refuse to issue letters testamentary).

21. *See* Cunningham v. Parkdale Bank, 660 S.W.2d 810, 812 n.1 (Tex. 1983) (quoting Corpus Christi Bank & Trust v. Alice Nat'l Bank, 444 S.W.2d 632, 634 (Tex. 1969)) (explaining that independent administrations are intended to decrease cost and delay through minimal court supervision).

St. Mary's Law Journal, Vol. 44 [2012], No. 1, Art. 4

the will to probate, and filing an inventory, appraisement, and list of claims by and against the estate.[22] An independent executor has the authority to act without court supervision in situations where a dependent administrator would be required to obtain court approval prior to taking such action.[23] A Texas probate court cannot interfere with an independent executor's settlement of an estate unless explicitly allowed by the probate code.[24]

The two most important purposes of the independent administration of estates in Texas are to reduce the cost and time spent settling estates, and to encourage the use of the probate system.[25] In light of these purposes,[26] the addition of the material conflict of interest provision to the statutory grounds for removal of an independent executor takes a large step away from the deeply rooted goals of the Texas probate system[27] and

---

22. *See, e.g.*, M. K. Woodward, *Some Developments in the Law of Independent Administrations*, 37 TEX. L. REV. 828, 829–30 (1959) (opining that although independent executors are required to interact with the court for certain limited purposes, these interactions do not grant the court *control* over the independent administrator).

23. *See id.* at 829 (describing independent executors as individuals who "may do, without an order, every act which an executor administering an estate under the control of the court may do with such order").

24. *See* PROB. § 3 (aa) (West 2003) ("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.").

25. *See* Burke v. Satterfield, 525 S.W.2d 950, 955 (Tex. 1975) (discussing the attributes of section 145 of the Texas Probate Code and its effective reduction of cost and delay); *see also Corpus Christi Bank & Trust*, 444 S.W.2d at 634 (describing the first independent administration act in Texas and its purpose of reducing the costs associated with the settlement of an estate). Section 145 further provides that there shall be no further action in the county court once the court appoints an independent executor except in the instances explicitly stated in the Texas Probate Code. PROB. § 145(h) (West 2003). The Texas Supreme Court strictly interprets section 145. *See, e.g.*, D'Unger v. De Pena, 931 S.W.2d 533, 534 (Tex. 1996) (holding the probate court abused its discretion in applying section 221(d) of the Texas Probate Code to the independent executor because this section is not specifically made applicable to independent executors); Bunting v. Pearson, 430 S.W.2d 470, 473 (Tex. 1968) (stating the purpose of section 145 is to "free the independent executor from the control of the court" and only those sections which are explicitly applicable to independent executors will permit court action) (internal quotation marks omitted).

26. *See* Paul E. Basye, *Streamlining Administration Under the New Texas Probate Code*, 35 TEX. L. REV. 165, 183 (1956) (outlining the purpose of the independent administration of estates is to simplify the process "without subjecting creditors and beneficiaries to undue risk" and emphasizing the ability of any lawyer in Texas to say that the system works in practice); Michael Hatfield, *Pro Se Executors—Unauthorized Practice of Law, or Not?*, 59 BAYLOR L. REV. 329, 333–34 (2007) ("While the expenses and complications of probate systems elsewhere sustain substantial probate avoidance planning, Texans have never had the same generalized need to avoid probate. Indeed, . . . the Texas probate system is 'much different and typically much simpler' than other systems . . . .") (footnotes omitted).

27. The main purpose of the independent administration of estates is to decrease cost and delay by enabling the independent executor to act without judicial approval. Cunningham v. Parkdale

a step towards the more complex and time-consuming systems prevalent in other jurisdictions.[28]

A. *Removal Power of Texas Probate Courts Prior to the 1979 Adoption of Section 149C*

Immediately after Texas established independent executors, courts did not have any statutory removal power.[29] Instead, courts used the bond procedure to deal with the mismanagement of an estate.[30] Under the bond procedure, a creditor or heir could file a motion that would require an executor to post bond in an amount equal to double the value of the estate in order to continue representing the estate.[31] After the court entered a bond order, the executor had ten days to either raise the funds or be subject to removal.[32]

The Texas legislature codified the state's probate laws in 1955, and they became effective January 1, 1956.[33] At that time, the Texas Probate Code

---

Bank, 660 S.W.2d 810, 812 n.1 (Tex. 1983) (quoting *Corpus Christi Bank & Trust*, 444 S.W.2d at 634). Furthermore, there are many benefits associated with having a will and naming the person who will oversee the settlement of the estate. *E.g.*, *To Will or Not to Will*, 71 TEX. B.J. 944, 945 (2008) (listing the benefits of having a will, including the ability to name an executor and the ability to minimize the costs of probate by designating that the estate go through independent administration). These benefits begin to lose their appeal when courts step in to supervise the administration of the estate.

28. *See, e.g.*, Charles Scott, *Estate Planning Fundamentals: Practical Challenges & Perspectives*, *in* ESTATE PLANNING CLIENT STRATEGIES: LEADING LAWYERS ON UNDERSTANDING THE CLIENT'S GOALS, USING TRUSTS EFFECTIVELY, AND PLANNING IN A CHANGING ECONOMIC CLIMATE 109, 118 (2009) (explaining the slow and expensive probate system in California).

29. *See* David Patterson Smith, Note, *Fiduciary Administration—Administration of Estates*, 45 TEX. L. REV. 352, 353 (1966) (limiting a court's power of removal to the bond process). In fact, courts did not gain the statutory power to remove an independent executor until the adoption of section 149C in 1979. *See* Roy v. Whitaker, 92 Tex. 346, 48 S.W. 892, 896 (Tex. 1898) (explaining that an independent executor has the power to do all acts necessary for the settlement of an estate without court supervision and the court may not interfere in matters concerning the settlement of an estate, including payment of debts and the distribution of an estate's property); McDonough v. Cross, 40 Tex. 251, 280 (1873) ("[T]he executor, when authorized to administer . . . estates independently of the supervision . . . of the court, and where there are no terms of restriction upon his authority contained in the will, may do whatever is necessary for the . . . settlement of the estate . . . ."); Hutcherson v. Hutcherson, 135 S.W.2d 757, 758 (Tex. Civ. App.—Galveston 1939, writ ref'd.) ("[The administrator] is by the terms of the will vested with unbridled authority over the estate and is authorized to do any act respecting it which the court could authorize . . . or whatever [the] testator himself could have done in his lifetime . . . ."). Note that these cases were superseded by the adoption of section 149C.

30. David Patterson Smith, Note, *Fiduciary Administration—Administration of Estates*, 45 TEX. L. REV. 352, 353 (1966).

31. *Id.*

32. *Id.*

33. *See* TEX. PROB. CODE ANN. § 2(a) (West 2003) ("This Code shall take effect and be in force on and after January 1, 1956.").

provided probate courts with the power to remove personal representatives; the term "personal representative" was originally defined to include independent executors.[34] However, two years later the legislature amended this section to exclude independent executors from probate court control except under explicit circumstances outlined in the probate code.[35] As a result, probate courts today are unable to exercise any control over independent executors unless specifically authorized by the probate code.[36]

B. *Court Authority to Remove Independent Executors After the Adoption of Section 149C*

The Texas Probate Code added section 149C in 1979.[37] At that time, critics of the removal power argued it would subject independent executors to constant litigation when beneficiaries did not agree with the executor's actions.[38] Furthermore, critics argued that granting such power to the courts was contrary to the public policy in Texas of permitting

34. Act effective Jan. 1, 1956, 54th Leg., R.S., ch. 55, 1955 Tex. Gen. Laws 88, *amended by* Act effective Aug. 22, 1957, 55th Leg., R.S., ch. 31, § 2(a), 1957 Tex. Gen. Laws 53.

35. *Id.* Further, the legislature amended section 145 to provide that no additional action would be acceptable in the probate court beyond the basic formalities required to settle the estate, except as specifically provided in the code. *Id.* Courts interpreting these two amendments determined that the legislature did not intend to expand probate court control over independent executors. *See, e.g.*, Bell v. Still, 403 S.W.2d 353, 353 (Tex. 1966) (suggesting that a probate court does not have authority to remove an independent executor for mismanagement of an estate). Note, however, the court decided *Bell* prior to the adoption of section 149C to the Texas Probate Code.

36. *See* PROB. § 3(aa) (West 2003) (specifying that a court may not exercise control over an independent executor unless expressly permitted to do so under Texas law).

37. Describing the adoption of section 149C, the Austin Court of Appeals stated:

> Section 149C, patterned after an analogous section of the Uniform Probate Code, was added to the Texas Probate Code in 1979. It resulted from the [l]egislature's decision that even [independent] executors should be subject to removal by a court for "gross mismanagement" or "gross misconduct," notwithstanding the fact that the existence of the statutory remedy might defeat[,] to some extent[,] the purposes of independent administration as a speedier and less costly alternative to court-supervised administration.

Geeslin v. McElhenney, 788 S.W.2d 683, 684 (Tex. App.—Austin 1990, no writ) (citing *Bell*, 403 S.W.2d at 353).

38. *See* David Patterson Smith, Note, *Fiduciary Administration—Administration of Estates*, 45 TEX. L. REV. 352, 357 (1966) (acknowledging arguments made against removal power, but reasoning that it is likely heirs or creditors would not seek to remove an executor unless they had no other options available). Mr. Smith reasoned that removal would be a last resort for creditors and heirs because of the resulting delay and increased costs associated with the removal process. *Id.* Mr. Smith also argued that courts should have the power to remove independent executors in certain circumstances where the bond procedure is inadequate. *Id.* at 358.

independent executors to act without judicial supervision.[39] After the addition of section 149C, courts heard—and continue to hear—numerous suits brought to remove independent executors.[40] However, considering the conduct of the executors in most of these cases,[41] removal is often warranted, and the public policy in Texas has not suffered at the hands of section 149C.[42]

39. *See id.* at 357 (explaining the Texas legislature's decision to adopt a bond process instead of granting additional supervisory powers to the probate court). Mr. Smith believed that some court control may be necessary in light of the fiduciary duties imposed upon independent executors. *Id.* He asserted that because fiduciaries are "subject to judicial inspection" in all other areas of the law, independent executors should be subject to removal when they violate their fiduciary duties. *Id.* at 358. Generally, a court finds a fiduciary relationship when a person is in a position of confidence towards another. Robert J. Malinak, Comment, *Self Dealing by Fiduciaries—A Texas Survey*, 39 TEX. L. REV. 330, 330 (1961) (quoting Cartwright v. Minton, 318 S.W.2d 449, 453 (Tex. Civ. App.—Eastland 1958, writ ref'd n.r.e.)). When a court finds a fiduciary relationship, the fiduciary is obligated to act in good faith and with integrity and fidelity. *Id.* (quoting *Cartwright*, 318 S.W.2d at 453). Also, an executor owes a fiduciary duty to disclose all material facts known to him or her that could affect a beneficiary's rights. *See* Montgomery v. Kennedy, 669 S.W.2d 309, 312–13 (Tex. 1984) (determining that the executors breached their fiduciary duty to disclose when they did not inform the beneficiaries of an oil and gas lease and when they exercised an option without notifying the beneficiaries); *see also* Baird v. Mills, 119 S.W.2d 889, 892 (Tex. Civ. App.—Austin 1938, writ ref'd) (explaining that the administratrix failed to fulfill her duties, namely, the duty to disclose, when she actively sought to conceal information from the beneficiary). The Texas Supreme Court further explained the duty of disclosure in *Huie v. DeShazo* by explaining the attorney-client privilege may not limit the duty. Huie v. DeShazo, 922 S.W.2d 920, 923 (Tex. 1996). Thus, an executor may not get around the duty of disclosure by communicating the information to his or her attorney. *Id.*

40. *See* Sammons v. Elder, 940 S.W.2d 276, 283–84 (Tex. App.—Waco 1997, no writ) (refusing to remove executors because the complainant "failed to prove [that the executors] willfully omitted to perform a legal duty, intentionally committed a wrong act, and breached a fiduciary duty"); Street v. Skipper, 887 S.W.2d 78, 83 (Tex. App.—Fort Worth 1994, writ denied) (describing the conduct of an independent executor which led to the suit for removal); *In re* Estate of Canales, 837 S.W.2d 662, 668–69 (Tex. App.—San Antonio 1992, no writ) (overruling the argument that the trial court erred in failing to remove the executor because the issue was a question of fact and the evidence did not conclusively support removal); *In re* Estate of Minnick, 653 S.W.2d 503, 508 (Tex. App.—Amarillo 1983, no writ) (holding that the evidence was not sufficient to permit removal because, though there were assertions of misconduct, the evidence was "scant and disputed"). In *Sammons v. Elder*, the Waco Court of Appeals refused to remove the executor because the conflict was merely over how to divide the estate's property among the beneficiaries, which did not indicate a conflict between the personal interests of the executor and the interests of the estate sufficient to warrant removal. *Sammons*, 940 S.W.2d at 284. The court reasoned that these types of disputes regularly arise between executors and beneficiaries, so an executor cannot be subject to removal merely because he or she is also a beneficiary under the will. *Id.* Allowing such removal would "paralyze the independent administration of estates in Texas." *Id.*

41. *See, e.g.*, *Montgomery*, 609 S.W.2d at 312 (finding the administrator willfully and actively prevented beneficiaries from receiving material information about the estate).

42. *See In re* Estate of Miller, 243 S.W.3d 831, 841 n.2 (Tex. App.—Dallas 2008, no pet.) (affirming removal based on "a clear and gross breach of his fiduciary duties to the [e]state, and that all payments made by [the independent executor] to himself from the assets of the [e]state constitute gross mismanagement of the [e]state"); *Street*, 887 S.W.2d at 83 ("[S]he refused to sign the estate tax

Court supervision of estate administration should be limited to those estates that are exceedingly difficult to administer. However, not all conflicts of interest should be included in this class of "problematic estates."[43] Moreover, in a suit to remove an executor, the Texas Probate Code permits payment out of the estate for reasonable attorney's fees incurred by both parties.[44] Thus, it is exceedingly important that a beneficiary bring a suit for removal only when an executor has harmed or is likely to harm the assets of an estate.

The pre-amendment standards for removal under section 149C protected the interests of beneficiaries, and allowed courts to dismiss claims brought solely to harass independent executors;[45] however, under

---

return and retained the estate's portion of a $42,443 income tax refund for her own benefit. We believe the first constituted a willful omission to perform a legal duty . . . ."); *see also* Formby v. Bradley, 695 S.W.2d 782, 784–85 (Tex. App.—Tyler 1985, writ ref'd n.r.e.) (finding the evidence supported removal because the executor sold estate property without keeping a record of the sales and then deposited the money into her personal account); Hitt v. Dumitrov, 598 S.W.2d 355, 356 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ) (finding sufficient evidence to remove the independent executor because "[e]ach estate should have a representative that will assume the role of an advocate to achieve the best possible advantage for the estate") (internal quotation marks omitted). *But see* Lee v. Lee, 47 S.W.3d 767, 788–89 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (holding the trial court did not abuse its discretion in refusing to remove the independent executor despite the excessive fees charged, the long amount of time taken to fund the testamentary trusts, and a failure to properly handle estate property because removal is not mandatory—it is subject to the discretion of the trial court).

43. *But see* Michael Hatfield, *Pro Se Executors—Unauthorized Practice of Law, or Not?*, 59 BAYLOR L. REV. 329, 336 (2007) (stating that court-dependent administrations should only be utilized when a "problematic estate" is involved, and asserting that estates in which conflicts between beneficiaries and executors are expected fall within the class of problematic estates). A testator usually selects a spouse or a close family member to ensure that his or her last wishes regarding the distribution of estate property are carried out because these individuals are the only people the testator trusts to carry out the terms of the will. *E.g.*, Kappus v. Kappus, 284 S.W.3d 831, 837 (Tex. 2009) (emphasizing the importance of a testator's ability to select his or her own independent executor).

44. TEX. PROB. CODE ANN. § 149C(d) (West 2003 & Supp. 2011); *see also Sammons*, 940 S.W.2d at 284 (providing that the expenses incurred in the suit for removal may be paid out of the estate and the trial court's decision is subject to an abuse of discretion standard). The estate may also be liable for fees incurred by both sides so long as the independent executor defends the suit in good faith. Garcia v. Garcia, 878 S.W.2d 678, 681 (Tex. App.—Corpus Christi 1994, no writ); *see also* Charles Epps Ipock, Comment, *A Judicial and Economic Analysis of Attorney's Fees in Trust Litigation and the Resulting Inequitable Treatment of Trust Beneficiaries*, 43 St. Mary's L.J. 855, 885 n.179 (2012) (illustrating the legal and economic complexities of allowing an independent executor to recover his or her attorney's fee from the estate).

45. *See, e.g.*, *In re* Estate of Casida, 13 S.W.3d 519, 524 (Tex. App.—Beaumont 2000, no pet.) (noting that although the contestant made several allegations of conflicts of interest, he failed to prove willful neglect of a legal duty and the proceeding appeared to be "little more than [a] disagreement over the value of rights to and status of property of the estate"). However, under the amended version of section 149C, courts will be required to entertain more lawsuits, and the result may harm the public policy of Texas. Further, the court in *In re* Estate of Casida would likely have

section 149C, the enumerated means[46] for removing an independent executor are the only grounds for removal.[47] For example, a court may remove an independent executor under section 149C when the executor misapplies or embezzles estate property.[48] The Texas Supreme Court defined misapplication as "the improper or illegal use of funds or property lawfully held."[49] Furthermore, the supreme court elucidated that embezzlement occurs when a person fraudulently takes personal property entrusted to his or her care.[50] Under this standard, an executor is subject to removal based on his or her affirmative malfeasance.[51]

Another ground for removing an independent executor under section 149C exists when an executor is guilty of gross mismanagement or gross misconduct.[52] In *Kappus v. Kappus*,[53] the Texas Supreme Court explained that the legislature's use of the term "gross" indicates that something more than ordinary negligence is required before justifiably removing an executor.[54] The independent executor's actions must be flagrant or glaringly obvious to constitute gross misconduct.[55] Accordingly, this

reached a different result if decided under the material conflict of interest standard because of the conflict between the contestant and the executor.

46. PROB. § 149C (West 2003 & Supp. 2011). The list of grounds for removal includes misconduct or mismanagement of duties related to the estate, incapacitation, and imprisonment. *Id.* Additionally, section 149C lists failure to provide an accounting as grounds for removing an independent executor. *Id.* § 149C(a)(1) (West 2003). Section 149A of the Texas Probate Code also protects the right to an accounting, which allows any interested person to demand an accounting at any time following the expiration of fifteen months after the creation of the independent administration. *Id.* § 149A (West 2003).

47. *See Kappus*, 284 S.W.3d at 834–38 (explaining the removal process and the six specific grounds for removal listed under section 149C).

48. PROB. § 149C(a)(2) (West 2003 & Supp. 2011).

49. *Kappus*, 284 S.W.3d at 835 n.10.

50. *Id.* at 836 n.11.

51. *Id.* at 837.

52. PROB. § 149C(a)(5) (West 2003).

53. *Kappus*, 284 S.W.3d at 831.

54. *Id.* at 836.

55. *Id.* The Austin Court of Appeals provided three situations when an executor's conduct rises to the level of gross misconduct: "(1) any *willful* omission to perform a legal duty; (2) any *intentional* commission of a wrongful act; (3) any breach of a *fiduciary* duty . . . ." Geeslin v. McElhenney, 788 S.W.2d 683, 685 (Tex. App.—Austin 1990, no writ). Further, the Waco Court of Appeals noted that a probate court had the authority to remove an executor for misconduct that wastes estate property. Murphey v. Murphey, 131 S.W.2d 158, 162 (Tex. Civ. App.—Waco 1939, no writ). A probate court also has authority to remove an executor when doing so protects a remainder interest. *In re* Estate of Srubar, 728 S.W.2d 437, 439 (Tex. App.—Houston [1st Dist.] 1987, no writ). A court can remove an independent executor for a breach of fiduciary duty if the breach causes damage to the beneficiaries. *Geeslin*, 788 S.W.2d at 685. Though breach of fiduciary duty is not one of the grounds for removal listed under section 149C, courts consider this gross misconduct—which does warrant removal—if the breach causes damages to the beneficiaries. *See id.* ("[T]he statutory

standard also looks solely at the executor's actions. Prior to the 2011 amendment, the only ways to remove an independent executor were for affirmative malfeasance or legal incapacity;[56] after the 2011 amendment, executors will be subject to removal in situations that have nothing to do with their actions regarding the estate.

Under the section 78 suitability test, trial courts receive broad discretion to determine whether an individual is disqualified from serving their appointment.[57] The addition of material conflict of interest to section 149C is a legislative attempt to grant trial courts more discretion in deciding suits brought to remove independent executors. Instances inevitably arise in which removal of an independent executor is proper; however, the safeguards provided under the previous version of section 149C were sufficient to allow removal of the "rogue executor."[58]

III. INTRODUCTION OF MATERIAL CONFLICT OF INTEREST TO THE REMOVAL PROCESS

Conflicts of interest are not strangers to the probate system.[59] Courts in Texas have effectively dealt with the issue in the past and will inevitably continue to do so in the future.[60] For instance, in 2009 the Texas Supreme Court held the alleged conflict of interest of an independent executor did not constitute grounds for removal as a matter of law.[61]

---

criteria ('gross mismanagement' and 'gross misconduct') are necessarily elastic. They must be sufficiently narrow to exclude ordinary negligence, yet sufficiently broad to include a fiduciary's breach . . . .").

56. *See, e.g.*, *Kappus*, 284 S.W.3d at 837 ("The statute speaks of affirmative malfeasance, and an executor's mere assertion of a claim to estate property, or difference of opinion over the value of such property, does not warrant removal.").

57. *See* PROB. § 78(e) (West 2003) (allowing a court to disqualify an individual from representing an estate if the court finds this person unsuitable).

58. *See* Edward J. Patterson & Wesley L. Bowers, *Dealing With the Rogue Executor: A Page From the Fiduciary Litigation Playbook*, 48 ADVOC. 44, 45–46 (2009) (discussing instances in which an executor fails to look out for the best interests of the estate).

59. Some argue that removal is proper when an executor claims ownership of estate property to the exclusion of the estate. *See* Respondent's Response to Motion for Rehearing at 1, Kappus v. Kappus, 284 S.W.3d 831 (Tex. 2009) (No. 08-0136) ("Imagine the chaos if an executor could assert his personal ownership over real property that is owned by an estate, force the beneficiaries to defend such an action by the executor, and have the estate pay all of his personal attorney['s] fees as an expense of the estate.").

60. *See, e.g.*, Sammons v. Elder, 940 S.W.2d 276, 284 (Tex. App.—Waco 1997, no writ) (expressing concern that conflicts of interest created by an independent executor who is also a beneficiary of estate property would inhibit the independent administration process in Texas because "[f]amily members would no longer be able to serve as independent executors and receive property under the will . . . .").

61. *Kappus*, 284 S.W.3d at 838–39. The Texas Supreme Court expressed concern that

Although the Texas Supreme Court clarified the condition of the probate law in Texas,[62] the potential problems associated with the inclusion of material conflict of interest under section 149C were amply demonstrated by the Tyler Court of Appeals when it removed an independent executor based on unfounded complaints made by the testator's disgruntled ex-wife.[63] This decision, although later reversed by the Texas Supreme Court, produced an unappealing result—the removal of a family member who was selected by the testator despite full knowledge that the family member had an interest in the estate's property.[64] When making removal

permitting removal for a conflict of interest "would undermine the ability of Texas testators to name their own independent executor and also weaken the ability of an executor 'free of judicial supervision, to effect the distribution of an estate with a minimum of cost and delay.'" *Id.* at 837 (quoting Corpus Christi Bank & Trust v. Alice Nat'l Bank, 444 S.W.2d 632, 634 (Tex. 1969)). *Kappus* involved a good-faith disagreement that arose between an executor and a beneficiary concerning how to split the value of improvements between the executor and the estate and whether this disagreement constituted gross misconduct. *Id.* The executor sought to sell the property and evenly split the proceeds from the sale. *Id.* at 834. However, the decedent's ex-wife argued the estate was entitled to more than 50% of the proceeds of the sale. *Id.* The court did not want to open the door to suits for removal of an executor any time there is a shared interest in property because an alleged conflict of interest does not constitute actual misconduct. *Id.* at 837. The court explained that an executor should be removed for affirmative acts of malfeasance, not for a "mere assertion of a claim to estate property," because this would negatively impact the law of independent administrations in Texas. *Id.* The court emphasized that not all conflicts result in disqualification. *Id.* at 837–38. For instance, creditors of the decedent are permitted to serve as executors of the decedent's estate. *Id.* at 837.

62. Today, and at the time of *Kappus* decision, an independent executor may only be removed under section 149C. *See* PROB. § 149C (West Supp. 2011) (listing the grounds for removal of an independent executor).

63. *See In re* Estate of Kappus, 242 S.W.3d 182, 189–90 (Tex. App.—Tyler 2007, pet. granted) (recognizing the right of testators to choose an independent executor of their choice, but permitting removal because the independent executor shared ownership of the estate's property), *rev'd sub nom.* Kappus v. Kappus, 284 S.W.3d 831 (Tex. 2009); *see also* STANLEY M. JOHANSON, JOHANSON'S TEX. PROB. CODE ANN. cmt. at 247 (2011) (referring to the amendment to section 149C as "a litigation-breeding statute with no hope of a fine-tuning legislative fix as to what might constitute a 'material' conflict .... For the reasons set out by the supreme court in *Kappus v. Kappus*, I recommend its repeal at the next legislative session"). Note the appellate court's line of reasoning in allowing the independent executor's removal in *In re Kappus* paralleled the reasoning in the court's prior decision in *Formby v. Bradley*. *See* Formby v. Bradley, 695 S.W.2d 782, 784–85 (Tex. App.—Tyler 1985, writ ref'd n.r.e.) (explaining that the surviving spouse was disqualified from serving as the administrator of the estate because a conflict of interest developed as a result of the spouse's use of estate property and money as her own without keeping records of the accounting). The Fort Worth Court of Appeals also followed similar reasoning in *Street v. Skipper* when it affirmed the removal of a co-administratrix. *See* Street v. Skipper, 887 S.W.2d 78, 83 (Tex. App.—Fort Worth 1994, writ denied) (reasoning that a claim to more than her share of the community estate provided sufficient grounds to remove the co-administratrix).

64. *See In re Kappus*, 242 S.W.3d at 189–90 (removing independent executor who shared ownership in some of the estate's property), *rev'd sub nom.* Kappus v. Kappus, 284 S.W.3d 831 (Tex. 2009); *see also Kappus*, 284 S.W.3d at 837–38 (recognizing the need to avoid removal of an executor

St. Mary's Law Journal, Vol. 44 [2012], No. 1, Art. 4

decisions, courts should give significant weight to the fact that the testator did not consider the family member's potential adverse interest a bar to representation.[65]

Citing *Kappus v. Kappus* to support the firm policy in Texas that an executor may only be removed for one of the reasons enumerated under section 149C, the Beaumont Court of Appeals found sufficient grounds to remove an independent executor where it was proven that the independent executor intended to misapply estate funds.[66] The court concluded that section 149C allows discretion when making removal decisions; therefore, the trial court did not abuse its discretion in granting removal based on an apparent intent to misapply estate funds.[67] Considering the well-established safeguards under section 149C,[68] the 2011 amendment appears to do nothing more than create confusion in a system designed to avoid the problems that are prevalent in other probate systems across the country.[69]

---

who was selected by the testator despite knowledge of that individual's interest in estate property). With the recent amendment, the Texas legislature created a tool for increased litigation when an independent executor's actions do not satisfy the beneficiaries. Though a court is not going to remove an executor based on mere allegations, delayed will be the settlement of the estate because of the suit filed to remove the executor.

65. The Texas Supreme Court stated:

> A good-faith disagreement over the executor's ownership share in the estate is not enough, standing alone, to require removal under section 149C. The statute speaks of affirmative malfeasance, and an executor's mere assertion of a claim to estate property, or difference of opinion over the value of such property, does not warrant removal.

Kappus, 284 S.W.3d at 837.

66. *See In re* Estate of Hoelzer, 310 S.W.3d 899, 907 (Tex. App.—Beaumont 2010, pet. denied) ("On this record, the judge could reasonably conclude 'sufficient grounds appear to support [the] belief' that [the independent executor] intended to apply any funds received by the estate to pay a judgment-barred claim, a claim he did not list on the amended inventory presented to and approved by the court."). This result is in accordance with the decision in *Kappus* and the pre-amendment version of section 149C, both of which state that an independent executor may be removed for affirmative malfeasance, not mere negligence. *See* PROB. § 149C (West 2003) (outlining the grounds for removal, which include "gross misconduct or gross mismanagement" of the executor's duties, and circumstances which indicate the executor has or is about to misapply or embezzle estate property); *Kappus*, 284 S.W.3d at 837 (holding that an executor should not be removed unless the executor engages in actual misconduct).

67. *In re Hoelzer*, 310 S.W.3d at 907. This decision permitted removal prior to the actual misconduct of the executor because the evidence demonstrated that the executor was likely to use the estate's funds in an inappropriate manner. *Id.* Thus, the pre-amendment version of section 149C provided courts with a sufficient amount of discretion to protect estates from actual and future misconduct of executors.

68. PROB. § 149C (West 2003).

69. *See, e.g.*, Charles Scott, *Estate Planning Fundamentals: Practical Challenges & Perspectives*, *in* ESTATE PLANNING CLIENT STRATEGIES: LEADING LAWYERS ON UNDERSTANDING THE CLIENT'S GOALS, USING TRUSTS EFFECTIVELY, AND PLANNING IN A CHANGING ECONOMIC

A. *Conflicts of Interest in Other Jurisdictions*

Courts in other jurisdictions also struggle to determine the point at which an executor's interests provide grounds for removal.[70] The most frequent cause for removal based on a conflict of interest occurs when an executor has a personal interest that is adverse to the estate, such as when an executor claims that he or she owns property that arguably belongs to the estate.[71] However, some courts hold that sufficient grounds for

CLIMATE 109, 118 (2009) ("Probably the most significant change in California has been the increased use of living trusts to avoid probate administration after death. This was prompted by the slow, archaic, and expensive probate system that we have here.").

70. These cases consider the conduct of an executor, such as circumstances that indicate the executor is unfit to administer an estate, as well as personal interests that are adverse to the estate. *See* Kidd v. Bates, 23 So. 735, 736 (Ala. 1898) (holding that an executor who has claims adverse to the estate or antagonistic to the beneficiaries is unsuitable to administer the estate); Putney v. Fletcher, 19 N.E. 370, 370 (Mass. 1889) (providing that an executor is not suitable to administer an estate if he or she has a conflicting personal interest that prevents him or her from effectively representing the estate's interests); Corey v. Corey, 139 N.W. 509, 511 (Minn. 1913) (asserting the importance of an executor representing an estate free of personal conflicting interests to ensure judicial determinations will be free from bias); Davis v. Roberts, 226 S.W. 662, 664 (Mo. Ct. App. 1920) (removing an executor who claimed ownership over estate property because the executor's claim was adverse to the estate's interests, stating "it is contrary to general experience that one is able to fairly represent his own interest and at the same time represent those of another which are in conflict with his own").

71. *See In re* Rathgeb's Estate, 57 P. 1010, 1011–12 (Cal. 1899) (revoking executor's letters when it was shown the executor claimed estate property was given to him by the decedent outright, however, the co-executors alleged the property was transferred to the executor in trust, thus, this sufficiently established the executor's position was antagonistic to the estate); Hancock v. Hancock, 79 S.W.2d 206, 208 (Ky. 1935) (dismissing arguments that an executor should be removed because the executor's refusal to contest the declaratory judgment action did not disadvantage the estate or subject it to substantial loss); Hunt v. Crocker, 55 S.W.2d 20, 21 (Ky. 1932) (disqualifying the decedent's father from appointment because his claim to the entire proceeds of the insurance policy that was payable to the estate created an adverse personal interest, but also noting that each case should be decided on its own facts); First Nat'l Bank v. Towle, 137 N.W. 291, 294–95 (Minn. 1912) (ordering the removal of an administrator due to his personal interests in fraudulent conveyances from decedent to the administrator and the administrator's failure to exercise diligence in administering the estate); *In re* Dolenty's Estate, 161 P. 524, 526 (Mont. 1916) (holding that an executrix claiming estate property under a lost deed must be removed because her personal interests conflicted with those of the estate); *In re* Wallace, 74 N.Y.S. 33, 33 (App. Div. 1902) (determining the lower court erred when it refused to revoke the letters of administration from an administrator who claimed substantially all of the decedent's estate as his own); *In re* Gleason's Estate, 41 N.Y.S. 418, 429–30 (Sur. Ct. 1896) (removing an executor based on his attempt to use his position as estate representative to gain the benefits of a contract, explaining that if the executor wanted to obtain the benefits of the contract, he should have excused himself from representing the estate); Batchelder v. Knecttle, 66 P.2d 919, 920 (Okla. 1937) (affirming removal of executor whose personal interests became adverse to the estate's interests when the executor claimed most of the estate's property as her own through several conveyances of property from the decedent mere days before his death); *In re* Faulkner's Estate, 65 P.2d 1045, 1046–47 (Or. 1937) (upholding the revocation of letters of administration because the allegedly fraudulent transfer of stock shares to the administratrix created an adverse personal interest which rendered her unable to effectively represent both the interests of the estate and her personal interests); Marks v. Coats, 62 P. 488, 489–90 (Or. 1900) (approving

St. Mary's Law Journal, Vol. 44 [2012], No. 1, Art. 4

removal exist when an executor asserts a personal indebtedness owed to him or her out of the estate.[72] On the other hand, courts are in disagreement as to whether the existence of a debt owed by the executor to the estate establishes an adverse interest sufficient to justify removal.[73]

---

removal of an administrator who purchased property from the decedent and conveyed the property in an attempt to defraud creditors because the administrator's personal interests would prevent him from effectively completing his duties as estate representative); Mills v. Mills, 29 P. 443, 444 (Or. 1892) (conceding the failure of the administrator to inventory any of the property allegedly belonging to the estate provided sufficient grounds for his removal because the administrator's claim to estate property created a direct conflict between the estate and the administrator which rendered the administrator incapable of adequately protecting the interests of the estate because "it is expecting too much of human nature to assume" the administrator would sacrifice his own interests for those of the estate); Farnsworth v. Hatch, 151 P. 537, 541 (Utah 1915) (reasoning that the trial court abused its discretion in refusing to remove an executor who asserted ownership over estate property, objected to all actions her co-executor attempted to take, and resisted all claims by the estate against her). *But see* Baker v. Wood, 267 S.W.2d 765, 767 (Ark. 1954) (refusing to remove an executor based on allegations that his personal interests were antagonistic to the estate even though the executor was to receive cash and real property out of the estate); Trevathan v. Grogan, 276 S.W. 556, 557 (Ky. 1925) (refusing to remove an executor who was claiming ownership over estate property because "the assertion by an executor of title to property which heirs and devisees claim belong to the estate is not ground for his removal from office" unless he or she acts in bad faith); Rieke v. Rieke, 208 S.W. 764, 765 (Ky. 1919) (overruling the contention that an executor may be subject to removal for any condition that makes his or her personal position antagonistic to his or her position as estate representative because the members of the class of persons preferred to serve necessarily consists of those who have "interests antagonistic to others entitled to participate in the distribution of the estate"); Hansell v. Hickox, 46 So. 784, 785 (La. 1908) (permitting administratrix to continue representing the estate despite her claim that some of the money allegedly belonging to the estate was given to her by the decedent prior to his death, but also requiring her to account for all of that money); *In re* Estate of Drummond, 165 N.Y.S. 78, 80 (Sur. Ct. 1917) (holding that the New York legislature expressly provided an executor may present his or her personal claim against the estate after the settlement of the executor's account and did not intend for the executor's claim against the estate to be grounds for removal).

72. *Compare* Gray v. Gray, 39 N.J. Eq. 332, 335–36 (1884) (removing an executor who filed two personal claims against the estate in different jurisdictions because his actions constituted a misapplication of estate property), *and* Henry's Estate, 54 Pa. Super. 274, 278 (1913) (removing an executor who asserted a personal claim for professional services rendered against the estate, and characterizing the conflict as too hostile and antagonistic to the interests of the estate for the executor to continue effectively representing the estate), *with* Campbell v. Allen, 37 N.E. 517, 518 (N.Y. 1894) (refusing to remove an administrator who held mortgages against some estate property and who foreclosed the mortgages with promises to account to the estate for any profits he may make in the resale, but subsequently refused to account for the profits).

73. *Compare* Haines v. Christie, 68 P. 669, 669–70 (Colo. App. 1902) (affirming removal of an executor who owed money to the estate, but denied the debt and refused to account to the estate), *and In re* Sharpless' Estate, 57 A. 1128, 1128–29 (Pa. 1904) (determining that because two of the executors were members of a firm which owed a substantial amount of money to the estate, and disposed of the business of the firm without accounting to the estate, the executors must be removed), *with* Hussey v. Coffin, 83 Mass. 354, 356–57 (1861) (refusing to remove the decedent's sons as executors for failing to account for the money given to them by the decedent, stating that "[f]or any debt which was due from them to the testatrix, they may be required to account in the settlement of the estate, in the ordinary course of administration; and they, and the sureties on their

In a few instances, courts allow removal where an executor's actions with respect to stock owned by the decedent indicate the executor has an adverse personal interest with the estate's interests.[74] Indeed, various types of conduct justify removal of an executor based on adverse personal interests.[75]

When remedies other than removal are available, some courts have held an adverse personal interest should not be the sole basis for the removal of an independent executor.[76] In a number of instances where the executor's

bond, will be liable to make it good").

74. *See, e.g., In re* Hirsch's Estate, 101 N.Y.S. 893, 899–900 (App. Div. 1906) (providing that removal of the executor was justified when the executor held the controlling interest in the company, elected himself president, and voted himself a large salary), *aff'd*, 81 N.E. 1165 (N.Y. 1907); *In re* Grossman's Estate, 283 N.Y.S. 323, 328 (Sur. Ct. 1935) (explaining that the executor should be removed where it was shown that he "effected his election as president of . . . a corporation in which the estate held a substantial block of stock," and "placed himself in a position where his personal interest and the interest of the beneficiaries over whom he was trustee were antagonistic"), *aff'd*, 294 N.Y.S. 942 (App. Div. 1937).

75. For instance, the Supreme Court of California stated:

> An administrator in the position of petitioner, who is the proponent of an after-discovered will, the effect of which is to give him a larger share of the estate of a decedent than he would receive in the event of intestacy at the expense of a contestant who would profit from an intestate succession, has an interest adverse to said contestant and to the estate, both in securing a larger portion of the estate and in establishing his own innocence of guilty conduct. His self-interest may prompt him to uphold the will attacked as a forgery and as the product of his own undue influence and fraud. It is true that the personal representative of an estate in a great number of cases is an heir or legatee possessing [a] pecuniary interest in the estate. But there is a distinction between the interest of a representative under a will duly admitted to probate and that of an administrator who is the proponent of an unadmitted will under attack, on the ground that it is the product of the fraud and undue influence of said administrator.

Luckey v. Superior Court of Los Angeles Cnty., 287 P. 450, 453–54 (Cal. 1930); *see also* McCarthy v. Griffin, 12 N.E.2d 836, 837–38 (Mass. 1938) (removing an administrator who refused to account for the insurance policy which was formerly payable to the decedent's estate and claimed the proceeds from the policy as belonging to himself and his sister). The New York Supreme Court, Appellate Division also found sufficient facts to justify removal when an executor secretly acquired a new lease with a purchase option on property already leased by the estate; but, the court did not expressly state that the executor's conduct created an adverse personal interest. *In re* O'Keefe's Estate, 3 N.Y.S.2d 877, 877–78 (App. Div. 1938) (conceding that the executor's conduct in secretly acquiring a new lease with an option to purchase property held by the estate which was already under a lease that contained an option to purchase, and subsequently exercising said option to purchase, justified his removal), *aff'd*, 18 N.E.2d 696 (N.Y. 1939). Also, the Nebraska Supreme Court found grounds to remove an executor who unduly prolonged the administration of the estate for his own benefit. *In re* Estate of McLean, 295 N.W. 273, 274 (Neb. 1940). The court stated the conduct of the executor was antagonistic to the interests of the beneficiaries and stressed that he was the only one benefitted by the delay because he was receiving the income from the expenditures while allowing the taxes to accumulate. *Id.*

76. *See* Fry v. Fry, 135 N.W. 1095, 1096 (Iowa 1912) (permitting an executor to continue representing the estate despite her claim to all of the estate's assets because she fell within the class of persons whom the law favors for appointment, she asserted her claims in a proper manner, and if she

personal interests were not contrary to those of the estate at the time the suit was instituted for removal, courts have refused to remove the executor.[77] In a few jurisdictions, a court will not remove an executor unless there is evidence of bad faith or fraudulent concealment.[78] Still others treat a potentially adverse personal interest as a question of fact for the jury;[79] mere allegations against an executor by heirs or beneficiaries will not justify removal in the absence of a trial.[80] Finally, West Virginia

---

did withhold assets from the inventory in the future, it could be adjudicated in open court). The court in *Fry v. Fry* specifically stated that removal should not be based solely on the fact that an executor has a claim against the estate. *Id.* Courts in Michigan and New York hold that when an interested person has the ability to personally bring a suit to set aside a fraudulent conveyance of property, removal is not proper. *See* McFarlan v. McFarlan, 119 N.W. 1108, 1109 (Mich. 1909) (rejecting arguments that the administratrix should be removed, despite the fact the decedent conveyed real property to himself and the administratrix during his lifetime as tenants by the entirety, which was fraudulent with respect to decedent's creditors, because the creditors could maintain a suit to set aside the conveyance if the administratrix refused to sue); *In re* Moulton's Estate, 10 N.Y.S. 717, 724 (Gen. Term 1890) (denying removal when the administratrix held a mortgage by assignment, allegedly transferred for the purpose of defrauding the deceased's creditors, because the creditors may maintain a suit to set aside the fraudulent assignment). *But see* Corey v. Corey, 139 N.W. 509, 511 (Minn. 1913) (removing an executor who refused to set aside a trust instrument because the beneficiaries had a right to have a representative who is free from conflicting personal interests even if another remedy were available).

77. *See, e.g.*, Drake v. Green, 92 Mass. 124, 126 (1865) (explaining the removal decision must be determined based on the facts as they exist at the time the application for removal is filed because the adverse claims may be adjusted, and adding that the executor may either show that he or she is willing to make his or her rights subordinate to those of the estate, or indicate that he or she intends to obtain an unfair advantage by means of his or her position); Odlin v. Nichols, 69 A. 644, 645 (Vt. 1908) ("When his competency is challenged on the score of interest, the question is to be considered with reference to the situation of the estate at the time. If his interest will not conflict with the duties still to be performed, there is no occasion for removal.").

78. *See* Simpson v. Jones, 82 N.C. 279, 281 (1880) (affirming removal of administrator because he neglected to defend a suit against the estate in which he had an interest in any judgment that may of been rendered against the estate). The court based its decision in *Simpson v. Jones* on the fact the heirs were unable to defend the suit by themselves because the administrator was the sole protector of the estate. *Id.* In a subsequent case, the North Carolina Supreme Court refused to affirm the removal of an administrator who asserted personal interests adverse to the estate because the beneficiaries were free to bring suit against the administrator to contest title to the property as a remedy. Morgan v. Morgan, 72 S.E. 206, 207 (N.C. 1911). Thus, even if removal is justified when an administrator asserts an adverse claim against the estate, it is not necessarily warranted when the administrator makes the claim in good faith. *See, e.g.*, *In re* Estate of Below, 162 F. Supp. 88, 89 (V.I. 1958) (refusing to remove an administrator unless "the conflict of interest is so substantial and direct as to render it impossible for the administrator to administer his trust faithfully or that he has in fact proved unfaithful to his trust").

79. *See, e.g.*, Stanley v. Spell, 166 S.E. 669, 669 (Ga. Ct. App. 1932) (holding the administratrix's personal ownership claim over estate property created a conflict between the interests of the administratrix and the interests of the estate, but was a question of fact for the jury to decide).

80. *See* Brosnan v. Brosnan, 289 F. 547, 550 (D.C. Cir. 1923) (explaining an administrator could not be removed based only on the filing of a petition which alleged the administrator claimed ownership over shares of corporate stock belonging to the estate because the administrator was

courts may remove an estate representative if he or she develops a conflict of interest after appointment or if he or she breaches a fiduciary duty.[81]

B. *When Does a Conflict of Interest Become Material?*

With the addition of material conflict of interest to section 149C,[82] the legislature opened the door for extensive litigation to determine the meaning of the word "material."[83] Courts likewise spent several years attempting to determine what facts would render a person unsuitable to represent an estate under section 78.[84] Ultimately, Texas courts

entitled to a trial before removal could be justified); *In re* Wagner's Estate, 62 P.2d 1186, 1189 (Okla. 1936) (holding a mere allegation that property was not accounted for is not, by itself, grounds for removal, but evidence that property was withheld from the accounting is admissible at the hearing on the final account).

81. Jones v. Harper, 55 F. Supp. 2d 530, 533 (S.D. W. Va. 1999).

82. TEX. PROB. CODE ANN. § 149C (West 2003 & Supp. 2011).

83. *See* STANLEY M. JOHANSON, JOHANSON'S TEX. PROB. CODE ANN. cmt. at 246–47 (2011) (emphasizing the problems the statute is now likely to create). Courts that have addressed potential conflicts of interest have frequently done so in the context of an executor with an interest in the estate as a beneficiary under a will. *See, e.g.*, Hartmann v. Solbrig, 12 S.W.3d 587, 597 (Tex. App.—San Antonio 2000, pet. denied) ("The fact that an executrix also has a claim against the estate does not, by itself, render someone unsuitable for the position."). Though courts often hold that an executor's interest in the estate is not grounds for removal, there are other potential circumstances when a conflict of interest may arise and force courts to determine whether the conflict falls within the legislature's definition of material. *See* Kappus v. Kappus, 284 S.W.3d 831, 837 (Tex. 2009) (opining that if a per se removal rule were adopted, a surviving spouse named as independent executor may be ousted in instances where there is a question as to the "separate or community character of estate assets").

84. *See* Boyles v. Gresham, 158 Tex. 158, 309 S.W.2d 50, 53 (Tex. 1958) (attempting to determine the legislature's intent when it enacted section 78); Dean v. Getz, 970 S.W.2d 629, 633 (Tex. App.—Tyler 1998, no pet.) (recognizing that "no comprehensive, discrete explanation exists delineating the attributes which make someone unsuitable under [section 78 of] the Probate Code"); Olguin v. Jungman, 931 S.W.2d 607, 609 (Tex. App.—San Antonio 1996, no writ) (finding cases to serve as guidance to determine the characteristics that make an individual unsuitable to serve as an independent executor). Although no bright-line rule exists, courts have acknowledged ways in which to declare an independent executor unsuitable to serve. *See, e.g.*, *In re* Estate of Robinson, 140 S.W.3d 801, 806 (Tex. App.—Corpus Christi 2004, pet. dism'd) ("[G]enerally a person claiming ownership of property, to the exclusion of the estate, is deemed unsuitable because of the conflict of interest between the person and the estate, while a person making a claim within the probate process . . . is not deemed unsuitable."). Several factors go to the suitability determination under section 78, including a potential representative's claims to estate property. *See, e.g.*, *Dean*, 970 S.W.2d at 634 (determining that the potential representative was unsuitable because the representative's interests were "adverse to the estate and its beneficiaries"). The Amarillo Court of Appeals also dealt with the lack of a definition of unsuitable under section 78. *See In re* Estate of Roots, 596 S.W.2d 240, 243–44 (Tex. Civ. App.—Amarillo 1980, no writ) (contemplating whether the legislature intended to stray from established principles to allow the disqualification of an independent executor based on evidence that the executor planned to charge excessive fees for his compensation). Other courts have dealt with unsuitability under section 78 by holding that it takes more than a conflict of interest to disqualify an individual from serving as an independent executor. For instance, the Houston

concluded that a comprehensive analysis of the characteristics that render a person unsuitable is not available.[85] Accordingly, the recent amendment creates an obstacle for courts attempting to determine the point at which a conflict becomes material.[86] A bright-line rule will not be available to

---

Court of Appeals for the Fourteenth District stated:

> Case law provides examples in which a clear conflict of interest on the part of an individual is insufficient by itself to render that individual unsuitable to serve as independent executor of an estate, unless that conflict of interest involves a claim of ownership adverse to the best interests of the estate or the clear intent of the will itself.

Eastland v. Eastland, 273 S.W.3d 815, 827 (Tex. App.—Houston [14th Dist.] 2008, no pet.). Despite the lack of a bright-line rule, one important consideration of an individual's ability to serve as an independent executor is whether the individual is capable of being an advocate for the estate. Hitt v. Dumitrov, 598 S.W.2d 355, 356 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ) (quoting the trial court's judgment which stated that the representative should be an advocate for the estate). When ascertaining an individual's ability to advocate for an estate, courts consider both the interests of the potential representative and the estate's interests, along with the risks associated with each appointment. *See Dean*, 970 S.W.2d at 634 (assessing the interests of the potential estate representative and concluding she was disqualified because the will provided her with a vested remainder interest and the ability to select the property that would constitute the marital deduction gift, which would be taken from the vested remainder interest).

85. *See Boyles*, 309 S.W.2d at 53–54 ("Neither the Model Code nor the Texas Probate Code purports to define 'unsuitable,' and we shall not attempt here to define it.").

86. Some courts find a conflict of interest when an executor has a pecuniary interest that conflicts with the interests of an estate. *See, e.g.*, Lesikar v. Rappeport, 33 S.W.3d 282, 297 (Tex. App.—Texarkana 2000, pet. denied) (determining a conflict of interest existed when the executor's husband acquired an interest in oil wells in exchange for the executor indemnifying the assignee from estate's claims against assignee). In *Lesikar*, a conflict of interest arose when the executor dismissed overpayment litigation and acquired property for her personal benefit during the time that she was under a fiduciary duty to the estate. *Id.* at 298. Further, the Houston Court of Appeals for the First District found a conflict of interest where the executor claimed ownership of a substantial portion of the estate. Pine v. deBlieux, 360 S.W.3d 45, 48 (Tex. App.—Houston [1st Dist.] 2011, no pet.). The court explained that when an individual makes a claim under a will or asserts a claim against an estate through the probate court, the claim alone does not render a person unsuitable. *Id.* However, when an individual claims title to property owned by the testator at the time of his or her death, courts have held this conflict of interest renders the individual unsuitable as a matter of law. *See, e.g.*, Bays v. Jordan, 622 S.W.2d 148, 149–50 (Tex. App.—Fort Worth 1981, no writ) (reversing the trial court's grant of letters testamentary to a joint venturer who previously executed an agreement with the testator that created rights of survivorship in their joint ventures because this conflict of interest rendered the joint venturer unsuitable to serve as executor); Haynes v. Clanton, 257 S.W.2d 789, 792 (Tex. Civ. App.—El Paso 1953, writ dism'd by agr.) (affirming removal of executor who was a stockholder in the bank that filed suit against the estate to recover the estate's assets because the executor's status as a stockholder in the bank created a conflict of interest between his personal interests and the estate's interests). The key factor most courts focus on when making a removal decision is whether the executor is claiming through the probate process or disputing the estate's title. *Pine*, 360 S.W.3d at 49. If the executor is claiming through the probate process, he or she is not disputing the estate's title, but is seeking satisfaction of his or her claim out of the assets of the estate. *Id.* The executor disputes the estate's title when he or she claims assets as his or her own to the exclusion of the estate. *Id.* When claiming assets to the exclusion of the estate, the executor is essentially asserting that the assets are not subject to probate proceedings. *Id.* Disputing the estate's

determine the existence of a material conflict of interest. Instead, a court will have to make removal decisions on a case-by-case basis. As noted previously, Texas established the system of independently administration to *avoid* the increased cost and delay involved in settling estates and to *encourage* the use of the probate system.[87] Though a case-by-case analysis is not necessarily an inferior method, the cost and delay involved in determining the existence of a material conflict of interest is unavoidable.

Courts should consider that removal of an independent executor under section 149C has historically been based either on misconduct of the executor or his or her legal incapacity, not on mere complaints of those who are dissatisfied with the testator's appointment decisions.[88] However, courts should give weight to conflicts of interest when it would be difficult, if not impossible, for the executor to advocate effectively for both the estate's interests and his or her own personal interests.[89] For instance, imagine a company is renting property from a testator. After the testator's death, the president of that company becomes the executor of the estate and proceeds to lower the amount of rent that his or her company has to pay the estate dramatically. Most courts would agree this creates a conflict of interest between the personal interests of the executor and the estate. Under the previous version of section 149C, courts were already inclined to find that such a conflict rendered the executor

title creates a conflict of interest between the executor and the estate, and renders the executor subject to removal. *Id.* The basic assumption courts make is that such executive action creates a conflict between the estate and the executor that is too adverse for the executor to advocate for both the estate and him or herself effectively. *See, e.g.*, Ayala v. Martinez, 883 S.W.2d 270, 272 (Tex. App.—Corpus Christi 1994, writ denied) (determining the surviving spouse was disqualified from serving as a result of her community interest claim to her deceased husband's separate property); *Hitt*, 598 S.W.2d at 355–56 (affirming disqualification of an executor from administering his wife's estate because the claims of the husband and wife's estates to the insurance proceeds were adverse and made the executor, who was already representing the husband's estate, unable to effectively advocate for the interests of both estates).

87. *See Pine*, 360 S.W.3d at 49 (describing the court's consideration of an important factor—whether the claimant uses the probate process).

88. *See In re* Estate of Hoelzer, 310 S.W.3d 899, 907 (Tex. App.—Beaumont 2010, pet. denied) (removing an executor who intended to use estate funds to pay a judgment-barred claim which was not listed on the inventory presented to the court); Brief for Petitioner at 10, Kappus v. Kappus, 284 S.W.3d 831 (Tex. 2009) (No. 08-0136) (arguing that "what merits the extreme sanction of removal of a fiduciary such as an executor or trustee is *not* a *potential* conflict of interest, but *actual* misconduct . . . .") (emphasis added).

89. The executor does not represent the beneficiaries—the executor represents the estate. Jennings v. Srp, 521 S.W.2d 326, 330 (Tex. Civ. App.—Corpus Christi 1975, no writ). There is no presumption that the executor will represent the interests of the beneficiaries. *See id.* (noting that beneficiaries under a will should be named as parties to a will construction suit to ensure that their interests are adequately represented).

St. Mary's Law Journal, Vol. 44 [2012], No. 1, Art. 4

incapable of adequately representing the interests of the estate.[90] The addition of material conflict of interest does not provide meaningful assistance in these situations.

Instead of increasing the efficiency of the Texas probate system, the recent amendment creates an impediment that will only add to the time and expense required to settle an estate. This obstacle is unnecessary because the safeguards previously in place under section 149C allowed removal when an independent executor's conduct indicated his or her inability to represent the estate adequately.[91] Thus, the legislature should remove the material conflict of interest provision from the probate code because the established protections under sections 149C and 78 are sufficient to remove or disqualify individuals who are unfit to serve.[92]

C. *Problems Created for Courts Attempting to Honor a Testator's Intent in Texas*

The cardinal rule of will interpretation is to ascertain the testator's intent.[93] Judges make every effort to avoid substituting their opinions and views for those of the testator.[94] As mentioned above, most testators

90. These same facts were before the Waco Court of Appeals in 2008. *See In re* Roy, 249 S.W.3d 592, 594–95 (Tex. App.—Waco 2008, pet. denied) (holding that the actions of the executor amounted to a breach of his fiduciary duty to disclose, which constituted gross mismanagement of the estate and warranted his removal).

91. TEX. PROB. CODE ANN. § 149C (West 2003); *see also* Geeslin v. McElhenney, 788 S.W.2d 683, 685 (Tex. App.—Austin 1990, no writ) (affirming removal of independent executor who was guilty of gross mismanagement and gross misconduct).

92. It is well-established that section 78 applies to independent executors. *See* Boyles v. Gresham, 158 Tex. 158, 309 S.W.2d 50, 54 (Tex. 1958) (providing that an independent executor is not unsuitable as a matter of law if he or she asserts a claim against the estate in good faith); Olguin v. Jungman, 931 S.W.2d 607, 609 (Tex. App.—San Antonio 1996, no writ) (holding section 78 applies to independent executors); Monson v. Betancourt, 818 S.W.2d 499, 500 (Tex. App.—Corpus Christi 1991, no writ) (assessing the qualifications of an independent executor based on the guidelines set forth under section 78); *In re* Estate of Roots, 596 S.W.2d 240, 244 (Tex. Civ. App.—Amarillo 1980, no writ) (applying section 78 to determine an independent executor's suitability to serve); Alford v. Alford, 601 S.W.2d 408, 410 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ) (using section 78 to assess the independent executor's suitability to serve).

93. *See, e.g.*, Kelley v. Harsch, 161 S.W.2d 563, 567 (Tex. Civ. App.—Austin 1942, no writ) (stating the cardinal rule of will construction is the ascertain the testator's intent). "[T]he intention of the testator is the first and great object of inquiry." Banks v. Banks, 262 S.W.2d 119, 121 (Tex. Civ. App.—Fort Worth 1953, no writ).

94. The Tenth Court of Appeals stated:

> So the question here is: Can this court re-write the testator's will so as to create a mandatory trust on one-half of the property at Mrs. Williams' death in favor of testator's family, contra to the intention of the testator made free of doubt by the express provisions of the will and contra to the expressed intention of the testator as detailed by the parol testimony tendered? Our view is that we cannot.

Williams v. Bartlett, 254 S.W.2d 559, 563 (Tex. Civ. App.—Waco 1952, writ ref'd n.r.e.). In addition,

consider potential conflicts before naming a specific executor, but nevertheless deem that individual capable of carrying out the testator's wishes.[95] Therefore, courts should exercise caution when removing an executor because each removal decision inevitably interferes with the testator's intent and goes against the cardinal rule of will interpretation.[96]

Unfortunately, situations that warrant removal of an executor consistently arise.[97] However, the protections in place under the previous version of section 149C addressed these situations appropriately.[98] Further, because section 78 of the Texas Probate Code[99] permits disqualification of an independent executor prior to appointment, courts may consider potential conflicts of interest when making the initial appointment decision.[100] Thus, removal should only be appropriate in

---

the Galveston Court of Appeals stated: "It is the settled law in this [s]tate that every citizen has the right to dispose of his property by will in any way that he may desire, regardless of the ties of nature or relationship." Scheetz v. Bader, 251 S.W.2d 427, 428 (Tex. Civ. App.—Galveston 1952, writ ref'd).

95. *See* Kappus v. Kappus, 284 S.W.3d 831, 837 (Tex. 2009) (describing the utilization of a conflict of interest to remove an independent executor and stating such a rule "would undermine the ability of Texas testators to name their own independent executor and also weaken the ability of an executor 'free of judicial supervision, to effect the distribution of an estate with a minimum of cost and delay'" (quoting Corpus Christi Bank & Trust v. Alice Nat'l Bank, 444 S.W.2d 632, 634 (Tex. 1969))). The Texas Supreme Court explained it is common for a testator to name a spouse or business partner as independent executor, and if a conflict of interest is allowed as a reason for removal, the named independent executor may be ousted as a beneficiary under the will. *Id.* However, testators do not always name an appropriate individual as executor, and courts may need to protect the beneficiaries by disqualifying the named executor prior to appointment or removing him or her after appointment. *E.g.*, Mary Beth Beattie, *Top Ten Myths and Misconceptions in Estate Planning*, MD. B.J., March/April 2003, at 8 ("[M]any clients make the mistake of appointing as fiduciary a child who is completely inappropriate."). Reasons for removing named executors include instances where there is self-dealing or other misapplication of the estate's property. *Id.* Estate planning attorneys may prevent this problem by having a discussion with clients about naming a corporate or professional fiduciary as executor when the client's family members are not suitable for the duties of administering the estate. *Id.* at 8–9.

96. The recent amendment to section 149C of the Texas Probate Code provides courts with yet another tool to threaten the testator's wishes.

97. *E.g.*, Street v. Skipper, 887 S.W.2d 78, 82–83 (Tex. App.—Fort Worth 1994, writ denied) (reasoning that the executor's misconduct, which included the willful omission of performance of a duty required by law, called for removal under section 149C).

98. *See* TEX. PROB. CODE ANN. § 149C (West 2003) (providing removal for "gross misconduct or gross mismanagement").

99. *Id.* § 78.

100. *See In re* Estate of Robinson, 140 S.W.3d 801, 808 (Tex. App.—Corpus Christi 2004, pet. dism'd) (holding that the family accountant was suitable to serve as co-executor because "such a business relationship [cannot] be the basis for a finding of unsuitability"). The standards under section 78 provide courts with a significant amount of discretion. Accordingly, denied appointment are those individuals with questionable interests. *See* Spies v. Milner, 928 S.W.2d 317, 319 (Tex. App.—Fort Worth 1996, no writ) (upholding the trial court's disqualification of the testator's

situations where the executor has actively engaged in malfeasance, fails to perform his or her executive duties, or claims ownership of estate property to the exclusion of the estate.[101]

A person challenging an executor's actions must prove one of the enumerated grounds under section 149C to convince a court to remove the executor.[102] Mere dissatisfaction with an executor's actions or

---

daughter based on evidence that the daughter had a hard time dealing with professionals and took money from the testator's account without permission while the testator was alive). Conflict of interest issues are constantly raised under section 78 by beneficiaries who are dissatisfied with the testator's choice of an independent executor, and courts sometimes determine that otherwise qualified individuals are disqualified based on the complaints of unhappy beneficiaries. *Cf.* Olguin v. Jungman, 931 S.W.2d 607, 609 (Tex. App.—San Antonio 1996, no writ) ("[A beneficiary] questioned [the independent executor's] calculation of the amounts paid to Flores by the Trust. This led to [the beneficiary's] assertion of conflict of interest . . . ."). The claims filed against an independent executor are, of course, subject to the usual rules of civil procedure in Texas:

> The signatures of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment. Attorneys or parties who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleading which they know to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt.

TEX. R. CIV. P. 13. However, the statute does not define "material;" many claims that would otherwise not be litigated will likely be permitted. These claims will effectively increase the cost of the administration of the estate and delay its closing, which will cause an unnecessary loss to the beneficiaries.

101. *See* Kappus v. Kappus, 284 S.W.3d 831, 837 (Tex. 2009) (stating that executors affirmative malfeasance should be the only ground for removal, not mere negligence).

102. *See* PROB. § 149C (West 2003 & Supp. 2011) (listing grounds for removing an independent executor). Further, as a matter of law, independent executors are fiduciaries. *See, e.g.*, Magruder v. Drury, 235 U.S. 106, 119 (1914) (explaining the fiduciary duty as a "duty to protect the interests of the estate, and not to permit his personal interest to in any wise conflict with his duty in that respect. The intention is to provide against any possible selfish interest exercising an influence which can interfere with the faithful discharge of the duty . . . ."); Humane Soc. of Austin & Travis Cnty. v. Austin Nat'l Bank, 531 S.W.2d 574, 577 (Tex. 1975) (noting that an executor is subject to the same fiduciary duties in the administration of the estate as a trustee). The Texas Probate Code also provides that an executor hold property as trustee for the benefit of the beneficiaries or heirs at law. *See* PROB. § 37 (West 2003) (providing that "the executor or administrator shall have the right to possession of the estate as it existed at the death of the testator or intestate . . . and he shall recover possession of and hold such estate in trust to be disposed of in accordance with the law"). The executor acts as a trustee and is subject to the higher standards of care that courts impose on a trustee to protect the property for the beneficiaries. *See* Slay v. Burnett Trust, 143 Tex. 621, 187 S.W.2d 377, 387–88 (Tex. 1945) (describing the duty of loyalty imposed on a trustee which prohibits him or her from using his or her position for his or her own self-interests and from placing himself or herself in a position where his or her own interests may conflict with those of his or her duties as trustee); *see also* Respondent's Response to Motion for Rehearing at 11, Kappus v. Kappus, 284 S.W.3d 831 (Tex. 2009) (No. 08-0136) (arguing that as a fiduciary, the executor owes the beneficiaries

decisions was not enough to warrant removal under the earlier version of section 149C.[103] For instance, in a case decided prior to the 2011 amendment, the Ninth Court of Appeals refused to remove an executor based solely on the dissatisfaction of the person seeking removal.[104] The court explained that even though the son sought removal of the stepdaughter for alleged misconduct, he failed to prove that she "willfully omitted to perform a legal duty, intentionally committed a wrong act, or breached a fiduciary duty."[105] Under the amendment, however, an executor's actions and decisions will undergo more scrutiny. Consequently, under the material conflict of interest standard, a court is more likely to interfere with the testator's intent than ever before.

D. *Possible Benefits of the Recent Amendment*

Situations may arise *after appointment* that would have resulted in disqualification under section 78 *pre-appointment*,[106] such as if a state convicts the executor of a felony.[107] Additionally, post-appointment, an executor's actions may indicate his or her personal interests are adverse to the estate's interests. In that scenario, the executor cannot effectively advocate for both his or her interests and the estate's interests.[108] However, once an executor is appointed, section 78 no longer is applicable.[109] Section 149C applies and provides the exclusive grounds for removing an independent executor after appointment.[110] In situations

a duty to be an advocate and if the executor asserts a claim against the beneficiaries, then the executor should be subject to removal).

103. *See* PROB. § 149C (West 2003) (providing specific reasons for removal).

104. *In re* Estate of Casida, 13 S.W.3d 519, 524 (Tex. App.—Beaumont 2000, no pet.).

105. *Id.*

106. *See* PROB. § 78 (West 2003) (providing reasons why an executor or administrator is not qualified to serve, such as when he or she is incapacitated, a convicted felon, a non-resident, or if the court determines that he or she is unsuitable).

107. *Id.*

108. *See* Hitt v. Dumitrov, 598 S.W.2d 355, 356 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ) ("[E]ach estate should have a representative that will assume the role of an advocate to achieve the best possible advantage for the estate.") (internal quotation marks omitted).

109. *E.g.*, Sales v. Passmore, 786 S.W.2d 35, 36 (Tex. App.—El Paso 1990, writ dism'd by agr.) (stating that after appointment, section 149C applies and the provisions of section 78 no longer affect the qualifications of the executor).

110. Under section 149C, incapacity is a valid reason to remove an executor, but convicted felons are not necessarily subject to removal after appointment unless serving time in a penitentiary. *See* PROB. § 149C (West 2003 & Supp. 2011) (listing reasons for removal, including when an executor "becomes an incapacitated person, or is sentenced to the penitentiary, or from any other cause because he becomes legally incapacitated from properly performing his fiduciary duties"). Note the wording of section 149C is slightly different from the language used in section 78. *Compare* PROB. § 78 (West 2003) (permitting disqualification of a convicted felon), *with* PROB. § 149C (West 2003 &

where an executor reveals an ownership interest in the estate's property or receives a felony conviction—which would render the executor unsuitable under section 78 if revealed prior to appointment[111]—the recent amendment may provide courts with a previously unavailable removal tool. However, some courts hold that an assertion of ownership of estate property constitutes gross misconduct,[112] and the previous version of section 149C allowed removal based on an assertion of ownership of estate property under appropriate circumstances.[113] Therefore, the recent amendment only adds complication to the probate system.

Moreover, basing a removal decision on a felony conviction may not be the best approach when the executor has otherwise complied with the requirements of the estate administration. Allowing removal for actions and circumstances that do not necessarily affect the administration of an estate invites endless litigation. Removal of an executor should be based on actions taken after appointment that negatively impact the estate. Misapplication of estate property and gross mismanagement appropriately result in removal because the executor has affirmatively demonstrated his or her inability to manage the estate adequately.[114] Outside forces, such as a felony conviction, may call the executor's ability to serve into question and result in disqualification *prior* to appointment;[115] but once an executor is appointed, the grounds for removal should be restricted so the executor can exercise sufficient discretion to manage the estate effectively.

Supp. 2011) (listing as a reason for removal, an executor who is sentenced to the penitentiary). The Eighth Court of Appeals explained that being a convicted felon and a sentence to the penitentiary are not the same. *Sales*, 786 S.W.2d at 37. Because the issue was not raised prior to the appointment of the independent executor, the court explained that the executor's status as a convicted felon no longer affected his ability to serve and did not constitute grounds for removal under section 149C. *Id.* at 36. The recent amendment to section 149C may provide courts and beneficiaries with a valuable tool to remove an executor in situations when the executor's past begins to surface after appointment and his or her ability to serve becomes questionable. However, permitting these types of issues to arise after appointment will unavoidably increase the cost and delay in the administration of an estate. These issues will also interfere with the executor's ability to exercise sufficient discretion in the management of an estate.

111. *See* PROB. § 78 (West 2003) (allowing disqualification of any person the court finds unsuitable).

112. *See, e.g.*, Pine v. deBlieux, 360 S.W.3d 45, 48 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (explaining that when an executor asserts ownership over estate property to the exclusion of the estate, the executor is subject to removal).

113. *See id.* (demonstrating the effect of section 149C).

114. The inability to manage an estate reveals an executor's unsuitability and subjects him or her to removal. Unfortunately, poor estate planning leads many to make this mistake. *See* Mary Beth Beattie, *Top Ten Myths and Misconceptions in Estate Planning*, MD. B.J., March/April 2003, 8 ("[M]any clients make the mistake of appointing [a] fiduciary . . . who is completely inappropriate.").

115. *See* PROB. § 78 (West 2003) (listing the numerous reasons a court may deem an

IV. ANALYSIS

Section 77 of the Texas Probate Code contains a hierarchy of persons qualified to serve as the representative of an estate in the order that such individuals are preferred.[116] A named executor is the first person deemed qualified to serve under this section.[117] The list also includes several potentially interested persons such as the surviving spouse, a creditor of the decedent, and the next of kin.[118] When the person seeking letters testamentary is within the class of persons given priority under section 77, the opposing party has the burden to prove disqualification.[119] Obviously, this shows that the legislature considers these individuals—who usually have a claim to estate property—worthy of representing an estate.[120] Thus, the question arises: what exactly constitutes a material conflict of interest if the persons most likely to have a conflict of interest are deemed qualified under section 77?

As previously stated, if a party alleged a conflict of interest under the pre-amendment standards, courts removed executors when necessary to protect the interests of the estate.[121] For instance, the Tenth Court of Appeals explained that a conflict of interest by itself did not provide sufficient grounds for removal, but removal was appropriate when the independent executor kept important information from the beneficiaries.[122] The court described the executor's conduct as a breach

---

administrator unsuitable).

116. *Id.* § 77 (West 2003).

117. *Id.*

118. *Id.*

119. Monson v. Betancourt, 818 S.W.2d 499, 500 (Tex. App.—Corpus Christi 1991, no writ).

120. Further, a court must grant letters testamentary to an independent executor named in a will unless disqualified. *See* PROB. § 178(a) (West 2003) ("When a will has been probated, the court *shall*, . . . grant letters testamentary, . . . to the executor or executors appointed by such will, if any there be, or to such of them as are not disqualified, and are willing to accept the trust and qualify according to law.") (emphasis added).

121. The San Antonio Court of Appeals affirmed the removal of an executor who used estate property for his own personal benefit without compensating the estate. *In re* Estate of Vrana, 335 S.W.3d 322, 324–25 (Tex. App.—San Antonio 2010, pet. denied). The executor was the testator's son and one of five beneficiaries under the will, and was entitled to receive a one-fifth share in the Rozypal Ranch. *Id.* at 324. The Ranch also served as the base for the executor's oilfield waste and recycling business. *Id.* However, the executor failed to pay the estate or the other beneficiaries for his use of the property. *Id.* The court determined that the trial court correctly removed the executor because there were sufficient grounds to believe the executor was preparing to misapply or embezzle estate property, and therefore the executor was guilty of gross misconduct. *Id.* at 326. Hence, the court was able to use section 149C to remove the executor based on his actual misconduct, not on an alleged conflict of interest.

122. *See In re* Roy, 249 S.W.3d 592, 597 (Tex. App.—Waco 2008, pet. denied) ("Although that conflict of interest alone may not disqualify him as an independent executor . . . [the] fiduciary duty

of the duty to disclose, which the court defined to include the failure to provide certain information in the accounting and the failure to notify beneficiaries of important facts related to the administration of the estate's property.[123] Other appellate courts consider a conflict of interest as one

---

required him to disclose information regarding the estate to the [s]iblings."). The decision of the Waco Court of Appeals was a departure from its prior precedent. *Compare In re Roy*, 249 S.W.3d at 597 (removing an executor after determining that he exercised gross mismanagement when he failed to abide by his fiduciary duty to disclose), *with* Sammons v. Elder, 940 S.W.2d 276, 284 (Tex. App.—Waco 1997, no writ) (refusing to remove an executor despite arguments that he was unable to perform fiduciary duties due to his personal interests which would interfere with his judgment because the result would "paralyze the independent administration of estates in Texas"). Arguments against the court's decision contend that it "has greatly diminished the authority and discretion of independent executors to administer and settle estates." Brief for Petitioner at 46, *In re* Roy, 249 S.W.3d 592 (Tex. App.—Waco 2008, pet. denied) (No. 08-0338). The court removed the executor in *In re* Roy after he consulted an independent appraiser to ascertain the fair market value for rental payments and subsequently reduced the rent without notifying the beneficiaries. *In re Roy*, 249 S.W.3d at 597. Thus, the Waco Court of Appeals placed a substantial burden on independent executors by requiring them to seek the approval of beneficiaries prior to making important decisions regarding the estate's property. This decision is unattractive and out of line with Texas Supreme Court decisions that reinforce the importance of an independent executor administering an estate free from court control. *See* Bunting v. Pearson, 430 S.W.2d 470, 473 (Tex. 1968) (emphasizing the importance of freeing an independent executor from the supervision of the court); Roy v. Whitaker, 92 Tex. 346, 48 S.W. 892, 897 (Tex. 1898) ("The prohibition upon the power of the court arises out of the existence of a trustee to whom the testator has chosen to confide those powers, and when the trust lapses the limitation upon the exercise of judicial control ceases likewise."); Dwyer v. Kaltayer, 68 Tex. 554, 5 S.W. 75, 79 (Tex. 1887) ("It cannot be doubted that such an executor, called in our state . . . an independent executor, has the power to do without the order of the county court every act which an executor administering an estate under the control of the court can do with such order.").

123. *In re Roy*, 249 S.W.3d at 597. Requiring an executor to notify and consult with beneficiaries prior to making decisions regarding the estate's property was criticized in the petitioner's brief seeking supreme court review. *See* Brief for Petitioner at 9, *In re* Roy, 249 S.W.3d 592 (Tex. App.—Waco 2008, pet. denied) (No. 08-0338) (stating that the decision of the court of appeals places "significant financial burdens on the thousands of individuals designated in wills to act as independent executors by their loved ones in the State of Texas"). Although the Texas Supreme Court declined to hear *In re Roy*, its decision in *Kappus v. Kappus* in 2009 served to clarify its opinion regarding the freedom an executor should have from court supervision. *See* Kappus v. Kappus, 284 S.W.3d 831, 837 (Tex. 2009) (deciding that permitting removal of an independent executor based on a conflict of interest would "undermine the ability of Texas testators to name their own independent executor and also weaken the ability of an executor 'free of judicial supervision, to effect the distribution of an estate with a minimum of cost and delay'" (quoting Corpus Christi Bank & Trust v. Alice Nat'l Bank, 444 S.W.2d 632, 634 (Tex. 1969))); *see also In re* Estate of Hanau, 806 S.W.2d 900, 902–03 (Tex. App.—Corpus Christi 1991, writ denied) ("The general purpose of independent administration of estates is to free the independent executor from the often onerous and expensive judicial supervision and thereby to effect the distribution of the estate with a minimum of cost and delay."); Baker v. Hammett, 789 S.W.2d 682, 683 (Tex. App.—Texarkana 1990, no writ) (reiterating that independent executors receive deference and freedom from court supervision so the estate may be distributed with the least amount of costs and delays); Sweeney v. Sweeney, 668 S.W.2d 909, 910 (Tex. App.—Houston [14th Dist.] 1984, no writ) (describing restraints placed on courts for the purpose of reducing costs and delays).

factor used to form the basis for removal of an independent executor under appropriate circumstances.[124]

Courts often find sufficient grounds for removal when the executor's personal interests are adverse to the interests of the estate.[125] An adverse personal interest indicates the executor is not able to advocate for the interests of the estate and his or her own interests simultaneously.[126] In *Haynes v. Clanton*,[127] the Eighth Court of Appeals determined that an executor who had a direct personal interest in a suit instituted by a bank against the estate was subject to removal.[128] Because the executor was a stockholder of the bank and would receive approximately 11% of the estate's assets that were in his possession if the bank prevailed, the court conceded that it was inconsequential whether the executor was guilty of bad faith because the personal interest alone constituted acceptable grounds to support his removal.[129] The court went on to state that an adverse interest that warrants removal is not limited to cases involving an executor's bad faith or to litigation outside of the probate court which impacts the estate.[130] The court concluded that the executor's personal interest in the litigation instituted against the estate rendered him incapable of fulfilling his duties as the estate representative.[131] Although this case involved a dependent administrator,[132] the analysis may offer guidance to courts preparing to interpret material conflicts of interest as applied to independent executors.

In *Formby v. Bradley*,[133] the court concluded that a substantial conflict of

124. *See* Ayala v. Brittingham, 131 S.W.3d 3, 9–10 (Tex. App.—San Antonio 2003, pet. granted) (removing an independent executor based on a conflict of interest that arose when the executor sought to set aside a marital agreement and assert a community property claim over part of the estate; explaining that although a conflict of interest between the executor's interests and the estate's interests is not one of the enumerated factors in the statute, courts still consider this as a basis for removal of an executor), *rev'd sub nom.* De Ayala v. Mackie, 193 S.W.3d 575 (Tex. 2006); Hitt v. Dumitrov, 598 S.W.2d 355, 356 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ) (affirming removal of an independent executor because the conflict of interest rendered the executor incapable of satisfactorily completing his duties).

125. *See* Haynes v. Clanton, 257 S.W.2d 789, 792 (Tex. Civ. App.—El Paso 1953, writ dism'd by agr.) (removing an executor whose personal interests were adverse to the estate).

126. *See id.* (explaining that when an executor's interests are adverse to the interests of the estate, both the executor's interests and the estate's interests cannot be effectively represented by the same person).

127. *Id.* at 789.

128. *Id.* at 792.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. Formby v. Bradley, 695 S.W.2d 782 (Tex. App.—Tyler 1985, writ ref'd n.r.e.).

St. Mary's Law Journal, Vol. 44 [2012], No. 1, Art. 4

interest existed between the estate's interests and the interests of the executor.[134] The conflict of interest arose when the executor sold estate property and commingled the proceeds with her personal funds without keeping a record.[135] The executor also used estate property as if she personally owned it, without accounting to the estate for its use.[136]

These cases demonstrate courts' ability to remove unqualified, disqualified, or unsuitable executors prior to the 2011 amendment to section 149C effectively.

A. *Conflicts of Interest Under Section 78 of the Texas Probate Code*

As previously discussed, the safeguards in section 78 of the Texas Probate Code permit courts to eliminate individuals who are not suitable for estate representation.[137] Unsuitable individuals include those who claim estate property to the exclusion of the estate, so long as a party brings the claim to the attention of the court prior to appointment. These standards are broad enough to permit disqualification based on conflicts of interest in appropriate circumstances.[138] As a result, courts frequently consider conflicts of interest under section 78.[139] The Corpus Christi Court of Appeals, for example, disqualified a caretaker of a decedent, who claimed $12,000 from the estate, because the claim created a conflict of interest.[140] The court focused on the age of the decedent when he wrote a check to the caretaker and emphasized his susceptibility to the caretaker's influence.[141]

In *Bays v. Jordan*,[142] the Second Court of Appeals held that a named

134. *Id.* at 784–85.

135. *Id.*

136. *Id.* at 785.

137. *See* TEX. PROB. CODE ANN. § 78 (West 2003) (providing the standard for disqualification of independent executors); *see also* Bays v. Jordan, 622 S.W.2d 148, 148 (Tex. App.—Fort Worth 1981, no writ) (describing section 78 and the role it plays in "assuring [the] effective administration of estates . . . that certain persons be disqualified from serving as executors or administrators").

138. *See, e.g.*, Dean v. Getz, 970 S.W.2d 629, 633–34 (Tex. App.—Tyler 1998, no pet.) (discussing cases in which family discord and claims to estate property give rise to disqualification of an administrator); *see also* Ayala v. Martinez, 883 S.W.2d 270, 272 (Tex. App.—Corpus Christi 1994, writ denied) (concluding the surviving spouse was disqualified to serve because she claimed a community interest in part of the estate which created a conflict of interest). *But see* Sorsby v. State, 624 S.W.2d 227, 235 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ) ("We hold that her individual interest in or claim for part of the lands in the Jared Kirby estate did not require the district court to disqualify her as administratrix.").

139. *See Bays*, 622 S.W.2d at 149 (discussing a conflict of interest that rendered the proponent of a will disqualified from serving as executor of the estate).

140. *In re* Estate of Vigen, 970 S.W.2d 597, 601 (Tex. App.—Corpus Christi 1998, no pet.).

141. *Id.* (noting that the decedent was on his deathbed when he signed the check).

142. Bays v. Jordan, 622 S.W.2d 148 (Tex. App.—Fort Worth 1981, no writ).

https://commons.stmarytx.edu/thestmaryslawjournal/vol44/iss1/4

executor who claimed title to estate property through written instruments executed pursuant to her joint venture agreement with the decedent, which contained rights of survivorship, rendered her unsuitable to serve as a matter of law.[143] Because the executor was claiming estate property to the exclusion of the estate, she could not adequately represent the interests of the estate.[144] Further, the court considered the fact the executor was not claiming property through the probate court as a beneficiary under the will, but as a joint venturer through a non-testamentary instrument which conflicted with the decedent's holographic will.[145] Ultimately, the executor's personal interests were too adverse to the estate's interests to allow adequate representation by the same person.[146]

In *Ayala v. Martinez*,[147] the Corpus Christi Court of Appeals held that the surviving spouse of the decedent was disqualified due to her claim that some of the estate property was community property.[148] The court reasoned that this claim created a conflict of interest between the surviving spouse's interests and the estate's interests.[149] Similarly, in *Dean v. Getz*,[150] the Tyler Court of Appeals denied the appointment of an executor because her interests were adverse to both the beneficiaries' interests and the interests of the estate.[151] The court pointed out that the would-be executor's interests were in conflict because if appointed, she would have to sue her mother, siblings, and herself to determine the portion of the property the testator intended to include as homestead property.[152] The interests were also placed in conflict by the would-be executor's vested remainder interest and by the will's grant of sole discretion to the estate representative to determine the property that would constitute the marital deduction gift and the value of the gift.[153] The executor's decisions regarding the gift would ultimately affect the property

143. *Id.* at 148–50.

144. *Id.* at 149 ("In the case of an administrator claiming ownership . . . the estate's title to the property is denied by the claimant.").

145. *Id.* at 148–49 (summarizing Ms. Bay's arguments for the disqualification of the executor).

146. *Id.* at 149.

147. Ayala v. Martinez, 883 S.W.2d 270 (Tex. App.—Corpus Christi 1994, writ denied).

148. *Id.* at 272.

149. *Id.*

150. Dean v. Getz, 970 S.W.2d 629 (Tex. App.—Tyler 1998, no pet.).

151. *Id.* at 634.

152. *Id.* ("[I]f Carol were appointed, she would probably have to sue her mother, her brother, her two sisters[,] and herself to determine what portion of the twenty-acre tract L.A. Dean intended to include in the homestead devised to Barbara.").

153. *Id.* ("[H]er interest as a vested remainderman would be adverse to the estate if she assumed the capacity of executrix since the will grants the independent executor the sole discretion to select from the total estate the properties which would constitute the marital deduction gift.").

that the vested remaindermen would receive because the estate representative could select the less desirable property for the gift so that the vested remaindermen would receive the more desirable property.[154]

The Edinburg Court of Appeals determined that no conflict of interest existed where the executor was also the accountant for several family members.[155] The court reached its decision because there was no evidence the executor was acting as an agent for any members of the family.[156] Therefore, the executor's status as accountant for several family members did not conflict with his duties as estate representative and did not render him unsuitable to serve.[157] Conversely, in *Hitt v. Dumitrov*,[158] a different court determined that the executor who was representing the wife's estate could not also represent the husband's estate because there was a conflict between the two estates as to which was entitled to the proceeds of an insurance policy when the husband and wife died simultaneously.[159] The executor could not represent both estates because he would be unable to advocate for the interests of both effectively.[160]

B. *Removal Under Section 149C of the Texas Probate Code*

The only way a court may remove an independent executor, after appointment, is under section 149C or section 149B.[161] Section 149C does not include failure to comply with a court order as a ground for removal.[162] Section 222 of the Texas Probate Code[163] establishes the

154. *Id.* (describing how the estate representative could manipulate the situation to her benefit). The court declined to consider Carol's assurances that she would be "fair" in executing her duties because "under these circumstances, the interests of Carol would be inimical to the interests of the estate." *Id.*

155. *In re* Estate of Robinson, 140 S.W.3d 801, 808 (Tex. App.—Corpus Christi 2004, pet. dism'd).

156. *See id.* (clarifying that the executor merely provided accounting services and the record was devoid of evidence to suggest an agency relationship between the executor and the families).

157. *See id.* ("Case law does not support appellee's argument that such a business relationship can be the basis for a finding of unsuitability.").

158. Hitt v. Dumitrov, 598 S.W.2d 355 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).

159. *Id.* at 356.

160. *See id.* (referring to the trial court's statement that "[e]ach estate should have a representative that will assume the role of an advocate to achieve the best possible advantage for the estate," and concluding that Hitt's dual representation could not achieve this result) (alteration in original) (internal quotation marks omitted).

161. Under section 149B, a court may order an accounting and distribution upon a motion filed by an interested person two years after the creation of the independent administration. TEX. PROB. CODE ANN. § 149B (West 2003).

162. *See id.* § 149C (West 2003 & Supp. 2011) (providing the grounds for removal of an independent executor).

163. *Id.* § 222 (West 2003).

Kopecki: Removal of Independent Executors: Examining the Standard in Texas

removal process for "personal representatives," which is defined to include independent executors.[164] The grounds for removing a personal representative under section 222 are similar to those under section 149C, except that section 222 includes the failure to comply with a court order during the performance of the personal representative's duties as a ground for removal.[165]

Although independent executors are included within the definition of personal representatives under section 222,[166] section 3 does not permit a court to exercise control over an independent executor during the settlement of an estate, except as expressly provided by the probate code.[167] As a result, section 222 does not apply to matters concerning the settlement of an estate by an independent executor unless the probate code explicitly states that it will apply.[168] However, because section 149B does apply to independent executors, if an independent executor fails to comply with an order or a court requiring an accounting after the expiration of two years from creation of the independent administration, a court may order removal based on the failure to comply.[169]

In light of the foregoing, the legislature should remove the material conflict of interest provision from section 149C. Independent executors in Texas are meant to operate free from the exertion of court control.[170] The freedom accorded to independent executors should also extend to

164. Section 222 does not apply to the settlement of an estate handled by an independent executor. *See id.* § 3(aa) (West 2003) ("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."); *see also* Baker v. Hammett, 789 S.W.2d 682, 685 (Tex. App.—Texarkana 1990, no writ) (stating that section 222 does not apply to estates handled by independent executors unless explicitly provided for in the Texas Probate Code).

165. *Compare* PROB. § 222(b)(3) (West 2003) (permitting removal of any personal representative who fails to comply with a court order in the performance of the representative's duties), *with* PROB. § 149C (West 2003 & Supp. 2011) (allowing removal of an independent executor who fails to return an inventory, misapplies or embezzles property, is guilty of gross mismanagement or gross misconduct, or for a material conflict of interest).

166. Section 222 defines terms pursuant to section 3. According to section 3(aa), a "'personal representative' . . . includes executor, independent executor, administrator, independent administrator, temporary administrator, together with their successors." *Id.* § 3(aa) (West 2003).

167. *Id.*

168. *See id.* § 145(h) (providing that after the creation of an independent administration and the inventory is filed and approved by the court, the court shall take no further action provided the estate is represented by an independent executor, except as otherwise provided in the probate code).

169. *Cf. Baker*, 789 S.W.2d at 685 (holding a court does not have authority to order the distribution of an estate prior to the expiration of two years after the formation of an independent administration).

170. *See* Lee v. Lee, 47 S.W.3d 767, 795 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (noting that public policy in Texas favors independent administration).

Published by Digital Commons at St. Mary's University, 2012

St. Mary's Law Journal, Vol. 44 [2012], No. 1, Art. 4

and protect them from the influences of beneficiaries. By providing an additional removal tool, beneficiaries now have more power to exert influence over independent executors, which will correspondingly increase the cost and time spent administering estates. As a result, the Texas probate system will suffer. The material conflict of interest amendment does nothing more than add uncertainty to an already simple and efficient system.

V. SOLUTION

In order to avoid court confusion over the meaning of material conflict of interest, the legislature should remove this section from the probate code. Alternatively, the legislature should consider adding another section to the probate code to clarify the meaning of material conflict of interest. This section should provide that after the settlement of an estate, the executor may present any debts or claims he or she has against the estate without creating a material conflict of interest. This section should also list each circumstance that does not create a material conflict of interest. Specifically, the section should provide that when a spouse serves as an executor, this by itself does not create a material conflict of interest. Under this system, an executor will be able to continue representing an estate even though he or she may have a personal interest in the assets of the estate. This will further the goals of the independent administration of estates in Texas by reducing the grounds for removal and allowing testators to retain the power to choose their own independent executors. Permitting an executor to bring his or her claim through the probate court after the estate settlement will allow him or her to advocate for the interests of the estate effectively, thus eliminating any reason to remove him or her from the position.

The ideal resolution of the problems created by the recent amendment would be for the legislature to remove this section. In the alternative, the legislature should add the above-described section to the probate code and leave material conflict of interest under section 149C, but define it to include instances only when an executor has an adverse personal interest that will interfere with his or her ability to effectively advocate for the estate's interests effectively. By clearly defining material conflict of interest, the legislature will prevent years of litigation attempting to determine the meaning of a material conflict and will protect numerous independent executors from endless attacks on their decision-making.

VI. CONCLUSION

The recent amendment to section 149C[171] has the potential of creating years of litigation to resolve the meaning of the word material. The increased litigation is not necessary and should be avoided because the Texas probate system is one of the most cost-effective and least time-consuming systems in the United States.[172] The Texas Probate Code is a model for systems in other states, with other jurisdictions attempting to mirror their systems to that of the Texas Probate Code.[173] Increasing the ability to challenge an independent executor's actions will create doubt in the probate system, which will potentially influence individuals to resort to will substitutes to avoid the increasing complexities of the probate system.[174]

---

171. *See* PROB. § 149C (West 2003 & Supp. 2011) (adding material conflict of interest to the grounds for removing an independent executor).

172. *E.g.*, M. K. Woodward, *Independent Administrations Under the New Texas Probate Code*, 34 TEX. L. REV. 687, 687 (1956) (supporting the drafters of the Texas Probate Code in creating a code that is "second to none in this country"). The Texas Probate Code is described as "more workable than that found in most states." *Id.* The attraction of the Texas probate system stems from an executor's ability to quickly and effectively settle estates and distribute the assets to beneficiaries. By taking this ability away, the probate system may begin to lose its appeal and Texas estate planners will resort to revocable *inter vivos* trusts designed to avoid a system that no longer does what it was designed to accomplish.

173. *See* Michael Hatfield, *Pro Se Executors—Unauthorized Practice of Law, or Not?*, 59 BAYLOR L. REV. 329, 333–34 (2007) ("It is also unethical for Texas attorneys to claim that the Texas probate system is inherently lengthy, expensive, complicated, or always to be avoided. Texas has long had the type of probate system other states are now moving towards.") (footnotes omitted). Commentators also suggest that the high number of testate estates in Texas is the result of the ability to select an independent administration. Karen J. Sneddon, *Beyond the Personal Representative: The Potential of Succession Without Administration*, 50 S. TEX. L. REV. 449, 466–67 (2009). Others reason that Texans are proud of the state's system of independent administrations because it permits significant savings of time and money when settling an estate. *See* Jack M. Kinnebrew & Deborah Cox Morgan, *Community Property Division at Death*, 39 BAYLOR L. REV. 1035, 1066 (1987) ("Texas has long been proud of its independent administration of estates. Significant savings of time and money in the estate settlement process have been accomplished over the years and continue under the statutes as they exist today.").

174. *See* Joanne Hughes Burkett, *Misconceptions About Probate Law*, S.C. LAW., Nov. 2008, at 18, 19 (describing the common public misconceptions about the probate system in South Carolina; for example, the myth that estate planners need to avoid probate because court costs are high); Hon. William P. DeFeo, *Avoiding Probate Court: A Judge's Perspective*, 19 QUINNIPIAC PROB. L.J. 53, 54–56 (2005) (detaling the use of the living trust to avoid probate). Norman F. Dacey published a book in 1965 entitled "How to Avoid Probate," and lured readers with promises of reduced costs through the use of the living trust in lieu of the probate system. NORMAN F. DACEY, HOW TO AVOID PROBATE (1965). The book created quite a stir in the legal community. *See, e.g.*, Hon. William P. DeFeo, *Avoiding Probate Court: A Judge's Perspective*, 19 QUINNIPIAC PROB. L.J. 53, 56 (2005) ("Despite the enthusiasm of Mr. Dacey's book, living trusts do not address all the issues inherent in a comprehensive estate plan .... Avoiding probate is not the primary objective of an estate plan."). The success of "How to Avoid Probate" illustrates the doubt the public has in the probate system's

St. Mary's Law Journal, Vol. 44 [2012], No. 1, Art. 4

The legislature does not provide an effective means to an end with the recent amendment. The potential benefits are simply not worth the costs and delays of the resulting litigation.[175] Testators carefully select trusted individuals to distribute their property according to their wishes. When it becomes clear that an executor is managing an estate in a detrimental manner, a court should remove the executor. However, the legislature should provide courts with exceedingly specific guidelines to follow when making removal decisions to ensure they adequately protect testator's wishes. Accordingly, the recent amendment should be removed from the probate code as it does nothing more than add confusion to a simple and cost-effective system.

---

ability to honor the decedent's wishes in a cost-effective manner. *See* Judge Joseph S. Mattina, *The Probate Court and the Non-Probate Revolution*, 13 QUINNIPIAC PROB. L.J. 409, 411 (1999) (illustrating the publicity generated by Dacey's book and "[t]he widespread perception of the so-called 'evils' of the probate system" as a result). Doubt in probate systems leads to the increased use of *inter vivos* trusts to distribute property instead of reliance on the probate system. *See* Earl D. Tanner, Jr., *Wills v. Trusts*, UTAH B.J., Oct. 1997, at 18 (stating that the decision to avoid probate stems from clients wanting to avoid the "expense, delay, and assorted supposed horrors of probate"). Without providing an in-depth analysis on the problems associated with *inter vivos* trusts, one important concern is the lack of court overview of a trustee's actions. *E.g.*, Hon. William P. DeFeo, *Avoiding Probate Court: A Judge's Perspective*, 19 QUINNIPIAC PROB. L.J. 53, 57 (2005) ("The named trustee, unencumbered by the scrutiny of the probate court, can proceed directly to the administration .... Without the checks and balances of an intervening court ... the individual ... must be one ... in which the title 'trustee' is very well placed."). Abuse is much more likely in the absence of court supervision. So, an important lesson can be taken from trust law and applied to independent executors in Texas. Courts and legislatures should strive to reach an appropriate balance between the need for supervision of independent executors and the need to permit discretion to settle estates in a cost-effective and efficient manner. *Cf.* Mary Beth Beattie, *Top Ten Myths and Misconceptions in Estate Planning*, MD. B.J., March/April 2003, at 3, 5 (emphasizing the need to protect beneficiaries from the personal representative's negligence and self-service). When that balance is reached, doubts in the system will be reduced accordingly.

175. Members of the public are frequently concerned with the costs and delays associated with the probate system. *See, e.g.*, Mary Beth Beattie, *Top Ten Myths and Misconceptions in Estate Planning*, MD. B.J., March/April 2003, at 3, 4–5 (clarifying mistaken beliefs about the probate system). Consequently, revocable trusts are used as a way to avoid the probate system. *Id.* at 4. However, the revocable trust may not be any less expensive than the probate system because a revocable trust involves more up-front costs in the trust agreement's preparation and in transferring property into the trust. *Id.* Further, after the settlor's death, the trustee must perform many of the same duties as a personal representative without receiving any of the benefits of the probate system. *See id.* (describing the advantages of the probate system, which includes "a well-defined procedure for the personal representative to follow").

UNITED STATES POSTAL SERVICE

Statement of Ownership, Management, and Circulation (All Periodicals Publications Except Requester Publications)

1. Publication Title	2. Publication Number	3. Filing Date
St. Mary's Law Journal	P E 9 9 - 2 5 4 0	9-29-12
4. Issue Frequency	**5. Number of Issues Published Annually**	**6. Annual Subscription Price**
Four Times per Academic Year: September - June	Four	$40.00

7. Complete Mailing Address of Known Office of Publication (Not printer) (Street, city, county, state, and ZIP+4)
St. Mary's University School of Law - Law Journal
One Camino Santa Maria
San Antonio, Texas 78228-8604

Contact Person: Renee A. Higgins
Telephone (Include area code): 210-436-3525

8. Complete Mailing Address of Headquarters or General Business Office of Publisher (Not printer)
St. Mary's University School of Law - Law Journal
One Camino Santa Maria
San Antonio, Texas 78228-8604

9. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor (Do not leave blank)

Publisher (Name and complete mailing address)
St. Mary's University School of Law - Law Journal
One Camino Santa Maria
San Antonio, Texas 78228-8604

Editor (Name and complete mailing address)
Charles Epps Ipock
St. Mary's University School of Law - Law Journal
One Camino Santa Maria San Antonio, Texas 78228-8604

Managing Editor (Name and complete mailing address)
Lauren A. Valkenaar
St. Mary's University School of Law - Law Journal
One Camino Santa Maria San Antonio, Texas 78228-8604

10. Owner (Do not leave blank. If the publication is owned by a corporation, give the name and address of the corporation immediately followed by the names and addresses of all stockholders owning or holding 1 percent or more of the total amount of stock. If not owned by a corporation, give the names and addresses of the individual owners. If owned by a partnership or other unincorporated firm, give its name and address as well as those of each individual owner. If the publication is published by a nonprofit organization, give its name and address.)

Full Name	Complete Mailing Address
St. Mary's University	One Camino Santa Maria
	San Antonio, Texas 78228-8604

11. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages, or Other Securities. If none, check box → ☒ None

Full Name	Complete Mailing Address

12. Tax Status (For completion by nonprofit organizations authorized to mail at nonprofit rates) (Check one)
The purpose, function, and nonprofit status of this organization and the exempt status for federal income tax purposes:
☒ Has Not Changed During Preceding 12 Months
☐ Has Changed During Preceding 12 Months (Publisher must submit explanation of change with this statement)

13. Publication Title	14. Issue Date for Circulation Data Below
St. Mary's Law Journal	

15. Extent and Nature of Circulation: Libraries, Attorneys, Judges and Legal Community		Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a. Total Number of Copies (Net press run)		800	800
b. Paid Circulation (By Mail and Outside the Mail)	(1) Mailed Outside-County Paid Subscriptions Stated on PS Form 3541 (Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)	538	538
	(2) Mailed In-County Paid Subscriptions Stated on PS Form 3541 (Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)	0	0
	(3) Paid Distribution Outside the Mails Including Sales Through Dealers and Carriers, Street Vendors, Counter Sales, and Other Paid Distribution Outside USPS®	20	14
	(4) Paid Distribution by Other Classes of Mail Through the USPS (e.g. First-Class Mail®)	0	0
c. Total Paid Distribution (Sum of 15b (1), (2), (3), and (4))		558	552
d. Free or Nominal Rate Distribution (By Mail and Outside the Mail)	(1) Free or Nominal Rate Outside-County Copies included on PS Form 3541	90	90
	(2) Free or Nominal Rate In-County Copies Included on PS Form 3541	0	0
	(3) Free or Nominal Rate Copies Mailed at Other Classes Through the USPS (e.g. First-Class Mail)	0	0
	(4) Free or Nominal Rate Distribution Outside the Mail (Carriers or other means)	0	0
e. Total Free or Nominal Rate Distribution (Sum of 15d (1), (2), (3) and (4))		90	90
f. Total Distribution (Sum of 15c and 15e)		648	642
g. Copies not Distributed (See Instructions to Publishers #4 (page #3))		152	158
h. Total (Sum of 15f and g)		800	800
i. Percent Paid (15c divided by 15f times 100)		86%	86%

16. Publication of Statement of Ownership
☒ If the publication is a general publication, publication of this statement is required. Will be printed in the V.44:1 issue of this publication.
☐ Publication not required

17. Signature and Title of Editor, Publisher, Business Manager, or Owner	Date
[signature]	September 29, 2012

I certify that all information furnished on this form is true and complete. I understand that anyone who furnishes false or misleading information on this form or who omits material or information requested on the form may be subject to criminal sanctions (including fines and imprisonment) and/or civil sanctions (including civil penalties).