

**10 THINGS (OR MORE) ESTATE PLANNING AND
PROBATE LAWYERS WISH
BANKERS KNEW WHEN
ADMINISTERING DEPOSIT ACCOUNTS**

Don Totusek

Francis & Totusek, L.L.P.
500 North Akard Street, Suite 1830
Dallas, Texas 75201

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10 THINGS (OR MORE) ESTATE PLANNING AND PROBATE LAWYERS WISH BANKERS KNEW WHEN ADMINISTERING DEPOSIT ACCOUNTS

I. INTRODUCTION

This outline discusses several matters regarding deposit accounts that estate planning and probate lawyers (“EP&P lawyers”) wish were better-known by bankers.

As part of his preparation for the presentation, the author asked the members of Austin attorney Glenn Karisch’s Texas Probate.com email mailing list to provide suggestions for inclusion, and this outline incorporates many of those suggestions. (The author believes that more than a thousand Texas attorneys are subscribers to The Texas Probate email list, but he has not confirmed current subscriber numbers with the sponsor.)

Bankers opening new accounts for deposit customers should know that there may be significant estate planning consequences of different types of account ownership of deposit accounts, and bankers should be aware that the proper taxpayer identification numbers for certain trusts and business entities are not always employer identification numbers (“EIN”).

Bankers who administer accounts after the death of a customer should know what information an executor or administrator is entitled to request from the bank, when letters testamentary or of administration should be not be required because there is a valid probate alternative which protects the bank, and how to proceed when there will be no executor or administrator appointed by a probate court.

EP&P lawyers would like to have access to someone who can help them efficiently resolve their clients’ problems to the mutual satisfaction of the client and the bank.

II. ESTATE PLANNING: OPENING NEW BANK ACCOUNTS

A. How an account is styled affects ownership at death, and the style of the account may DESTROY the depositor’s estate plan.

Several different types of multiple-party accounts result in changed ownership at the depositors death.

- ▶ Survivorship Account. At the death of a party to a multiple-party account with right of survivorship (“ROS account”), the surviving parties own the entire balance in the account, regardless of ownership during lifetime. Assume John has a \$250,000 CD in his name only in your bank. John adds Mary to the account as a party and signs a new signature card/deposit agreement (hereafter, “deposit agreement”) designating the account as a ROS account. At John’s death, the account does not pass under John’s Will. Mary owns the entire balance in the account.

- ▶ P.O.D. Account or Trust Account. Similarly, at the death of the surviving party to a P.O.D. or trust account, the funds in the account belong to the surviving P.O.D. payee or trust beneficiary (both of which are commonly referred to a “beneficiary”). Assume John has a \$250,000 CD in his name only in your bank. John adds Mary to the account as the beneficiary by signing a new deposit agreement designating the account as a P.O.D. or trust account and Mary as beneficiary. At John’s death, the balance in the account automatically belongs to Mary and does not pass under John’s Will.

For many customers, use of a ROS or P.O.D. account may accomplish important estate planning objectives. In fact, the use of a ROS or P.O.D. account may allow the customer to pass the funds in the account to the customer’s desired testamentary beneficiaries without the need of a Will or without having to probate his Will if he has one. So these types of accounts can be very popular with customers.

These types of accounts are popular with banks, as well. It can be much easier for the bank to determine to whom to pay the funds in the account in the event of the customer’s death if the funds are in a ROS account or P.O.D. account.

- ▶ In the case of the ROS account, the bank already has a relationship with the surviving party to the account, and the bank does not need to receive

documentation of any kind to allow the surviving party to withdraw the funds in the account. The bank can safely pay the funds to the survivor, and the bank does not need a death certificate or letters testamentary.

- ▶ In the case of the P.O.D. account, the bank can pay out the funds in the account after examining the customer's death certificate and verifying the identity of the beneficiary. No letters testamentary would be needed.

However, an account which avoids probate and doesn't pass under the depositor's Will can interfere with the depositor's estate plan. In fact, ROS and P.O.D. accounts may be completely incompatible with the estate plan set out in the depositor's Will. Here are a few examples of issues which may arise.

- ▶ New account personnel sometimes suggest multiple-party accounts be established to obtain increased deposit insurance coverage. But those ROS and P.O.D. accounts may prevent the funds in the accounts from passing into trusts (under a Will or revocable trust) designed to reduce federal estate taxes or federal generation-skipping transfer taxes. Using ROS and P.O.D. accounts may cause some of the depositor's assets to be subject to a 40% federal estate tax at some point.
- ▶ When married depositors have children from a prior marriage, their estate plan may involve a trust for the benefit of the survivor. ROS and P.O.D. accounts in favor of the other spouse may destroy that plan, so that the entire estate passes to only one side of the family, instead of being split among the children of both spouses.
- ▶ If an elderly depositor names only one child as a party to an ROS account, she may be unintentionally disinheriting the rest of her children. (This recurring and unfortunate problem led to the creation of the convenience account as a possible solution.)
- ▶ Naming minor children as P.O.D. beneficiaries may prevent the use of trusts established for the children in the depositors' Wills or revocable trust and make an expensive guardianship proceeding necessary.
- ▶ In the case of a special needs adult child or other

beneficiary eligible to receive governmental assistance, naming the child or other beneficiary as a party to an ROS account or as a P.O.D. beneficiary may disqualify the child or beneficiary for assistance or result in dissipation of the funds.

- ▶ Creating ROS accounts and P.O.D. accounts may prevent the estate from having funds needed to pay specific bequests under the Will.
- ▶ Creating ROS accounts and P.O.D. accounts may make funds unavailable to the executor to pay taxes, debts, and expenses of administration.

Suggestions for Bankers:

- ▶ Don't suggest ROS and P.O.D. accounts to obtain additional deposit insurance coverage. Persons who need deposit insurance coverage planning should have an estate plan which could be compromised.
- ▶ Don't suggest an ROS account as the first choice for an elderly client seeking to add another signer to the account. The convenience account may be what is needed.
- ▶ New accounts personnel should be careful about suggesting accounts to "avoid probate." The depositor's estate plan may require that the Will be probated to achieve the depositor's estate planning objectives.

Don't hesitate to ask the depositor if he would like to check with the attorney about the type of account which should be opened. Many attorneys provide their clients with instructions and warnings about how accounts should be styled, and your customer may appreciate the reminder.

B. EIN? EIN? We don't need no stinkin' EIN for this trust!

Maybe so, maybe no! The rules governing the proper TIN for revocable and irrevocable trusts have changed several times over the years. Depending on all the facts, the proper TIN for an account opened by the trustee of a trust can now be either someone's Social Security Number or an Employer Identification Number assigned to the trust.

Here is a brief summary of the general rules:

- ▶ If the trust is a revocable trust with one grantor (also known as the settlor or trustor), the proper TIN for the trust is usually the grantor's SSN. (Although an EIN may not be required, sometimes the trustee obtains one anyway.)
- ▶ If the trust is a revocable trust with two grantors, the proper TIN for the trust is usually the SSN of one of the grantors. (Although an EIN may not be required, sometimes the trustee obtains one anyway.)
- ▶ The proper TIN may change after the death of a grantor; it may then be appropriate to use an EIN for the same trust for which the trustee and payers had been properly using an SSN.
- ▶ If the trust is irrevocable, the proper TIN for the trust could be (a) the SSN of the grantor, (b) the SSN for the beneficiary, or (c) an EIN obtained by the trustee for the trust.

So how does the bank determine whether someone's SSN or the trust's EIN is what should be used? Fortunately, the answer is simple:

The bank should use the name and number provided to it by the trustee; either the name and employer identification number of the trust, or the name and social security number of the grantor (or in some cases, the beneficiary). In either case, the bank should send the Form 1099-INT to the trustee of the trust.

If the trustee does not know whether to provide an EIN or a SSN, the trustee should be advised to consult his lawyer or CPA now, to prevent the need for remedial action later.

C. EIN? EIN? We don't need no stinkin' EIN for this single member LLC!

Once again: maybe so, maybe no. Depending on the number of owners and the tax elections made by a limited liability company and its owners, an LLC can be taxed as a sole proprietorship, a partnership, a regular corporation, or an S corporation.

If the LLC will be taxed as a sole proprietor, it is appropriate for an LLC to use the SSN of the sole owner as the TIN for the LLC rather than an EIN. In all other cases, the LLC should obtain an EIN and provide that

information to the bank.

Note: If the only two owners of an LLC are a married couple in a community property state, the TIN for the LLC can be the SSN of one of the owners.

Note Also: Even if an SSN may be used for a single member LLC, some tax advisors prefer that the LLC obtain and use an EIN.

D. Trust Agreement? Trust Agreement? We don't need no stinkin' copy of a trust agreement!

Once again, maybe so, maybe no. Some banks routinely request a copy of the trust agreement when a trustee opens an account for the trust. Sometimes, in order to preserve privacy for the trustee and beneficiaries, a trustee would prefer not to provide a copy of the trust agreement.

Texas Trust Code § 114.086 allows the trustee of a trust to provide a third party with a "certification of trust" as an alternative to providing the third party with a copy of the trust instrument. A person who acts in reliance on a certification of trust without knowledge that the representations contained in the certification are incorrect is not liable to any person for the action and may assume without inquiry the existence of the facts contained in the certification.

The statute provides detailed requirements for a certification of trust. Some EP&P lawyers automatically prepare a certification of trust every time they draft a trust agreement. A sample certification of trust which satisfies the Texas Trust Code requirements is included at the end of this outline. This certification also includes some provisions drafted for the bank's benefit which are not required by the statute. If your bank does not have an in-house form for a trust agreement, this could provide a starting point for drafting one.

E. Sometimes the decedent's Will is the trust agreement.

When the bank requests the trustee to provide a copy of the trust agreement, the trustee may provide the bank with a copy of a decedent's Will. This is not necessarily a misunderstanding; the Will may be all that is needed to satisfy the bank's request.

Trusts can be divided into two broad categories, (1)

living or *inter vivos* trusts, and (2) testamentary trusts. A living or *inter vivos* trust is created under a trust instrument (which may be either an agreement or declaration of trust). The trust generally comes into existence when it is signed by the creator of the trust (referred to as the “grantor,” “settlor,” or “trustor”) and the trustee (who may be the same person as the grantor) or when a contribution is made to the trust.

A testamentary trust is one which is created under the terms of a Will which has been admitted to probate. The trust does not come into existence when the Will is signed by the testator, but only after the testator’s death, after the Will has been admitted to probate. The Will contains the provisions of the trust, including the beneficiaries, trustees, and powers of the trustees.

Whether a trust is a living trust or a testamentary trust is not necessarily apparent from the name of the trust. While some trusts include the phrase “living trust” as part of the name of the trust, many do not. Sometimes the term “testamentary” or the phrase “under the Will of” is part of the name of a testamentary trust, but often it is not.

As an aside, a trust which includes the term “revocable” in its name may, in fact, be an irrevocable trust. For example, John Smith may establish the John Smith Revocable Trust. After John’s death, the trust may be an irrevocable trust for a period of time until all assets are distributed.

III. PROBATE ISSUES: ADMINISTERING ACCOUNTS AFTER DEATH OF DEPOSITOR

A. The bank should not always require letters testamentary or letters of administration in the case of the death of a depositor.

Some banks routinely require—it may be a request, but your customers hear “require”—letters testamentary with respect to every account which does not automatically pass at death under a ROS agreement or P.O.D. arrangement.

Banks should be aware that there are several different types of probate proceedings in Texas under which the bank can be completely protected in paying out the funds in a deceased depositor’s account. Here are some of the options which may be available:

- ▶ Probate of a Will with appointment of executor or

administrator with Will annexed. Letters testamentary or of administration with Will annexed will be issued in this case.

- ▶ Probate of a Will as a muniment of title. No executor or administrator is appointed and no letters will be issued, but the bank is protected.
- ▶ Dependent or independent administration of an estate where there is no Will. An Administrator will be appointed and letters of administration will be issued.
- ▶ Proceeding to determine heirship where there is no Will. No executor or administrator will be appointed. A “Judgment Declaring Heirship” will be entered, and if the court determines no administration is necessary, the bank will be protected in paying pursuant to the judgment.
- ▶ A small estate proceeding, in which there is a Small Estate Affidavit and Order. No executor or administrator will be appointed, and no letters testamentary or of administration will be issued. But the bank is protected in paying pursuant to the Small Estate Affidavit and Order.

The bottom line is that letters testamentary or letters of administration need not and should not be required to administer a decedent’s account in some circumstances.

Attached is a document entitled Death of a Depositor - Determining Proper Payment of Probate Account after Death of Depositor which provides a question and answer approach to determining whether the bank can pay the decedent’s funds as requested by family members or heirs. Perhaps this can be used to develop a list of questions your bank can use to better assist a deceased customer’s family or heirs in determining what must be done to obtain payment of the funds in the account.

B. The family and potential heirs of the decedent may need information from the bank to decide how best to proceed in handling the estate.

As the following paragraphs indicate, there are sometimes several different options available to the family and potential heirs of the decedent in handling the estate. Choice of how to proceed initially depends on whether or not the decedent had a Will. If the decedent

had a Will, the family will consider whether a full-blown administration is required (in which an executor or administrator will be appointed and letters testamentary or letters of administration issued), or whether a muniment of title proceeding would be sufficient.

The cost of a full-blown administration is greater, because it will involve required publication a notice to creditors, notices to secured credits, notices to beneficiaries, affidavits of notice to beneficiaries, preparation of an Inventory, Appraisal, and List of Claims, etc. With a muniment of title proceeding, involvement with the probate court often begins and ends with the probate hearing, resulting in significantly lower total cost. Determining which way to proceed requires analysis of the nature of the decedent's estate (what assets are in the estate, and where are those assets located) and whether the decedent had any unsecured creditors. (The muniment of title proceeding is not available when there are unsecured creditors which remain unpaid at the time of the probate hearing.

If the decedent had no Will, then there are several options potentially available, including a full-blown dependent administration (supervised by the court) or independent administration (if the heirs agree). In each case, an administrator would be appointed, and the administrator would be issued letters of administration. The administrator will be able to present letters of administration to the bank, and will be able to collect the assets of the estate.

A full-blown administration is relatively expensive, and those involved often seek to avoid an administration. If there are no debts, then it may be possible for the parties to use procedures which are less expensive, including a determination of heirship proceeding or a small estate affidavit and order. The small estate affidavit procedure is usually the least expensive, but there are dollar limits on the size of the estate to qualify for the small estate affidavit procedure.

Before filing a probate application, the family and potential heirs generally try to determine the nature of the bank accounts held by the deceased depositor. There are really two main issues:

- ▶ Did the decedent own any accounts in the bank *other than* those passing automatically at the decedent's death, such as ROS accounts and P.O.D. accounts?

If not—if there are no single ownership accounts without P.O.D. beneficiaries—perhaps a probate court proceeding is not needed at all.

- ▶ If the decedent owned accounts not passing automatically at death, such as single party accounts or multiple party accounts with no right of survivorship, what is the balance in those accounts?

If the balance exceeds \$50,000, then the small estate affidavit procedure is unavailable.

If the balance is minimal, the cost of any kind of probate proceeding may not be justified.

So the family and potential heirs need information about the decedent's bank accounts. Bank statements in the decedent's personal effects may or may not provide any clue as to the nature of the accounts (single ownership, P.O.D., right of survivorship, etc.). The decedent may or may not retain current bank information in an accessible format.

This may create a dilemma for the bank. Will the bank provide any useful information to the family and potential heirs of the decedent? The bank, of course, is concerned about possible violation of the privacy aspects of the GLB Act, and its employees are trained not to provide any financial information about depositors' accounts.

But how do these privacy rules apply after the death of a depositor? If the bank has been presented with a death certificate for the depositor, who is the "customer" whose privacy the bank is trying to protect? One can argue that the privacy provisions don't and shouldn't apply to those accounts, because the bank's customer is no longer living, and that refusing to provide information benefits no one and can in effect be harmful.

The bank may be providing a very helpful service if it provides some generally information, such as (1) whether the depositor had any single ownership accounts or other accounts for which there are no beneficiaries, and if so, (2) the approximate balance in the accounts. This information can be very helpful to the deceased depositors family or heirs in a very difficult time.

Effective September 1, 2015, new Estates Code section 153.003 provides that an heir, spouse, creditor, or any other person having a property right in or claim

against the decedent's estate can request a probate court to issue an order requiring a financial institution to release to the person named in the order information concerning the balance of each account that is maintained at the financial institution of a decedent who dies intestate if:

- ▶ 90 days have elapsed since the date of the decedent's death;
- ▶ No petition for the appointment of a personal representative for the decedent's estate is pending; and
- ▶ No letters testamentary or of administration have been granted with respect to the estate.

A probate court can issue such an order on its own motion, as well.

This provision does not apply to an account with a beneficiary designation (such as an IRA), a P.O.D. account, a trust account, or an account that provides for a right of survivorship.

C. When the Probate Court appoints a personal representative of an estate, the personal representative has the same authority as the deceased customer.

An executor is a person designated by the decedent in a Will and appointed by the probate court to administer an estate. An administrator is a person appointed by the probate court to administer an estate when there is no Will, or when no one designated in the Will is able or willing to serve as executor. The executor or administrator is sometimes referred to as the "personal representative" of the estate (and in some states, the term "personal representative" has wholly replaced the terms "executor" and "administrator").

In Texas, a personal representative can be either "independent" of probate court supervision or "dependent" on probate court with respect to certain matters. Status as "independent" can be granted by the Will or agreed to by the beneficiaries or heirs and approved by the court. The evidence of the personal representative's appointment is "letters testamentary" in the case of an executor and "letters of administration" in the case of an administrator. Letters testamentary and letters of administration are prepared and certified by the probate clerk.

Whether independent or dependent, the personal

representative's responsibility is to "administer" the estate, which involves (1) collecting all of the decedent's assets, (2) paying all taxes, debts, and expenses, and (3) distributing the remaining assets to the proper persons named in the Will or entitled to inherit the property under the laws of descent and distribution.

In order to collect the assets of the estate, the personal representative must first identify the assets which the decedent owned and which are included in the estate. As a practical matter, "included in the estate" means that the assets are available to the representative to pay debts and expenses and will pass to the beneficiaries under the Will or to the heirs.

In order to identify the assets which the decedent owned, the personal representative must obtain information from the bank about every deposit account which might be included in the decedent's estate. In many cases, the bank will be the only source of that information, and the personal representative will contact the bank requesting the following information:

- ▶ Date of death balances for every account in which the decedent was a party, including single party accounts, multiple party accounts with and without rights of survivorship, P.O.D. accounts, and trust accounts. Even though the funds in a valid right of survivorship account do not become part of the decedent's probate estate, the personal representative may need to report the date of death balance in the account on federal estate tax or State inheritance tax returns.
- ▶ Copies of deposit agreements for any multiple party accounts with and without rights of survivorship, P.O.D. accounts, and trust accounts. The personal representative has a responsibility to make sure that these accounts satisfied the statutory requirements to create a valid ROS or valid P.O.D. arrangement.

Even though the personal representative may not be not entitled to collect the funds in a ROS or P.O.D. account, the personal representative is entitled to information about the status of the account, including transactions before the date of death, account balance as of the date of death, and copies of the signature card or deposit agreement.

To what information is the personal representative entitled? *If you would have been willing to provide the*

information to the depositor if he were living, you should be willing to provide that information to the personal representative of the depositor's estate.

Note: That does not necessarily include information about an account after the date of the depositor's death if the account is a P.O.D. account, for example. Whether the P.O.D. beneficiary has closed the account may be private information to the beneficiary

D. Letters testamentary/letters of administration granted in one state can be used for the decedent's bank accounts in another state.

As a general rule, a probate administration of an estate in one state is sufficient to deal with personal property (known as "movables" in conflict of laws lingo) in another state, including intangible personal property like bank accounts.

So if the depositor has an account in your bank in Texas, but the Will was admitted to probate in Oklahoma and an Oklahoma personal representative was appointed, the personal representative is entitled to administer the Texas bank account as part of the Oklahoma estate. There is no need for an "ancillary administration" in Texas to gain access to the bank account.

This can be confusing, because different rules apply to real estate and to guardianships.

- ▶ A probate proceeding in one state generally does not grant the personal representative to deal with real property ("immovables") located in another state. The personal representative appointed by the Oklahoma probate court would have to open an ancillary administration in Texas to sell real estate situated in Texas.
- ▶ A guardian of the estate for a minor or incapacitated person appointed in a proceeding in another state generally does **not** have authority to deal with property of the Ward situated in another state, whether the property is real or personal.

E. The bank does not need letters testamentary or of administration if the decedent's Will has been admitted to probate a muniment of title.

Under Estates Code Chapter 257, a probate court may admit a Will to probate but also determine that there

is no need for an administration of the estate (for example, when there are no debts that need to be paid). The court admits the Will to probate solely as a muniment (evidence) of title. In other words, the Will itself is the evidence of the proper owners of the decedent's property. The court does not appoint an executor or administrator to administer the estate, and no letters testamentary or letters of administration are issued.

The order admitting the Will to probate as a muniment of title is sufficient authority for an institution to deal directly with the person who receives the account of the decedent in the Will. Estates Code § 257.102 provides:

"(a) An order admitting a will to probate as a muniment of title constitutes sufficient legal authority for each person who owes money to the testator's estate, has custody of property, acts as registrar or transfer agent of any evidence of interest, indebtedness, property, or right belonging to the estate, or purchases from or otherwise deals with the estate, to pay or transfer without administration the applicable asset without liability to a person described in the will as entitled to receive the asset.

"(b) A person who is entitled to property under the provisions of a will admitted to probate as a muniment of title is entitled to deal with and treat the property in the same manner as if the record of title to the property was vested in the person's name."

In other words, bank and other third parties holding property which belonged to the decedent can pay the property directly to the person entitled to the property under the terms of the decedent's Will.

If advised that the depositor's Will has been admitted to probate as a muniment of title, and that no letters testamentary or letters of administration will be issued, the bank should require presentation of the following:

- ▶ The decedent's death certificate.
- ▶ A certified copy of the Order Admitting Will to Probate as a Muniment of Title.
- ▶ A certified copy of the decedent's Will.

The bank is then protected in paying the funds in the account directly to the person(s) entitled under the Will—*provided that it is possible for the bank to make that determination by reviewing the Will*. The bank’s legal counsel should be consulted in determining to whom the account should be paid, and whether the determination can be made from the Will itself.

- ▶ For example, if the Will provides for all of the decedent’s property to pass to his children, but does not specifically name his children, how will the bank determine who is entitled to the property?

Estates Code § 257.101 provides that order admitting the Will to probate as a muniment of title may include a declaratory judgment construing the Will or determining those persons who are entitled to receive property under the Will and the persons’ shares or interests in the estate. An institution delivering property in accordance with the judgment is not liable to any person for actions in good faith reliance on the judgment.

Those probating a Will as a muniment of title may not automatically request that a declaratory judgment provision be included in the order admitting the Will to probate as a muniment of title, because of the additional filing fees, court costs, publication expenses, and attorneys fees.

F. The bank does not need letters testamentary or of administration if the Probate Court has entered a Judgment Determining Heirship.

Estates Code Chapter 202 provides for a proceeding to determine heirship of a decedent. This procedure may be used when the deceased depositor does not leave a Will and there has been no administration in the estate. The court, after hearing evidence of the parties, determines who are the heirs of the decedent and enters a “Judgment Declaring Heirship.” The court may also enter an order that no administration is necessary.

If the court states in the judgment that no administration is necessary, then the bank will be protected in paying or transferring the decedent’s accounts to the person(s) determined to be heirs in the judgment entered by the court. Estates Code § 202.205 provides as follows:

“(a) A judgment in a proceeding to declare heirship stating that there is no necessity for administration of the estate of the decedent who is

the subject of the proceeding constitutes authorization for a person who owes money to the estate, has custody of estate property, acts as registrar or transfer agent of an evidence of interest, indebtedness, property, or right belonging to the estate, or purchases from or otherwise deals with an heir named in the judgment to take the following actions without liability to a creditor of the estate or other person:

“(1) to pay, deliver, or transfer the property or the evidence of property rights to an heir named in the judgment; or

“(2) to purchase property from an heir named in the judgment.

“(b) An heir named in a judgment in a proceeding to declare heirship is entitled to enforce the heir’s right to payment, delivery, or transfer described by Subsection (a) by suit.

“(c) Except as provided by this section, this chapter does not affect the rights or remedies of the creditors of a decedent who is the subject of a proceeding to declare heirship.”

The Bank should require the following before paying the account:

- ▶ A certified copy of the decedent’s death certificate.
- ▶ A certified copy of the Judgment Declaring Heirship.

Of course, the bank should always take reasonable steps to confirm that the persons with whom it is dealing are the persons named as heirs in the judgment declaring heirship.

G. The bank does not need letters testamentary or of administration if the Probate Court has approved a Small Estate Affidavit.

Estates Code Chapter 205 provides that, where the entire assets of an estate, not including homestead and exempt property, do not exceed \$50,000 and there is no application for appointment of a personal representative pending or granted, the distributees of an estate may, thirty days after the death of the decedent, file an affidavit with the clerk of the probate court listing the assets and liabilities of the estate, listing the names and addresses of the distributees and their right to receive the money or property of the estate, and listing all assets and known liabilities of the decedent. This affidavit is known as a “Small Estate Affidavit” (abbreviated “SEA”).

When the SEA is approved by the judge of the probate court and presented to the bank, the bank may make payment of the decedent's accounts in the manner stated in the SEA. Estates Code §205.007 provides:

“(a) A person making a payment, delivery, transfer, or issuance under an affidavit described by this chapter is released to the same extent as if made to a personal representative of the decedent. The person may not be required to:

“(1) see to the application of the affidavit;

or

“(2) inquire into the truth of any statement in the affidavit.

“(b) The distributees to whom payment, delivery, transfer, or issuance is made are:

“(1) answerable for the payment, delivery, transfer, or issuance to any person having a prior right; and

“(2) accountable to any personal representative appointed after the payment, delivery, transfer, or issuance.

“(c) Each person who executed the affidavit is liable for any damage or loss to any person that arises from a payment, delivery, transfer, or issuance made in reliance on the affidavit.

“(d) If a person to whom the affidavit is delivered refuses to pay, deliver, transfer, or issue property as provided by this section, the property may be recovered in an action brought for that purpose by or on behalf of the distributees entitled to the property on proof of the facts required to be stated in the affidavit.”

When the bank makes payment pursuant to a SEA, the bank will be released from liability to the same extent as if the payment was made to the decedent's personal representative. The bank has no liability to see to the application of any funds so delivered.

Before making payment, the bank should require:

- ▶ A certified copy of the decedent's death certificate.
- ▶ A certified copy of the SEA and the Order signed by the court.

Before paying the depositor's funds pursuant to the SEA and Order, the bank should:

- ▶ Review the SEA to make sure that the account in the bank owned by the deceased depositor is described in the SEA.

- ▶ Confirm the identity of the persons requesting payment as the persons entitled to them under the SEA and Order.

A Small Estate Affidavit and Order typically expresses the amounts of the various assets which each person should receive in fractions. The bank may have to do the math or confirm the math involved. Don't hesitate to call the attorney!

H. A deposit account owned by a single member Limited Liability Company does not have to be closed out or liquidated when the member dies.

When an account is opened in the bank for a single-member limited liability company, the member of the LLC often names himself as the only signer on the account and provides his SSN as the TIN for the account.

In the event of the death of the sole owner of the LLC, there is no one left to sign on behalf of the LLC. This does not mean, however, that the LLC must be liquidated and its existence terminated. The LLC is the asset in the estate, not the bank account. The bank account is an asset of the LLC.

The personal representative of the estate can take the action needed with respect to the LLC. This may involve taking over as manager of the LLC, voting in new managers, electing new offices, and adopting new bank resolutions designating new signers on the account.

I. Let the EP&P Lawyer Talk to Bank's Lawyer or Legal Department

One recurring problem of which EP&P lawyers frequently complain is the inability to communicate with someone in the bank who is knowledgeable about the matters being discussed. Many of the problems can easily be addressed if the lawyer for the estate bank customer is given an opportunity to talk with the bank's attorney.

CERTIFICATION OF TRUST

BEFORE ME, the undersigned authority, on this day personally appeared _____
_____ *[Insert Name of Trustee]*, who being by me duly sworn or affirmed,
deposes and says:

1. General Description and Existence of Trust. I, _____
_____ *[Insert Name of Trustee Signing Certification]*, am *[Choose One]*
 the sole trustee one of the co-trustees of a trust that exists and is known as

_____ *[Insert Name of Trust]*, which was executed on _____, _____ *[Insert Date Trust Was Executed]*, hereafter referred to as the "Trust."

2. Identity of Settlor(s). The name and address of each "settlor" of the Trust (who may be referred to in the trust instrument as a "grantor" or a "trustor") are as follows:

Name: _____
Address: _____

Name: _____
Address: _____

3. Number and Identity of Current Trustee(s). There is/are _____ *[Insert Number of Trustees]* currently acting trustee(s) of the Trust. The name and mailing address of each currently acting trustee are as follows:

Name: _____
Address: _____

Name: _____
Address: _____

Name: _____
Address: _____

4. Number and Identity of Successor Trustee(s). *[Choose All That Apply]*

A. There is more than one trustee currently serving. If one or more of the current trustees fail(s) or cease(s) to serve, the remaining current trustee(s) shall continue to serve.

B. If the current trustee(s) fail(s) or cease(s) to serve, the following persons are designated as successor trustee(s) under the Trust:

(1) _____

(2) _____

A successor trustee cannot act on behalf of the Trust until the successor trustee provides BANK with a new Certification of Trust. In its discretion, BANK may require a successor trustee to provide evidence of the successor's authority satisfactory to BANK, including excerpts from the trust instrument and amendments.

5. Number of Signatures Required. If there is more than one trustee serving, then the trustees have the authority to sign or otherwise authenticate *as follows [Choose One]*:

- A. Independently.** Any one of the co-trustees has authority to sign or otherwise exercise the powers of the trustee with respect to accounts in BANK without the joinder of any other co-trustee.
- B. Jointly.** The signatures of *[Choose One]* all co-trustees any _____ co-trustees *[Insert Number of Co-Trustee Signatures Required]* are required to sign or otherwise exercise the powers of the trustee with respect to accounts in BANK.

6. Powers of Trustee. The powers of the trustee include *[Choose One or More]*:

- A.** At least all of the powers granted to a trustee under the Texas Trust Code [Subchapter A, Chapter 113].
- B.** The powers set out on the true and correct copies of excerpts from the trust instrument of the Trust attached hereto.

7. Type of Trust. *[Choose One]*

- A.** The Trust is revocable. The Trust can be revoked by _____ *[Insert Name(s) of Person(s) With Power to Revoke Trust]*.
- B.** The Trust is irrevocable.

8. Taxpayer Identification Number. The proper taxpayer identification number for the Trust is *[Choose One]*:

- A.** The following Social Security Number ("SSN"): _____ which is the SSN for _____ (name of person to whom SSN was issued).
- B.** The following Employer Identification Number ("EIN"): _____

9. Title to Trust Property. Title to the trust property should be taken in the following manner:

- A.** The names of the trustees, as trustees of the named Trust.
- B.** The name of the Trust.

NOTE: Titles of accounts in the bank will be modified as necessary to comply with IRS interest reporting regulations requiring that names and taxpayer identification numbers be properly matched.

10. Attachments. True and correct copies of the following are attached to this Certification of Trust:

- A.** The first page and signature page of the current trust instrument. *[REQUIRED IN ALL CASES.]*
- B.** Excerpts from the original trust instrument and later amendments to the trust instrument that designate the Trustee and successor trustees. *[REQUIRED WHEN A SUCCESSOR TRUSTEE PROVIDES CERTIFICATION.]*

11. Representations Made By Trustee. The undersigned trustee represents that the Trust is now in full force and effect, and the Trust has not been revoked, modified, or amended in any manner that would cause the representations contained in this Certification of Trust to be incorrect.

12. Reliance By BANK. This Certification of Trust is provided to BANK to induce it to allow the trustee to open an account in BANK or allow the trustee to conduct one or more transactions on an account in BANK. BANK may accept and rely on this Certification of Trust as proof of the Trust, the identity of the trustee, the authority of the trustee to act, the powers of the trustee, and any other matter set out herein, without requesting a copy of the trust instrument.

Notwithstanding the foregoing, each trustee agrees to provide BANK with copies of the current trust instrument and amendments and/or relevant provisions of the trust instrument and any amendments and/or other relevant documentation at BANK's request when needed to administer a deposit account held by the Trust.

13. Indemnification. The undersigned trustee agrees to indemnify and hold BANK harmless from any and all cost and expense arising out of its reliance on this Certification of Trust, including, without limitation, attorneys fees.

[Signature of Trustee]

SUBSCRIBED AND SWORN TO OR AFFIRMED before me by the said _____
_____ *[Insert Name of Trustee]* on this _____ day of _____, 20__.

Notary Public, State of _____
Notary's Name Printed:

My Term Expires: _____

Death of a Depositor - Determining Proper Payment of Probate Account after Death of Depositor

The following questions may be used to determine to whom to make payment in the event of the death of the owner of a single ownership account without a P.O.D. designation (including a single ownership convenience account) after the death of the depositor.

- ✓ These questions may also be appropriately used with some multiple-party accounts in unusual situations.
 - ◆ In the case of a joint/multiple-party account with right of survivorship, where the surviving account holder dies before any changes are made in the account. The account will be a probate asset of the surviving account holder's estate.
 - ◆ In the case of a joint/multiple-party account with right of survivorship, where both account holders die within 120 hours of each other. A portion of the account will be a probate asset of the estate of each deceased account holder.
 - ◆ Single-party and multiple-party accounts with payable on death designation if all P.O.D. payees have predeceased the parties/owners. The account will be a probate asset of the original party/owner's estate.
 - ◆ Single-party and multiple-party accounts with payable on death designation if a P.O.D. payee who survived all of the parties/owners has died before receiving his portion of the funds in the account. The portion payable to the deceased payee will be a probate asset of his estate.
 - ◆ Trust accounts (informal revocable trust accounts) where all beneficiaries have predeceased the trustee/owner. The account will be a probate asset of the trustee's estate.
 - ◆ Trust accounts (informal revocable trust accounts) where a beneficiary who survived the trustee has died before receiving his portion of the funds in the account. The portion payable to the deceased beneficiary will be a probate asset of his estate.

Questions to Ask

1. Did the depositor have a Will?

If YES, go to Question 2.

If NO, go to Question 7.

Payment If The Depositor Had A Will

2. Has the depositor's Will been probated?

If YES, go to Question 3, after reading and making note of the following:

- ✓ You may be presented with an original or photocopy of a document which is represented to be the depositor's Will.
 - ◆ However, that document is just another piece of paper until a probate court has determined that the document is a valid Will and is the depositor's last Will.
 - ◆ When this has been done, the probate court enters an order admitting the document to probate as the depositor's last Will.

- ✓ If the person(s) offering you the copy of the document indicate(s) unwillingness to probate the Will, then you should consult your legal counsel for guidance.
 - ◆ In some cases, it may be possible for the proper parties to enter into an agreement not to probate the Will known as a "Family Settlement Agreement." The considerations of such an agreement are beyond the scope of this Manual.

If NO, suggest that the person consult his attorney to determine whether the Will should be probated.

3. Has an executor under the depositor's Will been appointed by the probate court?

If YES, then payment of the depositor's account balance may be made to the executor of the depositor's estate.

- ✓ The executor should provide you with a certified copy of the death certificate, a certified copy of the Letters Testamentary, and the EIN for the estate (so that you can report interest on 1099-INT in the name of the estate, using the estate's EIN).
 - ◆ In Texas, an executor is often an "independent executor," which means that the executor functions independently of probate court supervision.
- ✓ You may generally honor any instructions the executor gives with respect to the account. He may wish to open an account in the name of the estate, or he may wish to disburse funds to beneficiaries.

If NO, go to Question 4.

4. Has an "administrator with Will annexed" for the depositor's estate been appointed by the probate court?

If YES, then payment of the depositor's account balance may be made to the administrator of the depositor's estate.

- ✓ The administrator should provide you with a certified copy of the death certificate, a certified copy of the Letters of Administration, and the EIN for the estate (so that you can report interest on 1099-INT in the name of the estate, using the estate's EIN).
- ✓ You may generally honor any instructions the administrator gives with respect to the account. He may wish to open an account in the name of the estate, or he may wish to disburse funds to beneficiaries or heirs.

If NO, go to Question 5.

5. Has the Will been probated as a "muniment of title"? (Estates Code Chapter 257)

If YES, request a certified copy of the Will and the Order Admitting the Will to Probate.

- ✓ Upon receipt of these documents, please go to Question 6.

If NO, then the Will may not really have been probated, since Questions 3 through 5 are only the alternatives. Please make further inquiries into what has been done and consult your legal counsel.

- ✓ If there really is no Will, then go to Question 7.

6. Can the specific beneficiary(ies) and the amount(s) to be paid to the beneficiary(ies) be definitely

determined from the Will and/or the Order Admitting the Will to Probate?

If YES, then the balance in the account may be paid directly to the beneficiaries entitled to receive it.

- ✓ If you have any doubt about to whom to pay the account balance, or how much should go to any beneficiary, then consult your legal counsel. It may be very important to seek the opinion of your legal counsel if beneficiaries are described by relationship rather than by name or if one or more beneficiaries have predeceased the depositor.
- ✓ If any distributee is a minor or incapacitated person, special procedures must be followed (refer to "Payment of Testamentary Account to Minor or Incapacitated Person").

If NO, then steps must be taken to determine the beneficiaries entitled to the account balance.

- ✓ There are at least two methods which can be used to provide more certainty as to the proper distributee(s).
 - ◆ The Texas Probate Code specifically authorizes a "declaratory judgment" procedure.
 - ◆ An alternative would be to obtain an affidavit as to family identification. Appropriate indemnification should be required. This is similar to an affidavit of heirship and provides little protection for the institution.

Payment If Depositor Did Not Have A Will

7. Was the deceased depositor a minor?

If YES, go to Question 12.

If NO, go to Question 8.

8. Has an administrator of the depositor's estate been appointed by the probate court?

If YES, then the depositor's account balance may be paid to the administrator of the depositor's estate.

- ✓ The administrator should provide you with a certified copy of the death certificate, a certified copy of the Letters of Administration, and the EIN for the estate (so that you can report interest on 1099-INT in the name of the estate, using the estate's EIN).
 - ◆ Appointment of an administrator generally means that the estate has debts, and that administration of the estate is necessary to collect assets, pay taxes, debts, and expenses, and distribute remaining assets to the proper person(s).
- ✓ You may generally honor any instructions the administrator gives with respect to the account. He may wish to open an account in the name of the estate, or he may wish to disburse funds to beneficiaries or heirs.

If NO, go to Question 9.

9. Has there been a "determination of heirship" proceeding in the probate court? (Estates Code Chapter

If YES, then the depositor's account balance may be paid directly to the heirs identified in the "Judgment Declaring Heirship" entered by the probate court.

- ✓ You should be provided with a certified copy of the death certificate and a certified copy of the Judgment

Declaring Heirship.

- ◆ The determination of heirship procedure is generally used when there are no debts of the estate other than those secured by real estate. The judgment should include a determination that there is no need for an administration. If not, there is potential liability to creditors.
- ◆ If any distributee is a minor or incapacitated person, special procedures must be followed (refer to "Payment of Testamentary Account to Minor or Incapacitated Person").

If NO, go to Question 10.

10. Has a "Small Estate Affidavit" been approved by the probate court?

If YES, then the depositor's account balance may be paid directly to the heirs identified in the Small Estate Affidavit as being entitled to receive the account balance.

- ✓ You should be provided with a certified copy of the death certificate and a certified copy of the Small Estate Affidavit approved by the probate court.
 - ◆ The Small Estate Affidavit procedure may be used when the total value of the assets of the estate do not exceed \$50,000 (not including homestead and exempt assets).
 - ◆ If any distributee is a minor or incapacitated person, special procedures must be followed (refer to "Payment of Testamentary Account to Minor or Incapacitated Person").

If NO, please go to Question 11.

11. Is the balance of the depositor's account substantial?

If YES, the bank should consider requiring a formal proceeding in the probate court, such as an administration, determination of heirship, or small estate affidavit, before making payment of the depositor's account balance.

- ✓ What an institution considers to be substantial may vary, depending on the size of the institution, the location of the institution, and the typical costs of probate proceedings in the locality.
 - ◆ Please consult with your legal counsel about this. There is protection to the bank only when these formal probate procedures are utilized.

If NO, the bank should consider accepting an "affidavit of heirship," generally prepared by an attorney and sworn to by two or more disinterested witnesses familiar with the depositor's family circumstances.

- ◆ ***There is no statutory protection to the institution if an affidavit of heirship is used.*** Therefore, accuracy of information and credibility of witnesses is important.
- ◆ Your legal counsel should review the affidavit to make sure that the information included provides support for the conclusions reached as to whom should be paid. The institution should consider requiring appropriate indemnification.

Payment If The Depositor Was a Minor

12. What is the balance in the account?

For state and national banks, if the balance in a single ownership account for a minor does not exceed \$3,000,

then the bank may safely pay the funds to a parent or guardian of the child. (Finance Code § 34.305(d).)

✓ If the balance exceeds \$3,000, then a bank should go to Question 8.

For state and federal savings associations and savings banks, if the balance in a single ownership account for a minor does not exceed \$1,000, then a savings association or savings bank may safely pay the funds to a parent or legal guardian of the child. (Finance Code §§ 65.101(f) and 95.101(f).)

✓ If the balance exceeds \$1,000, then a savings association or savings bank should go to Question 8.