

PRO SE EXECUTORS—UNAUTHORIZED PRACTICE OF LAW, OR NOT?

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I. STATUTORY PROBATE COURTS, EXECUTORS AND ESTATE ADMINISTRATION IN TEXAS

There is a well known and continuing split among Texas' seventeen statutory probate courts.¹ The split is as to the rights of the person named executor to probate a will or otherwise appear in court without hiring a lawyer. Eight of the courts permit it, while nine insist an executor doing so would be engaging in the unauthorized practice of law and, thus, cannot be permitted.² Depending upon how the split is resolved, either nine of the statutory probate court judges are denying executors' their *pro se* appearance rights otherwise guaranteed under Texas law or eight of the judges are assisting the unauthorized practice of law.³ A recent Waco Court of Appeals decision denying *pro se* rights to an executor is likely to widen

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¹See *infra* p. 8.

²See, e.g., Travis County Court Policy Regarding Pro Se Applicants available at http://www.co.travis.tx.us/probate/pdfs/pro_se.pdf. (last visited September 19, 2006). The eight courts permitting executors to appear *pro se* are Bexar County Probate Court Number 1; Bexar County Probate Court Number 2; Dallas County Probate Court Number 3; El Paso County Probate Court; Galveston Country Probate Court; Harris County Probate Court Number 1; Harris County Probate Court Number 4; and Tarrant County Probate Court Number 1. Dallas County Probate Court Number 1, Harris County Probate Court Number 3 and Hidalgo County Probate Court each allows the executor to appear *pro se* so long as the executor is the sole beneficiary. A special thanks to Nicholas Davis of Texas Tech University School of Law for discussing these court policies with the court clerks. His report (including the contact information of the individuals he spoke with) is in my files.

³The issue of *pro se* appearances is analyzed in detail *infra* pp. 16-32. As to assisting in the unauthorized practice of law, see TEX. DISCIPLINARY R. PROF'L CONDUCT 5.05, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. 10, §9)

the split.⁴

In practical terms, the court split also means that whether or not an executor is required by a court to hire a lawyer depends on a matter of geography. To exacerbate the role of chance, it is not simply a matter of geography but a matter of docket ordering for some executors because some of the probate judges in counties with more than one probate court have conflicting policies. Thus, for example, an executor appearing to probate a will in Harris County may or may not be forced to hire a lawyer depending upon which one of the four Harris County probate court's docket his or her case lands when the court clerk accepts the filing. One Houstonian in a clerk's office is told he or she has different legal rights than the Houstonian ahead or behind him or her in a bureaucratic queue.

This Article clarifies why under Texas law an individual named as executor in a will has the right to offer the will for probate and otherwise appear in a probate court without hiring a lawyer.⁵ This Article first provides an overview of the independent administration provisions of the Texas probate code before reviewing the unauthorized practice of law prohibition and the *pro se* exception. After establishing that Texas executors qualify for the *pro se* exception in Texas because executors appearing in court are exercising their own management rights (rather than the rights of "the estate" or the beneficiaries), the Article explores suggestions of court reform to be considered in light of these *pro se* rights. The Article concludes with the suggestion that it is probably unwise for most executors to proceed *pro se* regardless of their right to do so.

A. *Historical Model of Ease*

The term "probate"⁶ should not have the same connotations to Texans⁷

⁴ Steele v. McDonald, 202 S.W.3d 926 (Tex.App. – Waco 2006).

⁵ As it is the most common form of estate administration, the paradigm considered in the Article will be an independent administration in which there is no will contest or other litigation. Throughout this Article, the presumption is that there is no contest between which of more than one alleged wills is the valid one. All references to probate and estate administration are to those not involving legal contests or disputes of any kind. The term "probate court" is intended to mean those courts with original probate jurisdiction whichever court that may be in a particular county. See *infra* p. 8.

⁶ The term "probate" refers to both the court procedure by which a will is proved to be valid or invalid (the technical meaning) and to the legal process wherein the estate of a testator is administered (the popular meaning). See BLACK'S LAW DICTIONARY 1202 (6th ed. 1990). Generally, in this Article, the latter meaning will be intended except when reference is specifically

as it does to those living or owning real property in many other states. Texas has provided a “plain” and “layman”-friendly probate system since the 19th century.⁸ 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.⁹ Indeed, because the Texas probate system is “much different and typically much simpler” than other systems, the State Bar of Texas considers it unethical for Texas lawyers to make undue comparisons between the Texan system and others.¹⁰ It is also unethical for Texas attorneys to claim that the Texas probate system is inherently lengthy, expensive, complicated, or always to be avoided.¹¹ Texas has long had the type of probate system other states are now moving towards.¹²

made to probating the will.

⁷The term “Texan” is used to refer to individuals residing in Texas or owning real property located in Texas. See TEX. PROB. CODE ANN. §6 (Vernon 2003); 17 M.K. WOODWARD ET. AL., TEXAS PRACTICE, PROBATE & DECEDENTS’ ESTATES §§44-45 (2006.); 2 JUDGE NIKKI DESHAZO ET. AL., TEXAS PRACTICE GUIDE PROBATE §14:36 (2006).

⁸See W.S. SIMKINS, THE ADMINISTRATION OF ESTATES IN TEXAS 9 (1934). (“[T]he Legislature, August 9, 1876, framed a complete system of procedure and laws for the administration of estates in Texas. It will be seen. . . that the law of 1876 is only a reproduction of the law of 1848. . . This Act of 1876 was intended by the Legislature *to be a plain and definitive system of rules* to govern executors and administrators, *and to make it possible for the layman to perform his duties without appealing for instruction from the court in the various steps to be taken*” (emphasis added).) Minter v. Burnet, 90 Tex. 245, 251, 38 S.W. 350 (1896) (“We think that the legislature intended, by the enactment of the law of 1876, to make plain and definite rules to govern administrators and executors in the discharge of their duties, because it is not infrequently the case that they must perform those duties without having the instruction of the court with reference thereto.”)

⁹Of course, specific Texas clients may be well advised to avoid probate in certain situations but in other states avoiding probate is a near-universal estate planning objective. See, e.g., Thomas M. Featherston, Jr. *Wills and Living Trusts – What’s Best for the Client?*, p. 3 in WILLS TRUSTS AND ESTATE PLANNING 2000 (Texas Bar CLE 2000); Bernard E. Jones, *Revocable Trusts*, p. 28 in BUILDING BLOCKS OF WILLS, TRUSTS AND ESTATE PLANNING 2002 (Texas Bar CLE 2002).

¹⁰State Bar of Texas Advertising Review Committee *Interpretive Comment No. 22: Advertisement of Living Trusts* available at http://www.texasbar.com/Template.cfm?Section=Advertising_Review&template=/ContentManagement/ContentDisplay.cfm&ContentID=8559#ALT (last visited September 18, 2006).

¹¹*Id.*

¹²For example, Texas has chosen to keep its own, comprehensive probate code rather than adopt the Uniform Probate Code being considered and adopted in other states because the improvements made in probate law by the Uniform Probate Code have long been part of Texas law, such as the streamlined, independent administrations of decedents’ estate. C. Boone

B. Probating Wills in Texas

Probating a will in Texas requires only three separate documents, typically consisting of no more than four total pages. The will and a written application for its probate are delivered to the court clerk who posts public notice.¹³ A court hearing is usually scheduled for the first Monday following ten days after the notice is posted.¹⁴ The court hearing rarely takes more than five minutes and consists of no more than a recitation of the facts necessary to support the application (*e.g.*, that the decedent was domiciled in the county).¹⁵ A simple order is presented for the judge's signature, and, when signed, the will is admitted to probate.¹⁶ The efficiency of the Texas system routinely results in dozens of wills to be admitted to probate at each uncontested docket session.¹⁷

It is with the court's admission of a will to probate that the testator's directions become legally operative.¹⁸ Ensuring a document to be a valid will is the responsibility of the probate courts.¹⁹ With the court's order that a will is admitted to probate, the testator's intentions for his or her property are effected. These intentions may include deviating from the intestacy scheme, providing certain tax benefits for the beneficiaries, or providing certain specific benefits for minor or disabled beneficiaries or others needing management assistance or creditor protection.

Because the effects of a will are so important, whoever possesses the will when the testator dies is required to deliver the document to the probate court clerk.²⁰ The person in possession is not required to begin the process of probating the will, only to make it available for anyone qualified to probate it.²¹ In order to be qualified to probate a will, a person must be

Schwartzel, *Is the Prudent Investor Rule Good for Texas?* 54 BAYLOR L. REV 71 n.472 (2002).

¹³TEX. PROB. CODE ANN. §§81(a), 128(a) (Vernon 2003); *see, generally*, 17 WOODWARD, *supra* note 7, §282.

¹⁴This is the earliest time at which a hearing can be scheduled. §§ 128(c), 33(ff), (g).

¹⁵§ 88.

¹⁶§ 89.

¹⁷This is based upon my personal experience of the well established routines of the Bexar County Probate Courts as well as my interviews with other attorneys who are Board Certified in Estate Planning and Probate.

¹⁸§ 94; *more generally*, *see* WILLIAM J. BOWEN AND DOUGLAS H. PARKER PAGE ON WILLS § 26.8 (2004).

¹⁹§§ 84, 88.

²⁰§ 75.

²¹There is no requirement that a will ever be probated. *See, e.g.*, *Stringfellow v. Early*, 15

named as the executor in the will or have a beneficial interest in it (that is, be a beneficiary or a creditor of the estate).²²

C. Administration Independent of Court Oversight

The vast majority of estates in Texas—over 80%—are administered under the independent administration provisions of the probate code.²³ These provisions are “one of the most significant developments in American probate law” because of their simplicity.²⁴ Independent administration means that the independent executor rather than the probate court judge bears sole responsibility for the administration.²⁵ The expectation of independent estate administration is so well-established as the norm in Texas, that suggestions of court-dependent administration are limited to problematic estates.²⁶

The only court proceeding required under independent administration is

Tex. Civ. App. 597, 40 S.W. 871 (Tex. Civ. App. 1897, writ dismissed).

²² § 3(rr), § 76.

²³ Young Lawyers Association Needs of Senior Citizens Committee, *Living Trust Scams*, 62 Tex. B.J. 745 (1999); Sara Patel Pacheco, *et al. The Texas Probate Process from Start to Finish*, p. 12 in 5TH ANNUAL BUILDING BLOCKS OF WILLS, ESTATES AND PROBATE 12 (Texas Bar CLE 2004). Estates may be administered independently of court involvement beyond the probate hearing in two situations. The most common situation is that the will requires independent administration. § 145(b). Otherwise, in the case of wills that do not require it or in the case of intestate estates, the sole condition for independent administration is consent of the beneficiaries or, as in the case of an intestate estate, the heirs. § 145(c) – (e).

²⁴ 17 WOODWARD, *supra* note 7, § 491. However, independent administration is not the only simple means of estate administration in Texas, even if it is the most common. The Texas probate code provides several alternatives for simple estate administration. Wills can be admitted as muniments of title rather than being offered for probate with title being passed to beneficiaries without the need for any estate administration. § 89A. Surviving spouses can administer community property without any court proceedings at all. §§ 156, 160, 177. And the use of affidavits in connection with certain estates and contractual settlement agreements for any estate can be substituted for court involvement in estate administration. §§52, 137; *see, e.g., Stringfellow*, 40 S.W. 871, Estate of Morris, 677 S.W.2d 748 (Tex. Civ. App.—Amarillo 1979, writ refused n.r.e.). Thus, in Texas, the general expectation is that the probate system is one of flexibility, simplicity, and efficiency.

²⁵ §§36, 145 (h), (q); 17 WOODWARD, *supra* note 7, § 75; *Id.* § 497; 1 DESHAZO, *supra* note 7, § 1:24.

²⁶ For example, dependent administration might be favored when the estate is insolvent or where disputes between the executor and beneficiaries are expected. *For discussion see, e.g., Pacheco, supra* note 23, at 18.

the hearing to probate the will.²⁷ Thereafter, the independent executor (“the executor”) must submit three additional documents usually consisting of no more than five pages total: a single-paragraph oath,²⁸ a short affidavit regarding notice to creditors,²⁹ and an inventory of the estate’s assets.³⁰ These documents are submitted to the court clerk. No additional contact between the executor and the court is required. For example, there is no requirement that the judge oversee the executor or review the fees or that the executor close the administration.

D. Attorneys’ Involvement in Independent Administration

Executors offering a will for probate are entitled to hire a lawyer at the estate’s expense.³¹ While estate administration may become complex in terms of dealing with third parties (*e.g.*, those with custody of estate assets) or in terms of dealing with tax or asset management issues (*e.g.*, locating and valuing assets or managing active businesses), there is little complexity in the probate court work required by an independent administration. In a law firm, the requisite documents can be prepared by a legal assistant and then reviewed by the attorney who may expect to offer multiple wills for probate in one docket session. While lawyers in other states often charge high fees for probate court, Texas lawyers’ fees are far more likely to be charged for the practical, non-court work involved in an estate administration rather than probate court appearances.³²

²⁷ §145(h); 17 WOODWARD, *supra* note 7, § 75; *Id.* §497; 1 DESHAZO, *supra* note 7, § 1:24.

²⁸ § 190; 18 M.K. WOODWARD ET AL., TEXAS PRACTICE, PROBATE & DECEDENTS’ ESTATES §642 (2006); 1 DESHAZO, *supra* note 25, § 7:7.

²⁹ § 294; 17 WOODWARD, *supra* note 7, §500; 1 DESHAZO, *supra* note 25, § 1:30.

³⁰ §§45(h), 250, 251. Of the three court filings required, the inventory is the most legally complex. It requires not only valuation but a characterization of marital property as either separate or community. This characterization can be complex whenever a decedent was married and (a) either or both spouses at any time lived outside of Texas while married and acquired significant property during such time; (b) either or both spouses inherited or were given significant property; (c) either or both spouses owned significant property prior to marriage; or (d) there was a pre-marital or post-marital property agreement between the spouses. 18 WOODWARD, *supra* note 28, §791; *Id.* § 800; 1 DESHAZO, *supra* note 7, § 1:29; 2 DESHAZO, *supra* note 7, § 9:30.

³¹ § 242; 18 WOODWARD, *supra* note 28, §729; 2 DESHAZO, *supra* note 7, § 10:21.

³² While total lawyers fees for an estate administration may vary from about \$1,200 to about \$10,000 in Texas (depending upon the nature of the estate and the issues it raises), even in the state’s largest city total legal fees *and court costs* for the probate hearing (independently of other estate administration legal fees) should not be expected to exceed \$800. *See* David P. Hassler *et*

E. Probate Courts

A will may be offered for probate in the county in which the decedent resided, if any, otherwise in the county in which the decedent's property is located.³³ In counties without a statutory probate court, wills are offered for probate in the constitutional county court (or, in certain instances, the statutory county court).³⁴ However, in a county with a statutory probate court, the statutory probate court is the only court with probate jurisdiction.³⁵

With original and exclusive jurisdiction over probate matters, the statutory probate courts of Texas are located in ten of the states most populated counties: Bexar (two courts), Collin, Dallas (three courts), Denton, El Paso, Galveston, Harris (four courts), Hidalgo, Tarrant (two courts), and Travis.³⁶ The exclusive nature of the jurisdiction means that in probate-related cases, parties do not have recourse to a district court.³⁷ About half of Texans live in the high population counties with specialized statutory probate courts.³⁸ As mentioned above, eight of the specialized courts currently permit executors to appear without a lawyer, while nine require it.³⁹

al., Getting Down to Bidness: A Survey on Economics, Practice Management and Life Quality Issues for Texas Estate Planning and Probate Attorneys At The Turn of the Century p. 16 in *ESTATE PLANNING AND PROBATE 2000* (Texas Bar CLE 2000) and Jones, *supra* note 9, at 29.

³³For a more complete overview of venue, *see, e.g.*, § 6; 17 WOODWARD, *supra* note 7, §§ 44-45; 2 DESHAZO, *supra* note 7, § 14:36.

³⁴§4; §5; *see* TEX. GOV'T CODE ANN. §25.0003(d) (Vernon 2003); 17 WOODWARD, *supra* note 7, § 1.

³⁵TEX. GOV'T CODE ANN. §25.0003(e) (emphasis added).

³⁶The Statutory Probate Courts contact and other information is available at <http://www.courts.state.tx.us/trial/probate.asp> (last visited June 26, 2006).

³⁷For a review of the history of the statutory probate courts from the 1970s onward, *see* Joseph R. Marrs, *Playing the Probate Card: A Plaintiff's Guide to Transfer to Statutory Probate Courts*, 36 ST. MARY'S L.J. 99 (2004).

³⁸The population of Texas is estimated to be about 23,000,000 with about 11,700,000 Texans living in the following counties each of which having one or more specialized statutory probate court: Bexar, Collin, Dallas, Denton, El Paso, Galveston, Harris, Tarrant, and Travis. The population estimates may be found on the U.S. Census Bureau web site available at <http://quickfacts.census.gov/qfd/states/48000.html> (last visited April 28, 2006) while the current list of statutory probate courts (with their contact information) may be found on the Texas Judiciary Online web site available at <http://www.courts.state.tx.us/trial/probate.asp> (last visited June 26, 2006).

³⁹*Supra* note 3.

On October 18, 2006 the Waco Appeals Court spread the confusion beyond the most populous counties by denying an executor the right to proceed *pro se* in a hearing unrelated to the probate of a will.⁴⁰ A vigorous dissent by the Chief Justice argued that the majority had adequately considered neither the law nor the consequences.⁴¹ The Chief Justice lamented the ending of the independent administration system in Texas heralded by such *pro se* denials,⁴² which is a concern echoed elsewhere — and now in this Article.

II. AN OVERVIEW OF THE UNAUTHORIZED PRACTICE OF LAW PROHIBITION

Though providing legal services for oneself has never been considered “unauthorized,” no one is entitled to engage in the unauthorized practice of law.⁴³ This prohibition is the general norm in the United States (though not necessarily elsewhere),⁴⁴ and it prevents non-lawyers from representing others in court or advising others as to the law. Though well established in general terms, there are many exceptions to the rule, and the organized bar’s interest in enforcing it has waxed and waned over the past century.

A. *The 20th Century Ebb and Flow*

The organized bar’s campaign against the unauthorized practice of law⁴⁵ was born, matured, and all but retired into an un-enforced letter during the course of the 20th century.⁴⁶ The historical concern was so low that when

⁴⁰ *Steele v. McDonald*, 202 S.W.3d 926 (Tex.App. – Waco 2006).

⁴¹ *Steele*, 930-931.

⁴² *Id.*

⁴³ RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS §4, especially Comment C (2000) [hereinafter RESTATEMENT]

⁴⁴ Perhaps also surprising to Americans would be knowing that the prohibition against “the unauthorized practice of law” is unknown in most of the world, including Europe. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *LEGAL ETHICS, LAWYER’S. DESKBOOK PROFESSIONAL RESPONSIBILITY* §5.5-3 (2005-6 ed.).

⁴⁵ *Id.*

⁴⁶ From the American Revolution through the Civil War, there was no substantial effort by the bar to stop “unauthorized” practice. Deborah L. Rhode, *Policing The Professional Monopoly: A Constitutional And Empirical Analysis Of Unauthorized Practice Prohibitions*, 34 *STAN. L. REV.* 1, 7-10 (1981); Derek A. Denckla, *Nonlawyers And The Unauthorized Practice of Law: An Overview of Legal and Ethical Parameters*, 67 *FORDHAM L. REV.* 2581, 2583-2586 (1999); see also *STANDING COMMITTEE ON LAWYERS’ RESPONSIBILITY FOR CLIENT PROTECTION*,

the American Bar Association adopted its first Canons of Ethics in 1908, the issue was not even addressed.⁴⁷ The campaign against unauthorized practice began in 1914 as an effort to curtail competition with lawyers from banks and title companies.⁴⁸ This campaign gained momentum during the Great Depression when the American Bar Association organized its first unauthorized practice committees, which eventually were successful at divvying-up legally-significant work through negotiations with the banks and title companies, as well as the insurance companies, realtors, accountants, and other competing industries and professions.⁴⁹ By the 1960s, federal anti-trust issues raised by these negotiated professional boundaries began to weaken the bar's campaign.⁵⁰ By the end of the 20th century, the campaign had weakened to the point that the American Bar Association and many states disbanded their committees on unauthorized practice; legal reformers began calling into question whether or not the rule actually provided any public benefit (or only provided an economic benefit to lawyers); and even members of the bar began calling for the minimization rather than the defense of the professional walls encircling the law.⁵¹

AMERICAN BAR ASSOCIATION 1994 SURVEY AND RELATED MATERIALS ON THE UNAUTHORIZED PRACTICE OF LAW/NONLAWYER PRACTICE p. xii – xv (1996) (hereinafter [ABA Survey]). After the Civil War, bar associations did begin lobbying for passage of legislation that prohibited non-lawyers from making court appearances. Denckla, *supra*, at 2582-2583. Roscoe Pound's theory of the evolution of legal systems begins with the first step of a desire to administer justice without lawyers which manifests itself in a hostility to a formal bar. The appropriate role of lawyers in the American justice systems has been the subject of debate since the beginning, even though it is hard for contemporary lawyers to imagine how that could even be possible. Pound's orientation to the lawyers and the administration of justice sets the tone for the ABA Survey. *Id.* at xi.

⁴⁷ Denckla, *supra* note 43, at 2583.

⁴⁸ *Id.* at 2582-2584.

⁴⁹ Rhode, *supra* note 43; Denckla, *supra* note 43, at 2584-2585. Initially articulated by the bar in terms of economic self-interest, the public justification for the prohibition was eventually changed to protecting the public (though the public itself has not given much support to the bar's efforts and the empirical research indicates the public has suffered little, if any, as a result of non-lawyers practicing law). Rhode, *supra* note 43, at 3; RESTATEMENT, *supra* note 40, Note on Comment A, Comment b, and Comment C.

⁵⁰ Denckla, *supra* note 43, at 2584; ABA Survey, *supra* note 43, at p. xv-xvi.

⁵¹ Denckla, *supra* note 43, at 2585. See, e.g., Michael W. Price, *A New Millennium's Resolution: The ABA Continues Its Regrettable Ban On Multidisciplinary Practice*, 37 HOUS. L. REV. 1495 (2000); Stuart S. Prince, *The Bar Strikes Back: The ABA's Misguided Quash of the MDP Rebellion*, 50 AM. U. L. REV. 245 (2000); Bradley G. Johnson, *Ready or Not, Here They Come: Why The ABA Should Amend The Model Rules To Accommodate Multidisciplinary Practices*, 57 WASH. & LEE. L. REV. 951 (2000).

Coinciding with the national Great Depression-era campaign, Texas enacted its first statute against the unauthorized practice of law in 1933.⁵² The statute was drafted by the first unauthorized practice of law committee to be appointed by the Texas Bar Association (the predecessor of the State Bar of Texas).⁵³ As did the national campaign, the Texas campaign began to falter in the latter part of the 20th century, which ended with the failure of a high profile unauthorized practice prosecution against a national accounting firm — and many Texas lawyers advocating a fundamental re-thinking of the sharp divide between the practice of law and other professions.⁵⁴

B. Defining the Unauthorized Practice of Law

An enduring problem in enforcing the unauthorized practice prohibition has been defining the practice of law.⁵⁵ Within a given a state, definitions and standards may be found in statutes, case law, and the disciplinary rules of the bar.⁵⁶ These are often not uniform within the state and are not consistent between the states.⁵⁷ As the problems of vagueness and

⁵² See *In Re Nolo Press/Folk Law*, 991 S.W.2d 768, 769-70 (Tex. 1999); Rodney Gilstrap and Leland C. de la Garza, *UPL: Unlicensed, Unwanted and Unwelcome*, 68 TEX. B.J. 798 (October 2004).

⁵³ See *In Re Nolo Press*, 991 S.W.2d at 769-70; Gilstrap and Garza, *supra* note 49. In 1939, the State Bar of Texas created the Unauthorized Practice of Law Committee. The Texas Supreme Court initially adopted rules that authorized the UPLC to assist local grievance committees to investigate UPL but did not authorize the UPLC to prosecute lawsuits. The UPLC's role was largely advisory. The investigation and prosecution of UPL was left to the local grievance committees. In 1952, the Texas Supreme Court adopted rules establishing the UPLC as a permanent entity and giving the UPLC investigative and prosecutorial powers, as well as the duty to inform the State Bar and others about UPL. From 1952 to 1979, the UPLC's members were appointed by the State Bar. In 1979, the UPL statute was amended to require that members of the UPLC be appointed by the Supreme Court. See *In Re Nolo Press*, 991 S.W.2d at 769-70; Gilstrap and Garza, *supra* note 49.

⁵⁴ Jack Baker et al., *Professionals Clash on What Is The Practice of Law*, PRAC. TAX STRATEGIES (May 1999).

⁵⁵ ROTUNDA & DZIENKOWSKI, *supra* note 41, § 39-1.2.

⁵⁶ For example, for Texas law see TEX. PEN. CODE ANN. §38.122 – 38.123 (Vernon 2003); TEX. GOV'T CODE ANN., § 81.103, 81.104. (Vernon 2005); *Crain v. UPLC*, 11 S.W.3d 328, 333 (Tex. App.—Houston [1st Dist.] 2000, pet. denied), *cert. denied*, 532 U.S. 1067 (2001); *Davies v. Unauthorized Practice Committee*, 431 S.W.2d 590 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.); *Stewart Abstract Co. v. Judicial Commission*, 131 S.W.2d 686, 689 (Tex. Civ. App.—Beaumont 1939, no writ); see Gilstrap and Garza, *supra* note 49.

⁵⁷ ROTUNDA & DZIENKOWSKI, *supra* note 41, § 39-1.2; Denckla, *supra* note 43.

circularity in definition appear insurmountable, the contemporary trend is to avoid any attempts at a precise or exhaustive definition, preferring instead an *ad hoc* approach somewhat similar to Justice Stewart's "I know it when I see it" approach to defining pornography.⁵⁸

Some of the difficulties in defining unauthorized practice involve Constitutional concerns, but others involve accepting the practical needs of public access to law-related services.⁵⁹ Across jurisdictions, a variety of activities that seem likely to be the practice of law by conceptual standards are exempted from the definition of unauthorized practice, including allowing non-lawyers to prepare documents related to real estate transfers,⁶⁰ the sale of legal forms,⁶¹ and even assistance in preparing forms.⁶² More substantial practical deviations are to be found in exceptions for allowing non-lawyers to represent others in legal proceedings: many states permit non-lawyers to represent others in administrative proceedings (*e.g.*, workers' compensation proceedings), and some states permit non-lawyers to appear in court on behalf of others in specific situations – such as small claims courts, law clinic representations, and domestic violence situations.⁶³

⁵⁸ See, *e.g.*, Linda Galler, "Practice of Law" in the New Millennium: *New Roles, New Rules But No Definitions*, 72 TEMP. L. REV. 1001 (1999); REST Reporters Note C; see, *e.g.*, Miller v. Vance, 463 N.E.2d 250, 251 (Ind. 1984); *In re Campaign for Ratepayers' Rights*, 634 A.2d 1345, 1351 (N.H. 1993); *In re Unauthorized Practice of Law Rules*, 422 S.E.2d 123, 124 (S.C. 1992).

⁵⁹ For a critical assessment in terms of Constitutional and public policy concerns, see, *e.g.*, Rhode, *supra* note 43.

⁶⁰ Denckla, *supra* note 43, at 2590; RESTATEMENT, *supra* note 40; Compare, *e.g.*, Pope County Bar Ass'n v. Suggs, 624 S.W.2d 828 (Ark. 1981) (real-estate brokers may complete standardized forms for simple real-estate transactions); Miller, 463 N.E.2d 250 (both banks and real-estate agencies may fill in blanks on approved mortgage forms, so long as no individual advice given or charge made for that service); *In re First Escrow, Inc.*, 840 S.W.2d 839 (Mo. 1992) (escrow closing companies, real-estate brokers, lenders, and title insurers may use standard forms for standardized real-estate transactions, so long as no advice given or separate fee charged for that service); *In re Opinion No. 26 of the Comm. on Unauthorized Practice*, 654 A.2d 1344 (N.J. 1995) (despite fact that many aspects of residential real-estate transaction involves practice of law, real-estate brokers and title-company officers may control and handle all aspects of such transactions, after fully informing parties of risks of proceeding without lawyers), with, *e.g.*, Arizona St. Bar Ass'n v. Arizona Land Title & Trust Co., 366 P.2d 1 (Ariz.1961) (real-estate agents may not fill out standardized forms in land-sale transactions); Kentucky St. Bar Ass'n v. Tussey, 476 S.W.2d 177 (Ky. 1972) (bank officer's act of filling out mortgage forms constitutes unauthorized practice).

⁶¹ Denckla, *supra* note 43, at 2591.

⁶² *Id.*

⁶³ ABA Survey, *supra* note 43, at 34-43, see especially the study of California, Delaware, the District of Columbia, Iowa, Maryland, Massachusetts, New Hampshire, New York, Oregon,

The federal rules even permit non-lawyers to represent others in the United States Tax Court, which travels across the country holding trials in states with local laws that prohibit non-lawyer representation in court.⁶⁴

*C. The Texas Approach to the Unauthorized Practice Prohibition*⁶⁵

The Texas Supreme Court has the ultimate authority to regulate the practice of law in Texas, including the definition of the unauthorized practice of law.⁶⁶ However, the Texas legislature has enacted both criminal and civil statutes prohibiting the unauthorized practice of law. The criminal statute very narrowly addresses only the issue of individuals falsely holding themselves out as lawyers.⁶⁷ The civil statute is Chapter 81 of the State Bar Act and is intended to be the primary deterrent. It authorizes the Supreme Court to appoint a committee charged with eliminating the unauthorized practice of law,⁶⁸ which it defines as

the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved

Pennsylvania, Virginia, and Washington.

⁶⁴ Attorneys, accountants, actuaries, and other agents are permitted to represent others before the Internal Revenue Service, though actuaries and other agents are subject to specific limitations on their practice. 5 U.S.C. §500 (2006); 31 C.F.R. § 1.03(a), (b), (d) (2005); *Id.* §10.4. Non-lawyers are also allowed to practice before the U.S. Tax Court as a result of Internal Revenue Code of 1986, as amended, §7452. The provision states that no person is to be denied admission to practice before the Tax Court because of failure to be a member of a particular profession (i.e., an attorney). The provision gives the Tax Court the right to make the rules regarding practice before the court. Tax Court Rule §200(a)(3) allows nonattorneys to practice before the court by passing a written examination. Baker, *supra* note 51. The federal law permitting the non-lawyer practice pre-empts the state law prohibiting it. See *Sperry v. Florida*, 373 U.S. 379 (1963).

⁶⁵ A good overview of these laws can be found in the October 2004 Texas Bar Journal article authored by the chair of the Texas Unauthorized Practice of Law Committee. See Gilstrap and Garza, *supra* note 49.

⁶⁶ TEX. CONST. art. II, § 1; see *In Re Nolo Press/Folk Law*, 991 S.W.2d 768, 769-70 (Tex. 1999).

⁶⁷ TEX. PEN. CODE ANN. §§38.122 – 38.123 (Vernon 2003).

⁶⁸ TEX. GOV'T CODE ANN., §§ 81.103, 81.104 (Vernon 2005).

must be carefully determined.⁶⁹

Even though the statute defines the practice of law, it acknowledges that the issue is ultimately one for the Texas Supreme Court rather than the legislature.⁷⁰ In its rules for admission to the bar, the Texas Supreme Court has defined the practice of law as “drafting and interpreting legal documents and pleadings, interpreting and giving advice regarding the law, or preparing, trying or presenting cases before courts, departments of government or administrative agencies.”⁷¹ In case law, Texas courts have defined the practice of law to include “all advice to clients, express or implied, and all action taken for them in matters connected with the law.”⁷²

However, non-lawyers in Texas are now legally entitled to represent others in a variety of situations: the U.S. Tax Court; certain specialized Texas courts;⁷³ and before specific Texas and federal agencies.⁷⁴ Non-lawyers enrolled in law school have a limited license to practice law.⁷⁵ As for providing legal advice and document preparation, in certain situations non-lawyers are authorized to provide services to transfer mineral or mining interests in real property⁷⁶ and other real property interests,⁷⁷ as well as provide advice and document preparation assistance for medical powers of attorney and the designation of guardians (two legally powerful documents, it should be noted).⁷⁸

D. Pro Se Representation and the Unauthorized Practice of Law

The prohibition against the unauthorized practice of law only prohibits

⁶⁹ *Id.* § 81.101.

⁷⁰ *Id.* § 81.101(b).

⁷¹ TEX. R. GOVERN. BAR ADM’N XIII(c)(1).

⁷² *Crain v. UPLC*, 11 S.W.3d 328, 333 (Tex. App.—Houston [1st Dist.] 2000, pet. denied), cert. denied, 532 U.S. 1067 (2001); *Davies v. Unauthorized Practice Committee*, 431 S.W.2d 590 (Tex. Civ. App.—Tyler 1968, writ ref’d n.r.e.); *Stewart Abstract Co. v. Judicial Commission*, 131 S.W.2d 686, 689 (Tex. Civ. App.—Beaumont 1939, no writ).

⁷³ See TEX. GOV’T CODE ANN. § 28.003(d); Op. Tex. Att’y Gen. Nos. C-82 (1963), C-283 (1964) and II-538 (1975) (small claims court cases); TEX. R. CIV. P. 747a; TEX. PROP. CODE ANN. § 24.011 (Vernon 2000); Op. Tex. Att’y Gen. No. JM-451 (1988) (FED cases).

⁷⁴ See, e.g., TEX. LAB. CODE ANN. § 401.011(37) (Vernon 2006) (Workers’ Compensation Comm.); 28 TEX. ADMIN. CODE § 1.8 (West 2006) (Tex. Dep’t of Ins.).

⁷⁵ TEX. GOV’T CODE ANN. § 81.102; TEX. R. GOVERN. BAR ADM’N XIX.

⁷⁶ TEX. GOV’T CODE ANN. § 83.001.

⁷⁷ *Id.*

⁷⁸ *Id.* § 81.101.

the *unauthorized* practice of law by non-lawyers.⁷⁹ So even though it is the practice of law, providing legal services for oneself has never been considered *unauthorized*.⁸⁰ For example, one can draft one's own will or appear in court on one's own behalf, even when doing either of those for another would be the unauthorized practice of law.⁸¹ The unauthorized practice prohibition only applies to a person seeking to advise or represent another person.⁸²

A historical principle of British common law, the right to advise or represent oneself in legal matters – *pro se* representation –⁸³ was statutorily codified at the federal level with the Judiciary Act of 1789 and then adopted by states – including Texas—with either their adoption of the British common law or by statute.⁸⁴ American Courts have described the right as fundamental⁸⁵ and moral.⁸⁶ However, because it has always been given statutory protection, the issue of a Constitutional right to appear *pro se* has never arisen for review (except for in criminal cases, in which it has been recognized.)⁸⁷ The Texas statute recognizing the right follows both the

⁷⁹ RESTATEMENT, *supra* note 40, §4.

⁸⁰ *Id.* Comment C

⁸¹ *Id.* Comments C and D.

⁸² ROTUNDA & DZIENKOWSKI, *supra* note 41, § 39-4.2; RESTATEMENT, *supra* note 40.

⁸³ Tiffany Buxton, *Foreign Solutions To The U.S. Pro Se Phenomenon*, 34 CASE W. RES. J. INT'L L. 103, 107 (2002).

⁸⁴ *Id.* at 109. Congress re-enacted a revised version of this Act in 1948, granting parties the right to “plead and conduct their own case personally” in any court of the United States. *Id.* at 110.

⁸⁵ U.S. v. Dougherty, 473 F.2d 1113, 1127, 154 U.S.App.D.C. 76, 90 (D.C.Cir. Jun 30, 1972).

⁸⁶ *Id.* at 1128, 91.

⁸⁷ The Supreme Court needed to specifically recognize a Constitutional right to proceed *pro se* in criminal cases because the *pro se* right can conflict with the Constitutional right to competent counsel in criminal cases. Since the Supreme Court has recognized the right as a more fundamental Constitutional right than the right to competent counsel, it would be hard to argue the Supreme Court would not recognize the right in a civil context in which there is no competing Constitutional right. Nevertheless, the court has never had the opportunity and given the statutory protection of the right, it seems an issue unlikely to ever arise for review. The seminal decision extending the federal constitutional right of *pro se* representation to an accused in a criminal case is *Faretta v. California*, 422 U.S. 806 (1975). In effectuating the right, the court is required to warn a defendant adequately of the dangers and disadvantages of self-representation in order that the waiver of the right to counsel be knowing and voluntary. *Id.* at 2541; *e.g.*, *United States v. Sandles*, 23 F.3d 1121 (7th Cir. 1994), and authority cited. On the power of the court to appoint “standby counsel” for an accused proceeding *pro se*, even over objection by the accused, see *Faretta*, 422 U.S. at 834 n.46; *McKaskle v. Wiggins*, 465 U.S. 168, 184 (1984). On the general desirability of doing so, see, *e.g.*, *United States v. Moya-Gomez*, 860 F.2d 706, 740 (7th Cir.

federal statute and other state statute formats, simply stating that⁸⁸ “any party to a suit may appear and prosecute or defend his rights therein, either in person or by an attorney of the court.”⁸⁹

The right to proceed *pro se* is a personal right and can only be exercised by the person having the right. This means, for example, that a non-lawyer owner, officer, or other agent of a business entity does not have the right to appear in court in order to prosecute or defend the business entity’s rights.⁹⁰ Texas courts have followed this general rule with respect to corporations finding that the corporation’s non-lawyer agents are not appearing to defend

1988), *cert. denied*, 492 U.S. 908 (1989). There is, however, no constitutional right to the assistance of standby counsel. *E.g.*, *United States v. Betancourt-Arretuche*, 933 F.2d 89 (1st Cir. 1991), *cert. denied*, 502 U.S. 959 (1991); *United States v. La Chance*, 817 F.2d 1491, 1498 (11th Cir. 1987), *cert. denied*, 484 U.S. 928 (1987). An accused also has no right to a “hybrid” representation, part *pro se* and part standby counsel. *See McKaskle*, 465 U.S. at 178. On the rule that a mid-trial election by an accused to invoke the right to proceed *pro se* does not relieve long-standing counsel from responsibility to continue as standby counsel, see *United States v. Cannistraro*, 799 F.Supp. 410 (D.N.J. 1992). RESTATEMENT, *supra* note 40. *See also* Comment, *Letting the Laitly Litigate: The Petition Clause and Unauthorized Practice Rules*, 132 U. PA. L. REV. 1515 (1984); Julie M. Bradlow, *Procedural Due Process Rights of Pro Se Civil Litigants*, 55 U. CHI. L. REV. 659 (1988); Edward M. Holt, *How To Treat “Fools:” Exploring The Duties Owed To Pro Se Litigants In Civil Cases*, 25 LEGAL PROF.. 167 (2001); Buxton, *supra* note 80, at 103.

⁸⁸The Texas Constitution specifically provides that Texas criminal defendants have the right to appear without counsel.

⁸⁹Texas Rules of Civil Procedure 7 applies to probate proceedings. TEX. R. CIV. P. 2.

⁹⁰Restatement, *supra* note 40, Comment E. *See generally* C. Wolfram, MODERN LEGAL ETHICS § 13.7 (1986). On the rule that a corporation or similar entity can appear in court only through an attorney, *see, e.g.*, *Osborn v. Bank*, 22 U.S. (9 Wheat.) 738, 830 (1824); *Commercial & R.R. Bank v. Slocomb, Richards & Co.*, 39 U.S. (14 Pet.) 60, 65 (1840); *Capital Group, Inc. v. Gaston & Snow*, 768 F.Supp. 264 (E.D. Wis. 1991) (president and sole shareholder of professional-services corporation could represent himself *pro se*, but could not represent corporation in either of those capacities or by assignment of its cause of action), citing authority; *Nicollet Restoration, Inc. v. Turnham*, 486 N.W.2d 753 (Minn. 1992) (corporation appearing in trial court must be represented by attorney despite fact that court proceeding originated in small-claims court where no such rule applied); *Salman v. Newell*, 885 P.2d 607 (Nev. 1994) (trust could not proceed *pro se*, and non-attorney trustee could not represent trust); *E & A Assocs. v. First Nat’l Bank*, 899 P.2d 243 (Colo. Ct. App. 1994) (nonattorney general partner could not represent partnership). Some courts have made narrow exceptions where the proceeding would not be unduly impaired, in view of the nature of the litigation, or where enforcing the rule would effectively exclude the entity from court. *E.g.*, *In re Unauthorized Practice of Law Rules*, 422 S.E.2d 123 (S.C. 1992) (business may be represented in civil-magistrate proceedings by nonattorney); *Vermont Agency of Natural Res. v. Upper Valley Reg’l Landfill Corp.*, 621 A.2d 225 (Vt. 1992), and authority cited. RESTATEMENT, *supra* note 40, Comment D.

their personal rights but rather the corporation's and, thus, do not qualify under the *pro se* exception.⁹¹

The corporate variety of the *pro se* right allows the corporation's in house, employee-lawyer to represent it in court rather than requiring the corporation to hire outside legal counsel. Since the in house, employee-lawyer is an agent of the corporation, his or her appearance in court is considered to be the corporation's appearance. Even though corporations cannot practice law, they are allowed this type of *pro se* appearance so long as the subject of the legal proceedings is the corporation's own rights and not the rights of others. To allow the latter would be to allow the corporation to practice law for another's benefit.

III. TEXAS EXECUTORS AND THE UNAUTHORIZED PRACTICE OF LAW

A. Whose Rights Are At Stake

Texas courts that deny executors' *pro se* rights do so out of an unauthorized practice of law concern.⁹² There is no law that explicitly mandates the retention of an attorney by an executor. The probate code authorizes executors to hire attorneys with estate funds, but it is otherwise silent as to the attorney-executor relationship.⁹³ There are innumerable cases involving this right to use estate funds to hire an attorney for the executor, but none of these cases premise the right on the legal necessity of the hire.⁹⁴ The allowance of the expense has never been construed to mean it is obligatory.

The unauthorized practice of law concern with respect to executors is whether or not they qualify for the *pro se* exception in Texas. The legal

⁹¹Kunstoplast of Am., Inc. v. Formosa Plastics Corp., 937 S.W.2d 455, 456 (Tex. 1996) (generally, a corporation may be represented only by a licensed attorney). *But see*, Custom-Crete, Inc. v. K-Bar Services, Inc., 82 S.W.3d 655 (App. 4 Dist. 2002) (letter of non-attorney corporate representative, which denied breach of contract claims against corporation, was sufficient to avoid no-answer default judgment).

⁹²*See, e.g.*, Travis County Court Policy Regarding Pro Se Applicants available at http://www.co.travis.tx.us/probate/pdfs/pro_se.pdf (last visited September 19, 2006).

⁹³TEX. PROB. CODE ANN. § 242 (Vernon 2003); 18 WOODWARD, *supra* note 28 § 729; 2 DESHAZO, *supra* note 7, § 10:21.

⁹⁴*Id.*; *See, e.g.*, Callaghan v. Grenet, 66 Tex. 236 (1886); Williams v. Robinson, 56 Tex. 347 (1882); Dallas Joint Stock Land Bank v. Maxey, 112 S.W.2d 305 (Civ.App.1937, n. w. h.); *see* W.S. Simkins, THE ADMINISTRATION OF ESTATES IN TEXAS 3D. § 270 (1934).

question is whether or not an executor as *the party appearing* in court would be *the person with rights* being prosecuted or defended.⁹⁵ The statute guarantees the right to appear in person without an attorney so long as the party appearing is the party with the rights at stake. When an executor appears in a Texas probate court, is the executor appearing in person to prosecute or defend *the executor's* rights? Or is the executor appearing in person to prosecute or defend another person's rights? If so, who is this other person? Is the estate this other person? Are the beneficiaries this other person?

Conceptually, there are three options for settling the rights of executors to appear *pro se*. One option – the entity approach—is to claim that the rights at stake in probate court proceedings belong to the estate. The second option – the “Minnesota rule”—is to claim that the rights belong to the beneficiaries. The third option is to claim that the rights belong to the executor. In chart form, the options are as follows:

Executors and Pro Se Representation: Whose Rights Are At Stake?

Party Appearing	Party With Rights	Pro Se Representation?
Executor	Estate	No
Executor	Beneficiaries	No
Executor	Executor	Yes

Thus, whether or not the executor qualifies for *pro se* representation depends upon whether the executor is representing his or her own rights in the proceeding. This Article argues that the third option is required under Texas law. It rejects both the entity approach (the first option) and the Minnesota rule (the second approach).

B. Rejecting The Entity Approach

As discussed above, the general rule in Texas and elsewhere is that a non-attorney owner, officer, or other agent of a business entity does not have the right to appear in court to prosecute or defend the business entity's rights.⁹⁶ There is no *pro se* right in the entity's non-attorney agents because those agents' rights are not at stake in any court appearance. In Alabama,⁹⁷

⁹⁵TEX. R. CIV. P. 7: “Any party to a suit may appear and prosecute or defend his rights therein, either in person or by an attorney of the court.”

⁹⁶See *supra* pp. 15-16.

⁹⁷The Alabama Supreme Court adopted the reasoning that an estate is a legal entity in Ex

Maine⁹⁸ and South Carolina,⁹⁹ the courts have extended the reasoning of this business entity rule to estates without addressing the fundamental question.

When solving the *pro se* rights equation for an executor, the fundamental question is whether or not a non-attorney executor relates to the estate in the way that a corporation's non-attorney officer or other agents relate to the corporation. While we may casually speak of an executor representing "the estate," the question with respect to *pro se* representation is how legally similar are the two relationships.

An estate is very much unlike a corporation because it is not a legal entity. It can neither sue nor be sued.¹⁰⁰ The "estate" is no more than the property owned by the decedent at death and is legally defined as such.¹⁰¹ Because estates are not entities with legal rights, the Texas cases in which corporate agents are prohibited from appearing on behalf of the corporation are not analogous.

Proponents of the entity approach could point to the exceptions to the general rule. It is true that there are limited exceptions to the general rule, such as giving estates entity-like rights to be a partner in a Texas partnership.¹⁰² However, the Texas Supreme Court has consistently dismissed any claims that an estate should be treated as an entity as a *general rule* in Texas and has specifically denied that an estate is the party with rights in a law suit.¹⁰³

parte Ghafary, 738 So.2d 778, 780 (Ala. 1998) and affirmed it in *Godwin v. McKnight*, 784 So.2d 1014, 1014 (Ala. 2000) in which it asserted without further analysis that the executor's filings were "on behalf of" the estate.

⁹⁸The Supreme Judicial Court of Maine adopted the reasoning that an estate is a legal entity in *State v. Simanonok*, 539 A.2d 211, 212 (Me. 1988).

⁹⁹The Supreme Court of South Carolina adopted the reasoning that an estate is a legal entity in *Brown v. Coe*, 616 S.E.2d 705, 707-708 (S.C. 2005).

¹⁰⁰*Dueitt v. Dueitt*, 802 S.W.2d 859 (Tex.App.—Houston [1st Dist.] 1991, no writ); *Henson v. Estate of Crow*, 734 S.W.2d 648 (Tex. 1987); *Price v. Estate of Anderson*, 522 S.W.2d 690 (Tex. 1975); see also JUDGE ADELE HEDGES & LYNNE LIBERATO, TEXAS PRACTICE GUIDE: CIVIL APPEALS §5:38 (2006); 17 WOODWARD, *supra* note 7, § 178; 29 TEX. JUR. 3D DECEDENTS' ESTATES §544 (2006).

¹⁰¹ § 3(1).

¹⁰² For discussion of estates as partners, see, e.g., 19 ROBERT W. HAMILTON ET. AL., TEXAS PRACTICE, BUSINESS ORGANIZATIONS §6.5 (2005).

¹⁰³ *Dueitt*, 802 S.W.2d 859; *Henson*, 734 S.W.2d 648; *Price*, 522 S.W.2d 690; ; see also HEDGES & LIBERATO, *supra* note 94; 17 WOODWARD, *supra* note 7, § 178; 29 TEX. JUR. 3D DECEDENTS' ESTATES §544. For a discussion of the general rule that only the executor has the

C. The Minnesota Rule

At the height of the organized bar's twentieth century campaign against banks providing legal services,¹⁰⁴ the Minnesota Supreme Court held that a bank serving as executor does not have the right to proceed *pro se*.¹⁰⁵ This kept the bank's lawyers from appearing in probate court on behalf of the bank, which required the bank to hire outside legal counsel. This "Minnesota rule" has been followed in the Supreme Courts of Arkansas, Wisconsin, Kentucky and Florida but rejected by the Supreme Court of Ohio (even though it was considering the same issue in the same Great Depression-era anti-bank legal environment).¹⁰⁶

1. Minnesota

The seminal Minnesota case was a 1930 professional discipline case, *In Re Otterness*.¹⁰⁷ An attorney who was a salaried employee of a bank turned

right to be the party to the suit and some of the exceptions to the general rule, *see* 17 WOODWARD, *supra* note 7, § 171; AUTHOR, TEXAS PROBATE, ESTATE AND TRUST ADMINISTRATION §§ 46.01-0.2 (year); HEDGES & LIBERATO, *supra* note 94; 17 WOODWARD, *supra* note 7, § 178; 29 TEX. JUR. 3D DECEDENTS' ESTATES §544.

¹⁰⁴ *See supra* p. 9.

¹⁰⁵ *In Re Otterness*, 181 Minn. 254, 223 N.W. 318 (Minn. 1930).

¹⁰⁶ A too brief review of 19 A.L.R.3d 1104 regarding the "necessity that executor or administrator be represented by counsel in presenting matters in probate court" could leave the impression that the Minnesota rule is more settled law than it is. This secondary source cites all of the cases described but, for example, cites the Ohio case (described below) in support of the proposition even though the Ohio case rejected the Minnesota rule. As to the other cases the American Law Reporter cites, none are on point even though close: *Wright, State ex rel. v. Barlow*, 132 Neb. 166, 271 N.W. 282 (1937) (this was a criminal case against a man who held himself out as a lawyer and given advices to executors and administrators; the *pro se* exception was not relevant); *Detroit Bar Ass'n v. Union Guardian Trust Co.*, 282 Mich. 707, 281 N.W. 432 (1938) (this was a case of a corporation using non-lawyers to appear in court on its behalf, which is not permitted since the non-lawyers are representing the corporation, not themselves; the issue was a corporation's general *pro se* rights rather than an executor's specific *pro se* rights); *Grand Rapids Bar Ass'n v. Denkema*, 290 Mich. 56, 287 N.W. 377 (1939) (this is the case of a real estate broker providing legal services; although dicta recites the Minnesota rule, the broker had provided legal advice to executors and administrators but had not himself appeared as such; the *pro se* exception was not relevant). This *Denkema* case cites several older cases along with the *Otterness* case, but the older cases are all examples of someone who was not a lawyer holding himself out as a lawyer—and not cases in which an executor's right to appear *pro se* was relevant. Similarly, *see*, for example, *Ferris v. Snively*, 19 P.2d. 942 (Wash. 1933) and *In re Brainard*, 39 P.2d. 769 (Ia. 1934).

¹⁰⁷ *In Re Otterness*, 223 N.W. 318.

over to the bank his legal fees charged for the probate court work he did.¹⁰⁸ The Minnesota Supreme Court censured the attorney.¹⁰⁹ The bank was not permitted to practice law in Minnesota, and the attorney was facilitating its practice because the probate court work profited the bank.¹¹⁰ The *pro se* exception was a potential defense since had it qualified, the bank would not have been engaged in the unauthorized practice of law, and the attorney would not have been guilty of assisting it.¹¹¹ That is, while the bank could not appear in probate court on behalf of the beneficiaries of the estates, if its court appearances were for its own benefit as executor of the estates, it would not be engaged in the *unauthorized* practice of law but rather covered by the *pro se* exception. Dismissing the potential *pro se* defense, the court cited, explained, and distinguished the *pro se* exception in a single short paragraph: as the bank had no beneficial interest in the estate, it had no right to appear *pro se*.¹¹² The only exception according to the Minnesota court would be if the bank were to defend personal rights as an executor, such as if it were to defend against a fiduciary misconduct charge.¹¹³

2. Arkansas

In the 1954 case *Arkansas Bar Ass'n v. Union Nat'l Bank of Little Rock*, the Arkansas Supreme Court followed the Minnesota rule when it too considered a bank's use of salaried attorneys to engage in the practice of law in the probate courts. Again addressing the *pro se* exception in a situation in which it could be used defensively by a bank, the court opined that the bank executor was not acting on its own behalf but on behalf of the beneficiaries. Thus, the court concluded the bank-executor did not qualify for the *pro se* exception.¹¹⁴ (Almost fifty years later, the Arkansas Supreme Court re-affirmed this as the rule in Arkansas.)¹¹⁵

¹⁰⁸ *Id.* at 256.

¹⁰⁹ *Id.* at 258.

¹¹⁰ *Id.* at 257.

¹¹¹ *See supra* pp. 15-16.

¹¹² *In Re Otterness*, 223 N.W. 318 at 258.

¹¹³ *Id.*

¹¹⁴ *Arkansas Bar Ass'n v. Union Nat'l Bank of Little Rock*, 224 Ark. 48, 273 S.W.2d 408 (1954).

¹¹⁵ *Davenport v. Lee*, 72 D.W.3d. 85 (Ark. 2002).

3. Kentucky

As in Minnesota and Arkansas, it was banks allegedly engaged in the practice of law in the probate courts that brought the issue of *pro se* executors to the Supreme Court of Kentucky in the 1965 case *Fraze v. Citizens Fidelity Bank & Trust Company*.¹¹⁶ Specifically, the court was considering contempt proceedings against five banks for the unauthorized practice of law through their salaried employee-attorneys.¹¹⁷ The banks claimed protection under a Kentucky statute explicitly confirming *pro se* rights to fiduciaries.¹¹⁸ The court invoked its superiority over the legislature on these issues and disregarded the statute.¹¹⁹ Citing its own cases against unauthorized practice but offering no further analysis, the court simply stated that “fiduciaries are in no different position” than other unlicensed persons without a “beneficial interest in the corpus of the estate.”¹²⁰ Thus, the court denied the banks the right to appear *pro se*.

4. Wisconsin

The first state supreme court to consider the *pro se* executor issue outside the context of preventing banks from practicing law for profit was the Wisconsin court in the 1965 case *Baker v. County Court of Rock County*.¹²¹ An individual executor fired his attorney and then made *pro se* filings.¹²² The courts rejected the filings and ordered the executor to hire an attorney.¹²³ As was required in the Wisconsin probate process, the executor had requested the probate court to review and adjudicate the rights of the beneficiaries in certain distributions.¹²⁴ The probate court thought that it was rare for beneficiaries to hire their own attorneys to review these procedures, and, thus, the court reasoned it was incumbent upon the executor to hire an attorney; otherwise, the legal rights of the beneficiaries would go un-represented by an attorney, which would place an undue

¹¹⁶*Fraze v. Citizens Fidelity Bank & Trust Co.*, 393 S.W.2d 778 (Ky. 1965).

¹¹⁷*Id.* at 781.

¹¹⁸*Id.* at 781-782.

¹¹⁹*Id.* at 783.

¹²⁰*Id.* at 782.

¹²¹*Baker v. County Court of Rock County* 29 Wis. 2d 1, 138 N.W.2d 162 (1965).

¹²²*Id.* at 164.

¹²³*Id.*

¹²⁴*Id.* at 165.

burden of review on the court.¹²⁵

The Wisconsin court deviated from the Minnesota rule in two significant ways, however. First, it opined that not all *pro se* court filings by an executor are prohibited but only those that raise complex legal questions.¹²⁶ Second, the court made clear that it rejected the notion that even a beneficially interested executor could appear *pro se*.¹²⁷ The court's reasoning was that executors are officers of the probate court, and as part of their management by the court, they must obey any orders to hire an attorney, which the court has good reason to do in order to manage its own burden of reviewing pleadings.¹²⁸

5. Florida

The Florida Supreme Court followed the Minnesota rule in its 1974 case *Falkner v. Blanton*.¹²⁹ Like the Wisconsin court, the Florida Supreme Court considered the *pro se* appearance rights of an individual executor outside of the context of prohibiting banks from practicing law in the probate court.¹³⁰ However, in its single paragraph opinion, the court distinguished itself from the Wisconsin court by holding that an individual executor would have *pro se* rights so long as the executor was the sole beneficiary of the estate.¹³¹ Unlike the Wisconsin court, it did not distinguish between simple and complex proceedings.

6. Ohio's Rejection of the Minnesota Rule¹³²

Similarly to the situations considered in Minnesota, Kentucky, and Arkansas, in the 1937 case, *Judd v. City Trust Savings Bank* the Ohio Supreme Court considered banks that were engaged in estate planning and probate court work in Ohio.¹³³ It held that the bank could not provide estate

¹²⁵ *Id.* at 167.

¹²⁶ *Id.*

¹²⁷ *Id.* at 171-172.

¹²⁸ *Id.*

¹²⁹ *State ex rel. Falkner v. Blanton*, 297 So.2d 825 (Fla. 1974).

¹³⁰ *Id.* at 825.

¹³¹ *Id.*

¹³² The Supreme Court of Indiana also rejected the Minnesota approach to the *pro se* exception but with respect to trustees (*i.e.*, the case did not address executors' rights). *Groninger v. Fletcher Trust Co.*, 220 Ind. 202, 41 N.E.2d 140 (1942).

¹³³ *Judd v. City Trust Sav. Bank*, 133 Ohio. St. 81, 12 N.E.2d 288 (1937). In Ohio, once the

planning for clients, even if it were named as the fiduciary in the estate planning documents.¹³⁴ However, it held that banks were covered by the *pro se* exception (and thus not engaged in the unauthorized practice of law) if their salaried attorney-employees appeared in probate court on behalf of the banks as executors.¹³⁵ The court noted that executors are bound to fulfill various duties and that they are personally liable for mismanagement, misconduct, or neglect in connection with these duties.¹³⁶ The attorneys employed by the banks were thus employed so that the bank could discharge its duties without being subject to suit.¹³⁷ The court noted that any beneficiary dissatisfied with the way in which the executor discharges its duties can sue the executor.¹³⁸ Nevertheless, as a result of their *pro se* rights, the bank-executors could represent themselves in court (through their salaried-employee attorneys) without being engaged in the unauthorized practice of law.¹³⁹ Thus, the Ohio Supreme Court rejected the notion that the executors were only representatives of the beneficiaries' interests and focused instead on the executor's personal liability in discharging its duties.

D. Rejecting the Minnesota Rule in Texas

Texas courts should reject the Minnesota rule for multiple reasons, especially because it is inconsistent with contemporary Texas Supreme Court jurisprudence.

1. The Historical Battle Between Banks and the Bar

The Minnesota rule emerged during the turf battle between attorneys and bank trust officers over who had what capacities in estate administration.¹⁴⁰ This turf battle was the 20th century genesis of the campaign against the unauthorized practice of law, and the initial

bank is appointed "it can handle all probate and other legal work necessary to execute the trust." 2 ANGELA G. CARLIN, BALDWIN'S OHIO PRACTICE MERRICK-RIPPNER PROBATE LAW §53:6 (2006).

¹³⁴ *Id.* at 85, 291.

¹³⁵ *Id.* at 94, 294.

¹³⁶ *Id.* at 90-92, 292-294.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *See supra* p. 9.

Minnesota case, the Kentucky case, the Ohio case, and the Arkansas case all have to be seen in this greater historical context. The Kentucky court was not only siding with the bar over the banks in the contempt proceeding against the banks, but also was defending its own turf against the legislature; the court was asserting its rights over the legislature's when it rejected both the substance and the form of the legislature's permission for fiduciaries to appear *pro se* (permission one surmises that may have been granted after the banks' lobbying).¹⁴¹

As the *pro se* exception was a potential defense for the banks, it was removed with cursory reasoning by those courts following the Minnesota rule. As discussed above, corporations cannot appear *pro se* through their non-lawyer employees.¹⁴² Thus, the right for a corporation to appear *pro se* is simply the right not to spend their funds on *outside* legal counsel. The banks that were providing probate services did so with their in house legal counsel in order to make a profit. Had the courts concluded that it was the bank's rights at stake in the probate proceedings, the banks could have continued to make a profit with their in house legal counsel. But by concluding the banks were not acting for their own benefit but for the beneficiaries, the banks were not permitted to proceed with their in house legal staff in competing with lawyers for probate services.

The Minnesota rule courts were explicitly interested in stopping bank competition for probate services. There is nothing said about protecting the public from ill-prepared non-lawyers since, after all, those who were representing the banks were, indeed, lawyers. Historically, this type of economic defensiveness by the bar eventually led to anti-trust concerns, which eventually led to the decline in the zealotry of unauthorized practice prosecutions.¹⁴³ In the early days, it was not shameful for the bar to assert that economic interests were behind its unauthorized practice prosecutions.¹⁴⁴ Eventually, of course, this did become shameful, and the

¹⁴¹Frazer v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 778, 783 (Ky. 1965).

¹⁴²See *supra* pp. 15-16.

¹⁴³See *supra* pp. 9-12.

¹⁴⁴Rhode, *supra* note 43; Denckla, *supra* note 43, at 2584-2585. Initially articulated by the bar in terms of economic self-interest, the public justification for the prohibition was eventually changed to protecting the public (though the public itself has not given much support to the bar's efforts and the empirical research indicates the public has suffered little, if any, as a result of non-lawyers practicing law). Rhode, *supra* note 43, at 3; RESTATEMENT, *supra* note 40, Note on Comment A, Comment B, and Comment C.

justification gave way to expressing concerns about protecting the public.¹⁴⁵ In an age in which access to justice is a greater concern than economic protectionism, and in an age in which there are so many exceptions to the unauthorized practice prohibition, the zealotry of the Minnesota rule courts to restrict judicial access is anachronistic.

2. Failure to Respect the Executor-Beneficiary Fiduciary Relationship

Focusing on denying banks their profit-center of employed probate court attorneys, most of the Minnesota rule courts did not focus on the uniqueness of the executor-beneficiary relationship.¹⁴⁶ However, the uniqueness of the executor-beneficiary relationship is essential to understanding the *pro se* rights of executors. What the Minnesota rule courts have done is to treat executors as legally transparent—as agents of the beneficiaries—just as the employee-attorneys were agents of the banks. This made their reasoning syllogistic but at odds with the intentional division of management rights from beneficial interests. None of the courts discussed this division. These courts' conclusion that the executors have no right to appear in court followed directly from their observation that the beneficiaries have the beneficial interests.¹⁴⁷

However, by definition, executors have special, specific, and statutory rights and duties that are not derived from beneficial interests. The unique rights of the executor are reflected in the specific statutory entitlement of the person nominated to be executor to probate the will (even though the only other persons entitled to probate the will are those who have a beneficial interest in the estate.)¹⁴⁸ When a nominated executor appears in court to probate the will, he or she is acting pursuant to a specific statutory definition distinct from any beneficial interest.¹⁴⁹ While the beneficiaries of the will may receive a benefit by its probate, the executor's choice to

¹⁴⁵ *Id.*

¹⁴⁶ The exception was the Wisconsin court which focused on the executor's relationship to the court during estate administration. *Baker v. County Court of Rock County* 29 Wis. 2d 1, 8 138 N.W.2d 162, 166 (1965).

¹⁴⁷ *In Re Otterness*, 181 Minn. 254, 258 223 N.W. 318, 320 (1930); *Arkansas Bar Ass'n v. Union Nat'l Bank of Little Rock*, 224 Ark. 48, 52, 273 S.W.2d 408, 411 (1954); *Frazee v. Citizens Fidelity Bank & Trust Company*, 393 S.W.2d 778, 782 (Ky. 1965); *Falker v. Blanton*, 297 So.2d 825, 825 (Fla. 1974).

¹⁴⁸ TEX. PROB. CODE ANN. §76 (Vernon 2003); 17 WOODWARD, *supra* note 7, § 243.

¹⁴⁹ *Id.*

probate the will is personal.¹⁵⁰ There is no duty to probate the will.¹⁵¹ Thus, the nominated executor cannot be forced to do so by the beneficiaries. Failing to probate the will does not reduce his or her qualification to be appointed executor.¹⁵² Furthermore, the beneficiaries' rights are not affected either way. The nominated executor prosecutes his or her *personal* rights when probating the will. To put an even finer point on it, when the nominated executor probates the will, he or she, by definition, has yet to assume the role of executor and thus has no duties or obligations to the beneficiaries. Thus, it is incoherent to claim the executor's right to probate the will is somehow derived from the beneficiaries' interests. And in the Texas independent administration system, this is the only court appearance required.

Additionally, under the Texas probate code, even though not a beneficiary of the estate, the executor has the sole right to collect, possess, and manage the assets of the estate in his or her personal prudent discretion.¹⁵³ This is true even though title to the assets of the estate vests immediately in the beneficiaries upon the testator's death (which is necessary to avoid a lapse in legal title at death.)¹⁵⁴ The executor's management right includes the exclusive right to bring estate-related law suits.¹⁵⁵ Those law suits must be brought by the executor *in the name of the executor* rather than in the name of the estate or the beneficiaries.¹⁵⁶ Since the beneficiaries do not have the right, the executor certainly does not

¹⁵⁰ *Id.*

¹⁵¹ The custodian of the will upon the testator's death should deliver it to the proper court clerk, but there is no duty to probate a will in Texas. §75.74 TEX. JUR. 3D WILLS §361.

¹⁵² § 78 provides the only grounds on which an executor can be disqualified from serving. 17 WOODWARD, *supra* note 7, § 252; 1 DESHAZO, *supra* note 25, § 5:14.

¹⁵³ §37, §230, §232. Blinn v. McDonald, 92 Tex. 604, 612, 46 S.W. 787 (1898); Morris v. Ratliff, 291 S.W.2d 418 (Civ. App. 1956, writ ref'd n. r. e.); Freeman v. Banks, 91 S.W.2d 1078 (Civ. App. 1936, writ ref'd.) See 18 WOODWARD, *supra* note 28, § 693; 18 TEXAS PRACTICE, PROB. & DECEDENTS' ESTATES §697; 17 WOODWARD, *supra* note 7, § 171; TEXAS PROBATE, ESTATE AND TRUST ADMINISTRATION §47.01[2].

¹⁵⁴ *Id.*

¹⁵⁵ For a discussion of the general rule and the rare exceptions, see §233A; Gannaway v. Barrera, 74 S.W.2d 717 (Civ. App. 1934), *aff'd on other grounds*, 130 Tex. 142, 105 S.W.2d 876 (1937). Gaston v. Bruton, 358 S.W.2d 207 (Civ. App. 1962, writ ref'd n. r. e.). See 17 WOODWARD, *supra* note 7, § 171; TEXAS PROBATE, ESTATE AND TRUST ADMINISTRATION §§46.01-0.2; HEDGES & LIBERATO, *supra* note 94; 17 WOODWARD, *supra* note 7, § 178; 29 TEX. JUR. 3D DECEDENTS' ESTATES §544.

¹⁵⁶ *Id.*

derive the right from them. The beneficiaries have no right to manage the executor, and even by pooling all of their rights, the beneficiaries cannot remove the executor for the exercise of his or her discretion one way rather than another so long as he or she discharges the legal duties and abides by fiduciary principles.¹⁵⁷ For example, the executor can decide whether or not to pursue a malpractice claim against the testator's estate planning attorney.¹⁵⁸ Not any one of the beneficiaries and not all of the beneficiaries acting jointly could bring such a claim, nor could they force the executor to bring such a claim. It is the statutory authorities given exclusively to the executor that are at stake when the executor appears in court. Conceptually, the executor might be said to be an agent of the testator but cannot be said to be the agent of the beneficiaries. Though the beneficiaries are destined to be the ultimate recipient of the property, it does not follow the executor is their mere representative: the executor's rights to manage the estate are distinct from the beneficiaries' interests and are not derived from them.

As the Ohio court noted, the executor is given these management rights subject to high fiduciary duties, and the beneficiaries are given no rights at all other than to sue if the duties are unfulfilled.¹⁵⁹ This is the essence of the fiduciary relationship between the executor and the beneficiaries. Under Texas law executors are given the exclusive management rights but owe the beneficiaries the highest duties of good faith, fidelity, loyalty, fairness, and prudence.¹⁶⁰ The Minnesota rule reduces the executor's court appearance rights in an apparent attempt to ensure the beneficiaries' interests are protected, but this ignores the role of fiduciary duties for that purpose. These duties are imposed by the law precisely because the law gives the executor the exclusive rights to manage the estate. Because of these duties,

¹⁵⁷ § 222; 17 WOODWARD, *supra* note 7, § 508.

¹⁵⁸ Belt v. Oppenheimer, 192 S.W.3d 780 (Tex. 2006) (malpractice claim in the estate-planning context may be maintained in Texas only by the estate planner's client or the client's personal representative)

¹⁵⁹ *Id.* at 90-92, 292-294. The Minnesota rule courts could have protected both the historical understanding and their objective of denying *pro se* rights to bank executors simply by finding it a violation of the executor's fiduciary duties to proceed *pro se*. However, the courts did not give this type of fiduciary analysis. Instead, the courts derived the right to appear in court from beneficial interests—deciding who had the right to appear with reference to who had the rights to benefit.

¹⁶⁰ Humane Soc. of Austin & Travis County v Austin Nat'l Bank, 531 S.W.2d 574 (Tex. 1975), *cert. denied*, 425 US 976, 48 L Ed 2d 800, 96 S Ct 2177 (1976); McLendon v McLendon, 862 SW2d 662 (Tex. App.—Dallas 1993, writ denied); Ertel v O'Brien 852 SW2d 17 (Tex. App.—Waco, writ denied).

the executor's bond or personal assets protect the beneficiaries. It is this liability that ensures the executor's prudent exercise of the management rights. Because of this liability exposure, the Ohio court described the executor's interest in avoiding a fiduciary suit as "very real, vital, and substantial."¹⁶¹ In contrast, the Minnesota rule cases do not mention these duties or analyze the fiduciary relationship. Instead, they simply reject the executor's management rights by reciting the un-disputed fact that it is the beneficiaries who receive the property.

3. Inapplicability of Wisconsin Rationale

The unique reasoning of the Wisconsin court deserves special mention as to why Texas courts should reject it specifically along with the Minnesota rule generally.

Unlike the other Minnesota rule cases, the Wisconsin court did not attempt to settle who had the right to appear in court merely by reciting who had the beneficial interest. Instead, the Wisconsin court's reasoning invoked the complexity of the Wisconsin probate system and the need of the executor to have the court make determinations. But the Texas probate system has been designed without undue complications, and executors do not seek the type of determinations that the Wisconsin system requires.¹⁶² Indeed, the premise of complexity is essential to the Wisconsin holding because the court reasoned that not all court appearances required a lawyer, only the ones involving complex issues.¹⁶³

The Wisconsin court also based parts of its reasoning on the fact that most beneficiaries do not hire an attorney to review their rights.¹⁶⁴ The court then concluded that the executor must hire one so that the beneficiaries' rights are protected.¹⁶⁵ This, too, is specifically unpersuasive in Texas because under Texas law an executor's attorney has no duty to the beneficiaries but only to the executor.¹⁶⁶

¹⁶¹Judd v. City Trust Sav. Bank, 133 Ohio. St. 81, 91, 12 N.E.2d 288, 293 (1937).

¹⁶²Baker v. County Court of Rock County 29 Wis. 2d 1, 8 138 N.W.2d 162, 166 (1965). Texas probate court judges are not responsible for the acts of independent executors. §§ 145(q), 36, 145(h); 17 WOODWARD, *supra* note 7, § 75; *Id.* § 497; 1 DESHAZO, *supra* note 25, § 1:24. Young Lawyers Association Needs of Senior Citizens Committee, *supra* note 23; Pacheco, *supra* note 23.

¹⁶³Baker, 9 138 N.W.2d at 167.

¹⁶⁴*Id.*

¹⁶⁵*Id.*

¹⁶⁶Huie v. DeShazo, 922 S.W.2d 920 (Tex. 1996).

4. “Practice of Law” Outside the Courtroom

Under the Minnesota rule, executors are engaged in the unauthorized practice of law whenever an attorney fails to represent them *in court*. A consequence of this rule is that executors are engaged in the unauthorized practice with respect to a variety of *non-courtroom tasks* as well. As discussed above, the Texas standards for unauthorized practice include, not only court appearances, but providing services that have a “legal effect” that must be “carefully determined”¹⁶⁷ or taking any action in a matter that is “connected with the law.”¹⁶⁸ Delineating which of the executor’s management tasks did not require the executor to obtain a legal opinion would be considerably impractical if every legally significant decision the executor made might be considered the practice of law. Defending the executors’ right to appear *pro se* in probate court also defends the executors’ right to manage the estate without the obligation of anxiously securing legal opinions to avoid the unauthorized practice of law *outside of the courtroom*. Individuals managing their own affairs have the right to make legally significant decisions for themselves, and so do executors (who can be sued by the beneficiaries for failing to act as a prudent individual would in managing those affairs).

In some of those states adopting the Minnesota rule, the courts have been forced to consider which of an executor’s out-of-court tasks do require an executor to hire an attorney.¹⁶⁹ Historically, as explained above, the goal of the Texas probate system has been to allow non-lawyers to administer the estate without seeking permission at every turn.¹⁷⁰ Prohibiting the executor’s performance of non-courtroom tasks would defeat the purpose of the simplified independent administration system by replacing the judge’s management of the estates in Texas with attorneys’. Legal fees and complications would certainly increase beyond the current level if there were a legal obligation of an attorney to review all of an executor’s legally significant letters, agreements, and decisions to ensure that the executor is

¹⁶⁷TEX. GOV’T CODE ANN. § 81.101 (Vernon 2004).

¹⁶⁸*Crain v. UPLC*, 11 S.W.3d 328, 333 (Tex. App.—Houston [1st Dist.] 2000, pet. denied), cert. denied, 532 U.S. 1067 (2001); *Davies v. Unauthorized Practice Committee*, 431 S.W.2d 590 (Tex. Civ. App.—Tyler 1968, writ ref’d n.r.e.); *Stewart Abstract Co. v. Judicial Commission*, 131 S.W.2d 686, 689 (Tex. Civ. App.—Beaumont 1939, no writ).

¹⁶⁹*See, e.g.*, *Frazer v. Citizens Fidelity Bank & Trust Co.*, 393 S.W.2d 778, 784-785 (Ky. 1965).

¹⁷⁰TEX. PROB. CODE ANN. §6 (Vernon 2003); 17 WOODWARD, *supra* note 7, §§ 44-45; 2 DESHAZO, *supra* note 7, § 14:36.

not engaged in the unauthorized practice of law.

5. Professional Responsibility and Liability Issues Under the Minnesota Rule

The Minnesota rule has disturbing, unintended ethical consequences for Texas lawyers, which is another set of reasons to reject it.

a. Executors Practicing Law Outside the Courtroom

A Texas attorney cannot ethically assist anyone engaged in the unauthorized practice of law.¹⁷¹ If the executor is at risk for engaging in the practice of law by making legally significant out-of-court decisions during the estate administration, the attorney has an obligation in order to ensure that his or her client has not crossed the line into the practice of law in order to ensure he or she is not assisting in unauthorized practice. As a practical matter, the attorney's job would be transformed from advising the executor when requested to supervising the executor at all times. This would be necessary to make sure the attorney has not unwittingly helped the executor engage in the practice of law. Thus, it is not only a matter of increased legal fees for the attorney reviewing all of the executor's legally significant decisions but also a question of what level of supervision and detailed instruction is ethically required of the Texas lawyer in order to keep the client from engaging in the practice of law.

b. Unbundled Probate Services

If an executor has the right to proceed *pro se*, then a Texas attorney is able to provide unbundled legal assistance in probate court without breaching any ethical duties. For example, if an executor has the right to proceed *pro se*, an attorney might draft the application for the probate of the will and send the executor to court with it. However, if the executor does not have the right to proceed *pro se*, drafting the documents for the proceeding would be ethically prohibited.¹⁷² This type of unbundled assistance might provide a significant cost savings for some clients and may even be provided *pro bono*, especially to the attorney's friends and family.

¹⁷¹TEX. DISCIPLINARY R. PROF'L CONDUCT 5.05.

¹⁷²*Id.* 5.05.

c. *Knowing the Client's Identity*

The fundamental issue in the executor's right to proceed *pro se* is whether the executor is prosecuting the executor's rights or the beneficiaries' rights. Under the Minnesota rule cases, the claim is the executor is prosecuting the beneficiaries' rights when he or she appears in court. This, those cases conclude, is why the executor cannot appear *pro se*. This would mean that when the executor's attorney appears in court, it is to represent the estate's beneficiaries. Thus, if the executor does not have *pro se* rights, then the executor does not have the right to an exclusive attorney-client relationship with his or her attorney. As discussed below, the right of the attorney and the executor to an exclusive attorney-client relationship is well established in Texas law.¹⁷³ The attorney's certainty that he or she is advising the executor as to the executor's rights is a corollary to knowing the attorney is not obligated to advise all of those with beneficial interests in the estate (including creditors) as to their rights. It is this certainty that allows the attorney to behave both ethically and competently, knowing who the client is—and, just as importantly, who the client is not.

6. Texas Supreme Court Jurisprudence and the Minnesota Rule

The Minnesota rule cases are also inconsistent with contemporary Texas Supreme Court jurisprudence. One Texas Supreme Court case explicitly affirms the right of an executor to appear *pro se* while another makes clear that the attorney-client relationship is between the executor and the attorney (not the estate or the beneficiaries).

a. *Pro Se Rights of an Executor*

In the 1983 case *Ex parte Shaffer* the Texas Supreme Court considered whether a Texas executor had *pro se* rights in probate court.¹⁷⁴ In the case, the executor was sued for an alleged breach of his fiduciary duty.¹⁷⁵ Before the trial, the executor's attorney withdrew. The Dallas County Probate Court Number 3 ordered the executor to retain a new attorney, which the executor failed to do.¹⁷⁶ The judge ordered the executor to be held in the

¹⁷³ See *infra* pp. 31-32.

¹⁷⁴ *Ex parte Shaffer*, 649 S.W.2d 300 (Tex. 1983).

¹⁷⁵ *Id.* at 301.

¹⁷⁶ *Id.*

county jail in contempt of court until he hired an attorney.¹⁷⁷ The Texas Supreme Court held the probate judge's order void.¹⁷⁸ The Texas Supreme Court's reasoning was short and blunt:

counsel cites no authority, and indeed we can find none, which allows a court to . . . require any party to retain an attorney. . . [O]rdering a party to be represented by an attorney abridges that person's right to be heard by himself.¹⁷⁹

Presumably because the Texas Supreme Court believed the facts were directly covered by the *pro se* rule, it did not detail its application of the rule. The court's brevity provides an ambiguity for those who favor the Minnesota rule. Those proponents can argue the case simply affirms that an executor is permitted to proceed *pro se* when he or she is "personally liable"—allegations of fiduciary duty breaches—and not when it involves "estate claims." The initial Minnesota case indeed cites this as a *pro se* right.¹⁸⁰

While superficially plausible, this Minnesota rule distinction is inherently problematic. It makes a distinction between an attorney "for the estate" (when no one is claiming the executor has mismanaged it) and an attorney "for the executor" (whenever there is a claim of mismanagement). It envisions two attorneys for each executor: one to advise the executor on how to prudently handle estate business and one to defend the executor from any suits claiming the executor failed to prudently handle estate business. It is impossible to segregate the executor's need for legal advice in this way. The executor is always exposed to personal claims of wrongdoing when making decisions in administering the estate, and Texas law does not require the hiring of a second attorney to advise the executor when a fiduciary claim is made. Texas law permits the executor's use of estate funds in defense against claims of his or her personal wrongdoing; even if the executor fails in his or her defense, so long as the executor defended the actions in good faith, the executor is entitled to use estate funds for the attorney.¹⁸¹ There is no such person as the "attorney for the estate." The estate funds legal representation for the executor for routine

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *In Re Otterness*, 181 Minn. 254, 358 223 N.W. 318 (1930).

¹⁸¹ TEX. PROB. CODE ANN. §149C(c) (Vernon 2003); 1 DESHAZO, *supra* note 25, § 5:75.

advice and for defense against fiduciary claims. It is the executor's rights at stake in both situations.

b. Whose Rights Are At Stake?

In the question of the 1996 case *Huie v. DeShazo*, the Texas Supreme Court answered whose rights are the subject of legal representation when a trustee hires an attorney.¹⁸² The Texas court rejected the trends in other states to make the beneficiaries' rights or the trust estate's rights the subject of the legal representation and continued instead with the historical view that it is the fiduciary's rights.¹⁸³ The court held that trustees have a right to confidential legal advice in how to manage their trust estates and how best to discharge their duties to the beneficiaries.¹⁸⁴ The trustee is the personal client of the attorney, not a legally transparent representative of the beneficiaries. This is true even when trust estate funds are used to compensate the attorney and even when the beneficiaries are bringing legal claims against the trustee personally.¹⁸⁵

The right of trustees to pay the attorney with trust estate funds while expecting the attorney to represent the trustee to the exclusion of the beneficiaries is indistinguishable from the right of executors to do so. Executors' standards of performance are the same as those of trustees, and nothing in the Texas Supreme Court's reasoning would mark a difference between executors and trustees.¹⁸⁶ As the executor's—rather than the beneficiaries'—rights are the subject of any legal representation of the executor, it follows that these are the relevant rights at stake when an attorney appears in probate court. Since an attorney would appear in court to prosecute or defend the executor's exclusive right to manage the estate, the executor has the right to appear *pro se* in court with respect to his or her same rights.

The Texas Supreme Court did not hesitate to reject the view that the

¹⁸² *Huie v. DeShazo*, 922 S.W.2d 920 (Tex. 1996).

¹⁸³ *Id.* at 924-927.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *See, e.g.,* *Geeslin v. McElhenney*, 788 S.W.2d. 683, 684 (Tex. App.—Austin 1990, no writ); *Humane Soc. of Austin & Travis County v Austin Nat'l Bank*, 531 SW2d 574 (Tex. 1975), *cert denied*, 425 US 976, 48 L Ed 2d 800, 96 S Ct 2177 (1976); *McLendon v McLendon*, 862 S.W.2d 662 (Tex. App.—Dallas, writ denied); *Ertel v O'Brien*, 852 S.W.2d 17 (Tex. App.—Waco 1993, writ denied).

beneficiaries are the “real” clients with the “real” interests at stake, which is the principle of the Minnesota rule cases.¹⁸⁷ Instead, the Texas Supreme Court reasoned along the lines of the Ohio Supreme Court focusing on the legal rights to manage rather than the rights to benefit. As the Ohio court made explicit, it is the executor’s personal liability for mismanagement that ensures proper management—and not a requirement that the executor hire an attorney to represent the beneficiaries’ interests.

E. Waco Court of Appeals

On October 18, 2006, the Waco Court of Appeals considered a ruling in the 77th District Court (Limestone County) in which an independent executor had discharged his attorney after the appeal was perfected.¹⁸⁸ Having no attorney appearing before them prompted the court to consider whether or not an independent executor had the right to appear *pro se*.¹⁸⁹ Without the benefit of a briefing, the court answered itself.¹⁹⁰

Claiming in one sentence that it was “not all clear” whether or not an independent executor could appear *pro se* under Texas Rule of Civil Procedure 7, the court began the next sentence by concluding that “a plain reading” of the rule suggests the independent executor cannot appear *pro se*.¹⁹¹ There was not any reasoning between the sentences, which introduced and attempted to resolve the issue without asking the fundamental question as to *whose* rights are at stake when an independent executor appears *pro se*. Begging the question it did not even ask, the court wrote and concluded that the independent executor “is litigating rights in a representative capacity rather than on his own behalf.”¹⁹² In dissent, the Chief Justice clarified that the independent executor has all the rights of the decedent, including the right to appear *pro se*.¹⁹³ The majority did not consider this claim, nor otherwise investigate whose rights were involved in managing the estate.

¹⁸⁷“We concluded that, under Texas law at least, the trustee who retains the attorney to advise him or her in administering the trust is the real client, not the trust beneficiaries.” *Huie*, 922 S.W.2d at 925.

¹⁸⁸Steele, 927.

¹⁸⁹Steele, 928.

¹⁹⁰Steele, 931.

¹⁹¹Steele, 928.

¹⁹²*Id.*

¹⁹³Steele, 930.

Except for a case denying *pro se* rights to non-attorney representatives of corporations, no Texas cases were cited in the opinion. No mention was made of *Ex parte Shaffer* nor *Huie v. DeShazo*. Further, much to the dismay of the dissenting Chief Justice, no mention was made of the Texas independent estate administration system or the rights of independent executors.¹⁹⁴

Instead of considering Texas law, the opinion cites a jumble of out-of-state cases, including lower state appellate cases and federal circuit cases rather than authoritative statements from the respective state supreme courts.¹⁹⁵ The Waco court did cite the supreme courts of Alabama, Maine and South Carolina, which each had concluded the estate is a legal entity.¹⁹⁶ Being persuaded by this reasoning, the Waco court failed to cite the Texas law to the contrary.¹⁹⁷ It did cite the Wisconsin supreme court case that adopted the Minnesota rule and the recent Arkansas case that re-affirmed the Minnesota rule in Texas – but it failed to consider the distinction between the two (*i.e.*, that the Wisconsin rationale presumed legal complexities).¹⁹⁸ It also failed to cite any opposing authorities (such as the Ohio supreme court) or Texas-specific considerations (such as the peculiarities of the Texas independent administration system).

The Chief Justice addressed many of these shortcomings. He reminded the majority that the independent executor has the management rights that belonged to the decedent.¹⁹⁹ He criticized the majority for deciding an issue without any briefing, and for its misplaced discussion of and reliance on out-of-state authority, which, he pointed out, the court failed to acknowledge is divided.²⁰⁰ The Chief Justice's primary concern was the

¹⁹⁴Steele, 930-931.

¹⁹⁵For example, rather than considering the case law issued by the Minnesota, Kentucky, Florida, and Ohio supreme courts discussed above, the court cited lower court rulings from Illinois and Nebraska, as well as cases from the 6th, 8th, and 11th federal circuits without acknowledging that only the supreme court of a state speaks authoritatively as to its law. With no shortage of state supreme court cases, this is a curious string of citations. Steele, 928.

¹⁹⁶Steele, 928.

¹⁹⁷*Dueitt v. Dueitt*, 802 S.W.2d 859 (Tex.App.—Houston [1st Dist.] 1991, no writ); *Henson v. Estate of Crow*, 734 S.W.2d 648 (Tex. 1987); *Price v. Estate of Anderson*, 522 S.W.2d 690 (Tex. 1975); *see also* JUDGE ADELE HEDGES & LYNNE LIBERATO, TEXAS PRACTICE GUIDE: CIVIL APPEALS §5:38 (2006); 17 WOODWARD, *supra* note 7, § 178; 29 TEX. JUR. 3D DECEDENTS' ESTATES §544 (2006).

¹⁹⁸Steele, 928.

¹⁹⁹Steele, 930-931.

²⁰⁰Steele, 930-931.

majority's failure to consider the peculiarities and value of the independent administration system and how their expansive holding would mean nothing could be done in any probate judicial proceeding without an attorney.²⁰¹ With considerable justification, as explained above, the Chief Justice concluded his dissent:

This is not the law. Further, this holding will come as an enormous surprise to the personal representatives of estates that have been and are currently being probated and who regularly represent the estate as independent executor in judicial proceedings without being represented by counsel.²⁰²

F. Conclusion

Under Texas law, the executor is representing his or her own rights when he or she (or his or her attorney) appears in probate court. Because under *Huie v. DeShazo*, an attorney could appear in court on behalf of the executor's exclusive right to manage the estate, the executor has the right to appear *pro se* in court with respect to those same rights. *Ex parte Shaffer* must be interpreted as the Texas Supreme Court specifically guaranteeing this right. The Minnesota rule has never been adopted in Texas and is inconsistent with both *Huie v. DeShazo* and *Ex parte Shaffer*. Independently of these Texas Supreme Court cases, the Minnesota rule should be rejected because it obliterates the distinction between vesting management rights in executors and beneficial interests in beneficiaries. It also disregards the role of fiduciary duties in regulating the executor-beneficiary relationship. Adopting the Minnesota rule in Texas would raise professional responsibility issues for Texas attorneys involved in estate administration, such as forcing them into hyper-vigilant supervision of their executor-clients to ensure their clients were not inadvertently practicing law outside of the courtroom. More importantly, the adoption of the Minnesota rule's reasoning that it is the beneficiaries' interests that are the subject of legal representation would contradict the reasoning in *Huie v. DeShazo* that the executor's attorney owes no duties to the beneficiaries.

IV. IMPLICATIONS OF *PRO SE* RIGHTS

Having demonstrated that executors have *pro se* rights in Texas, it is

²⁰¹ Steele, 930-931.

²⁰² Steele, 931.

timely to consider the implications. The chief implication for the probate court system is how best to accommodate *pro se* executors. Attorneys need to be aware of the professional responsibility implications that denying *pro se* rights to executors would have, as discussed above, but should also discuss with their clients their desires regarding permitting, prohibiting, or regulating their chosen executors' *pro se* activities. For executors, the question becomes not whether or not they can proceed *pro se* but under what, if any, circumstances they ought to.

A. Probate Court System Reforms

With some limited exceptions, the general rule is that a *pro se* litigant is held to the same courtroom procedures and standards as an attorney.²⁰³ Thus, there is no legal mandate of special accommodations. However, the judicial trend is towards providing special accommodations in a way calculated to balance both access to justice and judicial efficiency.²⁰⁴

Any accommodation of *pro se* executors must reflect the obvious fact: non-lawyers are unlikely to know as much about the law as lawyers. With respect to executors appearing *pro se*, one concern is that the interests of the beneficiaries will not be well served because the executor does not know what to do when. The other concern is that executors not knowing what to do when increases the work load of judges and court staff and decreases the efficiency of the probate system.

Considering how best to respond to the concerns for beneficiaries' interests and judicial efficiency when executors proceed *pro se* requires an understanding of how other jurisdictions accommodate *pro se* petitioners and the uniqueness of the Texas probate court systems.

1. National Experience

The problems of *pro se* representation are well studied, and many different courts are experimenting with solutions. *Pro se* representation is on the rise both at the federal and state levels, with more than 1/3 of the cases filed in federal district court being *pro se*.²⁰⁵ There is abundant

²⁰³ In a civil proceeding in which plaintiff determined to proceed *pro se*, no allowance would be made for the fact that plaintiff was not a lawyer. See, e.g., *Bailey v. Rogers*, 631 S.W.2d 784 (Tex. App.—Austin 1982). (litigants who represent themselves must comply with applicable procedural rules). But see, e.g., *Bradlow*, *supra* note 84; *Holt*, *supra* note 84.

²⁰⁴ *Id.*

²⁰⁵ *Buxton*, *supra* note 80, at 112.

scholarly and professional literature on *pro se* representation, including correlating the increase in *pro se* cases with a financial inability to hire counsel.²⁰⁶ Almost every state participated in a recent national conference on making the judicial system more accessible to *pro se* litigants,²⁰⁷ and 45% of all jurisdictions have established some sort of *pro se* assistance program or service to increase the ability of *pro se* litigants to participate effectively in the judicial system and, thereby, increase both the effectiveness and the efficiency of the judicial system as a whole.²⁰⁸ These programs range from providing basic information and forms to providing on-site, *pro bono* legal counsel.

2. Unique Texas Probate Court Considerations

Accommodating *pro se* executors requires acknowledging the uniqueness of the simplified executor-centered independent administration provisions Texas probate.²⁰⁹ It is relatively informal and easy to use. The purpose of the probate proceedings is simply to publicize basic information about the decedent, the decedent's will, and the property the decedent owned.²¹⁰ As mentioned above, the court proceeding to probate a will in Texas requires only about four pages of simple documents and five minutes of time with the judge.²¹¹ These provide basic information and do not require articulating legal doctrines or theories.

Additionally, we have to remember that the probate court's work is not optional. Because of death's universality, the probate court's jurisdiction is also universal. It affects Texans of the lowest and highest economic situations. In this context, given that the national rise in *pro se* appearances has been correlated with the financial inability to retain an attorney,²¹² the dominant concern should be to ensure that estates of insufficient value to secure legal services are able to secure legal access.

²⁰⁶ See, e.g., Lois Bloom & Helen Hershkoff *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 475 (2002); Bradlow, *supra* note 84; Holt, *supra* note 84; Kevin H. Smith, *Justice for All?: The Supreme Court's Denial of Pro Se Petitions for Ceterari*, 63 ALB. L. REV. 381 (1999); Buxton, *supra* note 80, at 103.

²⁰⁷ Buxton, *supra* note 80, at 118.

²⁰⁸ *Id.*

²⁰⁹ See *supra* pp. 4-8.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² Buxton, *supra* note 80, at 106.

3. Potential Court Responses

Bearing in mind the uniqueness of the Texas probate system, several reforms and experiments in other jurisdictions might be useful to increasing the effectiveness of *pro se* executors and judicial efficiency without decreasing the financial efficiency of the courts.

a. Education and Orientation

The most basic accommodation for *pro se* executors would be for the court to provide generic information through a web site or otherwise, including explanations of laws and court procedures, as well as form pleadings.²¹³ Another simple accommodation that is used in some courts is to provide video recorded programs providing the basic information, while other courts sponsor courses for *pro se* litigants in which lawyers, paralegals, or court staff provide orientation to the court system and basic instructions.²¹⁴

b. Assistance

A more involved level of accommodation for *pro se* executors would be to provide assistance in completing specific forms or addressing specific issues. This level of accommodation might range from the use of a document examiner to review documents to ensure they comply with basic requirements to the use of a staff attorney to serve as a “facilitator” to provide more specific information on procedure and assistance in preparation of court documents.²¹⁵ In some states, lawyers providing pro bono representation or law students enrolled in law clinics are also used to provide this level of assistance in some courts.²¹⁶

c. Covering Expenses

A fee charged to *pro se* executors should cover the courts’ costs for such programs and, perhaps, even offset other court expenses.

²¹³ *Id.* at 112.

²¹⁴ *Id.* at 123.

²¹⁵ *Id.* at 121.

²¹⁶ *Id.* at 123.

4. Coordinated Legislative Response

While the probate courts could undertake these reforms on their own, the legislature could play a substantial role in ensuring the willingness of judges, court staff, and lawyers to be involved in these reforms. The legislature should statutorily limit causes of actions against lawyers or others that might arise from providing assistance to *pro se* representatives.

B Advising the Testator and Drafting the Will

Because the testator's intention is the guide in estate administration, the will should reflect the testator's intention with respect to *pro se* estate administration. The risks of *pro se* administration—that is, the executor's exposure to fiduciary litigation and the beneficiaries' exposure to losing property due to the executor's mistakes—as well as the potential cost savings of it should be discussed with the testator. The testator should be left with the final word.

1. Prohibiting Proceeding *Pro Se*

The will could prohibit *pro se* representation by conditioning the executor's appointment on his waiving any right to proceed *pro se*. Since the "practice of law" is not limited to courtroom appearances (which can be easily prohibited), the complication in drafting would be to define the prohibition in a way that would not impair the out-of-court activities an executor might be qualified to do without legal assistance but that might arguably fall within the definition of the "practice of law." For example, would preparing forms to make an insurance claim on estate property be the practice of law when the benefit of the insurance would be for the beneficiaries? While conceptually identical to prohibiting *pro se* representation, requiring the executor to hire an attorney for representing the executor in court would avoid the hard task of defining what exactly the executor could and could not do.

2. Providing Flexibility

The testator may prefer to provide flexibility to the executor. For example, if the testator's child is sophisticated and the testator's estate is relatively simple, the testator might wish to appoint the child as executor and allow her to make the decision at the time. If the testator is not adverse to the executor proceeding *pro se*, he might consider explicit provisions

addressing the situation. For example, perhaps he would like to prohibit the beneficiaries from suing unless the executor was grossly negligent in deciding to proceed *pro se*, or perhaps he would permit the executor to proceed *pro se* only if she posted a bond. Perhaps the most practical provision would be to allow the executor to proceed *pro se* only with the beneficiaries' consent.

C. Should Executors Appear Pro Se?

While it is clear that executors have the legal right in Texas to proceed *pro se*, it is unclear when, if ever, they should. Executors choosing to go without legal counsel run the risk of being sued for breaching duties to the beneficiaries. An inherent disadvantage to defendants of such suits is that the plaintiffs have the benefit of hindsight, which is denied at the time the balancing of risks and benefits must be made. Complicating any sort of risk-benefit calculus by the executor is that the executor never knows what he or she does not know. The executor lacks the information, strategies, and experience of a good lawyer, which means the executor is quite unlikely to discern the real dangers of proceeding *pro se*. The real danger is not that an application for probate will have to be amended to include some overlooked information, but that the executor might, for example, misinterpret a clause in the will in a way that benefits one beneficiary at the expense of another. The most serious estate administration risks for executors are not mistakes in the probate courtroom but mistakes with beneficiaries, creditors, and third parties.

1. Fiduciary Duties and Infallible Hindsight

An executor is charged with duties of good faith, fidelity, loyalty, fairness, and prudence.²¹⁷ Presumably a *pro se* executor can act in good faith and with fidelity, loyalty, and fairness towards the beneficiaries.²¹⁸ The key question is whether or not an executor would ever be acting prudently by proceeding *pro se*.²¹⁹ If the executor cannot establish that his

²¹⁷Humane Soc. of Austin & Travis County v Austin Nat'l Bank, (1975, Tex) 531 S.W.2d 574 (Tex. 1975), *cert denied*, 425 US 976, 48 L Ed 2d 800, 96 S Ct 2177 (1976); McLendon v McLendon, (1993, Tex App Dallas) 862 S.W.2d 662 (Tex. App.—Dallas 1993, writ denied); Ertel v O'Brien, 852 S.W.2d 17 (Tex. App.—Waco 1993, writ denied).

²¹⁸Herschbach v. City of Corpus Christi, 883 S.W.2d 720 (Tex. App.—Corpus Christi 1994, writ denied).

²¹⁹TEX. PROB. CODE ANN. § 230(a) (Vernon 2003); 18 WOODWARD, *supra* note 28, § 693;

or her decision to proceed *pro se* evidenced the prudence an ordinarily capable and careful person would have used in making the decision, he or she can be sued for breaching a duty to the beneficiaries. Such a suit would only be brought if there had been damage to the beneficiaries' interest, so it follows that the executor would only be called to prove the prudence of proceeding *pro se* in the event of some significant problem with the estate's property or beneficiaries. Inevitably, as fiduciaries often discover only after such a claim is brought, the plaintiffs have the benefit of hindsight in second-guessing the executor's decisions. If the executor proceeds *pro se* without a hitch, no one will care. But if any problems arise during the estate administration, the executor has taken the risk that the beneficiaries will sue claiming he or she is responsible on the theory that the problem would have been avoided had the executor been sufficiently prudent to hire legal counsel. Hiring counsel insures against this claim.

2. The Real Work of Estate Lawyers and the Real Risk of *Pro Se* Executors

Appearing in court to probate a will is a necessary but obviously insufficient part of estate administration. The most substantial work of estate administration and the most substantial role of estate lawyers occur outside of the brief probate hearing. Estate lawyers use their practical experience in helping the executor locate and value assets, which may involve choosing between competing appraisals or determining if the executor has an ownership interest in assets the testator may not even realized were owned, such as legal claims.²²⁰ Estate lawyers guide executors through income tax, estate tax, gift tax, generation-skipping transfer tax, and property tax issues. Estate lawyers prepare deeds or other assignments to the beneficiaries, as well as settlement agreements that memorialize the distributions from the estate and the beneficiaries' acquiescence in their propriety. Estate lawyers advise the executor in dealing with creditors' claims. Perhaps most importantly, estate lawyers provide both legal and practical guidance when one or more beneficiaries appear likely to become cross-wise with one another or the executor. The

Int'l First Bank Dallas, N.A. v. Risser, 739 S.W.2d 882 (Tex. App.—Texarkana 1987) (disapproved of on other grounds by, Texas Commerce Bank, N.A. v. Grizzle, 96 S.W.3d 240 (Tex. 2002)).

²²⁰For example, the testator may have a malpractice claim against his or her estate planning attorney. See, e.g., Belt v. Oppenheimer, 192 S.W.3d 780 (Tex. 2006).

five or so minutes of the routine probate hearing very quickly becomes a distant memory in the estate's administration.

There is a continuum of technical and practical difficulty between the uncontested probate of a will destined for independent administration and a multi-year contested estate litigation. Whether or not a prudent person would proceed *pro se* in estate administration depends upon the person's estimation of where on that continuum the estate's administration will be. While even the most experienced lawyers may misjudge the complications of a particular estate's administration, the *pro se* executor's judgment is presumably going to be made without the benefit of much experience. This lack of experience is likely to miss any number of potential complications a competent lawyer would spot.

a. Complications with Uncontested Probate

The application for the uncontested probate of a will is a simple and relatively informal court proceeding only so long as the original will is offered and was duly executed. A *pro se* executor might not make much of the fact that there is only a photocopy of the will²²¹ or that one of the witnesses signed the self-proving affidavit attached to the will but not the will itself.²²² The executor may also miss that there is no self-proving affidavit attached to the will.²²³ Any of these deviations might require significant additional work to have the will probated; though, to the untrained eye, none of them are likely to seem significant at all. And these are all complications that can arise in uncontested hearings with all of the beneficiaries' supporting both the executor and the will. Yet, their consent and support is legally insufficient to overcome the deficiencies.

b. The Unavoidable Risk of Contest

The contest of a will is very unlike the simple uncontested proceeding requiring knowledge of procedure and strategy in addition to substantive legal information. The risk of the *pro se* executor being defeated on procedural rather than substantive grounds is substantial.²²⁴ However,

²²¹ See WOODWARD, *supra* note 7, § 284.

²²² See §59; Boren v. Boren, 402 S.W.2d 728 (Tex. 1996).

²²³ See §59.

²²⁴ See, e.g., Bloom & Hershkoff, *supra* note 184; Bradlow, *supra* note 84; Holt, *supra* note 84; Smith, *supra* note 184.

unlike most *pro se* litigants whose defeat is consequential only to them, the estate's beneficiaries stand to lose. This is a loss the beneficiaries may seek to recover from the executor. Unfortunately for the *pro se* executor, there is never certainty that a probate hearing initially scheduled for the uncontested docket will remain so.

c. Interpreting the Will

One of the most common legal services lawyers provide during an estate administration is explaining the will's meaning to the executor so that the executor can follow its terms. Although a *pro se* executor might mistake clear wording for clear meaning in a will, an estate lawyer knows better. Is a distribution to be *per stirpes* or *per capita*?²²⁵ Is an individual adopted as an adult a "child"?²²⁶ Is a step-child?²²⁷ What if the testator was divorced from his wife but never changed his will—does she still benefit?²²⁸ How are taxes and expenses to be charged among the beneficiaries' shares?²²⁹ Do non-probate assets bear any of these?²³⁰ The answer to each of these questions will shift benefits and burdens among the beneficiaries, and the answer may not be as clear to the executor as the words of the will. The duty to be fair to the beneficiaries is one the *pro se* executor can risk transgressing when he interprets the will without a lawyer even if the interpretation is in good faith and reasonable.

d. Estate Assets

The job of the executor is to collect the testator's assets and to distribute the assets to the beneficiaries. Like most jobs, it is easier said than done. The ease of this task depends in part on how well organized the testator was, but even the most organized testator's assets might not be so easily collected and distributed. The testator may have legal claims he never considered pursuing, such as claims against beneficiaries for unpaid debts owed. May, must or should the executor pursue such a claim?²³¹ The

²²⁵ See §43.

²²⁶ See *Lehman v. Corpus Christi Nat'l Bank*, 668 S.W.2d 687 (Tex. 1984).

²²⁷ See *Guilliams v. Koonsman*, 279 S.W.2d 579, 583 (Tex. 1955).

²²⁸ See §69.

²²⁹ See §§ 322A, 322B.

²³⁰ *Id.*

²³¹ See, e.g., *Russell v. Adams*, 299 S.W. 889, 894 (Tex. Comm'n App. 1927); *Oxsheer v. Nave* 40 S.W. 7 (Tex. 1897).

testator's assets are likely to have changed between the date of the will and the date of death. What if assets specifically bequeathed to a beneficiary cannot be found or were sold and replaced with other assets?²³² None of these issues are likely to become evident until after the probating of the will, yet these types of issues are common complications to an executor's attempt to locate and distribute the testator's assets.

e. Summary

It is impossible to catalog the potential complications of an estate administration, even one that seems simple on first review. Even an experienced estate lawyer never knows what all he or she does not know when considering whether or not to take on advising an executor with respect to an estate administration. As a practical matter, a *pro se* executor bears the risk personally when he or she estimates where upon the continuum of ease and trouble the estate's administration will be; disgruntled beneficiaries will be armed with both the rights of those owed the highest duties and the certainty of hindsight as to how problematic the administration became.

D. Conclusion

Executors have the right to proceed *pro se* to probate a will and otherwise administer the estate. However, given the inherent uncertainties of estate administration and the executor's fiduciary duties to the beneficiaries, it is likely unwise for most executors to do so. Nevertheless, the probate courts should consider how best to accommodate *pro se* executors in a way that maximizes judicial access without decreasing judicial efficiency. Since, by definition, Texas attorneys will not be advising *pro se* executors, we should consider advising our testator clients as to the risks and potential benefits of *pro se* probate and ensuring that the testator's balancing of those risks and benefits is reflected in the will governing the executor.

²³² See, e.g., *Shriner's Hospital etc. v. Stahl*, 610 S.W.2d 147, 150 (Tex. 1980).