We recognize that the loss of a loved one is an emotional and difficult experience. Based on our experience in these matters, we have the ability to quickly interview you and determine the proper probate procedure to assist you in this difficult time.

This document is a modified example from one of our actual files in the estate of a physician. It includes the basic analysis and explanations of alternatives or alternate fact scenarios where they might be present.

Prior to making any filing with the local probate or county court, we interview you, examine the Last Will and Testament of the deceased person, and any other documents that you may have available. In the course of our interview with you and examination of the Will we make several important determinations about the procedure to be employed in properly handling the Estate. Fortunately, in Texas, several low cost options are available to settle an estate and the more complex proceedings may be terminated when a need no longer exists for such a procedure. As you read this document, realize that an Independent Administration is one of the easiest and simplest forms of procedures available to administrate an estate. John Doe Decedent was a well-recognized neurosurgeon and based on minimal documents and the tax appraised value of his homestead property, his estate should exceed $8,000,000. An example of a memorandum that would apply to a preliminary analysis of his estate is as follows:

Date: April 29, 2005

From: Tommy D. Overton, Jr.

To: File XXX-XXX, Estate of John Doe Decedent

Re: Determining Proper Probate Procedure for the Subject Estate

1. Is there an urgent and immediate need for a personal representative of the estate?

Decedent, John Doe Decedent, died on April 15, 2004. He was survived by his wife and three adult children. The family has taken some measures to protect assets and the home. Based on the signature cards provided to us, several members of the family have access to accounts to pay bills and other expenses. There is no urgent and immediate need to proceed to the court to appoint a personal representative in any form of a temporary administration.

An urgent and immediate need to appoint a personal representative might be present if: 1)_____ or 2) _____ or 3)_____. However, none of these issues seem to be present.

2. Is there a written Will? Where is it?

The firm is in possession of an original written Will pursuant to a written receipt provided to Favored Favorite Executor on April 28, 2005.

Had the Will been located in a safe deposit box, we would have implemented our procedure to inspect and inventory the contents of the box as well as have the Will deposited with the Court. Normally, in this procedure we will travel to the court with a motion to inspect the contents of a safe deposit box and have any Will or other instruments forwarded to the Court. In Harris County, we can normally obtain a signed court order and inspect the contents of the safe deposit box provided that we are contacted early in the day and if the local bank has personnel available.

3. Is there a need for administration?

A necessity for administration is deemed to exist if two or more debts against the estate exist, or it is desired that the Probate Court partition the estate among the distributees. However, these two statutory provisions are not exclusive. *See* Tex. Prob. Code § 178. Nonetheless, based on these criteria alone, it is difficult to say whether an administration is necessary, there are most likely some unsecured debts. Credit cards are present as well as other outstanding obligations. Securities could also be included in the estate. Once it is determined that an administration is no longer necessary procedures are available for termination

Under the Texas Probate Code, a testator may specify that he wants an independent administration of his estate. More specifically, the Texas Probate Code provides that

> "(a) Independent administration of an estate may be created as provided in Subsections (b) through (e) of this section. (b) Any person capable of making a will may provide in his will that no other action shall be had in the county court in relation to the settlement of his estate than the probating and recording of his will, and the return of an inventory, appraisement, and list of claims of his estate." *See* TEX. PROBATE CODE § 145.

John Doe Decedent's Last Will and Testament specifies under Article 6.3 entitled "Independent Administration Without Bond" that "[n]o action shall be required in any court in relation to the settlement of my estate other than the probating and recording of this Will and the return of return of an inventory, appraisement, and list of claims of my estate." While this language does not verbatim track the language of the Texas Probate Code, it is close. Additionally, a court would likely find that it suffices the testator's intent for an independent administration of his estate. This conclusion is supported by the fact that Courts have also found that a Will specifying an Independent Executor, and _____ or _____ are also sufficient.

While the solvency of this estate does not seem to be an issue based on the information provided by family members, often debts and other liabilities are present. As noted above, there could be debts of the estate, however, the estate is most likely not insolvent or potentially insolvent. Thus, this provision most likely permits the estate to be administered without judicial supervision.

4. Is there an Independent Executor without bond named in the Will who is alive, willing, and qualified?

Wisely drafted, the Will names several alternative Independent Executors and additionally includes provisions for the appointment of a corporate fiduciary_____. Resorting to a corporate fiduciary does not seem necessary in this matter or at this point. Each of these Executors is named to serve independent of others and in successive order as provided in the Will. The first Independent Executor, appointed without bond and named in the Will, who is alive, willing and qualified, is named Favored Favorite Executor therein. More specifically and with regard to bond, Article 6.6 of the Last Will and Testament of John Doe Decedent specifies that "[n]o bond or other security shall be required . . . ." With regard to the appointment of an Independent Executor, John Doe Decedent's Will provides that "Favored Favorite Executor", otherwise Second Favorite Executor, otherwise Third Favorite Executor, otherwise Fourth Favorite Executor, to serve without bond or other security as sole Independent Executor. Favored Favorite Executor has engaged the Firm to represent him in this matter and desires to be qualified as Independent Executor. At this point, Favored Favorite Executor would most likely qualify, and he will be prepared for the hearing using our guide.

While it may seem to be a negative qualification standard, technically persons named may be appointed if they are not "disqualified." The standards for disqualification of a person as an executor are provided in Section 78 of the Texas Probate Code. That section specifies that no person is qualified to serve as an executor or administrator who is:

> (a) An incapacitated person;
> (b) A convicted felon, under the laws either of the United States or of any state or territory of the United States, or of the District of Columbia, unless such person has been duly pardoned, or his civil rights restored, in accordance with law;
> (c) A non-resident (natural person or corporation) of this State who has not appointed a resident agent to accept service of process in all actions or proceedings with respect to the estate, and caused such appointment to be filed with the court;
> (d) A corporation not authorized to act as a fiduciary in this State; or
> (e) A person whom the court finds unsuitable. *See* TEX. PROB. CODE § 78.

Favored Favorite Executor has none of the attributes of §§ 78 (a)–(d); however, § 78 (e) has been interpreted to state that the legislature intended for courts to have wide latitude in determining who is an appropriate person to administer an estate. Because there is no bright line test, we can only offer general guidance and clarification by specific examples.

The general guidance is that an executor is unsuitable to serve when his interests are so adverse to the interests of the estate or the beneficiaries that he cannot fairly represent both. As a general principle, where an executor would represent more than one estate, and where these estates have claims to the same property, courts have found that each estate should have a representative that will assume the role of an advocate to achieve the best possible advantage for the estate. Additionally, courts, by example, have found executors unsuitable where persons have claims to the same funds, where the executor would be forced to sue beneficiaries, where there are conflicts of interest, and in cases where there is family discord. Here, there is only one estate with claims against property, and based on the facts provided to us, it seems that there is no conflict of interest, no genuine family discord, and there would be no reason to disqualify Favored Favorite Executor as executor.

After Favored Favorite Executor qualifies and takes the oath, he must prepare and file an inventory, appraisement, and list of claims, to be approved by the court. After the court approves such documents, as long as the Independent Executor represents the estate, no further action is required before the court, unless where specifically required by the Probate Code. Notices to creditors and other general provisions apply.

5. Is there an executor named in the Will who is alive and qualified but not otherwise designated in the Will to serve without bond?

This does not apply because Favored Favorite Executor is appointed in the Will as Independent Executor.

If this would apply, _____

6. Provide a brief evaluation of alternatives proceedings to an Administration?

Even though a Will provides for an independent administration, it is not always necessary to subject the estate to administration. If there are no debts of the estate other than those debts that are secured by real property and no special assets to transfer, an alternative procedure is to probate the Will as a muniment of title. While the absolute facts are not available, the size of the estate, presence of securities, and extent to which real property comprises the estate should be considered. A muniment of title proceeding, small estate filing, or other procedures may be available.

In this matter, probating the will as a muniment of title may be possible; however, an independent administration is requested in the Will and is advisable in estates of this size or with any estate that could have securities as part of its assets.

Additionally, if a Will and the circumstances, including the four-year statute of limitations, provide for and allow an independent administration, given the availability and choice between an independent administration and a muniment of title proceeding, this Firm, not unlike a majority of other practitioners that we have talked with in Houston prefers, and it is the policy of this Firm that the lawyer acting on behalf of this Firm shall choose an independent administration. And, in the event that securities are to be transferred, independent administration is always the preferred method.

A proceeding as a Small Estate may be available where the estate equal to or less than $50,000 exclusive of homestead and exempt property, and the non-exempt assets exceed all liabilities exclusive of those liabilities secured by homestead and exempt property. Stated another way, a small estate administration applies, among other criteria, when the estate is not worth more than $50,000. John Doe Decedent's estate is worth more than $8,000,000. Thus, John Doe Decedent's estate is worth more than $50,000, and a small estate administration is not possible.

8. Is there a need for administration and are there debts that are not secured by real estate?

There is most likely a need for administration as stated above. At this time, Favored Favorite Executor believes that there are no debts that are not secured by real property. However, we have routinely found during the Administration that this is rarely true. Often debts are present.

