Published on *The National Law Review* https://natlawreview.com

Court Reversed the Appointment of a Successor Independent Administrator of an Estate

Article By:

David Fowler Johnson

In *In re Estate of Allen*, a trial court appointed a successor independent administrator, the decedent's son, and the decedent's wife appealed the decision. No. 08-21-00184-CV, 2022 Tex. App. LEXIS 8841 (Tex. App.—El Paso December 2, 2022, no pet. history). The court first discussed the distinction between a dependent and independent administration:

> The primary distinction between dependent and independent administrations is the level of judicial supervision over the exercise of the executor's power. In a dependent administration, an executor or other personal representative can perform only a few transactions without seeking a court's permission. In contrast, in an independent administration, the executor is "free from . . . the expense and control of judicial supervision except where the . . . Code specifically and explicitly provides otherwise." As our sister court in Waco has recognized, the "independent administration of estates and the testator's right to select an independent executor of his or her choice are foundations of Texas law." So if an independent executor named in a will is willing to serve, the court has no discretionary power to refuse to issue letters to the named executor unless he is a minor, an incompetent, or otherwise disqualified under the Code.

Id. The court then determined the relevant statute in determining a successor independent administrator:

> In the trial court, Kenneth and Corey relied on Chapter 361 of the Estates Code in their Application seeking to allow Kenneth to step down and to name Corey as the successor independent executor… We conclude, however, that Chapter 361 does not govern the appointment of a successor independent executor or administrator not named in a will.
>
> Under section 361.002 of the Code, a court may accept the resignation of a "personal representative" of an estate, and may immediately appoint a successor representative when "necessity exists" without notice or a hearing. To be sure, section 22.031(a) of the Code defines a "personal representative" to include an "independent executor" or "independent

> administrator" of an estate. But section 22.031(b) provides a significant exception to the general rule that an independent executor is to be treated like a "personal representative," stating that "[t]he inclusion of an independent executor in Subsection (a) may not be construed to subject an independent executor to the control of the courts in probate matters with respect to settlement of estates, except as expressly provided by law." And in turn, a trial court exerts "control" over an independent executor when the court either removes him, or when it appoints a successor who has not been named in the testator's will. Thus, a trial court may neither remove an independent executor or appoint his successor absent express statutory authority allowing it to do so.
>
> As Lisa points out, section 404.005 of the Code, which is found in Subtitle I of the Code governs "Independent Administration," and provides one specific instance in which a trial court may appoint a successor independent administrator not named in a will. Section 404.005(a) provides that if the will of a person names an independent executor who for any reason is unwilling or unable to serve, and if each successor executor named in the will is also either unable or unwilling to serve, "all of the distributees of the decedent" may file an "application for an order continuing [the] independent administration [and] may apply to the probate court for the appointment of a qualified person, firm, or corporation to serve as successor independent administrator." And if the probate court finds that the "continued administration of the estate is necessary," this provision allows the court to "enter an order continuing independent administration and appointing the person, firm, or corporation designated in the application as successor independent administrator, unless the probate court finds that it would not be in the best interest of the estate to do so."
>
> Given the language used in this provision—requiring "all distributees" to join in the application—we conclude that the Legislature intended to only give a probate court the limited authority to appoint a successor independent executor not named in a will when "all" of the distributees agreed; in other words, it did not intend to allow a single distributee to unilaterally apply for the continuation of an independent administration or to appoint a successor administrator. And in turn, if the distributees do not all agree on the continuation of the independent administration or the appointment of a successor independent administrator, the estate will then be converted to a dependent administration, which will be subject to judicial control, and any successor appointed by the court will be treated as a dependent executor. We therefore conclude that Lisa is correct that all "distributees of the decedent" needed to agree on Corey's appointment as the successor independent administrator to allow the independent administration to continue.

Id. The court then determined that Lisa, the decedent's wife, was a distribute of the estate based on her life estate in the family homestead. The court concluded:

> We therefore conclude that Lisa was in fact a "distributee" under section 404.005(d) through her homestead rights, and that, consequently, her agreement was required under section 404.005(a) of the Code before the trial court could appoint Corey as the successor independent administrator of Rickey's estate. Accordingly, the trial court erred by accepting Kenneth's resignation and appointing Corey as his successor without obtaining Lisa's agreement.

Id. The court also mentioned that upon remand, the decedent's wife may have priority as the successor administrator under statute.

National Law Review, Volume XIII, Number 121