

**CREDITORS' CLAIMS AND ALLOWANCES  
IN DECEDENTS' ESTATES**

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# CREDITORS' CLAIMS AND ALLOWANCES IN DECEDENTS' ESTATES

## I. INTRODUCTION

A Decedent's estate can be a trap for the unwary creditor who is seeking to enforce a lien or collect a debt against a deceased debtor. Recent changes now make it imperative that a creditor be aware of Texas law in both independent and dependent administrations and act appropriately in order to protect its claim against an estate. How a personal representative deals with creditors' claims, allowances and exempt assets can materially affect the assets passing to the family members. Consequently, this article will discuss creditors' claims in both independent and dependent administrations and uses of allowances and exempt assets.

## II. INDEPENDENT ADMINISTRATION

### A. Notice to Creditors.

Sections 146 and 294 of the Texas Probate Code (the "Code") provide for the notices that a personal representative in an independent administration are required to give to creditors.

#### 1. Notice by Publication.

Within one (1) month after receiving letters, the personal representative of an estate shall publish in some newspaper, printed in the county where the letters were issued, a notice requiring all persons having claims against the estate being administered to present the same in the time prescribed by law. The notice shall include the date of issuance of letters held by the representative, the address to which the claims may be presented and an instruction of the representative's choice that the claims be addressed in care of the representative, in care of the representative's attorney or in care of "Representative, Estate of \_\_\_\_\_". A copy of the printed notice together with the publisher's affidavit that the notice was properly published shall be filed in the court where the cause is pending. Published notice is required in all independent administrations.

#### 2. Notice to Secured Creditors.

A personal representative in an independent administration must also give notice to secured creditors in accordance with Section 295 of the Code. Within two (2) months after receiving letters, the personal representative shall give notice of the issuance of such letters to each and every person known to the personal representative to have a claim for money against the estate of a decedent that is secured by real or personal property of the estate. If the personal representative does not have actual notice

of such a creditor within two (2) months of receiving letters, then within a reasonable time after obtaining actual knowledge of the existence of a secured creditor, the personal representative shall give notice to that person of the issuance of letters. Notice to secured creditors shall be given by certified or registered mail, with return receipt requested, addressed to the record holder of such indebtedness or claim at the record holder's last known post office address. A copy of each notice to a secured creditor, a copy of the returned receipt, and an affidavit of the representative stating that the notice was mailed as required by law, giving the name of the person to whom the notice was mailed, shall be filed with the Clerk of the Court from which the letters were issued.

#### 3. Penalty for Failure to Give Required Notices.

Pursuant to Section 297 of the Code, if a personal representative fails to give notice by publication or to a secured creditor, the representative and the sureties on the representative's bond shall be liable for any damage which any person suffers by reason of such neglect, unless it appears that such person had notice otherwise.

#### 4. Permissive Notice.

Section 146 of the Code provides that a personal representative in an independent administration may give notice permitted under Section 294(d) of the Code and bar a claim under that subsection. Section 294(d) provides that permissive notices may be given to unsecured creditors at any time before an estate administration is closed. Such notice may be given by certified mail with return receipt requested to an unsecured creditor having a claim for money against the estate expressly stating that the creditor must present a claim within four (4) months after the date of the receipt of the notice or the claim is barred, provided the claim is not already barred by the applicable statute of limitation. A notice must include: (1) the date of issuance of letters held by the representative; (2) the address to which claims may be presented; and (3) the instruction of the representative's choice that the claim be addressed in care of: (a) the representative; (b) the representative's attorney; or (c) "Representative, Estate of \_\_\_\_\_ (naming the estate)"; (4) a statement that the claim may be effectively presented by one of the following methods: (a) a written instrument that is hand-delivered with proof of receipt or mailed by certified mail return receipt requested with proof of receipt to the Independent Executor or the Executor's attorney; (b) a pleading filed in a lawsuit with respect to the claim; or (c) a written instrument or pleading in the court in which the administration of the estate is pending. It is also suggested that that the notice instruct the creditor that the claim must be in the form

required by the Texas Probate Code and that the attorney for the estate cannot give advice as to the proper procedure for filing a claim, so the creditor should contact an attorney of its choice with respect to the procedures for filing the claim. This should decrease the number of phone calls received by the attorney for the personal representative from creditors asking for help in filing claims. It also puts the creditor on notice that the claim needs to be in a particular form. See *Appendix A*.

### **B. Presentment of Claim by Secured Creditor.**

A major difference between a dependent administration and an independent administration is the form in which a claim must be presented by a creditor. Pursuant to Section 146(b), a secured claim for money must be presented within six (6) months after the date letters are granted, or within four (4) months after the date notice is received if the notice was sent more than two (2) months after the date letters were issued, whichever is later. A creditor with a claim for money secured by real or personal property must give notice to the independent representative of the creditor's election to have the creditor's claim approved as a matured secured claim to be paid in the due course of administration. In addition to giving the notice within this period of time a creditor whose claim is secured by real property shall record a notice of the creditor's election in the deed records of the county in which the real property is located. If no election to be a matured secured creditor is made or the election is not made within the prescribed period, or is made within the prescribed period, but the creditor has a lien against real property and fails to record notice of the claim in the deed records, the claim shall be a preferred debt and lien against the specific property securing the indebtedness and shall be paid according to the terms of the contract that secured the lien. A claim may not be asserted against other assets of the estate. The independent representative may pay the claim before the claim matures if paying the claim before maturity is in the best interest of the estate. If a secured creditor's claim is considered a preferred debt and lien, then the creditor may not seek any deficiency against the other assets of the estate. Prior to this addition to Section 146, the secured creditor was not bound to such an election and could still seek a deficiency against the estate in an independent administration.

### **C. Non-Judicial Foreclosure.**

It has long been the law in Texas that, in a dependent administration, an attempted exercise of a power of sale in an extrajudicial foreclosure is void. *Pearce v. Stokes*, 291 S.W. 2d 309 (Tex.1956); *Hury v. Preas* 673 S.W. 2d 949 (Tex.App--Tyler 1984, writ

*ref'd n.r.e.*); *Bozeman v. Follitt*, 556 S.W. 2d 608 (Tex.Civ.App.—Corpus Christi 1977, writ *ref'd n.r.e.*). Consequently, if a secured creditor foreclosed upon a deceased person's assets prior to a dependent administration being opened, the foreclosure would be void, but the foreclosure would stand if an independent administration was opened. *Taylor v. Williams*, 101 Tex. 388, 108 S.W. 815 (1908); *Fischer v. Britton*, 125 Tex. 505, 83 S.W.2d 305 (1935). Further, a non-judicial foreclosure while a dependent administration is pending is void, as the administration suspends the power of sale.

However, if an independent administration is opened, a secured creditor whose claim is considered a secured debt and lien against the property securing the indebtedness is free to exercise any judicial or extrajudicial collection rights, including the right to foreclose, but the creditor does not have the right to conduct a non-judicial foreclosure sale within six (6) months after letters are granted. This six (6) month waiting period was added by the legislature effective, September 1, 2011. Since a secured creditor does not have the ability to use non-judicial foreclosure until six (6) months from the date letters are granted, the question is raised as to whether a non-judicial foreclosure conducted prior to the opening of an independent administration is void since it was done within the six (6) month period. If the secured creditor elects matured secured claim then the creditor is not entitled to exercise any contractual collection rights including the power to foreclose without prior written approval of the independent executor or court approval. A claim that is approved as a matured secured claim remains secured by any lien or security interest against the specific property securing the payment of the claim, but such lien is subordinate to the payment from the property of claims having a higher classification under §322 of the Probate Code.

### **D. Presentment of Unsecured Claim.**

In an independent administration, an unsecured creditor who has a claim for money against the estate and who has received the permissive four (4) month notice, shall give notice to the independent representative of the nature and amount of the claim no later than the 120<sup>th</sup> day after the date on which notice is received, or the claim is barred. Sections 146(b-4) and 146(e) provide that the notice given by either a secured creditor or an unsecured creditor responding to a permissive four (4) month letter must be contained in: (a) a written instrument that is hand delivered with proof of receipt or mailed by certified mail, return receipt requested, to the independent executor or the executor's attorney; (b) a pleading filed in a lawsuit with respect to the claim; or (c) a written instrument or pleading filed in the court in which the administration of the estate is pending.

Note that the 120 day requirement is different than the four (4) month requirement that is set forth in the permissive notice letter. Consequently, if an unsecured creditor filed a claim within four (4) months, but later than the 120<sup>th</sup> day, there is a question as to whether or not the claim is barred. This author believes that the claim is not barred and that the creditor should have the full four (4) months as provided in the notice. The claim does not have to meet the formal requirements that are set forth in a dependent administration for the form of claims of creditors, *Ditto Investment Co. v. Ditto*, 293 S.W. 2d 267 (Tex. Civ. App.—Fort Worth 1956, no writ), but the delivery of the notice must meet the requirements of Section 146(e), or the claim is barred. For instance, if the creditor simply sends by regular mail a statement showing the amounts owed, it does not comply with Section 146(e) because it was not hand delivered with proof of receipt or mailed by certified mail. Therefore, a strict reading of the statute requires that the claim be barred. An executor's attorney receiving claims from creditors should always keep the envelope in which the claim is received as proof as to whether or not it was properly delivered.

#### **E. Enforcement of Claims by Suit.**

Pursuant to Section 147, any person having a debt or claim against the estate in an independent administration may enforce the payment of same by suit against the independent executor; and when judgment is recovered against the independent executor, execution shall run against the estate of the decedent in the hands of the independent executor which is subject to such debt. An independent executor is not required to plead to any suit brought against him for money until after six (6) months from the date the independent administration was created and the order appointing an independent executor was entered. Consequently, unlike a dependent administration, at any time a claimant may file suit against the executor; however, if the claimant has received the permissive four (4) month letter, a claim must be presented or suit must be filed within the four (4) months to prevent the claim from being barred.

#### **F. Liability of Independent Executor.**

An independent executor, in the administration of an estate, may pay at any time, without personal liability, a claim for money against the estate to the extent approved and classified by the personal representative if: (a) the claim is not barred by limitations; and (b) at the time of payment, the independent executor believes the estate has sufficient assets to pay all claims against the estate. *Section 146(c)*.

#### **G. Unliquidated Claims.**

Section 146 and Section 294 provide for permissive notice to unsecured creditors having a claim for money. Consequently, an unliquidated claim may not be presented and is not subject to a four (4) month bar if a letter under Section 146(a)(2) is sent. Case law has construed "all claims for money" to require presentment of a claim if the amount can be ascertained with certainty. Examples of such unliquidated claims are tort claims *See Wilder v. Mossler*, 583 S.W. 2d 664 (Tex. Civ. App.—Houston 1964, no writ) and quantum meruit claims for services rendered *See Wells v. Hobbs*, 122 S.W. 451 (Tex. Civ. App.—1909, no writ); and *Moore v. Rice*, 80 S.W. 2d 451 (Tex. Civ. App.—Eastland 1935, no writ).

### **III. DEPENDENT ADMINISTRATION.**

#### **A. Notices.**

In a dependent administration, the same notices as set forth above for independent administration are required under Sections 294 and 295; therefore, a published notice and notice to secured creditors are required. In addition, the permissive four (4) month notice may be given to unsecured creditors.

#### **B. Presentment of Claims.**

In a dependent administration, the creditor is required to "present" its claim. The Probate Code authorizes two different methods by which a claim may be presented: (a) the creditor may present the claim directly to the executor or administrator as authorized by Section 298(a); or (b) claims may also be presented by depositing, or filing, same with the Clerk pursuant to Section 308 of the Code. If a claim is deposited with the Clerk, then the Clerk is directed to notify the "representative" of the estate of the deposit of the claim with the Clerk, but Section 308 goes on to provide that failure of the Clerk to give that notice does not affect the validity of the presentment or the presumption of rejection if the claim is not acted upon within thirty (30) days after it is filed with the clerk.

#### **C. Exceptions to Presentment.**

There are a few exceptions to the requirement of presentment of claims in a dependent administration: (a) as discussed in independent administrations above, unliquidated claims may not be presented because Section 298 requires only that "claims for money" be presented to the administrator; and (b) Section 317(c) eliminates presentment as a requirement with respect to: (1) claims of any heir, devisee, or legatee who claims in such capacity; (2) claims that accrue against the estate after the granting of letters for which the representative of the estate has contracted, such as attorneys' fees or accounting fees; or (3) claims for delinquent taxes against the decedent's estate that is

being administered in probate in: (a) a county other than the county where the taxes were imposed or (b) the same county in which the taxes were imposed if the probate of the decedent's estate has been pending for more than four (4) years.

#### **D. Action by Personal Representative with Respect to Claims.**

##### **1. Form of Claim.**

Section 301 of the Code prohibits an administrator from allowing, and the Court from approving, any claim that is not supported by an affidavit that the claim is just and that all legal offsets, payments and credits known to the affiant have been allowed. Consequently, any time a claim is received in a dependent administration, it should be checked for these magic words. In addition, Section 304 of the Code contains the requirement that if the claim is made on behalf of a corporation or other entity, the "authorized officer or representative" of the corporation or entity must make the affidavit authenticating the claim and that it is sufficient to state in such affidavit that the person making it "has made diligent inquiry and examination, and that he believes that the claim is just and all legal offsets, payments and credits known to the affiant have been allowed". A corporate representative signing in his or her individual capacity, or simply signing the name of the corporation, with nothing else, is not proper, and the claim should be rejected.

##### **2. Objections to the Form of Claims.**

Under Section 302 of the Code, an administrator is deemed to have waived "any defect of form, or claim of insufficiency of exhibits or vouchers presented" in a claim, unless he files a written objection thereto within thirty (30) days after presentment. The dilemma facing the administrator on this subject is whether a defect in a claim is one of form only, or is a fatal defect, rendering the claim a nullity. In *City of Austin v. Aguilar*, 607 S.W. 2d 310 (Tex. Civ. App.—Austin 1980, no writ), the creditor filed two claims in which the authenticating affidavit was not properly executed by a representative of the corporation. The Administratrix rejected both of those claims although the Administratrix made no written objections to either claim. More than ninety days passed after the rejection of the claims. The Administratrix took the position that the claims were barred under Section 313 of the Code. The claimant argued that the claims were null because of its own failure to comply with Section 304. The Court of Appeals disagreed with the claimant and held that the defects in the claims were defects in form only, which were waived by the Administratrix because she filed no written objection as to the form of the claim. The claims were barred because the claimant failed to file

suit ninety days after rejection. However, in *Boney v. Harris*, 557 S.W. 2d 376 (Tex. Civ. App.—Houston 1977, no writ), the affidavit filed by the claimant did not comply with Section 301 because the affidavit stated that all legal offsets, payments and credits through a certain date had been allowed, but the affidavit was filed four months after the stated date. No representation was made in the claim concerning any offsets, payments or credits after the date set forth in the claim. The Administrator rejected the claim and the claimant failed to file suit within ninety days thereafter. The Court of Appeals, in reversing the trial court, held that the rejection of the improperly verified claim did not set in motion the ninety day statute of limitation. The Court stated "A claimant may sue for the establishment of his claim only after rejection of it by the personal representative and only if the claim was legally presented." The Court found the claim at issue to be void and held that the ninety-day limitation period could not run against a void claim. Consequently, a personal representative who receives a claim that is not in the proper form has the dilemma of whether or not to object to the form of the claim. This author's practice is to reject a claim that is not in the proper form and state that the reason for the rejection of the claim is because the claim does not comply with the form required by the Texas Probate Code. If the creditor fails to timely file a proper claim and does not file suit within ninety days of the rejection, the personal representative can argue that the claim is barred because the claim was rejected. If the personal representative had sent the four month permissive notice under Section 294(d) and the trial court decides to follow the reasoning under *Boney*, the personal representative could then argue that the creditor failed to file a properly authenticated claim as required by the Texas Probate Code, and therefore, the claim is void, as it was not filed within the requisite four month period. Consequently, a dependent administrator should always consider sending the permissive notice allowed under Section 294(d) because this puts the burden on the creditor to timely file a claim that strictly complies with the requirements of the Code.

##### **3. Endorsement of Claim.**

Under Sections 309 and 310 of the Code, the administrator must endorse on or annex to every claim presented to him, within thirty (30) days after presentment, a memorandum signed by him, stating the time of presentation or filing, and whether he allows or rejects it, or what portion thereof he allows or rejects. The administrator's failure to take any action constitutes a rejection of the claim; and, under Section 310, if the claim is thereafter established by suit, the costs shall be taxed against the estate representative, individually, or he may be removed on

the written complaint of any person interested in the claim, after citation and hearing.

#### 4. Limitations on Claims.

The administrator is expressly prohibited by Section 298(b) from allowing any claim that is barred by limitations. If the administrator allows such a claim, and if the Court is satisfied that limitations has run, Section 298(b) directs the Court to disapprove the claim. Under Section 299 of the Code, the general statutes of limitations are tolled: (1) by filing a claim which is legally allowed and approved; or (2) by bringing a suit on a rejected claim within ninety (90) days after rejection. Also, under Section 16.062 of the Texas Civil Practice and Remedies Code, the general statute of limitation which would otherwise apply, are tolled for a period of twelve (12) months after a decedent's death or until "an executor or administrator of a decedent's estate qualifies", whichever occurs first.

#### 5. Rejected Claims.

If an administrator in a dependent administration rejects a claim, the Court cannot override the rejection unless the rejected claim is established by suit. When that occurs, the Court may then render a judgment granting the claim and classifying it. Under Section 314, a creditor cannot obtain a valid judgment against an administrator unless he goes through the claims process, including presentment, rejection by the administrator, and obtaining a judgment in a suit on the rejected claim. If an administrator rejects a claim in a dependent administration, then the creditor must, within ninety (90) days of rejection, file suit or the claim is barred.

### IV. CLASSIFICATION OF CLAIMS.

#### A. Duty of Personal Representative.

In both an independent and dependent administration, a personal representative is required to classify claims; however, Section 146 provides that the independent executor classify the claims free from the control of the Court in the same order of priority, classification, and proration described in the sections of the Code dealing with dependent administration. In a dependent administration, whenever a claim is allowed by the personal representative, the Court classifies the claim. Under Section 312(b) of the Code, the Court classifies a claim within ten (10) days after the administrator has allowed it and the claim has been placed on the claims docket. The Court can approve the claim in whole, in part or reject it.

Section 322 of the Code sets forth the eight classes in which the creditor's claim may be classified:

- a. funeral expenses and expenses of last sickness for a reasonable amount to be approved by the Court, not to exceed a total of \$15,000.00, with any excess to be classified and paid as any other unsecured claim;
- b. expenses of administration and expenses incurred in the preservation, safekeeping and management of the estate, including fees and expenses awarded under Section 243 of the Code, and unpaid expenses of administration awarded in a guardianship of the decedent;
- c. secured claims for money under Section 306(a)(1), including tax liens, so far as the same can be paid out of the proceeds of the property subject to such mortgage or other lien and when more than one mortgage, lien or security interest shall exist upon the same property, they shall be paid in order of their priority;
- d. claims for the principal amount of and accrued interest on delinquent child support and child support arrearages that have been confirmed and reduced to money judgment as determined under Subchapter F, Chapter 157, Texas Family Code and claims for unpaid child support obligations under Section 154.015, Family Code;
- e. claims for taxes, penalties and interest owed to the State of Texas;
- f. claims for cost of confinement established by the institutional division of the Texas Department of Criminal Justice;
- g. claims for repayment of medical assistance payments made by the State under Chapter 32, Human Resources Code, to or for the benefit of the decedent; and
- h. all other claims.

Section 321 of the Code provides that if there is a deficiency of assets to pay all claims of the same class, then such claims shall be paid pro rata. This applies in both independent and dependent administrations.

#### B. Claims for Child Support.

Revised Family Code Section 154.006 no longer provides that a child support order terminates on the death of the parent ordered to pay child support. *See* TEX. FAM. CODE § 154.006. This provision became effective on September 1, 2007, and applies to all child support orders regardless of whether the order was rendered before, on, or after the effective date. Prior to this amendment, the child support obligation (as to future payments) terminated on the death of the obligor unless a court order provided otherwise.



New Family Code Section 154.015 mandates the acceleration of an obligor's unpaid child support obligation upon the obligor's death. Specifically, Family Code Section 154.015 provides as follows:

§ 154.015. Acceleration of Unpaid Child Support Obligation

- (a) In this section, "estate" has the meaning assigned by Section 3, Texas Probate Code.
- (b) If the child support obligor dies before the child support obligation terminates, the remaining unpaid balance of the child support obligation becomes payable on the date the obligor dies.
- (c) For purposes of this section, the court of continuing jurisdiction shall determine the amount of the unpaid child support obligation for each child of the deceased obligor. In determining the amount of the unpaid child support obligation, the court shall consider all relevant factors, including:

- (1) the present value of the total amount of monthly periodic child support payments that would become due between the month in which the obligor dies and the month in which the child turns 18 years of age, based on the amount of the periodic monthly child support payments under the child support order in effect on the date of the obligor's death;
- (2) the present value of the total amount of health insurance premiums payable for the benefit of the child from the month in which the obligor dies until the month in which the child turns 18 years of age, based on the cost of health insurance for the child ordered to be paid on the date of the obligor's death;
- (3) in the case of a disabled child under 18 years of age or an adult disabled child, an amount to be determined by the court under Section 154.306;
- (4) the nature and amount of any benefits to which the child would be entitled as a result of the obligor's death, including life insurance proceeds, annuity payments, trust distributions,

social security death benefits, and retirement survivor benefits; and

- (5) any other financial resource available for the support of the child.

- (d) If, after considering all relevant factors, the court finds that the child support obligation has been satisfied, the court shall render an order terminating the child support obligation. If the court finds that the child support obligation is not satisfied, the court shall render a judgment in favor of the obligee, for the benefit of the child, in the amount of the unpaid child support obligation determined under Subsection (c). The order must designate the obligee as constructive trustee, for the benefit of the child, of any money received in satisfaction of the judgment.
- (e) The obligee has a claim, on behalf of the child, against the deceased obligor's estate for the unpaid child support obligation determined under Subsection (c). The obligee may present the claim in the manner provided by the Texas Probate Code.
- (f) If money paid to the obligee for the benefit of the child exceeds the amount of the unpaid child support obligation remaining at the time of the obligor's death, the obligee shall hold the excess amount as constructive trustee for the benefit of the deceased obligor's estate until the obligee delivers the excess amount to the legal representative of the deceased obligor's estate.

**C. Debts Due to the United States.**

It is important to remember that, especially in an insolvent estate, there are other debts and expenses which must be taken into account by the personal representative, whether that representative is a dependent administrator or an independent executor, before the representative can pay any of the claims which are classified under §322 of the Code. Nowhere in the Code is any mention made of amounts which may be owing to the United States Government. But under 31 U.S.C.A. §3713(a), a claim of the United States Government must be paid before other claims against the estate. Section 3713(a) provides as follows:

- (a)(1) A claim of the United States Government shall be paid first when -

- (A) a person indebted to the Government is insolvent and –
  - (i) the debtor is without enough property to pay all debts makes a voluntary assignment of property;
  - (ii) property of the debtor, if absent, is attached, or
  - (iii) an act of bankruptcy is committed;
- (B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor.

The cases have interpreted Section 3713 to require payment to the IRS above other debts of the estate; however, family allowances, administration expenses and funeral expenses have been determined not to be “debt” and therefore are not subject to the superior priority of the United States’ claims. *United States v. Weisburn* 48 F.Supp. 393 (E.D.Pa.1943); *Rev. Rul. 80-112, 1980-1 C.B. 306.*; *PLR 8341018 (1983)*; *Schwartz v. Commissioner, 560 F.2d 311 (8<sup>th</sup> Cir.1977)*. Note that only administration expenses have a priority over federal tax claims which are secured by a lien. However, not all cases are consistent on this matter and care should be taken in insolvent estates in determining payment of expenses, debts and claims due to the Federal Government so as not to make the personal representative personally liable for such amounts if assets of the estate were distributed to creditors, family members or beneficiaries instead.

#### **D. Order of Payment of Claims.**

Although Section 322 provides for the classification of claims, Section 320 provides the order of payment of claims and when claims can be paid. Basically, the order for payment of claims is as follows: (a) funeral expenses and expenses of last illness not to exceed \$15,000.00; (b) allowances made to surviving spouse and children or to either; (c) expenses of administration and expenses incurred in preservation, safekeeping and management of the estate; and (d) other claims against the estate in order of their classification. After the date letters are granted and on application by the personal representative stating that the personal representative has no actual knowledge of any outstanding or enforceable claims against the estate, other than those claims that have already been approved and classified by the Court, the Court may order the personal representative to pay any claim that is allowed and approved. No claims for money against the estate of a decedent shall be allowed by the personal representative, and no suit shall be instituted against

the personal representative on any such claim after an order for the final partition and distribution is made; but after such an order has been made, the owner of the claim, if it is not barred by limitations, shall have an action thereon against the heirs, devisees, legatees or creditors of the estate limited to the value of the property received by them in distribution from the estate. *Section 318.*

#### **E. Secured Creditors.**

##### **1. Election by Secured Creditor.**

When a secured creditor files a claim for money against an estate, the creditor must specify, in addition to the other matters required in a claim: (1) whether it desires to have the claim allowed and approved as a mature secured claim that may be paid in the due course of administration, in which event, it shall be paid if allowed and approved; or (2) whether it is desired to have the claim allowed, approved and fixed as a preferred debt and lien against a specific property securing the indebtedness and paid according to the terms of the contract, in which event it shall be so allowed and approved if it is a valid lien; provided, however, the personal representative may pay said claim prior to maturity if it is in the best interest of the estate to do so. *Section 306(a).*

##### **2. Time for Election.**

A secured creditor must make the election described above within six months after the date letters are granted, or within four months after the date notice is received under Section 295 of the Code, whichever is later. The secured creditor may present its claim and specify whether the claim is to be allowed and approved either as a matured secured claim or a preferred debt and lien. If the secured claim is not timely presented, or if the claim is presented without specifying how the claim is to be paid, it will be treated as a claim being paid as a preferred debt and lien, and no deficiency may be allowed against any other assets of the estate. *Section 306(b).*

##### **3. Matured Secured Claims.**

If a secured claim is allowed as a matured secured claim, the claim shall be paid in the due course of administration, and the secured creditor is not entitled to exercise any other remedies, including foreclosure, in a manner that prevents the preferential payment of claims and allowances as described in the Code. *Section 306(c).*

##### **4. Preferred Debt and Lien.**

When an indebtedness is allowed as a preferred debt and lien, no further claim shall be paid against the other assets of the estate by reason of the claim, but the claim shall remain a preferred lien against the

property securing the same, and the property shall remain as security for the debt, and any distribution or sale thereof, prior to final maturity or payment of the debt. If property securing a claim that is allowed as a preferred debt and lien is not sold or distributed within six months from the date letters are granted, the representative of the estate shall promptly pay all maturities which have accrued on the debt according to the terms of the contract and shall perform all of the terms of any contract securing the same. If the representative defaults in such payment or performance, on application of the claimant, the Court shall require the sale of the property or authorize a foreclosure. The procedures for a foreclosure and sale of the property are set forth in Section 306.

## **V. SETTING ASIDE EXEMPT ASSETS**

In both a dependent and independent administration, the personal representative is required to set aside exempt assets for the use and benefit of the surviving spouse, minor children, unmarried children remaining with the family of the deceased, and for each other adult child who is incapacitated. Exempt property is considered any property of the estate that is exempt from execution of forced sale by the Constitution and laws of the State of Texas. This includes the homestead and any property exempt from execution as set forth in the Texas Property Code.

### **A. Action by Personal Representative.**

Section 271 provides that the personal representative, immediately after the inventory, appraisal and list of claims has been approved, shall by order of the Court, set apart for the use and benefit of the surviving spouse, minor or incapacitated children, and unmarried children remaining with the family, all of such exempt property of the estate. An independent executor shall set aside such exempt assets without order of the Court. Before approval of the inventory, the surviving spouse, or any person who is acting or authorized to act on behalf of a minor or incapacitated child of the decedent, or an unmarried child remaining with the family of the deceased, may apply to the Court to have exempt property set aside by filing an application and verified affidavit listing all of the property that the applicant claims is exempt. The applicant bears the burden of proof by a preponderance of the evidence at the hearing on the application.

### **B. Delivery of Exempt Assets.**

The exempt property set apart to the surviving spouse and children shall be delivered by the executor or the administrator without delay as follows: (a) if there be a surviving spouse and no children, or if the children be the children of the surviving spouse, the whole of such property shall be delivered to the

surviving spouse; (b) if there be children and no surviving spouse, such property, except the homestead, shall be delivered to such children if they be of lawful age and not incapacitated or to their guardian if they be minors or adult incapacitated children, or as determined by the court on behalf of the adult incapacitated child if there is no guardian; (c) if there be children of the deceased of whom the surviving spouse is not the parent, the shares of such children in such exempt property, except the homestead, shall be delivered to such children if they be of lawful age and not incapacitated or to their guardian if they be minors or incapacitated adults, or to another appropriate person, as determined by the court, on behalf of the adult incapacitated child if there is no guardian; and (d) in all cases, the homestead shall be delivered to the surviving spouse if there be one, and if there be no surviving spouse, to the guardian of the minor children. *Section 272.*

### **C. Homestead.**

A homestead can be defined as being either urban or rural. An urban homestead is located within a municipality or subdivision, and is served by police protection, fire protection, and at least three of the following: electricity, natural gas, sewer, storm sewer and water. An urban homestead can consist of no more than ten acres of land in one or more contiguous lots, and includes the improvements thereupon. A homestead is also considered urban if it is both an urban home and a place of business. A rural homestead consists of not more than 200 acres which may be in one or more parcels and the improvements thereupon if the home is occupied by a family; or if the rural home is occupied by a single adult person, it may not be more than 100 acres.

### **D. Partition of Homestead.**

The homestead rights of the surviving spouse and children of the deceased are the same whether the homestead be separate property of the deceased or the community property between the surviving spouse and the deceased, and the respective interest of the surviving spouse and children shall be the same in one case as in the other. *Section 282.* Upon the death of a spouse, the homestead generally retains its prior definition either as urban or rural; however, in the case of a rural homestead, the homestead rights of the decedent's surviving spouse and children continue, but only as to one hundred acres of the rural homestead, as the spouse and child are at that point determined to be single persons. *United States v. Blakeman*, 750 F.Supp. 216 (N.D.Tex 1990), affirmed in part, reversed in part, 997 F.2d 1084 (5<sup>th</sup> Cir. 1992), cert denied, 510 U.S. 1042 (1994). The homestead may not be partitioned among the heirs of the deceased during the lifetime of the surviving

spouse, as long as the survivor elects to use and occupy the same as the homestead, or so long as the guardian of the minor children of the deceased is permitted under proper order of the Court to use and occupy the same. *Section 284.* Note, however, if only an unmarried adult child of the decedent is living in the homestead, it may be partitioned. When a surviving spouse dies or sells his or her interest in the homestead, or elects to no longer use or occupy the same as a homestead, or when the proper court no longer permits the guardian of the minor children to use or occupy the same as a homestead, it may be partitioned among the respective owners thereof in a like manner as other property held in common. *Section 285.* The rights of the surviving spouse or child entitled to homestead rights is considered a homestead life estate under case law. The homestead life tenant is required to pay maintenance and upkeep on the property, taxes, and interest on any mortgage against the property. Principal payments on the mortgage and insurance are the responsibility of the remainder beneficiaries. *Trimble v. Farmer, 157 Tex. 533, 306 S.W.2d 157(1957); Hill v. Hill, 623 S.W. 2d 779 (Tex. App.-- Amarillo 1981, writ ref'd n.r.e.).*

#### **E. Homestead Free from Debts.**

Except as provided in Section 270 of the Code, the homestead shall not be liable for payment of debts of the estate. Consequently, if a constituent family member survives the decedent, then the homestead passes free from the claims of creditors, except as to those creditors defined in Section 270, forever. Constituent family members include the spouse and minor children. In *George v. Taylor, 296 S.W. 2d 620 (Tex. Civ.App.—Fort Worth 1956, writ refused n.r.e.)*, the homestead is not liable for the decedent's debts following the death of the widow. Anyone who inherits the property receives it free from debt. Further, the homestead passes free from debt if the decedent is survived by a constituent family member whether or not such family member inherits the house. Consequently, if the decedent is survived by a minor child, but such minor child's guardian does not elect to exercise the minor child's homestead rights to live in the home, the homestead passes free from the claims of creditors to the ultimate beneficiaries of the homestead. *Nat'l Union Fire Ins. Co. v. Olson, 920 S.W. 2d 458 (Tex. App. -- Austin 1996, no writ).*

#### **F. Title to Exempt Assets.**

The exempt personal property to be set aside by the personal representative shall include any property that is exempt from execution or forced sale by the Constitution and the laws of the State of Texas. This includes any property described in Sections 42.001, et seq. of the Texas Property Code. A traditional list of exempt assets is found in Section 42.002, and certain

retirement plans, annuity contracts and life insurance are described in Section 42.0021. The definition of exempt property is important because the personal representative has to determine whether or not the estate is insolvent. An estate is considered insolvent if the debts exceed the assets; however, in ascertaining whether an estate is insolvent, the exempt property set apart to the surviving spouse or children, or the allowance in lieu thereof and family allowance shall not be considered as assets of the estate. *Section 280.* If an estate is insolvent, then upon final settlement of the estate, the title of the surviving spouse and children to the exempt properties and allowances in lieu of exempt property shall become absolute and are not liable for any of the debts of the estate except for Class 1 claims. *Section 279.* If the estate is solvent, then the exempt property, except for the homestead and any allowance in lieu thereof, shall be subject to partition and distribution among the heirs and distributees of the estate in like manner as the other property of the estate. This can be a very powerful tool in an insolvent estate for setting aside automobiles, household furnishings, jewelry and other valuable exempt assets for the benefit of the surviving spouse, minor and incapacitated adult children and unmarried children remaining with the family.

### **VI. SETTING ALLOWANCES**

In both independent and dependent administrations, the personal representative of the estate is required to set certain allowances as required by the Code. In a dependent administration, such allowances are set by application and order of the Court. In an independent administration, the personal representative of the estate sets the allowances without approval of the Court. The author of this paper suggests that in an independent administration, a memorandum of allowances be filed in the probate proceeding setting forth the allowances that have been set by the independent personal representative. This documents the allowances set. *See Appendix B.* Allowances such as the family allowance, allowance in lieu of exempt assets and allowance in lieu of homestead can allow the surviving spouse and children to retain more assets of the estate. Consequently, personal representatives must always be aware of the necessity for setting such allowances.

#### **A. Family Allowance**

##### **1. Time for Setting.**

Section 286 provides that immediately after the inventory, appraisal and list of claims has been approved, the Court shall fix the family allowance for the support of the surviving spouse, minor children and adult incapacitated children of the deceased. However, before approval of the inventory, a surviving spouse and any person who is authorized to

act on behalf of the minor child or an incapacitated adult child of the deceased, may apply to the Court for the family allowance by filing an application and a verified affidavit describing the amount necessary for the maintenance of the surviving spouse, minor children or adult incapacitated children for one (1) year after the date of death of the decedent, and describing the spouse's separate property and any property the minor or adult incapacitated children have in their own right. The applicant bears the burden of proof by a preponderance of the evidence at any hearing on the application. The Court shall fix the family allowance for the support of the surviving spouse, minor children and adult incapacitated children of the deceased.

## 2. Amount of Allowance.

Section 287 provides that the amount of the allowance shall be sufficient for the maintenance of the surviving spouse, minor children and adult incapacitated children for one year from the time of death of the testator or intestate. The allowance shall be fixed with regard to the facts and circumstances then existing and those anticipated to exist during the first year. The allowance may either be paid in a lump sum or in installments as the Court shall order. The family allowance is a community debt and therefore will be satisfied in part out of the surviving spouse's half of the community assets under administration. *Miller v. Miller*, 235 S.W. 2d 624 (Tex. 1951). No allowance shall be made for the surviving spouse when the survivor has separate property adequate for the survivor's maintenance, nor shall such allowance be made to the minor children or the adult incapacitated children when they have property in their own right adequate for their maintenance. Section 288. However, it appears that at least one court does not consider property inherited by the surviving spouse, or non-probate assets such as life insurance received by the surviving spouse as a result of the death of the decedent, when setting the allowance, although there was no holding to this effect by the Court. *Churchill v. Churchill*, 780 S.W.2d 913 (Tex. App.—Fort Worth 1989, no writ).

## 3. Payment of Allowance.

The family allowance shall be paid in preference to all other debts or charges against the estate except Class 1 claims. Section 290. Section 291 provides that the family allowance shall be paid as follows: (a) to the surviving spouse if there is a surviving spouse, if there is a surviving spouse for the use of the surviving spouse and the minor children and the adult incapacitated children if such children be the surviving spouse's children; (b) if the surviving spouse is not the parent of such minor children or adult incapacitated children, or of some of them, the

portion of such allowance necessary for the support of such minor children or adult incapacitated children of which the surviving spouse is not the parent shall be paid to the guardian or guardians of such child or children or to another appropriate person, as determined by the court, on behalf of the adult incapacitated child if there is no guardian; (c) if there be no surviving spouse, the allowance to the minor child or adult incapacitated child or children shall be paid to the guardian or guardians of such minor child or adult incapacitated child or children or another appropriate person, as determined by the court, on behalf of the adult incapacitated child if there is no guardian; and (d) if there be a surviving spouse and no minor children, the entire allowance shall be paid to the surviving spouse.

## B. Allowances in Lieu of Exempt Property

### 1. Setting Allowances.

Section 273 provides for allowances in lieu of exempt property if such exempt property is not on hand in the decedent's estate. If there should not be among the effects of the deceased all or any of the specific articles exempted from execution or forced sale by the Constitution and the laws of the State, the Court may make a reasonable allowance in lieu thereof to be paid to such surviving spouse, minor children, adult incapacitated children and unmarried children remaining with the family. An allowance in lieu of a homestead cannot exceed \$15,000.00 and the allowance in lieu of other exempted property shall not exceed \$5,000.00, exclusive of the allowance for support of the surviving spouse, minor children and adult incapacitated children. Instances where an allowance in lieu of homestead might be appropriate is when the decedent and the family were living in rented property or if the mortgage on the homestead is so high that the surviving spouse or minor children cannot reasonably be expected to pay the mortgage and therefore, the home is unavailable for their occupancy. *Ward v. Braun*, 417 S.W. 2d 888 (Tex. Civ. App.—Corpus Christi 1967, no writ). The exempt property other than the homestead or an allowance made in lieu thereof, shall be liable for payment of Class 1 claims, but such property shall not be liable for any other debts of the estate, as provided in Section 281. Consequently, an allowance in lieu of homestead is paid before any other claims. An allowance in lieu of exempt property may be liable for payment of Class 1 claims but has priority over all other claims. Further, if the estate is determined to be insolvent under Section 280, then the allowance in lieu of exempt property shall be set aside for the surviving spouse, minor children, adult incapacitated children and unmarried children remaining with the family above any other debts of the estate, except Class 1 claims.

## 2. Delivery of Allowances.

Section 275 provides that the allowance in lieu of exempt property shall be paid as follows: (1) if there be a surviving spouse and no children, or if all of the children, including adult incapacitated children, are the children of the surviving spouse, the whole shall be paid to the surviving spouse; (2) if there be children and no surviving spouse, the whole shall be paid to and equally divided among them if they be of lawful age, but if any of such children are minors or incapacitated their share shall be paid to their guardian or another appropriate person, as determined by the court, on behalf of the adult incapacitated child if there is no guardian; and (3) if there be a surviving spouse and children of the deceased, some of whom are not the children of the surviving spouse, then the surviving spouse shall receive one-half (1/2) of the whole plus the shares of the children of whom the survivor is the parent, and the remaining share shall be paid to the children of whom the survivor is not the parent, or if they are minors or incapacitated to their guardian or another appropriate person, as determined by the Court, on behalf of the adult incapacitated child if there be no guardian.

## C. Timely Setting Allowance.

By properly setting a family allowance and allowances in lieu of exempt property, the personal representative of the estate can have more non-exempt assets set aside for the benefit of the spouse and children over other claimants against the estate. Consequently, this is an important part of the duties of the personal representative, and a personal representative can be held liable for failure to properly set such allowances. Further, many courts will not set a family allowance if the request is made more than one year after the date of death, the reason being that if the surviving spouse, minor children or adult incapacitated children have managed for more than one year, there is not a need to set allowances to support them for that year.

## VII. NON-PROBATE ASSETS

In most instances, creditors of an estate cannot reach non-probate assets. Non-probate assets such as life insurance, IRA's and qualified plan assets pass pursuant to the beneficiary designations and are outside the reach of the decedent's creditors unless paid to the estate. *Parker Square State Bank v. Huttash* 484 S.W. 2d 429 (Tex. Civ. App.—Fort Worth 1972, writ refused); *Pope Photo Records, Inc. v. Malone* 539 S.W. 2d 224 (Tex. Civ. App.—Amarillo 1976, no writ). However, some non-probate assets, such as multi-party bank accounts and joint tenancy with rights of survivorship may be subject to the claims of creditors. Section 442 of the Code provides that any multi-party bank accounts, including right of

survivorship accounts, may be made available as necessary to pay the decedent's debts, taxes and expenses of the administration, including statutory allowances to the surviving spouse and children if other assets of the decedent's estate are insufficient. Further, any party receiving payment from a multi-party account after the death of the decedent shall be liable to account to the decedent's personal representative for such taxes and debts of the decedent, up to the amount passing to the person from the bank account. However, in order for the payee to be liable, the personal representative must receive a written demand from the surviving spouse, a creditor, or one acting on behalf of the decedent's minor child. Any such action must be brought within two (2) years after the decedent's date of death. A financial institution will not be liable for paying such sums on deposit to the payee or beneficiary, unless it receives written notice from the personal representative stating that the sums on deposit are needed to pay debts, taxes and expenses of administration.

## VIII. CONCLUSION

The Texas Probate Code can be a trap for the unwary creditor and a trap for the unwary attorney representing a personal representative of the decedent's estate. The Probate Code, as well as other Texas law and case history, can affect a creditor's right to assets in the decedent's estate. A decedent who was very credit worthy during his lifetime may be considered insolvent at the time of death after considering non-probate assets, exempt assets and allowances. Consequently, the attorney representing either the creditor or the estate must be aware of these traps and take timely action to protect his or her client.



## APPENDIX A

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**January 9, 2012**

«FirstName» «LastName», «JobTitle»  
«Company»  
«Company2»  
«Address1»  
«City», «State» «PostalCode»

RE: «Decedent»  
«AccountNo»

Dear «Title» «LastName»«Company»:

You are hereby given notice that «Decedent» is deceased. He/She died on «Dateofdeath». Letters of Administration were issued to «Administrator» on «Dateofletters» in Cause No. «CauseNo» in the Probate Court Number «Probatecourt» of Tarrant County, Texas. Our records indicate that «Company» «Company2» may have a claim against the estate. **You must properly present a claim for the amounts owed to you within four (4) months after the date of receipt of this notice or your claim is barred (if your claim is not already barred by the general statutes of limitation).** The claim should be addressed to «Administrator», c/o \_\_\_\_\_. The claim must be presented by (a) a written instrument that is hand-delivered with proof of receipt or mailed by certified mail return receipt requested with proof of receipt to the Independent Executor or the Executor's attorney; (b) a pleading filed in a lawsuit with respect to the claim; or (c) a written instrument or pleading in the court in which the administration of the estate is pending.

I represent the Administratrix of the Estate and therefore cannot provide you with legal assistance on your requirements in filing this claim with the Court. If you have additional questions regarding your duties in filing a claim, you should consult with an attorney in Texas.



## APPENDIX B

NO. \_\_\_\_\_

ESTATE OF § IN THE PROBATE COURT

\_\_\_\_\_ § NO. \_\_\_\_\_

DECEASED § TARRANT COUNTY, TEXAS

MEMORANDUM OF ALLOWANCES

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes \_\_\_\_\_, Independent Executor of the Estate of \_\_\_\_\_ and files this his/her Memorandum of the allowances set aside by Independent Executor in accordance with the Texas Probate Code. Prior to the approval of the Inventory, Appraisement and List of Claims in this Estate, the Independent Executor in accordance with Section 146 of the Texas Probate Code set aside a family allowance in the amount of \$\_\_\_\_\_ to compensate the surviving spouse, minor child and adult incapacitated child for one year taking into account the circumstances of the family. The family allowance was delivered to the surviving spouse since the minor child and the adult incapacitated child are also the children of the surviving spouse.

Also, in accordance with Section 146 of the Texas Probate Code, Independent Executor delivered to surviving spouse an allowance in lieu of exempt property in the amount of \$\_\_\_\_\_ to compensate the surviving spouse, minor child and adult incapacitated child for exempt assets not on hand at the time of death. This allowance was delivered to the surviving spouse since he is also the parent of the minor child and the adult incapacitated child. The total allowances were allocated to the community estate.

Respectfully submitted,

\_\_\_\_\_

SWORN TO AND SUBSCRIBED before me this \_\_\_\_\_ day of \_\_\_\_\_, 2008, by \_\_\_\_\_, \_\_\_\_\_, of the Estate of \_\_\_\_\_, to certify which witness my hand and seal of office.

\_\_\_\_\_  
Notary Public in and for the  
State of Texas