

**CREDITORS' CLAIMS IN DEPENDENT
AND INDEPENDENT ADMINISTRATIONS**

M. KEITH BRANYON
JACKSON WALKER L.L.P.
777 MAIN STREET, SUITE 2100
FORT WORTH, TEXAS 76102
817.334.7235

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M. KEITH BRANYON
Jackson Walker L.L.P.
777 Main Street, Suite 2100
Fort Worth, Texas 76102
Telephone: 817.334.7235
Telecopier: 817.870.5135

BIOGRAPHICAL INFORMATION

EDUCATION

B.B.A. in Accounting, Baylor University (1981)
J.D., Baylor University School of Law (1983)

PROFESSIONAL ACTIVITIES

Partner, Jackson Walker L.L.P., Fort Worth, Texas
Board Certified in Tax Law (1990) and in Estate Planning and Probate Law (1988),
Texas Board of Legal Specialization
Advisory Commission for Estate Planning and Probate Law,
Texas Board of Legal Specialization (Member: 2000 - 2005; Chair: 2002 - 2005)
Advisory Commission for Tax Law,
Texas Board of Legal Specialization
(Member: 2005 -2009; Vice-Chair: 2006; Chair: 2007-2009)
Tax Law Exam Writing Commission
Texas Board of Legal Specialization
(Member: 2005-2009; Chair: 2006-2009)
Certified Public Accountant
Texas Society of Certified Public Accountants
Fellow – American College of Trust & Estate Counsel

PUBLISHED WORKS

Author: *Texas Probate – Forms and Procedures*, James Publishing, 2008.

LAW-RELATED SPEAKING ENGAGEMENTS AND PUBLICATIONS

Numerous articles and speeches on estate planning and probate topics for the State Bar of Texas and other organizations

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CREDITORS' CLAIMS IN DEPENDENT AND INDEPENDENT ADMINISTRATIONS

I. Introduction

Dealing with creditors during a probate administration can be a confusing ordeal. While efforts have been made by various groups to make the Probate Code ("Code") more understandable regarding the topic of creditors' claims, it remains a fact that the Code is not very helpful or very instructive. [Alternate references will be made in this paper to the Estates Code (—EC), which will be effective on January 1, 2014.] In other words, it would be helpful to have all statutes dealing with claims in independent administrations grouped together, and statutes covering claims in dependent administrations grouped in the same way. However, in writing the Code our legislature has chosen over the years to create a very detailed —claims" process that does not always clearly indicate, within its text, whether it applies to dependent administrations, independent administrations, or both.

In addition, the statutes which outline the claims process are not in the same area of the Code. The sections covering notices to be sent to creditors are found in §§294 and 295 [EC §§308.051-.054]. The statutes covering the filing of claims and actions on claims are found in §§298-322 [EC §§355.001-.008, 355.051-.066, 355.101-.106, 355.108, 355.110, 355.111, 355.151-.160, 355.201, & 355.202] All of these statutes are found in the Code under the general heading of —Proceedings During Administrations" and under the specific heading of —Resentment and Payment of Claims." There is no indication in these sections, or in the titles, as to whether they apply to dependent administrations, to independent administrations, or both. Nevertheless, courts have held that these statutes are generally not applicable to independent administrations, making clear that they definitely apply to dependent administrations. *Bunting v. Pearson*, 430 S.W.2d 470 (Tex. 1968).

On the other hand, the 2011 Legislature tried to clear up some of the confusion by stating definitively that Code §§313 and 306(f)–(k) [EC §§355.064, 355.066, & 355.156-.160] do not apply to independent administrations. [Code §146(b-7)(1) & (2).] [EC §403.058(1) & (2).] However, it is not clear why the same Legislature did not comment on the remaining —claims" statutes [Code §§298-306(a)-(e), 307-312, 314-322] [EC §§355.001-.008, 355.051-.063, 355.0065, 355.101-.106, 355.108, 355.110, 355.111, 355.151-155, 355.201, & 355.202] and declare definitively that they do not apply to independent administrations.

In order to find claims statutes that are specific to independent administrations, it is necessary to locate Code §§146 and 147 [EC §§403.051-.059, 403.001] These two statutes are found under the general heading of —Special Types of Administration" and under the specific heading of —Independent Administration." These sections make clear that they must be applied in conjunction with some, but not all, of the statutes that cover claims in dependent administrations. The purpose of this article is to describe, in logical order, how the claims process works in both dependent and independent administrations, regardless of where the applicable statutes happen to be located in the Code.

II. Definitions

A —claim" is defined to —include liabilities of a decedent which survive, including taxes, whether arising in contract or in tort or otherwise, funeral expenses, the expense of a tombstone, expenses of administration, estate and inheritance taxes, and debts due such estates." [Code §3(c).] [EC §22.005.] As this definition shows, a claim is a debt that the decedent supposedly owed before death. However, debts incurred during the administration are handled the same way as those that were in existence prior to death. Thus, generally, any debt may be pursued against the estate.

Various courts have made clear that the term —claim" as defined in Code §3(c) [EC §22.005] includes only claims for money and not obligations for anything else. *Dunn v. Sublett*, 14 Tex. 521 (1855). In addition, the extension —for money" is added to the term —claim" to make a single phrase in numerous statutes. [See, e.g., Code §§298(b); 299(1).] [EC §§355.061; 355.008(1).]

How the claim must be pursued depends on whether the claim is liquidated or unliquidated, secured or unsecured, or for money or something else. Even if a creditor is in the midst of a collection action, or has even obtained a judgment prior to the death of the decedent, the creditor must —start over" pursuing the claim after the Decedent dies. *Mackey v. Lucey Products Corp.*, 150 Tex. 188, 239 S.W.2d 607 (1951) (a creditor who obtains a judgment prior to the decedent's death may not attempt to collect the judgment except through the probate court).

A secured creditor must elect whether to have the claim treated as —matured secured" or —preferred debt and lien." The terms —matured secured" and —preferred debt and lien" are not defined in §3 of the Code [EC §22.005]. Instead, the terms are defined by narrative in §146(b) [EC §403.052] for independent administrations and in §306(a) [EC §355.151] for (presumably) dependent administrations. To paraphrase those sections, a secured creditor who elects —matured secured" has chosen to abandon the lien securing his

debt in the hope that he will recover more cash from the Estate than a sale of the collateral might have achieved.

On the other end of the spectrum is the secured creditor who elects “preferred debt and lien” (or is relegated to that election by default). That secured creditor will ultimately receive the collateral to which the lien is attached to either sell or retain, but the creditor cannot seek any additional recovery of cash or other property from the Estate if the sale of the collateral yields less than the amount owed on the debt.

III. Notices

The Code requires both dependent and independent personal representatives to send the same notices to creditors. Two of the notices are mandatory, and one is voluntary. The first two types of notice have the same requirements for both dependent and independent representatives, but different duties are placed on the responding creditor. The final type of notice has different requirements for both the representative and the creditor, depending on the type of administration.

A. Mandatory notice to all creditors

Both dependent and independent representatives must publish a general notice to creditors within 30 days of the issuance of letters testamentary or letters of administration. The notice must be published in a newspaper “in the county where the letters were issued.” [Code §294(a).] [EC §308.051.] Once publication has occurred, proof of the publication must be filed with the court. [Code §294(b).] [EC §308.052.] Code §146(a)(1) [EC §403.051(a)(1)] makes §294 [EC §§308.051, 308.052, & 308.054] applicable to independent administrations. [See Form 1.]

B. Mandatory notice to secured creditors

If there were secured debts at the date of death, within two months after receiving letters, the personal representative must send notice by certified mail, return-receipt requested, to each secured creditor. [Code §295(a) & (b).] [EC §308.053(a)-(c).] A copy of the notice and proof of service must be filed with the court. [Code §295(c).] [EC §308.053(d).] Code §146(a)(1) [EC §403.051(a)(1)] makes §295 [EC §308.053] applicable to independent administrations. [See Form 2.]

To qualify as a “secured” creditor under Code §295 [EC §308.053], the debt must be a claim for money and must be collateralized by a lien on either real or personal property of the decedent. If the personal representative did not know about a secured

creditor before the two-month window expired, notice may be sent within a “reasonable time” after the personal representative discovers the debt. [Code §295(a).] [EC §308.053(b).] The notice letter for both dependent and independent representatives is required to state only that letters have been issued. However, depending upon the type of administration, the creditor’s response will be different as explained below.

C. Permissive notice to unsecured creditors

The personal representative may send a different notice letter to unsecured creditors. (As with §295 [EC §308.053] creditors, this optional notice should be sent only to unsecured creditors who are believed to have claims for “money.”) This notice both alerts the creditors and starts the running of a statute of limitations regarding these unsecured claims. The notice consists of a letter sent certified mail, return-receipt requested, stating that the creditor must present a claim within four months of the receipt of the notice or the claim is barred. [Code §294(d).] [EC §308.054.] This optional letter is specifically authorized for use in independent administrations. [Code §146(a)(2).] [EC §403.051(a)(2).]

This type of notice is particularly effective for the estate where there is insufficient cash to pay all of the debts of the estate. It is quite likely that some or all of the unsecured creditors will not meet the deadline, and the personal representative then has no duty to pay the debts.

1. Dependent Administration - In dependent administrations, the personal representative is given guidance in Code §294(d) [EC §308.054] as to what must be included in the notice letter in addition to describing the 4-month deadline to respond. Those additional requirements are as follows:

- The date of issuance of letters held by the representative;
- The address to which claims may be presented; and
- An instruction of the representative’s choice that the claim be addressed in care of the representative, the representative’s attorney, or “Representative, Estate of” (naming the estate).

[See Form 3.]

2. Independent Administration - As a result of 2011 legislation, an independent representative is required to send a Code §294(d) [EC §308.054] letter that differs from what a dependent representative can send. In new §146(a-1) [EC §403.051(b)], an independent representative must include in the §294(d) [EC §308.054] letter a statement to the effect that a

responding creditor can effectively present a claim ONLY by adhering to one of the methods prescribed by new §146(b-4) [EC §403.056(a)] as will be further discussed below.

The new requirements of §146(b-4) [EC §403.056(a)] for the notice letter are in addition to the elements listed in §294(d) [EC §308.054]. It is not clear in the Code how much detail from §146(b-4) [EC §403.056(a)] should be included. These sections can be interpreted as requiring the administrator's attorney to give specific legal advice to a non-client (the creditor). Any creditor receiving such notice will likely rely on the details included in the letter and may believe that the attorney who signed the letter actually represents the creditor in addition to the administrator.

Balancing the legislative requirement with the duty owed to the administrator/client will be difficult. At least one recent court decision makes clear that an administrator does not owe a general duty of care to an unsecured creditor. *Mohseni v. Hartman*, 2011 Tex. App. LEXIS 4412 (Tex. App. Houston [1st], June 9, 2011, no pet.). Unfortunately, this court decision will not prevent possible misunderstanding on the part of the creditor which results when the administrator's attorney sends a §294(d) [EC §308.054] letter which seems to give legal advice. [See Form 4.]

IV. Filing the Claim

A. Dependent Administration

1. Unsecured Creditor - The unsecured creditor who sees the newspaper notice or who receives any of the notices described above from a dependent administrator is presumably bound to follow §§301, 302, 306 and 307 [EC §§355.003, 355.004, 355.007, 355.059, 355.151-160] regarding the content of a claim. Specifically, the claim must be supported by an affidavit which declares "that the claim is just and that all legal offsets, payments and credits known to the affiant have been allowed." If the claim is not supported by a written instrument or account, the affidavit must also state the facts upon which the claim is based.

The final sentence of Code §301 [EC §355.004] is confusing. It states that a creditor MAY attach to the claim and affidavit "photostatic copy" of any exhibit necessary to "prove" the claim rather than the "original." Does "may" mean that attaching exhibits to a claim is optional, or does the sentence presume that exhibits will be attached and simply allow the creditor to use copies rather than originals? It is not clear. However, it could certainly be argued that a lack of supporting documents should lead to a

rejection of the claim because a "prove" affidavit will make little sense to the administrator. [See Form 5.]

The claim can be filed either with the administrator [Code §298(a)] [EC §355.001] or with the clerk [Code §308.] [EC §355.002.] Since the administrator in a §294(d) [EC §308.054] letter is required to give the creditor an address (singular) to which a claim can be presented, the Code seems to give a creditor an optional place to file that was not contemplated or authorized by the administrator. Moreover, if the administrator in the §294(d) [EC §308.054] letter directed the creditor to send claims to the attorney of record for the administrator, but the creditor instead chose to file the claim with the clerk, the administrator might make the argument that the creditor has failed to comply with §294(d). [EC §308.054.]

2. Secured Creditor - Like unsecured creditors, secured creditors in a dependent administration are also bound to follow Code §§301, 302, 306 and 307 [EC §§355.003, 355.004, 355.007, 355.059, & 355.151-160] regarding the content of a claim if the claim is to be valid. Further, within the later of 6 months from the date on which letters were granted or 4 months after receiving the Code §295 [EC §308.053] notice, the creditor must not only present the claim but must also elect to have the claim treated as "preferred debt and lien" or "matured secured" under §306 [EC §355.151]. A failure to make a timely election causes the claim to default to "preferred debt and lien." [Code §306(b.)] [EC §355.152.]

B. Independent Administration

The Code gives absolutely no guidance whatsoever as to what a "claim" should look like in an independent administration. While it has been assumed for many years that creditors who are faced with an independent administration were not required to file a claim, that is no longer the case in some situations.

1. Unsecured Creditor

a. §294(a) Notice - If the unsecured creditor is responding to newspaper notice, a claim is not required to be filed in an independent administration. The creditor can proceed at any time by filing suit directly against the administrator [Code §147] [EC §403.059] or against the heirs/beneficiaries [Code §269] [EC §354.058] if any of the estate has been distributed. If limitations is a problem, the creditor might choose to file a claim anyway. The applicable limitations period is tolled for 12 months after the death of the debtor. [TEX. CIV. PRAC. & REM. CODE §16.062(a).] However, if a personal representative qualifies during the 12-

month period, then the limitations period begins to run again on the date of qualification. [TEX. CIV. PRAC. & REM. CODE §16.062(b).]

Although most of the creditor statutes in the Code do not apply to independent administrations [See, e.g., Code §§301, 309, 310, & 313] [EC §§355.004, 355.051, 355.052, 355.059, 355.064, & 355.066], the provision for the tolling of the general statutes of limitations [Code §299] [EC §355.008] appears to be applicable. That statute provides that the statutes of limitation are tolled when a creditor does either of the following:

- Files a claim with the clerk.
- Files a suit against the personal representative regarding a claim that is not required to first be presented to the personal representative.

[Code §299.] [EC §355.008.] This latter phrase seems to speak directly to independent administrations.

If a creditor files a claim with the clerk, the personal representative will not be successful in subsequently asserting that the limitations period expired even if the creditor fails to file suit before the applicable limitations period would have otherwise expired. For example, assume that the independent personal representative qualifies on January 15, that the limitations period expires one month later (on February 15), and that a creditor files a claim with the clerk on January 30 but fails to file suit before February 15. Even though the creditor was not required to file a claim because it was an independent administration, the creditor probably succeeded in tolling limitations due to the language in Code §299 [EC §355.008].

Code §299 [EC §355.008] does not provide for the filing of a claim with the personal representative. Therefore, if a creditor files a claim with the personal representative and not with the clerk, then the limitations period is not tolled.

The other option for a creditor in an independent administration who is reacting to a newspaper notice (or who simply acts without receiving any notice whatsoever) is to file suit against the personal representative. [Code §147] [EC §403.059] (providing that a person may enforce a debt by filing suit against the independent executor.) Filing suit against the personal representative avoids any possible argument about whether a claim was proper, or whether a claim was allowed or rejected. Also, filing suit tolls any applicable statutes of limitation. [Code §299.] [EC §355.008.]

However, the independent personal representative is allowed to ignore the suit until six months after Letters were granted. [Code §147.] [EC §403.059.] This would presumably mean that the

creditor could not take a default judgment against the personal representative if the personal representative chooses not to file an original answer within the time prescribed on the citation.

b. §294(d) Notice - As stated above, §294(d) [EC §308.054] is specifically made applicable to independent administrations by §146(a)(2) [EC §403.051(a)(2)]. If a creditor receives the §294(d) [EC §308.054] notice, a claim must be filed. Unfortunately, and as stated above, the Code gives absolutely no guidance as to what the claim must look like. The only information in the Code deals with how the claim must be delivered.

Even if for some reason the notice received by the creditor is deficient, the creditor is required by §146(b-3) [EC §403.055] to “deliver” the claim to the administrator according to one of the methods described in §146(b-4) [EC §403.056(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;
- A pleading filed in a lawsuit with respect to the claim; or
- A written instrument or pleading filed in the court in which the administration of the estate is pending.

When the administration is “independent,” avoiding the statute of limitations is more complicated after a §294(d) [EC §308.054] notice. If the creditor files its claim within 4 months of receipt of the claim, the limitations period prescribed by §294(d) [EC §308.054] has been met and the creditor would appear to be “safe.”

However, new §146(b-6) [EC §403.057] makes it clear that the general statute of limitations which would have been applicable if the decedent were still alive is not tolled simply by filing a claim. Instead, to toll limitations, the creditor’s claim must be approved by the administrator, in writing, and the approval must be signed by the administrator. As an alternative to obtaining the written approval and signature of the administrator, §146(b-6) [EC §403.057] allows the general statute of limitations to also be tolled if (1) the creditor files a pleading in a suit which was pending at the time of decedent’s death, or (2) the creditor files a new suit against the independent administrator.

The burden placed upon the creditor in §146(b-4) [EC §403.056(a)] is applicable ONLY if the creditor receives a §294(d) [EC §308.054] notice before either filing a claim with the clerk or sending some type of notice of a claim to the administrator. Therefore, a creditor who knows about the death of a debtor can

apparently avoid a great deal of red tape by filing the claim before the administrator has an opportunity to send notice letters.

2. Secured Creditor - The scant information in the Code regarding unsecured creditors in an independent administration also applies to secured creditors, whether the creditor receives the §295 [EC §308.053] notice or no notice at all. In addition, the secured creditor must be careful to notify the administrator of any preference regarding the classification of its lien. Within the later of 6 months from the date on which letters were issued or 4 months after receiving the §295 [EC §308.053] notice, the creditor must notify the administrator if the claim is to be classified as a ~~“matured secured”~~ claim. [Code §146(b).] [EC §403.052.] The notice to the administrator must comply with §146(b-4) [EC §403.056(a)], but only if the creditor receives the notice before filing a claim. As stated in the prior section, the requirements of §146(b-4) [EC §403.056(a)] only apply if the creditor is reacting to a §295 [EC §308.053] notice from the administrator.

Finally, if the debt is secured by real property, the creditor must record a notice of the creditor's claim and of the ~~“matured secured”~~ election in the deed records of the county where the land is located. If the secured creditor fails to get a ~~“matured secured”~~ election to the administrator within the time specified above, the claim will default to ~~“preferred debt and lien.”~~ If the secured creditor who has a lien on real estate files a timely notice to treat the claim as ~~“matured secured”~~ but fails to record the notice in the deed records, the election fails and the claim will be treated as ~~“preferred debt and lien.”~~ [Code §146(b).] [EC §403.052.] In other words, the secured creditor with a lien on real estate must both give notice to the administrator AND properly record the notice in the deed records within the ~~“4-month”~~ or ~~“6-month”~~ deadline in order to have the debt handled as ~~“matured secured.”~~

As stated above, the Code gives no guidance as to what a claim should look like in an independent administration. Similarly, the Code gives no guidance as to what must be recorded in the deed records by a creditor with a security interest in real estate which is electing ~~“matured secured”~~ status. However, from other law it is quite clear that the document to be recorded must, at the very least, have a notary acknowledgement. Texas Property Code §12.001 states that a document can be recorded by a county clerk only ~~“if it has been acknowledged, sworn to with a proper jurat, or proved according to law.”~~

V. Action on the Claim

A. Dependent Administration

The action to be taken by a dependent administrator regarding claims is the same whether the claim is secured or unsecured and regardless of the type of notice received by the creditor. Once claims are filed, the dependent personal representative and the creditor must follow statutory procedures before the claim will be converted into a debt that must be paid. [Code §§309-319.] [EC §§355.051-.058, 355.063-.66, 355.101, 355.111, 355.201, & 355.202.]

The personal representative must act within 30 days of the date that the claim is either filed with the clerk or presented to the personal representative. [See Code §308 [EC §355.002] (after the claim is ~~“deposited”~~) & §309 [EC §355.051] (after the claim is ~~“presented or deposited”~~).] Though the statutes do not make it clear, the 30-day period appears to commence on the earlier of the filing or the presentment. Generally, the personal representative must do one of the following:

- Allow the claim. [Code §309.] [EC §355.051.]
- Reject the claim. [Code §309.] [EC §355.051.]
- Object to the claim. [Code §302.] [EC §355.007.]

The specific action taken by the personal representative must be written and filed with the clerk. The written memorandum by the personal representative must include the date the claim was presented or filed along with the action taken. [Code §309.] [EC §355.051.] **[See Form 6.]**

The personal representative must be careful with the 30-day deadline. If the personal representative fails to act within 30 days of presentment/filing, the claim is deemed to be rejected. [Code §310.] [EC §355.052.] However, if a claim is deemed rejected because of the personal representative's failure to act, and the claim is later established by the creditor in a suit, the court costs are taxed against the personal representative, individually. [Code §310.] [EC §355.052.] Alternatively, the successful creditor (or another interested person) can use the faulty rejection to support an action to remove the personal representative. [Code §310.] [EC §355.052.]

The administrator has a further burden regarding applicable statutes of limitations. Code §298(b) [EC §355.061] makes it clear that an administrator is prohibited from allowing a claim that is barred by limitations. To allow or to pay a barred claim is considered to be a fraud on the estate. *Pinkston v.*

Pinkston, 266 S.W.2d 515, 519 (Tex. Civ. App. – Waco 1954, writ ref'd n.r.e.).

1. Allowance of Claim - If a claim is allowed by the personal representative, it is filed with the clerk and entered on the claim docket. [Code §311.] [EC §355.053.] The court then either approves the claim in whole or in part or rejects it. If the claim is approved, then the court classifies the claim into one of eight levels of priority. [Code §312(d).] [EC §355.057.] For the classifications, see Code §322. [EC §355.102.]

The personal representative's attorney should submit an order to the court regarding approval and classification with the memorandum that allows the claim. Once the claim has been approved and classified, the personal representative can request court permission to pay it in the order of its classification. [Code §320.] [EC §355.103.] [See **Form 7**.]

If the personal representative has "allowed" the claim but the court fails to approve it, the court must hear testimony from both the personal representative and the creditor. If the court determines that the claim is not "just," the claim will be disapproved. [Code §312(c).] [EC §355.056.] The creditor can then appeal as in other cases. [Code §312(e).] [EC §355.058.]

2. Rejection of Claim - If the administrator rejects a claim (either intentionally or unintentionally), then the creditor must file suit on the claim within 90 days of the rejection date. Failure to file the suit within 90 days is fatal because the claim is then barred. [Code §313.] [EC §355.064.] Court costs in the suit will vary, depending on the history of the treatment of the claim as follows:

- If the claim is rejected by the personal representative but established by the creditor at trial, the estate pays court costs. [Code §315(c).] [EC §355.111(3).]
- If the claim is rejected by the personal representative and the creditor loses its suit, the creditor pays court costs. [Code §315(d).] [EC §355.111(4).]
- If the claim was partially rejected by the personal representative (meaning that it was also partially allowed), and if the creditor fails to recover more after trial than the personal representative had initially allowed, the creditor pays court costs. [Code §315(e).] [EC §355.111(5).]

3. Objections to Claim - An administrator may object to the form of a claim or to the insufficiency of

exhibits or vouchers that might be attached to the claim. [Code §302.] [EC §355.007.] Unfortunately, this statutory provision for objections to claims does not clarify how an objection affects:

- The 30-day window during which the personal representative must act on the claim. [Code §§308-310.] [EC §§355.002, 355.051, & 355.052.]
- The 90-day window within which the creditor must file suit on a rejected claim. [Code §313.] [EC §355.064.]

Furthermore, there is very little case law providing guidance to either the administrator or to the creditor regarding objections to claims.

From the administrator's perspective, it may be difficult to know whether the defect is one of "form" or not. If there are no exhibits attached to the claim, or if the exhibits do not fully explain the amount allegedly owed, then the personal representative would appear to be safe in filing an objection. Nevertheless, it is difficult to see how filing an objection would be a better choice than simply rejecting the claim.

The creditor who receives an objection can simply re-file the claim and attempt to correct the defects. If a statute of limitations is a problem, then the creditor could consider the claim to have been rejected, and then file suit. In a worst-case scenario for the creditor, the administrator might challenge the suit as being "immature" on the ground that the claim had not been properly rejected.

B. Independent Administration

After the notices have been sent, the independent administrator must perform the tasks of a dependent administrator without guidance and assistance from the court. Code §146(a)(3) [EC §403.051(a)(3)] requires the independent administrator to classify any claims that have been filed or established by suit in accordance with the eight levels of priority described in Code §322 [EC §355.102]. There is no requirement to file notice of approval/rejection or of the classification with the court or send it to creditors. However, an independent administrator has the same duty as a dependent administrator to determine if the claim is barred by any applicable statute of limitations. If so, the claim should neither be classified nor put in line for payment.

VI. Paying the Claim

A. Dependent Administration

1. Order for Payment - After a claim has been approved and classified by the court, a creditor may apply to the court for payment of the claim at any time after twelve months from the date letters were granted.

[Code §326.] [EC §355.107.] The creditor must presumably schedule a hearing and provide appropriate proof to the court regarding its approved claim. The court can then order the personal representative to pay the creditor. If there is not enough cash to pay the creditor, the court can order the sale of sufficient estate property to pay the debt. [Code §326.] [EC §355.107.] [See Forms 8 & 9.]

2. Report on Condition - Any person (creditor, heir or beneficiary) entitled to a share of the estate may require the personal representative to report on the condition of the estate. [Code §262.] [EC §354.051.] This request can be made as soon as the inventory has been approved. [Code §262.] [EC §354.051.]

Once the report has been made, the person who wants his or her share of the estate must file a bond with the court equal to at least twice the value of the property that the personal representative delivers. [Code §263.] [EC §354.052.] This bond is sometimes called a "refunding bond" because the creditor (or beneficiary) is basically liable to the estate if the property distributed is ultimately needed to pay creditors with a higher priority.

After the bond has been given and approved, the court will enter an order directing the administrator to deliver the portion of the estate to which the person is entitled. [Code §264.] [EC §354.053.] However, if there is another creditor whose claim does not get paid and is not barred by limitations, that creditor can sue the creditor or the beneficiary who received property pursuant to the court's order. [Code §§268 & 269.] [EC §§354.057 & 354.058.]

This procedure of (1) requiring a report, (2) posting a bond and (3) getting an order for payment is not as favorable to creditors as the order for payment under Code §326 [EC §355.107]. While the creditor may get paid more quickly, finding a surety to write a refunding bond is no easy task. Plus, the creditor who gets property under this procedure has the continuing liability problem from other potential creditors.

B. Independent Administration

In an independent administration, the administrator generally has discretion regarding the payment of debts to creditors (unless a judgment creditor forces payment with a writ of garnishment, writ of execution, etc.). The purpose of the classification task as described above is to make certain that the administrator pays claims in the order of priority if there are insufficient assets to pay all claims in full. Thus, classification is not important unless the estate is insolvent. If the estate's assets are insufficient to pay all of the classified debts, then the

administrator pays the claims in the order of priority of the classification. [Code §146(a)(3).] [EC §403.051(3).]

A secured creditor which has elected "preferred debt and lien" status can exercise any judicial or nonjudicial collection rights, including foreclosure and execution, but such action cannot be taken until at least six months after Letters are granted. [Code §146(b-2).] [EC §403.054.] On the other hand, a secured creditor who has selected "matured secured" status is not entitled to exercise any remedies in a manner that prevents the payment of the higher priority claims and allowances. [Code §146(b-1)(A).] [EC §403.053(a)(1).] A "matured secured" creditor is also prohibited from exercising "any contractual collection rights, including the power to foreclose, without either the prior written approval" of the administrator or the court. [Code §146(b-1)(B).] [EC §403.053(a)(2).]

VII. Exempt Property and Allowances

A. Dependent Administration

1. Recipients - A dependent administrator may be required to set aside exempt property and the homestead if there are eligible beneficiaries involved in the Estate. This process is always applicable in insolvent estates because the administrator will be dealing with a competition between claims of creditors and assets of the estate which are exempt from some of those claims. The statutes dealing with these issues are found in Code §§270-293 [EC §§102.002-006, 353.051-056, 353.101-107, & 353.151-155]. Whether to set aside the homestead or exempt property is important because it can impact the ability to pay creditors.

There is a belief that the personal representative has a duty to initiate the set-aside. However, there is no statutory support for that belief. The Code provides that the "court" shall set aside the homestead and exempt property. [Code §271.] [EC §353.051.] The court is to do this either immediately after the inventory has been approved [Code §271(a)] [EC §353.051(a)] or upon an application by the surviving spouse or some other authorized person prior to the filing of the inventory [Code §271(b).] [EC §353.051(b).] [See Forms 10 & 11.] If no one files the appropriate application with the court, it does not appear that the personal representative has any duty to act.

Once the court has ordered the set-aside, the administrator must deliver possession of the items to the appropriate beneficiaries. [Code §272.] [EC §353.052.] Code §271(a)(1) [EC §353.051(a)(1)] states that the court can order the administrator to set aside the homestead to the surviving spouse and minor children. All other exempt property can be ordered by the court

to be set aside to the surviving spouse, minor children, unmarried adult children remaining with the family of the deceased and adult incapacitated children. [Code §271(a)(2).] [EC §353.051(a)(2).]

2. Timing - Code §271(a) [EC §353.051(a)] states that the —~~et~~—aside” must occur immediately after either the approval of the Inventory, Appraisal and List of Claims or the filing of the affidavit in lieu of an inventory.

Since the approval of the Inventory, or the filing of the affidavit in lieu of an inventory, could be delayed for months or years after the Decedent's death, Code §271(b)(1) [EC §353.051(b)(1)] allows the surviving spouse or any person who is authorized to act on behalf of minor children to file an application with the court BEFORE the Inventory is approved (or before the affidavit in lieu of an inventory is filed). Section 271(b)(2) [EC §353.051(b)(2)] allows any unmarried adult child remaining with the family of the deceased, any other adult child who is incapacitated, or a person who is authorized to act on behalf of the adult incapacitated child to follow the same procedure to have the court set aside all other exempt property. The application must be supported by affidavit, and the applicant bears the burden of proof at any hearing on such application. [Code §271(b) & (c).] [EC §353.051(b) & (c).]

B. Independent Administration

These procedures are specifically applicable to an independent personal representative. Code §146(a)(4) [EC §403.001] gives an independent executor the power to set aside homestead and other exempt property without court involvement. [See **Form 12.**] Presumably, therefore, the portion of Code §271 [EC §353.051] which required a —~~ourt~~ order” applies only to dependent administrators.

If the independent executor files the necessary document in the probate case to set aside homestead and exempt property, that document should also be recorded in the deed records of the county where the land is located in order to give proper notice to third parties.

VIII. Conclusion

The claims process is perhaps the most difficult and confusing part of probate practice. The potential problems begin at the outset of a case when a decision is made as to whether the administration should be independent or dependent. That decision sets the path which must then be followed by the administrator, creditors and heirs/beneficiaries. Working through the administration and dealing with creditors' claims is

tricky because of the way the Probate Code (and soon the Estates Code) are written and organized. Hopefully this paper provides a more understandable way to navigate the trip between the death of a decedent and the distribution of property to the heirs or beneficiaries.

Form 1—Mandatory Notice to Creditors (General Notice)

NO. _____

**IN THE ESTATE OF
[DECEDENT],
DECEASED**

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**IN THE PROBATE COURT
NUMBER ____ OF
[COUNTY] COUNTY, TEXAS**

NOTICE TO CREDITORS

Notice is hereby given that original Letters Testamentary for the Estate of [DECEDENT], Deceased, were issued on [DATE], in Docket No. [CAUSE NO.], pending in Probate Court No. [NUMBER] of [COUNTY] County, Texas, to:

[EXECUTOR]

[ADDRESS]

All persons having claims against this Estate, which is currently being administered, are required to present them within the time and in the manner prescribed by law. All persons having claims should address them in care of the representative at the address stated above.

DATED the ____ day of _____, 20__.

Respectfully submitted,

[ATTORNEY SIGNATURE BLOCK]

PUBLISHER'S AFFIDAVIT

I solemnly swear that the above notice was published once in the [*NAME OF NEWSPAPER*], a newspaper printed in [*CITY*], [*COUNTY*] County, Texas, and of general circulation in said county, as provided in the Texas Probate Code for the service of citation or notice by publication, and the date that the issue of said newspaper bore in which said notice was published was [*DATE*]. A copy of the notice as published, clipped from the newspaper, is attached hereto.

Publisher

SWORN TO AND SUBSCRIBED BEFORE ME by _____, this _____ day of _____, 20 __, to certify which witness my hand and seal of office.

Notary Public in and for the State of Texas

Form 2—Mandatory Notice to Secured Creditor

[Date]

Via Certified Mail
Return Receipt Requested
No.

RE:

Dear:

Please be advised that [EXECUTOR] has been appointed as Independent Executor of the referenced Estate. I have enclosed a copy of Letters Testamentary for your file.

It has come to our attention that the Decedent may have been indebted to you at the time of death. You may also find that one of the obligors on the note, or the principal obligor, is the surviving spouse of Decedent, [SPOUSE], whose social security number is [NUMBER]. Please consider this your formal notice under Section 295 of the Probate Code [Section 308.053 of the Estates Code]. Also, please forward to me copies of the promissory note, any security agreements executed by the Decedent and/or [SPOUSE], a statement declaring the balance as of Decedent's date of death [DATE] and information concerning whether the note is ~~e~~urrent."

I have enclosed a return envelope for your convenience. Thank you for your cooperation.

Sincerely,

Form 3—Permissive Notice to Unsecured Creditor (Dependent Administration)

[Date]

Via Certified Mail
Return Receipt Requested
No.

RE:

Dear:

Notice is hereby given that original Letters Testamentary for the Estate of [DECEDENT], Deceased, were issued to [EXECUTOR] on [DATE] under Cause No. [NUMBER] pending in Probate Court No. [NUMBER], [COUNTY] County, Texas.

All persons having claims against the Estate of [DECEDENT], which is currently being administered, are required to present their claim as required by the Texas Probate Code [Texas Estates Code] to [EXECUTOR] in care of [his/her] attorney, [ATTORNEY], at _____, within four (4) months after the date of the receipt of this Notice or the claim is barred.

Please be advised that claims may also be presented by depositing the same with [COUNTY] County Clerk, [ADDRESS], within four (4) months after the date of the receipt of this Notice or the claim is barred.

Sincerely,

[EXECUTOR], Dependent Executor
of the Estate of [DECEDENT], Deceased

Form 4—Permissive Notice to Unsecured Creditor (Independent Administration)

[Date]

Via Certified Mail
Return Receipt Requested
No.

RE:

Dear:

Notice is hereby given that original Letters Testamentary for the Estate of [DECEDENT], Deceased, were issued to [EXECUTOR] on [DATE] under Cause No. [NUMBER] pending in Probate Court No. [NUMBER], [COUNTY] County, Texas.

All persons having claims against the Estate of [DECEDENT], which is currently being administered, are required to present their claim as required by the Texas Probate Code [Texas Estates Code] within four (4) months after the date of the receipt of this Notice or the claim is barred.

To be effectively presented, any claim must be made in compliance with Texas Probate Code §146(a-1) and (b-4) [Estates Code §§403.051 and 403.056(a)].

Sincerely,

[EXECUTOR], Independent Executor
of the Estate of [DECEDENT], Deceased

Form 5—Authenticated ["Secured" or "Unsecured"] Claim for Money

NO. _____

IN THE ESTATE OF
[DECEDENT],
DECEASED

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IN THE PROBATE COURT
NUMBER ____ OF
[COUNTY] COUNTY, TEXAS

AUTHENTICATED ["SECURED" OR "UNSECURED"] CLAIM FOR MONEY

I, _____, was owed the sum of _____ by Decedent at the date of death. I hereby file this Authenticated [~~Secured~~ OR ~~Unsecured~~] claim against the Estate within the time prescribed by the Texas Probate Code [Texas Estates Code].

Attached hereto as Exhibit A, and incorporated herein by reference, are true and correct copies of all documents that are necessary to support my claim.

[IF CLAIM IS SECURED, ADD]

My claim is secured by a certain Deed of Trust Lien on the property described as _____. A true and correct copy of the recorded Deed of Trust is attached hereto as Exhibit B and is incorporated herein by reference.

Further, I hereby elect to have my claim treated as [~~preferred debt and lien~~ OR ~~mat~~ured secured]. This claim is just, and all legal offsets, credits, and payments known to me have been allowed.

I hereby request allowance and payment of this claim as soon as is permitted by the Texas Probate Code.

Claimant

STATE OF TEXAS §
 §
COUNTY OF _____ §

Before me, the undersigned Notary Public, personally appeared _____, who, after being duly sworn, stated that all statements in the foregoing [~~secured~~ or ~~unsecured~~] claim are within his/her personal knowledge and are true and correct.

Notary Public, State of Texas

Form 6—Administrator’s Action on Claim

NO. _____

IN THE ESTATE OF
[DECEDENT],
DECEASED

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IN THE PROBATE COURT
NUMBER ____ OF
[COUNTY] COUNTY, TEXAS

ADMINISTRATOR’S ACTION ON CLAIM OF [NAME OF CREDITOR]

On the ____ day of _____, 20__, an Authenticated Unsecured [or ~~Secured~~] Claim was [~~ifed with the clerk~~ OR ~~presented to the Administrator~~].

Said claim is hereby [~~Rejected~~ OR ~~Allowed~~ OR ~~Rejected in Part and Allowed in Part~~] as follows:

[describe what was rejected/allowed]_____.

Administrator

Form 7—Proposed Court Order Approving and Classifying Claim

NO. _____

IN THE ESTATE OF
[DECEDENT],
DECEASED

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IN THE PROBATE COURT
NUMBER ____ OF
[COUNTY] COUNTY, TEXAS

ACTION OF COURT ON CLAIM OF [NAME OF CREDITOR]

On the ____ day of _____, 20__, came to be considered the Authenticated [~~Secured~~ OR ~~Unsecured~~] Claim of [CREDITOR].

The Court finds that said Claim was [~~filed in this cause~~ OR ~~presented to the Administrator~~] on the ____ day of _____, 20__.

The Court further finds that the Administrator of this Estate allowed the claim by written memorandum dated [DATE], which was filed in this cause on [DATE], and which has been on the claim docket of this Court for more than 10 days.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Claim of _____ is hereby Approved.

It is further ordered that the Claim of _____ is designated as a Class ____ Claim.

[IF CLAIM IS SECURED, ADD]

It is Further Ordered that, pursuant to the preference expressed by [CREDITOR], this Claim shall be treated as [~~Preferred Debt and Lien~~ OR ~~Matured Secured~~].

Signed this ____ day of _____, 20__.

JUDGE PRESIDING

Form 8—Application to Allow Payment of Claim

NO. _____

**IN THE ESTATE OF
[DECEDENT],
DECEASED**

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§
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§
§

**IN THE PROBATE COURT
NUMBER ____ OF
[COUNTY] COUNTY, TEXAS**

APPLICATION TO ALLOW PAYMENT OF CLAIM

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, [*NAME AND TITLE OF PERSONAL REPRESENTATIVE*], and files this Application to Allow Payment of Claim, and in support thereof shows:

1. The Claim of [*CREDITOR*] was approved by this Court on [*DATE*]. Based upon the classification of said Claim, there is sufficient cash in the estate to pay said Claim.
2. The Personal Representative respectfully requests permission of this Court to pay said claim pursuant to Texas Probate Code §320(d). [*Estates Code §355.106.*]

Wherefore, premises considered, [*NAME AND TITLE OF PERSONAL REPRESENTATIVE*] requests permission from this court to pay the Claim of [*CREDITOR*] and for such other and further relief to which the personal representative may be entitled.

Respectfully submitted,

[ATTORNEY SIGNATURE BLOCK]

Form 9—Order Directing Payment of Claim

NO. _____

**IN THE ESTATE OF
[DECEDENT],
DECEASED**

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§

**IN THE PROBATE COURT
NUMBER ____ OF
[COUNTY] COUNTY, TEXAS**

ORDER DIRECTING PAYMENT OF CLAIM

On the ____ day of _____, 20__, came on to be heard the Application to Allow Payment of Claim filed herein by [*NAME AND TITLE OF PERSONAL REPRESENTATIVE*]. After reviewing the Application, the Court finds that it is well-taken and that it should be granted.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that [*NAME AND TITLE OF PERSONAL REPRESENTATIVE*] shall pay the claim of [*CREDITOR*] within _____ days from the date of this order.

SIGNED this _____ day of _____, 20__.

JUDGE PRESIDING

Form 10—Request for Designation of Probate Homestead and Other Exempt Property

NO. _____

IN THE ESTATE OF
[DECEDENT],
DECEASED

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§
§
§
§

IN THE PROBATE COURT
NUMBER ____ OF
[COUNTY] COUNTY, TEXAS

REQUEST FOR DESIGNATION OF PROBATE HOMESTEAD AND OTHER EXEMPT PROPERTY

WHEREAS, [DECEDENT] died on _____, and left the undersigned as his/her surviving spouse [and left _____ as minor children, _____ as adult unmarried children remaining with the family of Decedent, and _____ as adult incapacitated children]; and

WHEREAS, [EXECUTOR] has been appointed by the Probate Court No. _____ of _____ Texas, as Dependent Executor of the Estate of [DECEDENT]; and

WHEREAS, [DECEDENT] died owning as his/her homestead and other exempt property the following:

[PROPERTY DESCRIPTION]

WHEREAS, the undersigned, as the surviving spouse of [DECEDENT] [and _____, minor children] is [are] entitled to have the homestead of his/her deceased spouse set aside to him/her/them under Section 271(a)(1) of the Texas Probate Code. [§353.051(a)(1) of the Texas Estates Code.]

WHEREAS, the undersigned, as the surviving spouse of [DECEDENT] [and _____, minor children, _____, adult unmarried children remaining with the family, and/or _____, as adult incapacitated children of Decedent] are entitled to have exempt personal property set aside to him/her/them under Section 271(a)(2) of the Texas Probate Code. [§353.051(a)(2) of the Texas Estates Code.]

NOW, THEREFORE, the undersigned requests that [EXECUTOR], Dependant Executor of the Estate of [DECEDENT], designate, set aside and deliver unto the undersigned as surviving spouse [and _____, minor children; _____, adult unmarried children remaining with the family of the Decedent; and _____, adult incapacitated children] of [DECEDENT], for his/her/their use and benefit during the remainder of his/her natural lifetime [and/or until the minor children reach majority], as provided by Section 272 of the Texas Probate Code [§353.052 of the Texas Estates Code], the homestead and other exempt property of [DECEDENT], being described more fully as follows along with to whom same is hereby to be set aside:

<u>Property Description</u>	<u>Party to Whom Set Aside</u>

Date: _____

Signature: _____
Surviving Spouse or Minor Child or
Unmarried Child Remaining with the
Family or Adult Incapacitated Child.

[IF FILED BEFORE THE FILING AND APPROVAL OF THE INVENTORY, APPRAISEMENT AND LIST OF CLAIMS, ADD THE FOLLOWING AFFIDAVIT]

STATE OF TEXAS §

COUNTY OF _____ §

Before me, the undersigned authority, personally appeared _____ [name of spouse] who swore on oath as follows:

—My name is _____. I am over the age of 18 years and am competent to make this affidavit.

—I have read the foregoing Request for Designation of Probate Homestead and Other Exempt Property. All of the allegations contained therein are within my personal knowledge and are true and correct.”

Further, Affiant sayeth not.

Affiant

SUBSCRIBED AND SWORN TO BEFORE ME on the ____ day of _____, 20__.

Notary Public in and for the State of Texas

Form 11—Order Designating Probate Homestead and Other Exempt Property (for Dependent Administrations Only)

NO. _____

IN THE ESTATE OF
[DECEDENT],
DECEASED

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§

IN THE PROBATE COURT
NUMBER ____ OF
[COUNTY] COUNTY, TEXAS

ORDER DESIGNATING PROBATE HOMESTEAD AND OTHER EXEMPT PROPERTY (FOR DEPENDENT ADMINISTRATIONS ONLY)

On the ____ day of _____, 20____, came on to be heard the Application for Designation of Probate Homestead and Other Exempt Property filed herein by _____. After reviewing the pleadings, and after hearing the arguments of counsel, the Court finds that such application is well taken and should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the following homestead property is hereby designated and set aside for _____ [SURVIVING SPOUSE] [and/or _____, minor children,] for his/her/their use and benefit during the remainder of his/her/their natural lifetime [and/or until the minor children reach majority] subject to all obligations corresponding to the exercise of his/her/their homestead rights as provided by law, that lot, tract, or parcel of land described below:

[PROPERTY DESCRIPTION]

IT IS FURTHER ORDERED that the following exempt personal property is hereby designated and set aside for _____ [SURVIVING SPOUSE] [and/or _____, minor children, adult unmarried children remaining with the family, and/or _____, adult incapacitated children of Decedent] for his/her/their use and benefit during the remainder of his/her/their natural lifetime [and/or until the minor children reach majority] as further described below:

[PROPERTY DESCRIPTION]

IT IS FURTHER ORDERED that the homestead and other exempt property is/are hereby set apart for the use and benefit of the spouse [and minor children, unmarried children remaining with the family and/or adult incapacitated children] forever free and clear of all unsecured debts of the estate and free and clear of any expenses of administration.

Signed this _____ day of _____, 20____.

JUDGE PRESIDING

Form 12—Designation of Probate Homestead and Other Exempt Property by Independent Executor

NO. _____

IN THE ESTATE OF
[DECEDENT],
DECEASED

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§
§
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§

IN THE PROBATE COURT
NUMBER ____ OF
[COUNTY] COUNTY, TEXAS

DESIGNATION OF PROBATE HOMESTEAD AND OTHER EXEMPT PROPERTY BY INDEPENDENT EXECUTOR

WHEREAS, [DECEDENT], died on [date of death]; and

WHEREAS, the undersigned has been appointed by the Probate Court No. _____ of _____ County, Texas, in Cause No. _____ as Independent Executor of the Will and of the Estate of the Decedent; and

WHEREAS, the Decedent left surviving him/her, his/her spouse, [SURVIVING SPOUSE] [add *and minor children , unmarried children remaining with the family and/or adult incapacitated children*]; and

WHEREAS, the undersigned, as the surviving spouse of [DECEDENT] [and _____, minor children] is [are] entitled to have the homestead of his/her deceased spouse set aside to him/her/them under Section 271(a)(1) of the Texas Probate Code. [§353.051(a)(1) of the Estates Code.]

WHEREAS, the undersigned, as the surviving spouse of [DECEDENT] [and _____, minor children, _____, adult unmarried children remaining with the family, and/or _____, as adult incapacitated children of Decedent] are entitled to have exempt personal property set aside to him/her/them under Section 271(a)(2) of the Texas Probate Code. [§353.051(a)(2) of the Texas Estates Code.]

NOW, THEREFORE, in consideration of the premises and under the authority vested in me as Independent Executor of the Estate of [DECEDENT], Deceased, and under authority of Section 146(a)(4) of the Texas Probate Code [§403.001 of the Texas Estates Code], the undersigned Independent Executor does hereby designate, set aside, and deliver unto [NAME OF SURVIVING SPOUSE], spouse of the Decedent [and (NAMES OF CHILDREN), minor children] for his/her/their use and benefit subject to all obligations corresponding to the exercise of his/her/their homestead rights as provided by law, that lot, tract, or parcel of land being described as follows:

[PROPERTY DESCRIPTION]

NOW, THEREFORE, in consideration of the premises and under the authority vested in me as Independent Executor of the Estate of [DECEDENT], Deceased, and under authority of Section 146(a)(4) of the Texas Probate Code [§403.001 of the Texas Estates Code], the undersigned Independent Executor does hereby designate, set aside, and deliver unto [SURVIVING SPOUSE], spouse of the Decedent [and (NAMES OF CHILDREN), minor children; (NAMES OF UNMARRIED CHILDREN REMAINING WITH THE FAMILY; and/or (NAMES OF ADULT INCAPACITATED CHILDREN)], for his/her/their use and benefit and subject to all obligations corresponding to the exercise of his/her/their exempt property rights as provided by law, the following exempt property:

[PROPERTY DESCRIPTION]

The homestead and other exempt property is hereby set apart for the use and benefit of the spouse [and minor children, unmarried children remaining with the family, adult incapacitated children] forever free and clear of all unsecured debts of the estate and free and clear of any expenses of administration.

IN WITNESS WHEREOF, this instrument is executed this ____ day of _____, 20__.

[EXECUTOR], Independent Executor
of the Estate of [DECEDENT], Deceased

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned Notary Public on this the ____ day of _____, 20__.

Notary Public In and For the State of Texas

