

**CREDITOR CLAIMS
IN INDEPENDENT AND DEPENDENT ADMINISTRATIONS**

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Table of Contents

CREDITOR CLAIMS IN INDEPENDENT AND DEPENDENT ADMINISTRATIONS

Introduction.	4
I. Notice, Notice, Notice.	4
A. General Notice to Creditors.	4
B. Notice to the Tax Man	4
C. Optional Actual Notice to Unsecured Creditors	4
D. Notice to Secured Creditors	5
E. One Notice Sufficient	6
F. Penalty for Failure to Give Notice	6
II. Creditor Claim Presentment	6
A. Dependent Administration	6
1. Formal Presentment.	6
2. Secured Creditors.	6
3. Exceptions to Presentment.	7
4. Presentment Required by Judgment Creditor.	8
5. Family Care-givers May Not Have a Reimbursement Claim.	8
B. Independent Administration	8
1. No Formal Presentment.	9
2. Unsecured Creditors.	9
3. Secured Creditors.	9
III. Claim Review Procedure	10
A. Dependent Administration	10
1. Form of Claim.	10
2. Form of Claim of Corporate Creditor.	10
3. Objections to Form of Claim.	10
4. Memorandum of Allowance or Rejection.	11
5. Contest, Action by Court, Appeals.	12
6. Suit on Rejected Claim.	13
7. Costs of Suit.	13
8. Claims Not Allowed After Partition.	13
B. Independent Administration	14
1. No Affidavit Required.	14
2. Payment of Claims / Statute of Limitations.	14

3.	Enforcement of Claim.	14
4.	Requiring Heirs to Give Bond.	15
5.	No Fiduciary Duty to Creditors.	15
IV.	Classification and Payment of Claims	15
A.	Classification	15
B.	Claim Payment	16
V.	Method of Handling Secured Claims	18
A.	Dependent Administration	18
1.	Matured Secured Claims.	18
2.	Preferred Debt and Liens.	18
3.	Foreclosure Process.	18
4.	Power of Sale Under Deed of Trust.	20
B.	Independent Administration	20
1.	Matured Secured Claims.	21
2.	Preferred Debt and Liens.	21
VI.	Methods of Handling Claims for Child Support.	21
VII.	Medicaid Estate Recovery Program.	24

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INTRODUCTION

The Texas Probate Code sections pertaining to creditor claims are often the most confusing and misunderstood statutes in the probate process. At first blush, there appears to be no rational organization or specific applicability to an independent or dependent administration. Hence, a clear understanding of the creditor claims process is imperative if we are to assist personal representatives, creditors, and beneficiaries through the maze of statutes.

This article will explore the rules for handling claims in independent and dependent administrations.

I. NOTICE, NOTICE, NOTICE

Regardless of the form of administration, all personal representatives are required to give notice to creditors. The forms of notice vary depending on the type of creditor.

A. General Notice to Creditors

Within one month after receiving letters, a personal representative (independent and dependent) is required to give notice to all persons having claims against the estate by publishing notice in a newspaper in the county in which the letters were issued. Tex. Prob. Code §294(a) (West 2011); Tex. Prob. Code §146(a)(1) (West 2011).

The notice shall include the following:

- the date of issuance of letters;
- the address to which claims may be presented; and

- an instruction as to whom the claim should be addressed. *Id.*

After the notice is published, the publisher will provide what is known as a publisher's affidavit which is required to be filed with clerk of the court where the estate is pending. Tex. Prob. Code §294(b) (West 2011).

B. Notice to the Tax Man

Within one month after receiving letters, the personal representative shall send notice to the comptroller of public accounts by certified or registered mail if the decedent remitted or should have remitted taxes to the comptroller. Tex. Prob. Code §294(a) (West 2011).

C. Optional Actual Notice to Unsecured Creditors

The Texas Probate Code has two provisions related to sending actual notice to an unsecured creditor essentially to force action on the part of the creditor to come forward with his claim or otherwise be barred. Originally, the legislature allowed the notice to be sent only by a dependent administrator. The law changed to make the notice provision available to an independent executor. The 2011 Legislature made some slight amendments to the language required in the notice by an independent executor.

1. Notice by Dependent Administrator

At any time before an estate administration is closed, the personal representative *may* give notice *by certified or registered 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 months* after the date of the receipt of the notice or the claim is barred, *if the claim is not barred by the*

general statutes of limitation. Tex. Prob. Code §294(d) (West 2011) (emphasis added).

The notice must include:

- (1) the dates of issuance of letters held by the representative;
- (2) the address to which claims may be presented; and
- (3) an 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). *Id.*

The manner in which the unsecured creditor must present his claim is discussed below.

2. Notice by Independent Executor

An independent executor may also give the notice permitted under Section 294(d) and bar a claim under that subsection. Tex. Prob. Code §146(a)(2) (West 2011).

To be effective, the notice must include the information required by Section 294(d) (set forth above) and *a statement that a claim may be effectively presented by only one of the methods prescribed by Section 146*. Tex. Prob. Code §146(a-1) (West 2011) (emphasis added). Those methods are as follows:

- (1) 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;

- (2) a pleading filed in a lawsuit with respect to the claim; or
- (3) a written instrument or pleading filed in the court in which the administration of the estate is pending.

Tex. Prob. Code §146(b-4) (West 2011). [*see also* Tex. Prob. Code §146(e) (West 2011)]

The unsecured creditor is required to give the independent executor notice of the nature and amount of the claim not later than the *120th day* after the date the notice is received or the claim is barred. Tex. Prob. Code §146(d) (West 2011). (Note that the unsecured creditor must respond to notice by a dependent administrator *within 4 months*. Therefore the due date could actually differ depending on whether the notice comes from a dependent administrator or an independent executor).

D. Notice to Secured Creditors

Within *two months* after receiving letters, the personal representative (independent and dependent) *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. Tex. Prob. Code §295(a) (West 2011) (emphasis added); Tex. Prob. Code §146(a)(1) (West 2011). Within a reasonable time after the personal representative obtains actual knowledge of the existence of a person having a secured claim for money and to whom notice was not previously given, the personal representative shall give notice to the person of the issuance of letters. *Id.*

The notice stating the original grant of letters shall be given by mailing it *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. Tex. Prob. Code §295(b) (West 2011) (emphasis added).

A copy of each notice and a copy of the return receipt and an affidavit of the representative, stating that said notice was mailed as required by law, giving the name of the person to whom the notice was mailed, if not shown on the notice or receipt, shall be filed with the clerk of the court from which letters were issued. Tex. Prob. Code §295(c) (West 2011).

The methods by which a secured creditor must respond to the notice are discussed below.

E. One Notice Sufficient

If the required notices have been given by a former representative, or by one where several representatives are acting, that notice is sufficient and need not be repeated by any successor or co-representative. Tex. Prob. Code §296 (West 2011).

F. Penalty for Failure to Give Notice

If the representative fails to give the required notices, the representative and the surety 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. Tex. Prob. Code §297 (West 2011).

II. CREDITOR CLAIM PRESENTMENT

A. Dependent Administration

1. Formal Presentment

In a dependent administration, the creditor is required to formally *present* a claim. Only a creditor who has a claim for money must

formally present a claim. Tex. Prob. Code §298 (West 2011). There are two methods of presentment:

(a) Direct Presentment to Representative

The creditor may present the claim directly to the personal representative. Tex. Prob. Code §298(a) (West 2011).

(b) Deposit With Clerk

Claims may be presented by depositing them with the clerk. Tex. Prob. Code §308 (West 2011). The clerk will notify the administrator of the filing of the claim. *Id.* However, failure by the clerk to give 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. *Id.*

The form of presentment is discussed below.

2. Secured Creditors

Within *six months* after the date letters are granted, or within four months after the date notice is received under Section 295, whichever is later, the secured creditor may present the creditor's claim and *shall* specify whether the claim is to be allowed and approved as a matured secured claim to be paid in due course of administration or whether it is desired to have the claim allowed, approved, and fixed as a preferred debt and lien against the specific property securing the indebtedness Tex. Prob. Code §306(b) (West 2011). If a secured claim is not presented within the time prescribed or if the claim is presented without specifying how the claim is to be paid, it shall be treated as a preferred debt and lien against the specific property securing the indebtedness. *Id.*

3. Exceptions to Presentment

A claim is considered to be a “claim for money” if the amount is fixed, definite, and susceptible of verification, including unmaturing monetary claims. *Dunn v. Sublett*, 14 Tex. 521 (1855); *Hume v. Perry*, 136 S.W. 594 (Tex. Civ. App. 1911, writ dismissed). There are numerous claims which are not considered to be claims for money and therefore do not have to be formally presented:

(a) Unliquidated Claims

An “unliquidated” claim does not need to be presented because, by definition, the amount cannot be ascertained with reasonable certainty.

(b) Tort Claims

A personal injury plaintiff does not need to present his claim for damages to the executor as prerequisite to bringing suit for such injuries. *Carter v. Kahler*, 902 S.W.2d 85 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (medical malpractice claim); *Wilder v. Mossler*, 583 S.W.2d 664 (Tex. Civ. App.—Houston 1979, no writ) (breach of fiduciary duty); *Allen v. Denk*, 87 S.W.2d 303 (Tex. Civ. App.—Austin 1935, no writ) (automobile negligence).

(c) Contract claims

A claim for damages for breach of contract which are unliquidated and uncertain need not be presented. *Evans’ Adm’r v. Hardeman*, 15 Tex. 480 (1855); *Bullion v. Campbell*, 27 Tex. 653 (1864); *Donaldson v. Taylor*, 713 S.W.2d 716 (Tex. App.—Beaumont 1986, no writ) (breach of warranty).

(d) Quantum Meruit Claims

Quantum meruit claims for services rendered need not be presented. *Wells v. Hobbs*, 122 S.W. 451 (Tex. Civ. App.—1909, no writ); *Moore v. Rice*, 80 S.W.2d 451 (Tex. Civ. App.—Eastland 1935, writ dismissed w.o.j).

(e) Specific Performance

Presentment is not a prerequisite to a suit for specific performance. See *Bullion v. Campbell & Strong*, 27 Tex. 653 (1864); *Robinson v. McDonald’s Widow & Heirs*, 11 Tex. 385 (1854).

(f) Title Claims

An action for possession and title to property due to an express vendor’s lien is not a claim for money requiring assertion through the probate courts. *Lusk v. Mintz*, 625 S.W.2d 774 (Tex. App.—Houston [14th Dist.] 1981, no writ). See also, *Walton v. First Nat’l. Bank of Trenton*, 956 S.W. 2d 647 (Tex. App.—Texarkana 1997, pet. denied).

(g) Administrator’s Claim

Presentment is not required where the administrator has a claim against the decedent. However, such claim must be filed with the court *within six (6) months* after the personal representative is qualified or such claim is barred. Tex. Prob. Code §317(a) (West 2011)(emphasis added).

(h) Claim by Heir or Beneficiary

A claim by any heir, devisee or legatee who claims in such capacity is not required to be presented. Tex. Prob. Code §317(c)(1) (West 2011).

(I) Claim Accruing During Administration

A claim accruing against the estate after the granting of letters for which the representative of the estate has contracted is not required to be presented. Tex. Prob. Code §317(c)(2) (West 2011). See also *Ullrich v. Anderson*, 740 S.W.2d 481 (Tex. App.—Houston [1st Dist.] 1987, no writ) (holding that a claim for accounting fees pursuant to a contract with an administrator was not required to be presented to the administrator and could therefore be acted upon by the court in the first instance).

(j) Claim for Delinquent Taxes

A claim for delinquent ad valorem taxes against a decedent's estate that is being administered in probate in (A) a county other than the county in which the taxes were imposed; or (B) the same county in which the taxes were imposed, if the probate proceedings have been pending for *more than four years* is not required to be presented. Tex. Prob. Code §317(c)(3) (West 2011)(emphasis added).

If the probate proceedings have been pending for four years or less in the county in which the taxes were imposed, the taxing unit has the option to present a claim for delinquent taxes against the estate in the probate proceedings. Tex. Prob. Code §5C(c) (West 2011). (From my experience, the taxing authorities try to avoid the probate courts like the plague!)

4. Presentment Required by Judgment Creditor

It would seem that one holding a valid judgment would be able to collect upon the judgment without going through the claims procedures. This is not the case. Judgment holders must comply with the presentment

requirements in the same manner as any other creditor holding a claim for money against the estate. *Harms v. Ehlers*, 179 S.W.2d 582, 583 (Tex. Civ. App.-Austin 1944, writ ref'd)(upon the death of a judgment debtor and an administration upon his estate, a judgment for a debt only, without the foreclosure of any lien property, ceases to have the usual force of a judgment, and becomes merely a claim to be established in the same manner as other claims for money); *First Nat. Bank of Bowie v. Cone*, 170 S.W. 2d 782, 783 (Tex. Civ. App.-Fort Worth 1943, writ ref'd); *Dent v. A. Harris & Co.*, 255 S.W. 221, 222 (Tex. Civ. App.-Dallas 1923, no writ).

5. Family Care-givers May Not Have a Reimbursement Claim

Where persons related by blood are living together as a household, services performed for the other are presumed to be gratuitous. *McFaddin v. Trahan*, 80 S.W. 2d 492, 493 (Tex. Civ. App.-Beaumont 1935, no writ). An express contract for remuneration must be shown, or circumstances must have existed which clearly show a reasonable and proper expectation or mutual intention that there would be compensation. *Id.* See also *Herbst v. Sheppard*, 995 S.W. 2d 310, 314-315 (Tex. App.-Corpus Christi 1999, writ denied).

B. Independent Administration

An independent executor, in the administration of an estate, independently of and without application to, or any action in or by the court is required to do only the following with respect to creditor claims:

- (1) give the notices required under Sections 294 and 295;
- (2) give, at his option, the notice permitted under Section 294(d) and bar a claim under

that subsection;

(3) approve, classify, and pay, or reject, claims against the estate in the same order of priority, classification, and proration prescribed in this Code; and

(4) set aside and deliver to those entitled thereto exempt property and allowances for support, and allowances in lieu of exempt property, as prescribed in this Code, to the same extent and result as if the independent executor's actions had been accomplished in, and under orders of, the court.

Tex. Prob. Code §146(a) (West 2011).

1. No Formal Presentment

In an independent administration, the creditor's claim does not have to meet the formal requirements applicable to creditors' claims in dependent administrations. *Ditto Investment Co. v. Ditto*, 293 S.W.2d 267, 269 (Tex. Civ. App.-Fort Worth 1956, no writ). Therefore, the creditor in an independent administration does not need to present his claim in the form prescribed in Section 301 of the Texas Probate Code. Tex. Prob. Code §146(b-7) (West 2011).

2. Unsecured Creditors

If the independent executor chooses to send the optional notice to an unsecured creditor, the unsecured creditor must simply give to the independent executor notice of *the nature and amount of the claim* not later than the 120th day after the date the notice is received or the claim is barred. Tex. Prob. Code §146(b-3) (West 2011). The differences between the form of the claim of an unsecured creditor in a dependent and an independent administration are discussed below.

As previously discussed, the unsecured creditor must notify the independent executor of his claim by one of the following methods:

(1) 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;

(2) a pleading filed in a lawsuit with respect to the claim; or

(3) a written instrument or pleading filed in the court in which the administration of the estate is pending.

Tex. Prob. Code §146(e) (West 2011).

3. Secured Creditors

Within six months after the date letters are granted or within four months after the date notice is received under Section 295 of this code, whichever is later, a creditor with a claim for money secured by real or personal property of the estate *must* give notice to the independent executor of the creditor's election to have the creditor's claim approved as a *matured secured claim* to be paid in due course of administration. Tex. Prob. Code §146(b) (West 2011)(emphasis added).

In 2011, the Texas Legislature added an additional requirement for a secured creditor with respect to presentment of his secured claim. In addition to giving the notice within the referenced period, a creditor whose claim is secured by real property *shall record a notice of the creditor's election under this subsection in the deed records of the county in which the real property is located. Id.* (emphasis added).

If no election to be a matured secured creditor is made, or the election is made, but not 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 as required within the prescribed period, 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, and the claim may not be asserted against other assets of the estate. *Id.*

Methods of handling secured claims are discussed below.

III. CLAIM REVIEW PROCEDURE

The claims review procedure differs between independent and dependent administrations.

A. Dependent Administration

1. Form of Claim

A claim presented in a dependent administration must meet certain formal requirements. A dependent administrator shall not allow, and the court shall not approve, a claim for money against the estate, unless such claim be supported by an affidavit that the claim is just and that all legal offsets, payments, and credits known to the affiant have been allowed. Tex. Prob. Code §301 (West 2011). If the claim is not founded on a written instrument or account, the affidavit shall also state the facts upon which the claim is founded. *Id.* A photostatic copy of any exhibit or voucher necessary to prove a claim may be offered with and attached to the claim in lieu of the original. *Id.* (emphasis added).

Compliance with Section 301 is mandatory. *W. P. Converse & Co. v. Sorely*, 39 Tex. 515,

528 (Tex. 1873)(a judgment not having been presented to the administrator in the mode and within the time prescribed by law was not legally established as a claim against the estate.)

2. Form of Claim of Corporate Creditor

An authorized officer or representative of a corporation or other entity shall make the affidavit required to authenticate a claim of such corporation or entity. Tex. Prob. Code §304 (West 2011). When an affidavit is made by an officer of a corporation, or by an executor, administrator, trustee, assignee, agent, representative, or attorney, it shall be 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 that all legal offsets, payments, and credits made known to the affiant have been allowed. *Id.*

A creditor bank has a right of offset against a decedent's funds on deposit without having to file a claim in probate. *See Bandy v. First State Bank of Overton*, 835 S.W.2d 609 (Tex. 1992).

3. Objections To Form of Claim

An administrator is deemed to have waived any defect of form or claim of insufficiency of exhibits or vouchers presented unless he makes written objections thereto within thirty (30) days of presentment and files them with the county clerk. Tex. Prob. Code §302 (West 2011).

(a) Is the defect "form" or "fatal"

In *City of Austin v. Aguilar*, 607 S.W.2d 310 (Tex. Civ. App.—Austin 1980, no writ), the City filed a claim which was rejected by the administrator. *Id.* at 311. When the City failed

to file suit within 90 days, the City argued that its own claim was a nullity because it was improperly presented due to a defect in the affidavit and that, therefore, the 90 day limitations period never began to run. *Id.* The court disagreed, concluding that when an administrator failed to object in writing that the claims were not authenticated by the city manager the defect was of *form* and waived, hence, rendering the claim *valid*. *Id.* at 312. (emphasis added). Therefore, the claims were barred when the creditor failed to file suit ninety days after rejection. *Id.*

On the other hand, in *Boney v. Harris*, 557 S.W.2d 376 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ), the creditor filed a claim in which the affidavit was defective. *Id.* at 377. The creditor failed to file suit within 90 days. *Id.* The court granted administrator’s motion for summary judgment on the issue of limitations. *Id.* On appeal, the Court reversed, holding that the rejection of an improperly verified claim did not set in motion the ninety day statute of limitations. *Id.* at 378, The court found that the failure to state that all “legal offsets, payments or credits have been allowed” rendered the claim void, and the statute of limitations does not run against a void claim. *Id.*

4. Memorandum of Allowance or Rejection

(a) 30 Days to Allow or Reject

When a duly authenticated claim against an estate is presented to the representative, or deposited with the clerk, the representative shall, within *thirty days* after the claim is presented or deposited, endorse thereon, annex thereto, or file with the clerk a memorandum signed by the representative, stating the date of presentation or depositing of the claim, and that the representative allows

or rejects it, or what portion thereof the representative allows or rejects. Tex. Prob. Code §309 (West 2011) (emphasis added).

(b) Deemed Rejection

The failure of a representative of an estate to timely allow or reject a claim under Section 309 constitutes a rejection of the claim. Tex. Prob. Code §310 (West 2011). If the claim is thereafter established by suit, the costs *shall* be taxed against the representative, *individually*, or the representative may be removed on the written complaint of any person interested in the claim, after personal service of citation, hearing, and proof, as in other cases of removal. *Id.* (emphasis added)

(c) No notice of rejection required

A creditor need not be notified of claim rejection. See *Russell v. Dobbs*, 354 S.W.2d 373, 376 (Tex. 1962)(petitioners knew that their claim had been filed with the clerk, and were charged with knowledge that the same would be deemed rejected by operation of law if no action was taken by the Administratrix within thirty days. They also should have known that the claim would be barred in the event suit was not instituted within ninety days after such rejection. The statutes contemplate that a creditor will keep himself informed as to the status of his claim and take the steps required by law to reduce the same to judgment).

What happens if there is a difference between the date of presentment and the date the claim is filed with the court? No case was found addressing the possible discrepancy. One court stated that a claim against an estate is deemed to have been rejected by the representative of the estate 30 days from the date of the *filing thereof*. *Green Mach. Co. v. Smithee*, 474 S.W.2d 279, 280 (Tex. Civ. App.--Amarillo

1971, no writ)(emphasis added); See also Tex. Prob. Code §308 (West 2011). Other courts state that failure to allow or reject a claim within thirty days after the claim is *presented* constitutes a rejection of the claim. *Pearson v. Bunting*, 423 S.W.2d 177, 179 (Tex. Civ. App.--Amarillo 1967) rev'd, 430 S.W.2d 470 (Tex. 1968); *Podgoursky v. Frost*, 394 S.W.2d 185, 189 (Tex. Civ. App.--San Antonio 1965, writ ref'd n.r.e.); *Stamps v. Varelas*, 313 S.W.2d 141, 141 (Tex. Civ. App.--San Antonio 1958, no writ). The safer course is to choose the *earliest* date and calendar the allowance/rejection deadline thirty days from that date.

(d) No Change of Heart

An administrator may not subsequently reject a claim previously allowed even if the court has not acted upon the claim. *Hensel v. International Bldg. and Loan Ass'n.*, 85 Tex. 215, 20 S. W. 116 (1892).

(e) Statute of Limitations Must be Honored

An administrator is expressly prohibited from allowing a claim that is barred by limitations. Tex. Prob. Code §298(b) (West 2011). If the administrator allows such a claim, and the court is satisfied that limitations has run, the court shall disapprove the claim. *Id.*

The general statutes of limitation are tolled on the date: (1) a claim is filed or deposited with the clerk; or (2) suit is brought against the personal representative on a claim that is not required to be presented to the personal representative. Tex. Prob. Code §299 (West 2011). The statute of limitations is not tolled by filing a suit to establish a claim which has not been properly presented. *Furr v. Young*, 578 S.W.2d 532, 536 (Tex. Civ. App.-Fort Worth 1975, no writ).

The general statute of limitations is tolled for a period of 12 months after a decedent's death or until an executor or administrator qualifies, whichever is first. Tex. Civ. Prac. & Rem. Code §16.062 (West 2011).

Assurances of payment by the administrator does not toll the statute of limitations. *Russell v. Dobbs*, 354 S.W.2d 373, 376 (Tex. 1962).

5. Contest, Action by Court, Appeals

(a) Contest of Claims

Any interested person may, at any time before the court has acted upon a claim, appear and object in writing to the approval of the same, or any part thereof, and in such case the parties shall be entitled to process for witnesses, and the court shall hear proof and render judgment as in ordinary suits. Tex. Prob. Code §312(a)(West 2011)(emphasis added)

“Interested persons” or “persons interested” means heirs, devisees, spouses, creditors, or any others having a property right in, or claim against, the estate being administered; and anyone interested in the welfare of an incapacitated person, including a minor. Tex. Prob. Code §3(r)(West 2011).

(b) Court's Action Upon Claims

All claims which have been allowed and entered upon the claim docket for a period of ten days shall be acted upon by the court and be either approved in whole or in part or rejected, and they shall also at the same time be classified by the court. Tex. Prob. Code §312(b) (West 2011).

(c) Hearing on Claims

Although a claim may be properly authenticated and allowed, if the court is not satisfied that it is just, the court shall examine the claimant and the personal representative under oath, and hear other evidence necessary to determine the issue. Tex. Prob. Code §312(c) (West 2011). If not then convinced that the claim is just, the court shall disapprove it. *Id.*

(d) Order of the Court

When the court has acted upon a claim, the court shall also endorse thereon, or annex thereto, a written memorandum dated and signed officially, stating the exact action taken upon such claim, whether approved or disapproved, or approved in part or rejected in part, and stating the classification of the claim. Tex. Prob. Code §312(d) (West 2011). Such orders shall have the force and effect of final judgments. *Id.*

(e) Appeal

When a claimant *or any person interested* in an estate shall be dissatisfied with the action of the court upon a claim, the claimant or person may appeal therefrom to the courts of appeals, as from other judgments of the county court in probate matters. Tex. Prob. Code §312(e) (West 2011) (emphasis added).

6. Suit on Rejected Claim

The creditor must institute suit on a rejected claim, in whole or in part, within ninety (90) days of its rejection or the claim is forever barred. Tex. Prob. Code §313 (West 2011). Suit is brought in the court where the administration is pending. *Howe State Bank v. Crookham*, 873 S.W.2d 745 (Tex. App.—Dallas 1994, no writ).

A claimant's judgment on a rejected claim will not allow any execution thereon, rather, the judgment shall be entered upon the claim docket, be classified and paid in the due course of administration. Tex. Prob. Code §313 (West 2011).

7. Costs of Suit

All costs incurred in the probate court with respect to claims shall be taxed as follows:

(a) If allowed and approved, the estate shall pay the costs.

(b) If allowed, but disapproved, the claimant shall pay the costs.

(c) If rejected, but established by suit, the estate shall pay the costs.

(d) If rejected, but not established by suit, the claimant shall pay the costs, except as provided by Section 310 (when a personal representative fails to endorse or annex memorandum). Tex. Prob. Code §315 (West 2011).

In suits to establish a claim after rejection *in part*, if the claimant fails to recover judgment for a greater amount than was allowed or approved, the claimant shall pay all costs. *Id.*

8. Claims Not Allowed After Partition

No claim for money against the estate shall be allowed and no suit shall be instituted against the representative on any claim after an order for final partition and distribution has been made. Tex. Prob. Code §318 (West 2011) After such an order has been made, the owner of any claim *not barred by the laws of limitation* 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 distributions from the estate. *Id.*

B. Independent Administration

1. No Affidavit Required

Common law provided that the various requirements for dependent administrations such as authentication, waived defects, depositing the claim with the clerk were not applicable to an independent administration. See *Fischer v. Britton*, 83 S.W.2d 305 (Tex. 1935); *Bunting v. Pearson*, 430 S.W.2d 470 (Tex. 1968). The 2011 Texas Legislature finally codified the issue. Except as otherwise provided by Section 146 of the Texas Probate Code, the procedural provisions of the Texas Probate Code governing creditor claims in supervised administrations do not apply to independent administrations. Tex. Prob. Code §146(b-7) (West 2011). By way of example, but not as a limitation, the Legislature gave two examples:

(1) Section 313 of the Texas Probate Code does not apply to independent administrations, and consequently a creditor's claim may not be barred solely because the creditor failed to file a suit not later than the 90th day after the date an independent executor rejected the claim or with respect to a claim for which the independent executor takes no action; and

(2) Sections 306(f)-(k) of this code do not apply to independent administrations.

2. Payment of Claims / Statute of Limitations

An independent executor, in the administration of an estate, may pay at any time and without personal liability a claim for money against the estate to the extent approved and classified by the personal

representative if:

(1) the claim is not barred by limitations; and

(2) at the time of payment, the independent executor reasonably believes the estate will have sufficient assets to pay all claims against the estate.

Tex. Prob. Code §146(c) (West 2011); *See also Rowland v. Moore*, 174 S.W.2d 248 (Tex. 1943) (executor has full powers to resolve creditor claims where will contains no restrictive terms on his authority).

Except as otherwise provided by Section 16.062 of the Texas Civil Practice and Remedies Code, the running of the statute of limitations shall be tolled only by a written approval of a claim signed by an independent executor, a pleading filed in a suit pending at the time of the decedent's death, or a suit brought by the creditor against the independent executor. In particular, the presentation of a statement or claim, or a notice with respect to a claim, to an independent executor does not toll the running of the statute of limitations with respect to that claim. Tex. Prob. Code §146(b-6) (West 2011)

3. Enforcement of Claim

A creditor may enforce the payment of his claim against an independent executor by suit. Tex. Prob. Code §147 (West 2011). When judgment is recovered against an independent executor or administrator, the execution of the judgment shall run against the estate of the decedent in the hands of the independent executor which is subject to such debt. *Id.* However, an independent executor is not required to file an answer until six (6) months have elapsed from the date that an independent administration is created and the

order appointing the independent executor is entered. *Id.*

4. Requiring Heirs To Give Bond

A creditor may petition the court to require all distributees, heirs and others entitled to any portion of the estate to execute a bond for an amount equal to the claim or the estate's full value, whichever is smaller. Tex. Prob. Code §148 (West 2011).

5. No Fiduciary Duty to Creditors

It is important to note that an independent executor does not owe a general legal duty of care to the unsecured creditor of an estate in the management of the estate's assets. *Mohseni v. Hartman*, 2011 WL 2304133 (Tex. App.—Houston [1st Dist.] 2011, no pet. h.) (not released for publication). In *Mohseni*, an unsecured creditor sued an independent executor for breach of fiduciary duty, negligence, fraud, and conversion. *Id.* at 1. The creditor claimed that the executor's misconduct caused the estate to lack sufficient funds to pay his claim. *Id.* The trial court granted the executor's summary judgment ruling that an independent executor owes no legal duty to an unsecured creditor of the estate. *Id.* The creditor appealed. The appellate court affirmed holding that an independent executor owes a fiduciary duty to the beneficiary of the estate but not to unsecured creditors of an estate in the management of the estate's assets. *Id.* at 3. Under Probate Code § 37 the beneficiaries have title to the estate subject to the payment of debts. *Id.* at 4. The executor thus holds the property in trust for the benefit of the title holders, not the creditors. *Id.* The creditor's remedy is to seek a judgment against the executor in his capacity as the estate administrator and seek execution against the estate's assets. *Id.* at 7.

IV. CLASSIFICATION AND PAYMENT OF CLAIMS

A. Classification

1. All Claims are Classified

In both independent and dependent administrations, claims must be classified. In an independent administration, the executor, without court involvement, classifies the claim. Tex. Prob. Code §146(a)(3) (West 2011). In a dependent administration, the court classifies the claim. Tex. Prob. Code §312 (West 2011).

2. The Classes

Claims against an estate are classified and have priority of payment, as follows:

Class 1. Funeral expenses and expenses of last sickness for a reasonable amount to be approved by the court, not to exceed a total of Fifteen Thousand Dollars, with any excess to be classified and paid as other unsecured claims.

Class 2. Expenses of administration and expenses incurred in the preservation, safekeeping, and management of the estate, including fees and expenses awarded under Section 243 of this code, and unpaid expenses of administration awarded in a guardianship of the decedent.

Class 3. 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.

Class 4. 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, Family Code, and claims for unpaid child support obligations under Section 154.015, Family Code.

Class 5. Claims for taxes, penalties, and interest due under Title 2, Tax Code; Chapter 8, Title 132, Revised Statutes; Section 81.111, Natural Resources Code; the Municipal Sales and Use Tax Act (Chapter 321, Tax Code); Section 451.404, Transportation Code; or Subchapter I, Chapter 452, Transportation Code.

Class 6. Claims for the cost of confinement established by the institutional division of the Texas Department of Criminal Justice under Section 501.017, Government Code.

Class 7. 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.

Class 8. All other claims.

Tex. Prob. Code §322 (West 2011).

3. Debts Due to the United States

The Texas Probate Code does not mention any amounts which may be owing to the United States government. However, a claim of the United States Government must be paid before all other debts of a deceased debtor. 31 U.S.C.A. §3713(a). A personal representative who does not give priority to the claims of the United States is personally liable therefor. 31 U.S.C.A. §3713(b). Government claims do not take priority over funeral and administrative expenses since these are not

debts of the Decedent. *United States v. Weisburn*, 48 F. Supp. 393 (E.D. Pa 1943); Rev. Rul. 80-112, 1980-1 C.B. 306. The family allowance also takes priority over government claims. *Schwartz v. Commissioner*, 560 F.2d 311 (8th Cir. 1977). Expenses of last illness are debts of the decedent and are inferior to claims due to the United States. Rev. Rul. 80-112, 1980-1 C.B. 306.

B. Claim Payment

(A) Claim Must First Be Established

A dependent administrator shall not pay a claim for money in the due course of administration until the claim is approved by the court or established by judgment. Tex. Prob. Code §319 (West 2011).

As previously stated, an independent executor, in the administration of an estate, may pay at any time and without personal liability a claim for money against the estate to the extent approved and classified by the personal representative if:

- (1) the claim is not barred by limitations; and
- (2) at the time of payment, the independent executor reasonably believes the estate will have sufficient assets to pay all claims against the estate.

Tex. Prob. Code §146(c) (West 2011)

(B) Order of Payment

The personal representative shall pay claims in the following order:

- (1) Funeral expenses and expenses of last sickness, in an amount not to exceed Fifteen Thousand Dollars.

(2) Allowances made to the surviving spouse and children, or to either.

(3) Expenses of administration and the expenses incurred in the preservation, safekeeping, and management of the estate.

(4) Other claims against the estate in the order of their classification.

Tex. Prob. Code §320(a) (West 2011).

3. Court Orders for Payment

(a) By Claimant Before Determination

A claimant whose claim has not been paid may petition the court for determination of his claim at any time before it is barred by the applicable statute of limitations and upon due proof procure an order for its allowance and payment from the estate. Tex. Prob. Code §320(c) (West 2011).

(b) By Creditor After Determination

Any creditor of an estate of a decedent whose claim, or part thereof, has been approved by the court or established by suit, may, at any time after twelve months from the granting of letters testamentary, upon written application and proof showing that the estate has on hand sufficient available funds, obtain an order directing that payment be made; or, if there are no available funds, and if to await the receipt of funds from other sources would unreasonably delay payment, the court shall then order sale of property of the estate sufficient to pay the claim; provided, the representative of the estate shall have first been cited on such written complaint to appear and show cause why such order should not be made. Tex. Prob. Code §326 (West 2011).

(c) By Personal Representative

After the sixth month 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 enforceable claims against the estate other than the claims already approved and classified by the court, the court may order the personal representative to pay any claim that is allowed and approved. Tex. Prob. Code §320(d) (West 2011).

4. Deficiency of Assets

When there is a deficiency of assets to pay all claims of the same class, other than secured claims for money, the claims in such class shall be paid pro rata, as directed by the court, and in the order directed. Tex. Prob. Code §321 (West 2011). No personal representative shall be allowed to pay the claims, whether the estate is solvent or insolvent, except with the pro rata amount of the funds of the estate that have come to hand. *Id.*

5. Failure to Pay Claim

If any representative of an estate fails to pay on demand any money ordered by the court to be paid to any person, except to the State Treasury, when there are funds of the estate available, the person or claimant entitled to such payment, upon affidavit of the demand and failure to pay, shall be authorized to have execution issued against the property of the estate for the amount due, with interest and costs; or upon return of the execution not satisfied, or merely upon the affidavit of demand and failure to pay, the court may cite the representative and the sureties on the representative's bond to show cause why they should not be held liable for such debt, interest, costs, and damages. Upon return of citation duly served, if good cause to the

contrary be not shown, the court shall render judgment against the representative and sureties so cited, in favor of the holder of such claim, for the amount theretofore ordered to be paid or established by suit, and remaining unpaid, together with interest and costs, and also for damages upon the amount neglected to be paid, at the rate of five per cent per month for each month, or fraction thereof, that the payment was neglected to be paid after demand made therefor, which damages may be collected in any court of competent jurisdiction. Tex. Prob. Code §328 (West 2011).

V. METHOD OF HANDLING SECURED CLAIMS

A. Dependent Administrations

1. Matured Secured Claims

If a claim has been allowed and approved as a matured secured claim, the claim shall be paid in due course of administration and the secured creditor is not entitled to exercise any other remedies in a manner that prevents the preferential payment of claims for funeral expenses and expenses of last illness up to \$15,000, allowances made to the surviving spouse or children, or expenses of administration. Tex. Prob. Code §306(c) (West 2011).

2. Preferred Debt and Liens

When an indebtedness has been allowed and approved as a preferred debt and lien, no further claim shall be made against other assets of the estate by reason thereof, but the same thereafter shall remain a preferred lien against the property securing same, and the property shall remain security for the debt in any distribution or sale thereof prior to final maturity and payment of the debt. Tex. Prob.

Code §306(d) (West 2011).

If property securing a claim allowed, approved, and fixed 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 thereof, and shall perform all the terms of any contract securing same. Tex. Prob. Code §306(e) (West 2011). If the representative defaults in such payment or performance, on application by such creditor, the court shall:

(1) require the sale of said property subject to the unmatured part of such debt and apply the proceeds of the sale to the liquidation of the maturities;

(2) require the sale of the property free of the lien and apply the proceeds to the payment of the whole debt; or

(3) authorize foreclosure by the claimholder as provided by Subsections (f) through (k) of Section 306. *Id.*

3. Foreclosure Process

(a) Affidavit

The secured creditor shall accompany the application for foreclosure with an affidavit which must:

(1) describe the property or part of the property to be sold by foreclosure;

(2) describe the amounts of the claimholder's outstanding debt;

(3) describe the maturities that have accrued on the debt according to the terms of the debt;

(4) describe any other debts secured by a mortgage, lien, or security interest against the property that are known by the claim holder;

(5) contain a statement that the claim holder has no knowledge of the existence of any debts secured by the property other than those described by the application; and

(6) request permission for the claim holder to foreclose the claim holder's mortgage, lien, or security interest. Tex. Prob. Code §306(f) (West 2011).

(b) Issuance of Citation

On the filing the application, the clerk shall issue citation by personal service to the personal representative and to any person described by the application as having other debts secured by a mortgage, lien, or security interest against the property and by posting to any other person interested in the estate. Tex. Prob. Code §306(g) (West 2011). The citation must require the person to appear and show cause why foreclosure should or should not be permitted. *Id.*

(c) Hearing on Application

When the application is filed, the clerk shall immediately notify the judge. The judge shall schedule in writing a date for a hearing on the application. Tex. Prob. Code §306(h) (West 2011). The judge may, by entry on the docket or otherwise, continue the hearing for a reasonable time to allow an interested person to obtain an appraisal or other evidence concerning the fair market value of the property that is the subject of the application. *Id.* If the interested person requests an unreasonable time for a continuance, the person must show good cause for the continuance. *Id.*

(d) Order to Be Entered

At the hearing, if the court finds that there is a default in payment or performance under the contract that secures the payment of the claim, the court shall:

(A) require the sale of the property subject to the unmaturing part of the debt and apply the proceeds of the sale to the liquidation of the maturities;

(B) require the sale of the property free of the lien and apply the proceeds to the payment of the whole debt; or

(C) authorize foreclosure by the claim holder. Tex. Prob. Code §306(i) (West 2011).

(e) Terms of Foreclosure

When the court grants a claim holder the right of foreclosure, the court shall authorize the claim holder to foreclose the claim holder's mortgage, lien, or security interest in accordance with the provisions of the document creating the mortgage, lien, or security interest or in any other manner allowed by law. *Id.* In the discretion of the court and based on the evidence presented at the hearing, the court may fix a minimum price for the property to be sold by foreclosure that does not exceed the fair market value of the property. *Id.* If the court fixes a minimum price, the property may not be sold at the foreclosure sale for a lower price. *Id.*

(f) Right of Appeal

Any person interested in the estate may appeal the order of foreclosure. Tex. Prob. Code §306(j) (West 2011).

(g) Unsuccessful Foreclosure.

If a foreclosure sale authorized under this section is conducted and the property is not sold because no bid at the sale met the minimum price set by the court, the claim holder may file another application. Tex. Prob. Code §306(k) (West 2011). The court may, in the court's discretion, eliminate or modify the minimum price requirement and grant permission for another foreclosure sale. *Id.*

4. Power of Sale Under Deed of Trust

(a) When No Administration is Pending but is Later Opened

A trustee's sale by a mortgagee made under a power of sale is not void but is *voidable* in the event a dependent administration is initiated within the four-year statutory period and the administration seeks to have the sale canceled. *Pearce v. Stokes*, 291 S.W.2d 309 (Tex. 1956).

(b) During The Pendency of A Dependent Administration

The power of sale under the deed of trust is suspended as long as the administration is pending and a non-judicial foreclosure sale by the mortgagee is *void*. *Id.*

(c) Temporary Administration

The power of sale is suspended even in a case where a temporary administration had not been made permanent. *Hury v. Preas*, 673 S.W.2d 949 (Tex. App.—Tyler 1984, writ ref'd n.r.e.).

(d) Value of Use of Property

The administrator may also “recover the value of the use of the property during the time the

mortgagee held the property” if the sale is set aside. *American Savings & Loan Ass'n v. Jones*, 482 S.W.2d 62 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.).

(e) Executory Contracts

A contract vendor cannot declare an executory contract of sale forfeited for nonpayment while the estate of the intestate vendee is pending but must file a claim with the probate court because contract of sale is a money claim. *Rivera v. Morales*, 733 S.W.2d 677 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.).

(f) When No Administration is Opened

A power of sale may be exercised and the purchaser's sale becomes absolute when more than four years have passed from the date of decedent's death and there has been no administration of the estate. *Pearce v. Stokes*, 291 S.W.2d 309 (Tex. 1956).

(g) Joint Obligation

The lien may be foreclosed against the surviving spouse's interest in the property if the debt is a joint and several obligation of both the husband and wife and the security is community property. *Albiar v. Arguello*, 612 S.W.2d 219 (Tex. Civ. App.—Eastland 1980, no writ).

B. Independent Administrations

The 2011 Texas Legislature amended Section 146 of the Texas Probate Code to address, in part, the handling of secured claims in independent administrations.

1. Matured Secured Claims

A claim approved as a matured secured claim under Section 146(b) remains secured by any lien or security interest against the specific property securing payment of the claim but subordinated to the payment from the property of claims having a higher classification under Section 322 of this code. However, the secured creditor:

(A) is not entitled to exercise any remedies in a manner that prevents the payment of the higher priority claims and allowances; and

(B) during the administration of the estate, is not entitled to exercise any contractual collection rights, including the power to foreclose, without either the prior written approval of the independent executor or court approval.

Tex. Prob. Code §146(b-1)(1) (West 2011).

The referenced section, however, may not be construed to suspend or otherwise prevent a creditor with a matured secured claim from seeking judicial relief of any kind or from executing any judgment against an independent executor. Tex. Prob. Code §146(b-1)(2) (West 2011). Except with respect to real property, any third party acting in good faith may obtain good title with respect to an estate asset acquired through a secured creditor's extrajudicial collection rights, without regard to whether the creditor had the right to collect the asset or whether the creditor acted improperly in exercising those rights during an estate administration due to having elected matured secured status. *Id.*

If a claim approved or established by suit as a matured secured claim is secured by property passing to one or more devisees in accordance with Section 71A of the Texas Probate Code,

the independent executor shall collect from the devisees the amount of the debt and pay that amount to the claimant or shall sell the property and pay out of the sale proceeds the claim and associated expenses of sale consistent with the provisions of Section 306(c-1) of the Texas Probate Code applicable to court supervised administrations. Tex. Prob. Code §146(b-1)(3) (West 2011) .

2. Preferred Debt and Liens

During an independent administration, a secured creditor whose claim is a preferred debt and lien against property securing the indebtedness under Section 146(b) of the Texas Probate Code is free to exercise any judicial or extrajudicial collection rights, including the right to foreclosure and execution; provided, however, that the creditor does not have the right to conduct a non-judicial foreclosure sale *within six months after letters are granted*. Tex. Prob. Code §146(b-2) (West 2011) (emphasis added).

VI. METHODS FOR HANDLING CLAIMS FOR CHILD SUPPORT

1. Child Support In Arrears at the Time of Decedent's Death

Unpaid child support is a "debt" that survives the death of the obligor and is payable by the decedent's estate. *Smith v. Bramhall*, 556 S.W.2d 112, 113 (Tex. Civ. App.–Waco 1977, writ ref'd n.r.e); Tex. Prob. Code § 37 (West 2011) (estate vests immediately in heirs at law subject to debts of the testator or intestate and *subject to the payment of court-ordered child support payments that are delinquent on the date of the person's death*)(emphasis added); Tex. Fam. Code § 154.013. Interestingly, in denying writ in *Bramhall* with the notation, "Refused. No Reversible Error," the Texas Supreme Court

stated that such action should not be interpreted as approving the conclusion of the Court of Civil Appeals that “unpaid child support is . . . a debt for which judgment may be taken.” The Court pointed out that Section 14.09(c) of the Texas Family Code (now repealed) provides only that unpaid child support may be reduced to judgment and enforced by the same means as a judgment for a debt, not that such sums are debts. *Smith v. Bramhall*, 563 S.W.2d 238, 239 (Tex. 1978); *See also Ex parte Shaver*, 597 S.W.2d 498, 500 (Tex. Civ. App.- Dallas, 1980, no writ) (it is well settled that the natural and legal duty of a parent to support his child is not a debt, but arises from the relationship.)

As is discussed below, the procedure for obtaining a judgment for post-death child support appears to require the court of continuing jurisdiction to determine the amount due. However, it is unclear whether such a procedure is required to recover for the amount of child support in arrears at the time of the obligor’s death. The obligee in *Bramhall* presented the claim to the executor and then filed suit within 90 days after the rejection. *Bramhall*, 556 S.W.2d at 113. On the other hand, Section 157.269 of the Texas Family Code provides:

A court that renders an order providing for the payment of child support retains continuing jurisdiction to enforce the order, including by adjusting the amount of the periodic payments to be made by the obligor or the amount to be withheld from the obligor's disposable earnings, until all current support and medical support and child support arrearages, including interest and any applicable fees and costs, have been paid.

Tex. Fam. Code §157.269 (West 2011) .

The proper jurisdiction for reducing the amount of child support in arrears to judgment appears to depend on the type of action brought by the obligee. If the obligee brings a Suit Affecting Parent-Child Relationship (SAPCR), jurisdiction lies in the family court. *Fleming v. Easton*, 998 S.W.2d 252 (Tex. App.–Dallas 1999, no pet.) (probate court had no jurisdiction over motion to enforce decree and to modify child support order); *Curtis v. Gibbs*, 511 S.W. 2d 263, 266 (Tex. 1974) (suit to remove custody restrictions and increase child support). If, however, the obligee treats the failure to pay child support as a *breach of contract* action, the obligee may bring the matter in the probate court or have the matter brought in family court transferred to the probate court. *Carson v. Korus*, 575 S.W.2d 326, 328 (Tex. Civ. App.–San Antonio 1979, no writ) (a suit to enforce the terms of a support agreement set forth in the decree by contempt proceedings or other remedies available for enforcement of a judgment must be brought under family code as a ‘suit affecting the parent-child relationship,’ but a suit to enforce the terms of such an agreement as contract terms is not one ‘brought under this subtitle,’ and, further, is not permitted unless the agreement provides that it may be enforced as a contract. If the contract does so provide, the suit may be brought, but it must be brought under the common law rather than ‘under this subtitle.’); *Fleming*, 998 S.W. 2d at 255.

2. Child Support Accruing After the Decedent’s Death

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. Tex. Fam. Code §154.015(b) (West 2011).

For purposes of §154.015, the *court of continuing jurisdiction shall determine the amount of the unpaid child support obligation* for each child of the deceased obligor. Tex. Fam.Code §154.015(c) (West 2011)(emphasis added). 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 benefit 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.

Tex. Fam. Code §154.015(c) (West 2011).

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. Tex. Fam. Code §154.015(d) (West 2011).

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.* Tex. Fam. Code §154.015(e) (West 2011)(emphasis added).

Section 322 of the Texas Probate Code makes the claims for unpaid child support under Tex. Fam. Code §154.015 a Class 4 claim. Tex. Prob. Code §322 (West 2011).

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. Tex. Fam. Code §154.015(f) (West 2011).

The court may order a child support obligor to obtain and maintain a life insurance policy that will establish an insurance funded trust or an annuity payable to the obligee for the benefit of the child that will satisfy the obligor's child support obligation in the event

of death. Tex. Fam. Code §154.016(a) (West 2011).

VII. MEDICAID ESTATE RECOVERY PROGRAM

[This subsection was borrowed from Molly Dear Abshire, Elder Law Planning and Issue Spotting, State Bar of Texas Medicaid 101, (November 30, 2011) with her permission.]

The Medicaid estate recovery was mandated by the Omnibus Budget Reconciliation Act of 1993 ("OBRA 1993"). The estate recovery provisions of that statute are codified at *42 U.S.C.A. §1396(p)(b)(1)*. The law mandates recovery for individuals who were 55 years of age or older at the time that they received the following services for which recovery is required; nursing home services, home and community-based services, and related hospital and prescription drug services. *42 U.S.C.A. §1396p(b)(1)(B)*. In addition to recovering for the mandated services, states have the option of recovering the costs of any and all items and services provided to the Medicaid client under the State Medicaid plan. *42 U.S.C.A. §1396p(b)(1)(B)(ii)*.

The purpose of this section is to provide a brief overview of the program and is not intended to be an exhaustive discussion on MERP and the strategies of defeating a MERP claim.

A. Applicability of Estate Recovery

In Texas, a Medicaid estate recovery claim may be filed against the estate of a deceased Medicaid recipient for Medicaid services if the recipient was 55 or older at the time the services were received and initially applied for Medicaid on or after March 1, 2005. *1 Tex. Admin Code §373.103(a)*.

Services covered under the estate recovery program include nursing home services, ICF-MR services, home and community-based waiver services (e.g., CBA, CLASS, etc.), certain Medicaid-funded attendant services, and related hospital and prescription drug services. *1 Tex. Admin Code §373.103(c)*. Acceptance of one of these Medicaid-funded covered services provides the basis for a Class 7 probate claim. *1 Tex. Admin Code §373.201*.

Note: A March 5, 2008 bulletin from Chicago Title to all of its agents and operators in Texas, advised them to pay all MERP claims without exception in order to insure title, effectively placing a lien on the property. DADS and HHSC were not aware of the existence of the memo. This Chicago Title memo has since been withdrawn.

B. Basis of the Claim

A MERP claim is considered a Class 7 probate claim under Section 322 of the Texas Probate Code. Class 7 claims are based on the acceptance of Medicaid medical assistance, as defined by Title XIX of the Social Security Act, including mandatory and optional payments under the Social Security Act.

C. Definition of Estate

The "estate" for MERP purposes is defined as real or personal property (including additions, accretions, and substitutions) which is included in the probate estate, as defined at §3(1), Texas Probate Code. *1 Tex. Admin Code §373.105(b)*. This is a key definition because it does not allow for recovery against non-probate assets, such as remainder interests and the interests of survivors in multi-party accounts. (i.e., POD or JTROS accounts).

D. Notice Requirements

Written notice of the MERP provisions will be provided to individuals for Medicaid-covered services with an application packet. The notice must contain a description of MERP, information as to covered Medicaid long-term care services subject to estate recovery, a description of the claim procedure found in Section 322 of the Texas Probate Code, information regarding transfer of asset penalties and the look-back period, and a description of the undue hardship procedures and information regarding the MERP Notice of Intent to File a Claim upon the death of the Medicaid recipient.

E. MERP Claim Procedure

The MERP Claims procedure begins when the program receives information regarding the death of a Medicaid recipient. Within 3 days after the receipt of such notification, MERP will send a Notice of Intent to File a Claim to the estate's personal representative and to other specified representatives and family members. *1 Tex. Admin Code §373.307(a)*. This notice will include a MERP questionnaire to be completed and returned to MERP. The purpose of this questionnaire is to gather information regarding the deceased beneficiary's estate, as well as to determine if a statutory exemption exists that would preclude estate recovery.

Within 60 days after the date of the Notice of Intent to File a Claim, the Undue Hardship Request must be made. *1 Tex. Admin Code §373.307(c)*. Also within 60 days, any requests for deductions from the amount of the claim must be made. Allowable deductions from the claim are for home maintenance or home care expenses. *1 Tex. Admin Code §373.213(a)*. Such requests must be supported with receipts and/or other written

documentation.

Within 40 days of the receipt of the request for an Undue Hardship Waiver, a determination of the waiver must be made. *1 Tex. Admin Code §373.209(e)*. If the waiver is denied, the person requesting the waiver has 60 days to request an informal review. *1 Tex. Admin Code §373.211(a)*. There is not a right to a hearing or an appeal of a denial of an Undue Hardship waiver.

Within 70 days after the date MERP has actual notice of the death, MERP files a claim "in accordance with applicable provisions in the Texas Probate Code." *1 Tex. Admin Code §373.203(b)*. That is, if there is an independent executor or administrator, it should not be filed in court but can be in any form and should go directly to the independent executor or administrator. If there is a dependent executor or administrator or a guardian, the claim must be filed in the probate court as a sworn claim meeting all of the requirements of the Texas Probate Code.

F. MERP Exemptions

The estate is exempt from recovery efforts if there is either a(n):

- Surviving spouse;
- Surviving child under age 21;
- Surviving blind/disabled child; or
- Unmarried adult child residing in the decedent's home continuously since at least 1 year prior to the decedent's death. *1 Tex. Admin Code §373.207(a)*.

There are also exemptions for certain assets of American Indians and/or Alaskan Natives *1*

Tex. Admin Code §373.207(b), or for government reparation payments to individuals in special populations. *1 Tex. Admin Code §373.207(d)*.

G. Undue Hardship Waivers

MERP will not recover from an estate if recovery would cause an undue hardship. An undue hardship does not exist solely because recovery would prevent heirs or legatees from receiving an anticipated inheritance or due to circumstances giving rise to a hardship created by, or the result of, estate planning methods under which assets were sheltered or divested contrary to requirements of Medicaid law in order to avoid estate recovery. *1 Tex. Admin Code §373.209(b)*.

The bases (i.e., grounds) for an undue hardship waiver are as follows:

- The estate has been operated as a family business, farm, or ranch for at least 12 months prior to decedent's death;
- The estate produces 50% or more of the income of the heirs/legatees; and recovery would cause heirs/legatee to lose their primary income source;
- Recovery would cause heirs/legatee to become eligible for public/medical assistance;
- Waiving recovery would allow one or more survivors to quit public/medical assistance;
- The decedent received Medicaid as a result of being a crime victim; or
- Other compelling reasons. *1 Tex.*

Admin Code §373.209(c).

There is no blanket exemption on the value of the homestead. However, up to \$100,000 of the tax value of the home may be exempt under undue hardship provisions if the following conditions are met: (1) siblings or lineal descendants of the decedent will inherit the home; and (2) each sibling or lineal descendant has gross family income of less than 300% of the federal poverty level ("FPL"). If the home will pass to multiple heirs not all of whom qualify for an undue hardship waiver, then only the percentage of the home that corresponds to the qualifying heir(s)'s share is exempt from recovery. *1 Tex. Admin Code §373.209(d)*.

For purposes of determining whether the 300% FPL threshold is met, the heirs are not aggregated into a single family. Rather each heir is considered separately. The term "family" is defined as follows: (1) for adults age 18 and older and emancipated minors, the family consists of the heir, the heir's spouse, and the heir's minor children (including step- and adopted-); (2) for children under age 18, the family consists of the heir, the heir's parent(s), the heir's stepparent, and the heirs minor siblings (including half-, step-, and adopted-) residing in the household. *1 Tex. Admin Code §373.307(d)(5)*.

The survivors have a right to a review of the denial of an undue hardship waiver request. The request for a review must be submitted within 60 days of the denial notice, and the review is an informal process - not a fair hearing. The MERP must review the request within 40 days of receipt. *1 Tex. Admin Code §373.211(a)*.

H. Deductions from the Claim

There are certain allowable deductions from the estate recovery claim. These are as follows: (1) reasonable and necessary expenses incurred in maintaining the decedent's home (i.e., property taxes, utility bills, homeowner's insurance, home repairs and lawn care; expenses incurred in paying the decedent's cost of care (including attendant care) that delayed nursing home entry. Supporting documentation (e.g., receipts) must be provided. *1 Tex. Admin Code §373.213.*

Requests for allowable deductions from the estate recovery claim must be submitted to the MERP within 60 days of receipt of the Notice of Intent to File Claim (after decedent's death).

I. Recovery Not Cost-Effective

Waivers of the estate recovery claim for lack of cost-effectiveness may be granted in the following situations:

- The value of the recoverable estate is \$10,000 or less;
- The recoverable Medicaid costs are \$3,000 or less; or
- The costs of selling the property equals or exceeds its value. *1 Tex. Admin Code §373.215.*