

CREDITOR'S CLAIMS IN ESTATE AND GUARDIANSHIP ADMINISTRATIONS

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This article will explore the rules and procedures for handling claims in both independent and dependent estate administrations as well as guardianship administrations in Texas.

I. OVERVIEW OF ESTATES CODE PROVISIONS

Before the Texas Estates Code became effective on January 1, 2014, the Texas Probate Code set forth provisions regarding estates and guardianships, which, although it was called a “code,” really was not a code. The Texas Probate Code sections pertaining to creditor claims were often confusing and misunderstood. It was at times unclear as to whether certain rules applied only to dependent administrations or whether they also applied to independent administrations. Over the last few sessions, and as a part of the process of codifying the new Estates Code, the Texas Legislature has made an effort to clarify which statutes apply to which type of administrations and evaluated procedures relating to secured creditors in independent administrations.¹

The Estates Code organizes creditor-related issues into the following sections:

- A. Notices to creditors: 308.051–308.056 (administrations), 1153.001–1153.005 (guardianships);
- B. Presentment and payment of claims: 355.001–355.203;
- C. Provisions relating specifically to independent administrations: 403.051–403.060; and
- D. Provisions relating specifically to guardianships: 1157.001–1157.202.²

1. See TEX. EST. CODE ANN. §§ 308.001, 403.051 (West 2014).

2. *Id.* §§ 308.051–.056, 355.001–.203, 403.051–.060, 1153.001–.005, 1157.001–.056.

II. NOTICES TO CREDITORS

A. Notice Is Required

The Estates Code requires all personal representatives (executors and administrators) and guardians of the estate to give notice to creditors.³ The forms of notice vary depending on the type of creditor.⁴

B. General Notice to Creditors

1. Dependent and Independent Executors and Administrators

Within one month after receiving letters, a personal representative of a decedent's estate (independent and dependent) and a guardian of the estate are 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.⁵ If the practitioner is unsure of which publication to use, most clerks' offices have a list of approved publications. The notice the executor or administrator publishes must include:

1. The date of issuance of letters;
2. The address to which one may send a claim; and
3. An instruction as to whom the claim should be addressed.⁶

After the publication of the notice, the publisher provides what is known as a publisher's affidavit, which the personal representative must file with the clerk of the court where the estate is pending.⁷

2. Guardians of the Estate

The notice provided by the guardian of the estate must include the following information:

1. The date of issuance of the letters of guardianship to the guardian;
2. The address where a claim may be presented; and
3. An instruction of the guardian's choice that the claim be addressed to: the guardian; the guardian's attorney; or Guardian, Estate of _____ (naming the estate).⁸

3. *Id.* §§ 308.051–.056

4. *See id.* §§ 308.051–.056.

5. *Id.* §§ 308.051, 403.051(a), 1153.001(a).

6. *Id.* § 308.051.

7. *Id.* § 308.052.

8. *Id.* § 1153.001(b).

After the publisher publishes the notice, the publisher provides what is known as a publisher's affidavit, which the guardian of the estate must file with clerk of the court where the guardianship process is pending.⁹

C. Notice to Comptroller

Within one month after receiving letters, the personal representative of a decedent's estate (both independent and dependent) and a guardian of the estate are required to send notice to the comptroller of public accounts by certified or registered mail if the decedent or ward remitted, or should have remitted, taxes to the comptroller.¹⁰

D. Actual Notice to Unsecured Creditors

Regardless of the type of estate administration, the executor or administrator may, but does not have to, give actual notice to unsecured creditors.¹¹

1. Notice by Dependent Administrator

Any time before an estate administration ends, the administrator may give notice to an unsecured creditor, by certified or registered mail, with return receipt requested, with a claim for money against the estate expressly stating that the creditor must present a claim no later than the 121st day after the date of the receipt of the notice, otherwise the claim is barred, if the claim is not barred by the general statutes of limitation.¹² The permissive notice to the unsecured creditor must include:

1. The date of issuance of letters the representative holds;
2. The address to which a creditor may present a claim; and
3. An instruction of the representative's choice that the claim be addressed to: (i) the representative; (ii) the representative's attorney; or (iii) Representative, Estate of (naming the estate).¹³

The article will discuss the manner in which the unsecured creditor must present his claim below.

2. Notice by Independent Executor

An independent executor may also give the notice permitted under section 308.054 and bar a claim under section 403.055.¹⁴ To be effective, the

9. *Id.* § 1153.002.

10. *Id.* §§ 308.051(a)(2), 1153.001(a)(2).

11. *See id.* §§ 308.054, 1153.004.

12. *Id.* § 308.054.

13. *Id.* § 308.054(b)(2).

14. *Id.* § 403.051(a)(2).

notice from an independent executor must include the information required by section 308.054 (set forth above) and a “statement that a claim may be effectively presented by only one of the methods” section 403.056 prescribes.¹⁵ The methods section 403.056 prescribes are as follows:

- (1) a written instrument that *complies with Section 355.004* and 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 that *complies with Section 355.004* or pleading filed in the court in which the administration of the estate is pending.¹⁶

The 2013 Texas Legislature added the italicized sections above, which represent a subtle but major change.¹⁷ The unsecured creditor who receives the permissive notice from an independent executor must present a claim in the same form as that required in dependent administrations if the creditor chooses to respond by methods (1) or (3) above.¹⁸

3. Notice by Guardian

While notice to unsecured creditors, other than published notice, is permissive to a personal representative of an estate, a guardian of the estate is required to send notice to an unsecured creditor who has a claim for money against the guardianship estate about which the guardian has actual knowledge within four months after he receives the letters of guardianship.¹⁹ The notice the guardian provides must be: (1) sent by certified or registered mail, return receipt requested; and (2) addressed to the record holder of the claim at their last known address.²⁰

[The guardian must file] in the court from which the letters of guardianship were issued:

- (1) a copy of each notice . . . with the return receipt; and
- (2) the guardian’s affidavit stating:
 - (A) that the notice was mailed as required by law; and
 - (B) the name of the person to whom the notice was mailed, if that name is not shown on the notice or receipt.²¹

15. *Id.* § 403.051(b).

16. *Id.* § 403.056 (emphasis added).

17. Tex. H.B. 2912, 83rd Leg., R.S., § 54 (2013).

18. See generally EST. § 403.056 (discussing notice requirements for creditors).

19. *Id.* § 1153.003(a)(2).

20. *Id.* § 1153.003(b)(1)–(2).

21. *Id.* § 1153.003(c)(1)–(2).

In addition,

[t]he guardian of the estate may expressly state in a notice given to an unsecured creditor under Section 1153.003(a)(2) that the creditor must present a claim not later than the 120th day after the date the creditor receives the notice or the claim is barred, if the claim is not barred by the general statutes of limitation. A statement under this section must include:

- (1) the address to which the claim may be presented; and
- (2) an instruction that the claim be filed with the clerk of the court that issued the letters of guardianship.²²

A claim may be barred if an unsecured creditor for money does not present it within the time section 1153.004 permits.²³

4. *To Whom Is Notice to an Unsecured Creditor Sent?*

The correspondence from an alleged creditor to the decedent or to her estate, or to a ward, often comes from collection agencies. When sending the permissive notice letter, should the personal representative or guardian send it to the collection agency or the creditor itself? The statutes simply state notice is sent to the “unsecured creditor having a claim for money against the estate.”²⁴ Arguably, if the creditor has hired a collection agency to be its agent, then notice to the agent should suffice.²⁵ The general rule is that notice an agent acquires “within his express, implied, or apparent authority, is notice to his principal.”²⁶ “If an agent’s acts are within the scope of his authority and are related to matters over which such authority extends, notice to the agent is then . . . notice to the principal.”²⁷ Therefore, it is probably sufficient for the executor to send notice to the collection agency.²⁸ However, if the executor is aware of the address for the underlying creditor, which one can usually obtain from a credit card statement, for example, it is good practice to send the notice letter to both the collection agency and the underlying creditor itself.²⁹

22. *Id.* § 1153.004(1)–(2).

23. *Id.* § 1157.060.

24. *Id.* § 308.054(a).

25. See *Casey v. Gibson Prods. Co.*, 216 S.W.2d 266, 269 (Tex. Civ. App.—Dallas 1948, writ dismissed); see also *Williams v. Jennings*, 755 S.W.2d 874, 883 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (discussing the scope of agencies in relation to permissive notice letters sent from a personal representative or guardian).

26. *Casey*, 216 S.W.2d at 269.

27. *Williams*, 755 S.W.2d at 883.

28. See *Casey*, 216 S.W.2d at 269; *Williams*, 755 S.W.2d at 883.

29. See generally Walter Wm. Hofheinz, *Wills, Probate, and Trust Drafting in Light of the Estates Code*, HOFHEINZ L. 11 (Apr. 25, 2014), https://hofheinzlaw.com/publications/GPI_Estates_Code_Drafting_140425.pdf (explaining that defective notice would likely give rise to a valid malpractice claim).

E. Notice to Secured Creditors

1. Notice to Secured Creditors by Estate Representatives

Within two months after receiving letters, the personal representative of a decedent's estate (independent and dependent) must give notice of the issuance of such letters to each and every person known by 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.³⁰ 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"³¹

The secured creditors must receive the notice letters by certified or registered mail, with return receipt requested, addressed to the record holder of such indebtedness or claim at their last known address.³² The representative must file a copy of each notice, a copy of the return receipt, and an affidavit of the representative stating that he mailed the notice as required by law, giving the name of the person the notice was mailed to if the name is not shown on the notice or receipt, with the clerk of the court who issued the letters.³³

The article discusses the methods by which a secured creditor must respond below.

2. Notice to Secured Creditors by Guardians of the Estate

The guardian of an estate must give notice, within four months, of the issuance of the letters to:

each person who has a claim for money against the ward's estate that is secured by a deed of trust, mortgage, or vendor's, mechanic's, or other contractor's lien on real estate belonging to the estate.³⁴

A guardian's notice to a secured creditor must be: (1) sent by certified or registered mail, return receipt requested; and (2) addressed to the record holder of the claim at their last known address.³⁵

The guardian must file the following in the court who issued the letters of guardianship:

30. TEX. EST. CODE ANN. §§ 308.053(a), 403.051(a)(1) (West 2014).

31. *Id.* § 308.053(b).

32. *Id.* § 308.053(c).

33. *Id.* § 308.053(d)(1)–(2).

34. *Id.* § 1153.003(a)(1).

35. *Id.* § 1153.003(b).

- (1) a copy of each notice . . . with the return receipt; and
- (2) the guardian's affidavit stating:
 - (A) that the notice was mailed as required by law; and
 - (B) the name of the person to whom the notice was mailed, if that name is not shown on the notice or receipt.³⁶

F. One Notice Sufficient

If the former representative or guardian gave the required notice, that notice is sufficient and the successor personal representative or guardian need not to repeat it.³⁷

G. Penalty for Failure to Give Notice

If the representative or guardian fails to give the required notices, the representative or guardian and the surety on the representative's or guardian's bond will be liable for any damages that any person suffers by reason of neglect, unless it appears that such person had notice otherwise.³⁸

III. PRESENTMENT OF A CREDITOR CLAIM

A. Time for Presentment

A creditor may present his claim to an estate personal representative at any time before the estate is closed, if the claim is not barred by the general statute of limitations.³⁹ A creditor may present a claim to the guardian of the estate at any time if the guardianship estate has not been closed and the statutes of limitations do not bar the suit on the claim.⁴⁰

B. To Whom a Claim Is Presented

1. Dependent Administration

In a dependent administration, the Estates Code requires the creditor to present a claim either directly to the administrator or by depositing the claim with the clerk.⁴¹ If the creditor files a claim with the clerk, the clerk must notify the administrator of the filing of the claim.⁴² However, failure by the clerk to give notice "does not affect the validity of the presentment or the

36. *Id.* § 1153.003(b)(1)–(2).

37. *Id.* §§ 308.055, 1153.005(a).

38. *Id.* §§ 308.056, 1153.005(b).

39. *Id.* § 355.001.

40. *Id.* § 1157.001.

41. *Id.* §§ 355.001–.002.

42. *Id.* § 355.002(a).

presumption of rejection” if the claim is not acted upon within thirty days after the creditor filed the claim.⁴³

2. *Independent Administration*

In an independent administration, the Estates Code does not require a creditor to present his claim to the executor, except that it requires the presentment to an executor or filing of notice of a claim if the creditor has received the permissive notice from the independent executor or administrator pursuant to section 403.051(a)(2) of the Estates Code.⁴⁴ The methods of presentation by an unsecured creditor who has received actual notice from the independent executor or administrator are set forth in section 403.056 of the Estates Code and were set forth above.⁴⁵ Otherwise, a creditor who has not received permissive notice would proceed directly to a lawsuit to prosecute his claim rather than go through a presentment process.⁴⁶

3. *Guardianship of the Estate*

Similar to a dependent administration, in a guardianship, the creditor may present a claim either directly to the guardian or by depositing the claim with clerk.⁴⁷ If a creditor files a claim with the clerk, the clerk has to notify the guardian of the filing of the claim.⁴⁸ 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 days after it is filed.⁴⁹

Except for a claim against the estate of a ward for delinquent ad valorem taxes being administered in probate in a county other than where the taxes were imposed, a court may not render a judgment “in favor of a claimant on a claim for money that has not been: (1) legally presented to the guardian of the estate of the ward; and (2) wholly or partly rejected by the guardian or the court.”⁵⁰

C. *Exceptions to Presentment*

Only a creditor who has a claim for money must present his claim prior to filing suit.⁵¹ A claim is a “claim for money” if the amount is fixed, definite,

43. *Id.* § 355.002(c).

44. *Id.* § 403.051(a)(2).

45. *Id.* § 403.056.

46. *Id.* § 403.059.

47. *Id.* § 1157.001.

48. *Id.* § 1157.002(a).

49. *Id.* § 1157.002(c).

50. *Id.* § 1157.064.

51. *Walton v. First Nat. Bank of Trenton*, 956 S.W.2d 647, 651 (Tex. Civ. App.—Texarkana 1997, pet. denied).

and susceptible of verification, including unmatured monetary claims.⁵² There are numerous claims that are not claims for money, and therefore, the creditor does not have to formally present them before the creditor files a suit.⁵³ The following are some examples.

1. *Unliquidated Claims*

A creditor does not have to present an “unliquidated” claim because, by definition, the amount cannot be ascertained with reasonable certainty.⁵⁴

2. *Tort Claims*

A personal injury plaintiff does not need to present his claim for damages to the executor as a prerequisite to bringing suit for such injuries.⁵⁵

3. *Contract Claims*

A creditor does not need to present a claim for damages for breach of contract that are unliquidated and uncertain.⁵⁶

4. *Quantum Meruit Claims*

A claimant does not need to present a quantum meruit claim for services rendered.⁵⁷

5. *Specific Performance*

Presentment is not a prerequisite to a suit for specific performance.⁵⁸

52. *Dunn v. Sublett*, 14 Tex. 521 (1855); *Hume v. Perry*, 136 S.W. 594 (Tex. Civ. App. 1911, writ diss’d).

53. *See Connelly v. Paul*, 331 S.W.2d 657, 659 (Tex. App.—Houston [1st Dist.] 1987, writ ref’d n.r.e.).

54. *See id.*

55. *Carter v. Kahler*, 902 S.W.2d 85 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (addressing a medical malpractice claim); *Wilder v. Mossler*, 583 S.W.2d 664 (Tex. Civ. App.—Houston 1979, no writ) (addressing breach of fiduciary duty); *Allen v. Denk*, 87 S.W.2d 303 (Tex. Civ. App.—Austin 1935, no writ) (addressing an automobile negligence claim).

56. *Evans’ Adm’r v. Hardeman*, 15 Tex. 480 (1855); *Bullion v. Campbell & Strong*, 27 Tex. 653 (1864); *Donaldson v. Taylor*, 713 S.W.2d 716 (Tex. App.—Beaumont 1986, no writ) (deciding breach of warranty).

57. *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 diss’d w.o.j.).

58. *See Bullion*, 27 Tex. at 653; *Robinson v. McDonald’s Widow & Heirs*, 11 Tex. 385 (1854).

6. Title Claims

An action for possession and title to property due to an express vendor's lien is not a claim for money.⁵⁹

7. Right of Set-Off

A bank with a right of set-off against a decedent's account can apply amounts on deposit to its claim without presenting a claim.⁶⁰

8. Injunctive Relief

In *Connelly v. Paul*, the court held that a claim against the intestate's estate seeking injunctive relief, as well as a declaration of rights under a purchase agreement and letter agreement in connection with an oil and gas lease, was not a liquidated claim for money that the creditor had to present to administrator before suit.⁶¹

9. Administrator's Claim

The Estates Code does not require presentment when the administrator has a claim against the decedent.⁶² However, such claims must be filed with the clerk within six months after the personal representative is qualified or the claim is barred.⁶³

10. Claim by Heir or Beneficiary

The Estates Code also does not require the presentment of a claim by any heir, devisee, or legatee.⁶⁴

11. Claim Accruing During Administration

The Estates Code does not require a creditor to present a claim accruing against the estate after the granting of letters for which the representative of the estate has contracted.⁶⁵

59. *Lusk v. Mintz*, 625 S.W.2d 774 (Tex. App.—Houston [14th Dist.] 1981, no writ); *see also* *Walton v. First Nat. Bank of Trenton*, 956 S.W.2d 647 (Tex. App.—Texarkana 1997, pet. denied).

60. *Bandy v. First State Bank of Overton*, 835 S.W.2d 609 (Tex. 1992).

61. *Connelly v. Paul*, 731 S.W.2d 657 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).

62. TEX. EST. CODE ANN. § 355.201(a) (West 2014).

63. *Id.* § 355.201(b).

64. *Id.* § 355.201(e)(1).

65. *Id.* § 355.201(e)(2); *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

12. Claim for Delinquent Taxes

Presentment is not a prerequisite for a claim for delinquent ad valorem taxes against a decedent's estate being administered in probate in a county other than the county in which the taxes were imposed, or the same county in which the taxes were imposed if the probate proceedings have been pending for more than four years.⁶⁶

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.⁶⁷ If the taxing unit presents a claim against the estate under section 34.002, then the taxing unit is subject to the claims procedures and may not bring a suit in any other court to foreclose the lien securing payment of the taxes or to enforce personal liability for the delinquent taxes before the first day after the fourth anniversary of the date the application for the probate proceeding was filed.⁶⁸ Taxing units almost always choose to file suit in the district court.⁶⁹ However, an executor may seek transfer of the tax suit to the probate court because it is a matter related to the estate.⁷⁰ Because the statute of limitations is rarely an issue in a tax collection case, the attorney for the governmental entity will often nonsuit the case if it is transferred to probate code and refile later.⁷¹ This is not always a good thing for the executor or administrator if she wants to close the estate and address all potential debts.

D. Presentment Required by Judgment Creditor

It would seem that one holding a valid judgment against a person who passes away could collect on the judgment without going through the claims procedures.⁷² However, this is not the case.⁷³ Judgment holders must comply with the presentment requirements in the same manner as any other creditor holding a claim for money against the estate.⁷⁴

was not required to be presented to the administrator and could, therefore, be acted upon by the court in the first instance).

66. EST. § 355.201(e)(3).

67. *Id.* § 34.002.

68. *Id.*

69. *Id.*

70. *Id.* § 34.001.

71. *Id.*

72. See generally *Harms v. Ehlers*, 179 S.W.2d 582, 583 (Tex. Civ. App.—Austin 1944, writ ref'd) (holding that 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).

73. See *Harms*, S.W.2d at 583; *Cone*, 170 S.W.2d at 783; *Dent*, 255 S.W. at 222.

74. *Harms*, S.W.2d at 583; *Cone*, 170 S.W.2d at 783; *Dent*, 255 S.W. at 222.

On the other hand, if the creditor has filed suit against the personal representative after the decedent's death and obtained a judgment in a court other than probate court, the creditor does not need to re-present his claim in probate court so long as the court in which the creditor obtained a judgment is a court of competent jurisdiction.⁷⁵ However, the claim would still need to be classified, and the Estate Code still limits the creditor's ability to collect on the judgment.⁷⁶ In the event a creditor files a suit against a personal representative in a court other than a probate court, the personal representative should consider filing a motion to transfer the case into the probate court, so as to assist in the orderly administration of the estate and the potential debts of the decedent.⁷⁷

E. Family Caregivers May Not Have a Reimbursement Claim

Services performed by people related by blood and who are living together are presumed to be gratuitous.⁷⁸ To overcome the presumption one must show an express contract for remuneration, or point to circumstances that clearly show a reasonable and proper expectation or mutual intention that there would be compensation.⁷⁹

F. Form of Presentment

1. Dependent Administration

a. Unsecured Creditors

A claim presented in a dependent administration must meet certain formal requirements.⁸⁰ A dependent administrator shall not allow, and the court shall not approve, a claim for money against the estate, unless an affidavit supports such claim showing that the claim is just and that all legal offsets, payments, and credits known to the affiant have been allowed.⁸¹ A photostatic copy of any exhibit or voucher necessary to prove a claim may be

75. See TEX. EST. CODE ANN. § 355.101 (West 2014).

76. See *id.*

77. See *id.*

78. See *McFaddin v. Trahan*, 80 S.W.2d 492, 493 (Tex. Civ. App.—Beaumont 1935, no writ).

79. *Id.*; *Herbst v. Sheppard*, 995 S.W.2d 310, 314–15 (Tex. App.—Corpus Christi 1999, writ denied).

80. See, e.g., TEX. EST. CODE ANN. §§ 355.059, 355.004(a) (West 2014).

81. *Id.* §§ 355.059, 355.004(a).

offered with and attached to the claim in lieu of the original.⁸² Compliance with section 355.004 is mandatory.⁸³

“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.”⁸⁴ When an officer of a corporation, executor, administrator, trustee, assignee, agent, representative, or attorney make an affidavit, it is sufficient to state in the affidavit that the person making it has made diligent inquiry and examination, and that he believes “the claim is just and that all legal offsets, payments, and credits made known to the affiant have been allowed.”⁸⁵

b. Secured Creditors

If a creditor presents a secured claim for money against an estate, the claimant must specify in the claim, in addition to all other matters required to be specified, whether the claimant desires to have the claim:

- (1) allowed and approved as a matured secured claim to be paid in due course of administration, in which case the claim shall be paid in that manner if allowed and approved; or
- (2) allowed, approved, and fixed as a preferred debt and lien against the specific property securing the indebtedness and paid according to the terms of the contract that secured the lien, in which case the claim shall be so allowed and approved if it is a valid lien.⁸⁶

A secured creditor must specify the manner in which he wants his claim within the later of six months after the date letters testamentary or of administration are granted, or four months after the date mandatory notice is received.⁸⁷ A secured claim for money that is not presented within the period prescribed or that is presented without specifying how the claim is to be paid is treated as a preferred debt and lien.⁸⁸

82. *Id.* § 355.004(b).

83. See *W. P. Converse & Co. v. Sorely*, 39 Tex. 515, 528 (Tex. 1873) (holding that 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).

84. EST. § 355.005.

85. *Id.*

86. *Id.* § 355.151(a).

87. *Id.* § 355.152(a).

88. *Id.* § 355.152(b).

2. *Independent Administration*

a. *Unsecured Creditors*

The requirement of the Estates Code for a formal authenticated claim does not apply in an independent administration.⁸⁹ However, if the creditor has received the permissive notice from the independent executor or administrator pursuant to section 403.051(a)(2) of the Estates Code, the creditor must respond in one of the following ways:

- (1) a written instrument that complies with Section 355.004 and 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 that complies with Section 355.004 or pleading filed in the court in which the administration of the estate is pending.⁹⁰

Otherwise, a creditor who has not received permissive notice must proceed directly to a lawsuit to prosecute his claim rather than go through a presentment process.⁹¹

b. *Secured Creditors*

The Estates Code now requires a secured creditor to present his claim in the same methods as prescribed for unsecured creditors who receive the permissive notice.⁹²

Within six months after the date letters are granted, or within four months after the date notice is received under Section 308.052, whichever is later, a creditor with a claim for money secured by 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 the due course of administration.⁹³

In 2011, the Texas Legislature added an additional requirement for a secured creditor with respect to presentment of his secured claim.⁹⁴ In

89. See *Alterman v. Frost Nat. Bank of San Antonio*, 675 S.W.2d 619, 621 (Tex. App.—San Antonio 1984, no writ) (holding that a letter from the bank to the executor was sufficient to present a claim in an independent administration).

90. TEX. EST. CODE ANN. § 403.056 (West 2014).

91. *Id.* § 403.059.

92. *Id.* § 403.056.

93. *Id.* § 403.052.

94. See *id.*

addition to giving notice within the referenced period, a creditor whose claim is secured by real property must record a notice of the creditor's election in the deed records of the county where the real property is located.⁹⁵

If no election to be a matured secured creditor is made, or if 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.⁹⁶

It is important for a secured creditor to give careful thought to the manner in which the court will likely treat his claim. By failing to act or by failing to timely act, a secured creditor's claim is automatically deemed to be a preferred debt and lien.⁹⁷ There are some instances when being a preferred debt and lien is clearly not "preferred."⁹⁸ A good example is *Cessna Finance Corporation v. Morrison*.⁹⁹ In that case, Frank Dye bought a plane from Cessna for \$360,745.80 to be paid in installments.¹⁰⁰ Cessna retained a security interest in the plane.¹⁰¹ About nine months later, the plane went down in the Bolivian jungle killing Mr. Dye and destroying the plane.¹⁰² Cessna filed a claim for \$213,888.55, which was the balance due on the note.¹⁰³ The administrator objected to the claim because Cessna failed to specify the manner in which it wanted its claim to be treated.¹⁰⁴ Cessna failed to cure the defect.¹⁰⁵ The administrator also rejected the claim in its entirety.¹⁰⁶ Cessna later filed for summary judgment.¹⁰⁷ Summary judgment was granted on the claim, but the claim was treated as a preferred debt and lien.¹⁰⁸ Thus, Cessna could not recover a judgment against the estate but instead was limited to a lien against the security.¹⁰⁹ On appeal, the court held

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Cessna Fin. Corp. v. Morrison*, 667 S.W.2d 580, 580 (Tex. App.—Houston [1st Dist.] 1984, no writ).

100. *Id.* at 581.

101. *Id.*

102. *Id.* at 582.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

that because Cessna did not make an affirmative election as to how it wished its claim to be treated, and when it failed to amend its claim in response to the administrator's objection, the probate court was authorized to treat the claim as a preferred debt and lien against the specific property.¹¹⁰ Thus, Cessna's only recourse was to try to salvage a destroyed, worthless plane in the Bolivian jungle.¹¹¹ Now there is an example of winning the battle and losing the war!

3. *Guardianship of the Estate*

a. *Unsecured Creditors*

Except as sections 1157.005 and 1157.102 provide, an affidavit must support a claim for money against a guardianship estate, and it must state:

- (1) that the claim is just;
- (2) that all legal offsets, payments, and credits known to the affiant have been allowed; and
- (3) if the claim is not founded on a written instrument or account, the facts on which the claim is founded.¹¹²

A creditor may offer a copy of an exhibit or voucher if it is necessary to prove a claim and attach it to the claim instead of attaching the original.¹¹³

The cashier, treasurer, or managing official of a corporation must make the affidavit that is required to authenticate a claim of the corporation.¹¹⁴ The affidavit may simply state that the affiant has made diligent inquiry and examination, and believes the claim is just and that all legal offsets, payments, and credits made known to the affiant have been allowed.¹¹⁵

Except as section 1157.102 provides, a guardian of the estate may not allow, and the court may not approve, a claim for money against the estate unless an affidavit supports the claim that meets the applicable requirements of sections 1157.004 and 1157.005.¹¹⁶

110. *Id.* at 583.

111. *Id.*

112. TEX. EST. CODE ANN. § 1157.004(a) (West 2014).

113. *Id.* § 1157.004(b).

114. *Id.* § 1157.005(a).

115. *Id.* § 1157.005(b).

116. *Id.* § 1157.059.

b. Secured Creditors

If a creditor presents a secured claim against a ward, the creditor must specify, in addition to all other matters required to be specified in the claim, whether the claim shall be:

- (1) allowed and approved as a matured secured claim to be paid in due course of administration, in which case the claim shall be paid in that manner if allowed and approved; or
- (2) allowed, approved, and fixed as a preferred debt and lien against the specific property securing the indebtedness and paid according to the terms of the contract that secured the lien, in which case the claim shall be so allowed and approved if it is a valid lien.¹¹⁷

If a creditor does not present the secured claim within the time provided by law, the claim will be a preferred debt and lien against the specific property securing the indebtedness.¹¹⁸

c. Lost or Destroyed Evidence Concerning Claim

The claimant or their representative may make an affidavit stating that evidence of a claim is lost or destroyed.¹¹⁹ The affidavit must state:

- (1) the amount, date, and nature of the claim;
- (2) the due date of the claim;
- (3) that the claim is just;
- (4) that all legal offsets, payments, and credits known to the affiant have been allowed; and
- (5) that the claimant is still the owner of the claim.¹²⁰

d. Claim by Guardian

A claim that a guardian of the person or estate held against the ward at the time of the guardian's appointment, or that accrues after the appointment, shall be verified by affidavit as required in other cases and presented to the clerk of the court in which the guardianship is pending.¹²¹ The clerk shall enter the claim on the claim docket and the claim shall take the same course as other claims.¹²²

117. *Id.* § 1157.151(a).

118. *Id.* § 1157.151(c).

119. *See id.* § 1157.006.

120. *Id.*

121. *Id.* § 1157.201(a).

122. *Id.*

e. Guardian May Not Purchase Claim

A guardian may not purchase for his or her own use or for any other purpose, a claim against the guardianship.¹²³ Any person interested in the guardianship estate may complain about such action, and on satisfactory proof of a violation by the guardian, after citation and hearing, the court shall enter an order canceling the claim.¹²⁴ No part of the canceled claim may be paid out of the guardianship.¹²⁵ “The court may [even] remove a guardian for a violation of this section.”¹²⁶

IV. ACTION UPON PRESENTED CLAIMS

A. *Objections to Form of Claim*

1. *Dependent Administration*

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 days of presentment and files them with the county clerk.¹²⁷

In *City of Austin v. Aguilar*, the city filed a claim that the administrator rejected.¹²⁸ When the city failed to file suit within ninety days, the city argued that its own claim was a nullity because it was improperly presented due to a defect in the affidavit and, therefore, the ninety-day limitations period never began to run.¹²⁹ The court disagreed, concluding that when the administrator failed to object in writing that the city manager failed to authenticate the claims, the defect was of form and waived, rendering the claim valid.¹³⁰ Therefore, the claims were barred when the creditor failed to file suit ninety days after rejection.¹³¹

On the other hand, in *Boney v. Harris*, the creditor filed a claim in which the affidavit was defective.¹³² The creditor failed to file suit within ninety days.¹³³ The court granted the administrator’s motion for summary judgment on the issue of limitations.¹³⁴ On appeal, the court reversed, holding that the

123. *Id.* § 1157.202(a).

124. *Id.* § 1157.202(b).

125. *Id.*

126. *Id.* § 1157.202(c).

127. *Id.* § 355.007.

128. *City of Austin v. Aguilar*, 607 S.W.2d 310, 311 (Tex. Civ. App.—Austin 1980, no writ).

129. *Id.*

130. *Id.* at 312.

131. *Id.*

132. *Boney v. Harris*, 557 S.W.2d 376, 377 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ).

133. *Id.*

134. *Id.*

rejection of an improperly verified claim did not set in motion the ninety-day statute of limitations.¹³⁵ 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.¹³⁶

In light of these different opinions, it may be more prudent for an administrator to reject a claim rather than object to the claim if there is a basis therefor.¹³⁷ This will at least insure that the timetable for creditor action is running.¹³⁸

2. *Independent Administration*

Unless the independent executor has sent the permissive notice letter, an unsecured claim does not need to take any particular form.¹³⁹ The independent administrator will allow the claim or reject the claim or take no action on the claim.¹⁴⁰ The unsecured creditor must file suit to enforce her claim.¹⁴¹

3. *Guardianship of the Estate*

A defect of form or a claim of insufficiency of a presented exhibit or voucher is considered waived by the guardian of the estate unless a written objection to the form, exhibit, or voucher is:

- (1) made not later than the 30th day after the date the claim is presented;
- and
- (2) filed with the county clerk.¹⁴²

B. *Allowance or Rejection of Claim in Whole or in Part*

1. *Dependent Administration*

a. *30 Days to Allow or Reject*

No later than the thirtieth day after the date an authenticated claim against the estate is presented to the representative or deposited with the clerk, the personal representative must endorse on the claim, attach to the claim, or file with the clerk a signed memorandum by the representative stating: “(1) the date the claim was presented or deposited; and (2) whether

135. *Id.* at 378.

136. *Id.*

137. *See id.*

138. *See id.*

139. *See supra* Part III.F.2.a.

140. *See* TEX. EST. CODE ANN. § 403.051 (West 2014).

141. *See id.* § 403.059.

142. *Id.* § 1157.007.

the representative allows or rejects the claim, or if the representative allows or rejects a part of the claim, the portion the representative allows or rejects.”¹⁴³

b. Deemed Rejection

“The failure of a personal representative to timely allow or reject a claim under Section 355.051 constitutes a rejection of the claim.”¹⁴⁴ If a suit after the rejection establishes the claim: “(1) the costs shall be taxed against the representative, individually; or (2) 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.”¹⁴⁵ Therefore, the personal representative should take some action one way or the other with respect to the claim.¹⁴⁶

c. No Notice of Rejection Required

An administrator does not need to notify the creditor of the claim rejection.¹⁴⁷ 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.”¹⁴⁸ 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.¹⁴⁹ The safer course is to choose the earliest date and calendar the allowance or rejection deadline thirty days from that date.

143. *Id.* § 355.051.

144. *Id.* § 355.052.

145. *Id.*

146. *See id.*

147. *See Russell v. Dobbs*, 354 S.W.2d 373, 376 (Tex. 1962) (finding that “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 Administrator 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.”). *Id.*

148. *Green Mach. Co. v. Smithee*, 474 S.W.2d 279, 280 (Tex. Civ. App.—Amarillo 1971, no writ); *see also* TEX. EST. CODE ANN. § 355.002 (West 2014).

149. *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).

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.¹⁵⁰

2. Independent Administration

Common law provided that the various requirements for dependent administrations such as authentication, waived defects, and depositing the claim with the clerk were not applicable to an independent administration.¹⁵¹ The 2011 Texas Legislature finally codified the issue.¹⁵² “Except as otherwise provided [in the code], the procedural provisions of [the Estates Code] governing creditor claims in supervised administrations do not apply to independent administrations.”¹⁵³ By way of example, but not as a limitation, the legislature provided two examples:

- (1) Sections 355.064 and 355.066 do 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 355.156, 355.157, 355.158, 355.149, and 355.160 do not apply to independent administrations.¹⁵⁴

However, as previously mentioned, the legislature amended the procedure for a secured creditor, or for an unsecured creditor who receives the permissive notice, so as to require an affidavit such as that required in a dependent administration, effective January 1, 2014.¹⁵⁵

3. Guardianship of the Estate

a. 30 Days to Allow or Reject

No later than the thirtieth day after the date an authenticated claim against the guardianship estate is presented to the guardian or deposited with the clerk, the guardian must endorse on the claim, attach to the claim, or file with the clerk a signed memorandum by the guardian stating: “(1) the date of presentation or filing of the claim; and (2) whether the guardian allows or

150. Hensel v. Int’l Bldg. & Loan Ass’n, 85 Tex. 215 (1892).

151. See Fischer v. Britton, 83 S.W.2d 305, 306 (Tex. 1935); Pearson, 430 S.W.2d at 472.

152. See TEX. EST. CODE ANN. § 403.058 (West 2014).

153. *Id.*

154. *Id.*

155. See *id.* § 403.056.

rejects the claim, or, if the guardian allows or rejects a part of the claim, the portion of the claim the guardian allows or rejects.”¹⁵⁶

b. Deemed Rejection

The failure of a guardian of the estate to endorse on or attach to a claim presented to the guardian the memorandum required by Section 1157.051 or, not later than the 30th day after the date a claim is presented, to allow or reject the claim or portion of the claim constitutes a rejection of the claim. If the claim is later established by suit:

- (1) the costs shall be taxed against the guardian, individually; or
- (2) the guardian may be removed as in other cases of removal on the written complaint of any person interested in the claim after personal service of citation, hearing, and proof.¹⁵⁷

c. Actions on Claims with Lost or Destroyed Evidence Void

A claim for which the evidence is lost or destroyed must be proved by disinterested testimony taken in open court or by oral or written deposition before it is approved.¹⁵⁸ The allowance or approval of the claim is void if the claim is allowed or approved without the affidavit under section 1157.006, or approved without satisfactory proof.¹⁵⁹

C. Representative Must Honor Statute of Limitations

1. Dependent Administration

The Estates Code expressly prohibits an administrator to allow a claim that the statute of limitations bars.¹⁶⁰ If the administrator allows such a claim, and the court is satisfied that limitations has run, the court shall disapprove the claim.¹⁶¹

“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.”¹⁶² The statute of limitations is not tolled by filing suit to establish a claim that has not been properly presented.¹⁶³ There is

156. *Id.* § 1157.051.

157. *Id.* § 1157.052.

158. *Id.* § 1157.062(a).

159. *Id.* § 1157.062(b).

160. *Id.* § 355.061; *Pinkston v. Pinkston*, 266 S.W.2d 515, 519 (Tex. Civ. App.—Waco 1954, writ ref’d n.r.e.).

161. *EST.* § 355.061.

162. *Id.* § 355.008.

163. *Furr v. Young*, 578 S.W.2d 532, 536 (Tex. Civ. App.—Fort Worth 1975, no writ).

some variation on the statute of limitations with respect to independent administrations, which is discussed below.¹⁶⁴

The general statute of limitations is tolled for a period of twelve months after a decedent's death or until an executor or administrator qualifies, whichever occurs first.¹⁶⁵ Assurance of payment by the administrator does not toll the statute of limitations.¹⁶⁶

2. *Independent Administration*

At any time and without personal liability, an independent executor may pay a claim for money against the estate to the extent approved and classified by the personal representative if the claim is not barred by the statute of limitations and the independent executor reasonably believes, at the time of payment, the estate will have sufficient assets to pay all claims against the estate.¹⁶⁷ Except as provided in section 16.062 of the Texas Civil Practice and Remedies Code, the running of the statute of limitations will only be tolled by written approval of the claim signed by an independent executor, a pleading that has been filed in a suit pending at the time of the decedent's death, or a suit against the independent executor that is brought by the creditor.¹⁶⁸ Specifically, "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."¹⁶⁹

3. *Guardianship of the Estate*

A creditor may present a claim to the guardian of the estate at any time so long as the general statutes of limitation do not bar the claim.¹⁷⁰ However, "[a] guardian of the estate may not allow a claim against a ward if a suit on the claim is barred by an applicable general statute of limitation."¹⁷¹ A claim against a ward allowed by the guardian "shall be disapproved if the court is satisfied that the limitation has run."¹⁷² "The general statutes of limitation are tolled by: (1) filing a claim that is legally allowed and approved; or (2) bringing a suit on a rejected and disapproved claim not later than the 90th day after the date the claim is rejected or disapproved."¹⁷³

164. See *infra* Part IV.C.2.

165. TEX. CIV. PRAC. & REM. CODE § 16.062 (West 2013).

166. Russell v. Dobbs, 354 S.W.2d 373, 376 (Tex. 1962).

167. TEX. EST. CODE ANN. § 403.0585 (West 2014); see also Rowland v. Moore, 174 S.W.2d 248 (Tex. 1943) (holding that an executor has full powers to resolve creditor claims where the will contains no restrictive terms on his authority).

168. EST. § 403.057.

169. *Id.*

170. *Id.* § 1157.001.

171. *Id.* § 1157.061.

172. *Id.*

173. *Id.* § 1157.008.

D. Contest, Action by Court, Appeals

1. Dependent Administration

a. Contest of Claims

Any time before the court has acted on a claim, any interested person may appear and object in writing to the approval of the claim, or any part of it; in such case, the parties are entitled to process for witnesses, and the court must hear evidence and render judgment as in ordinary suits.¹⁷⁴ An interested person means:

(1) an heir, devisee, spouse, creditor, or any other having a property right in, or claim against, the estate being administered; and (2) anyone interested in the welfare of an incapacitated person, including a minor.¹⁷⁵

b. Court's Action Upon Claims

The court must either approve, in whole or in part, or reject all claims that have been allowed and entered on the claim docket for a period of ten days; additionally, the court must classify the claim at the same time.¹⁷⁶

c. Hearing on Claims

Although a claim may be properly authenticated and allowed, if "the court is not satisfied that the claim is just, the court shall: (1) examine the claimant and the personal representative under oath; and (2) hear other evidence necessary to determine the issue."¹⁷⁷ If the court is not convinced that the claim is just, it must disapprove it.¹⁷⁸

d. Order of the Court

When acting on a claim, the court must endorse thereon, or annex thereto, a written memorandum dated and officially signed that states the exact action taken upon such claim, whether approved, in whole or in part, or disapproved, in whole or in part, and stating the classification of the claim.¹⁷⁹ These orders have the force and effect of final judgments.¹⁸⁰

174. *Id.* § 355.054.

175. *Id.* § 22.018.

176. *Id.* § 355.055.

177. *Id.* § 355.056.

178. *Id.*

179. *Id.* § 355.057.

180. *Id.*

e. Appeal

If a “claimant or any person interested in an estate . . . is dissatisfied with the court’s action on a claim, [the claimant or person] may appeal the action to the court of appeals, in a manner other judgments of the county court in probate matters are appealed.”¹⁸¹

2. Independent Administration

The court is not involved in the process of approving claims of unsecured creditors in an independent administration.¹⁸² Once suit is filed against the executor, the court will adjudicate the merits of the claim as part of the litigation.¹⁸³

3. Guardianship of the Estate

a. Claim Entered on Claim Docket

“After a claim against a ward’s estate has been presented to and allowed by the guardian of the estate, wholly or partly, the claim must be filed with the county clerk of the proper county.”¹⁸⁴ After filing, the clerk must enter the claim on the claim docket.¹⁸⁵

b. Contest of Claim

“A person interested in a ward may, at any time before the court has acted on a claim, appear and object in writing to the approval of the claim or any part of the claim.”¹⁸⁶ If a person objects, the parties are entitled to process for witnesses, and the court must hear evidence and render judgment as an ordinary suit.¹⁸⁷

c. Court’s Action on Claim

The court must either approve, in whole or in part, or reject all claims that have been allowed and entered on the claim docket for a period of ten days; additionally, the court must classify the claim at the same time.¹⁸⁸

181. *Id.* § 355.058.

182. *Id.* § 401.002.

183. *Id.*

184. *Id.* § 1157.053.

185. *Id.*

186. *Id.* § 1157.054(a).

187. *Id.* § 1157.054(b).

188. *Id.* § 1157.055.

d. Hearing on Certain Claims

If a claim is properly authenticated and allowed, but the court is not satisfied that the claim is just, the court shall:

- (1) examine the claimant and the guardian of the estate under oath; and
- (2) hear other evidence necessary to determine the issue.¹⁸⁹

If the court did not find the claim to be just after the examination, the court shall disapprove the claim.¹⁹⁰

e. Court Order Regarding Action on Claim

When acting on a claim, the court must endorse thereon, or annex thereto, a written memorandum dated and officially signed that states the exact action taken upon such claim, whether approved, in whole or in part, or disapproved, in whole or in part, and stating the classification of the claim.¹⁹¹ These orders have the force and effect of final judgments.¹⁹²

f. Appeal of Court's Action on Claim

"If a claimant or any person interested in a ward is dissatisfied with the court's action on a claim, the claimant or interested person may appeal the action to the court of appeals in the manner other judgments of the county court in probate matters are appealed."¹⁹³

E. Suit on Rejected Claim

1. Dependent Administration

The creditor must institute suit on a rejected claim, in whole or in part, within ninety days of its rejection, or the claim is forever barred.¹⁹⁴ A creditor should bring suit in the court where the administration is pending.¹⁹⁵ 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.¹⁹⁶

189. *Id.* § 1157.056(a).

190. *Id.* § 1157.056(b).

191. *Id.* § 1157.057(a).

192. *Id.* § 1157.057(b).

193. *Id.* § 1157.058.

194. *Id.* § 355.064.

195. *Howe State Bank v. Crookham*, 873 S.W.2d 745 (Tex. App.—Dallas 1994, no writ).

196. *EST.* § 355.066.

2. *Independent Administration*

A creditor may enforce the payment of his claim against an independent executor by filing suit.¹⁹⁷ When a judgment is recovered against an independent executor or administrator, “the execution of the judgment shall run against the estate of the decedent in the possession of the independent executor that is subject to the debt.”¹⁹⁸ However, the Estates Code does not require an independent executor to file an answer until six months have elapsed from the date that an independent administration is created and the court enters an order appointing the independent executor.¹⁹⁹

3. *Guardianship of the Estate*

If the guardian of the estate rejects a claim, in whole or in part, the claim, or part of the claim, is barred, unless:

not later than the 90th day after the date of rejection the claimant commences suit on the claim in the court of original probate jurisdiction in which the guardianship is pending or in any other court of proper jurisdiction.²⁰⁰

If the creditor commences suit on the rejected claim, “the memorandum endorsed on or attached to the claim is taken to be true without further proof unless denied under oath.”²⁰¹ Except for a claim against the estate of a ward for delinquent ad valorem taxes that is being administered in probate in a county other than where the taxes were imposed, “a judgment may not be rendered in favor of a claimant on a claim for money that has not been: (1) legally presented to the guardian of the estate of the ward; and (2) wholly or partly rejected by the guardian or the court.”²⁰²

Moreover, “[n]o execution may issue on a rejected claim or part of a claim that is established by suit.”²⁰³ Instead, the judgment in the suit shall be:

- (1) certified not later than the 30th day after the date of rendition, if the judgment is from a court other than the court of original probate jurisdiction;
- (2) filed in the court in which the guardianship is pending;
- (3) entered on the claim docket;
- (4) classified by the court; and

197. *Id.* § 403.059.

198. *Id.*

199. *Id.*

200. *Id.* § 1157.063(a).

201. *Id.* § 1157.063(b).

202. *Id.* § 1157.064.

203. *Id.* § 1157.065.

(5) handled as if originally allowed and approved in due course of administration.²⁰⁴

F. Costs of Suit

1. Dependent Administration

All costs incurred in the probate court in respect to such claims are taxed as follows:

1. If allowed and approved, the estate must pay the costs;
2. If allowed but disapproved, the claimant must pay the costs;
3. If rejected but established by suit, the estate must pay the costs;
4. If rejected but not established by suit, the claimant must pay the costs, except as provided by section 352.052 (when a personal representative fails to endorse or annex memorandum); and
5. 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 must pay all costs.²⁰⁵

2. Independent Administration

Section 355.111 of the Estates Code, set forth above, appears to apply to all suits on claims in probate court.²⁰⁶ Therefore, it appears the same rules on costs apply in an independent administration.²⁰⁷

3. Guardianship of the Estate

The taxation for costs incurred in the probate court with respect to a claim in a guardianship is as follows:

1. If allowed and approved, the guardianship estate must pay the costs;
2. If allowed but disapproved, the claimant must pay the costs;
3. If rejected but established by suit, the guardianship estate must pay the costs;
4. If rejected but not established by suit, the claimant must pay the costs; and
5. In a suit to establish the claim after the claim is rejected in part, if the claimant fails to recover judgment for a greater amount than was allowed or approved for the claim, the claimant must pay all costs.²⁰⁸

204. *Id.*

205. *Id.* § 355.111.

206. *See id.*

207. *Id.*

208. *Id.* § 1157.107.

V. CLASSIFICATION AND PAYMENT OF CLAIMS

A. *Dependent and Independent Administrations*

1. *Classification*

a. *All Claims Are Classified*

In both independent and dependent administrations, claims must be classified.²⁰⁹ In an independent administration, the executor, without court involvement, classifies the claim.²¹⁰ In a dependent administration, the court classifies the claim.²¹¹

b. *The Classes*

The law classifies and gives priority of payments to:

Class 1. “[F]uneral expenses and expenses of the decedent’s last illness for a reasonable amount to be approved by the court, not to exceed a total of \$15,000. Any excess shall be classified and paid as other unsecured claims.”

Class 2. “[E]xpenses of administration [and] expenses incurred in preserving, safekeeping, and managing the estate, including fees and expenses awarded under Section 352.052, and unpaid expenses of administration awarded in a guardianship of the decedent.”

Class 3. “[S]ecured claim[s] for money under Section 355.151(a)(1), including a tax lien, to the extent the claim can be paid out of the proceeds of the property subject to the mortgage or other lien. If more than one mortgage, lien, or security interest exists on the same property, the claims shall be paid in order of priority”

Class 4. “[C]laims 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. “[C]laims 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.”

209. *Id.* §§ 355.055, 403.051.

210. *Id.* § 403.051(a)(3).

211. *Id.* § 355.055.

Class 6. “[C]laims 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. “[C]laims 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. “[A]ll other claims not described above.”²¹²

c. Debts Due to the United States

The Estates Code does not mention any amounts that the estate may owe to the federal government.²¹³ However, an estate must pay a claim of the federal government before all other debts of a deceased debtor.²¹⁴ A personal representative who does not give priority to the claims of the federal government is personally liable.²¹⁵ Government claims do not take priority over funeral and administrative expenses because these are not debts of the decedent.²¹⁶ The family allowance also takes priority over government claims.²¹⁷ However, expenses of last illness are debts of the decedent and are inferior to claims due to the federal government.²¹⁸

In addition, the United States has the right to file suit under state law in state district court or file suit in United States district court, which has concurrent jurisdiction under 28 U.S.C. § 1345.²¹⁹

2. 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 a court approves the claim.²²⁰ 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 independent executor if:

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

212. *Id.* § 355.102.

213. *See id.*

214. 31 U.S.C. § 3713(a) (2012).

215. 31 U.S.C. § 3713(b).

216. *United States v. Weisburn*, 48 F. Supp. 393, 397 (E.D. Pa. 1943); Rev. Rul. 80-112, 1980-1 C.B. 306.

217. *Schwartz v. Comm’r*, 560 F.2d 311, 319 (8th Cir. 1977).

218. Rev. Rul. 80-112.

219. *Unites States v. Slate’s Estate*, 304 F. Supp. 380, 382 (S.D. Tex. 1969).

220. TEX. EST. CODE ANN. § 355.101 (West 2014).

- (2) at the time of payment, the independent executor reasonably believes the estate will have sufficient assets to pay all claims against the estate.²²¹

b. Order of Payment

The personal representative shall follow this order when paying claims:

1. Funeral expenses and expenses of last sickness, not to exceed \$15,000.
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.²²²

c. Court Orders for Payment

i. By Claimant Before Determination

“A claimant whose claim has not been paid may petition the court for determination of the claim at any time before the claim is barred by the applicable statute of limitations [and upon] due proof [procure] an order for the claim’s allowance and payment from the estate.”²²³

ii. 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, any time after the first anniversary dated from the granting of letters testamentary or administration, upon written application and proof showing that the estate has sufficient available funds on hand, obtain an order directing that payment be made.²²⁴ If there are no available funds, and if awaiting the receipt of “funds from other sources would unreasonably delay the payment, the court shall [then] order the sale of estate property sufficient to [pay the claim.]”²²⁵ The creditor must first cite the representative of the estate “to appear and show cause why such order should not be made.”²²⁶

221. *Id.* § 403.0585.

222. *Id.* § 355.103.

223. *Id.* § 355.105.

224. *Id.* § 355.107.

225. *Id.*

226. *Id.*

iii. By Personal Representative

Following 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, approved, and classified.²²⁷

3. 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.”²²⁸ In addition, no personal representative is allowed to pay the claims—whether the estate is solvent or insolvent—except with the pro rata amount of the funds of the estate in the representative’s possession.²²⁹ The “failure to pay the claims on an estate, or to pay the claims of creditors on a pro rata basis, [may subject] the executor to individual liability for such failure.”²³⁰

4. Failure to Pay Claim

A person or claimant, except the state treasury, who is entitled to payment of money from an estate that the court orders to be paid is authorized to have execution issued against the estate property in the full amount, including interest and costs, if:

- (1) the personal representative fails to pay the money on demand;
- (2) estate funds are available to make the payment; and
- (3) the person or claimant makes an affidavit of the demand for payment and the representative’s failure to pay.²³¹

The court may cite the personal representative and the sureties on the representative’s bond to show cause why the representative and sureties should not be held liable . . . for the debt, interest, costs, and damages:

- (1) on return of the execution not satisfied; or
- (2) on the affidavit of demand and failure to pay under Subsection (a).²³²

227. *Id.* § 355.106.

228. *Id.* § 355.108.

229. *Id.*

230. See *Ertel v. O’Brien*, 852 S.W.2d 17, 21 (Tex. App.—Waco 1993, writ denied).

231. EST. § 355.113(a).

232. *Id.* § 355.113(b).

On the return of citation served, if good cause is not shown why the representative and sureties should not be held liable, the court must render judgment in favor of the claim holder and against the cited personal representative and sureties.²³³ The judgment must be for:

- (1) the amount previously ordered to be paid or established by suit that remains unpaid, together with interest and costs; and
- (2) damages on the amount neglected to be paid at the rate of five percent per month for each month, or fraction of a month, that the payment was neglected to be paid after demand was made.²³⁴

The claim holder may collect damages in any court of competent jurisdiction.²³⁵

5. No Fiduciary Duty to Creditors

In *Mohseni v. Hartman*, an unsecured creditor sued an independent executor for breach of fiduciary duty, negligence, fraud, and conversion.²³⁶ The creditor claimed that the executor's misconduct caused the estate to lack sufficient funds to pay his claim.²³⁷ The trial court granted the executor's summary judgment motion, ruling that an independent executor owes no legal duty to an unsecured creditor of the estate.²³⁸ The creditor appealed.²³⁹ The appellate court affirmed, citing *FCLT Loans, L.P. v. Estate of Bracher*, holding that an independent executor owes a fiduciary duty to the beneficiaries of the estate, but not to unsecured creditors of an estate in the management of the estate's assets.²⁴⁰ Under section 37 of the Probate Code (now section 101.003 of the Estates Code), the beneficiaries have title to the estate subject to the payment of debts.²⁴¹ Thus, the executor holds the property in trust for the benefit of the titleholders, not for the creditors.²⁴² 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.²⁴³

233. See *id.* § 355.113(c).

234. *Id.*

235. *Id.* § 355.113(d).

236. *Mohseni v. Hartman*, 363 S.W.3d 652, 654 (Tex. App.—Houston [1st Dist.] 2011, no pet.).

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 675 (citing *FCLT Loans, L.P. v. Estate of Bracher*, 93 S.W.3d 469, 480–81 (Tex. App.—Houston [14th Dist.] 2002, no pet.)).

241. *Id.*

242. *Id.*

243. *Id.* at 659.

B. Payment of Claims in Guardianship of the Estate

1. Payment of Approved or Established Claim

Unless a guardian provides for payment of an authenticated claim at the guardian's own risk, "a claim or any part of a claim for money against the estate of a ward may not be paid until the claim or part of the claim has been approved by the court or established by the judgment of a court of competent jurisdiction."²⁴⁴

2. Payment of Unauthenticated Claim

A guardian of the estate may pay an unauthenticated claim against the ward's estate if he believes the claim is just.²⁴⁵ A guardian who pays a claim and the sureties on the guardian's bond are liable for the amount of any payment of the claim if the claim is found not just by the court.²⁴⁶

3. Priority of Payment of Claims

The estate's guardian must pay a claim against the estate that has been allowed and approved or established by suit, in the following order:

- (1) expenses for the care, maintenance, and education of the ward or the ward's dependents;
- (2) funeral expenses of the ward and expenses of the ward's last illness, if the guardianship is kept open after the ward's death as provided under this title, except that any claim against the ward's estate that has been allowed and approved or established by suit before the ward's death shall be paid before the funeral expenses and expenses of the last illness;
- (3) expenses of administration; and
- (4) other claims against the ward or the ward's estate.²⁴⁷

In the event the estate is insolvent, "the guardian shall give first priority to the payment of a claim relating to the administration of the guardianship. The guardian shall pay other claims against the ward's estate in the order prescribed [above]."²⁴⁸

244. TEX. EST. CODE ANN. § 1157.101 (West 2014).

245. *Id.* § 1157.102(a).

246. *Id.* § 1157.102(b).

247. *Id.* § 1157.103(a).

248. *Id.* § 1157.103(b).

4. *Payment of Proceeds from Sale of Property Securing Debt*

If a guardian of the estate has on hand the proceeds of a sale made to satisfy a mortgage or other lien and the proceeds or any part of the proceeds are not required for the payment of any debts against the estate that have a preference over the mortgage or other lien, the guardian shall pay the proceeds to a holder of the mortgage or other lien.²⁴⁹

If the guardian fails to pay the proceeds as required by this section, the holder of a mortgage or other lien, on proof of the mortgage or other lien, may obtain an order from the court directing the payment of proceeds to be made.²⁵⁰

5. *Claimant's Petition for Allowance and Payment of Claim*

A claimant who has not been paid may: (1) petition the court for a determination of the claim any time before the claim is barred by the statute of limitations; and (2) procure an order on due proof for the claim's allowance and payment from the estate.²⁵¹

6. *Payment When Assets Insufficient to Pay Certain Claims*

If there are not sufficient assets for all claims of the same class to be paid, the claims in that class must be paid pro rata, as directed by the court and in the order directed.²⁵² Moreover, "[a] guardian of the estate may not be allowed to pay any claims other than with the pro rata amount of the estate funds that have come into the guardian's possession, regardless of whether the estate is solvent or insolvent."²⁵³

7. *Liability for Nonpayment of Claim*

Except the state treasury, a claimant entitled to payment from a guardianship estate of money that the court orders to be paid is authorized to have execution issued against the property of the guardianship for the amount due, with interest and costs, if:

- (1) a guardian of the estate fails to pay the money on demand;
- (2) guardianship estate funds are available to make the payment; and

249. *Id.* § 1157.104(a).

250. *Id.* § 1157.104(b).

251. *Id.* § 1157.105.

252. *Id.* § 1157.106(a).

253. *Id.* § 1157.106(b).

(3) the person or claimant makes an affidavit of the demand for payment and the guardian's failure to pay.²⁵⁴

In order to show cause why the guardian or sureties should not be held liable for debt, interest, costs, or damages, the court can cite the sureties and the guardian on the guardian's bond: "(1) on return of the execution under Subsection (a) not satisfied; or (2) on the affidavit of demand and failure to pay under Subsection (a)."²⁵⁵ On the return of citation, if good cause is not shown why the representative and sureties should not be held liable, the court must render judgment in favor of the claim holder and against the cited personal representative and sureties for:

- (1) the unpaid amount ordered to be paid or established by suit, with interest and costs; and
- (2) damages on the amount neglected to be paid at the rate of five percent per month for each month, or fraction of a month, that the payment was neglected to be paid after demand for payment was made.²⁵⁶

The creditor may collect damages in any court of competent jurisdiction.²⁵⁷

VI. MISCELLANEOUS ISSUES UPON CLOSING OF ESTATES

A. *Claims Not Allowed After Partition*

No claim for money against the estate will be allowed and no suit can be instituted against the representative on any claim after an order for final partition and distribution has been made.²⁵⁸ After such an order has been made, the owner of any claim not barred by the statutes of limitation shall have an action thereon against the heirs, devisees, legatees, or creditors of the estate, limited to the value of the property they received in distributions from the estate.²⁵⁹

254. *Id.* § 1157.108(a).

255. *Id.* § 1157.108(b).

256. *Id.* § 1157.108(c).

257. *Id.* § 1157.108(d).

258. *Id.* § 355.063.

259. *Id.*

B. 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.²⁶⁰

C. Garnishment of Estate Assets

Funds and properties in the hands of executors and administrators and subject to the control of the court appointing such fiduciaries are in custody of law and are exempt from garnishment.²⁶¹ A legacy in a will is a gift by the testator, not a debt against the estate, nor is the executor or administrator prior to an order of distribution a debtor of the legatee or distributee.²⁶² "When an estate is being administered in the probate court, . . . neither a legacy nor a distributive share is subject to garnishment prior to an order of distribution or settlement of the estate."²⁶³ The reason is that "until an order of distribution is made, the distributee or legatee has no present right to or interest in the property in the hands of the executor or administrator; it is uncertain and contingent whether he shall receive anything, and, if so, what amount."²⁶⁴

Where the reason for the rule fails, the rule fails as well. Thus, where a "court has entered a decree for payment or distribution, or where, in view of the proceedings in the administration . . . nothing remains for the custodian . . . to do except to make payment or delivery to the person entitled, . . . the exemption from garnishment [ends]."²⁶⁵ However, it is incumbent on the garnishor to show that, at the time the personal representative was required to answer the writ of garnishment, the administration of the estate had proceeded so far that the amount owing the legatee or distributee had been definitely ascertained and its payment decreed.²⁶⁶ If a deceased debtor's property is in the hands of devisees or distributees, a creditor may establish its debt by suit and subject the property to garnishment.²⁶⁷

260. *Id.* § 403.060.

261. *Huggins v. Phillips*, 275 S.W. 1084, 1086 (Tex. Civ. App.—Waco 1925, writ dismissed w.o.j.).

262. *Alexander v. Berkman*, 3 S.W.2d 864, 870–71 (Tex. Civ. App.—Waco 1927, writ refused).

263. *Id.* at 871.

264. *Id.*; see also TEX. EST. CODE ANN. § 101.003 (West 2014) (explaining that the interest of a beneficiary is subject to the administration of the estate).

265. *Huggins*, 275 S.W. at 1086.

266. *Downs v. Cason*, 250 S.W. 471, 472 (Tex. Civ. App.—San Antonio 1923, no writ).

267. *Jackson v. Hubert*, 234 S.W.2d 414, 416 (1950).

VII. PROCEDURE FOR RESOLVING 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 remed[ies] 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.²⁶⁸

2. *Preferred Debt and Liens*

When an indebtedness has been allowed and approved as a preferred debt and lien, no further claim can be made against other assets of the estate by reason thereof, the debt remains a preferred lien against the property securing the debt, and the property will remain security for the debt in any distribution or sale thereof prior to final maturity and payment of the debt.²⁶⁹

When preferred debt and lien status is elected, the creditor’s priority with respect to its collateral is preserved against all other claims, including the family allowance.²⁷⁰ Preferred liens also have priority over Class 1 claims for funeral expenses and Class 2 claims for administrative expenses, with the exception of those administrative expenses directly related to the preservation and maintenance of the property.²⁷¹

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 that letters are granted, the representative of the estate must promptly pay all maturities that have accrued on the debt according to the terms thereof, and must perform all the terms of any contract securing the debt.²⁷² If the representative defaults in such payment or performance, on application by such creditor, the court shall:

- (1) require the sale of the property subject to the unmatured part of the 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

268. TEX. EST. CODE ANN. § 355.153 (West 2014).

269. *Id.* § 355.154.

270. *Herring v. Bank of Am.*, 176 S.W.3d 513, 516 (Tex. App.—Houston [1st Dist.] 2004, no pet.).

271. *Wyatt v. Morse*, 102 S.W.2d 396, 399 (Tex. 1937); *San Antonio Savings Assoc. v. Beaudry*, 769 S.W.2d 277, 280 (Tex. App.—Dallas 1989, writ denied).

272. EST. § 355.155(a).

(3) authorize foreclosure by the claim holder as provided [in] this subchapter.²⁷³

3. Foreclosure Process

a. Affidavit

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

- (1) describes the property or part of the property to be sold by foreclosure;
- (2) describes the amounts of the claim holder's outstanding debt;
- (3) describes the maturities that have accrued on the debt according to the terms of the debt;
- (4) describes any other debts secured by a mortgage, lien, or security interest against the property that are known by the claim holder;
- (5) contains 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) requests permission for the claim holder to foreclose the claim holder's mortgage, lien, or security interest.²⁷⁴

b. Issuance of Citation

On the filing of the application, the clerk will issue citation by:

- (1) personal service to:
 - (A) the personal representative; and
 - (B) any person described by the application as having other debts secured by a mortgage, lien, or security interest against the property; and
- (2) posting to any other person interested in the estate.²⁷⁵

The citation must "require the person cited to appear and show cause why foreclosure should or should not be permitted."²⁷⁶

273. *Id.* § 355.155(b).

274. *Id.* § 355.156.

275. *Id.* § 355.157.

276. *Id.*

c. Hearing on Application

When the application is filed, the clerk must notify the judge immediately.²⁷⁷ “[T]he judge shall schedule in writing a date for a hearing on the application.”²⁷⁸

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. If the interested person requests an unreasonable time for a continuance, the person must show good cause for the continuance.²⁷⁹

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:

- (1) require the sale of the property subject to the unmatured part of the 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 claim holder.²⁸⁰

e. Terms of Foreclosure

When the court grants the right of foreclosure to a creditor, “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.”²⁸¹ In the discretion of the court and based on the evidence presented at the hearing, “the court may set a minimum price for the property to be sold by foreclosure that does not exceed the fair market value of the property.”²⁸² If the court fixes a minimum price, the “property may not be sold at the foreclosure sale for a lower price.”²⁸³

277. *Id.* § 355.158(a).

278. *Id.* § 355.158(b).

279. *Id.*

280. *Id.* § 355.158(c).

281. *Id.* § 355.159.

282. *Id.*

283. *Id.*

f. Right of Appeal

Any person interested in the estate may appeal the order of foreclosure.²⁸⁴

g. Unsuccessful Foreclosure

If a foreclosure sale 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.²⁸⁵ The court may, in the court’s discretion, eliminate or modify “the minimum price requirement and grant permission for another foreclosure sale.”²⁸⁶

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.²⁸⁷

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 nonjudicial foreclosure sale by the mortgagee is void.²⁸⁸

c. Temporary Administration

The power of sale is suspended even in a case where a trustee does not make a permanent temporary administration.²⁸⁹

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.²⁹⁰

284. *Id.* § 355.158(d).

285. *Id.* § 355.160.

286. *Id.*

287. *Pearce v. Stokes*, 291 S.W.2d 309, 311 (Tex. 1956).

288. *Id.*

289. *See Hury v. Preas*, 673 S.W.2d 949, 951 (Tex. App.—Tyler 1984, writ ref’d n.r.e.).

290. *See Am. Savings & Loan Ass’n v. Jones*, 482 S.W.2d 62, 64 (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.²⁹¹

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 the decedent's death and there has been no administration of the estate.²⁹²

g. Joint Obligation

A creditor may foreclose on the lien 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.²⁹³

B. Independent Administrations

The 2011 Texas Legislature amended the old section 146 of the Probate Code to address, in part, the handling of secured claims in independent administrations.²⁹⁴

1. Matured Secured Claims

A claim approved as a matured secured claim under Section 403.052 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 355.102 of the code. However, the secured creditor:

- (1) is not entitled to exercise any remedies in a manner that prevents the payment of the higher priority claims and allowances; and
- (2) 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.²⁹⁵

291. *Rivera v. Morales*, 733 S.W.2d 677, 679 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.).

292. *Pearce*, 291 S.W.2d at 311.

293. *Albiar v. Arguello*, 612 S.W.2d 219, 220 (Tex. Civ. App.—Eastland 1980, no writ).

294. Tex. S.B. 1198, 82nd Leg., R.S. (2011); see TEX. EST. CODE ANN. §§ 403.051–.0585 (West 2014).

295. EST. § 403.053(a).

The above-quoted 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.”²⁹⁶

Except for real property, a third party acting in good faith may obtain good title for an estate asset obtained 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.”²⁹⁷

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 Subchapter G, Chapter 255, 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 355.153(b), (c), (d), and (e) of the [Estates Code] applicable to court supervised administrations.²⁹⁸

2. Preferred Debt and Liens

During an independent administration, a secured creditor with a preferred debt and lien against property securing the indebtedness under section 403.052 of the Estates Code may “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 nonjudicial foreclosure sale within six months after letters are granted.”²⁹⁹

C. Guardianship of the Estate

1. Option to Treat Claim as Matured Secured Claim or Preferred Debt and Lien

If a creditor presents a secured claim against a ward, in addition to all other matters required to be specified in the claim, the creditor must specify in the claim whether it will be:

296. *Id.* § 403.053(b).

297. *Id.*

298. *Id.* § 403.053(c).

299. *Id.* § 403.054.

- (1) allowed and approved as a matured secured claim to be paid in due course of administration, in which case the claim shall be paid in that manner if allowed and approved; or
- (2) allowed, approved, and fixed as a preferred debt and lien against the specific property securing the indebtedness and paid according to the terms of the contract that secured the lien, in which case the claim shall be so allowed and approved if it is a valid lien.³⁰⁰

Notwithstanding the above-quoted section, the guardian of the estate may pay a claim as described by (2) before maturity so long as the payment is in the best interest of the estate.³⁰¹

If a secured claim is not presented within the time the law provides, the claim is treated as a claim to be paid as a preferred debt and lien.³⁰²

2. Preferred Debt and Lien

When a claim has been allowed and approved under section 1157.151(a)(2) of the Estates Code:

- (1) a further claim for the debt may not be made against other estate assets;
- (2) the claim remains a preferred lien against the property securing the claim; and
- (3) the property remains security for the debt in any distribution or sale of the property before final maturity and payment of the debt.³⁰³

3. Payment of Maturities on Preferred Debt and Lien

If, not later than the 12th month after the date letters of guardianship are granted, the property securing a debt for which a claim is allowed, approved, and fixed under Section 1157.151(a)(2) is not sold or distributed, the guardian of the estate shall:

- (1) promptly pay all maturities that have accrued on the debt according to the terms of the maturities; and
- (2) perform all terms of any contract securing the maturities.³⁰⁴

If the guardian defaults in payment or performance under [the above-quoted paragraph]:

300. *Id.* § 1157.151(a).

301. *Id.* § 1157.151(b).

302. *Id.* § 1157.151(c).

303. *Id.* § 1157.152.

304. *Id.* § 1157.153(a).

- (1) on the motion of the claim holder, the court shall require the sale of the property subject to the unmatured part of the debt and apply the proceeds of the sale to the liquidation of the maturities; or
- (2) at the claim holder's option, a motion may be made in the same manner as a motion under Subdivision (1) to require the sale of the property free of the lien and apply the proceeds to the payment of the whole debt.³⁰⁵

VIII. CAN CREDITORS OF BENEFICIARIES INTERVENE IN ESTATE PROCEEDINGS?

Allison v. Federal Deposit Insurance Corporation involved the estate of Helen Allison.³⁰⁶ Mary Ann Allison was appointed as a successor administrator of Helen's estate.³⁰⁷ Mary Ann's two children, Jay and Alyson, were the sole living beneficiaries of Helen's estate.³⁰⁸ Jay and Alyson were also judgment debtors of Federal Deposit Insurance Corporation (FDIC), which held a judgment against them and against their partnership.³⁰⁹ The FDIC, which was unhappy about certain actions taken by the administrator with respect to estate assets, filed suit against the estate, proceeding to remove the administrator, demand an accounting and distribution, request the administrator to give bond, request the heirs to give bond, to set aside and declare certain transfers fraudulent, and for injunctive relief.³¹⁰ The trial court granted FDIC's request for injunctive relief, enjoining the administrator from dissipating and mismanaging estate assets.³¹¹ The trial court later granted FDIC's motion for summary judgment.³¹² On appeal, the administrator contended that FDIC was not an "interested person" and, therefore, had no standing to interfere in the estate proceeding.³¹³ Interpreting section 3(r) of the Probate Code, the court held that a judgment creditor of a beneficiary of an estate is not an "interested person," and, therefore, FDIC had no standing to seek the administrator's removal.³¹⁴

The question is whether *Allison* is limited in its holding of prohibiting a creditor of a beneficiary only from seeking to remove an executor or administrator.³¹⁵ There are no reported opinions addressing the extent of the

305. *Id.* § 1157.153(b).

306. *Allison v. Fed. Deposit Ins. Corp.*, 861 S.W.2d 7, 8 (Tex. App.—El Paso 1993, writ dismissed).

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.* at 8–9.

312. *Id.* at 9.

313. *Id.*

314. *Id.* at 10.

315. *Id.*

holding in *Allison*.³¹⁶ However, a plain reading of the Estates Code suggests that standing is limited to those creditors having a claim against the decedent or her estate.³¹⁷ For example, the term *interested person* is defined as an “heir, devisee, spouse, creditor, or any other having a property right in or claim against an estate being administered.”³¹⁸ *Estate* denotes the property of the decedent, both as such property originally existed and as from time to time changed in form.³¹⁹

IX. METHODS FOR HANDLING CLAIMS FOR CHILD SUPPORT

A. Child Support in Arrears at the Time of Decedent's Death

An 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 remain delinquent on the date of the person's death.³²⁰ “A child support obligation does not terminate on the death of the obligee but continues as an obligation to the child named in the support order”³²¹ 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.³²²

Despite this statutory language, the proper jurisdiction for reducing the amount of child support in arrears to judgment depends on the type of action the obligee brought.³²³ If the obligee brings a Suit Affecting the Parent-Child Relationship (SAPCR), jurisdiction lies in the family court.³²⁴ 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 transferred to the probate court from the family court.³²⁵

316. *Id.*

317. TEX. EST. CODE ANN. § 22.018 (West 2014).

318. *Id.*

319. *Id.* § 22.012.

320. See TEX. FAM. CODE ANN. § 154.013 (West 2013).

321. *Id.* § 154.013(a).

322. *Id.* § 157.269.

323. See *Fleming v. Easton*, 998 S.W.2d 252, 254 (Tex. App.—Dallas 1999, no pet.).

324. *Id.* (finding that the 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) (involving suit to remove custody restrictions and increase child support).

325. *Carson v. Korus*, 575 S.W.2d 326, 328 (Tex. Civ. App.—San Antonio 1979, no writ) (deciding that “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 this subtitle’ as a ‘suit

B. 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.”³²⁶ The court of continuing jurisdiction determines the amount of unpaid child support for each child of the deceased obligor.³²⁷ When the court determines the amount of the unpaid child support obligation, the court must 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.³²⁸

If the court finds that the child support obligation has been satisfied, “the court shall render an order terminating the child support obligation.”³²⁹ If the court finds that the obligor did not satisfy the child support obligation, “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,” as determined by the court.³³⁰ With respect to any money received toward the judgment, “the order must designate the obligee as constructive trustee, for the benefit of the child.”³³¹

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.’”) *Id.*; *Fleming*, 998 S.W.2d at 255.

326. TEX. FAM. CODE ANN. § 154.015(b) (West 2013).

327. *Id.* § 154.015(c).

328. *Id.*

329. *Id.* § 154.015(d).

330. *Id.*

331. *Id.*

The obligee, on behalf of the child, has a claim against the obligor's estate for the unpaid child support obligation, as determined by the court.³³² The obligee may present the claim in the manner provided by the Estates Code.³³³ Section 355.102 of the Estates Code makes a claim for unpaid child support a Class 4 claim.³³⁴

If the obligee receives more money than the amount of the unpaid child support obligation remaining at the time of the death of the obligor, the obligee must hold the excess amount as constructive trustee for the benefit of the obligor's estate until the excess amount is delivered to the legal representative of the obligor's estate.³³⁵

The court may order the obligor to obtain 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 his or her death.³³⁶

X. MEDICAID ESTATE RECOVERY PROGRAM

A. Federal Mandate

Federal law provides that a state must seek adjustment or recovery of certain Medicaid assistance correctly paid on behalf of an individual under the state plan in the case of certain designated individuals.³³⁷ This provision is essentially the mandate for Medicaid recovery.³³⁸ Texas resisted the mandate for some time. Finally, in 2003, the legislature passed a provision in the Government Code, which simply provides: "The commissioner shall ensure that the state Medicaid program implements 42 U.S.C. Section 1396p(b)(1)."³³⁹ The actual provisions as to how Medicaid recovery is to be implemented are set out in the rules of the Health and Human Services Commission, which became effective March 1, 2005.³⁴⁰ The rules are contained in Chapter 373 of the Texas Administration Code, which states specifically that its purpose is to implement a "Medicaid Estate Recovery Program (MERP) to recover the costs of Medicaid long-term care benefits received by certain Medicaid recipients."³⁴¹

332. *Id.* § 154.015(e).

333. *Id.*

334. TEX. EST. CODE ANN. § 355.102 (West 2014).

335. FAM. § 154.015(f).

336. *Id.* § 154.016(a).

337. 42 U.S.C. § 1396p(b)(1) (2012).

338. *See* TEX. GOV'T CODE ANN. § 531.077 (West 2013).

339. *Id.*

340. *See* 1 TEX. ADMIN. CODE § 373.101 (2013) (Tex. Health & Human Servs. Comm'n, Medicaid Estate Recovery Program).

341. *Id.* § 373.101.

B. Recovery Only Against Certain Decedent's Probate Estates

Medicaid recovery is sought only from the estate of decedents that meet the following requirements:

1. The decedent received "covered Medicaid services" (defined below);
2. The decedent was 55 years old or older at the time of receipt of the covered Medicaid services; and
3. The decedent initially applied for the covered Medicaid services on or after March 1, 2005.³⁴²

Covered Medicaid services are limited to long-term care services provided to a recipient fifty-five years old or older by the Texas Medicaid program, with funding under Title 19 of the Social Security Act, in any of the following categories:

1. Nursing facility services;
2. Services of Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF-IID, formerly called ICF-MR services);
3. Home and community-based services under section 1915(c) (all the long-term care Medicaid "waiver" services) and section 1929(b) ("Community Attendant Services") of the Social Security Act; and
4. Related costs of hospital and prescription drugs.³⁴³

The *estate* for MERP purposes is defined as real or personal property (including additions, accretions, and substitutions) that is included in the probate estate, as defined in section 22.012 of the Estates Code.³⁴⁴ This is a key definition because it does not allow for recovery against nonprobate assets, such as remainder interests and the interests of survivors in multi-party accounts. (i.e., POD or JTROS accounts).³⁴⁵

C. Medicaid Claim Process

1. Notice of Intent to File Claim

Within thirty days of notification of a Medicaid recipient's death, MERP will provide a Notice of Intent to File a Claim to the following:

- (1) Estate representative;
- (2) Recipient's guardian of the person, if any; guardian of the estate, if any; or guardian of the person and estate, if any, provided that the name and address of the guardian or guardians are known by MERP;
- (3) Recipient's agent under a durable power of attorney if the name and address of the agent are known by MERP;

342. *Id.* § 373.103(a).

343. *Id.* § 373.103(c).

344. *Id.* § 373.105(b).

345. *See id.*

- (4) Recipient's agent under a medical power of attorney if the name and address of the agent are known by MERP; or
- (5) If none of the above are known, family members who have acted on behalf of the recipient provided that the name and address of those family members who have acted on behalf of the recipient are known by MERP.³⁴⁶

2. Contents of Notice

The written notice of MERP's intent to file an estate recovery claim against the estate will include the following:

- (1) A program overview;
- (2) A questionnaire that seeks to determine whether the deceased recipient had:
 - (A) A surviving spouse;
 - (B) A surviving child under age 21;
 - (C) A surviving child of any age who is blind or disabled, as defined by 42 U.S.C. § 1382c; or
 - (D) An unmarried adult child residing continuously in the decedent's homestead for at least one year prior to the time of the Medicaid recipient's death.³⁴⁷

The notice will also provide an undue hardship waiver request form, which the article will discuss in detail below.³⁴⁸ "Undue hardship request forms and supporting documentation must be submitted to MERP within 60 days of the date of the Notice of Intent to File a Claim."³⁴⁹

3. Presentment of Claim

The MERP claim will be presented to the estate personal representative (executor, administrator, or guardian) or filed by depositing it in the appropriate Probate Court and will include the amount of the claim, the date or dates of the covered Medicaid services provided, and a statement that to MERP's best knowledge the deceased Medicaid recipient had:

- (1) No surviving spouse;
- (2) No surviving child under age 21;
- (3) No surviving child of any age who is blind or disabled as defined by 42 U.S.C. § 1382c;
- (4) No unmarried adult child residing continuously in the decedent's homestead for at least one year prior to the time of the Medicaid recipient's death; and

346. *Id.* § 373.307(a).

347. *Id.* § 373.307(b).

348. *Id.* § 373.307(c).

349. *Id.*

- (5) That to the best knowledge of the MERP no undue hardship, as defined by these rules, exists and that recovery will be cost-effective.³⁵⁰

A MERP claim must “be filed within 70 days after MERP has actual notice of the death of a Medicaid recipient aged 55 years or older who received covered long-term care services.”³⁵¹ If a MERP claim is established, it is classified as a Class 7 claim against the estate.³⁵²

D. Exemptions from Claims

There are certain exemptions that apply.

[MERP] claims will be sought only after the death the Medicaid recipient, and if there is no:

- (1) Surviving spouse;
- (2) Surviving child or children under 21 years of age;
- (3) Surviving child of any age who is blind or disabled as defined by 42 U.S.C. § 1382c; or
- (4) Unmarried adult child residing continuously in the decedent’s homestead for at least one year prior to the time of the Medicaid recipient’s death.³⁵³

In addition, certain exemptions exist for American Indians (AI) and Alaska Natives (AN) that will not be addressed here.³⁵⁴

E. Request for Waiver Based Upon Undue Hardship

An estate can present a request for waiver based upon undue hardship to the Health and Human Services Commission.³⁵⁵ “An undue hardship waiver request form will be provided with the MERP Notice of Intent to File a Claim, and undue hardship waiver requests must be made within 60 days of the date of the MERP Notice of Intent to File a Claim.”³⁵⁶ A waiver based upon undue hardship does not exist solely because:

- (1) Recovery would prevent heirs or legatees from receiving an anticipated inheritance; or
- (2) The circumstances giving rise to the hardship were created by, or are the result of, estate planning methods under which assets were sheltered or

350. *Id.* § 373.205(a).

351. *Id.* § 373.205(b).

352. *Id.* § 373.203; TEX. EST. CODE ANN. § 355.102 (West 2014).

353. 1 TEX. ADMIN. CODE § 373.207(a) (2013) (Tex. Health & Human Servs. Comm’n, Medicaid Estate Recovery Program).

354. *Id.*

355. *Id.* § 373.209.

356. *Id.* § 373.209(a).

divested contrary to the requirements of Medicaid law in order to avoid estate recovery.³⁵⁷

The following are acceptable circumstances for an undue hardship waiver:

- (1) The estate property subject to recovery has been the site of the operation of a family business, farm, or ranch at that location for at least 12 months prior to the death of the decedent; is the primary income producing asset of heirs and legatees, and produces 50 percent or more of their livelihood; and recovery by the State would affect the property and result in the heirs or legatees losing their primary source of income;
- (2) Heirs and legatees would become eligible for public and/or medical assistance if a recovery claim were made;
- (3) Allowing one or more survivors to receive the estate will enable him or her or them to discontinue eligibility for public and/or medical assistance;
- (4) The Medicaid recipient received medical assistance as the result of a crime, as defined by Texas law, committed against the recipient; or
- (5) Other compelling reasons.³⁵⁸

There is also an undue hardship waiver applicable to homesteads.³⁵⁹

The HHSC has exclusive authority to waive its Medicaid estate recovery claim and grant undue hardship waivers as determined by the Medicaid Estate Recovery Program (MERP) program on an individual case-by-case basis. An undue hardship waiver determination will be made by MERP within 40 days of the receipt of an undue hardship waiver request form and all required necessary supporting documents by MERP.³⁶⁰

A party who has been denied a waiver can “request a review of the denial of an undue hardship waiver request within 60 days of receiving notice of the denial from MERP.”³⁶¹ Within forty days of receiving the request, MERP will review the request.³⁶²

F. Certain Deductions for Home Maintenance and Costs of Care

The Administrative Code allows for certain deductions for expenses for home maintenance and costs of care.³⁶³

357. *Id.* § 373.209(b).

358. *Id.* § 373.209(c).

359. *Id.* § 373.209(d).

360. *Id.* § 373.209(e).

361. *Id.* § 373.211(a).

362. *Id.* § 373.211(b).

363. *Id.* § 373.213.

An amount equal to necessary and reasonable maintenance expenses and taxes may be deducted from the Medicaid Estate Recovery Program (MERP) claim for maintaining the home of the deceased Medicaid recipient, provided that sufficient supporting documentation of these expenditures, such as receipts, is provided to MERP by estate personal representatives, heirs, or legatees. Necessary and reasonable expenses for maintaining the home include real estate taxes, utility bills, insurance, home repairs, and home maintenance expenses such as lawn care.³⁶⁴

An amount equal to the necessary and reasonable expenses for the direct payment of the costs of care (including payment of personal attendant care) provided for a deceased Medicaid recipient that enabled the recipient to remain in his or her home and thereby delayed the institutionalization of the Medicaid recipient may be deducted from the MERP claim, provided that sufficient supporting documentation of these expenditures, such as receipts, is provided to MERP by estate personal representatives, heirs, or legatees.³⁶⁵

A request for obtaining allowable deductions must be made in writing within sixty days after receipt of the Notice of the Intent to File a Claim by MERP.³⁶⁶

G. No Claim Sought If Not Cost Effective

A Medicaid estate recovery claim will not be filed if it is not cost effective.³⁶⁷ A claim is not cost-effective if: “(1) the value of the recoverable estate is \$10,000 or less, (2) the recoverable amount of Medicaid costs is \$3,000 or less, or (3) the cost involved in the sale of the property would be equal to or greater than the value of the property.”³⁶⁸

H. Interplay Between MERP Rules and Estates Code

The MERP rules make it clear that MERP has a claim, and not a lien, against the decedent's estate.³⁶⁹ The rules also acknowledge that the MERP claim is included in the classification of claims set out in the Estates Code.³⁷⁰ Therefore, it would appear that MERP claims must be prosecuted in the same fashion as any other estate claims.³⁷¹ However, as is clear from the above summary of the MERP claims process, MERP places certain burdens on

364. *Id.* § 373.213(a).

365. *Id.* § 373.213(b).

366. *Id.* § 373.213(c).

367. *Id.* § 373.215.

368. *Id.*

369. *Id.* § 373.205.

370. *Id.* § 373.203(a).

371. *Id.*

those opposing the claim to prove that the claim is exempt or that a waiver should be allowed.³⁷² Because MERP is essentially an unsecured creditor of the decedent's estate, the estate representative should take advantage of the permissive notice rules and send the 121-day letter to MERP at the address set out in the statute.³⁷³ In the event MERP fails to file its claim within the proscribed time, the representative should take the position that MERP is barred just as any other unsecured creditor who fails to respond to the notice letter in a timely manner.³⁷⁴

XI. CONCLUSION

The current Estates Code represents an improvement in the organization of statutes relating to creditor claims in both estate administrations and guardianships, and does a better job than did the Probate Code of describing the applicability of the statutes to independent administrations. However, in spite of the changes, there is still some confusion and a number of unanswered questions that remain. I hope this article will serve as a supplement to the Estates Code in guiding you through the creditor claims process, whether you represent a creditor, beneficiary, or an estate representative.

372. *Id.* §§ 373.209–15.

373. TEX. EST. CODE ANN. § 308.054(b) (West 2014).

374. *Id.*