

**PAYING DEBTS, ALLOWANCES AND TAXES AND SATISFYING GIFTS UNDER  
THE WILL  
A GUIDE TO THE INDEPENDENT EXECUTOR(of a Potentially Insolvent Estate)**

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**PAYING DEBTS, ALLOWANCES AND  
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EXECUTOR**(of a Potentially Insolvent Estate)

If an independent estate has sufficient assets to pay all allowances and other debts of the estate, and still satisfy all gifts under the will, then perhaps one need not be too concerned with the rules governing the priorities between competing claims or about the abatement rules that are applicable when the estate is too small to satisfy all of the gifts under the will. However, if the estate is or may be too small to pay all debts and allowances or to satisfy all gifts under the will, then the claims procedures, the priority rules, and the rules of abatement become extremely important.

**APPLICATION OF PROBATE CODE  
TO INDEPENDENT  
ADMINISTRATIONS GENERALLY.**

Determining which provisions of the Probate Code apply to independent executors and which do not is usually accomplished by resort to case law and experience, on a section by section basis. Often there is no readily apparent or straightforward explanation when and why a particular Probate Code section applies or does not apply to an independent administrator. The problem here is that Tex. Prob. Code §3(q) defines “**representative**” as including the independent executor; however, Tex. Prob. Code §3(aa) limits the application of the general definition by stating that such inclusion “shall not be held to subject such representatives to control of the courts in probate matters with respect to settlement of estates *except as expressly*

*provided by law.*” (Emphasis added.)<sup>1</sup> More to the point, the definitions contained in Tex. Prob. Code §3 have the meaning assigned in that section “**unless otherwise apparent from the context.**”<sup>2</sup>

**NOTICE TO CREDITORS**

**General Notice.** Probate Code §294 was extensively amended, effective January 1, 1996. §294 requires that the personal representative shall publish in a newspaper printed in the County where the letters were issued a notice requiring all persons having claims against the estate to present the claims within the time prescribed by law. The personal representative is additionally required to give a similar notice, by certified or registered mail, to the comptroller of public accounts if the decedent remitted or should have remitted taxes administered by the comptroller. Probate Code §294(a) requires that the notice to the comptroller and general creditors be given within **one month** after receiving letters.

**Permissive Notice To Unsecured Creditors.** Effective January 1, 1996, Probate Code §294(d) was amended to provide that:

**At any time before an estate administration is closed,** the personal representative *may* give notice by certified or registered mail, with return receipt requested, to an **unsecured creditor** having a claim for money against the estate. . . . [Emphases added.]

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<sup>1</sup>When an independent administration has been created and the inventory has been filed and approved, further action of any nature shall not be had in the county court, **except where the Probate Code “specifically and explicitly provides.”** Tex. Prob. Code §145(h). (Emphasis added.) See also, *Corpus Christi Bank and Trust v. Alice National Bank*, 444 S.W.2d 632 (Tex. 1969).

<sup>2</sup>*Bunting v. Pearson*, 430 S.W.2d 470 (Tex. 1968).

If the personal representative elects to give an unsecured creditor the permissive notice in the form prescribed by §294(d), **the creditor will have four months after receipt of the notice in which to present the claim, or the claim will be barred.**<sup>3</sup>

**Specific Notice To Secured Creditors.** Probate Code §295 requires that special notice be given to all holders of secured claims. The notice required by Probate Code §295 is required to be given within **two months** after receiving letters. Probate Code §295(b) provides that the special notice to be given to secured creditors shall be given by mailing the notice “certified or registered mail, with return receipt requested, addressed to the record holder of such indebtedness or claim at the record holder's last known post office address.”

**Consequences Of Failure To Give Notice.** Under Probate Code §297, if the notices required by §§294 and 295 are not given within the time provided by the statutes, **“the representative and the sureties on his bond shall be liable for any damage** which the person suffers by reason of such neglect, unless it appears that the creditor otherwise had notice.”<sup>4</sup> Presumably, in the case of an unsecured creditor, the timely giving of the general notice by publication under §294(a) should suffice to relieve the personal representative of liability under this statute, even if the permissive notice of §294(d) was not given, though the statute could have been drafted more clearly on this point.

If the personal representative of an insolvent estate failed to give timely notice, and, as a result thereof, a creditor was relegated to a lower priority, the creditor, under the authority of Probate Code §297, is likely to

look to the personal representative and the sureties on his bond for restitution.

**Late Filed Claims Despite Notice** What if the personal representative gave the required notice, paid all properly presented claims within a reasonable period of time, and then had a claim presented which could not be fully paid, either because the estate's assets had been partially or fully distributed, or because the full payment of previously filed claims precluded full payment of the late filed claim? §146(c) expressly gives the independent executor authority to pay claims for money at any time and without personal liability if “at the time of payment, the independent executor reasonably believes the estate will have sufficient assets to pay all claims against the estate.” This statute ought to relieve the personal representative of liability if the inability to pay is a result of having paid other creditors. However, neither 146(c) nor compliance with the §247 notice provisions explicitly relieve an executor who is unable to pay a properly presented claim because of prior distributions to beneficiaries. **There is always the possibility of liability under the common law, depending on the facts and circumstances, if it can be shown that the personal representative breached a fiduciary duty to the creditor.**<sup>5</sup>

#### **TRANSFEROR LIABILITY FOR TAXES-31 USC §3713.**

The executor is liable, within limits, for estate and income taxes owed by the estate, to the extent that the executor makes a transfer of estate property.<sup>6</sup>

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<sup>3</sup>See *Ertel v. O'Brien*, 852 S.W.2d 17 (Tex. Civ. App.— Waco 1993, writ den.). Cf. *Humane Society v. Austin National Bank*, 531 S.W.2d 574, 577 (Tex.1975).

<sup>6</sup>31 USC §3713. Cf., *Price v. U.S.*, 269 U.S. 492, 499 (1926). *Want v. Commissioner*, 280 F.2d 777 (2nd Cir. 1960); *Viles v. Commissioner*, 233 F.2d 376, 379-380 (6th Cir. 1956); *Beckwith v. Commissioner*, 69 TCM 1678, 1680 (1995).

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<sup>3</sup>Tex. Prob. Code §298.

<sup>4</sup>Probate Code §297.

Under IRC §6501, the general statute of limitations for **assessment** of federal taxes is **3 years after the return is filed.**<sup>7</sup> There are exceptions under §6501(c): There is no limitation on the assessment of tax (a) in “the case of a false or fraudulent return with the intent to evade tax,”<sup>8</sup> in “the case of a willful attempt in any manner to defeat or evade tax,”<sup>9</sup> and in “the case of failure to file a return.”<sup>10</sup> There is a six year statute in the case of a substantial omission from the estate tax return.<sup>11</sup>

### PAYMENT, CLASSIFICATION AND PRIORITY OF CLAIMS

**Classification.** There are eight classes of claims specified by Probate Code §322, are as follows:

- Class 1.** “Funeral expenses and expenses of last sickness for a reasonable amount to be approved by the court, not to exceed a total of Fifteen Thousand Dollars, with any excess to be classified and paid as other unsecured claims.”<sup>12</sup>
- Class 2.** “Expenses of administration and expenses incurred in the preservation, safekeeping, and management of the estate, including fees and expenses awarded under Section 243 of this code.”

**Class 3.** “Secured claims for money under Section 306(a)(1), including tax liens, so far as the same can be paid out of the proceeds of the property subject to such mortgage or other lien, and when more than one mortgage, lien, or security interest shall exist upon the same property, they shall be paid in order of their priority.”

Class 3 describes claims secured by liens, including tax liens, so far as may be paid out of the security alone, i.e., “**matured secured claims**” for money under P.C. 306(a)(1).

**Class 4.** This is relatively new: “Claims for the principal amount of and accrued interest on delinquent child support and child support arrearages that have been confirmed and reduced to money judgment, as determined under Subchapter F, Chapter 157, Family Code.”

**Class 5.** Claims for certain taxes (including penalties and interest) due the state of Texas, under a host of enumerated statutes.

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

**Class 7.** Claims for repayment of medical assistance payments made by the state under Ch. 32 of the Human Resources Code for the benefit of the decedent.

**Class 8.** All other claims. [**Note that there is no longer a priority in the classification scheme for claims presented within six months!**]

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<sup>7</sup>IRC §6501(a).

<sup>8</sup>IRC §6501(c)(1).

<sup>9</sup>IRC §6501(c)(2).

<sup>10</sup>IRC §6501(c)(3).

<sup>11</sup>IRC §6501(e)(2).

<sup>12</sup>Note that there is no longer a requirement that funeral expenses and expenses of last illness be presented within 60 days to be given class one status. The expense limit was raised from \$5000 to \$15,000 effective September 1, 1997.

**Priority of Claims.** Probate Code §320 provides that the order of payment of claims is to be as follows:

- a. Funeral expenses and expenses of last illness not to exceed \$5,000.<sup>13</sup>
- b. Allowances made to the surviving spouse and children.
- c. Expenses of administration and the preservation and management of the estate.
- d. Other claims **in the order of their classification.**

Secured claims are a special case. Reading Probate Code §§320, 290 and 277 together, it appears that **the right of a Class 3 secured (Prob. Code §§320, 290 and 277) creditor is superior to the claim for allowances, but is inferior to Class 1 and 2 claims.**<sup>14</sup> This is interesting because **the claim for allowances is superior to Class 2 claims** (administration expenses).

Stated another way, the matured secured creditor, to the extent of his security, comes ahead of the family allowance but behind expenses of administration; whereas, somewhat ironically, the family allowance comes ahead of expenses of administration, though behind the matured secured creditor.

Note that neither the classes or the priority categories mention where claims of the federal government fit in, nor do they

directly address the super priority afforded a secured “preferred debt and lien.”

**Priority As Against The Federal Government.** In general, claims of the United States are given superior priority over all other “debts.”<sup>15</sup> Funeral and administration expenses<sup>16</sup> are not debts, but expenses of last illness are.<sup>17</sup> The family allowance is not, strictly speaking, a “debt”, and the 1977 8th Circuit decision of *Schwartz v. Commissioner*,<sup>18</sup> indicates that such allowances are not subject to the superior priority of United States claims. This issue has yet to be squarely determined and there is contrary authority.<sup>19</sup>

This means that the claims of the federal government, such as claims for income taxes, (1) will come ahead of all other creditor claims, (2) will come behind expenses of administration and funeral expenses, and (3) may come behind allowances, although this is uncertain. This is certainly inconsistent with the Texas law, which, among other inconsistencies, would place allowances ahead of administration expenses.

Do claims of Federal agencies that are in the commercial lending business, such as the SBA and the FHA constitute claims of the United States? A good argument that they do not can be based upon the 1979 United

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<sup>13</sup>There is no longer a requirement that the first \$5000 of funeral expenses and expenses of last illness be presented within 60 days, as was the case prior to 1996, thus removing an inconsistency that previously existed between Class One claims under §322 and the priority specified in §320(a)(1).

<sup>14</sup>*George v. First National Bank of Tulia*, 67 S.W.2d 324 (Tex. Civ. App.-1933, writ ref'd); *Dallas Joint Stock Land Bank In Dallas v. Maxey*, 112 S.W.2d 305 (Tex. Civ. App.-Dallas 1937, no writ); and Woodward and Smith, *Probate and Decedents' Estates*, 18 TEXAS PRACTICE (1971), §913.

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<sup>15</sup>31 U.S.C.A. §3713.

<sup>16</sup>*Hammond v. Carthage Sulphite Pulp and Paper Co.*, 34 F. 2d 155 (D.C. N.Y., 1928); *U.S. v. Weisburn*, 48 F. Supp. 393 (D.C. Pa. 1943).

<sup>17</sup>Rev. Rul. 80-112.

<sup>18</sup>*Schwartz v. Commissioner*, 560 F.2d 311 (8th Cir. 1977).

<sup>19</sup>*Federal Reserve Bank of Dallas v. Smylie*, 134 S.W.2d 838 (Tex. Civ. App.-Amarillo 1939, no writ).

States Supreme Court decision of *United States v. Kimbell Foods, Inc.*<sup>20</sup>

**Preferred Debt And Lien Holders.** A secured creditor who by election or by operation of law has his claim classified as a preferred debt and lien has a super priority over all other claims, but only to the extent of the value of the security. Such a creditor will forfeit his right to any deficiency.<sup>21</sup>

### SPECIAL PROBLEMS OF SECURED CREDITORS.

Before death, a creditor will generally have the right to foreclose upon his security and sue on the deficiency, if there is any, without being forced to make any special elections or submit claims in a special form or deal with 90 day statutes of limitations. After death, the secured creditor must subordinate his claim to claims of administration, if the creditor hopes to be able to recover the amount by which his debt exceeds the value of the security. If not very careful, the secured creditor may find that by inaction or by otherwise failing to properly elect, the law has made an election for the creditor restricting recovery to the value of the property securing the debt.

**Matured Secured Claims.** If a claim is properly presented and an election duly made **within 6 months** after the original grant of letters (or four months after notice, if later), a secured creditor may have his claim classified as a matured secured Class 3 claim to be paid in due course of administration<sup>22</sup>; otherwise the creditor is not

entitled to any deficiency should the security prove inadequate.<sup>23</sup>

As a Class 3 claim, a matured secured claim will be subordinate to funeral expenses and expenses of last illness up to \$15,000 and to administration expenses. The claim will be superior to all other claims, however, including family allowances, up to the extent of the security. If there is any deficiency, it will be treated as a Class 8 unsecured claim. ~~As a Class 5 Claim it will be superior to unsecured claims presented more than six months from the issuance of letters.~~

Although the issue is not entirely free from doubt, a matured secured claim is, by definition, "matured," and the due date of the debt is therefore presumably accelerated.<sup>24</sup> (But there is not necessarily a right to accelerate a long term unsecured class 5 or 6 debt or a preferred secured claim!)

**Preferred Debt And Lien.** A secured creditor may elect to have his claim approved as a preferred debt and lien against the specific property securing the indebtedness, to be paid according to the terms of the contract.<sup>25</sup>

A creditor who has elected (or who is deemed to have elected) preferred debt and lien treatment will have a super priority over everyone, but only to the extent of the value of his security: **the creditor will forfeit any**

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<sup>20</sup>*United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 99 S.Ct. 1448, 59 L. Ed. 2d 711 (1979).

<sup>21</sup>Tex. Prob. Code 306(c), second clause. *Wyatt v. Morse*, 129 Tex. 199, 102 S.W.2d 396 (1937); and *Gross Nat'l Bank of San Antonio v. Merchant*, 459 S.W.2d 483 (Tex. Civ. App.-San Antonio 1970, no writ).

<sup>22</sup>Probate Code §§298(a) and 306(a)(1).

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<sup>23</sup>Tex. Prob. Code 306(c), second clause. *Wyatt v. Morse*, 129 Tex. 199, 102 S.W.2d 396 (1937); and *Gross Nat'l Bank of San Antonio v. Merchant*, 459 S.W.2d 483 (Tex. Civ. App.-San Antonio 1970, no writ).

<sup>24</sup>Woodward and Smith, *Probate and Decedents' Estates*, 17 & 18 TEXAS PRACTICE (1971) §916; *Ferguson v. Mounts*, 281 S.W. 616 (Tex. Civ. App.-1926, writ dismissed); *Burke v. Guilford Mortgage Co.*, 161 S.W.2d 574 (Tex. Civ. App.-1942, writ refused); and *Wyatt v. Morse*, 129 Tex. 199, 102 S.W.2d 396, 398 (1937). (

<sup>25</sup>Probate Code §306(a)(2).

**deficiency, whether or not the estate is solvent.<sup>26</sup>**

The preferred debt and lien secured creditor cannot accelerate the due date of his debt. However, the personal representative may elect to pay the claim prior to maturity if it is in the best interest of the estate to do so.<sup>27</sup>

If the secured creditor fails to present his claim within the later of 6 months from the issuance of letters or four months from the date notice is received, the Probate Code will make the preferred debt and lien election for him.<sup>28</sup>

There used to be some doubt whether the election procedures applied in an independent administration.<sup>29</sup> In 1995, however, Probate Code §146 was extensively rewritten. In 1997 it was slightly modified. The statute now explicitly provides procedures applicable to secured claims in an independent administration.

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<sup>26</sup>Tex. Prob. Code 306(c), second clause. *Wyatt v. Morse*, 129 Tex. 199, 102 S.W.2d 396 (1937); and *Gross Nat'l Bank of San Antonio v. Merchant*, 459 S.W.2d 483 (Tex. Civ. App.-San Antonio 1970, no writ).

<sup>27</sup>Probate Code §306(a)(2).

<sup>28</sup>Probate Code §146.

<sup>29</sup>*Joffrion v. Texas Bank of Tatum*, 780 S.W.2d 451 (Tex. App.-Austin 1989, writ granted) and *Texas Commerce Bank-Austin, N.A. v. Estate of George Cox, Deceased*, 783 S.W.2d 16 (Tex. App.-Texarkana 1989, writ denied). Cf., *Gibraltar Mortgage and Loan Corporation v. Lerman*, 346 S.W.2d 487, 488 (Tex. App.-Waco 1961, no writ).

**If the Estate is Insolvent, Does the Super-Priority Apply to Administration Expenses Necessary to Preserve the Property?** The Probate Code is silent on the subject of whether administration expenses can be paid out of collateral subject to a preferred debt and lien, in derogation of the lien holder's claim (and in derogation of the usual rule, for that matter). In *San Antonio Savings Association v. Beaudry*, 769 S.W.2d 277 (Tex. Civ. App.— Dallas 1989, writ den.), the Dallas Court of Appeals held:

In fairness to all parties, *and in the silence of the Probate Code*, we hold that administration expenses **directly related to preserving, maintaining, and selling property** subject to a section 306 preferred lien may, as a rule, be charged against and paid first out of the sales proceeds of the property.<sup>30</sup>

If this indeed turns out to be the rule, one would expect that it would be narrowly applied, since it is not a rule found in the statute, and, after all, by electing preferred debt and lien treatment, the creditor has already foregone the right to recover on any deficiency. If general administration expenses were recoverable out of the proceeds of sale, ahead of the lien holder, then the advantage of electing preferred debt and lien treatment over matured secured claim status could be illusory.

It is probable that the *Beaudry* rule does not apply if the foreclosure is based upon a vendor's lien, which is outside the claims procedure statutes altogether, apparently.<sup>31</sup>

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<sup>30</sup> *San Antonio Savings Association v. Beaudry*, 769 S.W.2d 277 at 280 (Tex. Civ. App.— Dallas 1989, writ den.)

<sup>31</sup> See *Walton v. First National Bank of Trenton*, 956 S.W.2d 647 (Tex. App. —Texarkana [14<sup>th</sup> Dist.] 1997, review denied).

It is also doubtful that the rule would apply to a nonjudicial foreclosure during the pendency of an independent administration. The remedy of nonjudicial foreclosure, which is available in the case of an independent administration, is not available under a court supervised administration, and it would seem that the involvement of the court (a “given” in a dependent administration) would be necessary in order to apply the rule.

**Pre-Death Judgment Lien Creditor.** Is the pre-death judgment lien creditor a secured creditor? Generally, a judgment creditor must present his claim in the same manner as any other creditor, and may not simply execute on the estate.<sup>32</sup> Furthermore, it has been stated that a money judgment does not give the judgment creditor a secured lien against specific property of the debtor.<sup>33</sup> However, if the judgment has been abstracted against a specific piece of real property, there is an argument that the claim should be treated as secured.<sup>34</sup> There is authority for a contrary rule if the property was homestead.<sup>35</sup>

If this is a secured claim, must the judgment creditor elect to have the claim treated as either a matured secured or preferred debt and lien? If preferred debt and lien treatment is elected or applies by default, how can the

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<sup>32</sup>*Harms v. Ehlers*, 179 S.W.2d 582 (Tex. Civ. App.-Austin 1944, writ ref'd); *Long v. Castaneda*, 475 S.W.2d 578 (Tex. Civ. App.-Corpus Christi 1971, writ ref'd n.r.e.); *Dent v. A. Harris & Co.*, 255 S.W. 221 (Tex. Civ. App.— 1923, no writ), and *First National Bank v. Cone*, 170 S.W.2d 782 (Tex. Civ. App.- Fort Worth 1943, writ ref'd).

<sup>33</sup>*Flournoy Drilling Company v. Walker*, 750 S.W.2d 911 (Tex. App.-Corpus Christi 1988, writ denied).

<sup>34</sup>*Kiolbassa v. Raley*, 23 S.W. 253 (Tex. Civ. App.— 1892); *First National Bank v. Cone*, 170 S.W.2d 782 (Tex. Civ. App.- Fort Worth 1943, writ ref'd).

<sup>35</sup>*Harms v. Ehlers*, 179 S.W.2d 582 (Tex. Civ. App.-Austin 1944, writ ref'd).

claimant be “paid according to the terms of the contract which secured the lien” as required by Prob. Code §306(a)(2), if there is no contract involved?<sup>36</sup>

An interesting variation of this problem recently arose in *Flournoy Drilling Company v. Walker*.<sup>37</sup> In that case, the court, in *dictum*, stated the general rule to be that a judgment creditor was the same as any other and that the debt did not attach to specific property as a secured debt; however, the case under consideration was an oil and gas lien, **a statutory lien similar to a mechanics lien**. The court held that **such a lien is a secured lien** within the meaning of the Probate Code. Furthermore, the claimant had the right to perfect the lien after the decedent's death.

#### PRESENTMENT, ALLOWANCE AND REJECTION OF CLAIMS

Claims must be presented to the independent executor before they are required to be paid. After a claim has been properly presented, it is the duty of the personal representative to either allow the claim or reject it.

**Claims For Money.** Only claims for money must be presented to the personal representative. The courts have construed “claims for money” as encompassing only those cases “where the amount of the claim is fixed and definite, not contingent and indeterminate, and which are susceptible of verification by affidavit.”<sup>38</sup>

**Vendor's Lien is Not a Claim for Money.** A very important and somewhat astonishing

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<sup>36</sup>See *Creditor Problems From The Estate's Viewpoint*, by Joseph S. Horrigan, 1988 Advanced Estate Planning and Probate Course, State Bar of Texas Professional Development Program at page O-29 for an interesting discussion of this issue.

<sup>37</sup>*Flournoy Drilling Company v. Walker*, 750 S.W.2d 911 (Tex. App.-Corpus Christi 1988, writ denied)

<sup>38</sup>*Hume v. Perry*, 136 S.W. 594 at 652 (Tex. Civ. App. 1911, writ dism'd).

1997 case, *Walton v. First National Bank of Trenton*, 956 S.W.2d 647 (Tex. App. — Texarkana [14<sup>th</sup> Dist.] 1997, review denied), held that a vendor's lien was not a claim for money. Hence, the creditor could file a trespass to try title suit to foreclose on the lien, bypassing the probate code procedures otherwise applicable to a dependent administration.

**Other Claims.** If the claim is not a “claim for money” as that term has been construed by the Texas Courts, then it need not be presented. Moreover, it is an interesting question whether it *may* be presented. Whether or not it may be presented will effect such questions as the running of the statute of limitations, preserving priority as a fifth class claim, and establishing the claim as a matured secured claim. In order to be classified, the claim must be “legally exhibited.”

Claims which are not claims for money, and which, therefore, need not be presented, include all forms of **contingent claims**. Common situations include cases where the decedent is acting as a surety or guarantor of a debt, or where a claim is based on a tort. It is not always an easy matter to determine whether or not a claim is fixed and definite enough to constitute a claim for money. For example, what about a claim for professional fees alternatively based in *quantum meruit*?<sup>39</sup>

It has been held that a contract of sale was a “money claim,” and that, after the death of the buyer, the contract could not be canceled by the seller for nonpayment, notwithstanding a contract term purporting to give the seller this option.<sup>40</sup> Another case

held that a claim for unliquidated amounts or injunctive relief need not be presented to an administrator as a prerequisite to the filing of a suit against the estate.<sup>41</sup>

Another difficult and unresolved issue has to do with the treatment of contingent secured claims. How can a contingent secured claim be presented, and matured secured claim status elected?

**Administration Expenses.** Expenses incurred during the administration of the estate are not claims against the decedent, they do not need to be presented, and the 90 day statute of limitations does not apply to such claims.<sup>42</sup>

**Claims By Personal Representative.** It is not necessary for a personal representative to present a claim to himself. However, the representative is required to file his claim, verified by affidavit, within six months, or the claim will be barred.<sup>43</sup> Although this rule should not be applicable in an independent administration,<sup>44</sup> it may be prudent to follow it anyway in an appropriate case.

\*\*\* INDEPENDENT EXECUTORS—  
NOTICE, PRESENTMENT, FORM OF  
CLAIM, ALLOWANCE AND  
REJECTION, PAYMENT,  
CLASSIFICATION AND PRIORITY.

**Application Of Notice Rules To Independent Administrations.** It is now clear that an independent executor is required to give the mandatory notices described in Probate Code §§294 and 295,

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<sup>39</sup>See *Anderson v. First National Bank of El Paso*, 120 Tex. 313, 38 S.W.2d 768 (1931). See also, Comment, “Contingent Claims Against Decedent's Estates: A Need for Legislation in Texas,” 28 S.W.L.J. 561 (1964).

<sup>40</sup>*Rivera v. Morales*, 733 S.W.2d 677 (Tex. App.-San Antonio 1987, writ ref'd n.r.e.).

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<sup>41</sup>*Connelly v. Paul*, 731 S.W.2d 657 (Tex. App.-Houston [1st Dist.] 1987, writ ref'd n.r.e.).

<sup>42</sup>*Ullrich v. Estate of Anderson*, 740 S.W.2d 481 (Tex. App.-Houston [1st Dist.] 1987, no writ ).

<sup>43</sup>Probate Code §317(a).

<sup>44</sup>*El Paso National Bank v. Leeper*, 538 S.W.2d 803 (Tex. Civ. App.—xxx 1976, writ ref'd n.r.e.).

and may give the permissive notice described in §294(d).<sup>45</sup>

**Presentment Of Claims To Independent Executors.** It is not necessary to present a claim to an independent executor to enforce a claim:

“Any person having a debt or claim against an estate may enforce the payment of the same by suit against the independent executor . . . .”<sup>46</sup>

An independent executor is entitled by Probate Code §146 to “receive presentation of claims”; nevertheless, the Supreme Court of Texas has held that **the statutory procedures for presenting such claims do not apply to independent administrations.**<sup>47</sup>

Probate Code §146 is worth reading in full:

**Sec. 146. Payment of Claims and Delivery of Exemptions and Allowances**

**(a) Duty of the Independent Executor.** An independent executor, in the administration of an estate, independently of and without application to, or any action in or by the court:

- (1) shall give the notices required under Sections 294 and 295;
- (2) may give the notice permitted under Section 294(d) and bar a claim under that subsection;

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

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

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<sup>45</sup>Probate Code §146.

<sup>46</sup>Probate Code §147.

<sup>47</sup>*Bunting v. Pearson*, 430 S.W.2d 470 (Tex. 1968). See also *Collins v. State*, 506 S.W.2d 293 (Tex. Civ. App.-San Antonio 1973, no writ).

**(b) Secured Claims for Money.** Within **six months** after the date letters are granted or within **four months** after the date notice is received under Section 295, whichever is later, a **creditor** with a claim for money secured by real or personal property of the estate **must give notice to** the independent executor<sup>48</sup> of the creditor's election to have the creditor's claim approved as a matured secured claim to be paid in due course of administration. **If the election is not made, the claim is 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.** The independent executor may pay the claim before the claim matures if paying the claim before maturity is in the best interest of the estate.<sup>49</sup> [Emphasis added.]

**(c) Liability of Independent Executor.** An independent executor, in the administration of an estate, may pay at any time and without personal liability a claim for money against the estate to the extent approved and classified by the personal representative if:

- (1) the claim is not barred by limitations; and
- (2) at the time of payment, the independent executor reasonably believes the estate will have sufficient assets to pay all claims against the estate.<sup>50</sup>

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<sup>48</sup>In 1997 the phrase "by certified or registered mail" was deleted at this point from the statute.

<sup>49</sup>Tex. Prob. Code §146(b).

<sup>50</sup>Probate Code §146.

Historically, the statutory procedures for presenting claims did not apply to independent administrations.<sup>51</sup> This general rule is no longer fully applicable, in light of the explicit provisions of §146, enacted in 1995, discussed above.

**Although not required to do so, a creditor may present his claims to an independent executor, and if the estate is insolvent, it may be necessary to do so in order to retain priority.** Priority was apparently at issue in *Alterman v. Frost National Bank of San Antonio*.<sup>52</sup>

The secured creditor now has a clear option to have his claim treated as a matured secured claim or as a preferred debt and lien, as in the case of a dependent administration.<sup>53</sup>

**Form of the Claim—Application of §301 to Independent Administrations.** It has long been the rule that suit may be filed directly against the independent executor without first filing a claim.<sup>54</sup> The enactment of the Probate Code has not changed this rule.<sup>55</sup> In *Ditto Investment Company v. Ditto*, the court held that it was not necessary to

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<sup>51</sup>*Bunting v. Pearson*, 430 S.W.2d 470 (Tex. 1968). See also *Collins v. State*, 506 S.W.2d 293 (Tex. Civ. App.-San Antonio 1973, no writ).

<sup>52</sup>*Alterman v. Frost National Bank of San Antonio*, 675 S.W.2d 619 (Tex. App.-San Antonio 1984, no writ)

<sup>53</sup>For prior law, see *Fischer v. Britton*, 125 Tex. 505, 83 S.W.2d 305 (1935) and Woodward and Smith, *Probate and Decedents' Estates*, Vol. 18 TEXAS PRACTICE (1971) §915, and the discussion *infra*. But see also *Gross Nat'l Bank of San Antonio v. Merchant*, 459 S.W.2d 483 (Tex. Civ. App.-San Antonio 1970, no writ).

<sup>54</sup>*Fischer v. Britton*, 125 Tex 505, 83 S.W.2d 305 (Tex. 1935).

<sup>55</sup>*Collins v. State*, 506 S.W.2d 293 (Tex. Civ. App.-San Antonio 1973, no writ).

file a verified claim for medical services in an independent administration:<sup>56</sup>

Where an estate is being administered by an independent executor, the general provisions regulating the procedure for the establishment of claims against an estate are not applicable. 14-A Tex. Jur., p. 316, sec. 326; *Travis v. Kennedy*, Tex. Civ. App., 66 S.W.2d 444. Although Dr. Ditto, prior to the time appellant acquired the claim by assignment, presented a verified claim to the executor, such presentment to an independent executor was not necessary. *Smyth v. Caswell*, 65 Tex. 505, 83 S.W.2d 305; *Ewing v. Schultz*, Tex. Civ. App., 220 S.W.2d 625, error ref.; *Ashbrook v. Hammer*, Tex. Civ. App., 106 S.W.2d 776.<sup>57</sup>

Granting that verification of a properly presented claim to an independent administrator is not prerequisite to a suit on the claim, query whether an independent administrator may nevertheless require verification, or whether, in an insolvent estate, the fact that one claim is properly verified and another is not has any bearing on claim priority. **Although this issue has yet to be squarely addressed by the Texas Supreme Court it appears, based on existing authorities, that verification has no bearing on the matter at all, and that there is no special form or other requirements for presenting a claim to an independent executor.**

Probate Code §301 (which —again— may not apply to independent administrations) requires that **no personal representative of a decedent's estate shall allow, and the**

<sup>56</sup>*Ditto Investment Co. v. Ditto*, 293 S.W.2d 267 (Tex. Civ. App.- Fort Worth 1956, no writ). See also *Collins v. State*, 506 S.W.2d 293 (Tex. Civ. App.-San Antonio 1973, no writ).

<sup>57</sup>*Ditto Investment Co. v. Ditto*, 293 S.W.2d 267 at 269 (Tex. Civ. App.- Fort Worth 1956, no writ).

**court shall not approve, a claim for money against an estate, unless the claim is “supported by an affidavit that the claim is just and that all legal offsets, payments, and credits known to the affiant have been allowed.”** The statute goes on to provide:

“If the claim is not founded on a written instrument or account, the affidavit shall also state the facts upon which the claim is founded. A photostatic copy of any exhibit or voucher necessary to prove a claim may be offered with and attached to the claim in lieu of the original.” Prob. Code §301.

Probate Code §303, provides:

“If evidence of a claim is lost or destroyed, the claimant, or someone for him, may make affidavit to the fact of such loss or destruction, stating the amount, date, and nature of the claim and when due.”

However, the same statute continues as follows:

“If such claim is allowed or approved without such affidavit, or if it is approved without satisfactory proof, such allowance or approval **shall be void.**” (Emphasis added.)

**Waiver of Defects.** Probate Code §302, in an important provision, states:

“Any defect of form, or claim of insufficiency of exhibits or vouchers presented shall be deemed waived by the personal representative unless written objection thereto has been made within thirty days after presentment of the claim, and filed with the County Clerk.”

So, the waiver doctrine may make most of these concerns moot, most of the time. However, one place where the issue could still arise is in the area of who may

authenticate a claim made by a corporate creditor.

**Authentication By Proper Corporate Official.** In the case of a corporation, Probate Code §304 makes provision about who is the proper party to authenticate a claim:

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

In one case it was held that a “claim” made by the wrong official is not a “claim” at all, and thus, cannot be waived.<sup>58</sup>

**Secured Claims—§306 Applies To Independent Administrations.**

Historically, there were no Probate Code procedures for presenting a claim to an independent executor.<sup>59</sup> However, the secured creditor has always had the same option to have his claim treated as a matured secured claim, as in the case of a dependent administration.

Until 1996, there was some controversy about whether or not the distinctions described in Probate Code §306 between matured secured claims and preferred debts

and liens (and the time periods that can determine the distinction) applied in an independent administration. Two cases, *Joffrion* and *Cox*, held that Probate Code §306, as it then existed, did not apply to an independent administration.<sup>60</sup>

After 1995, however, Probate Code §146, as extensively rewritten, now explicitly provides procedures applicable to secured claims in an independent administration.

**Allowance, Rejection and Suit on Rejected Claim—§§309, 310 & 313 Do Not Apply to Independent Administrations.** The Texas Supreme Court has flatly held that Sections 309 (memorandum of allowance or rejection of claim), 310 (failure to endorse or annex memorandum) and 313 (suit on rejected claim) of the Probate Code simply do not apply to independent administrations.

[It is] *otherwise apparent* that these sections [Prob. Code 309, 310 and 313] are not applicable to an ‘independent executor’, because to apply them would be inconsistent with the provisions of Section 145 of the Probate Code; the general purpose of which is to free the ‘independent executor’ from the control of the court, except where the Code specifically and explicitly provides otherwise.<sup>61</sup>

In an independent administration, the administrator steps into the shoes of the decedent. Therefore, (1) a creditor is not required to present his claim and may bring suit directly against the independent

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<sup>58</sup>*Boney v. Harris*, 557 S.W.2d 376 (Tex. Civ. App.-Houston [1st Dist.] 1977, no writ). *Contra*, *City of Austin v. Aguilar*, 606 S.W.2d 310 (Tex. Civ. App.-Austin 1980, no writ).

<sup>59</sup>*Bunting v. Pearson*, 430 S.W.2d 470 (Tex. 1978).

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<sup>60</sup>*Joffrion v. Texas Bank of Tatum*, 780 S.W.2d 451 (Tex. App.-Austin 1989, writ granted) and *Texas Commerce Bank-Austin, N.A. v. Estate of George Cox, Deceased*, 783 S.W.2d 16 (Tex. App.-Texarkana 1989, writ denied). *Cf.*, *Gibraltar Mortgage and Loan Corporation v. Lerman*, 346 S.W.2d 487, 488 (Tex. App.-Waco 1961, no writ).

<sup>61</sup>*Bunting v. Pearson*, 430 S.W.2d 470 at 473 (Tex. 1968).

administrator or may foreclose upon his security without waiting for the claim to be rejected;<sup>62</sup> (2) rejection of a claim by an independent executor does not start the special ninety day statute of limitations running;<sup>63</sup> and (3) execution will issue on a prior judgment obtained during the life of a decedent, without presentment. If a non-independent administration is later opened because of the death or removal of the independent administrator, a sale made under a deed of trust at a time when an independent executor was representing the estate will not be upset.<sup>64</sup>

Although Probate Code §310 provides that “The failure of a representative of an estate to endorse on or annex to, a claim presented to him, his allowance or rejection thereof within thirty days after the claim was presented, **shall constitute a rejection** of the claim,” *Bunting v. Pearson*, as indicated above, is very explicit that §310 does not apply to independent administrations.

This is an important finding, because the **last sentence to Probate Code §310 provides that if a claim rejected by inaction is thereafter established by suit, the cost shall be taxed against the representative, individually.**

“If the claim is thereafter established by suit, the costs shall be taxed against the representative, individually, or he may be removed on the written complaint of any person interested in the claim . . . .”

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<sup>62</sup>*Fischer v. Britton*, 125 Tex 505, 83 S.W.2d 305 (Tex. 1935); *Sloan v. Dahl*, 127 S.W.2d 284 (Tex. Civ. App. 1930); *Ditto Investment Co. v. Ditto*, 293 S.W.2d 267 (Tex. Civ. App.-Fort Worth 1956, no writ); *Ball v. Parks*, 278 S.W.2d 189 (Tex. Civ. App.-Fort Worth 1955, writ dismissed w o j); *Pottinger v. Southwestern Life Insurance Co.*, 138 S.W.2d 645 (Tex. Civ. App.-Waco 1940, no writ).

<sup>63</sup>*Bunting v. Pearson*, 430 S.W.2d 470 (Tex. 1968).

<sup>64</sup>*Bozeman v. Folliott*, 556 S.W.2d 608 (Tex. Civ. App.-Corpus Christi 1977, writ refused n.r.e.).

The overcautious might be reluctant to take the Texas Supreme Court at its word on this point, because the automatic rejection issue was not directly before the Court. However, the Court was unequivocal in its pronouncement on this score, and it therefore seems reasonable to take its statement at face value.

### **Classification and Priority—§§320-322 Apply to Independent Administrations.**

On the other hand, the classification and priority rules of Prob. Code §§320-322 do apply to independent administrations.

Prior to the adoption of the Code the courts had held that ‘independent executors’ were required to handle claims in accordance with provisions of the statute dealing with classifications, priority and proration of claims. It appears to us that Section 146 carries forward the law in this respect as it existed prior to the adoption of the code. The phrase ‘in the same order of priority, classification, and proration prescribed in this code’ refers to Sections 322 dealing with classification; 321 dealing with proration; and 320 dealing with priority.<sup>65</sup>

### **GENERAL STATUTES OF LIMITATIONS**

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<sup>65</sup>*Bunting v. Pearson*, 430 S.W.2d 470 at 473 (Tex. 1968).

This memo does not attempt to deal with the general statutes of limitations (also known as limitation of actions) except to note that there is a huge corpus of law on the subject, many different rules, and a myriad of exceptions and special cases. However, as a very *general* rule, under Texas state law — and, again, subject to many special rules and exceptions—, a person must bring suit for a **tort** (e.g., personal bodily or property injury) **within two years of the injury**,<sup>66</sup> and must bring an action on a **contract** or debt **with four years** after the day the cause of action accrues.<sup>67</sup>

### **RESPONSE TO A SUIT BY AN INDEPENDENT EXECUTOR.**

Probate Code §147 provides that an independent executor shall not be required to respond to a suit for money until after 6 months from the date the order appointing the independent executor was entered.

### **STATUTE OF LIMITATIONS TOLLED**

In the case of a claim by or against a decedent, the statutes of limitation are tolled for a period of 12 months following the decedent's death, unless a personal representative sooner qualifies, in which case, the statute begins to run upon such qualification.<sup>68</sup>

Probate Code §299 provides that the general statutes of limitation are tolled “by filing a claim which is legally allowed and approved” or “by bringing a suit upon a rejected and disapproved claim within ninety days after such rejection or disapproval.” Read literally, if a claim is allowed and approved, filing the claim would appear to toll the statute.

It would be reasonable to assume that presentment to the personal representative would have the same effect as filing the claim with the clerk, but this is not clear.<sup>69</sup> On the other hand, if the claim is rejected, it would appear that the statute is not tolled until suit is brought on the claim. If the statute of limitations is about to run, an aggressive representative might choose to reject the claim on the 30th day of presentment and hope that the statute would run out before suit was filed.

It should be added that Probate Code §299 is somewhat ambiguous, there have not been many cases interpreting it, and it may be subject to an interpretation other than the one given above.<sup>70</sup>

**But, does §299 apply to an independent administration?** There is no authority on this point, but there are a number of good reasons for believing that it does not. For one thing, there is no requirement that claims be presented to an independent executor, much less “filed,” and it is to be doubted whether any action that an independent executor takes to approve or classify a claim presented rises to the level of “legally allowed and approved.” The use of the word “legally” is quite appropriate in the context of a court supervised dependent administration, but is out of place when used in connection with an independent administration, which is generally free from court control. In addition, the second part of the statute that provides for tolling “by bringing a suit upon a rejected and disapproved claim within ninety days after such rejection or disapproval,” is clearly of

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<sup>66</sup>Tex. Civ. Prac. and Rem Code §16.003.

<sup>67</sup>Tex. Civ. Prac. and Rem Code §16.004.

<sup>68</sup>§16.062 Texas Civil Practice and Remedies Code. Formerly Tex. Rev. Civ. Stat. Ann. art 5538?

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<sup>69</sup>*Palfrey v. Harborth*, 158 S.W.2d 326 (Tex. Civ. App.-San Antonio 1942, writ ref'd).

<sup>70</sup>Woodward and Smith, *Probate and Decedent's Estate*, 18 TEXAS PRACTICE (1971) §907.

no application to an independent administration.<sup>71</sup>

### ESTATE TAX APPORTIONMENT

Apportionment of estate taxes and the order in which gifts abate are two crucial concerns to the insolvent or potentially insolvent estate. Why is apportionment of concern, since in order to be subject to estate tax, the estate must be fairly large? The answer is that the probate estate may be small compared with nonprobate estate, and yet the non probate assets are still includible in the estate for estate tax purposes.

Until recently, no Texas statutes directly governed the order of abatement or estate tax apportionment. This has been changed by the enactment of new Probate Code §§322A and 322B.

**Estate Tax Apportionment Under Federal Law.** The Internal Revenue Code has a number of sections in the 2200 series that entitle the decedent's representative to recover from persons receiving nonprobate assets estate taxes paid with respect to those assets. In most the tax is averaged, but in the case of §2044 property in which the decedent had a qualified income interest for life (QTIP), the recovery is at the margin.

§2206 allows the executor to recover a prorata share of estate taxes from the beneficiary of life insurance includible in the decedent's gross estate by reason of §2042.

§2207 allows the executor to recover a prorata share of estate taxes from the beneficiary of property over which the decedent had a §2041 general power of appointment, unless the decedent directs otherwise in his will. This statute will not apply to property includible in the decedent's estate under Code §2036 (certain

transfers with a retained interest), in a situation where if §2036 didn't apply, §2041 would.<sup>72</sup>

§2207A gives the estate the right to recover estate taxes paid as a result of the inclusion of §2044 property (QTIP). Unlike the other recovery statutes, §2207A allows for recovery at the highest margin.

§2207 does not address the situation where the decedent retained an interest under §§2036-2038 because such a transfer was under the decedent's control when the decedent made it. §2207B now covers this situation.

**Estate Tax Apportionment Under State Law.** New Texas Probate Code §322A provides a comprehensive estate tax apportionment statute affecting Texas decedent's estates.

**In the absence of a contrary direction in the decedent's will,**<sup>73</sup> the personal representative is directed to charge each person interested in the estate a portion of the estate tax assessed against the estate. The portion of the total estate tax that is charged to each person interested in the estate must represent the same ratio as the taxable value of that person's interest in the estate bears to the total taxable value of the interests of all persons interested in the estate.

This ratio of the taxable value of the recipient's interest to the taxable value of all recipients is certainly intended to cover all of the tax; however, there is some question concerning the proper size of the denominator. The taxable value of the

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<sup>72</sup>For purposes of §§20.2041-1 to 20.2041-3, the term "power of appointment" does not include powers reserved by the decedent to himself within the concept of sections 2036 to 2038." Treas. Reg. §20.2041-1(b)(2).

<sup>73</sup>It is predicted that a great deal of litigation is going to result over just whether or not in any particular instance, a will does in fact contain a contrary direction.

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<sup>71</sup>*Bunting v. Pearson*, 430 S.W.2d 470 (Tex. 1968).

interests of all persons interested in the estate ought to exclude marital and charitable deduction property and property subject or subjected to a charge for debts and expenses. Whether the statute literally describes this intended reduction is an interesting question.

Expenses incurred in connection with the determination or collection of estate taxes are likewise apportionable. The executor is charged with the duty to make recovery unless the cost would be economically impractical.

No estate tax is charged to a gift qualifying for the marital or charitable deduction, nor is a charge made against a temporary interest such as a life estate or a term for years.

Probate Code §322A is not confined to probate assets, but allows recovery against any person interested in the decedent's estate, including anyone who is entitled to receive property included in the decedent's taxable estate.

Probate Code §322A(b)(2) allows the decedent to direct in the non-testamentary instrument whether or not the assets therein described will escape apportionment, but if the issue is not addressed, either in the will or other instrument, the general apportionment rules will apparently apply. (Under some circumstances, this may have the effect of allowing the settlor to amend an otherwise irrevocable unamendable trust.)

Note that §322A(b)(2) (last sentence) provides that "A direction for the apportionment or non apportionment of estate tax, whether contained in a will or in a nontestamentary instrument, is limited to the estate tax on the property passing under the instrument that contains the direction unless the instrument provides otherwise." Language in a will stating that all taxes shall be paid from the residuary estate (without more) should not be sufficient to override

the rule requiring apportionment of nonprobate assets under §322A.

The new statute is effective for estates of persons who die after September 1, 1987. An estate of a person who dies prior to that date is governed by prior law.

The law in Texas, prior to the enactment of Code §322A was somewhat uncertain. It is thought that the residuary estate would ordinarily be the primary source for payment of debts and expenses, including estate taxes, absent a contrary direction in the will, although inheritance taxes may have been apportionable.<sup>74</sup>

#### **ABATEMENT, EXONERATION, AND CLASSIFICATION OF BEQUESTS.**

Debts and expenses must be paid from somewhere. The source of property used to pay debts and expenses obviously has a profound impact on the beneficiaries of the estate if the beneficiaries are not all the same. Probate §322A is concerned with taxes. Probate Code §322B is concerned with other claims and expenses.

**Probate Code §322B.** New Probate Code §322B prescribes that if the assets of the probate estate are sufficient to pay all of the claims and expenses, excluding estate taxes apportioned under §322A, but are not sufficient thereafter to pay all of the gifts under the will, then, in the absence of a will provision to the contrary, abatement will take place in the following order:

1. Probate assets not disposed of in the will, passing by intestacy, abate first.
2. Personal property of the residuary estate.
3. Real property of the residuary estate.
4. General gifts of personal property.
5. General gifts of real property.

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<sup>74</sup>See *Sinnott v. Gidney*, 322 S.W.2d 507 (1959).

## 6. Specific gifts of personal property.

## 7. Specific gifts of real estate abate last.

Probate Code §322B is effective for estates of persons who die after September 1, 1987. An estate of a person who dies prior to that date is governed by prior law, whatever that was. It is thought that the new statute probably codified prior law, but the special effective date and *Hurt v. Smith*,<sup>75</sup> causes one to wonder.

Frequently, it will be the case that debts are paid from whatever source is convenient, rather than by selling a fractional share of each and every asset in the same class. Thus, some form of internal accounting and adjustment must be made. Query: in such a case, when should assets which have not actually been disposed of be valued for abatement purposes? Date of death? Date of distribution? Some other date?

**Classification of Gifts.** Whether or not a gift under the will shall be used to pay expenses and debts depends on its classification under Probate Code §322B. §322B recognizes general, specific and residuary gifts. This is a time honored approach. However, the classification of gifts is not always as easy as one might suppose. How is one to classify, for example, a gift of “all of my tangible personal property” or a gift of “100 acres of land,” or a gift of all of “my cattle and other livestock owned by me at the date of my death.”

The problem is that there may be more than one kind of specific gift: generic and individual, the former sometimes being referred to as a specific gift of a general nature. This is a distinction the authors of *Page on Wills* take pains to make in that

treatise,<sup>76</sup> and is one that the Texas Supreme Court has recently approved.<sup>77</sup> However, there are many definitions of “specific gifts” in the literature that would not apply to gifts that are essentially specific gifts of a general nature, even though the courts routinely classify such gifts as being specific: for example, “all my cattle.”<sup>78</sup>

**Specific Gifts.** A specific gift is a gift of a specific and identifiable asset of the estate as distinguished from other assets.

The Texas Supreme Court recently described a gift as specific if

(1) it is described with such particularity that it can be distinguished from all of the testator’s other property and (2) the testator intended for the beneficiary to receive that particular item, rather than cash or other property from his general estate.<sup>79</sup>

The Court of Civil Appeals in *Pinkston* described a specific gift by in turn quoting form 28 R.C.L., p. 289, par. 263, as follows:

A specific legacy is a gift by will of a specific article, or a particular part of the testator’s estate which is identified and distinguished from all others of the same nature, and which can be satisfied only by the delivery and receipt of the particular thing given. . . . No special words are required to make a bequest specific, though such words as ‘my’, ‘owned by me’, ‘standing in my name’,

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<sup>76</sup>*Page on Wills*, Revised Treatise, by William Bowe and Douglas Parker, 1962, published by the W. H. Anderson Company, Vol. 6, §48.4, page 15.

<sup>77</sup>*Hurt v. Smith*, 741 S.W.2d 1, 5 [top of page, left hand column] (Tex. 1987).

<sup>78</sup>*Brady v. Nichols*, 308 S.W.2d 100 (Tex. Civ. App.-San Antonio 1957), modified per curium 158 Tex. 382, 312 S.W.2d 381 (1958).

<sup>79</sup>*Hurt v. Smith*, 741 S.W.2d 1, 4 (Tex. 1987), citing *Houston Land & Trust Co. v. Campbell*, 105 S.W.2d 430, 433 (Tex. Civ. App.-El Paso 1937, writ ref’d) and Atkinson, *Law of Wills* §132, at 732 (1953).

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<sup>75</sup>*Hurt v. Smith*, 741 S.W.2d 1 (Tex. 1987).

or ‘in my possession’ are indicative of the specific character of the legacy.<sup>80</sup>

A fundamental characteristic of a specific gift is that it will adeem if the asset is not a part of the estate at death, which is to say that the gift will not be satisfied by resort to other assets of equivalent value.<sup>81</sup> In a sense this is also characteristic of residuary gifts and to a certain extent it is characteristic of certain forms of gifts routinely classified as general.

It is also sometimes said in the treatises, incorrectly, that with specific legacies, the will speaks as of the time of its execution. “A specific legacy disposes of property identified by the will at the time of its execution and does not include property thereafter acquired and not included in a testamentary provision when viewed as of the date of execution.”<sup>82</sup> This is a true statement with respect to individual specific gifts, but is untrue with respect to certain generic specific gifts: specific gifts of a general nature such as “all of the books in my library.”

It is clear that a gift of “all of my cattle” may be treated as specific even though the cattle owned at death may not be the same

as the cattle owned when the will was signed.<sup>83</sup>

Two examples of generic specific gifts are found in the Texas Supreme Court case of *Hurt v. Smith*, 741 S.W.2d 1, 4 (Tex. 1987).

We note that sections 4 and 5 of Smith’s will each devised a one-half interest of “all” Smith’s mineral interests. *See Brady v. Nichols*, 308 S.W.2d 100 (Tex. Civ. App.-San Antonio 1957), reformed 158 Tex. 382, 312 S.W.2d 381 (1958). Although the bequests do not identify each of the mineral interests owned by Smith, the description is specific enough to distinguish the gifts from the remainder of Smith’s property. *Brady*, 308 S.W.2d at 111 (a bequest of “all the Stock on all my ranches” constituted a specific description of all the cattle on all the testator’s ranches). In addition, the legacies clearly indicate that Smith only intended for the beneficiaries to receive the mineral interests that he owned when he died, rather than cash or other property from his general estate. Thus, even though the mineral interests passing under sections 4 and 5 are generically described, the description is definite enough to constitute a specific gift.<sup>84</sup>

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Section 8 bequeathed “[t]he remaining balance of all cash, checking accounts, certificates of deposit, savings certificates, and money market certificates I have at the time of my death, after the payment of all my just

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<sup>80</sup>*Pinkston v. Pinkston*, 81 S.W.2d 196, 198 (Tex. Civ. App.-Eastland 1935, no writ). See also *Houston Land & Trust Co. v. Campbell*, 105 S.W.2d 430 (Tex. Civ. App.-El Paso 1937, writ ref’d).

<sup>81</sup>*The Law of Wills*, by George W. Thompson, Third Edition, §481, p. 698, Indianapolis, The Bobbs-Merrill Company, 1947.

<sup>82</sup>*The Law of Wills*, by George W. Thompson, Third Edition, §481, p. 698, Indianapolis, The Bobbs-Merrill Company, 1947.

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<sup>83</sup>*Pinkston v. Pinkston*, 81 S.W.2d 196, 197 (Tex. Civ. App.-Eastland 1935, no writ). *Cf.*, “The doctrine of facts of independent significance.” *Wilson v. Phillips*, 459 S.W.2d 212 (Tex. Civ. App.-Fort Worth 1970, no writ); *Welch v. Trustees of Robert A. Welch Foundation*, 465 S.W.2d 195 (Tex. Civ. App.-Houston [1st Dist.] 1971, writ ref’d n.r.e.).

<sup>84</sup>*Hurt v. Smith*, 741 S.W.2d 1, 4-5 (Tex. 1987).

debts, funeral expenses, expenses of last illness, and costs and expenses incurred in the probate of this Will, shall pass to and vest . . .

Although this section does not set forth the amount of money or value of the accounts or certificates passing under it, the section identifies the assets and funds bequeathed to the charities. Thus, the legacies passing under section 8 are specific bequests. *See Brady*, 308 S.W.2d 100, 109-11 (a bequest of “all my moneys in Banks” is a specific bequest).<sup>85</sup>

This case is strong evidence that the court is inclined to find that a gift is specific when in doubt, despite the presumption to the contrary referred to in *Campbell*.<sup>86</sup>

Logically, one might think that as between a specific gift of an individual item, such as “my red 1965 Ford Mustang that Sally used to ride around in,” and a specific gift of a general nature, such as “all automobiles owned by me at the date of my death,” that the specific gift of a general nature ought to abate before the specific gift of an individual item. However, no such distinction is made in Probate Code §322B, which may make it more likely in a tough case to classify a specific gift of a general nature as a general gift.

**Demonstrative Gifts.** Few of us have actually ever seen a real life demonstrative gift, much less had an abatement problem associated with one. Nevertheless they must be discussed.

The Texas Supreme Court recently described a demonstrative gift as follows:

Demonstrative legacies are bequests of sums of money, or of quantity or amounts having a pecuniary value and measure, not in themselves specific, which the testator intended to be charged primarily to a particular fund or piece of property.<sup>87</sup>

A demonstrative gift is in a special category, having the characteristics of both a specific and general gift. A demonstrative gift is unusual in that it is to be satisfied *primarily* from a particular fund or source of property; however, unlike a specific gift, if the source of payment is exhausted or otherwise does not exist at death, then, to that extent, the gift does not adeem, but is treated as a general gift, abating with other general gifts in the same general category.<sup>88</sup>

The peculiar characteristic of a demonstrative gift, that it be treated as general to the extent the primary source of payment is insufficient, appears to be a question of intent, rather than a canon of construction. Unless the testator manifests an intent to treat a gift as demonstrative, it will probably be treated as specific. Demonstrative gifts are not covered by §322B, but if the intent is clear, it is a good guess that demonstrative gifts would abate only after general gifts, but before specific gifts, and that a demonstrative bequest of personal property would abate before a demonstrative bequest of real estate.

**General Gifts.** If a gift is classified as a general gift, it means that it will normally abate before gifts classified as specific. True, the Texas Supreme Court recently

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<sup>87</sup>*Hurt v. Smith*, 741 S.W.2d 1, 4 (Tex. 1987), citing *Houston Land & Trust Co. v. Campbell*, 105 S.W.2d 430, 433 (Tex. Civ. App.-El Paso 1937, writ ref'd) and Bailey, *Wills* §574, at 367-68 (Texas Practice 1968).

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<sup>85</sup>*Hurt v. Smith*, 741 S.W.2d 1, 5 (Tex. 1987).

<sup>86</sup>*Houston Land & Trust v. Campbell*, 105 S.W.2d 430, 434 (Tex. Civ. App.-El Paso 1937, err ref'd).

<sup>88</sup>*Page on Wills*, Revised Treatise, by William Bowe and Douglas Parker, 1962, published by the W. H. Anderson Company, Vol. 6, §48.7, page 26. Bailey, *Wills*, Vol. 10 TEXAS PRACTICE (1968), §574, page 367.

held otherwise,<sup>89</sup> however this decision appears to have been overridden by statute.<sup>90</sup>

A general legacy is not a charge upon any specific property.<sup>91</sup> “The outstanding characteristic of the general legacy or devise is that it does not attempt to dispose of any specific article of property . . .”<sup>92</sup>

The Texas Supreme Court recently described a general gift as follows:

A legacy is a general bequest if (1) it bequeaths a designated quantity or value of property or money and (2) the testator intended for it to be satisfied out of his general assets rather than disposing of, or being charged upon, any specific fund or property.<sup>93</sup>

Another way of defining a general legacy is to say that it is a gift that is not specific or demonstrative.<sup>94</sup>

Because a pecuniary legacy has all of the attributes of a general gift it may serve as a paradigm.<sup>95</sup> It may be hard to think of other examples. “My executor is directed to purchase an annuity for my wife that will pay her \$100 a month for her life” might be one example.

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<sup>89</sup>*Hurt v. Smith*, 741 S.W.2d 1, 6 (Tex. 1987).

<sup>90</sup>Texas Probate Code §322B.

<sup>91</sup>Bailey, *Wills*, Vol. 10 TEXAS PRACTICE (1968), §574, page 369.

<sup>92</sup>*Page on Wills*, Revised Treatise, by William Bowe and Douglas Parker, 1962, published by the W. H. Anderson Company, Vol. 6, §48.2, page 8.

<sup>93</sup>*Hurt v. Smith*, 741 S.W.2d 1, 4 (Tex. 1987), citing *Houston Land & Trust Co. v. Campbell*, 105 S.W.2d 430, 433 (Tex. Civ. App.-El Paso 1937, writ ref'd) and Bailey, *Wills* §574, at 367-68 (Texas Practice 1968).

<sup>94</sup>*Houston Land & Trust v. Campbell*, 105 S.W.2d 430, 433 (Tex. Civ. App.-El Paso 1937, err ref'd).

<sup>95</sup>*Page on Wills*, Revised Treatise, by William Bowe and Douglas Parker, 1962, published by the W. H. Anderson Company, Vol. 6, §48.2, page 8.

The treatise writers give the following as examples of general bequests: A bequest of all moneys or legacies from any source. A gift of one-half of all investments;<sup>96</sup> a bequest of a certain number of indistinguishable shares of stock if the testator owns a great number; a gift of all personal property less certain items.<sup>97</sup>

A gift of stock may be specific or general, depending on the facts. If it appears that the testator intended to give certain identifiable shares, the gift will be specific, but a gift of a specific number of shares, without further distinguishing characteristics has been held to be a general bequest, even if the testator owned the exact number of shares given.<sup>98</sup>

**Despite the examples given by the treatise writers, the Texas Courts tend to find generically described gifts to be specific.**<sup>99</sup>

Sometimes it is difficult to tell whether a gift is specific or general. In such case, it is the intention of the testator that governs; however, it is sometimes said that there is a presumption that a gift is general if in doubt.<sup>100</sup>

For example, what about a gift of “all of my real property”? Such a gift has many of the surface characteristics of a generic specific gift. First of all, the gift would adeem if the decedent didn't own real property. The word

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<sup>96</sup>*Page on Wills*, Revised Treatise, by William Bowe and Douglas Parker, 1962, published by the W. H. Anderson Company, Vol. 6, §48.2, page 9.

<sup>97</sup>*The Law of Wills*, by George W. Thompson, Third Edition, §482, p. 700, Indianapolis, The Bobbs-Merrill Company, 1947.

<sup>98</sup>*Page on Wills*, Revised Treatise, by William Bowe and Douglas Parker, 1962, published by the W. H. Anderson Company, Vol. 6, §48.6, page 21.

<sup>99</sup>*Hurt v. Smith*, 741 S.W.2d 1 (Tex. 1987); *Houston Land & Trust Co. v. Campbell*, 105 S.W.2d 430, 433 (Tex. Civ. App.-El Paso 1937, writ ref'd).

<sup>100</sup>*Houston Land & Trust v. Campbell*, 105 S.W.2d 430, 434 (Tex. Civ. App.-El Paso 1937, err ref'd).

“my” is used in the gift.<sup>101</sup> Such a gift can’t possibly be satisfied out of other assets of the estate. It can be distinguished from all of the testator’s other property, namely, his personal property. Nevertheless, **it is horn book law and the cases are legion that a gift of all of a testator’s personal property is a general legacy.**<sup>102</sup> For instance, there is a reference in *Currie v. Scott* to a “general legatee to whom all the personal property is given.”<sup>103</sup>

It may be that a gift of “all my personal property” is just too “general” to be specific, and the determining factor may be the rule of construction that a gift is presumed to be general if the determination is doubtful.

**Residuary Gifts.** According to the Texas Supreme Court:

A legacy should be classified as a residuary bequest if the testator intended for the gift to bequeath everything left in the estate, after all debts and legal charges have been paid, and after all specific, demonstrative and general gifts have been satisfied. See *Shriner’s Hospital for Crippled Children of Texas v. Stahl*, 610 S.W.2d 147, 152 (Tex. 1980); see also [Atkinson] *Law of Wills* §132 at 736; *Page on Wills* §48.10, at 35.<sup>104</sup>

**Testator’s Intent.** Before concluding the discussion on forms of gifts, it may be helpful to consider that it is the testator’s

intent that is paramount in making the classification.<sup>105</sup> But it is not really a question of whether the testator intended the gift to be specific, general or residuary, since testator’s don’t think in those terms; rather, it is a question of what the result of the classification would be. In other words the question is— would the testator have wanted the gift to abate to pay debts before resorting to other property in the estate? If so, then it is much more likely that a court will find that the gift was a general or residuary gift rather than a specific gift. In fact, this question of intent may be a part of the definition of a general bequest, no matter how the gift is described.<sup>106</sup>

In this regard it is important to reexamine the *Hurt*<sup>107</sup> case. The opinion has been cited above for its definitions of specific, general and residuary gifts. The opinion was most surprising, however, in its holding that pecuniary gifts that it classified as general, were not to abate before specific gifts, despite the general rule. It reached this conclusion based on the intent of the testator as found in the will. (To be candid, this intent was anything but clear, notwithstanding the Court’s conclusion.)

Our analysis, however, does not end here. In ascertaining what we believe to be the intent of the testator as to the priority of payment, it is important to consider these legacies in the overall context of this will. We believe the testator intended for the [general] legacies in sections 1, 2 and 3 to be paid before the [specific] bequest in section 8. Sections 1, 2 and 3 provide for legacies of specific dollar amounts of cash, while

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<sup>101</sup>*Pinkston v. Pinkston*, 81 S.W.2d 196, 198 (Tex. Civ. App.-Eastland 1935, no writ).

<sup>102</sup>*Page on Wills*, Revised Treatise, by William Bowe and Douglas Parker, 1962, published by the W. H. Anderson Company, Vol. 6, §48.2, page 8, ft. note 5. *The Law of Wills*, by George W. Thompson, Third Edition, §482, p. 700, Indianapolis, The Bobbs-Merrill Company, 1947.

<sup>103</sup>*Currie v. Scott*, 187 S.W.2d 551, 554 (Tex. 1945).

<sup>104</sup>*Hurt v. Smith*, 741 S.W.2d 1, 4 (Tex. 1987).

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<sup>105</sup>*Hurt v. Smith*, 741 S.W.2d 1, 4 (Tex. 1987).  
*Lake v. Copeland*, 82 Tex. 464, 17 S.W. 786, 787 (1891).

<sup>106</sup>*Hurt v. Smith*, 741 S.W.2d 1, 4 (Tex. 1987).

<sup>107</sup>*Hurt v. Smith*, 741 S.W.2d 1 (Tex. 1987).

section 8 refers, *inter alia*, to the “remaining balance of all cash.”

Under a ritualistic application of the rules governing classification, sections 1, 2 and 3 are general bequests, and section 8 is a specific bequest. Consequently, to the extent that the residuary estate is insufficient to pay the estate tax, these general legacies are exhausted before the specific bequest is reached, under the general rule discussed earlier herein. We believe, however, that this is an inappropriate result, given the relationship of these two bequests in the overall context of this will. Therefore, although we recognize the legacies in sections 1, 2 and 3 are ordinarily viewed as general bequests, while those under section 8 are classified as specific bequests, we hold that under the facts of this case, the section 8 bequests should be utilized for the payment of estate taxes before those bequests described in section 1, 2 and 3.<sup>108</sup>

It is remotely possible that *Hurt* is still good law if one considers that it was decided on the basis of intent. Recall that §322B(d) states that “A decedent’s intent as expressed in a will, controls over the abatement of bequests provided by this section.

#### **EXONERATION OF MORTGAGES ON SPECIFIC GIFTS.**

The doctrine of exoneration involves the question of whether or not the beneficiary of a specific devise of real property that is encumbered by a mortgage loan (for which the decedent was personally liable) ought to take the property charged with the debt.

Note at the outset that the doctrine of exoneration ought to no longer apply in Texas since the advent of Probate Code §322B. The authors of the Texas Practice

series on Wills close the chapter on exoneration by saying “Although there is no case law on the issue, Section 322B appears to set forth the priority of bequests for exoneration purposes.”<sup>109</sup> Nevertheless, because the doctrine has historical significance and could still apply if the testator intends to vary from the statutory scheme, it may be worthwhile to explore it.

It is sometimes said that the idea behind the doctrine is that if a testator makes a specific gift of encumbered real estate, that the debt ought to be paid by someone other than the recipient. However, in operation the result is more likely to be the opposite, since without the doctrine the ordinary abatement rules would operate to discharge the debt out of other property. **The concept ought more properly to be called the doctrine of *unexoneration*, since the rule operates as an exception to the general principles of abatement.**

First of all, the doctrine ought to have no application at all in the ordinary case, if the real or personal property in the residuary estate is sufficient and if the testator directed (or §322B directs) that the residuary estate pay the debt. Further, general bequests of property (real or personal) should be used to discharge the debt against specific property after the residuary estate is exhausted, before consideration of exoneration:

When the testator owes a debt secured by a lien upon specific property belonging to him, the debt, like any other personal debt, is to be paid out of the testator's personal estate, in the absence of provisions in the will showing a contrary intention; and that, as between the devisee or legatee of the encumbered property and a **general**

<sup>108</sup>*Hurt v. Smith*, 741 S.W.2d 1, 5-6 (Tex. 1987).

<sup>109</sup>Texas Practice, *Texas Law of Wills*, Vol. 9, §26.3 p. 732, by Leopold and Beyer, West Publishing Co., St. Paul, Minn., 1992.

legatee to whom all the personalty is given, or a **residuary** legatee or next of kin, the debt must be paid out of the personalty.<sup>110</sup> [Emphasis added.]

But this is no more than the normal rule of abatement. (In *Currie* there was no residuary estate and there was no direction how to pay debts.)

The issue squarely presented in *Currie*<sup>111</sup> and *Brady*<sup>112</sup> was whether or not an encumbrance against specifically devised real estate should be discharged by other specific legacies. The court refused to allow specific gifts, **whether real or personal**, to be abated to discharge the debt. The court has twice held that encumbered property specifically devised should alone bear the expense of discharging a mortgage against it, contrary to the general rule that personal property abates before real estate, and that property in the same class abates pro rata.<sup>113</sup> (In *Currie* the reference to personal property may have been dictum.)

[P]ersonalty which is specifically bequeathed cannot be applied to the mortgage debt. 4 *Page on Wills*, pp. 298, 299, Sec. 1486.

We have found no decisions permitting exoneration by resort to realty which has been specifically devised.<sup>114</sup>

**The result of the doctrine of unexoneration is not consistent with §322B which requires that specific gifts of**

**real estate abate last.** But consider whether §322B is overridden by a contrary intent expressed in the will. Under the *Hurt* case, decided prior to §322B, that intent, though not explicit, was found in the “the relationship of these two bequests in the overall context of this will.”<sup>115</sup>

It is a good practice to address the exoneration issue in any will where mortgaged property is being specifically devised. On the other hand, if it is intended that the property is to pass encumbered by a lien, or subject to a mortgage, the will should definitely say so, and any “pay all debts” clause should be modified accordingly so as not to create a conflict.

**Who Is Liable For The Tax On IRA Proceeds Or Qualified Plan Assets?** Even if the estate is solvent, the residuary beneficiaries may be very concerned with the question of who pays estate taxes associated with qualified plan assets or IRA proceeds. If the estate is insolvent, or potentially insolvent these issues may appear more important still.

**Who Is Liable For Administration Expenses Attributable To Specific Gifts.** Since the beneficiary of a specific gift is generally entitled to the net income attributable to that gift during administration<sup>116</sup>, it would stand to reason that expenses incurred in the generation of that income would likewise be chargeable to the gift, even if this occurs indirectly in arriving at *net* income in the first place. However, consider whether a direction under the will that the residuary estate shall be responsible for all expenses of administration could be construed as overruling the common sense approach. It is suggested that this is a matter which should be addressed in the will.

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<sup>110</sup>*Currie v. Scott*, 187 S.W.2d 551, 554 (Tex. 1945).

<sup>111</sup>*Currie v. Scott*, 187 S.W.2d 551, 554 (Tex. 1945).

<sup>112</sup>*Brady v. Nichols*, 158 Tex. 382, 312 S.W.2d 381 (1958).

<sup>113</sup>*Currie v. Scott*, 187 S.W.2d 551 (Tex. 1945); *Brady v. Nichols*, 158 Tex. 382, 312 S.W.2d 381 (1958).

<sup>114</sup>*Currie v. Scott*, 187 S.W.2d 551, 554-555 (Tex. 1945).

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<sup>115</sup>*Hurt v. Smith*, 741 S.W.2d 1, 5-6 (Tex. 1987).

<sup>116</sup>See, for example, Texas Trust Code §113.103.

## HOMESTEAD, ALLOWANCES AND EXEMPT PROPERTY.

The surviving spouse and certain other family members have rights in the homestead and in exempt property that survive death and which have priority over claims of creditors. In addition, under certain circumstances the surviving spouse and minor children may be entitled to a family allowance, in an amount sufficient to support them for one year.

These exemptions, allowances, etc. are discussed in this memo only very briefly.

§270 of the Probate Code provides

§270. Liability of Homestead for Debts:

The homestead shall not be liable for the payment of any of the debts of the estate, except for the purchase money thereof, the taxes due thereon, or work and material used in constructing improvements thereon; and in this last case only when the work and material are contracted for in writing, with the consent of both spouses given in the same manner as required in making a sale and conveyance of the homestead.

In *George v. Taylor*, 296 S.W.2d 620 (Tex. Civ. App.-Fort Worth 1956, writ ref'd n.r.e.), the homestead was not liable for the decedent's debts, following the death of his widow. Anyone who inherits the property, receives it free from debts.<sup>117</sup>

Moreover, the homestead passes free of debt if the decedent is survived by a constituent family member, whether or not such family member inherits the homestead! In other words, the property can pass to a

*nonconstituent* family member, free and clear of debt, if the decedent was survived by a constituent family member.<sup>118</sup>

The family members described in Probate Code §271 are the surviving spouse, minor children, and unmarried adult children remaining with the family, sometimes referred to in the literature as the *constituent* family members. An unmarried adult daughter or son living at home is within the class of constituent family members which cause the homestead to pass free and clear of debts, so, presumably, the property would pass free and clear in that event even if the decedent left the property to an unrelated third party who immediately took possession following administration.<sup>119</sup>

Pursuant to Article 16, §49, of the Texas Constitution, the Legislature has enacted Texas Property Code §42.001 and §42.002. Under §42.001(a)(1), up to \$60,000 in personal property is exempt.

Under Probate Code §271, all property that is exempt from execution by creditors is required to be set aside for the family immediately after the approval of the inventory, or sooner, if an affidavit of need.

If the estate should "prove" to be insolvent, "the title of the surviving spouse and children to all the property and allowances set apart or paid to them under the provisions of this Code shall be absolute, and shall not be taken for any of the debts of the estate except as hereinafter provided."<sup>120</sup>

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<sup>118</sup>*Chisholm v. Mills*, 250 S.W.2d 268 (Tex. Civ. App.-Waco 1952, writ ref'd); *Galloway v. Galloway*, 236 S.W.2d 832 (Tex. Civ. App.-Dallas 1951, no writ); Woodward and Smith, *Probate and Decedents' Estates*, Vol. 18, §856 & 857, p. 188-190, TEXAS PRACTICE (1971). *Dorman v. Grace*, 122 S.W. 401 (Tex. Civ. App.-1909, writ ref'd); §52 of the Texas Constitution.

<sup>119</sup>*Ward v. Hinkle*, 117 Tex. 566, 8 S.W.2d 641 (1928); *First Coleman National Bank v. Vaughan*, 139 S.W.2d 870 (Tex. Civ. App. - 1940, writ dism'd).

<sup>120</sup>Prob. Code §279.

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<sup>117</sup>Woodward and Smith, *Probate and Decedents' Estates*, Vol. 18, §859, TEXAS PRACTICE (1971).

§281 of the Probate Code provides:

The exempt property, other than the homestead or any allowance made in lieu thereof, shall be liable for the payment of Class 1 claims [i.e., 'funeral expenses and expenses of last sickness in a reasonable amount not to exceed \$15,000, with any excess to be classified as an unsecured claim'], but such property shall not be liable for any other debts of the estate.<sup>121</sup>

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<sup>121</sup>Prob. Code §281.