

CREDITOR'S CLAIMS IN DEPENDENT ADMINISTRATIONS

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"The Interaction of the DTPA and the Insurance Code"; co-authored by James L. Cornell; presented at 1993 and 1994 CLE seminars.

Updated "Sanctions for Discovery Abuse" by Justice William W. Kilgarlin; presented at September 1988 CLE seminar.

"Procedural Considerations in Defending and Defeating Privileges", co-authored with Hon. Alice Oliver Parrott; presented at October 1988 CLE seminar.

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<i>Noble v. Noble</i> , 636 S.W.2d 551(Tex. App. – San Antonio 1982, no writ).....	15
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I. INTRODUCTION

This article is intended to provide a basic guide through the relevant probate statutory law and case law regarding the rival interests of estate creditors, family members, heirs and beneficiaries in probate proceedings. Throughout this article any citations to statute section numbers refer to the Texas Probate Code, unless otherwise stated. Attached to this paper, in addition to forms, are suggested timelines for creditors and administrators to follow in processing claims (Appendices J & K); however, the Texas Probate Code will always be your first reference tool when representing a creditor or an administrator.

II. NOTICE TO CREDITORS

Every personal representative of a decedent's estate must give notice to potential creditors that he or she has been appointed.

A. Creditor Notice in Decedent's Estates

The notice statutes under Sections 294 and 295 apply equally to dependent and independent estates. Both statutes require "personal representatives of estates" to provide the notice.

1. Newspaper Notice (Appendix A)

Within *one month* after receiving letters, a personal representative must give notice under Section 294(a) of his or her appointment to all persons having claims against the estate requesting that the creditor present its claim within the time prescribed by law. The notice is to be published in any newspaper in the county where letters were issued. Section 294(b) requires that a copy of the notice, accompanied by an affidavit from the publisher (Appendix A), be filed in the court where the cause is pending to provide proof that notice was given in conformity with the law. Under Section 294(a), notice must also to be given to the comptroller of public accounts by certified or registered mail if the decedent remitted or should have remitted taxes to the comptroller.

2. Secured Creditor Notice (Appendix B)

Within *two months* after receiving letters, Section 295 requires a personal representative of an estate to provide notice to every person known to the personal representative who has a *claim for money* against a decedent's estate which is secured by real or personal property belonging to the estate. The notice must be given to the record holder of the debt at his or her last known address by certified or registered mail, return receipt requested. A copy of the notice, the return receipt, and an affidavit by the personal representative stating that notice was provided by law must be filed with the clerk of the court issuing letters. If the personal representative later learns of other secured creditors who did not receive notice of a right to file a claim, notice shall be given to the newly discovered secured creditor within a reasonable time.

3. Optional Notice (Appendix C)

a. *At any time before an administration is closed*, the personal representative *may* give Section 294(d) notice to an unsecured creditor having a *claim for money* against the estate and *expressly* state that the creditor has four months to present a claim from the date of receipt of such notice or that such creditor's claim will be barred. Independent executors are also specifically authorized to give Section 294(d) notice and to bar a creditor's claim by the terms of Section 146(a)(2). This optional notice must be sent by certified mail, return receipt requested. No requirement exists that a copy of the notice, the receipt, or an affidavit confirming service be filed of record; however, and especially because of the dire consequences that fall to the personal representative who fails to comply with the notice, it is strongly recommended that such steps be taken. These consequences are discussed in more depth below.

b. Whether to use Section 294 (d) is a decision that must be made on a case-by-case basis. Where there is a surviving spouse who has joint and several liability for a community property

debt, it may not always be in the best interest of the surviving spouse to bar such a claim from all estate assets. By doing so, a creditor may be forced to seek full payment of its community property claim against other property belonging to that spouse or against his or her community property share.

4. Personal Liability for Failure to Give Notice

Section 297 holds representatives and, where applicable, their sureties personally liable for any damage caused by the failure to provide proper notices to creditors unless it can be shown that such person had notice by other means. Successor representatives in decedent's estates need not repeat any notice to creditors that was properly given by the prior personal representative pursuant to Section 296.

III. THE CLAIMS PROCESS

A. General Information About Claims

1. What is a Claim?

Section 3 of the Probate Code defines "claims" in a decedent's estate as including liabilities which survive a decedent, whether those claims arise in contract, tort or otherwise, including taxes and funeral expenses, the expense of a tombstone, expenses of administration, estate and inheritance taxes, and debts due the estate.

2. Claims Must be Approved

Section 319 of the code is very clear that no portion of a claim for money against the estate of a decedent shall be paid unless it has been approved by the court or established by judgment. The most common method of establishing a "claim for money" is through the claims process outlined in Sections 301 - 317 for a dependent administration. Another method of establishing a claim is to obtain a judgment on a rejected "claim for money," or on an unliquidated claim.

B. When Does the Claims Statute Apply

Although it is not obvious from reading the Probate Code, the claims statute for the formal presentment and rejection of claims in decedent's estates *only* applies to dependent administrations. But note that secured claimants must elect whether their claim is to be treated as "matured secured" or as "preferred debt and lien" in both independent and dependent administrations under Sections 146(b) and 306(c), (c-1) and (d). The consequences to a creditor who fails to timely elect such status is discussed in more detail below.

C. Claims for Money

Only "claims for money" are subject to the claims process. A claim for money has been interpreted to mean liquidated claims in dependent administrations. See *Wilder v. Mossler*, 583 S.W.2d 664 (Tex. Civ. App. – Houston [1st Dist.] 1979, no writ); *Connelly v. Paul*, 731 S.W.2d 657 (Tex. App. – Houston [1st Dist.] 1987, writ ref'd n.r.e.); *Moore v. Rice*, 80 S.W.2d 451 (Tex. Civ. App. – Eastland 1935, writ dism'd w.o.j.); *Lusk v. Mintz*, 625 S.W.2d 774,776 (Tex. Civ. App. Houston [14th Dist.] 1981, no writ); *Walton v. First Nat'l Bank of Trenton*, 956 S.W.2d 647 (Tex. App. – Texarkana 1997, pet. denied).

D. Unliquidated Claims

1. Under Section 314, a creditor with a liquidated claim cannot bring suit against a decedent's estate to establish a "claim for money" unless the creditor's claim has been legally presented to and rejected by the representative of the estate or the court, in whole or in part, whichever is applicable. "[A]n express contract and . . . an implied contract, are virtually the same, and they are both claims for money. A claim for money means literally the claim that a debt exists . . . The fact that the claim must be sworn to indicates that the amount must be to a certain extent definite and not uncertain and contingent." *Anderson v. First National Bank*, 120 Tex. 313, 38 S.W.2d 768

(1931). There must be no fact issue associated with the amount of the debt owed by the estate. "The claim must be fixed and definite, not contingent and indeterminate, because it must be supported by an affidavit stating that the claim is just and that all legal offsets, payments, and credits have been allowed." *Connelly*, 731 S.W.2d at 659.

2. A tort cause of action is "an unliquidated potential liability of the kind that require fact-findings to ascertain their amount" and is not "a claim for money of the kind that must be presented to the executor or administrator for approval as provided by Section 298 of the Code." *Wilder*, 583 S.W.2d at 664. The claimant with an unliquidated claim may file suit directly against the dependent personal representative in order to establish his or her right to proceed against the assets of the estate. "[C]laims for unliquidated amounts, for injunctive relief, or for title to or possession of property need not be presented to the representative and rejected as a prerequisite to the filing of a suit against the estate. *Lusk*, 625 S.W.2d at 776.

E. Statutes of Limitations

1. When Limitations has Run

Section 298(a) permits a creditor whose claim is not barred by general statutes of limitations to present its claim to the personal representative of a decedent's estate at any time prior to the estate being closed. Subsection (b) of the statute prohibits a personal representative from approving any claim which is barred by a general statute of limitation. Section 298(b) specifically states that the personal representative shall not approve a "claim for money" whose limitation has run. If a stale claim is approved by a personal representative, the court is required to disapprove the claim if the court is satisfied that such claim was barred by law or that limitation has run.

2. Tolling Limitations

Several statutes toll a *general statute of limitation* in a decedent's estate:

a. Section 299 will toll limitations on any date that a claim for money is filed or deposited with the clerk (note that the code does not reference claims which are deposited with personal representatives).

b. In addition, Section 299 applies a tolling of limitation when suit has been brought against the personal representative of an estate with respect to claims that do not require presentment, such as unliquidated claims.

c. Texas Civil Practices and Remedy Code Section 16.062 provides that:

i. The death of a person against whom or in whose favor there may be a cause of action suspends the running of an applicable statute of limitations for 12 months after death.

ii. If an executor or administrator of a decedent's estate qualifies before the expiration of the period provided by this section, the statute of limitations begins to run at the time of the personal representative's qualification.

d. In addition, the code provides for a shortened statute of limitations in certain circumstances:

i. Section 298(a) states that an unsecured creditor's claim for money is barred if the claimant has not presented its claim within four months after the date he or she has received notice under Section 294(d).

ii. Section 313 requires a claimant whose claim has been rejected to file suit on its claim within 90 days after the date of rejection or the claim is barred. *Russell v. Dobbs*, 163 Tex. 282, 354 S.W.2d 373, 376 (1962). See also *Cross v. Old Republic Surety Company*, 983 S.W.2d 771, 774 (Tex. App. – San Antonio 1998, pet. denied).

iii. Where an unliquidated claim is erroneously presented, a claimant's failure to file suit within 90-days after rejection will not bar the claim. "If a claimant fails to present a liquidated claim to the administrator, any resulting order of payment is void." *Clements v. Chajkowski*, 146 Tex. 408, 208 S.W.2d 841, 843 (1948).

iv. Under Section 317(a), a personal representative must file his or her own claim against the estate in the court granting letters within six months of the date that the personal representative has qualified, otherwise the claim is barred. The claim must be verified by affidavit (as required in other claims).

e. No claims allowed following Order for Partition. Claims for money shall not be allowed under Section 318 against a decedent's estate once a final order for partition and distribution has been entered by the court. If the claim is not otherwise barred by law, the claimant may still file an action for payment against the heirs, devisees, legatees or creditors of the estate to the extent of any of the estate's property is still in the hands of a distributee.

F. How to Prepare and File a Claim (Appendices D & E)

1. Authentication of Claims in Decedent's Estates –

A claim for money must be authenticated in conformity with Section 301:

a. A claim must contain an affidavit by the claimant that states "the claim is just and that all legal offsets, payments, and credits known to the affiant have been allowed;"

b. The affiant must state the facts that form the basis of the claim when the claim is not based on a written instrument or on account; and

c. Copies of exhibits, in lieu of the originals, may be attached to the claim.

d. Claims by corporations or other entities must be authenticated by its authorized officers

or representatives under Section 304. When the affidavit is made by executors, administrators, trustees, assignees, agents, representatives or attorneys, the affiant need only state he or she "has made a diligent inquiry and examination" and "believes that the claim is just and that all legal offsets, payments, and credits made known to the affiant have been allowed." See TEX. PROB. CODE Section 304 (emphasis added).

2. Lost or Destroyed Claims

Lost or destroyed claims are void unless the claimant has made an affidavit under Section 303 which states the amount, date, nature of the claim, when it is due, the ownership of the claim and that known offsets have been allowed. The claim must then be proved by the testimony of disinterested witnesses in open court before it can be approved.

3. Attorney's Fees

Where the instrument supporting a claim provides for the collection of attorney's fees, Section 307 allows a claimant to include a request for legal fees that were incurred in preparing, presenting and collecting the claim.

4. Exception to the Requirement of Authentication in Decedent's Estates

Section 234 allows the personal representative of the estate in a dependent administration to pay calls and assessments, and to insure the estate against liability in appropriate cases (*i.e.*, pay bond fees, and insure property of the estate against fire, theft, and other hazards).

G. The Secured Claimant in Decedent's Estates

1. Matured Secured Claims

a. A matured secured claim is one that is paid in due course of administration. It is a claim against the entire assets of the estate. *Wyatt v. Morse*, 129 Tex. 199, 205, 102 S.W.2d 396, 398 (1937). Following the approval of its claim, the

matured secured claimant must wait until the personal representative completes the classification process with respect to all creditors before such creditor can be paid. The matured secured claim is a Class Three claim with priority over all other Class Three claims, or claims of a lower class, as to the proceeds from the sale of any asset which secures its claim. If there is any unpaid balance due and owing to the matured creditor after the personal representative has sold the secured asset and applied the proceeds to the matured secured creditor's debt, that unpaid balance becomes a Class Eight claim against the remaining assets of the estate. Where there are claims of a higher class (including court ordered family allowances, first, and second class claims), they will be paid with proceeds from the sale of the matured secured asset before the balance of the proceeds are paid to the matured secured creditor. *Wyatt v. Morse*, 102 S.W.2d at 399.

b. A secured creditor should probably only elect matured secured status when its collateral has been destroyed, or when the estate is certain to be solvent.

2. Preferred Debt and Lien Claims

a. Preferred debt and lien status runs against the specific property securing the indebtedness and no other assets of the estate. If there is a deficiency when the secured debt and lien asset is sold, the creditor cannot seek any further remedy against the remaining assets of the estate.

"The preference thus provided is not one which the court is authorized to make by virtue of a legislative pattern for classification of claims theretofore laid down, but is a legislative declaration of preference which is accorded holders of secured claims who elect to proceed against the specific property securing the claim rather than against the entire property of the estate. In return for this preference the claimants so electing are required to forego making further claim against other assets of the estate." *Wyatt v. Morse*, 102 S.W.2d at 400

(referencing the predecessor statute to the codification of Section 306(c) and (d)).

b. If an estate must expend funds or expenses of administration directly related to preserving or protecting the preferred debt and lien asset, the estate is entitled to reimbursement from the proceeds of the sale of such asset for those expenses. Reimbursement of general expenses of administration, even when related to processing such secured creditor's claim, is not chargeable against the proceeds of the secured asset. This comes up in estates that contain real property on which the debt far exceeds the value of the asset. The personal representative has a duty to preserve the property for the creditor and may sometimes incur expenses while doing so.

"An estate creditor with a section 306 preferred lien must look solely to the property subject to the lien for payment of his claim and is not entitled to share in the other assets of the estate. It would therefore be unfair to require him, in effect, to bear part of the general expense of administration of the estate. It would be equally unfair, however, to require nonpreferred estate creditors to pay to preserve and maintain preferred lien property, the proceeds from the sale of which will benefit first, foremost, and often exclusively, the preferred lien creditor. 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." *San Antonio Sav. Ass'n v. Beaudry*, 769 S.W.2d 277, 280 (Tex. App. - Dallas 1989, writ denied).

c. Any property that is the subject of a preferred debt and lien claim shall remain secured by the debt in any subsequent distribution or sale of the property as long as the debt remains unpaid in conformity with Section 306(d).

3. Time for Election in Decedent's Estates

a. The claimant must state whether it has

elected to treat its claim as a matured secured claim or as a preferred debt and lien at the time of presentment. If the secured creditor fails to elect either preferred debt and lien status or secured matured status, or fails to do so within the time required by law, Section 306(b) automatically deems an election of *preferred debt and lien* status for the secured creditor.

b. Section 306(a) requires the creditor to make its matured secured or preferred debt and lien status within the later of:

i. Six months of the date letters are granted; or

ii Within *four months* of the date the secured creditor has received certified mail notice to file its claim in accordance with Section 295.

c. Any secured claims that is not timely presented will be treated as a preferred debt and lien.

d. If the personal representative elects to do so, he or she may apply to the court for authority to pay the preferred debt and lien according to the terms of the original contract that secured the lien. See *State v. Estate of Brown*, 802 S.W.2d 898 (Tex. App. – San Antonio 1991, no writ).

e. If the secured property is sold or distributed during the course of administration, the property remains as security for the preferred debt and lien claim until the debt is paid in full under Section 306(e). Unlike the secured matured claimant, the preferred debt and lien takes priority over all claims of a higher class.

H. Presentment of Claims

1. Claims for Money

Claims for money must be presented to the personal representative by one of two different methods:

a. To the personal representative at any time before the estate is closed under Section 298(a);

or

b. By depositing the claim and its attachments with the clerk pursuant to Section 308.

2. The Clerk's Duties

a. When the clerk has received a claim, the clerk is charged with a duty under Section 308 to give written notice of its filing to the representative of the estate, or to the representative's attorney.

b. The presentment of the claim is will still be valid even though the clerk may fail to give the notice required under Section 308. This means the 30 day time period for the personal representative to act upon the claim (see below) begins on the date the claim is filed without regard to whether the personal representative has actual knowledge that the claim has been filed with the county clerk. All the consequences of a personal representative's failure to timely act on the claim under Section 310 will still apply, i.e. the personal representative has potential personal liability for any losses incurred by the creditor in proving its claim in trial.

c. Personal representatives must personally check the clerk's office on a regular basis to determine if any new claims have been filed in a decedent's estate.

3. No Presentment Necessary for Claims by Personal Representatives

a. A personal representative is authorized to file any claim he or she may have against a decedent's estate, verified by affidavit, directly with the court under Section 317. At the time such claim is filed, it is to be entered on the claim docket and classified by the court in the same manner as other cases. The court's approval or disapproval of the personal representative's claim operates as a final judgment from which an appeal may be taken.

b. "Section 317 is intended to prevent a personal representative from deciding the propriety of his own claims against the

estate. Thus, under section 317(a), claims by representatives that accrued directly against the testator or intestate are to be acted upon by the court pursuant to section 317(c) . . . conflicts of interest are thus avoided.” *Ullrich v. Estate of Anderson*, 740 S.W.2d 481, (Tex. App. Houston [1st. Dist.] 1987, rehearing denied).

c. Remember that a dependent personal representative must file his or her claim within six months of the date of qualification or the claim is barred. However, personal representatives need not present claims for estate related contracts that arise after Letters of Administration have been issued.

3. No Presentment Necessary for Claims by Distributees

Persons who claim to be an heir, devisee, or legatee are not required to present a claim in such capacity in accordance with Section 317(c).

I. Handling the Presented Claim

1. Personal Representative has no duty to help Creditors

An administrator has no fiduciary duty to the creditor of an estate. *Punts v. Wilson*, 137 S. W. 3rd 889 Tex. App. – Texarkana 2004, writ dismissed. It would be a breach of fiduciary duty to the beneficiaries for an administrator to assist a creditor with filing or persecuting its claim.

2. Waiver of Defects

Dependent administrators must object in writing to defects of form or claims of insufficiency as to exhibits or vouchers in a creditor’s claim pursuant to Section 302. Failure to do so results in waiver of these objections. Where a claim is not approved by a court due to mere defects in the form of the claim, the court’s decision to disapprove the claim will not result in a final order. “[A]ppellee’s claim, disapproved on the

basis of improper form, was a procedural ruling rather than an adjudication on the merits.” *Furniture Dynamics, Inc. v. Estate of Hurley*, 560 S.W.2d 486 (Tex. App. – Dallas 1977, no writ).

3. Acceptance or Rejection of Claims (Appendices F-H)

a. A dependent administrator, has thirty days under Section 309 to endorse, annex, or file a memorandum that is signed by the *representative* (not the attorney) and includes the following:

- i. The date of presentation of the claim to the administrator or the date such claim was filed with the clerk; and
- ii. Whether the representative allowed or rejected the claim; or
- iii. What portion of the claim is allowed or rejected.

b. A claim is deemed rejected if the representative fails to accept or reject the claim within the time required by Section 310. The Texas Supreme Court has upheld this 90 day limitation, despite instances where creditors have relied on the assurances of the lawyers that the personal representative would approve a claim that had been deposited with the clerk, and then failed to do so:

“Petitioners knew that their claim had been filed with the clerk, and were charged with knowledge that the same would be deemed rejected by operation of law if no action was taken by the Administratrix within thirty days. They also should have known that the claim would be barred in the event suit was not instituted within ninety days after such rejection. The statutes contemplate that a creditor will keep himself informed as to the status of his claim and take the steps required by law to reduce the same to judgment. Since the representative must now act within thirty days and is required to endorse a memorandum of allowance or rejection on the claim when he

does act, the claimant will ordinarily have no difficulty in ascertaining that his claim has been rejected in time to protect his rights by instituting suit thereon. Petitioners could and should have done so by examining their claim on file in the clerk's office. They were never told that the claim had been allowed, and the assurances of the Administratrix or her attorney that it would be approved and paid afford no basis, legal or equitable, for suspending the operation of the ninety day statute." *Russell*, 354 S.W.2d at 374.

c. By taking no action at all, Section 310 also states that the representative will be held personally liable for the cost of proving up any claim later established by suit. Moreover, a personal representative may be removed at the written request of any person who has an interest in the claim following citation and service.

4. Clearly Accept or Reject a Claim

a. There should be no room for ambiguity in rejecting claims. Rather than combining a Memorandum of Defects with a Memorandum of Rejection, it is best to prepare them in separate documents.

b. Personal representatives must file any claim that has been allowed or rejected with the county clerk where the probate is pending pursuant to Section 311. The clerk, in turn, must enter any claim that has been accepted or rejected by the personal representative on the claim docket. (Appendix I)

5. Action by the Court

a. A court must allow or reject and classify any claim within ten days following the day it was entered on the claim docket under Section 312(b). Section 312(a) allows any person interested in an estate to appear and object in writing to the approval of a claim before the court accepts it. In such a case, the court will conduct an evidentiary hearing in the same manner as ordinary suits. In addition, the court

has its own option to examine the claimant and the personal representative under oath whenever the court is not satisfied that a claim is just in accordance with Section 312(c).

b. Whether the court approves or disapproves a claim, the court must endorse on the claim, or annex to the claim, a written memorandum which is officially dated and signed and states the exact action taken by the court, including the court's classification of the claim. Such memorandums have the force and effect of a final judgment under Section 312(d). See *Estate of Figueroa-Gomez*, 76 S.W.3d 533 (Tex. App. – Corpus Christi 2002, no writ) (order approving expenses of dependent administration is a final judgment).

c. A claimant must appeal the court's judgment to the appellate court in the same manner as required for other judgments of the county court in probate matters in accordance with Section 312(e). Note, there is no requirement that the court give notice of its ruling to the claimant, nor to the personal representative. Therefore, both the administrator and the creditor must individually track the status of the claim through the clerk's office and the court. Failure to monitor the claim, could result in a claimant being left without a remedy because the court's judgment may have become final leaving no avenues of appeal available.

J. Classification of Claims

1. The Basic Rules

Section 320 sets out the order for payment of claims and allowances, as follows:

a. Funeral expenses and expenses of last illness not to exceed \$15,000.00. (This comes up again in Section 322.)

b. Allowances made to the surviving spouse and children, or to either.

c. Expenses of administration, including the preservation, safekeeping, and management of

the estate.

Claims against the estate in order of their classification.

Note that funeral expenses, tombstones, grave markers, crypts or burial plots are *only* chargeable against the decedent's separate property and the decedent's share of community estate. They are not chargeable against the surviving spouse's community property interest under Section 320A.

2. The Eight Classes

Section 322 of the Texas Probate code sets out the order in which the claimant shall be paid using eight levels of classification:

- a. Class 1. Funeral expenses and expenses of last illness, not to exceed \$15,000.00 dollars.
- b. Class 2. Expenses which are incurred in the administration of the estate in the preservation, safekeeping, and management of the estate, including fees and expenses incurred under Section 243, and unpaid expenses of administration, awarded in a guardianship of the decedent.
- c. 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 secured interest shall exist upon the same property, they shall be paid in order of their priority.
- d. Class 4. Claims for the principal amount of and accrued interest on delinquent child support and child support arrearages that have been confirmed and reduced to money judgment, as determined under Section F, Chapter 157, of the Texas Family Code.
- e. Class 5. Certain claims for taxes, penalties,

and interest.¹

f. Class 6. Claims made by the Texas Department of Criminal Justice for reimbursement of the cost of confinement.

g. Class 7. Claims made by state agencies for repayment of medical assistance payments to or for the benefit of the decedent under Chapter 32 of the Human Resources Code.

h. Class 8. All other claims (including attorney's fees awarded under Section 243 to unsuccessful will contestants. See *Hope v. Baumgartner*, 111 S.W.3d 775 (Tex. App. – Fort Worth 2003, no writ).

3. Deficiencies

When there is a deficiency of assets in the estate to pay all the claims, Section 321 controls. Except for secured assets, and only at the direction of the court, the personal representative must pay creditors of the same class on a *pro rata* basis whenever there are insufficient assets to pay all claims in a particular class. No creditor of a class is to be given preference over any other creditor in the same class (except in one narrow circumstance concerning matured secured claimants).

4. Who Assigns the Class?

The class for each claimant may be set by the personal representative in an independent estate pursuant to Section 146(3); however, it is ordered by the court in the dependent estate administration under Section 312(b) & (d). The court will apply the following when assigning a class:

- a. All claims which have been allowed and entered upon the claim docket for a period of ten days shall be acted upon by the court and be

¹ Federal income tax and other federal claims are not actually classified, but are paid prior to all Class 3-8 claims under 31 U.S.C.A. 3713(a).

either approved in whole or in part or rejected, and they shall also at the same time be classified by the court.

b. Although a claim may be properly authenticated and allowed, if the court is not satisfied that it is just, the court shall examine the claimant and the personal representative under oath, and hear other evidence necessary to determine whether a claim should be approved. If the court is not convinced that the claim is just, the court shall disapprove it.

c. When the court has acted upon a claim, the court is to endorse or annex a written memorandum, dated and signed officially, stating the exact action taken with respect to the claim. Specifically, the court must say whether it approved or disapproved the claim, or approved it in part or rejected it in part, and state the classification of the claim. Such orders shall have the force and effect of final judgments. The court has held that where the court has approved a claim before it was accepted by the administratrix, the order is only voidable and not void. If the personal representate does nothing, the order becomes final. The duty is on the personal representative to appeal the court's approval before the judgment becomes final. *Walton v. First Nat 'l Bank of Trenton*, 956 S.W.2d 647, 650 (Tex.App. – Texarkana 1997, pet. denied). See also *Estate of Figueroa-Gomez*, 76 S.W.3d 533.

d. The court's duty to classify in a dependent administration has been consistent in Texas for over a hundred years. "Our opinion is that in passing upon a claim the administrator is authorized to pass upon the question of indebtedness only, and has not the power of classifying the claims, including those for the payment of which a lien upon property is asserted." *Western M. & I. Co. v. Jackman*, 77 Tex. 622, 626, 14 S.W. 305, 307 (1890).

5. Order of Abatement of Assets to Pay Claims

Except for an application under Section 320, which gives priority to family allowances,

the general rule in estates is that the creditors and expenses of administration get paid first. When there is insufficient cash in an estate, Section 322B identifies the priority in which estate property is to be sold to pay estate debts and expenses of administration:

- a. Property which passes by intestacy.
- b. Personal property in the residuary estate.
- c. Real property of the residuary estate.
- d. General bequests of personal property.
- e. General devises of real property.
- f. Specific bequests of personal property.
- g. Specific devises of real property.
- h. An exception to Section 322B's order of abatement occurs when a preferred debt and lien claimant exercises its right for payment against specific property under Section 306, or when Section 322A is applied for the payment of Texas and federal estate taxes. In addition, a decedent may alter the order of abatement in a valid testamentary document.

K. Suit on a Rejected Claim

1. Claims Barred When Suits Are Not Timely Filed

a. Section 313 sets out the claimant's duty when its claim, or any part of its claim, has been rejected. Within 90 days the claimant must file suit against the estate or the claim will be barred. When suit is instituted, the rejection of the claim is taken as being true without further proof unless the rejected status of the claim has been denied under oath.

b. Even when a claimant has an option of establishing its claim in a non-probate forum against the estate, the claimant is bound by the rules of the claim statute when it fails to timely file suit on a rejected claim. See *Andrews v.*

Aldine I.S.D., 116 S.W. 3d 407, 410 (Tex. App – Houston [14th Dist.] 2003, writ. Denied). In *Andrews*, a taxing district could have filed suit in a district court directly against a personal representative pursuant to Section 5C, but presented a claim and failed to timely file suit on its rejected claim.

2. Judgments Treated the same as Approved Claims.

a. When a rejected claim or part thereof has been established by suit, no execution shall issue, but the judgment shall be filed in the court in which the cause is pending, entered upon the claim docket, classified by the court, and handled as if it had been originally allowed and approved in the due course of administration.

b. Note also that a creditor is not required to wait until a claim is rejected to file suit on that claim (for example, a creditor can ‘institute suit’ within the meaning of the statute if it files a motion to require the sale of estate property). See *Estate of Ayala*, 19 S.W.3d 477 (Tex. App. – Corpus Christi 2000, pet. Denied).

3. Exceptions to the Limitations Rule

a. The 30 day time bar will only apply to claims that are required to be presented to a personal representative.

“Unnecessary presentation and rejection of a claim that is not required to be presented in the first place does not invoke the limitation provisions of Section 313 of the Probate Code. The claims provisions of the code seemed to contemplate only liquidated money claims (Section 298) (Section 314). Therefore, claims for unliquidated amounts, for injunctive relief, or for title to or possession of property need not be presented to the representative and rejected as a prerequisite to the filing of a suit against the estate.” *Lusk*, 625 S.W.2d at 776.

Lusk was a guardianship case that interpreted the operation of Sections 313 and 314 before the codification of the Guardianship Code.

b. Creditors who have retained a vendor’s lien on real estate owned by an estate, and who fail to file suit on a rejected claim within 90 days to establish it’s claim, thus being “time barred” under Section 313, may still be able to file a trespass to try title suit against the estate for the real property which is secured. These secured creditors can claim to hold superior title because of the retention of a vendor’s lien. It has been held that the right to file a trespass to try title suit is a common law right, which is independent of the Texas Probate Code’s claim procedures. *Walton*, 956 S.W.2d at 653.

L. Costs to Establish Claim

Section 315 sets out the manner in which cost related to a claim are to be apportioned:

1. The estate pays the costs if the claim was allowed by the personal representative and approved by the court;

2. The claimant pays the costs for a claim which was approved by the personal representative, but disapproved by the court;

3. The estate of a decedent pays the costs if the claim was rejected and was later established by suit;

4. The claimant pays the costs if the claim was rejected and was not established by suit (except as provided by Section 310; and

5. The claimant pays the costs where a claim was approved in part and rejected in part and a subsequent lawsuit by the creditor fails to result in a judgment for a greater amount than the amount originally allowed by the personal representative or approved by the court.

VI. THE PAYMENT OF CLAIMS

A. Payment after Twelve Months

1. Creditors with approved claims may file an application under Section 326 following the first anniversary of the date Letters were granted, requesting that payment be ordered. The claimant must show:

a. That the estate has sufficient funds on hand to pay the claim, or

b. Where no funds exist, that it would be an unreasonable delay to wait for the receipt of funds from other sources.

i. In the latter case, the court will order the sale of estate property to pay the claim at a show cause hearing.

ii. Note, though, that this statute does not require that estate property be sold to satisfy a claim (e.g., a court can authorize conveyance of separate real property to a surviving spouse in satisfaction of a community claim for reimbursement). See *Riley v. Riley*, 972 S.W.2d 149 (Tex. App. – Texarkana 1998, no pet.).

B. Borrowing Money

1. Mortgaging Estate Assets - Real and personal property of an estate may be mortgaged or pledged with court authority under Section 329 when necessary to pay:

a. *Ad valorem*, income, gift, estate, inheritance, or transfer taxes of an estate, or

b. Administration expenses, including any funds that may be necessary to operate a business, farm, or ranch owned by the estate.

2. An application to borrow money or pledge assets of the estate must be sworn to and must be posted. The term of the loan or renewal cannot exceed three years and may be extended by the court for one additional year. The court may require that the personal representative's bond be increased.

C. Procedure to Force Payment

1. Enforcing the Court's Order with Execution

When the court orders money to be paid and a representative fails to pay such money on demand, the claimant may obtain execution against the property of the estate for the amount due, including interest and costs under Section 328(a).

a. Funds must be available in the estate to pay the claim;

b. This remedy is not available to the State Treasury; and

c. The claimant must make a sworn application and show demand has been made.

2. Enforcing the Order through a Show Cause Hearing

a. At the time the claimant makes the affidavit of demand and failure to pay, or should the execution be returned unsatisfied, the court may cite the representative and sureties to show cause why they should not be held liable for the debt interest, costs, and damages under Section 328(b). The court can order damages on any amount the personal representative neglected to pay at the rate of *five percent per month* for each month, or any portion of a month, following the initial demand for payment.

b. In addition, failure to first obtain an order for payment under Section 326, or to join an administrator as a defendant, does not preclude direct action against a surety when the estate does not have sufficient funds on hand to pay a claim. See *Cross*, 983 S.W.2d at 771.

3. Sale of Mortgaged Property

Any secured creditor who has established its claim against the estate may seek a court order that the property that is the subject of the secured interest be sold under Section 337. When such an application is made, the personal representative will be cited to appear and show

cause why the application should not be granted. The court may discharge the lien out of the general assets of the estate, order the debt refinanced, or order the sale of the property at a private or public auction.

4. Proceeds from Sale of Mortgaged Property

The personal representative must pay secured creditors the proceeds of any sale to satisfy a mortgage, lien or security interest that is not needed to pay debts against the estate of a higher priority under Section 320(b). If more than one creditor exists with a secured interest against the proceeds, the personal representative pays the proceeds in order of their priority. The secured creditor has a right to seek a court order to obtain payment.

5. Remedies following Six Months from the Date Letters are Granted

a. At the Request of the Personal Representative

A personal representative may file an application under Section 320(d) following the expiration of six months from the date letters testamentary were granted seeking authority to pay claims which have been allowed and proved. The application must state the personal representative has no personal knowledge of any outstanding enforceable claims against the estate other than the claims already approved and classified by the court.

b. Preferred Debt and Lien Creditors

Creditors who have accepted and approved preferred debt and lien claims, have three remedies available under Section 306(e) to obtain payment following the expiration of six months from the date Letters were granted to the personal representative. The preferred debt and lien creditor may petition the court to:

i. Sell the property subject to the unmatured debt and apply the proceeds of the sale to liquidation of the maturities;

ii. Sell the property free of the lien and apply the proceeds to the whole debt; or

iii. Authorize foreclosure pursuant to the terms of the Texas Probate Code.

6. Foreclosure by a Preferred Debt and Lien Creditor

a. The contents of an application to foreclose are set out in Section 306(f) and must include:

i. A description of the property or the portion of the property to be sold by foreclosure;

ii. The amount of the claimant's outstanding debt;

iii. A description of any maturities which have accrued;

iv. Any other known debts secured by a mortgage, lien or security interest against the property;

v. Whether the claim holder has knowledge of any other debts secured by the property other than those listed in the application; and

vi. A request for authority to foreclose by the claim holder.

b. An application to foreclose requires personal service on the personal representative and any other person described in the application as having debts secured against the property that is the subject of foreclosure under 306(g). The hearing is in the nature of a show cause hearing with the burden upon the personal representative to show why the court should not grant the claimant's request.

c. The court is required to set a hearing under Section 306(h), but may allow a reasonable amount of time for any interested person to

obtain an appraisal concerning the fair market value of the property. At the hearing on the application, the court is mandated under Section 306(i) to determine whether a default in payment or performance occurred under the contract and, if so, issue orders in conformity with 306(e). If the court grants a claim holder the right to foreclose, it will be in accordance with the provisions of the document creating the mortgage, lien, or other security interest, or as allowed by law. The court may set a minimum bid which does not exceed the fair market value of the subject property. If the property does not sell because it did not reach the minimum bid, Section 306(k) permits the claim holder to file a new application. The court may, in its discretion, eliminate or modify the minimum price requirement and grant permission for another foreclosure sale.

d. Section 306(j) permits any person interested in the estate to appeal orders issued under Section 306.

V. Exempt Assets Can Bar Collection

A. Homestead

The protection of the Texas homestead from forced sale by creditors is set out in Article XVI, Section 50, of the Texas Constitution and is further defined by the Texas Property Code.

1. Definition of Homestead - Texas Property Code Section 41.002

The definition of a homestead applies to all homesteads in Texas without regard to when they were created.

a. Urban Homestead -If used for the purposes of an urban home or as a place to exercise a calling or business in the same urban area, the homestead of a family or a single, adult person, not otherwise entitled to a homestead, shall consist of not more than ten acres of land which may be in one or more contiguous lots, together with any improvements.

b. Rural Homestead - A homestead is considered to be rural if, at the time the designation is made, the property is not served by municipal utilities and fire and police protection. If used for the purposes of a rural home, the homestead shall consist of:

i. For a family, not more than 200 acres, which may be in one or more parcels, with the improvements thereon; or

ii. For a single, adult person, not otherwise entitled to a homestead, not more than 100 acres, which maybe in one or more parcels, with the improvements thereon.

2. Homestead in Decedent's Estates Only

a. Homestead provisions for the surviving family of a decedent are covered by Sections 270, 273, 278, 279, and 282 - 285 of the Probate Code.

b. Section 283 makes it clear that upon decedent's death, the homestead descends and vests in the same manner as other real property owned by the decedent. Moreover, title is controlled by the laws concerning descent and distribution. Section 282 states that the right of the surviving family to live in the decedent's homestead applies regardless of whether the home is the separate or community property of the decedent.

c. The homestead is protected from the claims of most creditors of the estate under the terms of Section 270. Purchase money debts, taxes against the property, or home improvements which were contracted with the consent of both spouses, are an exception. Under Sections 278 and 279, the exempt status of a homestead applies whether an estate is solvent or insolvent.

3. Who Receives the Testamentary Homestead?

a. Section 272 states that the homestead is to be delivered to the surviving spouse without regard as to whether the decedent has minor

children by a prior marriage.

b. If the decedent has no spouse, but has minor children, the homestead is to be delivered to the guardian of such minor children. Note that unmarried adult children no longer have homestead protection even if they resided with decedent in the home.

4. How Long Does the Testamentary Homestead Survive?

a. A surviving spouse has the right to occupy the homestead property until the spouse dies, sells his or her interest in the property, or elects to no longer to use or occupy such property as a home under Section 284. Minor children of the decedent may occupy the home as long their guardian is permitted to do so by court order.

b. "Abandonment of a homestead requires both the cessation or discontinuance of use of the property as a homestead, coupled with the intent to permanently abandon the homestead." *Franklin v. Woods*, 598 S.W.2d 946, 949 (Tex. Civ. App. – Corpus Christi 1980, no writ).

5. The Allowance in Lieu of Homestead

a. Section 273 provides that where there is no homestead to set aside, courts have authority to grant an allowance in lieu of homestead, up to \$15,000.00. Where there is a mortgaged home that would otherwise qualify for a testamentary homestead exemption, the surviving family member who is entitled to such exemption may elect to receive the allowance in place of the encumbered property.

b. In *Ward v. Braun*, decedent died owning separate real property and a community property home that was heavily encumbered and had very little equity. The trial court denied an allowance in lieu of homestead because there was a home available for the widow's use. The court said, "Under the order of the trial court, appellant, in effect, is required to pay for the use of the homestead, and if she does not do so, loses her

homestead rights completely. In the absence of her agreement, appellant cannot be required to accept such disposition of her homestead rights. Appellant, as surviving widow, could not be required to accept a homestead, which is incomplete or unsuitable because of the impediments presented, and she could elect to insist upon an allowance in lieu of homestead. The fact that there is only a small amount of community property does not prevent such allowance, and it may properly be paid out of the deceased's husband's separate estate." *Ward v. Braun*, 417 S.W.2d 888, 891 (Tex. App. Corpus Christi 1967, writ dismissed). Tex. Prob. Code Section 288 has been construed in the past to require that the allowance fixed for a surviving spouse be determined with reference to the condition of the whole property of decedent during the first year after death and with reference to the necessities of and the circumstances to which the widow was accustomed to have during the lifetime of her husband *Noble v. Noble*, 636 S.W.2d 551 (Tex. App. – San Antonio 1982, no writ). See also *Barnett v. Barnett*, 985 S.W.2d 520 (Tex. App. – Houston [1st Dist.] 1998), rev'd on other grounds 67 S.W.3d 107 (Tex. 2001), which holds wife was not entitled to allowance where estate included homestead and other exempt property, and states "there is no statutory provision that permits a spouse to decline exempt property and instead receive an allowance".

B. Exempt Property

1. Texas Property Code Section 42.001 Personal Property Exemption

a. Personal property is exempt from garnishment, attachment, execution, or other seizure if:

i. The property is provided for a family and has an aggregate fair market value of not more than \$60,000.00 exclusive of the amount of any liens, security interests, or other charges encumbering the property; or

ii. The property is owned by a single adult,

who is not a member of a family, and has an aggregate fair market value of not more than \$30,000.00, exclusive of the amount of any liens, security interests, or other charges encumbering the property.

b. The following personal property is exempt from seizure and is not included in the aggregate limitations prescribed above:

i. Current wages for personal services, except for the enforcement of court-ordered child support payments;

ii. Professionally prescribed health aids of a debtor or a dependent of a debtor; and

iii. Alimony, support, or separate maintenance received or to be received by the debtor for the support of the debtor or a dependent of the debtor.

c. This section does not prevent seizure by a secured creditor with a contractual landlord's lien or other security in the property to be seized.

d. Unpaid commissions for personal services not to exceed 25 percent of the aggregate limitations prescribed by Subsection (a) are exempt from seizure and are included in the aggregate.

e. "Exempt property" also includes certain savings plans under Section 42.0021 of the Texas Property Code.

2. Texas Property Code Section 42.002 Defines Personal Property

The following personal property is exempt under Section 42.001(a):

a. Home furnishings, including family heirlooms;

b. Provisions for consumption;

c. Farming or ranching vehicles and

implements;

d. Tools, equipment, books, and apparatus, including boats and motor vehicles used in a trade or profession;

e. Wearing apparel;

f. Jewelry not to exceed 25 percent of the aggregate limitations prescribed by Section 42.001(a);

g. Two firearms;

h. Athletic and sporting equipment, including bicycles;

i. A two-wheeled, three-wheeled, or four-wheeled motor vehicle for each member of a family or single adult who holds a driver's license or who does not hold a driver's license but who relies on another person to operate the vehicle for the benefit of the nonlicensed person;

j. The following animals and forage on hand for their consumption:

i. Two horses, mules, or donkeys and a saddle, blanket, and bridle for each;

ii. 12 head of cattle;

iii. 60 head of other types of livestock;

iv. 120 fowl; and

k. Household pets.

3. Exempt Property in Probate

a. Definition of Exempt Property - "Exempt property" under Section 3(m) refers to "property of a decedent's estate which is exempt from execution or forced sale by the Constitution or laws of this State, and to the allowance in lieu thereof." Section 281 makes clear that exempt property (not including the homestead) is liable for Class I claims, but not for any other debts of the estate. If the exempt property which is to be

set aside for the use of decedent's family constitutes security for a debt, the debt against such property is to be paid or continued against such exempt property under the terms of Section 277. This follows the same statutory exceptions to the protection of the homestead that are stated above.

b. The Protection of Exempt Property in the Probate Code

i. Following the approval of the Inventory, Appraisal and List of Claims, the court is required to order under Section 271 that exempt property be set aside from the property in the decedent's estate for the use and benefit of the surviving spouse and minor children. Only the court has jurisdiction to set aside exempt property in dependent administrations.

ii. If an emergency exists to set aside exempt property for the decedent's family *before* the inventory can be assembled and approved, Section 271 permits the filing of a verified application to set aside the property that lists all property that the applicant claims to be exempt.

iii. In addition, any unmarried children remaining with the family of the decedent may apply to the court to have all exempt property other than the homestead set aside by filing an application and a verified affidavit listing all of the other property that the applicant claims is exempt.

iv. At the hearing on these applications, the burden of proving the exempt status of the property by a preponderance of the evidence is on the applicant. See *Ward*, 417 S.W.2d at 888 (fact that spouse owns separate property in her own right does not affect entitlement to exempt property set-aside).

c. Who Receives Exempt Property? - Under Section 272, the personal representative is required to deliver exempt property to:

i. The surviving spouse, if the children of the decedent are also the children of the spouse,

or in cases where the decedent left no children.

ii. If there are children but no spouse, then to decedent's adult children or to the guardian of decedent's minor children.

iii. If there is a spouse and any of decedent's children are not the children of the surviving spouse, such children receive a share either directly or, where applicable, through their guardian, presumably as ordered by the court.

d. Allowance in Lieu of Exempt Property

Similar to the allowance in lieu of homestead, Section 273 permits the court to provide an allowance in lieu of exempt personal property, up to \$5,000.00, when there is no personal property which belonged to the decedent or when the decedent's family does not want to take whatever property is available. The allowance may be paid from cash in the estate, or the family may choose specific personal property belonging to the estate at the appraised value of each item. If no other property is available to pay the allowance in lieu of exempt property, specifically bequeathed property can also be used to satisfy the allowance under Section 274. If necessary, the family of decedent may even apply to the court to order the executor or administrator to sell so much of the estate as is necessary to raise the cash to pay the allowance under Section 276.

e. Who Receives the Allowance in Lieu of Exempt Property?

Section 275 states that the allowance in lieu of exempt property is to be paid, as follows:

i. The surviving spouse, if the children of the decedent are also the children of the spouse, or where decedent left no children.

ii. If there are children but no spouse, to decedent's children in equal shares with the share of minor children being paid to such children's guardian.

iii. If there is a spouse, and if any of decedent's

children are not the children of the surviving spouse, the spouse receives one-half. The remaining one-half is divided on a pro rata basis among the decedent's children, either directly or, where applicable, through the child's guardian.

C. Family Allowance

1. The Basic Rule

The court enters an order fixing an amount that is sufficient for the maintenance of decedent's surviving spouse and children for a one year period from the death of a testator or an intestate, in either a lump sum or in installments. Section 286 requires the allowance to be set based on the circumstances of decedent's family as they exist at the time of the hearing and as the family circumstances are anticipated to be during the first year following death. As with, the application to set aside exempt property, the applicant bears the burden of proof by a preponderance of the evidence at any hearing on the application. Under Section 289, the court is to enter an order stating the amount of the allowance, how it is to be paid, and ordering the executor or administrator to pay it. No allowance may be made for a surviving spouse or children who have separate property adequate enough to provide for their maintenance under Section 288. Once the allowance is set, it is to be paid in preference to all other debts or charges against the estate, *except* Class 1 claims, in accordance with Section 290.

2. When is the Application Made?

a. Section 286 contains mandatory language requiring the court to fix a family allowance for the support of the decedent's surviving spouse and minor children following the court's approval of the Inventory, Appraisement and List of Claims. Like the Application to Set Aside Exempt Property, a family may make application for the court to fix the family allowance prior to the approval of the inventory by using a verified affidavit.

b. The family allowance application must set out the amount necessary for the support of the family for one year following the decedent's date of death and describe any separate property the surviving spouse and the children have available for their use.

3. How Payment Is to Be Made

The allowance may be satisfied through any personal property available in the estate, or by a payment of cash. If there is not enough cash and, if there is no personal property available to satisfy the allowance, or if the personal property which is available to satisfy the allowance is not acceptable to the decedent's surviving spouse or to the guardian of decedent's minor children, then the court is to order a sale of a portion of the estate to pay the allowance.

4. Insolvent versus Solvent Estates

a. If an estate is insolvent at the time it is closed, the title to all exempt property, and to any allowances paid to surviving spouse and decedent's children, becomes absolute under Section 279. The property cannot be taken for debts of the estate except Class 1 claims and secured claims against the specific property. If, however, the estate is solvent upon final settlement, Section 278 states that all exempt property and allowances set aside for the family, except the homestead and any allowance in lieu of homestead, is subject to partition and distribution among the heirs and distributees in the same manner as the other assets of the estate.

b. Section 280 requires personal representatives to subtract any exempt property, allowance in lieu of exempt property, and the family allowance from the gross value of the estate when computing the financial health of the estate. "In ascertaining whether an estate is solvent or insolvent", exempt property and allowances "shall not be estimated or considered as assets of the estate." TEX. PROB. CODE Section 280.

c. Consider the case of *Bolten v. Bolton*: Here, a husband left his wife a homestead interest in

his house, but gave the balance of his estate to his son. The wife obtained a court order to set aside exempt personal property, including a pick-up truck. In the court's order, the executor was ordered to deliver to the wife "all documents necessary to transfer title to said property". The executor appealed on the grounds that the court's order was tantamount to an absolute transfer of title to the property in an estate that was solvent. It was argued that the court's order was contrary to the provisions of decedent's will. The court stated, "the 'use and benefit' provision [of the code] cannot mean a transfer of fee simple title of the exempt property to the surviving spouse because once the estate is finally settled, the exempt property would not be subject to partition and distribution among the heirs and distributees of such estate in like manner as the other property of the estate . . . We conclude that during administration of an estate, the surviving spouse can retain possession of tangible exempt personal property under the 'use and benefit' provision of the Code, but when the administration terminates, the decedent's interest in these items must pass to his heirs or devisees." *Bolton v. Bolton*, 977 S.W.2d 157 (Tex. App.— Tyler 1998, no writ).

VI. CONCLUSION

The code is only one place to begin a search for the handling of creditors claims in a dependent administration. Great care must be taken by the personal representative when deciding which family member or which creditor has priority to receive assets that are subject to the administration process. Inaccuracies often will result in personal liability for the fiduciary. So much of the black letter law set out in the Probate Code takes on new meaning when the case law has been reviewed, but even the case law does not provide certainty when processing creditor's claims. Often the courts of appeal distinguish cases pertaining to claims and disagree in their interpretations of the code and other appellate court decisions in the same field.



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APPENDIX A

NO. _____

IN THE ESTATE OF
JOHN DOE,
DECEASED

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IN THE PROBATE COURT
NO. ONE (1)
HARRIS COUNTY, TEXAS

NOTICE TO CREDITORS

No. _____

Notice to All Persons Having Claims Against the Estate of
John Doe, Deceased

Notice is given that on the 15th day of July, 2006, Jane Smith, was appointed Administratrix of the Estate of John Doe, Deceased, in Cause No. _____ pending in Harris County Probate Court Number One (1).

The residence of Jane Smith, the Administratrix, is in Colorado Springs, Colorado. The Administratrix has appointed her attorney, (Name of Attorney), as her resident agent. The address for the presentment of claims against this estate is:

Name of Personal Representative
Address

All persons having claims against this estate, which is currently being administered, are required to present them within the time and in the manner prescribed by law.

Dated on this _____ day of _____, 2006.

NO. 123,456

IN THE ESTATE OF
JOHN DOE,
DECEASED

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IN THE PROBATE COURT
NO. ONE (1)
HARRIS COUNTY, TEXAS

PUBLISHER'S AFFIDAVIT

STATE OF TEXAS
HARRIS COUNTY

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I solemnly swear that a Notice to Creditors was published once in _____, a newspaper printed in Houston, Harris County, Texas and which is of general circulation in Harris County, Texas, as provided in the Texas Probate Code for the service of citation or notice by publication. The date of the issue of the newspaper in which the notice was published is _____. The copy of the notice as published, clipped from the newspaper, is attached.

Publisher

Sworn and subscribed to before me by this _____ day of _____, 2006, by the said _____, to certify which witness my hand and seal of office.

Notary Public
State of Texas

APPENDIX B

December 2, 2003

Bank, N.A.
P.O. Box 000
Anytown, Texas

CMRRR 7000 1670 0003 8432 9697

Re: Cause No. _____
Estate of John Doe, Deceased
Probate Court No. One (1) of Harris County, Texas

Dear Sir or Madam:

Notice is hereby given that original Letters Testamentary for the Estate of John Doe, Deceased, were issued on the 6th day of October, 2003, in Cause No. _____, pending in the Probate Court No. One, Harris County, Texas, to Jane Smith, Administratrix of the Estate.

You are required to file an authenticated claim and elect your status as a lien creditor in accordance with state law. Please forward your claim as follows:

Jane Smith, Administratrix
c/o (Attorney Name)
Attorney at Law
(Attorney for the Personal Representative of the Estate)
[Address]
[City, State, Zip]

Please feel free to call me should you have any questions about this letter at _____.
Sincerely,

Attorney's Name

cc: Ms. Jane Smith

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APPENDIX C

December 2, 2003

Bank, N.A.
P.O. Box 000
Anytown, Texas

CMRRR 7000 1670 0003 8432 9697

Re: Cause No. _____
Estate of John Doe, Deceased
Probate Court No. One (1) of Harris County, Texas

Dear Sir or Madam:

Notice is hereby given that original Letters Testamentary for the Estate of John Doe, Deceased, were issued on the 6th day of October, 2003, in Cause No. _____, pending in the Probate Court No. One, Harris County, Texas, to Jane Smith, Administratrix of the Estate.

You are required to file an authenticated claim in accordance with state law. Please forward your claim as follows:

Jane Smith, Administratrix
c/o (Attorney Name)
Attorney at Law
(Attorney for the Personal Representative of the Estate)
[Address]
[City, State, Zip]

Please feel free to call me should you have any questions about this letter at _____.

Sincerely,

Attorney's Name

cc: Ms. Jane Smith

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APPENDEIX D

No. _____

IN THE ESTATE OF

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IN THE PROBATE COURT

JOHN DOE,

§

NO. ONE (1)

§

DECEASED

§

HARRIS COUNTY, TEXAS

AUTHENTICATED SECURED CLAIM

1. Bank, N.A. is the owner of a secured claim against the Estate of John Doe, Deceased, in the sum of \$150.00.
2. Claimant requests that the claim be allowed and approved as a matured, secured claim to be paid in due course of administration (or preferred debt and lien).

 John Smith
 CEO of Bank, N.A.

STATE OF TEXAS

§

COUNTY OF HARRIS

§

Before me, the undersigned authority, on this the ____ day of _____, 2006, personally appeared John Smith, as CEO of Bank, N.A., and after being duly sworn, stated that:

"I have made diligent inquiry and examination, and I believe that the foregoing secured claim is just and all legal offsets, payments, and credits known to Claimant have been allowed.

"This claim is founded upon the following:

 John Smith
 CEO of Bank, N.A.

Subscribed and sworn to before me by John Smith on this ____ day of _____, 2006, to certify which witness my hand and seal of office.

 Notary Public
 State of Texas

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APPENDIX E

No. _____

IN THE ESTATE OF

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IN THE PROBATE COURT

JOHN DOE,

NO. ONE (1)

DECEASED

HARRIS COUNTY, TEXAS

AUTHENTICATED UNSECURED CLAIM

1. Joe Smith is the owner of an unsecured claim against the Estate of John Doe, Deceased, in the sum of \$300.00.
2. Claimant requests that the claim be allowed and approved.

 Joe Smith
 CEO _____ Credit Cards

STATE OF TEXAS

§

COUNTY OF HARRIS

§

Before me, the undersigned authority, on this the ____ day of _____, 2006, personally appeared Joe Smith, as Supervisor, _____ Credit Cards, and after being duly sworn, stated that:

"I have made diligent inquiry and examination, and I believe that the foregoing unsecured claim is just and all legal offsets, payments, and credits known to Claimant have been allowed.

"This claim is founded upon the following:

 Joe Smith
 CEO of _____ Credit Cards

Subscribed and sworn to before me by Joe Smith, CEO of _____ Credit Cards on this ____ day of _____, 2006, to certify which witness my hand and seal of office.

 Notary Public
 State of Texas

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No. _____

IN THE ESTATE OF

JOHN DOE,

DECEASED

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IN THE PROBATE COURT

NO. ONE(1)

HARRIS COUNTY, TEXAS

**MEMORANDUM OF DEFECTS OF FORM,
AND CLAIM OF INSUFFICIENCY OF EXHIBITS,
WITH RESPECT TO THE PROOF OF CLAIM
OF BANK, N.A.**

On August 3, 2006, Bank, N.A. ("Claimant") deposited with Jane Smith, ("Dependent Administratrix"), Dependent Administratrix of the Estate of John Doe, Deceased, a claim dated August 1,2006, against the above styled and numbered estate. By Memorandum of Rejection of an even date herewith, the Dependent Administratrix has rejected the claim.

Pursuant to Section 302 of the Texas Probate Code, the Dependent Administratrix objects to the following defects of form of the claim and insufficiency of exhibits thereto:

1. The claimant has failed to authenticate the claim in conformity with Section 301 of the Texas Probate Code; and
2. The claimant has failed to conform with Section 306 of the Texas Probate Code.

By specifying the foregoing defect or claims of insufficiency, the Dependent Administratrix does not intend to waive any additional defects, or claims of insufficiency or objection to such claims.

Dated this _____ day of _____, 2004.

Respectfully submitted,

Jane Smith
Dependent Administratrix of the Estate of John
Doe, Deceased

Approved:

Attorney's Name
[Address]
[Phone number]
[Fax]
[State Bar No.]

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APPENDIX G

No. _____

IN THE ESTATE OF

§

IN THE PROBATE COURT

JOHN DOE,

§

NO. ONE(1)

DECEASED

§

HARRIS COUNTY, TEXAS

§

**MEMORANDUM OF ALLOWANCE OF AUTHENTICATED
UNSECURED CLAIM OF BANK, N.A.**

On November 30, 2004, Bank, N.A. deposited with Jane Smith, Administratrix of the Estate of John Doe, Deceased, a claim in the amount of One Hundred Fifty Dollars and No Cents (\$150.00), against the above styled and numbered estate entitled "Authenticated Claim of Bank, N.A.

A copy of such claim, with exhibits, is attached to this Memorandum of Allowance and is referred to as the "Claim".

The claim is allowed.

Dated this _____ day of _____, 2004.

Respectfully submitted,

Jane Smith
Administratrix of the Estate of John Doe,
Deceased

Approved:

Attorney's Name
[Address]
[Phone]
[Fax]
[State Bar No.]

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APPENDIX H

No. _____

IN THE ESTATE OF
JOHN DOE,
DECEASED

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IN THE PROBATE COURT
NO. ONE (1)
HARRIS COUNTY, TEXAS

**MEMORANDUM OF REJECTION OF CLAIM
OF BANK, N.A..**

On August 3, 2006, Bank, N.A.. deposited with Jane Smith, Dependent Administratrix of the Estate of John Doe, Deceased, a claim in the principal amount of One Hundred Fifty Dollars (\$150.00), against the above styled and enumerated estate and identified as a "Formal Claim"; the original claim is attached to this Memorandum of Claim and is referred to as the "Claim".

The claim is rejected.

Dated this _____ day of _____, 2006.

Respectfully submitted,

Jane Smith,
Dependent Administratrix of the Estate of
John Doe, Deceased

Approved:

Attorney's Name
[Address]
[Phone]
[Fax]
[State Bar No.]

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APPENDIX I

No. _____

IN THE ESTATE OF

§

IN THE PROBATE COURT

JOHN DOE,

§

NO. ONE (1)

§

DECEASED

§

HARRIS COUNTY, TEXAS

§

**PROOF OF SERVICE OF NOTICE UPON
SECURED CLAIMANTS AGAINST ESTATE**

STATE OF TEXAS

§

COUNTY OF HARRIS

§

§

Before me, the undersigned authority, on this the ____ day of _____, 2006, personally appeared Jane Smith, and after being duly sworn, stated that:

"The attached notice is a copy of the notice which was sent by Certified Mail, Return Receipt Requested, to Bank, N.A. in compliance with Section 295 of the Texas Probate Code. A copy of the Return Receipt is attached to said notice."

Jane Smith, Dependant Administratrix of the Estate of
John Doe, Deceased

Sworn to and subscribed before me by Jane Smith, this ____ day of _____, 2006, to certify which witness my hand and seal of office, in the capacity therein stated.

Notary Public
State of Texas

Approved:

Attorney's Name
[Address]
[Phone]
[Fax]
[State Bar No.]

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Administrator's Timeline

I. Appointment

- A. Appointment & Qualification
- B. Post bond
- C. Orders letters of Administration

II. Identify Potential Claims

"Claims" include "liabilities of a decedent which survive, including taxes, whether arising in contract or in tort or otherwise, funeral expenses, the expense of a tombstone, expenses of administration, estate and inheritance taxes, and debts due such estates." (TPC 3(c))

III. Notice to Creditors Published (TPC 294)

- A. Within 1 month after receiving letters of administration (TPC 294(a))
- B. Notice to comptroller also by CMRRR if decedent owed taxes administered by comptroller (TPC 294(a))
- C. Publish in newspaper published in county where letters were issued (TPC 294(a))
 - 1. If no newspaper is published in the county (TPC 294(c)), post notice (TPC 33(f)(2) & (3))
 - 2. Needs to be paper of "general circulation" TPC 33(f)(3) and meet requirements of citation by publication
- D. Content of notice (TPC 294(a))
 - 1. Require all persons with claims against the estate to present the claims timely
 - 2. Date of issuance of letters of administration - Address to which claims may be presented (attorney for estate)
 - 3. Choose if claims should be addressed in care of the attorney, the PR or to "Representative, Estate of _____"
- E. File proof of publication with the court where the estate is pending (TPC 294(b))
 - 1. Include copy of printed notice
 - 2. Include affidavit of publisher, sworn to, stating notice was published as required
 - 3. Cannot be used to set deadlines to file claims with the PR

IV. Permissive Notice to Unsecured Creditors (TPC 294(d))

- A. At any time before administration is closed, PR "may" give notice by CMRRR to an unsecured creditor with a claim for money
 - 1. Notice must state the creditor must present claim within 4 months after receipt of the notice or the claim is barred (assuming the claim is not already barred by statute of limitations)
 - 2. Notice must also include:
 - a. Date letters of administration were issued
 - b. Address to which claims may be presented
 - c. Instructions of the PR that the claim be addressed in care of PR, PR's Attorney or "Representative, Estate of _____"

V. Mandatory Notice to Secured Creditors (TPC 295)

- A. Within 2 months after receiving letters, or within reasonable time after obtaining actual knowledge of claims PR "shall" give notice to creditors known to have claims for money against the estate that are secured by real or personal property of the estate. (TPC 295(a)) -

Notice must be mailed by certified or registered mail with return receipt requested, addressed to claimant at last known address (TPC 295(b))

- B. Proof of service of notice (TPC 295(C)) - File with the court a copy of the notice, return receipt and affidavit of PR stating notice was mailed as required

VI. Failure to Give Notice to Creditors (TPC 297)

PR and its surety "shall" be liable for any damage suffered by the creditor unless the creditor had notice from another source

VII. Receipt of Creditor's Claim

- A. Treat as if served with a lawsuit, calendar deadlines
- B. Do not rely on receiving clerk's notice of claim filing before calendaring deadlines (TPC 308)
- C. Creditor may call with questions or requesting help in filing claim
- D. To assist a creditor could compromise the rights of other creditors, the estate and the beneficiaries
- E. Conflict of interest between PR and creditor
- F. Creditor must have separate legal representation

VIII. PR's Objections to Claim – file within 30 Days of filing of claim or are waived (TPC 201-302)

- A. Lack of supporting affidavit stating claim is just, all legal offsets, payments and credits allowed (TPC 301)
- B. Lack of supporting affidavit stating the facts upon which claim is founded if no written instrument (TPC 301)
- C. Lack of supporting affidavit from authorized officer or representative of corporation of other entity (TPC 304)
- D. Insufficient exhibits or vouchers to prove claim
- E. Does not fall within definition of "claims" (TPC 3(g))
Is actually claim against estate, not decedent
- F. No basis for attorney fees if not in instrument (TPC 307)

IX. Acting on Claims (TPC 308-311)

- A. Deemed rejected if not acted on within 30 days of filing of claim or presentation of the claim to the PR (TPC 308)
 - 1. If the claim is then established through suit, costs "shall" be taxed against PR (TPC 310)
 - 2. PR may be removed after pleading, notice and evidentiary hearing (TPC 310)
- B. Within 30 days of filing or presentation, PR must file memorandum of allowance or rejection of the claim (TPC 309)
 - 1. Signed by PR
 - 2. State date of presentation or filing of claim
 - 3. State allowed or rejected
 - 4. State portion allowed or rejected if partial
 - 5. File with clerk of court where estate is pending
 - 6. No stated requirement of service on creditor (TPC 311)
 - 7. Begins 90 day period to file suit on rejected claim (TPC 313)
- C. PR cannot allow a claim barred by statute of limitations (TPC 298(b))
 - 1. Barred if unsecured claim is not presented within 4 months of TPC 294(d) notice
 - 2. Barred if suit not filed on rejection claim within 90 days of rejection (TPC 313)
 - 3. Barred if general statute of limitations bars claim (TPC 298(b))
 - a. 2 years for torts (Tex. Civ. Prac. & Rem. Code 16.003)
 - b. 4 years for contract (Tex. Civ. Prac. & Rem. Code 16.004)

- D. PR cannot allow a claim after order for partition and distribution (TPC 318) - Creditor must pursue the heirs, devisees and creditors.
- E. Court's actions on claims allowed by PR (TPC 312)
 - 1. Before the Court acts on the claim, any interested person may object in writing and have an evidentiary hearing resulting in a final judgment
 - 2. After 10 days, Court may approve the claim, the whole or in part, or it may reject the claim
 - 3. After 10 days, Court classifies claim under TPC 322
 - 4. Court may hold an evidentiary hearing if not satisfied claim is just (TPC 322 (c)), and may disapprove the claim
 - 5. Court shall issue an order reflecting its action on the claim; this order is a final judgment
 - 6. Appeal may be taken to the Court of Appeals

X. Paying Approved Claims (TPC 320)

- A. May file application after six months from issuance of letters of administration to pay approved claims - PR must represent no actual knowledge of enforceable claims other than those already approved and classified (TPC 320(d))
- B. If classified as preferred debt and lien, creditor is not allowed any other claim against estate for money and receives only preferred lien status (306(d))
- C. If classified as preferred debt and lien and property not sold within 6 months after issuance of letters of administration, PR shall bring debt current and comply with the contract (306(e))
- D. Pay pro rata by class if insufficient funds available (TPC 321)
- E. Classification of claims
 - 1. Funeral expenses, last sickness expenses up to \$15,000 (TPC 320(a)(1))
 - a. Class 1 expenses (TPC 322)
 - b. If exceed \$15,000, excess is classified as Class 8 unsecured claim (TPC 322)
 - c. Funeral expenses are charged only against decedent's share of the community estate if married (TPC 320))
 - 2. Family allowances (TPC 320(a)(2)). Treated as higher priority than Class 2
 - 3. Expenses of administration (TPC 320(a)(3)) – Class 2
 - 4. US Government claims (31 U.S.C.A. §3713(a) Not specifically classified but paid before all other debts of a decedent (Classes 3-8)
 - 5. Secured claims (TPC 322) – Class 3
 - 6. Delinquent child support (TPC 322) - Class 4 expenses
 - 7. Taxes, penalties and interest (TPC 322) - Class 5 expenses
 - 8. Costs of confinement in prison (TPC 322) - Class 6 expenses
 - 9. Repayment of state medical assistance payments (TPC 322) - Class 7 expenses
 - 10. All other claims - Class 8 expenses
- F. Receipts and Releases
 - 1. Send for signature with copy of check
 - 2. Consideration for release

XI. Final Accounting (TPC 405)

- 1. File when all debts paid or estate is insolvent (TPC 404)
- 2. Include documentation of debts paid and barred
- 3. No requirement of notice to creditors (TPC 407)

XII. Responding to Suit by Creditor

- A. Calendar answer date when served with citation (Monday following 20 days)
- B. Consider hiring litigation counsel to represent PR
- C. File verified answer denying debt (TRCP 93)

D. If general statute of limitations has run or the claim is barred because it is untimely, file motion for summary judgment with the answer and set for hearing within 21 days of service (TRCP 166a)

Creditor's Timeline

I. Claim Arises

II. Claims excluded from presentment requirements (TPC 317)

- A. PR's claim against decedent (TPC 317(a))
 - 1. Must file claim within 6 months from qualification
 - 2. Court alone acts on claim and order is final judgment
- B. Heir, devisee or legatee claiming as such
- C. Accrued after letters granted to PR and due to contract with PR
- D. Delinquent ad valorem taxes in county other than in which administration is pending, or in same county but administration has been pending more than 4 years
- E. Unliquidated claims, e.g. specific performance of real estate contract, partition of property

III. Notice of Claim Received? (TPC 294 and 295)

IV. Calculate deadline to file suit

- A. 2 or 4 year statute of limitations (TPC 298(b))
- B. Tolling until earlier of 1 year from death or the appointment of PR (Tex. Civ. Prac. & Rem. Code 16.042)

V. Calculate deadline to file claim (assuming statute of limitations has not expired)

- A. If unsecured and received TPC 294(d) notice, 4 months from date received
- B. If secured and received TPC 295 notice, the later of 6 months after letters are granted or within 4 months of receipt of the TPC 295 notice letter
- C. If no notice received, any time before estate is closed
- D. File simultaneously with suit if statute of limitations will run before TPC 294 or 295 notice period expires

VI. Determine if estate has been opened and PR appointed

- A. If Estate is open and PR appointed, file claim if not excluded from presentment requirements
 - 1. Absolute requirement before judgment can be rendered (TPC 314)
 - 2. Authenticated Claim Form (TPC 301-304)
 - If secured, specify if matured secured claim (TPC 306(a) or preferred debt and lien (TPC 306(a)(2))
 - If fail to specify, 306(a)(2) is default choice*
 - 3. Calendar PR's approval/rejection deadline of 30 days from presentment (TPC 308-309)
 - 4. If 30 days passes with no action, the claim is deemed rejected (TPC 308-310)
 - If claim is deemed rejected and later established by suit, costs are taxed against PR individually or he may be removed (TPC 310)
 - 5. If claim is approved by PR, it must be "allowed" by Court for creditor to be paid (TPC 298(b), 312(b))
 - 6 months after granting of letters with PR affidavit that knows of no enforceable claims other than approved claims, Court may order payment
- B. If Estate is not open, consider opening Estate. Creditor must weigh the costs of opening

an Estate against the likelihood of collection

1. Considerations: Bonding requirements; locating and providing notice to heirs; possible requirement of applying for heirship
2. Remember opening of administration is for all purposes and creditors

VII. File suit within 90 days of rejection of claim (TPC 313)

- A. Suit must be filed in original court with probate jurisdiction
- B. Seek costs against PR individually (TPC 310); however, see TPC 315 assessing costs against estate
- C. Costs may include attorney fees if statutorily or contractually allowed
- D. If receive judgment, it should be filed with and classified by the court and handled in due course of administration as if allowed and approved claim (TPC 313)

VIII. Remedies if Estate approves but fails to pay secured claims (TPC 306(e)-(k))

- A. File application with Court, personal service and hearing
- B. File 12 months from granting of letters if secured and property not sold or distributed
- C. Require the sale of the property or Foreclosure
- D. Attorney fees if available in underlying contract

IX. Remedy if Estate approves but fails to pay unsecured or secured claim (TPC 326)

- A. Request court order of payment 12 months from granting letters to PR, after application and proof of available funds (TPC 326)
- B. If PR refuses to pay per court order, claimant must submit affidavit of demand and failure to pay and receive writ of execution including interest and costs (TPC 328(a))
- C. PR and surety may be cited to appear and show cause why they should not be held liable for full amount plus 5% monthly after demand (TPC 328(b))

X. Remedies if Estate is partitioned and distributed (TPC 318)

- A. File suit against heirs, devisees, legatees or creditors
- B. Damages are limited to the amount received by each defendant from the estate

XI. Order of Payment of Claims (TPC 320-322)

- A. Pay pro rata by class if insufficient funds available (TPC 321)
- B. Funeral expenses, last sickness expenses up to \$15,000 (TPC 320(a)(1))
 1. Class 1 expenses (TPC 322)
 2. If exceed \$15,000, excess is classified as Class 8 unsecured claim (TPC 322)
 3. Funeral expenses are charged only against decedent's share of the community estate if married (TPC 320)
- C. Family allowances (TPC 320(a)(2))
- D. Expenses of administration (TPC 320(a)(3))
 1. Class 2 expenses
 2. Includes TPC 243 (will contest) and guardianship expenses
- E. US Government claims (31 U.S.C.A. §3713(a))
Not specifically classified but paid before all other debts of a decedent (i.e. Classes 3-8)
- F. Secured claims (TPC 322)
Class 3 expenses
- G. Delinquent child support (TPC 322)

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- Class 4 expenses
 - H. Taxes, penalties and interest (TPC 322)
 - Class 5 expenses
 - I. Costs of confinement in prison (TPC 322)
 - Class 6 expenses
 - J. Repayment of state medical assistance payments (TPC 322)
 - Class 7 expenses
 - K. All other claims
 - Class 8 expenses

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