

**Creditor Exempt Assets -- When You Can't Take It With You,
and the Creditors Can't Take It Either!**

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South Texas College of Law
Wills & Probate Institute
September 6-7, 2007

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James has a wide-ranging litigation practice that includes insurance litigation, fiduciary litigation, builder and developer litigation, and commercial litigation. His trial practice includes matters in state and federal court, as well as arbitration and mediation. In addition to serving as trial counsel for his clients, James routinely advises them on contract and insurance matters.

James has received an "AV" rating from Martindale-Hubbell, indicating "Very High to Preeminent" legal ability.

REPRESENTATIVE EXPERIENCE

Insurance Litigation

- Represented major insurance carriers on first and third party personal lines
- Represented corporations on denied insurance claims under a variety of policy types
- Wrote coverage opinions for insurance clients, for corporate clients and to assist third parties in litigation
- Brought declaratory actions, breach of contract claims, and statutory and common law bad faith suits

Fiduciary Litigation

- Represented clients involved in multimillion dollar lawsuits involving executors, trustees and other fiduciaries
- Represented fiduciaries in declaratory actions, removal actions and breach of fiduciary duty suits
- Published Cases

INDUSTRIES

Insurance
Real Estate
Construction

PRACTICES

Litigation

EDUCATION

JD, 1995, University of Texas School of Law, The Review of Litigation, Articles Editor, Coats, Rose, Yale, Holm, Ryman & Lee Award, UT's Environmental Law Essay Competition Winner

BA, 1992, Economics and Political Science, Baylor University, Baylor Honor Council

Lyndon B. Johnson Intern to Congressman Bill Archer, US House of Representatives (1990)

National Youth of the Year, Exchange Clubs of America (1988)

ADMITTED

Texas 1995
US Court of Appeals for the Fifth Circuit
US District Court for the Northern District of Texas
US District Court for the Southern District of Texas
US District Court for the Eastern District of Texas

- *In re Estate of Hersey*, ___ S.W.3d ___, 2006 WL 756088 (Tex.App.—Amarillo, April 25, 2006). James was the lead lawyer at trial and second chair on appeal for this case, which involved an appeal of attorneys' fees stemming from defense of an executor/corporate officer in a breach of fiduciary duty case.
- *Lee v. Hersey*, ___ S.W.3d ___, 2006 WL 756088 (Tex.App.—Amarillo, March 24, 2006). James was the lead lawyer at trial for this case, which involved the defense of an executor in a breach of fiduciary duty and conspiracy case.
- *Paul v. Merrill Lynch Trust Co. of Texas*, 183 S.W.3d 805 (Tex.App.—Waco, December 14, 2005). James was the lead lawyer at trial for this case, which involved the defense of a corporate executor in a removal suit and breach of fiduciary duty case.

Builder and Developer Litigation

- Represented custom home builders in home defect and misrepresentation/fraud cases in both litigation and arbitration
- Represented track home builder in home defect, misrepresentation/fraud cases, and breach of contract claims in litigation and arbitration
- Represented major land developers in a variety of litigation relative to development activities in both litigation and arbitration
- Advised builders and developers regarding contractual and insurance matters

Commercial Litigation

- Represented corporate clients in construction and engineering disputes, covenant not to compete litigation, nuisance cases, breach of contract suits, premises liability suits, products liability suits, and a variety of other commercial litigation
- Advised corporate clients regarding contract drafting, insurance and indemnification matters
- Published Cases
 - *Parks v. Landfill Marketing Consultants, Inc.*, 2004 WL 1351545 (Tex.App.—Houston [1st Dist.], June 17, 2004). James was the lead lawyer at trial for this case, which involved a commercial suit in a breach of an oral contract case).

ARTICLES / PUBLICATIONS

- "The Chicken or the Egg - Insurance and Indemnification Clauses in the Same Contract" (March 29, 2004)

- "When Actions Speak Louder Than Words: The Case for a Quasi-Estoppel Exception to the Statute of Frauds," 22 Rev. Litig. 69 (2003)
- "Texas Premises Liability Jury Definitions, Instructions, and Questions for Criminal Actor Cases – A Pattern to Ease the Madness?," 17 Rev. Litig. 259 (1998)
- "Walking the High Wire: Practical Possibilities for Regulatory Responses to the Electromagnetic Field Quandary," 15 Rev. Litig. 141 (1996)
- "Straddling the Wire: Electromagnetic Fields and Personal Injury Suits," 14 Rev. Litig. 545 (1995)

BRIEFINGS, SEMINARS & SPEECHES

- "Dealing With Your Insurance Company on Claims: If at First You Don't Succeed, Try, Try Again," panel moderator, Texas General Counsel Forum (February 22, 2005)
- "Bad Faith and Beyond," Insurance Adjuster Continuing Education Presentation (1999)
- "Using the New Rules of Civil Discovery: Effects on Insurance and Insurance Defense Litigation," Insurance Adjuster Continuing Education Presentation (1999)

PROFESSIONAL / CIVIC AFFILIATIONS

Membership/Leadership Positions

- Director – South Montgomery County Woodlands Chamber of Commerce
- Member – Texas Bar Association Insurance Section
- Trustee – Klein United Methodist Church
- Director – Alden Bridge Village Scholarships Foundation, Inc.
- Former Director – Town Center Improvement District (1999-2002)
- Former Chairman – Funding Request Committee of Town Center Improvement District (1999-2002)
- Former Director and Vice President – The Woodlands Association, Inc. (1998-2000)
- Member – Houston Bar Association

Awards

- Recipient of the 2005 South Montgomery County Woodlands Chamber of Commerce Chairman's Award

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Introduction

Because we cannot take our property with us when we pass away, the marking of our deaths often seems accompanied by the sounding of the starter's pistol for the gold rush for our assets. And if we die with debts, then the creditors are typically picking and panning for their share.

Although all that glitters isn't necessarily gold, Texas' statutes and cases are replete with methods to protect assets against creditor claims. This paper and accompanying continuing legal education presentation examines some of these statutes, cases and methods to help the reader understand where tactical advantages might be gained.

NOTE ON SCOPE: This paper has generally approached the subject with emphasis on probate and estates. It has not attempted to address the differences (and there are many) between protection from assets in the estate and probate context, as compared to protection of assets under federal bankruptcy law.¹ The author of this paper does not practice bankruptcy law; and generally bankruptcy laws do not impact the state statutes and exemptions applicable to debtors outside of bankruptcy court.

I. It Is Hard to Get What You Don't Own! -- Non-owned Assets

One of the most basic concepts behind asset protection is that creditors cannot generally take what you do not own in order to satisfy a debt you cannot pay. Within the estate and probate field, different planning mechanisms are used to structure the ownership of an

¹ For more on the subject of asset protection under federal bankruptcy law, see the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. 11 U.S.C.A. §522.

asset in a way that makes it more difficult for creditors to reach.²

Sections A-F below look at some of the different structures used to change asset ownership (or prevent asset ownership). These concepts are tempered, however, by the discussion in Section G pertaining to the "reverse piercing" method of reaching non-owned assets, and the Texas Uniform Fraudulent Transfer Act (TUFTA) preventing transfers made with intent to hinder, delay, or defraud creditors.

A. Assets Owned by Trust

The Texas Property Code contains the provisions that allow trusts with "spendthrift" provisions to protect assets of the trust from creditors. Section 112.035 of the property code provides that the settlor of a trust may include terms that "the interest of a beneficiary in the income or in the principal or in both may not be voluntarily or involuntarily transferred before payment or delivery of the interest to the beneficiary." The protection against involuntary transfer protects the trust property against the claims of creditors.

Note, however, that self-settled trusts (a trust created for the settlor's own benefit) are not protected under spendthrift language or Section 112.035 of the Property Code. The statute specifies that "If the settlor is also a beneficiary of the trust, a provision restraining the voluntary or involuntary transfer of his beneficial interest does not prevent his creditors from satisfying claims

² Under the new Texas Business Organizations Code, Section 2.101, "[A] domestic entity has the same powers as an individual to take action necessary or convenient to carry out its business and affairs" including the power to "(3) acquire, receive, own, hold, improve, use and deal in and with property or an interest in property." Put simply (and there is no surprise here), entities can own assets.

from his interest in the trust estate.” TEX.PROP.CODE 112.035(d).

Example: Self-settled “living trusts.” In a recent issue of the Texas Bar Journal, in debunking common myths about “living trusts” an article tackled the common sales pitch that a living trust will help a person protect himself against creditors. The article stated: “ 4. [Common Myth] Living trusts help you avoid your creditors. [The common myth is] *False*. During your lifetime, assets in a living trust are subject to the claims of your creditors. After death, these assets are subject to the claims of your estate's creditors.” LIVING TRUST SCAMS AND THE SENIOR CONSUMER, 70 TEX.B.J. 646-47 (July 2007). This is a straightforward application of TEX.PROP.CODE 112.035(d).

B. Life Insurance Trusts

A special form of trust asset ownership is the Life Insurance Trust whereby a trustee is named as the beneficiary of a policy. The Texas Insurance Code (Sections 1104.021 and 1104.023) provides that life insurance proceeds received by a trustee who has been named as the beneficiary of the life insurance policy “are not subject to debts of the insured . . . to any greater extent than if the proceeds were payable to a beneficiary . . . of the insured’s estate.” TEX.INS.CODE §1104.023. For more on the exemption of life insurance proceeds from creditors, see Section V. herein.

C. Corporation Assets

A corporation is a separate legal entity from its shareholders, officers, and directors. *Boyo v. Boyo*, 196 S.W.3d 409 (Tex.App.--Beaumont, 2006). The assets of the corporation are owned by the corporation -- not by the shareholders individually. TEX.BUS.ORG.CODE, SECTION 2.101(3).

Generally, the assets of a corporation cannot be reached to pay the debts of a shareholder. A creditor can, however, seek to have a

receiver appointed to exercise the rights of ownership that come with shares of corporate stock. *E.g. Norem v. Norem*, 105 S.W.3d 213, 217 (Tex.App.--Dallas, 2003, no pet.). A receiver of corporate shares has all the rights and powers of a shareholder except as limited by the trial court's order. *Newman v. Toy*, 926 S.W.2d 629, 631 (Tex. App.-Austin 1996, writ denied). An order appointing a receiver over the shares of stock cannot give more power over the corporation than a shareholder would have. *Norem v. Norem*, 105 S.W.3d 213, 217 (Tex.App.--Dallas, 2003, no pet.) (reversing part of a trial court's order that gave a receiver more powers over a corporation than would be had by a shareholder).

If the creditor can wrestle control of the shares of stock away from a debtor who is the sole shareholder, then the creditor may be able to reach the assets of the corporation to pay the debtor's debt. Under Texas law, a sole shareholder is the equitable owner of the corporation's assets and may unilaterally deal with the corporation's property and make contracts regarding the corporate assets that are binding on the corporation so long as the rights of creditors are not prejudiced. *In re Estate of Trevino*, 195 S.W.3d 223, 230 (Tex. App.--San Antonio 2006, no pet.) (finding that independent executrix, as sole shareholder of corporation, had authority to convey 40% of corporation's assets); *Martin v. Martin, Martin & Richards, Inc.*, 12 S.W.3d 120, 124 (Tex. App.—Fort Worth 1999, no pet.) (holding that the only three shareholders of corporation could contractually bind the corporation); *Newman v. Toy*, 926 S.W.2d 629, 631 (Tex. App.—Austin 1996, writ denied) (holding that sole shareholder could act unilaterally with corporation's property and monthly receipts). Although action would normally be required by a corporation's board of directors, only the corporation's creditors, and not the corporation itself, are in a position to complain of the lack of proper action by a board of directors. *In re Estate of Trevino*, 195 S.W.3d at 230; *Martin*, 12 S.W.3d at

124; *Newman*, 926 S.W.2d at 631. This sole-shareholder authority applies “[n]otwithstanding a charter, by-law, or statutory provision that places the power of management in a board of directors or requires formal action by them.” *In re Estate of Trevino*, 195 S.W.3d at 230.

D. Partnership Assets

Like corporate property, partnership property is owned by the partnership itself and not by the individual partners. TEX.BUS.ORG.CODE § 154.001(c)(stating that a partner is not a co-owner of partnership property) & 154.002 (stating that a partner does not have an interest that can be transferred, voluntarily or involuntarily, in partnership property); *Marshall v. Marshall*, 735 S.W.2d 587, 595 (Tex.App.--Dallas 1987, writ ref’d n.r.e). This is sometimes referred to as the “entity” theory of partnership.³ Texas has adhered to the entity theory of partnership since 1961, the date the Texas Uniform Partnership Act was enacted. Under this construct, all property brought into the partnership is partnership property, and as partnership property is not owned by the contributing individual partner. *Lifshutz v. Lifshutz* 199 S.W.3d 9 (Tex.App.--San Antonio, 2006).

A creditor cannot seek partnership assets to pay the debt of an individual partner. *See In re Gray Law, L.L.P.* 2006 WL 1030206 (Tex.App.--Forth Worth, April 20, 2006)(proceeds from sale of limited liability partnership’s property belonged to the partnership, not to individual partner or partner’s spouse). A creditor can, however, get a charging order⁴ against a partner’s interest in a partnership.

³ See TEX.REV.CIV.STAT.ANN. 6132b-2.01 (Stating that a partnership is an entity distinct from its partners).

⁴ A “charging order” is a statutorily created means for a creditor of a judgment debtor who is a partner of others to reach the debtor’s

E. Family Limited Partnership Assets

Many planners are familiar with the estate planning benefits that can be obtained from use of family limited partnerships (including valuation reductions that can result in less estate tax being imposed on an estate). Family limited partnerships, like other partnerships also provide asset protection. While the FLP’s assets do not have the benefit of a statutory exemption (see Sections III & IV herein for assets that do) they have a measure of protection in that assets held in a partnership can be difficult to reach. If a creditor were to get a charging order,⁵ the creditor would have the right to whatever distributions the partnership makes to the partner. But there is generally nothing that requires a partnership to make a distribution -- meaning that the family may be able to prevent the creditor from recovering. At the same time, the partnership continues to issue K-1 statements (the IRS form identifying the pass through tax consequences of the income to the family limited partnership). The creditor holding the charging statement

beneficial interest in the partnership without risking dissolution of the partnership. BLACK’S LAW DICTIONARY, 6th Ed., p.233.

⁵ TEX.REV.CIV.STAT.ANN. 6132a-1, 7.03(a), states: “On application to a court of competent jurisdiction by a judgment creditor of a partner or of any other owner of a partnership interest, the court may charge the partnership interest of the partner or other owner with payment of the unsatisfied amount of the judgment, with interest, may then or later appoint a receiver of the debtor partner's share of the partnership's profits and of any other money payable or that becomes payable to the debtor partner with respect to the partnership, and may make all other orders, directions, and inquiries that the circumstances of the case require. To the extent that the partnership interest is charged in this manner, the judgment creditor has only the rights of an assignee of the partnership interest.”

could get hit with the tax for the income earned by the partnership, while not having received a distribution of that income. This circumstance can make pursuit distasteful to a creditor.

F. Estate Disclaimers

Depending on the circumstances of the beneficiaries of an estate, and the terms of the will, a disclaimer or partial disclaimer of an inheritance can be an effective tool to protect assets against a creditor of the beneficiary. Section 37A of the Texas Probate Code governs disclaimers of inheritances. The creditor protection provision is found in the second section of the statute, as follows: "A disclaimer evidenced as provided herein shall be effective as of the death of decedent and shall relate back for all purposes to the death of the decedent and is not subject to the claims of any creditor of the disclaimant."

TEX.PROB.CODE §37A. See also *Dyer v. Eckols*, 808 S.W.2d 531 (Tex.App.--Houston [14th Dist.] 1991, writ dismissed)(disclaimer was effective against disclaimant's creditors -- by virtue of the disclaimer, disclaimant never owned the property).

Example: Grannie passes away and wills her estate to her only child (or in the alternative, to her grandchildren). Child has just finished a bitter divorce, is stuck with numerous debts assigned to Child in the divorce decree, has debts from a failing sole proprietorship business, and is being hounded by creditors. Child has two adult kids: Grandkid A and Grandkid B. If Child does not disclaim the inheritance, the creditors will be able to pursue the assets. However, if Child complies with the statute and gives a proper disclaimer, Child's two kids (Grandchild A & B) take Grannie's assets instead -- and Child's creditors cannot pursue the assets.

G. Two Caveats: (1) Reverse Piercing; and (2) TUFTA

Some of the asset protection planning measures discussed above may be tempered, however, by the discussion below.

Two express "caveats" may be worth considering -- namely the "reverse piercing" method of reaching non-owned assets, and the Texas Uniform Fraudulent Transfer Act (TUFTA) which prevents transfers made with intent to hinder, delay, or defraud creditors.

(1) Reverse Piercing

Entities can be used to create a liability shield -- for instance, shareholders are normally protected from liability for corporate obligations. The Texas Supreme Court has, in circumstance where the corporate privilege has been abused, disregarded the corporate fiction to hold shareholders individually liable. This is generally referred to as "piercing the corporate veil." See *Castleberry v. Branscum*, 721 S.W.2d 270, 271 (Tex.1986).

Although not yet taken up by the Texas Supreme Court, both the U.S. Fifth Circuit Court of Appeals and various Texas Courts of Appeals have applied this doctrine in reverse -- sometimes called "reverse piercing." *Zahra Spiritual Trust v. United States*, 910 F.2d 240, 243 (5th Cir. 1990)(reverse piercing in tax case); *Boyo v. Boyo*, 196 S.W.3d 409 (Tex.App.--Beaumont, 2006)(reverse piercing in division of marital assets); *Lifshutz v. Lifshutz*, 199 S.W.3d 9 (Tex.App.--San Antonio, 2006) (*Lifshutz II* - reverse piercing in division of marital assets); *Young v. Young*, 168 S.W.3d 276 (Tex.App.--Dallas 2005)(reverse piercing in division of marital assets); *Lifshutz v. Lifshutz*, 61 S.W.3d 511, 516-18 (Tex.App.--San Antonio 2001, pet. denied) (*Lifshutz I* - reverse piercing in division of marital assets); *Zisblatt v. Zisblatt*, 693 S.W.2d 944, 952 (Tex.App.--Fort Worth 1985, writ dismissed) (reverse piercing in division of marital assets); *American Petroleum*

Exchange, Inc. v. Lord, 399 S.W.2d 213, 216-17 (Tex.Civ.App.--Fort Worth 1966, writ ref'd n.r.e.)(allowing creditors to reach corporate assets to satisfy an individual debtor's liability under alter ego theory).

In reverse piercing cases, a creditor of some type attempts to apply the alter ego/piercing doctrine in reverse--that is to try to obtain a corporation's assets in payment of the liability of an individual who treated the corporation as an alter ego. *E.g. American Petroleum Exchange, Inc. v. Lord*, 399 S.W.2d 213, 216-17 (Tex.Civ.App.--Fort Worth 1966, writ ref'd n.r.e.) (where creditors sought to hold corporation accountable for debtor's liability as debtor held majority of stock individually and as trustee for minor daughter and treated corporation as alter ego); *Zahra Spiritual Trust v. United States*, 910 F.2d 240, 243 (5th Cir. 1990)(where U.S. Government sought reverse piercing to recover corporate assets in satisfaction of a tax lien against an individual).

In seeking reverse piercing, the ultimate goal show that the corporation is the alter ego of the debtor, should therefore be treated as one and the same as the debtor and therefore to recover against the purported corporate assets.

Although a handful of cases exist pertaining to corporations, Texas Courts have not allowed the same results with regard to partnership entities. *See Lifschutz I*, 61 S.W.3d 511, at 518 (general partnership); *In re Gray Law, L.L.P.* 2006 WL 1030206 (Tex.App.--Forth Worth, April 20, 2006) (Limited liability partnership).

(2) Texas Uniform Fraudulent Transfer Act

Texas has adopted the Texas Uniform Fraudulent Transfer Act (TUFTA). It is codified in the Texas Business and Commerce Code, in Chapter 24. The statute specifies that transfers of assets are

fraudulent as to *present and future* creditors if the debtor made the transfer:

(1) with actual intent to hinder, delay, or defraud any creditor . . . ; or

(2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(B) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

TEX.BUS.COMM.CODE §24.005(a).

The statute also provides a list of factors (or indicia of fraud) that may be considered in examining the intent to hinder, delay, or defraud. These indicia include:

- ▶ transfers to relatives, or entities owned or controlled by the debtor
- ▶ the debtor retaining possession or control of the property transferred after the transfer
- ▶ concealment of the transfer
- ▶ proximity in time of the transfer to a suit or threat of suit
- ▶ the quantity of assets in proportion to the totality of the debtors assets
- ▶ flight (absconding) of the debtor

- ▶ a transfer for less than adequate consideration
- ▶ insolvency of the debtor either before or because of the transfer
- ▶ proximity in time of the transfer to debtor's incurring a substantial debt

See TEX.BUS.COMM.CODE §24.005(b).

If TUFTA is violated, the statute provides substantial remedies for creditors, including (1) voiding the transfer; (2) an attachment against the asset transferred; (3) injunction against further dispositions and transfers; (4) appointment of a receiver over the asset and/or other property of the debtor; (5) if the creditor has a judgment, an order levying execution on the asset transferred or its proceeds; and (6) "any other relief the circumstances may require." See TEX.BUS.COMM.CODE §24.008.

The statute also allows the court to award costs and reasonable and necessary attorney's fees as are equitable and just (to either the debtor or the creditor). TEX.BUS.COMM.CODE §24.013.

II. His, Hers, and Theirs -- Separate & Community Property

A. Community Property - Liabilities

Section 156 of the Texas Probate Code provides that community property subject to the sole or joint management, control and disposition of a spouse during marriage is and continues to be subject to that spouse's liabilities upon death.⁶

⁶ However, the Family Code provides that the community property is not subject to nontortious liabilities incurred by the other spouse during marriage. TEX.FAM.CODE 3.202(b)(2).

This means that a creditor of the deceased spouse can generally reach the community property owned by either spouse. However, as set forth below, the separate property of one spouse is generally not subject to the debts and liabilities (and therefore creditors) of the other spouse.

B. Separate Property Liabilities

Section 3.202 of the Texas Family Code reiterates the general community property rule, but also makes a specific statement about the non-liability of separate property. It states, "A spouse's separate property is not subject to liabilities of the other spouse unless both spouses are liable by other rules of law." [E.G. both are jointly and severally liable for negligence related to a multi-car accident].

C. Partition of Community Property

Because wife's separate property is not subject to husband's creditors, one method of protecting assets is to have spouses partition (divide) the community property into separate property. Section 4.102 of the Texas Family Code allows spouses to partition their community property as the spouses may desire, with the partitioned property becoming the separate property of the receiving spouse. TEX.FAM.CODE 4.102.

Example: Husband and Wife own a homestead in The Woodlands worth \$350,000 as community property, and also own \$350,000 worth of mutual funds acquired from earnings during marriage. The homestead is generally protected from creditor claims (See Section III, below). But the mutual funds are not. Husband is an obstetrician, and fears a future medical malpractice claim could hit the family's assets. Under 4.102, Husband and Wife could partition their community property and assign the homestead to Husband (which would still remain the homestead and retain creditor protection) as his separate property and assign the mutual funds to

Wife as her separate property. Then a future medical malpractice judgment creditor of husband's would not be able to reach the separate property mutual funds owned by wife, and also would not be able to reach the exempt homestead.

III. God's Green [Urban 10; Rural 200] Acres -- Homestead Protection⁷

Under the Texas Probate Code, two different protections exist for property qualifying as a homestead: (1) protection from creditor claims against the Decedent's estate (§ 270); and (2) protection of the right of occupancy (§§ 282-285). What differs between the two protections is who⁸ is entitled to claim them, and how⁹ the protections are exercised.

⁷ Section 41.002 of the Texas Property Code provides a statutory definition of a homestead, with limitations on the basis of acreage (not value). 41.002(a) limits an urban homestead to not more than 10 acres of land, and 41.002(b) limits a rural family homestead to not more than 200 acres.

⁸ Who?

(1) Entitled to protection from creditor claims – spouse, minor child, or adult unmarried child living on the homestead with decedent prior to decedent's death. Texas Probate Code § 271(b); and *Estate of Casida*, 13 S.W.3d 519 (Tex.App.—Beaumont 2000, no writ)(citing *Milner v. McDaniel*, 36 S.W.2d 992 (Tex. 1931)).

(2) Entitled to occupancy – spouse and/or minor children (but NOT adult unmarried child). *Estate of Casida*, 13 S.W.3d 519 (Tex.App.—Beaumont 2000, no writ).

⁹ How?

(1)Protection from creditor claims – automatically accrues at the time of death of the decedent if a person entitled to protection exists. *Milner v. McDaniel*, 36 S.W.2d 992 (Tex. 1931)(stating homestead right applies “upon the death of an owner using and occupying property as a homestead, when there remains a constituent member of the family....”). It is not dependent on use by the qualifying person. *National Union Fire Ins.*

A. What is a Homestead: Texas Constitution Art. 16 § 51; Texas Property Code § 41.002.

Under the Texas Constitution, a homestead is (1) not more than 200 rural acres plus improvements; or (2) not more than 10 acres of land plus improvements in a city, town or village used for the purposes of a home or both a home and a business. Texas Constitution Art. 16 § 51.

Although the Texas Constitution does not differentiate between the maximum amount of rural acreage allowed for the homestead of a family in comparison to a single adult, the Texas Property Code imposes a smaller limit on single adults. The rural homestead of a single adult is limited to not more than 100 acres plus improvements. Texas Property Code § 41.002(b)(2). Neither the Texas Constitution nor the Texas Property Code makes a distinction between a family and a single adult with respect to the maximum 10 acre urban homestead. Texas Property Code § 41.002(a).

The character and protection of a home as a homestead can be lost through abandonment. The Houston, First District, Court of Appeals explained:

Abandonment of a homestead occurs when the homestead claimant ceases to use the property and intends not to use it as a home again. *Kendall Builders, Inc. v. Chesson*, 149 S.W.3d 796, 808 (Tex. App.—Austin 2004, pet. denied). Merely changing residence is not, alone, an abandonment of the homestead. *Id.*; see *Farrington v. First Nat'l Bank*, 753 S.W.2d 248,

Co. v. Olson, 920 S.W.2d 458 (Tex.App.—Austin 1996, no writ).

(2)Right of Occupancy – dependent on occupancy by the spouse and/or minor children. See Texas Probate Code § 285.

251 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (noting that “mere fact of acquiring and moving” to new property does not show abandonment, absent intent not to return). Moving from homestead property due to health reasons is not sufficient to show abandonment. *Morris v. Porter*, [393 S.W.2d 385](#), 390 (Tex. Civ. App.—Houston 1965, writ ref’d n.r.e.). Nor does temporary renting of the homestead constitute abandonment of the homestead. *Hollifield v. Hilton*, [515 S.W.2d 717](#), 721 (Tex. Civ. App.—Fort Worth 1974, writ ref’d n.r.e.). Proof of intent not to use the property as a home again is required to show abandonment. *Id.*

Churchill v. Mayo, 224 S.W.3d 340 (Tex.App.—Houston [1st Dist.] 2006).

B. Protection from Creditor Claims: Probate Code § 270.

The Texas Probate Code generally protects a homesteads as a creditor exempt asset. Save and except for seven (7) enumerated exceptions, Section 270 of the Texas Probate Code explicitly states “The homestead shall not be liable for the payment of any debts of the estate...” This is, of course, dependent on the existence of one of the requisite homestead-right claimants (spouse, minor child, or adult unmarried child living on the homestead with decedent prior to decedent’s death). If the decedent is survived by any of the family members entitled to the protection, the homestead property is not subject to the decedent’s debts and creditor claims. *Milner v. McDaniel*, 36 S.W.2d 992, 994 (Tex. 1931); *Estate of Casida*, 13 S.W.3d 519 (Tex.App.—Beaumont 2000, no writ); and *National Union Fire Insurance Co. v. Olson*, 920 S.W.2d 458 (Tex.App.—Austin 1996, no writ). *But see Brooks v. Norris*, 1997 WL 695588 (Tex.App.—Dallas, 1997)(arguing that adult unmarried child who resided with decedent, but was neither

dependent on decedent nor supported decedent, had no ‘legal or moral obligation . . . to support the other family members’ and therefore ‘was not a constituent member of his mother’s family’ within the meaning of the Texas Constitution).¹⁰

The seven enumerated exceptions to the homestead’s freedom from creditors’ claims are:

1. purchase money liens (like a vendor’s lien);
2. ad valorem taxes;
3. mechanic’s or materialman’s liens that meet the restrictions in Section 50(a)(5), Article XVI, Texas Constitution;¹¹

¹⁰ The ‘unpublished’ outcome in *Brooks* seems questionable at best, and one prior and one subsequent opinion come to a different conclusion (*Olson* - prior; and *Estate of Casida*-subsequent). Given the plain conflict between *Brooks* (not providing homestead creditor protection to an adult unmarried son who resided with decedent) and *Estate of Casida & Olson* (both stating that an adult unmarried child who resided with decedent is entitled to homestead protection from creditors) it seems likely that this issue will be revisited.

¹¹ Not all mechanics/materialman’s liens will meet the requirements of this provision of the Texas Constitution. One express requirement is that the contract for the work and material be executed by the owner and spouse “only at the office of a third-party lender making an extension of credit for the work and material, an attorney at law, or a title company.” Section 50(a)(5)(D), Article XVI, Texas Constitution.

Example: Homestead owner decides to put in a pool. Owner signs the contract for the pool construction at the pool company’s office, and intends to pay for the pool by cashing in some mutual funds. The pool gets built, but before the final 1/3 payment is made, the stock market tanks before Owner can sell, and Owner is killed in an unfortunate car accident. Save and except for the homestead, the estate has little left. Pool company files a lien and an seeks to foreclose on the homestead in order to get paid. Result? The lien does not meet the

4. a debt incurred to facilitate division of property in a divorce;
5. federal tax liens or debt incurred to discharge a federal tax lien;
6. a home equity loan that meets the restrictions contained in the Texas Constitution; and
7. reverse mortgages.

Texas Probate Code § 270(1)-(7).

C. The Right of Occupancy: Probate Code §§ 282-285.

In addition to the right of the decedent's homestead to pass free from creditor claims, the Texas Probate Code also provides a statutory right of occupancy of the homestead by the decedent's spouse and minor children -- whether or not decedent wills the house to the spouse or children. *National Union Fire Insurance Co. v. Olson*, 920 S.W.2d 458 (Tex.App—Austin 1996, no writ).

In *Olson*, Decedent died testate with an adult son, and a minor daughter who lived with the Decedent's ex-wife. Decedent left his homestead to his adult son. A judgment creditor sought to recover its judgment against the homestead as the minor child did not occupy the homestead. The Austin Court of Appeals noted that the minor child's right to occupy the homestead "is distinct from the right to have the property descend free and clear of the debts of the decedent. With respect to the latter, the mere existence of [the minor child] is sufficient to cause the homestead to descend free from debt" regardless of whether the minor's guardian chooses to assert the minor child's right to occupy the homestead. *Id.* The Court concluded "Thus, one who inherits the decedent's homestead property [in these circumstances] receives the

requirement of the Texas Constitution because it was not signed at a lender's office, attorney's office, or title company, and the homestead exemption is good as against the pool claim.

property free from debts of the decedent even though the heir may have no immediate right of occupancy." *Id.*

Professor Stanley Johanson likens the homestead right of occupancy to a determinable estate.¹² Johanson's Texas Probate Code Annotated, 2006 ed., Commentary following § 283, p. 298. The contingencies which can terminate the spouse's right to occupy the homestead are (1) the spouse's death; (2) the spouse's sale of his or her interest in the homestead; and (3) the spouse's abandonment of the homestead. These contingencies are contained in § 285 of the Probate Code, which specifies that, "When the surviving spouse dies or sells his or her interest in the homestead, or elects no longer to use or occupy same as a homestead . . . it may be partitioned among the respective owners. . . ." Texas Probate Code § 285. Likewise, "the children's homestead right of occupancy terminates when they are no longer minors." Johanson's Texas Probate Code Annotated, 2006 ed., Commentary following § 283, p. 298.

D. A Rising Tension?? Homestead Limits Under Bankruptcy Estates vs. Probate Estates.

The enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 has created a federal homestead exemption limit of \$125,000 as to homesteads acquired within the 1215 days (three years and four months) prior to the filing of a bankruptcy petition. 11 U.S.C.A. §522(p). Although the Texas Property Code attempts to authorize more,¹³ the bankruptcy act should preempt it.¹⁴

¹² A determinable estate is "Liable to come to an end upon the happening of a certain contingency." Black's Law Dictionary, 6th Ed. "Determinable", p. 450.

¹³ Texas Property Code § 41.008 states "To the extent of any conflict between this subchapter [establishing an acreage as opposed to value limit on Texas homesteads] and any federal

Despite the change in federal bankruptcy law and its impact on the homestead exemption allowed in bankruptcy estates, this should not change the application of Texas Probate Code § 270 regarding homesteads involved in probate proceedings. First and foremost, the bankruptcy law does not prima facie apply to a solvent probate estate. Second, although diversity jurisdiction might apply with regard to a creditor's suit to establish a claim against a decedent's estate, federal courts have questionable jurisdiction with regard to the administration of probate estates and are likely to abstain from consideration of such a claim where it would interfere with state probate proceedings or control of property in custody of the state court. The Fifth Circuit explained:

Federal jurisdiction ordinarily exists over lawsuits that could have been brought in a state court, so long as complete diversity of citizenship and the requisite amount in controversy are present. [cite omitted] For compelling historical reasons, however, a federal court "has no jurisdiction to probate a will or administer an estate." [Cite omitted]. Nevertheless, the Supreme Court has held that, federal courts of equity have jurisdiction to entertain suits "in favor of creditors, legatee, and heirs" and other claimants

law that imposes an upper limit on the amount, including the monetary amount or acreage amount, of homestead property a person may exempt from seizure, this subchapter prevails to the extent allowed under federal law."

¹⁴ "Preemption' is the doctrine . . . holding that certain matters are of such a national . . . character that federal laws preempt or take precedence over state laws. As such, a state may not pass a law inconsistent with the federal law. Examples are federal laws governing interstate commerce." Black's Law Dictionary, 6th Ed. "Preemption", p. 1177.

against a descendant's estate "to establish their claims" so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in custody of the state court." [cite omitted].

Breaux v. Dilsaver, 254 F.2d 533, 536 (5th Cir. 2001).

This reluctance of the Federal Courts to become involved in matters appertaining to the administration of an estate is sometimes referred to as the Federal Probate Abstention Doctrine. In light of the probate abstention doctrine, and because the Texas Probate Code has explicit provisions that relate to the handling of insolvent probate estates,¹⁵ it seems unlikely that a federal bankruptcy court would interfere in the probate proceedings or the attempt to control property being administered by the state court.

E. A Nod to Renters, and Those Mortgaged to the Hilt – Allowance in Lieu of Homestead: Probate Code §273.

Despite the extensive protection created under Texas homestead provisions, the simple truth is that those most needing protection from creditors either do not own a homestead, or have a homestead that is substantially covered by mortgage debt.

Fortunately, in situations such as these,¹⁶ the probate code authorizes an allowance in lieu

¹⁵ See Texas Probate Code § 279 (establishing exemption of homestead even as to insolvent estates); § 321 (identifying procedure for payment of claims in estates with deficiency of assets to pay all claims).

¹⁶ See *Ward v. Braun*, 417 S.W.2d 888 (Tex.Civ.App.—Corpus Christi 1967, no writ)(giving allowance where mortgage debt on homestead and payments required thereby would have caused widow to entirely lose homestead).

of homestead of up to \$15,000¹⁷ which is exempt (even as to ultimately insolvent estates)¹⁸ from all debts of the estate except the decedent's funeral expenses and last medical bills (which also cannot exceed \$15,000).¹⁹

F. Securing the Homestead Exemption

Like most matters pertaining to exempt property, the Texas Probate Code sets forth the procedure for applying for and securing the homestead exemption.

1. Prior to the court's approval of the inventory, appraisal and list of claims, the surviving spouse or person acting for a minor child may apply to the court to have the homestead set aside as exempt. The application should be filed with an affidavit identifying the property for which the exemption is sought. Texas Probate Code § 271(b).

2. If the court has approved an inventory, appraisal and list of claims and application has been made to have the homestead set aside as exempt, "the court shall, by order, set apart the homestead..." Texas Probate Code § 271(a).

3. If the application is contested, or if a hearing is set (presumably for reconsideration of a sua sponte order) then the applicant (person seeking the exemption) "bears the burden of proof by a preponderance of the evidence at any hearing on the application" and at its conclusion, "the court shall set aside

property of the decedent's estate that the court finds²⁰ is exempt." *Id.* at § 271(c).

IV. 2 Guns, 2 Mules, the Plow, Grandma's Quilt, and Fido -- Personal Property Protection²¹

No discussion of creditor exempt assets would be complete without a discussion of the statutory personal property protections given under the Texas Property Code. The general provisions provide an dollar limit cap on the personal property that is exempt from creditor assets. However, even these caps have exceptions (including burial plots, retirement plans, and college savings plans). The general exemption and specific additional exemptions are discussed below.

A. Personal Property Subject to Exemption Limits -- Texas Property Code § 42.001 & § 42.002

Section 42.001 provides caps on the dollar amount of personal property which is protected from creditor claims. This section generally provides protection for \$60,000 (fair market value) worth of personal property for a family; and for \$30,000 for a single adult.

In addition to these general limits, section 42.001 also protects (1) wages (except against court-ordered child support payments); (2) prescribed health aids; and (3) alimony, support or maintenance received for the support of the debtor or debtor's dependent.

²⁰ This wording "that the court finds" suggests that the dispute will be a bench trial.

²¹ Subject to the aggregate limits contained in Texas Property Code § 42.001, the property code exempts from execution or seizure various categories of personal property such as two firearms (42.002(a)(7)), 2 mules (42.002(a)(10)(A)), farming implements, like a plow (42.002(a)(3)), family heirlooms like Grandma's quilt (42.002(a)(1)) and household pets like Fido (42.002(a)(11)).

¹⁷ Texas Probate Code §273.

¹⁸ Texas Probate Code § 279.

¹⁹ Texas Probate Code §§ 281 (homestead allowance is liable for payment of Class 1 claims), 322 (identifying Class 1 claims as funeral expenses and last medical bills not to exceed \$15,000).

Oddly, while wages are exempt from garnishment and not subject to the aggregate limit, commissions in excess of 25% of the aggregate limit are not exempt, and are subject to the limit. This can lead to seemingly aberrant results depending on how a person receives compensation for the services.

Example 1: Married Attorney earns a \$50,000 contingency fee. As a current wage, this could not be garnished. Texas Property Code, Section 42.001(b)(1). The current wage of \$50,000 cannot be garnished and is in addition to the \$60,000 family aggregate personal property exemption.

However:

Example 2: Married Realtor is owed a \$50,000 commission. Realtor's personal property family exemption is \$60,000; however, only \$15,000 (\$15,000 = 25% of the aggregate exemption) of the unpaid commission is exempt from garnishment, and this \$15,000 is part of Realtor's aggregate \$60,000 worth of protected personal property. The remaining \$35,000 of the commission is not exempt from garnishment.

The statutory personal property aggregate limits also have sublimits. Under Section 42.001(a), limited numbers and/or amounts of certain items are protected.

Example: In *Paul v. Merrill Lynch Trust Co. of Texas*, 183 S.W.3d 805 (Tex.App.--Waco, no pet.) the Court reported that the married decedent, an accident reconstruction expert [who also worked with the Texas A&M marksmanship team], "had amassed a multi-million dollar estate that included a large home in College Station, 594 acres of land, at least twelve motor vehicles, multiple businesses, stocks and bonds, jewelry, a watch collection, and a large gun collection [62 firearms]." Although the case did not involve creditors pursuing assets of the

decedent as a debtor, the asset description provides useful examples.

Paul Scenario 1: 62 Firearms. Had creditors pursued the estate, within the limit of \$60,000 for a married person, Section 42.002(a)(7) protects two firearms. However, because the decedent worked with the Texas A&M marksmanship team, an interesting argument might exist that the firearms (or perhaps some of them) constituted "athletic and sporting equipment." Section 42.002(a)(8) does not contain a limit (other than the aggregate dollar limit) on the protection of athletic and sporting equipment.

Paul Scenario 2: 12 motor vehicles. Had creditors pursued the estate, within the limit of \$60,000 for a married person, Section 42.002(a)(9) protects one vehicle for each licensed member of the family. However, Section 42.002(a)(4) also protects an unspecified number of motor vehicles used in a trade or profession. As an accident reconstruction expert, an argument might exist for protection of additional vehicles for this decedent. BUT \$60,000 doesn't go far, particularly when vehicles are involved and other items (like clothing -- 42.002(a)(5)) are desired by the debtor.

Paul Scenario 3: Jewelry and Watch collection: Had creditors pursued the estate, within the limit of \$60,000 for a married person, Section 42.002(a)(6) protects jewelry up to 25% of the aggregate (in this case \$15,000 worth). If the decedent had an expensive Rolex within his watch collection, the rest might have been subject to seizure!

Paul Scenario 4: Home furnishings: The \$60,000 limit can cover home furnishings. Section 42.002(a)(1). One china set, and a plasma television can significantly eat up the limit!

B. Other Property Not Subject to the Aggregate

The Texas Property Code also identifies some property that is not subject to the aggregate limits identified in Section 42.001(a). Particularly, statutory protection is also given for burial lots, certain retirement plans, and certain college savings plans, as discussed below:

1. Burial plots

Although a burial plot is an interest in land (as opposed to personal property), it is worthy to note that the property code protects “one or more lots used for a place of burial of the dead.” 41.001(a) Property Code. There does not, on its face, appear to be any limitation on the number of lots protected. *Compare* § 42.002(a)(9) (limiting the number of vehicles protected to the number of family members meeting certain qualifications, and also capping the protection by the aggregate personal property exemption) *with* § 41.001(a) (protecting “one or more lots” without limit on the number of family members, and without subjecting it to an aggregate dollar limit). [Macabre, but novel, asset protection strategy???

2. Various Retirement Plans

Assets held in various qualifying retirement plans, pensions, profit-sharing plans, retirement annuity accounts under 403(b) or 408A [Roth IRAs] of the Internal Revenue Code of 1986, other IRA’s, health savings accounts under 223 of the Internal Revenue Code of 1986 and other plans [See Texas Property Code § 42.0021(a) for the specifics on which plans are included] are given exemption from attachment, execution and seizure for the payment of debts.

BUT: contributions that exceed the amounts deductible under the Internal Revenue Code, and accrued earnings on excess contributions are not exempt. Texas Property Code § 42.0021(b).

3. Various College Savings Plans

In addition to the aggregate dollar limit of personal property protected under Texas Property Code § 42.001(a), the Property Code also contains protections from creditors for purchasers and beneficiaries of various college savings plans. The three enumerated categories are:

a. Prepaid Higher Education Tuition Contracts under Subchapter F, Chapter 54 of the Texas Education Code;

Note: under the education code, these plans would be exempt from creditors even without their inclusion under § 42.0022 of the Property Code. Section 54.639(a) of the Texas Education Code provides, “Money in the fund is exempt from claims of creditors, including claims of creditors of a purchaser, a beneficiary, or a successor in interest of a purchaser or beneficiary.” Perhaps protection under both the Property Code and Education Code is a belt and suspenders approach.

b. Higher Education Savings Trust Accounts under Subchapter G, Chapter 54 of the Texas Education Code (Texas 529 plan); and

c. Qualified tuition programs from any other state under Section 529 of the Internal Revenue Code (aka 529 plans).

It is important to note that assets invested in a Section 529 plan for a child’s education is exempt from creditors even though the contributor can elect to take money back out of the plan! See TEX.PROP.CODE §42.0022(providing creditor protection); TEX.EDU.CODE §54.632 (relating to refunds under 529 plans).

C. Securing the Exempt Personal Property

Like most matters pertaining to exempt property, the Texas Probate Code sets forth the procedure for applying for and securing the exempt personal property.

1. Prior to the court's approval of the inventory, appraisal and list of claims, the surviving spouse, person acting for a minor child, or "unmarried children remaining with the family of the deceased" may apply to the court to have the exempt personal property set aside. The application should be filed with an affidavit identifying the property for which the exemption is sought. Texas Probate Code § 271(b)(1)-(2).

2. If the court has approved an inventory, appraisal and list of claims and application has been made to have the homestead set aside as exempt, "the court shall, by order, set apart: ... all other property of the estate that is exempt from execution or forced sale...." Texas Probate Code § 271(a)(2).

3. If the application is contested, or if a hearing is set (presumably for reconsideration of a sua sponte order) then the applicant (person seeking the exemption) "bears the burden of proof by a preponderance of the evidence at any hearing on the application" and at its conclusion, "the court shall set aside property of the decedent's estate that the court finds²² is exempt." *Id.* at § 271(c).

V. You Can Bet Your Life On It! Life Insurance Protections

The Texas Insurance Code provides that benefits under life insurance and certain annuity contracts are exempt from garnishment, attachment, execution or other seizure by creditors, in addition to the personal property protections given under the Texas Property Code. Texas Insurance Code 1108.001 & 1108.051.

The protection given is for any benefits to be provided under a policy issued by a life, health, or accident insurance company,

²² This wording "that the court finds" suggests that the dispute will be a bench trial.

expressly including "the cash value and proceeds of an insurance policy." Texas Insurance Code 1108.051. Because of the expansive nature of insurance products on the market, on its face this can lead to some seemingly inconsistent results. Compare the following two examples:

Example 1: Married person invests \$100,000 in mutual funds, and then later dies with debts. Creditor obtains a judgment against the estate and seeks to execute against the mutual funds. Under the personal property protections of 42.001(a) up to \$60,000 may be protected; however, the remaining \$40,000 is not exempt from the creditor's claim.

Example 2: Married person invests \$100,000 in a variable universal life insurance policy (a variable universal life insurance policy is a policy with both an investment feature, typically invested in mutual funds, as well as a death benefit. *See* http://en.wikipedia.org/wiki/Life_insurance; section 6.2.2 "Universal life coverage"). Part of the premium is invested by the life insurance policy in mutual funds of the buyer's choosing. The policy has a cash surrender value based primarily on the value of the investment feature of the policy. Creditor seeks to execute against the cash value of the policy. Under 1108.051(b), the policy is exempt from the creditor's attack.

Exceptions: The Insurance Code provides 3 exceptions to the creditor protections outlined above. The exemption for benefits under an insurance policy are not exempt from:

1. premium payments made in fraud of a creditor (note: under the statute, if the policy was bought in fraud of a creditor, the creditor does not recover the death benefit. The creditor recovers the premium payments, and the beneficiary recovers the death benefit).

Occasionally this subject gets raised in the context of contested estates when a

surviving spouse attempts to reclaim premiums on the decedent's life insurance policy that was (secretly???) purchased with community property and names a beneficiary other than the surviving spouse. When applied in this context, this section of the insurance code is a codification of the judicial concept of fraud on the community "Fraud on the community' is a judicially created concept based on the theory of constructive fraud. *Zieba v. Martin*, [928 S.W.2d 782](#), 789 (Tex.App.-Houston [14th Dist.] 1996, no writ) (op. on reh'g); *In re Marriage of Moore*, [890 S.W.2d 821](#), 827 (Tex.App.-Amarillo 1994, no writ). A presumption of constructive fraud arises where one spouse breaches the fiduciary duty owed to the other spouse and disposes of the other spouse's one-half interest in community property without the other's knowledge or consent. *Zieba*, 928 S.W.2d at 789; *Jackson v. Smith*, [703 S.W.2d 791](#), 795 (Tex.App.-Dallas 1985, no writ)." *Loaiza v. Loaiza*, 130 S.W.3d 894 (Tex.App.—Fort Worth, 2004)(emphasis added).

Note, however, that in 2001, the Texas Supreme Court determined that where insurance policies were procured through an employee benefit plan with community property earnings from the decedent's employment, and where the decedent named a beneficiary on the policies other than the decedent's spouse, the decedent's spouse's fraud on the community and constructive trust claim pertaining to the insurance policies is federally preempted by the Employee Retirement Income Security Act (ERISA). *Barnett v. Barnett*, 67 S.W.3d 107 (Tex. 2001).

2. a debt for which the policy has been pledged as collateral; (Example: a small business owner opens a \$50,000 line of credit with a bank, and the bank secures the repayment of the line of credit by requiring the small business owner to pledge the cash value of the life insurance policy as collateral) and

3. a child support lien or levy.

Texas Insurance Code 1108.053(1)-(3).

VI. They Snooze, They Lose! -- Untimely Unsecured Dependent Administration Claims

Although not a statutory asset exemption, § 298 of the Texas Probate Code protects the assets from creditor claims in certain circumstances. This provision creates an expedited four (4) month statute of limitation which can serve to nullify certain untimely or improperly presented creditor claims. Specifically, when an unsecured creditor with a claim for money against an estate in a dependent administration has been given a certified mail notice to present the claim within the time prescribed by law, the claim must be presented within four (4) months after the date of the receipt of the notice, or the claim is barred. Texas Probate Code §§ 294(d), 298(a). More so than being a special asset protection statute, this is an expedited statute of limitation and is limited to very particular creditor claims:

a. The estate must be a dependent administration. The provisions of Section 298 is applicable to dependent administrations has been held not to apply to independent administrations. *Bunting v. Pearson*, 430 S.W.2d 470, 473 (Tex. 1968);

b. Within the dependent administration, the claim must be a liquidated claim for money. It does not apply to tort claims (*Cross v. Old Republic Surety Co.* 983 S.W.2d 771 (Tex.App.—San Antonio 1998, writ denied)) or unliquidated claims *Connelly v. Paul*, 731 S.W.2d 657 (Tex.App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.);

c. The claim must be an unsecured claim. Texas Probate Code § 294(d). *See also Lusk v. Mintz*, 625 S.W.2d 774 (Tex.App.—Houston [14th Dist.] 1981, no writ)(holding Section 298 does not apply to collection on a note when secured by an express vendor's lien);

d. Notice complying with the statutory requirements must to be given to the creditor in question by certified mail, return receipt requested. Texas Probate Code § 294(d); *and*

e. The four (4) month expedited statute of limitation must pass without presentment of the claim. Texas Probate Code § 298(a). The claim must be presented in the proper form. *See* Texas Probate Code § 301(claim for money must be supported by an affidavit, and may require additional facts or a copy of the instrument or account on which the claim is founded.).

If each of these five requirements is met, then the creditor's untimely, unsecured, liquidated claim for money against the assets of an estate in a dependent administration is time barred, and shall not be approved by the administrator and shall not be allowed by the court. Texas Probate Code § 298(b).

Example: Dave Decedent (DD) had a Visa credit card account through MegaBank. DD died intestate, and a dependent

administration was opened. Hannah Heir-at-Law (HH) gave Allen Administrator (AA) a credit card statement that DD had received through the mail, setting forth DD's last charges on his MegaBank Visa. AA provided the 294(d) statutory notice to MegaBank. MegaBank responded by mailing AA a "final statement" through the mail, but did not include an affidavit or any other information (other than a payment voucher; envelope with return address; and ironic cardholder offer for an accidental death and dismemberment policy). AA provides no response to MegaBank (rejecting the claim by inaction after 30 days, according to Section 310), and thereafter, MegaBank naively sends AA monthly statements, gleefully adding late charges plus exorbitant interest each month thereafter. If MegaBank does not properly present the claim within four (4) months of receiving the statutory notice; and does not bring suit within ninety (90) days after AA's rejection, the claim shall be barred. Texas Probate Code §§ 298, 313.