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**CREDITORS' CLAIMS IN PROBATE AND GUARDIANSHIP:  
THE RULES OF A HIGH STAKES CHESS MATCH**

**C. BOONE SCHWARTZEL**

Attorney at Law

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C. Boone Schwartzel  
Attorney at Law  
1010 Lamar, Suite 1520

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## **CREDITORS' CLAIMS IN PROBATE AND GUARDIANSHIP: THE RULES OF A HIGH STAKES CHESS MATCH**

**I. INTRODUCTION AND WARNING.** It is hard to believe that it has been nearly 10 years since I last updated this outline on creditors' claims in probate and guardianship. While the law has been tweaked some over the years, the rules of the game are pretty much the same as they were when I last looked at them. Knowing the rules is important, especially in a court-supervised administration (whether you represent a creditor or an executor), because the rules are technical, some lawyers like to use them strategically to gain an advantage or an outright victory, and inattention to the rules can lead to costly mistakes in what sometimes can seem like a high stakes chess match. See, e.g., FCLT Loans v. Estate of Bracher, 93 S.W.3d 469 (Tex. App.--Houston [14th Dist.] 2002); Gorham v. Gates, 82 S.W.359 (Tex. App.--Austin 2002) and earlier Badouh estate litigation cited therein; Columbia Rio Grande Regional Hospital v. Stover, 17 S.W.2d 387 (Tex. App.--Corpus Christi 2000)

I thought that updating an old outline would not be too difficult. When he attached a copy of the 1997 version of this outline as an appendix to his own of 2001, Mark Schreiber pointed out that dusting off an old outline and making modest revisions can turn out to be a lot of work. Mark B. Scheiber, Creditors' Claims in Independent, Dependent, and Guardianship Estates, 25<sup>th</sup> STATE BAR ADV. ESTATE PLANNING AND PROBATE COURSE 5-1 (2001). After spending much more time than I originally planned updating much of the outline, I finally took Mark's advice and stopped work. As a result, I have not done as comprehensive of a job as I would have liked. Nor have I have thoroughly studied many available resources, such as the outlines of

others on this and related subjects, such as the excellent summary of Texas probate law originally authored by Professors Woodward and Smith for the Texas Practice Series and later supplemented by other authors. I have read many of the cases on this topic decided since 1997, but not all of them. Maybe some day I can do a better job--when my son is out of college and I no longer have to work for a living! In sum, all readers are **WARNED** that the following outline is only partially updated and was prepared pretty quickly. Consequently, I undoubtedly missed something or have drawn some wrong conclusions! And of course, I reserve the right, at any time, to modify or "clarify" some of the views expressed in this outline, especially when it serves the interests of one of my clients! As always, an outline such as this one is simply an aid, not a substitute for legal research and independent analysis of the law and how it applies to specific fact situations. **Accordingly, any reader who relies on this outline does so at his own risk!** So, let me begin this "new" outline as I did in 1997:

An estate administration is in many ways analogous to a federal bankruptcy proceeding. It has to be, for the law is clear that under federal bankruptcy law an "estate" is an "entity," not a "person" who can file for bankruptcy. E.g., In re Estate of Whiteside by Whiteside, 64 B.R. 99 (Bkrcty E.D.Cal. 1986); In re Estate of Patterson, 64 B.R. 807 (Bkrcty W.D. Tex. 1986). When an insolvent estate is settled in a dependent administration, the probate court serves the same functions as a bankruptcy court (and the administrator acts much like a bankruptcy trustee) in supervising the collection of the decedent's assets, determining the amount and validity of the decedent's debts, and directing the order and priority in which creditors' claims are paid. In independent administrations these tasks are

performed by the independent executor, free from court supervision and without the benefit of much of the certainty and protection afforded by statutory claim procedures found in the Probate Code which generally do not apply in independent administrations. As a result, the rights of creditors in independent administrations are less clearly defined, and chances are greater that creditors will be paid in the wrong order.

It should be noted that an executor or administrator is not simply a representative of the decedent and the decedent's heirs whose mission is to try to defeat or impair the payment of creditors' claims. "The appointment of an administrator is merely a trust to pay the claims of creditors, and then to restore the remainder of the assets to the heirs." Cochran's Administrators v. Thompson, 18 Tex. 652 (1857); Farmers' & Merchants' Nat. Bank v. Bell, 31 Tex. Civ. App. 124, 71 S.W. 570 (1902, writ ref'd). Creditors of a decedent have a general lien against the decedent's assets for the payment of their claims. E.g., Moore v. Moore, 89 Tex. 29, 33 S.W. 217 (1895); Jackson v. Hubert, 149 Tex. 451, 274 S.W.2d 414 (1950). As a result, a personal representative is, to a great extent, the representative of creditors. 33 C.J.S. Executors and Administrators § 142 (1942). In fact, some courts have suggested that a personal representative's primary duty is to creditors and that he only secondarily represents the decedents' heirs or distributees. E.g., Stone v. Townsend, 190 Miss. 547, 1 So.2d 237 (1941); Faulkner v. Faulkner, 23 Ariz. 313, 203 P. 560 (1922). After all, absent debts to pay, there often is no need for an administration of an estate. See TEX. PROB. CODE ANN. § 88 (2003) (hereinafter cited "PROB. C. § \_\_\_\_"). In view of the fact that one of a personal representative's primary responsibilities is to pay the claims of creditors, one would think

that a personal representative owes a duty to treat creditors fairly and can be held personally liable for breach of fiduciary duty if he deals in bad faith with creditors. See Ex Parte Buller, 834 S.W.2d 622 (Tex. App.--Beaumont 1992); Ertel v. O'Brien, 852 S.W.2d 17 (Tex. App.-Waco 1993, writ den.); but see FCLT Loans v. Estate of Bracher, 93 S.W.3d 469 (Tex. App.--Houston [14th Dist.]2002)(case involving alleged transfers of assets by independent co-executors and trustees of revocable trusts to evade payment of a claim and distinguishing between the duties of independent executors and court-supervised administrators: "[The duty to pay claims under PROB. C. § 146] does not support a claim that an independent executor holds estate assets in trust for the benefit of creditors, nor does it otherwise give rise to a fiduciary duty. . . Under the present statutory scheme. . . we cannot say an independent executor automatically holds the estate assets in trust for the benefit of estate creditors." Id. at 481. A personal representative can incur liability for failing to pay claims or for paying claims in the wrong order. E.g., Ertel v. O'Brien, supra; but see PROB. C. § 146(c) protecting independent executor protection from personal liability for paying claims not barred by the statute of limitations when at the time he reasonably believes the estate has sufficient assets to pay all claims.

Since the United States is often a creditor, both state and federal statutes must be considered in determining both the priority of claims and the property subject to the payment of claims. All claim priority problems caused by the interplay of federal and state law will not be discussed, for an entire outline could be devoted to this subject. See generally William T. Plumb, Jr., The Federal Priority in Insolvency: Proposals for Reform, 70 MICH. L. REV. 1 (1971). However, some of the conflicts between state and federal law have been highlighted.

This outline also does not explore in detail the impact of probate claim procedures on the personal liability of the surviving spouse of a decedent, the interplay and inconsistency between the marital property liability and management rules of the Family Code and the Probate Code, federal preemption issues (and especially in bankruptcy), the obligations of a personal representative to the surviving spouse (and of the spouse to the estate) in applying various kinds of marital property to the payment of debts, transfers in fraud of creditors' issues, the liability of non-probate assets for a decedent's debts, etc. For a discussion of some of these issues, see, e.g., Thomas M. Featherston, Jr., What a Spouse Can Do to Unilaterally Protect That Spouse's "Estate" From the Other Spouse and the Other Spouse's Creditors and Heirs, 28<sup>th</sup> STATE BAR ADV. ESTATE PLANNING AND PROBATE COURSE (2004); John L. Hopwood & Gina D. Patterson, Probate Dispositions—Community Administration, 27<sup>th</sup> STATE BAR ADV. ESTATE PLANNING AND PROBATE COURSE (2003). For example, under Section 3.202 of the Family Code, a spouse's separate property generally is not subject to the liabilities of the other spouse, and the community property subject to the sole management, control and disposition of one spouse is not liable for the liabilities of the other spouse incurred before marriage or for the other spouse's nontortious liabilities. Yet, under PROB. C. § 156, the decedent's interest in his spouse's non-exempt special community property is subject to the decedent's debts (even though during lifetime that property could not be used to pay the decedent's liabilities). In addition, concepts of marital claims for reimbursement and for economic contribution have greatly expanded in recent years. It seems doubtful, however, that a court could exercise the power given under TEX. FAMILY CODE § 3.406 to impose a lien, after death, to secure

the payment of certain marital claims to the detriment of existing creditors. That would be analogous to permitting a creditor holding a judgment against the decedent to record that judgment after death and transform his unsecured claim into a secured claim.

In 1995, the Legislature modified substantially the statutory claims procedures to address constitutional issues and other problems under the old statutes. Much of the discussion of the old rules has been left in this outline because I am too lazy to edit them out. Keeping them in the outline also might be helpful in analyzing how the new statutes impact the conclusions reached in older case law. In addition, guardianship claim procedures, for the most part, have not been updated, and thus some of the issues and problems addressed in old law still may be relevant in guardianship cases. At times references are made to old laws as "Old PROB. C. § \_\_\_\_" and to current law as simply "PROB. C. § \_\_\_\_."

In this outline, the term "personal representative" normally includes executors and administrators, both in independent and in dependent administrations. The term "administrator" includes all personal representatives of estates under dependent administration. The term "independent executor" includes both independent executors appointed by will and independent administrators and executors appointed at the request of estate beneficiaries under PROB. C. § 145.

This outline divides the discussion of Texas claim procedures into parts. Parts II through IV focus upon basic statutory probate claim procedures governing notice to creditors, the presentation or "presentment" of claims, and the allowance and approval of both contested and uncontested claims. Parts V and VI discuss

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