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Michael E. Alexander

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CONTINGENT CLAIMS AGAINST DECEDENTS' ESTATES: A NEED FOR LEGISLATION IN TEXAS

by Michael E. Alexander

The law provides for the orderly administration of decedents' estates so that the personal assets of the decedent can be collected by the personal representative in order to pay the lawful claims against the estate and distribute any surplus to the heirs, devisees, or legatees. After letters of administration or letters testamentary are issued to the personal representative of the estate, it is his responsibility to publish a notice¹ requiring all persons having claims against the estate to present them within the time prescribed by the state's nonclaim statute.

A nonclaim statute is a special statute of limitations which establishes a definite time limit within which claims against the estate must be presented to the personal representative or the probate court.² Such statutes provide for the speedy settlement and liquidation of estates and eliminate the uncertainty which would arise if some time limit were not imposed. Without a nonclaim statute the personal representative and distributees of the estate could never be certain that all claims against the estate had been made, until the general statute of limitations which applies to all claims had expired.³

While most claims against an estate are absolute in liability and liquidated in amount, contingent claims which should be disposed of during administration may also exist. A contingent claim is defined as one "where liability depends upon some future event, which may or may not happen, which renders it uncertain whether there will ever be liability."⁴ Although most states

1. TEX. PROB. CODE ANN. § 294 (1956). The personal representative must publish notice in a newspaper printed in the county where the letters were issued, or if there is no newspaper, he must post notice at the county courthouse within one month after issuance of letters. For discussion of the inadequacy of the notice provisions in Texas, see Comment, *The Unconstitutionality of the Notice Provision of the Texas Probate Code*, 23 SW. L.J. 890 (1969).

2. See, e.g., TEX. PROB. CODE ANN. § 298 (1956), as amended, TEX. PROB. CODE ANN. § 298(a) (Supp. 1974). This statute requires the creditor to file his claim within six months after letters are issued to the personal representative. The creditor can file a claim after that time but payment of his claim will be postponed until all creditors who filed within six months have been paid, unless the tardy creditor's claim is secured. The nonclaim statutes of most states, however, simply set a definite time limit after which claims cannot be filed. For the relevant text of the Texas statute, see note 28 *infra*.

3. For a general discussion of nonclaim statutes, see T. ATKINSON, LAW OF WILLS 690-92 (2d ed. 1953) [hereinafter cited as ATKINSON].

4. See, e.g., *American Sur. Co. v. Murphy*, 151 Fla. 151, 158, 9 So. 2d 355, 357 (1942). A contingent claim is to be distinguished from an unmatured claim, where liability is certain, but has not yet fallen due. For discussion of the distinction between contingent and unmatured claims, see ATKINSON 702-03.

If the decedent was a guarantor or surety on a note or long-term contract of a third person, the claim of the creditor will be contingent so long as there has been no default by the principal debtor as of the date of the decedent's death. See, e.g., *Hartford Accident & Indem. Co. v. Bierman*, 410 S.W.2d 342 (Mo. Ct. App. 1966) (indemnity agreement); *Hume v. Perry*, 136 S.W. 594 (Tex. Civ. App. 1911), *error dismissed* (decedent guaranteed payment of notes). Likewise, a claim against the estate for damages for breach of a title covenant given by the decedent is contingent. See, e.g., *Wiggins v. Stephens*, 246 S.W. 84 (Tex. Comm'n App. 1922), *judgment adopted*. Tort claims

have enacted legislation dealing with contingent claims, Texas has not done so,⁵ and a contingent claim is not required to be filed during the nonclaim period nor at any time during the administration of the estate. If a liability arising from a contingent claim becomes certain long after the estate has been distributed and the personal representative has been discharged from his duties,⁶ responsibility for its payment will fall on distributees of the decedent's estate.

This Comment examines the problems of estate administration when contingent claims against the estate exist. Various state statutes, as well as the Model and Uniform Probate Codes, will be examined and analyzed in reference to the method in which contingent claims are handled and the advantages and disadvantages to the parties under such provisions. As a result of this inquiry the Comment contains proposals for new legislation in Texas which is designed to alleviate the problem of contingent claims.

I. CONTINGENT CLAIMS

A. *In General*

Unless a contingent claim is presented during the administration of the estate so that provisions for its payment may be made at that time, the responsibility for payment of the claim will fall upon the heirs, devisees, and legatees of the estate.⁷ Fortunately, nonclaim statutes help to decrease substantially the possibility of liability to the unknowing distributee after the estate has been closed.

In some states contingent contract claims and all tort claims against the estate do not have to be presented despite the all-inclusive language of the nonclaim statutes, which require that "all claims shall be presented or be forever barred."⁸ At least two states, one by statute and the other by case law, do not even allow a contingent claim to be filed during administration.⁹

against the estate for wrongs committed by the decedent before his death are contingent, *see, e.g.*, *Powell v. Buchanan*, 245 Miss. 4, 147 So. 2d 110 (1962), and it has also been held that liability for future rentals under a lease is a contingent claim. *See Edgell Corp. v. Hutchens*, 282 Ala. 492, 213 So. 2d 225 (1968).

5. In 1955 the Texas Legislature failed to enact proposed legislation which would have dealt with contingent claims in much the same manner as does the MODEL PROBATE CODE. "As a result, the proper method of handling contingent claims remains a matter of speculation in this State." Interpretative Commentary, TEX. PROB. CODE ANN. § 298 (1956).

6. *See* TEX. PROB. CODE ANN. § 318 (1956); W. VA. CODE ANN. § 44-2-26 (1966); MODEL PROBATE CODE § 193 (1946) [hereinafter cited as MODEL PROBATE CODE].

7. *See* Warren, *Problems in Probate and Administration*, 32 HARV. L. REV. 315, 334 (1919); Comment, *Rights of Creditors of a Decedent to Recover from Distributees After the Estate Is Closed*, 41 MICH. L. REV. 920, 924-25 (1943).

8. *See* ALA. CODE tit. 61, § 211 (1960); ILL. REV. STAT. ch. 3, § 193 (1961); TEX. PROB. CODE ANN. § 298(c) (1956). The Alabama and Texas courts have held that the legislatures did not intend to include contingent claims as being within the limitation of the nonclaim statute. *See Hartford Accident & Indem. Co. v. Kuykendall*, 287 Ala. 36, 247 So. 2d 356 (1971); *Edgell Corp. v. Hutchens*, 282 Ala. 492, 213 So. 2d 225 (1968); *Hume v. Perry*, 136 S.W. 594 (Tex. Civ. App. 1911), *error dismissed*. *But see* *Fidelity & Deposit Co. v. Hobbs*, 144 F.2d 5 (10th Cir. 1944), in which the court interpreted N.M. STAT. ANN. § 31-8-3 (1953), *as amended*, (Supp. 1973), as requiring contingent claims to be filed, notwithstanding the general language of the statute.

9. *See* *Olsen v. Hartford Accident & Indem. Co.*, 368 Ill. 194, 13 N.E.2d 159 (1938); *Union Trust v. Shoemaker*, 258 Ill. 564, 101 N.E. 1050 (1913); MINN. STAT. § 525.411 (Supp. 1974).

It logically follows that if the presentment of a contingent claim is not required or allowed, it is not barred when it subsequently becomes absolute and the creditor seeks to enforce it.¹⁰ The general statutes of limitation do not begin to run against the creditor's action on the claim until liability becomes absolute, since the creditor could not enforce the claim in court before that time.¹¹

Because contingent claims are not required to be filed, the distributee could be held responsible for a claim which he did not know existed; one which he may be financially incapable of satisfying because he has exhausted his share of the estate in reliance upon the final accounting which had taken place ostensibly before closing the estate. The creditor whose contingent claim becomes absolute at a later date may also suffer from his failure to file a contingent claim¹² because he is likely to experience difficulty either in locating the distributees or in bringing them within the jurisdiction of the state courts.

In those states where the filing of contingent claims is required, the distributees may suffer the loss of enjoyment of a portion of the estate due to the retention of assets sufficient to meet contingent claims should liability ever become absolute. This retention could conceivably continue far beyond the lifetime of the distributee. Thus, both in states where filing of contingent claims is required and in those in which it is not, the claim will cause both the distributees and creditor inconveniences and burdens.

B. *Tort Claims Against the Estate*

A tort claim asserted against a decedent's estate is within the definition of a contingent claim, for liability depends upon a future event, that is, a favorable judgment or settlement for the plaintiff, an event which may or may not happen. Yet, even in some states which require presentment of contingent claims, those in tort are not required, nor, in some cases, allowed to be filed. The reasoning advanced is that nonclaim statutes generally apply only to claims in contract and not to those in tort.¹³ For example, the Montana nonclaim statute specifically states that it is applicable only to "claims arising upon contracts."¹⁴ Although the Nebraska statute does not specifically exclude tort claims,¹⁵ the courts have held that an unliquidated claim in tort is not a contingent claim.¹⁶ The Supreme Court of Wisconsin has ruled likewise, applying the general statute of limitations to tort claims and not the nonclaim statute.¹⁷

10. *Edgehill Corp. v. Hutchens*, 282 Ala. 492, 213 So. 2d 225 (1968); *Perkins v. Cain's Coffee Co.*, 466 S.W.2d 801, 802-03 (Tex. Civ. App.—Corpus Christi 1971); *Hume v. Perry*, 136 S.W. 594 (Tex. Civ. App. 1911), *error dismissed*.

11. *See, e.g., Zaruba v. Boethel*, 393 S.W.2d 716, 719 (Tex. Civ. App.—Corpus Christi 1965).

12. There is no case law in Texas stating that the contingent creditor may file his claim even though he is not required to do so.

13. ATKINSON 696-98.

14. MONT. REV. CODES ANN. § 91-2704 (1947); *see Hornbeck v. Richards*, 80 Mont. 27, 32, 257 P. 1025, 1027 (1927).

15. *See NEB. REV. STAT. § 30-704* (1964).

16. *Rehn v. Bingaman*, 151 Neb. 196, 36 N.W.2d 856 (1949).

17. *Lounsbury v. Eberlein*, 2 Wis. 2d 112, 86 N.W.2d 12 (1957), *noted in* 1958 Wis. L. REV. 652. However, the nonclaim statute in Wisconsin specifically provides that tort claims are not included within its meaning. WIS. STAT. § 859.01(3) (1971).

The Texas Probate Code provides that administration shall be closed on an estate when all debts known to exist against the estate have been paid.¹⁸ If the tort claimant has instituted suit in the county or district court against the estate of the decedent, the claim cannot be paid until it is established by judgment. Although section 405 of the Probate Code requires the personal representative to list any debts still owing by the estate,¹⁹ he cannot fulfill this requirement so long as there is a pending suit which might result in a judgment establishing the liability of the estate. Since Texas does not require the filing of contingent claims, tort claims will not present a problem different from that with other contingent claims. However, a statute enacted in Texas covering contingent claims should expressly be made applicable to contingent claims in contract as well as those in tort.²⁰

By not requiring the filing of tort claims, the distributee's ability to enjoy his distribution from the estate is burdened in the same manner as when other contingent claims exist but are not filed.²¹ This burden, however, will be alleviated by the termination of the statute of limitations applicable to tort claims.²² But in cases such as medical malpractice suits, the statute does not begin to run until the injury or damage is discovered by the plaintiff,²³ so that the burden may extend over a longer period than the number of years in the statute of limitations.

It would be more plausible to require tort claims to be filed with other contingent claims, as is done in Colorado²⁴ and Florida.²⁵ The Indiana statute²⁶ provides a somewhat unique solution to the tort claims problem. Theoretically the claimant does not have to file his claim before bringing suit, but if he does not, any judgment in his favor cannot affect the distribution made to the heirs, legatees, or devisees of the decedent tortfeasor.²⁷ The estate may be reopened in the absence of a filing, but the claimant can collect only from assets remaining in the hands of the personal representative. This is a good method for handling tort claims as the estate may be closed before there is a determination of tort liability. The distributees are protected, and if the estate is reopened, the personal representative is not personally liable. The creditor is given an incentive to file his claim, since he knows his recovery might be severely limited if he does not.

18. TEX. PROB. CODE ANN. § 404 (1956). "Paid" as used here means fully paid or paid to the extent of the assets available to the personal representative.

19. TEX. PROB. CODE ANN. § 405(a)(4) (1956).

20. See 1958 WIS. L. REV. 652, 654-56.

21. See note 12 *supra* and accompanying text.

22. TEX. REV. CIV. STAT. ANN. art. 5526 (1958).

23. Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969); Frohs v. Greene, 253 Ore. 1, 452 P.2d 564 (1969).

24. Meyers v. Williams, 137 Colo. 325, 324 P.2d 788 (1958) (wrongful death action).

25. FLA. STAT. ANN. § 733.16 (Supp. 1974). The statute provides that all claims, including those which are contingent, must be filed, "including but not limited to, actions founded upon fraud or other wrongful act or commission of the decedent"

26. IND. CODE § 29-1-14-1 (1972). The statute requires that all claims "founded on contract or otherwise," be presented.

27. *Id.*

C. *Contingent Claims in Texas*

In Texas the nonclaim statute makes no express reference to contingent claims.²⁸ Similarly, the cases state that the creditor is not required to file his claim,²⁹ but no case has clearly said that the creditor is prohibited from filing it. In *Hume v. Perry*³⁰ the decedent had assigned seven promissory notes in his possession to the plaintiff as partial payment for land conveyed by the plaintiff to the decedent. When the obligor defaulted on the notes, the decedent and plaintiff entered into an agreement whereby the plaintiff extended the time for payment of the notes, and the decedent guaranteed their payment if the obligor again defaulted. Default occurred after the decedent's death, but the distributees asserted that the claim had not been timely presented as required by the nonclaim statute and was, therefore, barred. In rejecting this contention, the court stated:

While the language of the statute is general, and is sufficiently comprehensive to include all claims for money against the estate of a deceased person, the courts have limited its application to those where the amount claimed is fixed and definite, not contingent or indeterminate, and which are susceptible of verification by affidavit.³¹

Thus, the distributees were liable for a claim presented after administration had terminated and for which they had no notice prior to or during administration. With proper notice of an existing contingent claim, at least they would have been aware that they might be liable for its future payment. The reasoning of the court was predicated upon the fact that a contingent claim could not be authenticated as required by the statute.³² The personal representative could not accept the claim without such verification and therefore it was not a claim for money within the meaning of the nonclaim statute.

28. TEX. PROB. CODE ANN. §§ 298(a) (Supp. 1974), 298(c) (1956):

[a] All claims for money against a testator or intestate shall be presented to the executor or administrator within six months after the original grant of letters testamentary or of administration; otherwise the payment thereof shall be postponed until the claims which have been presented within six months and allowed by the executor or administrator and approved by the court have been first entirely paid; provided, however, that the failure of the holder of a secured claim to present his claim within said six month period shall not cause his claim to be postponed, but it shall be treated as a claim to be paid in accordance with subsequent provisions of this Code.

[c] No claims against a decedent or ward, or against the estate of either, on which a suit is barred by a general statute of limitation applicable thereto shall be allowed by a personal representative. If allowed by the representative and the court is satisfied that limitation has run, the claim shall be disapproved.

29. See, e.g., *Greer's Estate v. Cooper*, 50 S.W.2d 345 (Tex. Civ. App.—Amarillo 1932), *error ref.*; *Hume v. Perry*, 136 S.W. 594 (Tex. Civ. App. 1911), *error dismissed*; *National Guar. Loan & Trust Co. v. Fly*, 29 Tex. Civ. App. 533, 69 S.W. 231 (1902). Because there is no procedure for disposing of contingent claims in Texas, the presentation of a contingent claim to the personal representative would most likely result in his disallowance of it.

30. 136 S.W. 594 (Tex. Civ. App. 1911), *error dismissed*.

31. *Id.* at 596.

32. See TEX. PROB. CODE ANN. § 301 (1956), which requires the creditors to submit an affidavit stating that "the claim is just and that all legal offsets, payments, and credits known to the affiant have been allowed."

The distributees could not have pleaded the general statute of limitations, since it did not begin to run until the claim became absolute.³³

Under Texas law, the distributees are not liable for an amount exceeding that received by them in partition and distribution of the estate.³⁴ However, the defense of change of position³⁵ will not be available to them if the contingent claim becomes absolute. In *Perkins v. Cain's Coffee Co.*³⁶ the plaintiff brought suit against the heirs of the intestate decedent for injuries sustained in an automobile collision caused by the decedent. The court stated that under section 37 of the Probate Code property and funds of the decedent received by the distributees are subject to the payment of the decedent's debts, and a creditor may follow the property or funds into the hands of the distributees.³⁷ The court further reasoned that if the distributees were to change the form of the property or otherwise dispose of it so as to render it incapable of being traced, they would be personally liable to the claimant for the value of the property received by them, up to the amount of the debt.³⁸ This is obviously a harsh result, because the nonclaim statute does not require the filing of a contingent claim and thus the distributee has no notice of the claim and is not able to spend or sell his portion of the estate safely.³⁹

If the distributees are exposed to liability in the future, the question arises whether their liability for the property received by them will be measured by its value at the time of distribution or at the time the creditor brings his suit against them. Although the Texas Probate Code in section 269 limits distributee liability to the *amount* of the funds or property received,⁴⁰ section 318 limits liability using the term "value" without delineating the time at which the value is to be measured.⁴¹ The Texas courts have not dealt with the question directly, but have indicated that liability will extend no further than the value at the time of distribution. In *City of Fort Worth v. Banner*⁴² the court refused recovery to the creditor because the creditor did not prove the value of the property the distributee had received. Stating that it was the creditor's burden to "establish the value of the property as so received,"⁴³ the decision indicated that value is measured as of the time of distribution.

33. See, e.g., *Zaruba v. Boethel*, 393 S.W.2d 716 (Tex. Civ. App.—Corpus Christi 1965).

34. TEX. PROB. CODE ANN. § 269 (1956). This statute states that "no one of such distributees shall be liable beyond his just proportion of the estate he shall have received in the distribution."

35. The equitable defense of change of position may apply where a person has materially changed his position in a way that he would not have had he known facts assumed to be true were actually false. See RESTATEMENT OF RESTITUTION § 142 (1937).

36. 466 S.W.2d 801 (Tex. Civ. App.—Corpus Christi 1971).

37. *Id.* at 802.

38. *Id.* at 802-03.

39. See Comment, *Right of Creditors of a Decedent to Recover From Distributees After the Estate is Closed*, 41 MICH. L. REV. 921, 936 (1943), where the writer asserts, contrary to the view in Texas, that the defense of change of position would be available, although the distributee may experience difficulty in proving to the jury or court that he had no notice of the claim.

40. TEX. PROB. CODE ANN. § 269 (1956).

41. *Id.* § 318.

42. 328 S.W.2d 239 (Tex. Civ. App.—Fort Worth 1959), *error ref. n.r.e.*

43. *Id.* at 242.

Hume and *Perkins* illustrate the inequitable results which may follow when a state does not require presentment of contingent claims during the nonclaim period. The distributees do not have notice of a claim which may be asserted against them after the estate is closed. Once the claim becomes absolute, they are liable regardless of whether they have acted in reliance upon the administration of the estate by exhausting or otherwise disposing of the property thereby obtained.⁴⁴ If the creditor cannot trace the assets received into the hands of the distributees, he will have a lien on the portion of the estate each distributee received, and he may enforce his claim against them personally.⁴⁵ The creditor may argue that this result is not inequitable because the distributee has nothing more than a windfall, and his liability is limited to the amount he received at the distribution of the estate. As a matter of practicality, however, it would be to the creditor's advantage to file his contingent claim during administration because he can assure himself that payment will be made if the claim later becomes absolute. This will protect him from later inability to locate the distributees and bring them within the jurisdiction of the court. Other states have enacted statutes which give the distributees notice of a contingent claim and protect the creditor's right to payment if the claim becomes absolute. Under such statutes both parties are protected to a degree not afforded in Texas.

II. STATUTORY TREATMENT OF CONTINGENT CLAIMS

Currently, legislation in most jurisdictions requires the presentment of all claims of every nature during the administration of the estate, including contingent claims. As a result the distributees can take their portion of the estate and spend it without apprehension of unknown future liability. In those jurisdictions such as Texas which do not require presentment of contingent claims, post-probate liability of the distributees is the rule.⁴⁶

It is important to examine the basic approaches to contingent claims in order to design a desirable statutory framework for Texas to enact. Statutes range from those which provide for permissive filing of contingent claims⁴⁷

44. *Perkins v. Cain's Coffee Co.*, 466 S.W.2d 801, 802-03 (Tex. Civ. App.—Corpus Christi 1971).

45. See TEX. PROB. CODE ANN. § 269 (1956).

46. See *Edgehill Corp. v. Hutchens*, 282 Ala. 492, 213 So. 2d 225 (1968); *Olsen v. Hartford Accident & Indem. Co.*, 368 Ill. 194, 13 N.E.2d 159 (1938). Ohio has specific statutory provisions for contingent claims, but they effectively provide only for contingent claims which become absolute before the estate is closed. OHIO REV. CODE ANN. § 2117.37 (1968). Claims which accrue thereafter need not be presented to the personal representative and the creditor may proceed against the distributees. *Id.* § 2117.39.

In Minnesota it is expressly stated that contingent claims shall not be filed. If the claim becomes absolute before the estate is closed it may be enforced against the personal representative, but only to the extent that he has assets remaining in his charge. MINN. STAT. § 525.411 (1969). A right of action against the distributees is preserved if the personal representative has insufficient assets to pay the claim, or if the claim becomes absolute after the estate is closed. *Id.* § 525.431.

47. See, e.g., ARK. STAT. ANN. § 62-2610 (1971); R.I. GEN. LAWS ANN. § 33-11-9 (1970); W. VA. CODE ANN. § 44-2-8 (1966). The Arkansas statute allows permissive filing but gives the distributee the defense of change of position if suit is brought against him on a claim which was not filed. The claim "may be enforced against the distributees to the extent of the assets of the estate, or the proceeds thereof, remaining in the

to those which require filing and provide alternative methods to insure the contingent creditor that he will be paid if his claim becomes absolute.⁴⁸ Somewhere between these extremes are those states which require filing of contingent claims but do not make provisions for how payment is to be insured.⁴⁹ Other statutes occupying this middle ground provide for the personal representative or court to retain assets sufficient to meet the claim if it becomes due,⁵⁰ and still others require filing within a limited time after the claim becomes absolute rather than during the nonclaim period.⁵¹

The most common method of providing for contingent claims is to have the personal representative or court retain assets out of the estate which will be sufficient to pay the claim if it becomes due.⁵² This can be as inequitable as where no provisions for payment of contingent claims are made since the distributee is deprived of the use of his portion of the estate, to the degree it is retained for the contingent claim, for a period which may extend far beyond his lifetime. As an alternative to this absolute retention of assets, a trust could be established as will be shown below.⁵³

In 1927 the case of *In re Littleton's Estate*⁵⁴ held unconstitutional the New York statute which required the retention of assets when there existed contingent claims against the estate. The factual setting of that case involved a decedent who was co-maker of a deed of trust, and whose possible liability could have extended over a period of thirty-six years. The trustee sought to have the executor set aside \$30,000, but the court stated that it could not "keep an estate from liquidation for a quarter of a century to aid a claimant so improvident as to accept a security so indefinite, and maturing, if at all, far beyond the period of the life of the obligor."⁵⁵ Strangely, this statute remains in effect today despite the fact that *Littleton* has not been reversed.⁵⁶

Some states provide relief to distributees against the retention of assets by limiting the retention to a maximum period, usually two years.⁵⁷ If the claim has not become absolute within that time, the amount retained is distributed

hands of the distributee." Thus, if the creditor cannot trace to assets still retained by the distributee, the distributee is protected from liability. ARK. STAT. ANN. § 62-2610-(c) (1971). See Note, *Effect of the Nonclaim Statute on a Cause of Action*, 10 ARK. L. REV. 237 (1956).

48. See, e.g., CAL. PROB. CODE § 953-53.1 (West 1966); IND. CODE § 29-1-14-7 (1972); IOWA CODE § 633.424 (1964); MD. ANN. CODE art. 93, § 8-112 (Supp. 1973); PA. STAT. ANN. tit. 20, § 3388 (Supp. 1972); WIS. STAT. § 859.21 (1971).

49. FLA. STAT. ANN. § 733.16 (1964).

50. NEB. REV. STAT. § 30-701 (1964); NEV. REV. STAT. § 150.250 (1973); N.Y. Surr. Ct. PROC. LAW § 1804 (McKinney 1967).

51. R.I. GEN. LAWS ANN. §§ 33-11-11, 33-11-12 (1970); VT. STAT. ANN. tit. 14, §§ 1335-36 (1974) (one year).

52. CAL. PROB. CODE § 953 (West 1956); COLO. REV. STAT. ANN. § 153-12-12 (1963); IND. CODE § 29-1-14-7 (1972); MD. ANN. CODE art. 93, § 8-112 (Supp. 1973); MICH. COMP. LAWS § 708.26 (1968); NEB. REV. STAT. § 30-701 (1964); N.H. REV. STAT. ANN. § 556:6 (1955); N.Y. Surr. Ct. PROC. LAW § 1804 (McKinney 1967); OKLA. STAT. ANN. tit. 58, § 596 (1965); PA. STAT. ANN. tit. 20, § 3388 (Supp. 1972).

53. See notes 77, 87-88 *infra* and accompanying text.

54. 129 Misc. 845, 223 N.Y.S. 470 (Surr. Ct. 1927).

55. *Id.* at 847, 223 N.Y.S. at 475. For discussion of the *Littleton* case, see Note, *Claims Against the Estate*, 34 BROOKLYN L. REV. 490, 495-96 (1968).

56. Note, *supra* note 55, at 496.

57. See, e.g., ARK. STAT. ANN. § 62-2610 (1971) (two years); VT. STAT. ANN. tit. 14, § 1334 (1974) (two years).

and the creditor will be left to his remedy against the distributees.⁵⁸ Although this provides relief against the retention of assets, the distributee will nevertheless be subject to liability if the claim becomes absolute after the distribution. His only advantage is that he has had notice of the contingent claim. To protect the creditor, the court should require that the distributees give him their bond as security for payment in all cases.

In order to serve best the interests of both creditors and distributees, statutes dealing with contingent claims should provide alternative methods of payment. Several factors must be considered when provision is made for payment of a contingent claim, such as the amount of possible liability, the number of years over which contingent liability may extend, and the probability of the claim becoming absolute. Some state legislation has allowed the personal representative to compromise the claim,⁵⁹ and the distribution of the estate as if the contingent claim did not exist, leaving the creditor to his remedy against the distributees if the claim later becomes absolute.⁶⁰ In addition, several states allow the court, in its equitable discretion, to fashion a remedy appropriate to the particular claim involved.⁶¹ For example, the Pennsylvania statute allows the court to make "such other provisions for the disposition or satisfaction of the claim as shall be equitable."⁶²

There are also statutes which do not require presentment of the claim during probate, but require the creditor to bring an action against the personal representative if the estate is not closed, or otherwise against the distributees, within a certain period after the claim becomes absolute. Thus, in Nebraska, the creditor is given one year within which to enforce his claim against the personal representative or distributees.⁶³ The only apparent advantage of provisions of this type is that the distributees would be subject to liability for a shorter period of time than under the general statute of limitations, which in most jurisdictions bar claims presented after a period of from one to four years after the claim arose.⁶⁴

During the years 1939 and 1940 Professor Thomas E. Atkinson wrote a series of articles for the *Journal of the American Judicature Society* on probate proceedings and concluded the series with an article entitled "Wanted—A Model Probate Code."⁶⁵ Professor Atkinson observed that a uniform probate act was needed in order to draw the best ideas from the statutes of all the states in order to meet rapidly increasing demand for a coherent, efficient, and economical probate system.⁶⁶

58. ME. REV. STAT. ANN. tit. 18, §§ 1853, 2654 (1964); VT. STAT. ANN. tit. 14, § 1336 (1974). See also ARK. STAT. ANN. § 62-2610(a) (1971), wherein the court may require the distributees to give their bond as security to the contingent creditor when distribution is made after two years.

59. See, e.g., PA. STAT. ANN. tit. 20, § 3388 (1972).

60. See, e.g., IND. CODE § 29-1-14-7 (1972); IOWA CODE § 633.424 (1964); MD. ANN. CODE art. 93, § 8-112 (Supp. 1973); WIS. STAT. § 859.21 (1971).

61. MD. ANN. CODE art. 93, § 8-112(d) (1957); PA. STAT. ANN. tit. 20, § 3388(3) (1972); WIS. STAT. § 859.21(4) (1971).

62. PA. STAT. ANN. tit. 20, § 3388(3) (1972).

63. NEB. REV. STAT. § 30-704 (1964).

64. See, e.g., CAL. CIV. PRO. CODE § 337 (West Supp. 1974); FLA. STAT. ANN. § 95.11 (1960); TEX. REV. CIV. STAT. ANN. arts. 5526-27 (1958).

65. 23 J. AM. JUD. SOC'Y 183 (1940).

66. The Model Probate Code was the result of Professor Atkinson's initiative, with

The Model Probate Code drew the best provisions from the state probate codes but added nothing new of its own. As to contingent claims it provided three alternatives: compromise of the claim on approval of the court,⁶⁷ retention of assets for two years followed by distribution if the claim had not become due or had not been extinguished,⁶⁸ or distribution as if the claim did not exist with the distributees remaining liable on the claim.⁶⁹ Relief under any of the alternatives was conditioned upon the contingent creditor filing his claim within the nonclaim period.⁷⁰

Although the Model Probate Code offered nothing that was not already provided in some state statutes, its draftsmen gave important commentary as to why contingent claim legislation was necessary. They adopted the policy that a decedent's estate should be settled and closed as soon as possible after the death of the decedent.⁷¹ It was recognized that if the nonclaim statute did not require filing of contingent claims, barring the claim afterwards if not filed, then the distributee could "never spend his legacy or inheritance safely, for he would never know when such a claim could be asserted against him."⁷² Even with a court order than might render the distributees liable in the future, the draftsmen observed, "at least they know the character of the claim. Under the older view they have no way of knowing what claims may be asserted against them at some future time."⁷³

In 1969 the National Conference of Commissioners on Uniform State Laws drafted the Uniform Probate Code. While the draftsmen did look to the laws of the states as guidelines, they also attempted "to reflect the normal desire of the owner of wealth as to disposition of his property at death,"⁷⁴ and thus the draftsmen felt that "the prevailing patterns in wills" were useful in determining probate laws, especially those concerning the property owner who dies intestate.⁷⁵ To date, only North Dakota has enacted the Code in its entirety.⁷⁶ However, it has been enacted in part by some thirteen states, including Texas, and has otherwise influenced legislation.

As to contingent claims, the Uniform Probate Code introduced a new approach. One alternative for the payment of a contingent claim is the establishment of a trust so that payment may be made from the principal of the trust if the claim should become due.⁷⁷ The Uniform Probate Code does not

its drafting undertaken by the American Bar Association's Section on Real Property, Probate, and Trust Law, with the assistance of the state bar associations and the University of Michigan Law School. See generally P. BASYE & L. SIMES, PROBLEMS IN PROBATE LAW 5-9 (1946); Fratcher, *Toward Uniform Succession Legislation*, 41 N.Y.U.L. REV. 1037 (1966).

67. MODEL PROBATE CODE § 140(a); see note 59 *supra* and accompanying text.

68. MODEL PROBATE CODE § 140(b); see notes 57-58 *supra* and accompanying text.

69. MODEL PROBATE CODE § 140(c); see note 60 *supra* and accompanying text.

70. MODEL PROBATE CODE §§ 135(a), 140.

71. MODEL PROBATE CODE § 135, Comment at 142.

72. *Id.* See generally Niles, *Model Probate Code and Monographs on Probate Law: A Review*, 45 MICH. L. REV. 321, 336 (1947); Comment, *The Model Probate Code: A Critique*, 48 COLUM. L. REV. 534, 548 (1948).

73. MODEL PROBATE CODE § 135, Comment at 143.

74. UNIFORM PROBATE CODE, General Comment at 21.

75. *Id.*

76. Act of 1973, ch. 257, [1973] N.D. Laws 43d Sess. 627. The new Code will not go into effect, however, until July 1, 1975.

77. UNIFORM PROBATE CODE § 3-810(b)(2).

specifically state how the trust is to be established, so presumably the court would be given broad discretion in this matter. The income of the trust could be distributed at regular intervals to the distributees, up to the amount they were to receive by the decedent's will or by intestacy, plus interest. The principal would be reserved for the payment of the claim.

While the Model Probate Code restricts the court to the three methods set out above,⁷⁸ the Uniform Probate Code grants the court the broad discretion given by the Maryland,⁷⁹ Pennsylvania,⁸⁰ and Wisconsin⁸¹ statutes, to formulate its own remedy for the payment of the contingent claim. The Uniform Probate Code states that payment may be provided for by a trust, mortgage, bond, or security from a distributee, *or otherwise*.⁸² This gives the court the ability to handle unusual situations where the alternatives given for payment are not suited to the needs of the parties.

In addition, the Uniform Probate Code solves the issue of valuation by providing that value is to be measured as of the time of distribution.⁸³ Establishment of the trust method is more satisfactory than any of the provisions of the Model Probate Code and state statutes, thus making the method proposed by the Uniform Probate Code a superior tool for handling contingent claims.

III. STATUTORY PROPOSAL

If the decedent had been able to foresee that there might be a contingent claim against his estate as the result of a transaction into which he was entering, he could have provided a method for disposal of the claim in an agreement with the creditor or with a provision in his will. But when the decedent has not had such foresight, the legislature must fashion a statutory framework which is designed to dispose of the claim in a way which closely parallels the method by which the decedent would have satisfied it. It is submitted that the following proposed statute, which combines the best features of the state statutes as well as the Model and Uniform Probate Codes, should be adopted as a means of handling contingent claims against a decedent's estate in Texas. Following each division and subdivision in the proposed statute is commentary explaining the basis for inclusion of the specific provision. It should be noted that along with the statute proposed, the Texas nonclaim statute⁸⁴ should be amended so that contingent claims are expressly required to be filed during the nonclaim period, and so that it is clear that both contractual and tort claims are included within the filing requirement.

- (a) If a claim which is contingent or unliquidated has been filed in the manner provided in § 298, the court may provide for payment as follows:

78. See notes 67-70 *supra* and accompanying text.

79. MD. ANN. CODE art. 93, § 8-112(d) (1957).

80. PA. STAT. ANN. tit. 20, § 3388(3) (1972).

81. WIS. STAT. § 859.21(4) (1971).

82. UNIFORM PROBATE CODE § 3-810(b)(2).

83. *Id.* § 3-1004, Comment.

84. TEX. PROB. CODE ANN. § 298 (1956), *as amended*, TEX. PROB. CODE ANN. § 298(a) (Supp. 1974).

- (1) If the claimant consents, he may be paid the present or agreed claim, taking any uncertainty into consideration.⁸⁵

This provision would be desirable if the possibility of the claim becoming due is almost a certainty. If it is uncertain whether in the future the claim will become absolute, this method would not be advantageous to the creditor because he would likely receive little on his claim. Likewise, the distributee under this method suffers by a loss of a portion of the estate if payment is made on a claim which later does not become absolute and payable. These, of course, are factors which cannot accurately be foreseen before the claim becomes due or is extinguished. Under present law in Texas, the personal representative may compromise doubtful debts against the estate only with the court's approval.⁸⁶ It is advisable that a statute covering contingent claims require such court approval for compromise of contingent claims so that the personal representative will be protected from future liability if the choice turns out to have been poor, and so that the guidance of the court may be available when weighing all the factors which must be considered if a contingent claim is to be compromised.

- (2) Arrangement for future payment on the happening of the contingency or on liquidation may be made by creating a trust or by obtaining a bond or security from a distributee.⁸⁷

The trust is selected as an alternative method to the straight retention of assets because of the inequity presented by the latter.⁸⁸ This is the most satisfactory way to deal with contingent claims, unless it appears certain that the claim will become absolute, in which case alternative (1) should be employed. The statute leaves to the court broad discretion as to the establishment and particulars of the trust so as to enable it to take into consideration the individual facts surrounding a specific claim.

- (3) Distribution of the estate may be made as though such contingent claim did not exist; but the distributees shall be liable to the creditor to the extent of the estate received by them if the contingent claim thereafter becomes absolute. The court may require the distributees to give bond for the performance of their liability to the contingent creditor.⁸⁹

Although this alternative will leave the distributees exposed to future liability, it is preferable if the likelihood of the claim becoming due is remote.⁹⁰ The distributees will have received notice of the claim because of its presentment during the nonclaim period, and the creditor may protect himself by obtaining bond from the distributees as security for payment.

- (4) Such other provisions for the disposition or satisfaction of the claim as shall be equitable may be made.⁹¹

85. The source for this provision is UNIFORM PROBATE CODE § 3-810(b)(1).

86. TEX. PROB. CODE ANN. § 234 (Supp. 1974).

87. The source for this provision is UNIFORM PROBATE CODE § 3-810(b)(2).

88. See notes 52-58 *supra* and accompanying text.

89. MODEL PROBATE CODE § 140(c) serves as the source for this alternative.

90. See Comment, *Executors and Administrators—Right of Creditors of a Decedent To Recover from Distributees After the Estate Is Closed*, 41 MICH. L. REV. 920 (1943); 41 COLUM. L. REV. 950 (1941); 27 CORNELL L.Q. 111 (1941).

91. The source for this alternative is PA. STAT. ANN. tit. 20, § 3388(3) (1972).

This provision allows the court to take into consideration the circumstances surrounding the claim and fashion an equitable remedy which suits the needs of the distributees and the creditor. Such a provision has merit because it provides a "catch-all" whereby the court may take into account the nature of the claim, the possibility of its becoming due, and the position of the distributees and creditors in relation to the hardships which may be imposed on them by retention of assets or post-administration liability.

- (b) If the contingent claim shall become absolute before distribution of the estate, it shall be paid in the same manner as absolute claims of the same class.⁹²

This section needs little explanation, for if the claim becomes absolute before distribution it obviously is to the advantage of all parties to dispose of it during administration.

- (c) A contingent or unliquidated claim shall be supported by the affidavit of the claimant showing the facts upon which the contingent or unliquidated liability is based and the probable amount thereof.⁹³

This provision provides a method for verification of the contingent claim. Texas and most states require that absolute claims be verified or authenticated by the affidavit of the creditor stating that the claim is just and true and that all offsets and credits have been allowed.⁹⁴ A contingent creditor could not authenticate his claim under such requirements because he could not state that his claim is just and true. The above method of verification provides a substitute appropriate for contingent claims, and in essence, the contingent creditor gives all the information about his claim that he can.

- (d) After assets of an estate have been distributed, an undischarged claim not barred may be prosecuted in a proceeding against one or more distributees. No distributee shall be liable to claimants for amounts in excess of the value of his distribution as of the time of distribution. As between distributees, each shall bear the cost of satisfaction of unbarred claims as if the claim had been satisfied in the course of administration. Any distributee who shall have failed to notify other distributees of the demand made upon him by the claimant in sufficient time to permit them to join in any proceeding in which the claim was asserted against him loses his right of contribution against other distributees.⁹⁵

This final section of the proposed statute allows recovery by the contingent creditor from the distributees. The creditor, however, must have filed his contingent claim during the nonclaim period because otherwise it would be barred by this writer's proposed amendment to the Texas nonclaim statute.⁹⁶ This provision is intended to provide for the situation where the contingent

92. MODEL PROBATE CODE § 140 is the source for this section.

93. The source for this provision is N.Y. Surr. Ct. Proc. Law § 1804 (McKinney 1967).

94. See, e.g., TEX. PROB. CODE ANN. § 301 (1956).

95. The source for this provision is UNIFORM PROBATE CODE § 3-1004.

96. TEX. PROB. CODE ANN. § 298 (1956), as amended, TEX. PROB. CODE ANN. § 298(a) (Supp. 1974); see note 84 *supra* and accompanying text.

claim is filed and the parties elect to distribute the estate as if the contingent claim did not exist, under section (a)(3) above. In addition, this section allows the contingent creditor whose claim was not allowed by the personal representative to prosecute a suit against the distributees. The distributees are given the right of contribution against each other provided the proper notice is given. Finally, the provision defines the time of valuation of the portion of the estate received by each distributee as being when the distribution is made.⁹⁷

IV. CONCLUSION

It is evident that legislation is needed in Texas which would require the filing of contingent claims during the nonclaim period and provide for their disposition in a manner as is proposed above. A noted Texas attorney has stated: "Both orderly administration and the best interests of creditors would seem to be served by disposing of such [contingent] claims in probate proceeding rather than by permitting a separate proceeding in another court as is the present practice."⁹⁸ When such legislation is forthcoming, probate procedure will further be advanced by a more speedy and final settlement of an estate where contingent claims are involved.

97. See notes 40-43 *supra* and accompanying text.

98. Furse, *Claim Practice in Probate Matters*, 34 *Tex. B.J.* 667, 681 (1971).