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**Texas Estates Code  
Redefines Secured Creditor's Rights and Remedies**

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**TEXAS ESTATES CODE REDEFINES  
SECURED CREDITOR'S RIGHTS AND REMEDIES**

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# TEXAS ESTATES CODE REDEFINES SECURED CREDITOR'S RIGHTS AND REMEDIES

## I. Rights of a Secured Creditor

When a lender makes a recourse loan to an individual secured by a deed of trust on real property, the rights of the lender are governed by the terms of the loan documents; Texas statutes, including the Texas Business & Commerce Code, the Texas Finance Code, and the Texas Property Code; and applicable case law. Upon an event of default, the lender can pursue one or more remedies. The lender can sue the borrower to collect its debt pursuant to the terms of the note.<sup>1</sup> The lender can enforce its power of sale under the deed of trust, instructing the trustee to conduct a non-judicial foreclosure sale.<sup>2</sup> The lender can file suit to obtain a court order authorizing a judicial foreclosure sale.<sup>3</sup> If the sale proceeds paid by the highest bidder are not sufficient to pay the lender's debt in full, the lender can file suit to collect the deficiency within two years after the foreclosure sale.<sup>4</sup> To the extent the foreclosure sale proceeds are more than the lender's debt, the trustee must pay the excess proceeds to subordinate lienholders, in order of their priority, and the balance, if any, to the owner of the property at the time of foreclosure.<sup>5</sup> The lender's foreclosure sale is subject to challenge as void or voidable by the borrower, or void by subordinate lienholders or any other person having a legal or equitable interest in the real property, within four years after the date of the foreclosure sale.<sup>6</sup>

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<sup>1</sup> *Tex. Bus. & Comm. Code Sec. 3.104.*

<sup>2</sup> *Tex. Prop. Code Sec. 51.002.*

<sup>3</sup> *Tex. R. Civ. Proc. Sec. 309.*

<sup>4</sup> *Tex. Prop. Code Sec. 51.003.*

<sup>5</sup> *See Bonilla v. Roberson*, 918 S.W.2d 17, 23 (Tex.App.—Corpus Christi 1996, no writ); *Pearson v. Teddlie*, 235 S.W.2d 757, 759 (Tex.Civ.App.—Eastland 1950, no writ).

<sup>6</sup> *See Mercer v. Bludworth*, 715 S.W.2d 693, 698 (Tex.App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

The secured creditor's rights as set forth above are as follows:

1. Collect the debt from the borrower.
2. Enforce its power of sale by instructing its trustee to conduct a non-judicial foreclosure.
3. File suit to enforce a judicial foreclosure.
4. File suit against the borrower to collect the deficiency judgment after the foreclosure sale.
5. Distribute excess foreclosure sale proceeds to subordinate lienholders, in order of their priority, and then, to the owner of the property at the time of foreclosure.
6. If a subordinate lienholder, file suit collaterally attacking the validity of a void non-judicial foreclosure sale by a prior secured creditor.

Upon a borrower's death, the Texas Estates Code redefines the secured creditor's rights and remedies.<sup>7</sup>

## **II. The Death of the Borrower Impacts the Secured Creditor's Rights**

Knowledge of the borrower's death is the first challenge faced by the lender. If the borrower dies and no probate action is taken, the borrower's heirs may continue to pay the lender according to the terms of the note. When the indebtedness is paid in full, the lender will deliver a release of lien to the debtor as shown in the lender's books and records. The burden will be on the heirs to establish ownership of the collateral when they attempt to sell it. If, however, the borrower's heirs fail to pay the lender, the lender is faced with enforcing its rights and remedies under the loan documents and applicable Texas law.

Unaware of the borrower's death and receiving no payments, the lender and/or its trustee will send notices of default, acceleration and/or foreclosure to the borrower at its last known address in the lender's files. A non-judicial foreclosure sale conducted after the borrower's death, even without knowledge of the borrower's death, is subject to being set aside as void if the estate files for dependent administration within four years of the borrower's death.<sup>8</sup> As a result, the trustee's deed will not convey marketable title until four years after the date of the borrower's

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<sup>7</sup> In 2006, the author presented Texas Probate Code Redefines Secured Creditor's Rights and Remedies at the University of Texas Mortgage Institute which was printed in the Real Estate Probate & Trust Law Reporter, Volume 45, No. 2 (January 2007). In 2012, the author revised the 2006 paper for the State Bar of Texas 34<sup>th</sup> Annual Advanced Real Estate Law Course. The 2012 paper incorporated the 2011 amendments to the Texas Probate Code. In the 2012 paper, the author points out that the 2011 amendments codified the author's conclusion that the procedural requirements of Section 306 [now Texas Estates Code Secs. 355.151-.160] do not apply to an independent administration. The 2011 amendments, however, rejected the author's conclusion that a matured secured claimant forfeited its right to contest a non-judicial foreclosure of a prior preferred debt and lien claimant. The Texas Estates Code was enacted, effective January 1, 2014, by Acts 2009, 81<sup>st</sup> Leg. Ch. 680 and Acts 2011, 82<sup>nd</sup> Leg. ch. 823 (H.B. 2759). This paper incorporates the provisions of the Texas Estates Code.

<sup>8</sup> *Pearce v. Stokes*, 291 S.W.2d 309 (Tex. 1956).

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