ADMINISTERING THE ESTATE EFFECTIVELY

- Robert E. Ciancola –

A. HOW TO RESPOND TO CREDITOR'S CLAIMS

1. Initial Steps in Notifying Creditors. One of the first duties of a personal representative (PR) after appointment is to give required notice to creditors. The notification process sets in motion a time limitation which will cut off claims after its expiration. Therefore the earlier the notice is provided, the earlier the PR will know with finality what claims will be presented to the estate for payment. For creditors whose identity is known to the PR, actual notice must be provided by mail or personal delivery, in a notice which states the name and address of the PR and the manner in which claims are to be presented. The notice must also advise the creditor that claims must be presented by the later of (1) four months after initial publication of notice to creditors; or (2) sixty days after mailing or delivery of the notice, or be time barred. In addition to actual notice, notice to creditors generally must be published at least once per week for three consecutive weeks in a newspaper of general circulation in the county in which the probate has been filed. Actual notice should be given liberally. For example, it is the author's practice to give notice to all physicians and establishments which may have treated the decedent, even if the PR is certain that all of their claims have been paid. In addition, notice should be provided in the case of contingent or disputed claims as well.

2. Determine the Timeliness of the Claim. Upon receipt of a claim the Personal Representative has the duty to allow or disallow the claim. One of the first things to consider is the timeliness of the claim. As noted above, a claim which arose *prior to the death of the decedent* must be submitted within the later of (1) four months after first publication of notice, or (2) 60 days after actual notification, if the creditor was "known" to the PR. Apart from this limitation, the claim could be barred by a general statute of limitations (as for claims in tort and contract) or the overall limit provided by A.R.S. § 14-3803[1] of two years after the date of death. The two year ultimate period is extended by any remaining time of the four month/60 day limits provided by notice. The

[1] Unless otherwise indicated, all section references are to the Arizona Revised Statutes.

period of limitations on claims accrued after death must be presented within four months of the time performance was due by the PR (for claims arising because of actions or contracts by the PR) or within two years of death (for other claims). These limitation periods bind all creditors, including the state and its political subdivisions, but will not bind the IRS because statutory liens created when federal taxes are owed are not affected by state law imposing limitations on creditors.[2]

3. Secured Claims. Debts of the decedent which are secured, as for example by mortgage on real property, are not subject to disallowance for failure to present a claim within the applicable time to the extent of the security. Any excess of the debt over the value of the property securing the claim is subject to the limitation periods.

4. Determine if the Claim was Properly Presented. Claims must be presented by delivery, by mail, or by lawsuit filed against the PR. It is unclear if a claim faxed or e-mailed to the PR are properly presented, but such methods would probably be considered delivery. The claim must contain the name and address of the claimant and the amount and basis of the claim. If the claim is contingent, it must state the nature of the contingency. A.R.S. § 14-3804. Unless otherwise stated by contract (for example, a credit card agreement), interest accrues on a claim 60 days after the presentment period expires. A creditor also has the option of filing the claim with the probate court, which seems to be the practice of some credit card issuers. Whenever a claim is filed with the court, the PR should obtain a release and satisfaction of the claim from the creditor upon payment or settlement so the record in the court will reflect its satisfaction.

5. Action to Allow or Disallow. After the time for submitting a claim has expired the PR must act within sixty days of that time to disallow the claim. If the PR does not mail a notice of disallowance within 60 days after expiration of the time limitation on submitting the claim, it is considered allowed. § 14-3806. The PR can, however, change his or her mind and disallow a claim which has previously been allowed (or deemed allowed) provided that the claimant is notified of the rescission of the allowance within six months of the date the claim was presented. If the PR decides to

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[2] *United States v. Bess*, 357 U.S. 51 (1958).

allow a claim, two courses of action are available: the PR can send a notice of allowance of claim to the creditor but postpone payment until later; or the PR can simply pay the claim in which case it is not necessary to send a notice of allowance. A notice of disallowance on a claim should always be sent certified mail so as to be able to prove delivery. Otherwise the PR may be unable to demonstrate the notice was given and, if so, it would be deemed allowed after the sixty day period. Whenever a claim is disallowed, the claimant must file a petition to allow the claim within 60 days of mailing the notice of disallowance.

6. Petitioning for Instructions. When determining whether to allow a claim in whole or in part, the PR also has the option of petitioning the probate court for instructions. The PR may want to do this when he desires the comfort of a court ruling in dealing with a particular claim. One reason the PR may want this comfort is due to his position as a fiduciary owing a duty both to creditors and to beneficiaries of the estate. Payment of a dubious claim may render the PR susceptible to complaints and claims of beneficiaries; while failure to pay a valid claim which has not been disallowed will render the PR personally liable to the creditor. If a petition for instructions is filed, it should contain a statement of the facts surrounding the claim, as known to the PR, and the PR's position on the claim (if any). A hearing date will be scheduled and the PR must notify all interested persons of the hearing. *Interested persons include all other creditors as well as all the beneficiaries of the estate.*

7. Payment of Claims. Before paying any claim, the PR must be satisfied that the estate will be solvent. This must be absolutely clear, based on the size of the estate and the known and surmised debts and expenses. If there is any doubt about the estate's solvency, the PR should avoid paying claims until the applicable period for presentment expires. It is only then that the PR knows if all claims can be satisfied from the estate, after payment of statutory allowances and administrative costs. Full payment of a creditor's claim in an estate which turns out to be insolvent will render the PR liable to the other creditors if the claim did not have priority. A.R.S. § 14-3807(B).

8. Community Property. Where the decedent is survived by a spouse, whether the claim is for a separate or community debt is also a consideration. If a separate debt, it must be satisfied from the decedent's separate property and the decedent's share of community property. If a community debt it should be satisfied in part by community property held by the surviving spouse. Where the surviving spouse is to inherit the residuary estate and the residuary is large enough to extinguish all claims, this may not make a difference. But where the survivor is largely disinherited or does not receive the residuary the failure of the PR to classify the claim as community or separate will allow the claimant to classify it in whatever way is most advantageous to the claimant.[3] This may result in a breach of fiduciary duty to beneficiaries by the PR. For this reason, the PR should notify the claimant that the claim, if allowed, will be treated as a community obligation or a separate obligation. A determination that a claim is community constitutes a disallowance of the claim in part, obligating the creditor to press the balance of the claim against the spouse.

B. INSOLVENT ESTATES

1. PR Liability. Extreme care must be exercised where the estate may not be large enough to satisfy all creditors. Such an estate can be a minefield of liability for both the PR and the PR's legal counsel. § 14-3805(B) provides as follows:

> No preference shall be given in the payment of any claim over any other claim of the same class and a claim due and payable shall not be entitled to a preference over claims not due.

Moreover, the PR is personally liable if a claim is paid in full to the injury of other creditors:

> The personal representative at any time may pay any just claim which has not been barred, with or without formal presentation, but the personal representative is personally liable to any other claimant whose claim is allowed and who is injured by such payment if either:
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> 1. The payment was made before the expiration of [the time to present claims] and the personal representative failed to require the payee to give adequate security for the refund of any of the payment necessary to pay other claimants.

[3] A.R.S. § 12-3806(A)

2. The payment was made, due to the negligence or wilful fault of the personal representative, in such manner as to deprive the injured claimant of the claimant's priority. § 14-3807(B).

In addition, if the PR makes distribution to beneficiaries before all creditors have been paid, a harmed creditor may, under § 14-3901, recover directly from the beneficiaries.

2. Order of Priority of Claims. § 14-3805(A) sets forth the priority of claims as follows:

1. Costs and expenses of administration.
2. Reasonable funeral expenses.
3. Debts and taxes with preference under federal law.
4. Reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation of persons attending him.
5. Debts and taxes with preference under the laws of this state.
6. All other claims.

The compensation of the PR, as well as fees of attorneys, accountants and others providing services during administration of the estate, filing fees and costs are all considered administrative expenses. While not stated in the priority statute, the homestead, exempt property and family allowance provisions take precedence over all of the above except administrative costs. As a result of the priority statute, the PR will be required, in any insolvent estate, to segregate the claims into the respective classes and to treat all claims within a given class equally. The safest course is for the PR to not pay any claims until the end of the notice period; at that time, the claims can be prioritized and paid according to their rank. In most cases, however, fairly accurate estimates of the classes of priority can be made and at least some payments made before the end of the period.

3. Federal Estate and Income Tax: the Federal Claims Statute. Where the federal estate tax is indicated, additional hazards will lurk in an insolvent estate. First, the question arises as to how an insolvent estate can be subject to the estate tax. The answer is non-probate transfers. Life insurance over which the decedent held incidents of ownership; property over which the decedent held a power of appointment; transfers in

trust; beneficiary deeds and many other types of transfers, while not included in the probate estate, are includable in the gross estate for tax purposes. Where an estate tax is or might be present, the practitioner needs to be aware of several federal statutes. Internal Revenue Code §2206 provides that, unless a will directs otherwise, an executor of an estate may recover estate tax arising from life insurance from the insurance beneficiaries. In addition, the IRS can follow estate assets into the hands of beneficiaries if necessary. IRC § 2205 provides that if the IRS seizes estate assets from beneficiaries, they will have right of reimbursement from the remaining undistributed estate.

The U.S. Code has another section which bears on the issue. It provides, in relevant part:

> ***31 U.S.C. § 3713*. Priority of Government claims**
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> (a)(1) A claim of the United States Government shall be paid first when -
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> * * *
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> (B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor.
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> * * *.
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> (b) A representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government.

Taxes, including income taxes, are "claims" under this statute.[4] In *Singleton*, T.C.M. 1996-29, the Tax Court held an executor personally liable for estate taxes when he made distributions to beneficiaries before discharging the tax. In *Estate of Florence Devida Johnson*, T.C.M. 1999-284, the Tax Court held that an executor was personally liable for the decedent's income tax deficiency, to the extent he had actual or constructive knowledge of the tax liability. In the *Johnson* case, the IRS also attempted to collect interest which, combined with the tax, actually exceeded the value of property which the executor had distributed. The Tax Court, however, found the executor can be liable only

[4] But estate taxes are not "claims" under the priority of claims statute. See the discussion of *Fogelman* below.

up to the amount of assets which the executor had distributed in violation of the priority of claims statute.

4. Federal Estate Tax: the *Fogelman* Case. *In Re Estate of Fogelman*, 197 Ariz. 252, 3 P.3d 1172 (App. 2000) is a famous case usually cited in connection with the duty owed by an attorney representing the PR to the beneficiaries of an estate. During the course of its analysis of this question, the court found it necessary to determine whether an estate tax fell on the residuary of the estate (which was insolvent) or the beneficiaries of life insurance policies. In this case, large life insurance benefits were paid to several beneficiaries, causing an estate tax liability to arise. The will had two clauses, one of which directed that all estate and inheritance taxes be paid from the residuary, and the other prohibiting the PR from seeking reimbursement of any tax from the insurance beneficiaries. The residuary estate was not large enough to pay the tax. The court held that the estate tax liability was not a "claim" against the estate and thus fell outside the Arizona priority of claims statute. According to the court, the tax properly goes with the insurance proceeds, citing IRC § 2206, and it interpreted the clause in the will directing that it be paid from the residuary estate as a residuary bequest to the insurance beneficiaries. Because the residuary lacked the funds to pay the tax as directed by the will, the bequest failed. The clause prohibiting the PR from collecting the tax from the insurance beneficiaries was treated by the court as a specific bequest, which likewise failed. The result was that the residuary was freed from paying the tax and the tax would not, in effect, be paid at the expense of other creditors due to the federal priority statute.

The *Fogelman* analysis agrees with the earlier case of *Estate of Tovrea v Nolan*, 173 Ariz. 568 (App. 1992). In that case the decedent's estate consisted of a $2 million probate estate, $2.7 in life insurance death benefit paid to Nolan and a $4 million QTIP trust established by the decedent's late husband. The will stated that "all estate and inheritance taxes assessed by reason of my death other than those related to qualified terminable interest property" would be paid by the residuary estate. If paid from the residuary estate, the estate tax would have exhausted it, leaving nothing for the residual

beneficiaries. The residuary beneficiaries sought a contribution from Nolan. The Court started with the presumption that, because of IRC § 2106, the recipient of life insurance proceeds is responsible for the estate tax on such proceeds. But it held that the residuary clause directed otherwise and therefore Nolan did not have to contribute to the tax caused by the insurance proceeds.

While the rule is that recipients of life insurance will bear its tax cost absent overriding language in the will, other non-probate transfers do not share that assumption. Arizona, unlike the majority of states, follows the residuary approach, under which estate tax is paid from the residuary unless the will requires tax apportionment. See *In the Matter of the Estate of Mason v. Cruce,* 190 Ariz. 312 (App. 1997) (bank account beneficiaries not responsible for paying estate tax caused by inclusion of the accounts in decedent's gross estate).

5. Example.

Decedent dies without a will. There is no surviving spouse and four children who are heirs at law. Assume the following assets, debts and expenses:

Assets		Debts and Expenses	
Residence	$500,000	Mortgage (on residence)	$300,000
Bank account	100,000	Fed Income tax deficiency	100,000
Life Insurance passing directly to child #1	2,000,000	Funeral Expense	10,000
		Hospital bills	140,000
Real estate passing by beneficiary deed to child #2	1,000,000	Administrative costs	20,000
		Other debts	100,000
		Federal Estate Tax	450,000
Total	$3,600,000	*Total*	$1,120,000

The probate estate looks like this:

Equity in home	$200,000
Bank account	100,000
Total probate assets	300,000
Debts and expenses	$1,120,000

Per IRC § 2106, the PR will recover, by lawsuit if necessary, a proportionate part of the estate tax from child #1, the life insurance beneficiary. Because the estate tax is caused

by $2 million of life insurance and $1 million of real estate passing outside of probate, assume $300,000 of the estate tax is apportioned to the life insurance and $150,000 to the real estate. Following *Estate of Mason*, Child #1 would contribute $300,000 toward the estate tax while Child #2 would pay nothing toward the estate tax. Applying the Arizona priority statute, the PR would use the $300,000 of net probate assets as follows:

Administrative expenses	$20,000
Funeral	10,000
Federal income tax	100,000
Federal estate tax	150,000
Hospital bills	20,000
	$300,000

The remaining hospital bills would not be paid, and the other creditors would get nothing. Children 3 and 4 also receive nothing. The unpaid creditors may have recourse against Child #2 under Arizona's nonprobate transfer statute, 14-6102.

Suppose that, instead of an intestate estate, the decent had left a will specifying that all estate and inheritance taxes were to be paid from the residuary estate without apportionment. Under the *Fogelman* rationale, Child #1 would be treated as having received a failed bequest, and be responsible for paying $300,000 toward the estate tax, resulting in the same distribution as above.

C. MANAGING ESTATE CASH RESPONSIBLY

Managing the estate is one of the essential duties of the PR. If the PR is not a "numbers person" and not inclined to keep detailed records, it would be well advised to bring an accountant on board to set up an accounting system, especially in large estates. Record keeping is essential. Do not allow the client to present you with a box of receipts at the time you are ready to prepare the final accounting and close the estate! What follows are some common-sense approaches to maintaining maximum value in the estate.

1. Opening the Estate Account. As soon as the PR is issued letters, an employer ID number should be obtained for the estate and, utilizing this number and the certified letters of appointment, the PR should open a bank account in the title "Paul Smith, Personal Representative of the Estate of John Doe." All the decedent's bank accounts and cash equivalent accounts should be transferred to this account and all estate

expenses paid from it and income added to it. If there is a cash balance in excess of short term foreseeable outlays and distributions, the excess should be kept in an interest-bearing account. The PR may have advanced costs, such as funeral expenses or attorney fees, from his or her own funds. If so, an itemized bill should be prepared by the PR and reimbursement taken from the estate.

2. Be certain all assets have been accounted for. Examine the title of all of the decedent's accounts and assets. Everything with a title which is not passing to a co-owner or beneficiary should be re-titled in the name of the estate, or closed out and transferred to the estate bank account. For life insurance policies, if a named beneficiary has predeceased the decedent, the proceeds will be paid to the estate. The Arizona Department of Insurance may be helpful in determining the status of old policies issued by companies no longer in existence. The death benefit should be applied for promptly. In the case of IRAs and other qualified defined contribution plans, a similar examination is called for. With such accounts which may be payable to the estate, bear in mind that liquidating the account will cause immediate taxation. If an IRA has no designated beneficiary it may be held up to five years before distribution is required. If the decedent held stocks and bonds in certificate form, a brokerage account may be opened in the name of the estate to which the individual securities can be transferred. This will facilitate sales, distributions and accounting for gains and losses.

3. Cancel credit cards and unneeded utilities. All credit cards in the decedent's name (unless a spouse is also on the account) should be cancelled by contacting the issuing company and providing a copy of the death certificate. All such card issuers should be served with the notice to known creditors. Although entitled to interest by the terms of the contract, many card issuers freeze the account at the date of death. It is possible to bargain with them for a discount in return for prompt payment (if it is clear the estate will not be insolvent). Where real property is owned, and is not occupied, unneeded utilities like telephone, cable and internet service should be cancelled. If a cellular phone contract is in force, contact the company to determine if it may be cancelled without charge.

4. Federal Estate Tax Options.

a. Take advantage of extensions of time for federal estate tax payments when necessary. The personal representative may obtain an automatic six-month extension of time to file the form 706 estate tax return by filing form 4768 and requesting additional time to pay the tax. The IRS can grant a discretionary extension of time to pay the tax of up to twelve months upon a showing of reasonable cause. IRC § 6161(a). Only a six month extension is available for any generation-skipping tax due. Reasonable cause for this purpose includes illiquidity of the estate and other circumstances specified in the IRS manual, but does not include reliance on the services or advice of an attorney or accountant. Granting of an extension will excuse the late-payment penalty but the estate will still have to pay interest on the tax paid late. There also are hardship extensions. The IRS may grant an extension up to ten years upon a demonstration of undue hardship (IRC § 6161(a)(2)) or an extension until six months after the termination of a reversion or remainder interest included in the estate (IRC § 6163). The first extension is usually available only where the estate includes farm land or business interests not large enough to qualify for the § 6166 extension. The extension for reversionary or remainder interests applies only to the extent of the value of the interest included in the gross estate.

b. Extensions for Business or Farm Assets. Section 6166 permits special installment payments of estate tax where over 35% of the adjusted gross estate consists of closely held business interests (including farms operated as businesses). The election must be made on a timely filed estate tax return. The extension of time to pay can be for a period up to fifteen years, with no payments being made for the first five years and installments paid over the next ten. A special favorable interest rate of 2% applies to extensions under this section.

c. Special Use Valuation - Farm or Business Real Property. Section 2032A permits a special use valuation for real property used in a business or farming operation. The section is lengthy and complicated and no attempt will be made here to give a complete explanation. To qualify, the value of the business or farm must

constitute 50% or more of the value of the gross estate (adjusted for taxes, debts and administration and funeral expenses) and the value of the real property must constitute at least 25% of the estate. The business must be passed to "qualified heirs" and such heirs must continue to use the property in the business and actively participate in the business for 10 years following the decedent's death. Special dispensation from the active participation requirement is provided to spouses, students and minors who inherit the business or farm. A recapture tax is imposed if the farm or business is disposed of or active family participation ceases within the ten year period. If available, the section allows real estate to be valued in accordance with its actual use rather than its highest and best use. This can be especially valuable in the case of farm and timber land.

d. Alternate Valuation Date. IRC § 2032 allows the executor to elect an alternate valuation date six months following the date of death. This alternate date is available only if it results in a lower valuation. If elected, property is valued at the subsequent date with the following special rules -

(i) property sold or disposed of (including property distributed to legatees) within six months of the date of death must be valued as of the date of disposition or distribution;

(ii) property interests the value of which are affected by the mere lapse of time (such as patents, remainder interests and life estates) are valued as of the date of death, but with adjustment for any changes in value occurring within six months of death and not attributable to the mere lapse of time;

(iii) the estate cannot claim any deduction which is affected by the alternate date except to the extent it would be allowable without the special valuation election.

Property is considered to be distributed when it is segregated from the estate and available to the distributee; when an order of distribution is entered by the court; or the actual distribution date, whichever occurs earliest. The alternative valuation date is not automatic and must be elected on a properly and timely filed estate tax return. The

election cannot be made after the due date (including extensions) for filing the return and cannot be revoked after such date.

5. Avoid unnecessary income tax and penalties.

a. Prepare the decedent's final income tax returns. A final income tax return may have to be prepared for the decedent. Generally, all income received through the date of death, and deductions realized through such date, are reported on the decedent's final 1040. Items of income and deduction accruing after death are either reported on the estate's income tax return on form 1041, or directly by the distributee. If the information needed to file the return is not gathered in time to file a timely return and pay the tax, a request for abatement of late payment and late filing penalty should be sought with showing of reasonable cause. A joint return is permitted if the decedent is survived by a spouse.

b. Avoid Accumulating Distributable Income. Trusts and estates are taxed at the same rates as apply to individuals except that the income brackets are greatly compressed. For example, the top marginal rate of 35% is reached on taxable income in excess of $10,450 for an estate or trust. Income which is distributed to a beneficiary is taxed to the beneficiary at the beneficiary's often lower rate.

c. Be aware of the income tax effects of distributions. A specific bequest of an item of property (e.g., 100 shares of IBM) is not taxable, even if the property has appreciated in value from the date of death. However, if the same 100 shares of appreciated stock are used to satisfy a specific bequest of an amount of cash, the estate is liable for a capital gain tax. This is also true where the will or trust provided for a pecuniary marital trust with date of death valuation, which is funded with property which has appreciated since the date of death.

6. Take advantage of decedent's medical insurance or Medicare benefits. If the decedent was covered by Medicare, be sure the medical bills were run through Medicare. If they were, Medicare will pay 80% of the usual and customary charge and the estate is liable for the remaining 20% of the usual and customary charge as determined by Medicare, and not 20% of the total billed. If, for some reason, the bills

were not submitted to Medicare, this can be done by obtaining the proper form from the physician's office. In cases not covered by Medicare there may be private insurance or HMO coverage available. A client of the author recently settled a $4,600 hospital bill for a $75.00 co-pay after finding the decedent's insurance coverage and following the claim through the insurer.

7. Operating the decedent's business. Absent contrary provision of a will and except for Supervised Administration, the PR is authorized to operate the decedent's unincorporated business for a period up to four months. For example, if the decedent operated a retail store, the PR could retain the employees and continue operations to the extend he deems advisable, either with a view to liquidating (disposing of the inventory) or selling or devising the business. An incorporated business can be operated by the PR until distribution of the stock. § 14-3715(24).

D. DISCLAIMERS

1. Uses of Disclaimers. A person inheriting property can disclaim such property, in which case it will pass to another person as if the disclaimant had predeceased the testator. A disclaimer can be a valuable post-mortem tool. For example, assume a person with a $2 million estate dies leaving the entire estate outright to his elderly spouse. If this were community property, the surviving spouse would have a similar amount of property. Upon the spouse's death, a substantial estate tax is likely to be incurred. Instead of receiving the inheritance, the spouse can disclaim some of that property, up to the applicable exclusion amount, and have such property pass directly to the children. The property thus disclaimed will not be included in the spouse's estate on death and will not be subject to gift tax or generation-skipping transfer tax by reason of the disclaimer. In another situation, suppose an individual beneficiary of a will is deeply in debt, such that any inheritance would likely be seized by creditors. A disclaimer may allow the inheritance to pass to the disclaimant's children or other designated beneficiary under the

will.[5] A qualified disclaimer may be made with respect to any property inherited from the decedent, whether by will, trust, or right of survivorship.

2. Disclaimers under federal law. There are separate disclaimer rules for federal and state purposes. In the examples given above, the estate tax example requires a disclaimer valid under federal law; the creditor example one valid under state law. The requirements for disclaimers valid for federal estate, gift and generation-skipping taxes are found in Treas. Reg. §§ 25.2518-2 and 25.2518-3. In general, as applied in the case of a will, the disclaimer must meet the following requirements:

- Be irrevocable and unqualified;
- In writing;
- The disclaimant may not have accepted the interest or any of its benefits (e.g., accepting a dividend will prevent disclaimer of the stock);
- The interest disclaimed must pass to another without any direction or control of the disclaimant;
- It must be delivered to the PR or trustee within 9 months of the date of death.

A qualified disclaimer may be made with respect to any property inherited from the decedent, whether by will, trust, or right of survivorship. A disclaimer may be made of all or an undivided portion of the property. For example, if a bequest is made a of 100 shares of stock, the beneficiary may disclaim 25 and accept the other 75 shares. If the bequest is a specific item, such as a plot of real estate, a disclaimer may be made of an undivided percentage interest in the property.

3. Disclaimers under Arizona law. Arizona has adopted the Uniform Disclaimer of Property Interests Act, codified in §§ 14-10001 through 14-10018. There are significant changes from the prior statute, 14-2801, principal among which is the elimination of the requirement that the disclaimer be made within 9 months of the date of death. Of course, that requirement remains for federal disclaimers. The new act specifies

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[5] This strategy will not work as against federal tax liens. *Drye v. United States*, 528 U. S. 49 (1999).

that a person may disclaim, in whole or in part, any interest in or power over property, including a power of appointment. The disclaimer may be made despite any spendthrift or similar clause in the will or other instrument which restricts alienation. The disclaimer must be in writing, signed by the disclaimant, and delivered to the PR (or trustee, in the case of a trust) by first class mail "or any other method likely to result in its receipt" (§ 14-10012). If no PR is serving, it may be delivered to the court having power to appoint a PR.. The state law is much more liberal than the federal tax requirements, permitting disclaimers of a term of years, portions of property, and even of beneficiary designations on insurance or other instruments, if made before the designation becomes irrevocable (e.g., upon death). Disclaimer is barred by acceptance, assignment, conveyance or encumbrance of the property or interest.

E. PARTIAL DISTRIBUTIONS

Contrary to popular belief and the pronouncements of some who sponsor living trust "seminars", property will usually not be "tied up in probate for years." Partial distributions, even of substantial amounts, are usual and ordinary and do not require court approval. The only circumstances which would prevent distributions are if the estate is under Supervised Administration; there is pending litigation; there is a likelihood of IRS challenge to a filed estate tax return; or there is serious threat of insolvency. In the more usual case, distributions may be made at any time, even very early in administration. It is, of course, prudent to delay distributions until after the creditor claim period has expired, but in many estates, it will be clear that the estate is solvent and that holding back a prudent reserve is all that is necessary.

F. NON-PROBATE TRANSFERS

The Arizona law on non-probate transfers contains important rules on asset protection and creditors rights which should not be overlooked. A non-probate transfer is a valid transfer effective at death by a decedent who was domiciled in Arizona at the time of death and who, prior to death and acting alone, had the power of revocation or

withdrawal with respect to the transfer and who could have used the property for his own benefit or to satisfy creditors. Transfers of real estate by right of survivorship are specifically excluded from the definition. § 14-6102(I).

This definition is broad enough to cover most common forms of property transferred by beneficiary designation, such as insurance proceeds, retirement accounts, pay-on-death designated bank accounts and beneficiary deeds. It appears it would not cover stock or accounts held as JTWROS because the decedent would not ordinarily have the power to terminate the joint tenant's interest unilaterally. The definition clearly includes transfers at a settlor's death by revocable trusts.

A revocable trust is, by this statute, made subject to claims of creditors of the decedent and the right of a surviving spouse and children to a homestead and family allowance, to the extent the probate estate is insufficient to pay these claims. Where such property has already been distributed to the beneficiaries, the beneficiaries are personally liable for such claims on a proportional basis. There is a 2-year statute of limitations on presenting claims. The trustee of a decedent's trust may, however, give notice to creditors in the same manner as is provided for probate estates and thereby subject such claims to a four-month period for submission. If a claim is submitted after four months from the date of notice, it is barred. § 14-6103(B). Prior to the enactment of this statute, the establishment of a revocable trust might have defeated both the homestead allowance and claims of creditors. While Arizona courts had never ruled on this, other states have. See, e.g., *Johnson v. LaGrange State Bank*, 73 Ill.2d 342 (1978).

Trust beneficiaries who are liable to creditors of the decedent abate in the same manner as wills – that is, the residuary estate is the first to go. In a proceeding to enforce the liability a demand must be made upon the personal representative to present a claim to the trustee. If the PR refuses to do so, the creditors may, at their own expense, initiate a proceeding to require abatement. The action must commence within two years of the date of death, unless a claim has been submitted and disputed, in which case the limit is 60 days after final disallowance. The PR may give notice to transferors of non-probate transfers, including insurance companies and trustees, that there is a deficiency in the

probate estate. Upon such notice, the transferor may become liable if distribution is made without satisfaction of the claims of creditors. See § 14-6102(H).

It is possible to pass even a large estate by beneficiary designation alone, and avoid probate. In such a case, there may be no probate, no trust, and no one in charge of paying debts of the decedent. It appears that, in order to enforce their rights under the non-probate transfer statute, a creditor would need to petition the court to appoint a PR in order to give the required demand.

FORMS

Robert E. Ciancola
8655 Via de Ventura, Ste G221
Scottsdale, AZ 85258
(480) 346-1080
Attorney for Personal Representative

SUPERIOR COURT OF ARIZONA, ___________ COUNTY

In the Matter of the Estate of	) NO. PB_____________
	)
John C. Doe,	) NOTICE TO CREDITORS
	) (for publication)
Deceased.	)
______________________________________	)

NOTICE IS HEREBY GIVEN that _____________________[Name of PR] has been appointed Personal Representative of this Estate. All persons having claims against the Estate are required to present their claims within four months after the date of the first publication of this notice or the claims will be forever barred. Claims must be presented by delivering or mailing a written statement of the claim to ____________________, Personal Representative, at _________________[Address of PR].

DATED this ___ day of ___________, 2006.

____
[Name and address of PR]

Robert E. Ciancola (012451)
8655 Via de Ventura
Scottsdale, Arizona 85258
(480) 346-1080
Attorney for Personal Representative

IN THE SUPERIOR COURT OF ARIZONA, MARICOPA COUNTY

In the Matter of the Estate of **John C. Doe,** Deceased.	Case No.: PB____________ NOTICE TO CREDITORS (known creditors)

NOTICE IS HEREBY GIVEN that ______________________ has been appointed Personal Representative of this Estate. A Notice to Creditors was first published on _________________. All persons having claims against the Estate are required to present their claims within four months after the published notice, or within 60 days after mailing or other delivery of this notice, whichever is later, or the claims will be forever barred. (See A.R.S. § 14-3803(A), copy attached). Claims must be presented by delivering or mailing a written statement of the claim to the Personal Representative at _________________________________(Address)

DATED this ____ day of _____, 2006.

____
[Name of PR]

____
Robert E. Ciancola (012451)
Attorney for Personal Representative

[name and address of counsel]
Attorney for ______________

SUPERIOR COURT OF ARIZONA, MARICOPA COUNTY

In the Matter of the Estate of **JAMES DOE**, Deceased	)))))	**Case No. PB_____________** **CLAIM AGAINST ESTATE**

The undersigned, ________________________________, states as follows:

1. The name and address of the claimant are:______________________

____.

2. The above Estate is indebted to claimant in the amount of $______.

3. The basis of the claim is: _______________________________________

____.

[4. The claim is not yet due. It will become due on ___________, ___, 20___.]

[5. The claim is contingent upon: _____________________]

[6. The claim is secured by the following described property:
____]

DATED this ____day of ___________________, 20___.

____
[Name of Claimant]
[Address]

Robert E. Ciancola (Bar No. 012451)
8655 Via de Ventura Ste G221
Scottsdale AZ 85258
(480) 346-1080
Attorney for ______________

SUPERIOR COURT OF ARIZONA, MARICOPA COUNTY

In the Matter of the Estate of **JAMES DOE**, Deceased	)))))	**Case No. PB_____________** **PETITION FOR ALLOWANCE OF CLAIM**

COMES NOW ______________________________________, a creditor of this estate, and petitions this Court for an order allowing Petitioner's claim against the estate in the amount of $ ________________ and states as the basis for its petition:

1. Petitioner's claim in the amount of $______________ was properly presented to the Personal Representative on ___________________. A copy of said claim is attached hereto..

2. Petitioner's claim is a valid debt of the Estate, and is for the provision of the following property/services rendered to the decedent [estate]: ________________
____

3. Petitioner's claim is due owing to the Petitioner and has not been barred by lapse of time or otherwise..

4. The claim has been [partially] disallowed by the Personal Representative.

WHEREFORE, Petitioner requests that the Court, after notice and hearing, enter an order allowing the claim in full.

DATED this ______ day of _______________________, 20______.

____
[Name of Petitioner]
[Address]

STATE OF ARIZONA)
COUNTY OF MARICOPA) ss

____________________________, being duly sworn, states as follows:

That [he/she] is the __________________ of ___________________, the Petitioner in the foregoing Petition; and that the statements in the Petition are accurate and complete to the best of [his/her] knowledge and belief.

____
[Name of Officer Acting on Behalf of Petitioner]

SUBSCRIBED AND SWORN TO before me this ___ day of________, 20___, by ________________________.

____
Notary Public

Robert E. Ciancola (Bar No. 012451)
8655 Via de Ventura Ste G221
Scottsdale AZ 85258
(480) 346-1080
Attorney for Personal Representative

SUPERIOR COURT OF ARIZONA, MARICOPA COUNTY

In the Matter of the Estate of **JAMES DOE**, Deceased	)))))	**Case No. PB_____________** **PETITION FOR INSTRUCTIONS**

COMES NOW ___________________, Personal Representative of this estate, by and through counsel undersigned, and petitions this Court for an order of instructions allowing or disallowing, or allowing in part, the claim made against the estate by __________________ and states as the basis for this petition:

1. Petitioner's was appointed Personal Representative of this estate in [formal/informal} proceedings on ___________________.

2. On ________________, [name of creditor] filed a claim against the estate alleging that [he/she/it] provided property and/or services to the decedent [estate] and is owed the sum of $ ________________. A copy of said claim is attached hereto..

3. The claim has not been barred by lapse of time or otherwise.

4. On _______________, the Personal Representative mailed a notice to Claimant [allowing/disallowing] the claim [in the amount of $_____________]

5 Petitioner requests a hearing before this court whereat the Claimant and other interested parties in the estate may state their positions, and for the Court to then issue an order allowing the claim in whole or in part or disallowing the claim.

DATED this ______ day of _______________________, 20______.

____
Robert E. Ciancola
Attorney for Personal Representative

Robert E. Ciancola (Bar No. 012451)
8655 Via de Ventura Ste G221
Scottsdale AZ 85258
(480) 346-1080
Attorney for Personal Representative

SUPERIOR COURT OF ARIZONA, MARICOPA COUNTY

In the Matter of the Estate of **JAMES DOE**, Deceased	)))))	**Case No. PB_____________** **NOTICE OF DISALLOWANCE OF CLAIM**

TO: ____

____

____

You are hereby notified that your claim against the above Estate in the amount of $_________ has been disallowed.

DATED this _____ day of ___________________, 20___.

____
[Name of PR]
[Address]

____
Robert E. Ciancola
Attorney for Personal Representative

Robert E. Ciancola (Bar No. 012451)
8655 Via de Ventura Ste G-221
Scottsdale, AZ 85258
(480() 346-1080
Attorney for Personal Representative

SUPERIOR COURT OF ARIZONA
MARICOPA COUNT

In the Matter of the Estate of __________________, Deceased	Case No.: PB___________ **DEED OF DISTRIBUTION**

The undersigned Personal Representative, in order to make distribution of the property of this Estate in compliance with Title 14 of Arizona Revised Statutes, hereby assigns, transfers and releases to ______________________, a distributee of the Estate, whose address is _____________________________ _____, all right, title and interest of decedent in and to the following described property:

DATED this ____ day of __________________, 20_____.

____

Name of Personal Rep
[Address]

STATE OF ARIZONA)
COUNTY OF MARICOPA)ss.

The foregoing instrument was acknowledged before me this ___ day of ________________, 20_____, by ____________________, as Personal Representative of the Estate.

____
Notary Public