

Corporation Basics

Asset ownership is the key to determining what assets are subject to probate, and therefore subject to creditor claims of the estate. As a general rule, only assets that are part of the "probate estate" are subject to probate court proceedings and creditor claims. It is easier to define the probate estate by first explaining what assets are not a part of the probate estate. Non-probate assets are those that pass by operation of law or under the terms of a contract:

- a. By operation of law. This category includes assets held by two or more persons in joint tenancy (which includes a "right of survivorship") and property held by married couples as community property with a right of survivorship, as well as accounts and securities held with a beneficiary designation, such as "in trust for" or "payable on death to." The laws related to non-probate transfers are contained generally in NRS 111.700. More specifically, Nevada law permits a landowner to make a "deed upon death", which is called a "transfer-on-death deed", a "beneficiary deed", or a "deed on death". [NRS 111.655 et seq.]
- b. Under the terms of a contract. This includes various contracts that permit the designation of one or more beneficiaries, such as life insurance, retirement accounts (including IRAs, Keogh accounts, and qualified plan benefits), other retirement benefits, annuities, and some buy-sell agreements related to business entities.
- c. Excluded Items. Some assets that would normally be non-probate assets sometimes become part of the probate estate. This happens if the estate is designated as the beneficiary under a contract, or if the person who would otherwise receive something by operation of law or under a contract files a disclaimer, waiving the right to receive the asset. Disclaimed assets pass as if the disclaimant were deceased, and if there is no alternate person who takes under that situation, the asset will become part of the probate estate.

The "probate estate" includes all assets not passing by operation of law or under the terms of a contract. In other words, the probate estate consists of assets for which there is no co-owner with a right of survivorship and for which there is no beneficiary designation.

1. VALIDATING CLAIMS

Notice to Creditors

The Personal Representative is required to provide notice to all creditors of the estate.

This is done in two ways.

1. The Personal Representative must publish a Notice to Creditors. The notice must be published three times, with at least 10 days between the first and the last publication. NRS 155.020(1)(b).
2. The Personal Representative must mail a copy of the Notice to Creditors to the creditors whose names and addresses are readily ascertainable. NRS 155.020(4).

The publishing of the Notice to Creditors starts the “creditor period,” the time in which a creditor has to file a claim with the court clerk against the estate. The creditor period runs for 90 days from the first publication date. If a creditor is discovered after the first publication and mailed notices to the known creditors, the Personal Representative must still mail a copy of the Notice to Creditors to the newly discovered creditor. This newly discovered creditor must file their claim within 30 days from the mailing, or the expiration of the 90 creditor period, whichever is longer. NRS 147.040.

The creditor period is shortened to 60 days for a Summary Administration probate. NRS 147.040(4).

The form of the notice to be published must be in substantially the form as provided in NRS 155.020(4):

NOTICE TO CREDITORS

Notice is hereby given that the undersigned has been appointed and qualified by the (giving the title of the court and the date of appointment) as personal representative of the estate of _____, deceased. All creditors having claims against the estate are required to file the claims with the clerk of the court within ____ (60 or 90) days after the mailing or the first publication (as the case may be) of this notice.

Dated _____

Payment of Valid Claims

Despite what many heirs and beneficiaries wish to believe, one of the purposes for the probate process is to ensure that a decedent’s debts are paid. Therefore, one of the duties of the Personal Representative is to pay the valid claims and debts of the estate. While an heir or beneficiary is the ultimate distributee of the estate, NRS 147.195 provides that creditors have a higher priority to estate assets than heirs and beneficiaries. NRS 151.010 provides that even when a partial distribution will be made to an heir or beneficiary before the estate is closed, such distribution cannot be made unless sufficient security is first provided to ensure that the debts of the estate will be satisfied.

A decedent may pass away with many debts and obligations, but, only valid claims filed

with the court clerk are required to be satisfied. Claims that are barred on some legal or factual basis are not required to be paid by the estate. A claim may be barred for many different reasons, including, but not limited to: statute of limitations, statute of frauds, other equitable doctrines, or not being filed timely (60 or 90-day creditor period).

For example, a claim which is barred by the statute of limitations must not be allowed or approved by the Personal Representative or the court. NRS 147.090. Also, claims that are not filed timely are barred forever, and the personal representative is not even required to allow or reject a claim that was not timely filed. NRS 147.110(3).

Claims that are for \$250 or more must be supported by an affidavit that states:

- i. The amount is due.
- ii. No payments have been made that have not already been credited.
- iii. There are no offsets to the claim.

Additionally, claims founded on a written instrument or secured by a mortgage or lien must include a copy of the instrument or the mortgage or lien. Any claim that is filed with defects risks being rejected by the personal representative and not being satisfied by the estate.

When a claim is filed, the personal representative must assess each claim and determine if the claims are valid. This may require an analysis of other areas of law. At times, it may be advisable for a personal representative to retain separate counsel to advise and/or represent them in certain creditor issues that arise.

Mortgage holders have an exception to the requirement to file a claim. A mortgage holder may bring an action to enforce the mortgage against the mortgaged property of the estate without filing a claim, but the action is limited to just the property secured by the mortgage. If the mortgaged property is insufficient to satisfy the mortgage holder's claim, then the mortgage holder would have to file a timely creditor's claim for the deficiency. NRS 147.150.

Filing Deadlines

While the personal representative is required to provide notice to creditors of the probate proceeding and the applicable creditor deadlines, creditors are required to file their claims with the court clerk within the 90-day creditor period (60-day creditor period for a Summary Administration). If a creditor fails to file their claim within the creditor period, then the claim is forever barred. NRS 147.040(3). This is a strict deadline, and even missing it by one day will forfeit the creditor's right to collect against the assets of the estate.

In order to file a timely claim, a creditor's claim must actually be **filed** with the court

clerk. NRS 147.040(3). Under a strict interpretation of the statute, mailing the claim to the personal representative or to the attorney for the personal representative is not sufficient.

The public policy behind the short and strict deadline is to allow for the prompt and efficient administration of a decedent's estate. This enables the decedent's final affairs to be wound down in a reasonable amount of time so that the outstanding issues can be properly addressed and the ultimate distributions paid to the heirs or beneficiaries.

As outlined above, all known creditors must be given specific notice. If the personal representative does not mail notice to known creditors, then the creditor period does not run against such creditors because known creditors have until the expiration of the creditor period (90 or 60 days), or 30 days after the mailing of the notice, whichever is later. If notice has not been mailed to a known creditor, then the 30-day period does not begin to run against that creditor.

Allowing and Rejecting Claims

A claim should be supported by sufficient facts, supporting documentation, or other information to justify the claim. If a claim is not supported by sufficient evidence, and the personal representative is not able to confirm the validity of the claim, a creditor runs the risk of having the claim rejected. A personal representative must examine each of the claims that have been filed timely. Within 15 days of the expiration of the creditor period, the personal representative should allow, reject in part, or reject in whole the claim of a creditor. Once the claim is allowed or rejected, the personal representative should either endorse each claim with the allowance or rejection, or file a notice of the allowance or rejection. NRS 147.110(1).

If a claim is allowed, then it will be ranked among the debts of the estate and other claims allowed, and will be paid from the assets of the estate in the normal course of administration. NRS 147.120.

If a claim is rejected (in whole or in part) by the personal representative, the personal representative should immediately notify the creditor in writing of the rejection. The notice of rejection should be sent to the creditor's mailing address by registered or certified mail. The creditor then has 60 days from the date of the notice to bring suit in the proper court against the personal representative to determine whether a claim is due. If the creditor is successful, and the claim is determined to be valid, then the estate could be liable to the creditor for the costs the creditor incurred in pursuing the claim. NRS 147.190. If the creditor fails to file suit within 60 days of the notice of rejection, the claim is forever barred. NRS 147.130.

If a personal representative refuses or neglects to endorse the allowance or rejection of a claim within 15 days of the expiration of the creditor period, the claim is deemed rejected. However, the personal representative may later allow the claim at any time before the final accounting. NRS 147.110(2).

While a claim will be deemed rejected automatically after 15 days if no allowance or rejection is filed for a claim, the 60-day time period will not begin to run until notice is actually sent to the creditor that its claim has been rejected. NRS 147.130(1). A personal representative should make sure to provide notice to a creditor as soon as possible if the personal representative believes that a filed claim is not valid. The personal representative may even file the rejection while the creditor period is still open, it is not necessary to wait until the creditor period has expired.

Compromising Claims

After the creditor period has expired, and the personal representative is aware of each claim that will need to be satisfied out of the estate, the personal representative may negotiate with the creditors to see if the creditor is willing to accept a discounted amount as payment in full. Depending on the type of claim and the creditor involved, some creditors may be willing to settle for a lesser amount. If a settlement is reached to satisfy a creditor's claim as payment in full, the personal representative should seek court approval to take such action, especially if the settlement requires payment of the agreed amount prior to final distribution of the estate. NRS 147.180.

Insolvent Estate

When an estate is insolvent because there are insufficient estate assets to satisfy all of the creditor claims filed, then the transferees of non-probate assets may be liable to satisfy the claims. NRS 111.779. Non-probate transfers can include lifetime transfers to an intervivos trust, those by operation of law (e.g. right of survivorship), or pursuant to the terms of a contract (e.g. beneficiary designation). A transferee may only be liable up to the value of the non-probate transfers received. NRS 111.779(2).

Generally, a creditor must pursue an action against a non-probate transferee within 1 year of the decedent's death, or, for a creditor whose claim was rejected by the personal representative, within 60 days of the allowance of the claim by the probate court. NRS 111.779(10). Because of this potential liability, a trustee of a trust would do well to publish a Notice to Creditors pursuant to NRS 164.025, even if a probate is not required. After the expiration of the trust's 90-day creditor period, all claims against the trust estate that were not filed are forever barred. NRS 164.025(3).

2. PRIORITY OF CREDITOR CLAIMS

A personal representative's duties include paying the proper debts and claims of the estate. In order to pay the various debts and claims, the personal representative must first determine the priority of the various debts and claims, and the proper timing of the payments. NRS 147.195 provides the classes of the debts and claims of the estate, listed in order of priority:

1. Expenses of administration.
2. Funeral expenses.
3. The expenses of the last illness.
4. Family allowance.
5. Debts having preference by laws of the United States.
6. Money owed to the Department of Health and Human Services for Medicaid.
7. Wages to the extent of \$600, of each employee of the decedent, for work done or personal services rendered within 3 months before the death of the employer.
8. Judgments rendered against the decedent in his or her lifetime, and mortgages in order of their date.
9. All other demands against the estate.

The personal representative can pay classes 2-7 as soon as sufficient money is available and a sworn statement of the amount due is provided; a court order is not required. NRS 150.230. Additionally, before the payment of classes 2-7, the personal representative should set aside sufficient money to pay class 1, the expenses of administration (attorney fees and costs, personal representative fees, accountant fees, etc.). The administrative expenses have priority to all other classes, but often require court approval before payment. The personal representative is not required to pay any other debts until ordered by the court, which in most cases, is at final distribution. NRS 150.230(2).

While not required, the personal representative is also permitted to pay debts of the estate of \$500 or less if: (a) the claim has been properly filed, (b) the debt is legally due; and (c) the estate is solvent. NRS 150.230(3).

Ideally, an estate will have sufficient funds to cover all debts and expenses of the estate, and to pay the heirs or beneficiaries an amount that they are expecting. However, there are times when an estate does not have sufficient assets to pay all of the debts and expenses, let alone the heirs or beneficiaries. When this occurs, creditors will receive a pro rata portion of the assets available for distribution based on class priority.

When paying the creditors a pro rata share, each creditor in a class is treated equally and must be fully satisfied before moving on to the next class. If there are insufficient assets to fully satisfy all of the creditors of a class, then each creditor of that class will receive a pro rata share

of the assets available. NRS 150.240(2). The personal representative should petition the court for approval of the pro rata distributions to be made.

3. SELLING PROPERTY TO SATISFY CLAIMS

At times, an estate may be solvent, but with insufficient liquid assets to satisfy the filed claims. Because the value of the estate exceeds the value of the claims, the creditors are entitled to payment in full. However, this can pose a problem for a personal representative when the estate assets are not cash or some other asset easily converted to cash. When this occurs, the personal representative will likely be required to liquidate or sell some of the assets of the estate in order to raise the necessary cash to satisfy the creditor claims.

When a personal representative is obligated to sell estate assets to raise the necessary cash in order to satisfy creditor claims, then the personal representative is required to follow certain steps to ensure that the property is being sold at fair market value. The following process applies to real property under both a general administration or a summary administration, and to personal property under a general administration:

1. The personal representative must publish notice of the sale in a newspaper published in the county where the proceedings are pending. NRS 148.190 and NRS 148.220.
 - a. The notice must be for 2 weeks, consisting of three publications 1 week apart.
 - b. If the personal representative is the sole beneficiary or heir of the estate, or if all beneficiaries or heirs of the estate consent in writing, the court may waive the requirement of publication. NRS 148.190(3) and NRS 148.220(2).
2. The personal representative must petition the court to confirm the sale. NRS 148.195 and NRS 148.260.
 - a. The court will confirm the sale only if it is satisfied that the offer represents fair market value, and an appraisal of the property (completed within the last year) is provided.
 - b. If the personal representative is the sole beneficiary or heir of the estate, or if all beneficiaries or heirs consent in writing to the sale without an appraisal, the requirement of an appraisal can be waived. NRS 148.195(2) and NRS 148.260(2).
3. When real property is being sold, at the hearing on the personal representative's petition to confirm the sale, the court will accept bids from any other party who offers to purchase the real property for more than the current offer.
 - a. The initial bid must be:

- i. 5% greater than the current bid if the real property is being sold for less than \$100,000; or
- ii. \$5,000 greater than the current bid if the real property is being sold for \$100,000 or more.

While these procedures may seem cumbersome and will slow down the sale process, they ensure that the property is sold for fair market value and ultimately protects the personal representative against accusations from heirs or beneficiaries claiming that the personal representative breached their fiduciary duties by selling property below market value.

Independent Administration

If a personal representative does want to sell property without the publication requirements and court confirmation, the personal representative can petition to administer an estate under the Independent Administration of Estate Act pursuant to NRS 143.300 et al. When a personal representative administers an estate under the Independent Administration of Estate Act, the personal representative is generally only required to give a 15-day notice of the sale to the interested parties. Court confirmation and/or involvement will not be required unless an interested party objects to the terms of the sale.

Abatement

When there is insufficient cash to pay creditor claims, the personal representative must determine what assets to sell and in what order. Abatement is the process of reducing gifts to beneficiaries when there is insufficient cash to pay the debts and expenses of an estate. NRS 151.163 provides that unless otherwise expressed in a Will, gifts to beneficiaries that are not related to the decedent abate first. Only after all gifts to non-related individuals are abated, is property abated that would go to the family. Abatement occurs on a pro rata basis. Abatement does not reduce secured claims.

4. TAX CLAIMS AND LIENS

When an estate owes taxes to the IRS, the personal representative must determine the priority of the tax claim against the estate. According to NRS 147.195, taxes would fall into class 5, debts having preference by laws of the United States. However, federal law will control when a federal tax claim competes with any interest under state law. Therefore, there is some question as to whether or not the IRS would be bound by Nevada's specified priority of classes.

While there may be some debate as to the exact preference of a tax claim, the IRS does allow certain expenses and claims to have a priority over a tax claim. These include reasonable and necessary administrative expenses, funeral expenses, and a family allowance. However, the

expenses of a decedent's last illness are a debt of the decedent are not entitled to priority under section 3713. Rev. Rul. 80-112, 1980-1 C.B. 306.

If a decedent had a tax lien at the time of death, the tax lien is not extinguished and is preserved and enforceable against the estate. The creditor period does not apply to the IRS, and the IRS is not required to file a timely creditor claim.

A personal representative's duties include filing tax returns and paying the taxes for all income, estate, and gift taxes due. A personal representative should determine what taxes are due prior to making any other payments to satisfy debts or claims against the estate. If a personal representative satisfies other claims against the estate before paying all taxes due, and the payment of those claims results in the estate being unable to pay the federal tax due, then the personal representative may be personally liable up to the amount paid in satisfaction of other claims and debts. See IRC § 6901; 31 U.S.C. § 3713.

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