



**KANSAS BAR
ASSOCIATION**

**PART THREE – CHAPTER 2
CREDITOR RIGHTS**

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§ 3.2.1 SCOPE OF CHAPTER

This chapter covers notice to creditors and their rights against estates and trusts. It does not cover Medicaid reimbursement issues, as those are thoroughly covered in the KBA's Long-Term Care Handbook.

§ 3.2.2 NOTICE TO CREDITORS

“Every petitioner who files a petition for administration or probate of a will shall give notice thereof to creditors, pursuant to an order of the court, and within 10 days after such filing.” K.S.A. 59-709(a). Requirements of the notice are further set forth at K.S.A. 59-2236. The notice is to be “to all persons concerned” and shall state the filing date of the petition for administration or probate of a will. The notice must be published three consecutive weeks and shall actually be given to “known or reasonably ascertainable creditors” prior to expiration of the four-month period for filing claims. K.S.A. 59-709(b).

Known or reasonably ascertainable creditors are entitled to actual notice of the claim filing deadline. *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988). In an unpublished opinion, the Kansas Court of Appeals held that the executor has a duty to search “reasonably available public records.” *Federal Land Bank of Wichita v. Custer*, No. 80,620 unpublished opinion filed Dec. 10, 1999 (citing Justice Schroeder’s concurring opinion in *In re Estate of Barnes*, 212 Kan. 502, 522 (1973), involving a search for heirs). Mere conjectural claims are not entitled to actual notice. *Pope*, 485 U.S. at 490. See also *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318 (1950). Impracticable and extended searches for creditors are not required. *Id.*; but see *Matter of Estate of Kopely*, 159 Ariz. 391, 394, 767 P. 2d 1181, 1184 (1988), where the court stated that a party shown in a police report of an accident in which the decedent was killed may have been a “readily ascertainable creditor” and remanded for a determination.

If proper notice is not given, the personal representative and the heirs, devisees and legatees may be liable. *In re Estate of Newland*, 240 Kan. 249 (1986); *In re Estate of Barnes*, 212 Kan. 502 (1973). See *Martin v. Hanschu*, 241 Kan. 521 (1987), where the personal representative was held liable, in a pre-*Pope* case, to creditors who filed claims. It would be relatively easy to extend this to a creditor entitled to notice who did not get it.

QUERY: Could an attorney who fails to advise the personal representative to send a required notice also become liable? What if the attorney causes notice to be sent to a conjectural claimant who might not have thought to file a claim, but for receiving notice? Would giving notice constitute acknowledgment of a claim or encourage a groundless claim? It seems best to err on the side of giving notice (and then disputing an inappropriate claim). Courts should not find against attorneys attempting to comply with *Pope*’s due process obligations.

PRACTICE TIP: If you discover a creditor and there is still time to file a claim (even if it is a short time), you should notify the creditor. K.S.A. 59-2239(1) provides at least a 30-day period after the giving of notice to known or reasonably ascertainable creditors. There is no other Kansas

CREDITOR RIGHTS

statute or case law further extending the claim filing deadline in these circumstances. This is presumably consistent with the desire to complete probate in a timely manner.

TRUSTS: Trustees should carefully consider whether to publish notice to creditors. K.S.A. 58a-818 indicates that a trustee with a "duty or power" to pay a deceased settlor's debts "may" give notice to creditors in a similar format as for estate fiduciaries. The claim deadline is only effective as to the trust property and the trustee (not as to estate property and the personal representative) after four months of publication (but at least 30 days from the giving of actual notice to known or reasonably ascertainable creditors). Tort claimant statutes of limitation are not affected, but they cannot affect trust distributions unless a timely claim was presented. If the trustee publishes notice after the K.S.A. 59-2239(1) six-month self-executing statute of limitation has run (which K.S.A. 59-709(c) indicates is not necessary), will the publication resurrect the right to file a claim? What if the trustee does so before two months run, so that the four-month period lapses before the six-month period to commence administration runs, and creditors are incorrectly led to believe they are too late to commence administration? The better practice would be to let the personal representative (executor or administrator) of the estate, if there is one, publish notice. If there is not an estate that will be commenced within six months of death, it would be better to let the six-month self-executing statute of limitation expire.

An executor may have a duty to collect from a trustee in order to pay estate creditors. K.S.A. 33-101 provides that self-created trusts are void as to creditors. K.S.A. 33-102 provides that trusts created to hinder, delay or defraud creditors are void. K.S.A. 58a-505 references K.S.A. 33-101 *et seq.* and further provides for a trust settlor's creditors to be paid at death. K.S.A. 58a-105(a)(5) and (12) prohibit contrary trust terms. This may cause a conflict of interest for an attorney representing both the executor and trustee if their interests are adverse.

§ 3.2.3 CREDITOR DEADLINES

If estate administration is commenced, the claim filing deadline is four months after the first publication of notice to creditors. K.S.A. 59-2239(1)(a).

If estate administration is not commenced under K.S.A. 59-2219 (administration) or K.S.A. 59-2220 (probate of will) within six months of death, creditors will be barred. K.S.A. 59-2239(1). Notice to creditors is not necessary in this situation pursuant to K.S.A. 59-709(c). This is a self-executing statute of limitation that does not impair due process rights to notice. That is because death, plus time, terminates the right; and deprives the court of jurisdiction. *See In re Estate of Tracy*, 36 Kan. App. 2d 401, Syl. ¶¶ 4-6 (2006). *See also Pope*, 485 U.S. at 485-87; *In re Estate of Decker v. Farm Credit Services of Mid-America, ACA*, 684 N.E.2d 1137, 1139 (Ind. 1997); *Martel v. Stafford*, 603 A.2d 345 (Vt. 1991). In *Texaco, Inc. v. Short*, 454 U.S. 536 (1982), the U.S. Supreme Court indicated that there is no duty to notify a potential plaintiff that the statute of limitation is about to expire. Claims of persons under disability (whether incapacitated, a minor or otherwise) are not excepted from the nonclaim statute. *Hoppas v. Bowman*, 167 Kan. 761 (1949).

- Kansas probate procedures that can rely on the six-month bar are the following:
- Determination of descent (K.S.A. 59-2250 *et seq.*)
- Refusal to grant letters (K.S.A. 59-2287 *et seq.*)
- Informal administration (K.S.A. 59-3301 *et seq.*)
- Summary administration, when there are no nonexempt assets in excess of debts (K.S.A. 59-1507)

Since there is no estate against which to file a claim under K.S.A. 59-2239(1), creditors will not be able to recover against a decedent's property that passes by:

- Remainder (*Windscheffel v. Wright*, 187 Kan. 678, 690 (1961))

CREDITOR RIGHTS

- Joint tenancy (*See* K.S.A. 58-501)
- Payable on death (K.S.A. 9-1215 & 17-49a08, subject only to Kansas medical assistance recovery claims under K.S.A. 39-709(g))
- Transfer on death (K.S.A. 59-3501 *et seq.*, subject only to Kansas medical assistance recovery claims under K.S.A. 39-709(g))
- Life insurance (K.S.A. 40-414. *See also* K.S.A. 40-441 exempting life insurance paid to a testamentary trustee from the deceased policy owner's creditors)
- Retirement plans (K.S.A. 60-2308(b))
- Other nontestamentary transfers (*See* K.S.A. 59-3513)

COMMENT: It is ironic that no notice may be constitutional if death is the triggering event, but that publication notice may be constitutionally insufficient as to known creditors if there is a full-scale court proceeding. Consequently, no notice may be constitutionally superior to publication notice depending on the circumstances.

Publication notice does not extend other statutes of limitation. For example, if a tort statute of limitation is set to expire the day after death of the tortfeasor, it is not extended for four more months from the publication date. In fact, a statute of limitation on a tort claim is not affected (lengthened or shortened) by the probate nonclaim statute. K.S.A. 59-2239(2). A tort claimant's recovery shall not affect distribution of estate assets unless a timely claim (or action under K.S.A. 59-2238(2)) was filed. K.S.A. 59-2239(2). This would not preclude recovery from the decedent's liability insurance, however.

PRACTICE TIP: Do not include a provision in a will requiring payment of "all my just debts." While this is historical boilerplate in wills, its use should be stopped as it may lead to unanticipated results for the testator, devisees and legatees. This is because K.S.A. 59-2239(1) states that "the provisions of the testator's will requiring the payment of a demand exhibited later shall control." Although two older Kansas cases (*Collamore v. Wilder*, 19 Kan. 67, 82 (1877); *Jordan v. Young*, 148 Kan. 829, 835 (1938)) hold that the boilerplate is to be given no real effect, the statutory language was not adopted until 1939 and no case has since interpreted its effect. The risk is that such testamentary language could abrogate the four-month nonclaim period by turning the creditor into a legatee.

Another problem could arise from K.S.A. 59-618, making any person who withholds a will liable to innocent beneficiaries for damages and attorney fees. This could be a problem if the plan is to wait out the six-month self-executing statute of limitation.

Although most people probably prefer to pay their legitimate debts, they probably also want to maximize benefits for their devisees and legatees. Unless the testator consciously wants to forego the six-month self-executing statute or the four-month nonclaim period, it is advisable not to include such a provision.

While it may be appropriate to state the source of payment (e.g., the residue) for estate debts, this is certainly not necessary in most cases (and may even cause confusion as to the intent if not properly worded). K.S.A. 59-1405 sets forth the priority order absent a contrary will provision.

When a trust is being used as the primary dispositive instrument, it may be appropriate to state the source for payment of debts (as authorized by K.S.A. 58a-505(a)(3)), but such a clause should be carefully drafted to avoid an argument that a creditor is to be treated as a beneficiary. Language restricted to payment of "legally enforceable debts" from a particular portion of the trust should be sufficient to avoid the creditor's transformation to beneficiary status.

CREDITOR RIGHTS

§ 3.2.3(a) Exhibiting Creditor Claims

A claim, or demand as referred to in the Probate Code, is filed by filing a verified petition for its allowance in the proper district court. K.S.A. 59-2237(a). A copy shall be provided to the personal representative. K.S.A. 59-2237(a). A civil action commenced against the personal representative shall be considered a legally exhibited demand when process is served on the personal representative. K.S.A. 59-2238(2). All probate applications shall be signed and verified. K.S.A. 59-2201. Demands must: (1) identify the petitioner and his or her interest in applying for relief; (2) state the jurisdictional facts; (3) include the facts, in ordinary and concise language, showing that the petitioner is entitled to the relief sought; and (4) include a prayer for relief. K.S.A. 59-2202. See K.S.A. 59-2202 for other petition requirements.

PRACTICE TIP: On the face of the petition, the creditor must set forth the details of the claim with as much specificity as possible to permit the personal representative to understand clearly what the creditor seeks from the estate. The policy behind the demand statutes and nonclaim provisions is “to protect the executor or executrix from stale claims and to enable him or her to close the estate and distribute the assets without unnecessary delay.” *In re Estate of Wolf*, 32 Kan. App. 2d 1247 (2004) (citing 3 Samuel E. Bartlett, *Kansas Probate Law and Practice* § 1316, at 190 (rev. ed. 1953)). In *Wolf*, the Court of Appeals denied, as out of time, a demand for attorney fees to the prevailing party on the basis that the claim made no explicit mention of attorney fees even though the prevailing party provision was part of an agreement that was the subject of the contest and the agreement was an exhibit attached to the original petition. The demand requirement is intended to give the executor “facts and circumstances to understand the exact nature of the claim and to aid in his or her determination as to whether to allow or contest the claim.” *Id.*

Estate attorneys should scrutinize claims for proper authorization and verification (and if there has been an assignment of the claim, proper evidence thereof). While K.S.A. 59-2204 also seems to require timely setting for hearing, this appears inapplicable to claims (because K.S.A. 59-2237 states that demands are “deemed duly exhibited from the date of the filing of the petition”). *In re Estate of Kruse*, 170 Kan. 429, 434 (1951), indicated that a claim was not filed too early where an administrator had not yet been appointed or had not published notice to creditors. It also noted the probate code did not require a claim to be provided to the personal representative, but that requirement has now been added to K.S.A. 59-2237.

The court on its own may, or upon request of the creditor or personal representative the court shall, schedule a hearing on the claim and direct the manner and to whom notice shall be given. K.S.A. 59-2237(a). Any demand not exceeding \$5,000 (other than by the personal representative) that is duly itemized and verified may be paid without petition, notice of hearing and court allowance. If a written defense is timely filed to a petition for final settlement, taking issue with the claim payment, the burden of proof will be on the personal representative to establish that the debt was due and owing. K.S.A. 59-2237(c). Court supervision is not required for payment of creditors’ claims under the Kansas Simplified Estates Act. K.S.A. 59-3204(b). Verification of a claim may be deemed prima facie evidence of its validity unless a written defense is filed. K.S.A. 59-2237(b). (Generally, proof is required in probate proceedings when there is no verification. K.S.A. 59-2213.)

PRACTICE TAX TIP: Debt cancellation is generally taxable. The federal government and most financial institutions are required to provide the absolved debtor a Form 1099-C or 1099-A if the cancelled debt exceeds \$600. Whether the 1099 form is received or not, the debtor should report the cancelled debt on Form 1040 or 1041. I.R.C. Sec. 61(a)(12). See I.R.C. § 108 for exceptions. See *E. Bankhead Estate*, 60 T.C. 535 (1973); *M.M. Miller Estate*, 37 T.C.M. (CCH) 1547 (1978); *Carl T. Miller Trust*, 76 T.C. 191 (1981); *Payne*, TC Memo 2008-66 (2008).

§ 3.2.4 SURVIVAL OF PRE-DEATH CLAIMS

Any action pending against a decedent at death, which by law survives against the personal representative, is considered as exhibited from the time of its revival in the court where it was pending. K.S.A. 59-2238(1).

CREDITOR RIGHTS

Survival of actions is controlled by K.S.A. 60-1801. Substitution of the personal representative for the decedent is governed by K.S.A. 60-225.

Guaranteed and contingent debt claims resulting from liability as a surety, guarantor or indemnitor are subject to the nonclaim statute. K.S.A. 59-2239(1). In *In re Estate of Wolf*, 279 Kan. 718 (2005), a claim for attorney fees was barred due to not being included in the creditor's original timely filed claim..

QUERY: Is such a debt conjectural (and therefore not entitled to actual notice) if the primary obligor is not in default? You should check if the guaranty automatically comes due at the borrower's death. These and other contingent claims are to be determined by the court so "as not to delay closing of the estate, if that can be done with justice to the parties." K.S.A. 59-2241. The nature of any contingency shall be stated in the court's judgment. K.S.A. 59-2237(b). The court may allow demands, which are payable in the future, at a present value, or may order the estate to retain sufficient funds to satisfy the demand at maturity. A bond is also possible if the estate beneficiaries so offer. K.S.A. 59-2240. No preference is to be given to demands already due over those not yet due. K.S.A. 59-1301.

§ 3.2.5 COMPROMISE OF CLAIMS

Before a compromise settlement is approved, the court must find that the personal representative "exercised the utmost good faith with honesty, fair dealing and adequate information, and that the proposed compromise settlement is in the best interest of the estate." *In re Stahl*, 226 Kan. 48, 54 (1979).

§ 3.2.6 SECURED DEBTS

A secured creditor has the option of filing a claim for the full balance (and waiving any security) or exhausting the security and filing a timely claim for the deficiency. K.S.A. 59-1303; *Ram Co. v. Estate of Kobbeman*, 236 Kan. 751, 763-764 (1985). A secured creditor may inadvertently lose its security by filing a claim. See *In re Estate of Klein*, 166 Kan. 334 (1949). Nonestate assets securing other obligors need not be surrendered, however. *Farmers State Bank of Ingalls v. Friesen*, 15 Kan. App. 2d 132 (1990), review denied 248 Kan. 995 (1991).

Upon order from the court, a personal representative may pay all or any part of a mortgage, pledge, or other encumbrance without increasing the estate beneficiary's share. K.S.A. 59-1304.

§ 3.2.7 ASSET APPROPRIATION ORDER

K.S.A. 59-1405 requires that unless the will provides otherwise, a decedent's property shall be applied in the following order to payment of debts:

- Personal property not disposed of by will
- Real estate not disposed of by will
- Personal property in the residue
- Real property in the residue
- Property not specifically bequeathed or devised
- Property specifically bequeathed or devised

The property of each class shall be exhausted before resorting to the next class. All of one class shall contribute ratably if all the property of that class is not required for debt payment. The discharge or bequest, in a will, of any debt owed to the testator is not valid against the testator's creditors. K.S.A. 59-1204.

CREDITOR RIGHTS

§ 3.2.8 DEBT PAYMENT ORDER

If an estate is insufficient to pay all debts, claims of the United States government are to be paid first. 31 U.S.C. § 3713(a)(1)(B). The estate representative who fails to do so is personally liable. 31 U.S.C. § 3713(b).

Some cases hold that funeral and administration expenses have priority. *See, e.g., In re Halsey Elec. Generator Co.*, 175 F. 825 (D.N.J. 1909), *aff'd* 179 F. 321 (3d Cir. 1910), *cert. den.* 219 U.S. 587 (1911); *U.S. v. Weisburn*, 48 F. Supp. 393 (E.D. Pa. 1943). The federal government may, but does not have to, file a claim in the probate proceeding. *Viles v. Comm'r.*, 233 F.2d 376 (6th Cir. 1956); *U.S. v. Summerlin*, 310 U.S. 414, 416 (1940). The state of Kansas must timely file a claim in the probate proceeding to preserve the state's interests.

After the United States government is satisfied, assets of an insolvent estate are to be applied in the following order according to K.S.A. 59-1301:

1. Funeral expenses (as appropriate and reasonably necessary)
2. Medical assistance reimbursements under K.S.A. 39-709
3. Administration expenses (as appropriate and necessary) and last sickness expenses, including servants' wages (as reasonably appropriate and necessary)
4. Judgments rendered before death in priority order
5. All other demands (subject to preferences established by federal or Kansas law)

All orders approving claims shall show the classification. K.S.A. 59-2237(b). If the four-month claim filing period has not expired, the court may require a bond or other security form from a creditor before payment is made. K.S.A. 59-1302.

§ 3.2.9 INTEREST

Interest properly accrued pursuant to contract or law should be included as part of the allowed claim. It has also been recognized that post-allowance interest may also be appropriate in certain circumstances. *In re Conservatorship of L.M.S.*, 12 Kan. App. 2d. 725, 730 (1988). If a fiduciary "neglects to pay over the money in his or her hands, and by reason thereof the value of the estate is lessened, or unnecessary costs, interest or penalties accrue, or the persons interested suffer loss, the same shall be deemed waste and the fiduciary shall be charged in his or her account with the damages sustained." K.S.A. 59-1703.

§ 3.2.10 APPEALS

There is a 30-day deadline for an appeal of an order allowing or disallowing a claim, in whole or in part, when the amount in controversy exceeds \$5,000. K.S.A. 59-2401(a)(5). This is consistent with the amount that can be paid without a hearing under K.S.A. 59-2337. The Chapter 60 tolling provisions of K.S.A. 60-2103(a) apply to Chapter 59 proceedings, so that the appeal time does not run until 30-days after the filing of a journal entry ruling on a motion to alter or amend. *In re Guardianship of Sokol*, ___ Kan. App. 2d ___ (2008). *See also In re Estate of Burns*, 227 Kan. 573 (1980).

§ 3.2.11 Kansas Judicial Council Probate Forms

Title	Form No.
Petition for Allowance and Classification of Demand	1201
Order for Hearing	1202
Notice of Hearing	1203
Affidavit of Service	1204
Order Allowing and Classifying Demand	1205