Opportunities and Problems Under the Kansas Informal Administration Act

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About the Authors

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Informal administration is the newest probate procedure available to Kansas practitioners. It became effective on January 1, 1986, and is described in K.S.A. 59-3301, *et seq.*

Unlike simplified administration, which was adopted in 1975 and generally offered the same procedures as regular administration, informal administration created an entirely new procedure. This new procedure also differs from the other simple procedures, such as refusal of letters (available if probate assets are under $25,000) and an affidavit for certain personal property (available if probate assets are under $10,000), in that it has no dollar limitation. Further, unlike determinations of descent, which require at least an opening and closing step, informal administration is designed to be a one-step probate procedure.

Although condensed into a one-step procedure, informal administration contains, in an abbreviated form, the following aspects of regular probate: admitting a will to probate; filing an inventory and valuation; setting aside family allowances; determining how the property of the estate will be distributed; proving the debts of the decedent and determining the priority in which they will be paid; and establishing that Kansas inheritance tax has been paid.

A detailed discussion of informal administration procedure is beyond the scope of this article. It instead discusses how Kansas practitioners are using informal administration, the frequency of its use, the kinds of estates where it is used, and the problem areas encountered in its use.

The information upon which this article is based came from a 1991 survey of members of the Real Estate Probate and Trust Section of the Kansas Bar Association ("KBA") and practitioners who indicated to the KBA that their practices included probate matters. The survey asked questions about attorneys' use of and problems with informal administration over the five and one-half years it has been available. A total of 943 surveys were sent, and 226 were returned. Practitioners from 53 of the 105 Kansas counties returned surveys.

Although the survey may not be statistically accurate from a scientific standpoint, it nevertheless provides interesting insights into the use of and problems with informal administration. The discussion below reflects the conclusions drawn from the responses and comments to the KBA survey.

USE OF INFORMAL ADMINISTRATION

Slightly more than half of the attorneys returning the survey had used informal administration. Only one percent of the practitioners who had used informal administration had done so in an estate exceeding $600,000. Most used it in estates ranging from $25,000 to $100,000, but many used it in estates over $100,000. Informal administration was intended for use in uncomplicated estates, even though they may have significant value. The survey reflects that informal administration is being used in estates that have significant value, but not in estates that require a federal estate tax return.

Informal administration also appears to be used frequently when there is real estate and publicly traded securities, even though in those situations there are more difficult requirements regarding titles and transfers.

Although the surveys from those who had not used informal administration seldom explained why it had not been used, the authors believe the following reasons may account for its disuse: the practitioner has not attempted to use informal administration due to unfamiliarity with it; the practitioner has not had an estate that appeared appropriate for the procedure; or because the practitioner anticipated one or more of the problems subsequently described in this article.

PROBLEM AREAS

There were a number of problem areas mentioned by the attorneys responding to the survey. Not all of them can be discussed here, but those frequently encountered discussed below.

Circumstances Preventing Use of Informal Administration

One concern about using informal administration is when it should be used. The Informal Administration Act ("Act") contains no conditions for its use, except that it cannot be used when it is "not appropriate." Matters the Act suggests render informal administration not appropriate are contested matters, the need for administration, disagreement among beneficiaries, or other "appropriate circumstances."

The attorneys responding to the survey indicated a number of circumstances in which they did not use informal administration. The most common circumstances are listed below, in the order of frequency:

1. Property of the estate needs to be sold or dealt with right away;
2. Assets cannot be divided in kind and therefore need to be sold before the estate can be distributed;
3. The attorney cannot get the information needed to file the Kansas inheritance tax return (which must be filed before informal administration can be commenced) without having an executor or administrator appointed;
4. Kansas inheritance tax is due and no beneficiary is willing to pay the amount due out of his or her own pocket; and
5. The district court judge who would hear the probate matter is adverse to the use of informal administration.

This list indicates two of the main obstacles to making informal administration work: (i) a Kansas inheritance tax return must be filed and the tax paid prior to any filing of informal administration; and (ii) no one is designated with authority to sell or otherwise deal with property as an executor or administrator would be in regular administration.

Transfer Agents

Informal administration is designed so that the court order, which describes in some detail each asset that each beneficiary is to receive, is the document to be used to transfer the assets. There is no executor or administrator with letters testamentary or letters of administration (hereinafter "Letters") who is authorized to transfer assets to the beneficiaries.

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Consequently, one of the most common problems with informal administration is dealing with stock transfer agents for publicly traded corporations, who are more likely than not located outside of Kansas, and who obviously do not have firsthand knowledge of Kansas informal administration. A standard requirement for stock transfer agents before they will sell or retitle stock owned

by a decedent is certified Letters. Since Letters are not available with informal administration, the attorney has to educate the stock transfer agent about Kansas law. Normally this eventually occurs, but results in additional time and paperwork to accomplish the transfers.

Similar problems have occurred with title companies, life insurance companies, and motor vehicle departments.

Obviously, anything that increases the time and paperwork in informal administration runs counter to its purpose. One possible solution to this problem is to appoint an executor or an administrator and issue Letters, but not require that person to account to the court for any actions.

Bond Requirements

Informal administration requires a bond in two circumstances. First, the person designated by the court to pay debts and expenses of informal administration must file a bond equal to 125 percent of the amount of money authorized to be used for payment of debts and expenses. Second, if the estate is to be distributed before six months from the date of death, the distributees must give a redelivery bond with sufficient sureties in the amount of the value of the property distributed. Obviously, the first requirement is designed to protect both creditors and beneficiaries of the estate, and the second requirement apparently is to protect creditors of the estate or beneficiaries under another will.

Furthermore, a bond is not needed for creditors who are not listed in the petition . . .

The bond requirement is not onerous if a personal signature bond will be approved by the court. However, some Kansas judges always require a corporate surety bond, thereby increasing expense and paperwork, contrary to the purpose and intent of informal administration.

The bond requirement could, however, be solved. First, the Act could expressly permit a personal bond, or it could make the payor of debts and the distributee personally liable for the return of the distributed property without the necessity of a separate bond. Second, the bond requirement could be eliminated for the payor of debts and expenses since the court's order in informal administration requires the payor of debts and expenses to pay all creditors listed in the Petition for Informal Administration. Thus, such creditors should not need to be protected by a bond. If they are concerned about payment, they can file a petition for supervised administration before the expiration of six months from the decedent's death. Furthermore, a bond is not needed for creditors who are not listed in the petition, since they would need to file a petition for supervised administration in any event.

A problem could exist, however, if some of the creditors named in the court's order are paid by the payor of debts before the expiration of six months, and other creditors appear before the expiration of six months and the estate is not sufficient to pay creditors in the order of their priority. Although informal administration may create such a problem, requiring a bond for the payor of debts and expenses will not eliminate it. To require the payor of debts to wait for six months before paying debts and expenses would be contrary to informal administration's purpose of expediting the entire probate process. A possible solution to the problem of early payment of debts and subsequent creditors appearing might be to give the payor of debts and expenses statutory authority to require a refunding agreement from any creditor paid before the expiration of six months.

The third solution to the bond requirement is for distributees to commence informal administration after six months from the date of death. However, when there is a will for which probate must be commenced within six months to be valid, an obvious problem results. If carefully timed, however, the petition can be filed within six months, thus preserving the validity of the will, and the order then entered after six months.

Judicial Discharge

The Act contemplates no proceedings after the petition is filed and the order issued. There is no requirement that the payor of debts file any receipts and be discharged. Therefore, it would seem that the payor of debts would be discharged if, in fact, the debts specifically listed in the court order are paid. Cancelled checks would be proof of payment.

Apparently a few judges are requiring the payor of debts to make a report of debts paid and petition for discharge. Out of an abundance of caution, a significant number of the attorneys responding to the survey are obtaining receipts and filing cancelled checks with the court, and either obtaining a separate court order terminating informal administration and approving the payment of debts, or putting that language in the order granting informal administration itself.

The additional paperwork required for any filing of receipts or discharge obviously goes against the intent and purpose of the statute. Perhaps the best way to solve this problem would be to have the statute clearly specify that the payor of debts is automatically discharged upon payment of the specified debts, without the need for any filing with the court.

Miscellaneous Assets

Normally in the first month or so following the date of death, the attorney will decide which probate procedure to use. If informal administration is to be used, the entire proceedings may be completed within six months following the date of death. Because the Act requires the order to describe every asset with particularity, a problem may develop if assets are discovered after the informal administration proceedings have been completed.

Common examples would be an income tax refund for returns filed prior to the date of death and reimbursement from health insurance companies for medical bills paid by

the decedent prior to death. Whenever such items are received after informal administration has been filed, it becomes a practical problem to transfer them to the beneficiaries.

In some cases, the practitioner may be fortunate to have an existing checking account in the decedent's name, or jointly held with the decedent and someone else, into which payments can be deposited. In other cases, the holder or payor of the asset may accept an affidavit from all the heirs and beneficiaries consenting to have the payment distributed without a specific court order. In most circumstances, however, the practitioner will probably have no alternative but to prepare a petition and order amending the informal administration so that the new asset can be clearly described and the beneficiaries named.

Some practitioners have suggested a solution by including in the order a statement that the residuary beneficiaries will receive, in addition to specific assets, all other property in which the decedent had an interest at the time of death. There is a question about whether this works. The language of the Act states that all assets must be assigned with sufficient particularity to allow their transfer. From a practical standpoint, success may therefore depend on whether the payor or the holder of an asset insists on precise statutory compliance. The suggested solution probably would not work with real estate, but it may work, however, with checks and similar assets.

Having to amend the order and petition adds to the paperwork and thus the cost of the proceeding. One possible solution to this problem would be for the Act to permit the appointment of an executor or administrator to make all transfers to the beneficiaries, so that after-identified assets could be collected and distributed without amending the court order.

Income Tax Issues

Two income tax issues were considered. First, who signs the decedent's final income tax return on behalf of the "decedent's estate"? Second, who reports income earned from the date of death through distribution of assets under informal administration?

Signing the decedent's final return offers few problems if the decedent is survived by a spouse. A joint return generally is filed and signed by the surviving spouse, both individually and on behalf of the deceased spouse. If, however, the decedent is not survived by a spouse or if the spouse is unable to sign the decedent's final return, information administration creates uncertainty as to who should sign the final return on behalf of the decedent. The Internal Revenue Code is of little help, as there is no counterpart to IRC §2203 (person in possession of the property is the deemed executor for signing the estate tax return) for income tax purposes. Accordingly, a substantial variety of practices could be expected. Responses to the Questionnaire confirm that expectation.

Half of the responding practitioners stated that the "designated representative" signed the decedent's final return. Among the other half, there was little uniformity, ranging from the "attorney for the estate," to "anyone who would sign." The large number of respondents using the term "designated representative" indicates a failure either to understand the role of the person designated by the court to pay the decedent's debts, or, more probably, a lack of any practical alternative. The only person "designated" in informal administration proceedings is the person designated under K.S.A. 59-3304(a)(2)(C) to pay the decedent's debts and expenses of informal administration. If the decedent's final income tax liability is considered to be a debt, the person designated to pay debts may be authorized to pay that liability and, therefore, to sign the decedent's final return. Even if the person so designated has the authority to sign the return, he or she is not the "designated representative," but simply a person without a title who is authorized to pay debts.

Because informal administration does not create, in the traditional sense, an "estate," or provide a personal representative, there is no obvious choice for how the income earned from the date of death through distribution of assets is reported. Various income tax reporting procedures are being used. The three choices used most often, listed in order of frequency are: i) the beneficiaries (heirs, devisees, or legatees) reporting the income directly on their individual income tax returns; ii) filing Form 1041 (fiduciary income tax return) as if an estate existed during the period from the date of death through the distribution of assets; and iii) filing nominee 1099's, treating the recipient of the income as a nominee for the true beneficiaries.

The variety of responses in how income during "administration" was handled may again be attributable to the Internal Revenue Code's failure to define when an estate exists for federal fiduciary income tax purposes. Absent such guidance, practitioners may be filing a 1041 when it is in the taxpayer's interest to do so, or causing the income to be reported directly by the beneficiaries if that reporting procedure is more favorable. For example, if there is less than $3,450 income during the period from the date of death through the distribution of assets under informal administration, the selection of a short fiscal year ending prior to the date of distribution will provide an additional $600 exemption and a maximum fifteen percent federal income tax rate. If the beneficiaries are in a tax bracket higher than fifteen percent, overall tax savings may therefore result. If, however, no savings result from the use of a separate taxable year for fiduciary income tax purposes, practitioners may be directing beneficiaries simply to report the income on their own returns. This approach may, however, create more work for the practitioner than if a 1041 were filed.

If the beneficiaries report income on their individual returns, and that income includes dividends and interest, 1099's issued by payors will be issued under the decedent's Social Security number. Therefore, the practitioner will be required to allocate a portion of the year of death income to the decedent's final return, and a portion of that income to the period following the date of death

until assets have been distributed to the distributees and the distributees' Social Security numbers supplied to the payors. If an inconsistency is to be avoided between the income reported on the returns and the 1099's, the allocation must be provided to the beneficiaries who should attach a schedule to their returns explaining the allocation and stating that a portion of the dividend or interest income shown on the 1099's was reported on the decedent's final return under the decedent's Social Security number.

The problems of income tax reporting in informal administration proceedings will be compounded if death occurs in one calendar year and assets are distributed in another calendar year. To avoid these problems, treating the informal administration period as an estate administration period for which a Form 1041 is due may be advantageous. The practitioner will have less work, and the distributees will have more certainty in that forms K-1 will be supplied to them.

Attorneys' Fees

Respondents were asked to compare attorneys' fees for informal administration with supervised administration. They were asked whether their experience indicated such fees to be higher, the same, lower, or significantly lower, than supervised administration. The results provided modest surprise, in that almost half stated that informal administration fees were higher or were the same, almost half stated that they were lower, and only a few stated that they were significantly lower.

If the legislative goal of informal administration was to simplify probate procedures and therefore to reduce administration costs, the answers to the question pertaining to attorneys' fees create doubt as to whether that goal has been accomplished. Several possibilities exist as to why fees are not uniformly lower. Informal administration proceedings are new, and practitioners incur more time in developing forms for a new procedure. The usual steps to which practitioners have grown accustomed in administering estates are accelerated in informal administration, therefore requiring more time to assemble information than might occur if that information were assembled over eight months rather than four and one-half months. Informal administration requires the attorney to perform many of the tasks that a personal representative would perform under either supervised or simplified administration. Each of the problem areas discussed above can cause additional attorney time. Other reasons no doubt exist.

Whatever the reasons for informal administration not providing significant cost savings, the answers to the questionnaire show that the goal of significantly reduced attorneys' fees has not occurred. Perhaps greater familiarity with informal administration and the development of forms will help, as will legislative changes that streamline the procedures and cure problem areas.

General Comments Concerning Informal Administration

Most respondents added comments to the Questionnaire. Those comments reveal perhaps the best gauge of practitioners' views of informal administration. Of those providing comments, only sixteen percent stated that they were satisfied with informal administration, or that it was an improved and needed procedure. Seventy-six percent, however, stated that informal administration is either more work, that it presented too many risks due to unresolved problems, that it was of no advantage over simplified administration, or that its utility was limited.

Few respondents were unrestrained in their praise for informal administration. Many, however, were unrestrained in their criticism. Among the criticisms were the following: informal administration imposes duties on the practitioner without appropriate mechanisms to carry out those duties; the procedure needs a statutory method of judicially discharging the person appointed to pay debts; the bonding requirements are burdensome; it is extremely difficult to assemble all necessary information to file an inheritance tax return within four and one-half to five months following the date of death; informal administration creates uncertainty about creditor's claims that the published and personal notice under K.S.A. 59-709 and 59-2230 avoids; if informal administration is to be a useful tool, more authority should be given to the designated representative to handle assets; other procedures such as simplified administration involve the same amount of work without the problems of informal administration; and informal administration imposes greater liability on the attorney because there are fewer guidelines than in supervised or simplified administration.

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Observations and Recommendations

We believe the variety, and in some instances the contrariety, of answers to the survey indicate that informal administration should be used primarily in limited circumstances, such as in small estates where a surviving spouse or family member can assume personally many of the responsibilities that would otherwise be imposed on a personal representative. Attempts to use informal administration in more complex estates will often be disappointing, as many of the problems described in this article no doubt will be encountered.

Although limited remedial legislation could further simplify informal administration, a legislative response to the

most numerous criticisms of informal administration would add additional steps to the process, thus causing it to trespass into territory already taken by simplified administration. The authors do not believe, however, that all of the criticisms described by practitioners need to be addressed legislatively, since informal administration was not intended to be appropriate for all estates. Perhaps remedial legislation addressing the bonding and discharge of the payor of debts and expenses would provide greater utility and certainty to informal administration without intruding into simplified administration procedures. Such legislation, accompanied by the greater familiarity with informal administration that time and use will provide, should give to this procedure a useful position in the family of Kansas estate administration procedures.