

MONETARY ASPECTS OF PROBATE
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MONETARY ASPECTS OF PROBATE

Charles J. Andres and Stephen M. Johnson¹

A. Marshalling the Assets: Probate vs. Non-Probate Property

As a museum curator carefully sorts through and assembles exhibits for the public's enjoyment and education, so an estate's personal representative's role involves sorting through the estate and distributing assets to the heirs. Kansas probate attorneys should consult the Probate Code, the Kansas Probate Handbook, the Kansas Judicial Council Forms, and the seminal Kansas probate treatise by Samuel Bartlett, the Kansas Probate Code's author.² The Estate's personal representative - whether an Executor, an Administrator, a Special Administrator, an Administrator C.T.A., or an Administrator D.B.N.C.T.A. - has both the duty and the power to marshal an Estate's assets and report to the Probate Court.³ When a person dies, all her assets - in whatever form and all over the world - becomes her Estate, a decedent's estate. A probate estate must be administered and distributed by a fiduciary appointed by the Probate Court or by a non-probate instrument, such as a trust.⁴

A decedent's estate includes two types of property: (1) probate property and (2) non-probate property.⁵ All probate property falls under the estate's personal representative's fiduciary care, so upon the decedent's death, the personal representative holds title to the decedent's real estate, car, personal effects, household goods, bank accounts, and all other property. The non-probate property is also under the estate's personal representative's fiduciary care as part of the estate, but is not included in filings with the Probate Court. Non-probate property includes joint tenancy property, POD or TOD property, and other property that passes outside the probate framework.⁶

¹ Copyright 2013, Charles J. Andres and Stephen M. Johnson. The authors are members of the Kansas and Missouri Bars. The authors dedicate this article to the probate judges they have been privileged to practice before. The authors welcome correspondence at charlesjandres@cs.com and steve@johnsonlawkc.com.

² Charles J. Andres and D. Michael Dwyer, eds., *Probate and Trust Administration After Death* (7th ed. 2008) ("Kansas Probate Handbook"); the Kansas Judicial Council Forms (3rd ed. 2011) (available at http://www.kansasjudicialcouncil.org/publications/probate_forms3d.shtml) ("KJC Form"); and Samuel E. Bartlett, *Kansas Probate Law and Practice* (5 vols., 1953 rev. ed.) ("Bartlett").

³ See *Kansas Probate Handbook*, § 1.2.5 (personal representative's duty to marshal assets) and see "Form of Sample Letter" and "Decedent's Fiduciary Checklist" after §1.3.10(f). See *Kansas Probate Handbook*, Part 2, Ch. 1, § 2.1.13. See K.S.A. 59-102(2) (Personal Representative) and see Bartlett, Vol. 1 §31. K.S.A. 59-701 (Executor issued Letters Testamentary upon appointment), KJC Forms 501 et seq. and see Bartlett, Vol. 2, §622; K.S.A. 59-705, 706 (Administrator issued Letters of Administration), KJC Forms 601 et seq. and see Bartlett, Vol. 2, §§630, 633; K.S.A. 59-710 (Special Administrator issued Letters of Special Administration), KJC Forms 1101 et seq. and see Bartlett, Vol. 2, §643; K.S.A. 59-707 (Administrator Cum Testamento Annexo ("with the will annexed") or Administrator C.T.A. issued Letters of Administration C.T.A.), K.S.A. 59-708 (Administrator De Bonis Non Cum Testamento Annexo or Administrator D.B.N.C.T.A. ("administrator of the goods not administered with will annexed") issued Letters of Administration D.B.N.C.T.A. The Administrator C.T.A. and Administrator D.B.N.C.T.A. are specialized and rare probate techniques. See Bartlett, Vol. 2, §637. See *Kansas Probate Handbook*, Part 4, Ch. 1 (Special Administrators).

⁴ See *Kansas Probate Handbook*, § 1.4.2(c).

⁵ See *Kansas Probate Handbook*, § 3.1.3.

⁶ See *Kansas Probate Handbook*, § 1.4.2.

Filing an inventory is a key moment in the probate process. The inventory is due 30 days after the personal representative's appointment by the Probate Court.⁷ The inventory is required to list all probate property, which becomes subject to the Probate Court's jurisdiction as the Court appoints the personal representative.⁸ The personal representative is free to undertake any action in the Estate's best interest, but his actions are subject to the Probate Court's ratification, sometimes done by an ex parte order.⁹ The personal representative should make a comprehensive sweep of the decedent's home, office, and personal effects to identify and gather assets to be listed in the inventory, including bank, brokerage, and investment account statements, safe deposit box, the decedent's desk and dresser drawers and car for receipts, tax returns, contacting the decedent's financial institutions, searching public real estate records, and obtaining any trust funding documents, asset spreadsheets or lists, or similar documentation.¹⁰

The Estate's personal representative could be an individual (the decedent's family member, surviving spouse, or friend), a corporate institution (a bank or trust company), or the decedent's trusted professional advisor (an accountant or attorney). Clients often choose an individual as personal representative for relatively simple estates and many individual personal representatives waive compensation or serve for a nominal fee.¹¹ Clients may opt for a corporate personal representative or for their professional advisor to serve in that role, especially for larger or more complex estates, and the corporate representative will charge either a flat fee or an hourly fee for their services. Because the personal representative acts as the Estate's fiduciary and is held to a fiduciary standard of care (and resulting liability for breaches of fiduciary duty), care should be taken in selecting an experienced personal representative, preferably with experience handling similar matters and some acquaintance with the decedent's family.¹²

B. Managing the Estate During Probate

The probate process is often drawn out over several months or even years, even where the Estate is smoothly settled and no litigation arises. A probate attorney may have dozens of pending probate cases, which lay dormant for weeks or months while the clock ticks and various deadlines for 3rd party filings approach – e.g. waiting 4 months after publication of notice for any potential creditors to exhibit their claims. During these statutory waiting periods, the attorney will often be working on other cases and billing minimally, if at all,

⁷ K.S.A. 59-1201; see Bartlett, Vol. 2, §751, and Kansas Probate Handbook § 1.2.5.

⁸ K.S.A. 59-1201. Property should be listed in 5 categories: (1) real estate; (2) furniture, household goods, and wearing apparel; (3) corporate stock; (4) bonds, mortgages, notes, and other debentures; and (5) all other personal property. See KJC Form 545 and Kansas Probate Handbook, §§ 2.1.15(a), 2.1.6 – 2.1.7.

⁹ See Kansas Probate Handbook, §1.3.3(a).

¹⁰ A personal representative's checklist may be found following Kansas Probate Handbook, §1.3.10(f).

¹¹ Simple estates may be handled via simplified administration or informal administration. For simplified administration, see K.S.A. 59-102(5), 59-3201 et seq.; KJC Forms 703 et seq.; Kansas Probate Handbook, § 4.2.3. For informal administration, see K.S.A. 59-102(7), 59-3301 et seq.; KJC Forms 401 et seq.; Kansas Probate Handbook, § 4.3.2; Nancy Schmidt Roush, "Opportunities and Problems Under the Kansas Informal Administration Act, 61 K.B.A. Journal 34 (1992).

¹² K.S.A. 59-102(3). See K.S.A. 58a-801 et seq. (trustee's fiduciary duties). A personal representative owes a fiduciary duty of care to act in the Estate's best interest, which the Probate Court can enforce by compelling action or removal for breach of fiduciary duty.

on a given probate case.¹³ The probate law's nature involves time-honored traditions of publishing notice of the decedent's death, sending notice to creditors to file any potential claims, notifying all interested parties to the Estate of the proceedings as they progress, and serving interested parties with a copy of the pleadings.¹⁴ While the Internet helps locate heirs and potential creditors, Kansas probate law requires publishing all notices in the local legal newspaper and serving all creditors and interested parties with paper copies of pleadings.¹⁵ While probate law may someday allow valid email or electronic service, for now the probate law remains a most traditional practice area, steeped in history, for in the probate law, "history is now."¹⁶ Depending on the circumstances, the Estate may distribute some assets to the surviving spouse during the probate process.¹⁷

C. Notifying Creditors and Paying the Debts

The Estate notifies potential creditors by publishing notice in the local legal newspaper and sending notice to potential creditors with a copy of the notice to creditors enclosed.¹⁸ Kansas' creditor claim statute, 59-2239, is a nonclaim statute and a statute of limitations,

¹³ Probate law best practices include sending the personal representative a monthly bill detailing legal services rendered. Whether the invoice amount is negligible or large, the personal representative often must get the Probate Court's permission to pay each bill (unless the decedent's will includes provisions allowing payment without court order). Billing may be every attorney's bane, but monthly bills facilitate good communication and a positive attorney-client relationship. See Estate of Chestnut, 4 Kan. App. 2d 694 (1980), and Kansas Probate Handbook, §2.3.2.

¹⁴ See e.g. KJC Form 506. The interested party concept parallels civil law standing. Interested parties in a probate case include the Estate's personal representative, all the decedent's heirs at law and devisees and legatees, and any creditors who file a valid claim.

¹⁵ K.S.A. 59-2208, 59-2209, 59-2210, 59-2211, 59-2222, 59-2223; Kansas Probate Handbook, § 1.3.3(b).

¹⁶ The Johnson County Probate Court, where the authors learned their probate law, allows attorneys to view free PDF copies of all probate pleadings filed. The Johnson County Courts have been pioneers in e-filing and electronic records. E-filing is available, but not mandatory, in probate cases. Probate law follows civil law service rules. See T.S. Eliot, *The Four Quartets*, "Little Gidding" (No. 4), V ("history is now").

¹⁷ See Kansas Probate Handbook, § 3.1.5.

¹⁸ See Bartlett, Vol. 3, §§ 1314, 1316 (59-2239 is "deemed to operate as a complete bar to all demands which could be charged" against the estate: "a bar on which the personal representative could rely with safety, and proceed to pay legacies or make distribution, a bar which a creditor could invoke to protect the assets" owed to the creditor, "a bar on which the heirs and beneficiaries may insist, for the exclusion of all claims not presented"); Kansas Probate Handbook, § 4.3.2-(9) ("K.S.A. 59-2239(1) specifically provides that no creditor shall have a claim against, or lien on a decedent's estate, except for liens existing at the date of decedent's death, "unless a petition is filed for the probate of the decedent's will" under K.S.A. 59-2220 "or for administration of the decedent's estate" under K.S.A. 59-2219 within 6 months of the decedent's death ... As Informal Administration "is not filed pursuant to either of those sections, no notice to creditors is required by statute. Notice is not constitutionally required because the creditor's rights are not cut-off by filing of the petition but rather by the 6 month 'statute of limitations' provisions of the nonclaim statute, just as in Determination of Descent proceedings." So "creditors are not protected in Informal Administration unless they are paid ... within 6 months of the decedent's death. If the beneficiaries [in] an Informal Administration ... refuse to pay the creditors, the creditors can block the Informal Administration by filing a petition for supervised or simplified administration," giving "rise to the publication notice to creditors and the 4 month nonclaim period." "[I]f a petition is filed within 6 months of death stating the creditor and the amount of the debt as a debt of the estate ... this should protect the creditor. The filing is ... a promise by the petitioner that the creditor will be paid, creating a contract with the petitioner on which the creditor would rely in consideration of foregoing the right to file for supervised or simplified administration." And "those claims listed in the petition and order should be deductible for federal estate tax purposes"); § 1.3.8(f).

barring creditors from filing claims against the estate after the 4 month notice deadline has expired.¹⁹

Kansas law provides two tiers of creditors: (1) known creditors, who have 30 days after notice has been published to exhibit their claim against the Estate, and (2) unknown creditors, who have 4 months after notice has been published to exhibit their claim against the Estate.²⁰ As a professional courtesy and local practice, probate attorneys usually give all creditors 4 months to exhibit their claims. Kansas probate law requires a personal representative provide actual notice to all known or readily ascertainable creditors.²¹ After notice to creditors is given and the 4 month deadline has passed, creditors who have filed valid claims under 59-2239 are paid.²²

From the authors' practice experience, many Estate's personal representatives are inclined to pay all bills and creditor claims upon receipt. When a personal representative pays funeral bills and last illness expenses before her appointment by the Court (before she legally has authority to pay those bills on the Estate's behalf), the attorney can file a simple motion praying the Court to ratify the payment, which is almost always done. Personal representatives should remember that Kansas probate law and the creditor claims statute require the creditor to file a notarized, itemized, and signed claim with the Probate Court by the 4 month deadline and to include any documentary evidence (e.g. receipts or invoice) for the claim. Many credit card companies will forgive the decedent's outstanding balance as a courtesy. A bill sent to the decedent's last address or captioned in the decedent's individual name (e.g. John Smith, 123 Main Street, Olathe, KS 66061) is not a validly exhibited creditor claim, so the personal representative should be advised that the Estate is not obligated to pay the bill, as it does not comply with the statute. Attorneys should send a brief letter to each creditor, once the nonclaims statute deadline expires to inform them of the payment status of their respective claims.

Kansas probate law establishes 4 classes of creditor claims: (1) first class, (2) second class, (3) third class, and (4) fourth class.²³ Creditor claim classes are important where the Estate may have limited assets (an insolvent estate), or where priority of which claims to pay first must be determined (e.g. public policy favors paying the funeral bill and getting the decedent buried before paying the decedent's credit card bill or library fine). While most creditors are quite congenial, a glance at the K.S.A. 59-2239 case law digest reveals this is a potential probate litigation flash point.

¹⁹ K.S.A. 59-2239(1) and see Bartlett, Vol. 3, §§ 1314-1315 ("When a person holding a claim against the estate fails to commence proceedings [on the claim] ... for more than [6] months after the [estate] published notice to creditors, [the] claim is barred by ... 59-2239, which is a statute of both nonclaim and limitation."). K.S.A. 59-2239(2) is a complex probate litigation topic beyond this article's scope.

²⁰ K.S.A. 59-2239(1) (a) (known creditors), (b) (unknown creditors). The statutory term of art is to "exhibit" a claim, but "exhibit," "file," and "lodge" are used interchangeably. The statutory term of art is an "allowance of demand," but "claim" and "creditor claim" are used interchangeably.

²¹ K.S.A. 59-709(b) (codifying Tulsa Professional Collection Services v. Pope, 485 U.S. 478 (1988)).

²² See Kansas Probate Handbook, Part 3, Ch. 2 (Creditor Rights).

²³ K.S.A. 59-1301; see Bartlett, Vol. 2, §782, and KJC Form 1201 et seq.

If the personal representative pays for the decedent's funeral or last illness expenses out of her own funds (which is quite common), the personal representative has a claim against the Estate and the Estate's attorney should prepare and file the claim with the personal representative listed solely in their individual capacity as a "claimant," rather than their fiduciary capacity as the personal representative. The authors have found the Probate Court amiable to approving these reimbursements.

While probate courts are a part of the Kansas civil court system, probate courts are less formal than their civil or criminal court counterparts. Most probate hearings on various petitions occur *ex parte* or even in the judge's chambers. The Judge may offer the attorney an opportunity to conduct the hearing in the courtroom and make a formal record of the hearing, a best practice if there is any possibility of probate litigation or division among the heirs. Witnesses, opposing counsel, juries, and spectators are rare. From the authors' experience, probate judges favor a brief explanation of the case and its progress, using the Kansas Judicial Council forms, and are eager to sign orders upon presentation of reasonable and routine pleadings. The probate law allows disclosure hearings and jury trials, but they are rare unless an estate is contested.²⁴ If an estate is contested or is tied to a trust established by the decedent, the attorney should note whether the probate judge assigned to the case is a magistrate judge (whose jurisdiction does not include civil cases, like trust litigation under the Kansas Uniform Trust Code), or a district judge (whose jurisdiction does include civil cases).²⁵ If a case involves probate and trust litigation, the courts are usually pleased to transfer the probate estate to a district judge who can hear the case's probate and trust angles.

D. Valuating and Disposing of Property

Kansas probate law follows property law in dividing property into 2 categories: (1) personal property and (2) real property.²⁶ Disposing of property depends on whether a particular item was bequeathed in the decedent's will (or under a personal property list, which is incorporated into the decedent's will under K.S.A. 59-623). If a personal property item was bequeathed in the decedent's will, the personal representative can deliver the item to the recipient before the Estate's final settlement, and usually requests the Court order a partial distribution.²⁷ If the decedent's will does not authorize sale of personal property, the Probate Court may allow sale of items in limited circumstances.²⁸ Further underscoring this point, the personal or real property sale proceeds must be apportioned according to statute.²⁹ Because the personal representative serves the Estate as a fiduciary, a sale (of personal or real property) can only be made to the personal

²⁴ K.S.A. 59-2216 and see Kansas Probate Handbook, §2.1.5. When an attorney represents a party other than the personal representative in a contested probate estate, disclosure hearings can be used to compel the personal representative to file an inventory or disclose the estate's assets, like civil discovery.

²⁵ Kansas was America's pioneering adopter of the Uniform Trust Code in 2003, found at K.S.A. 58a. Magistrate probate judges trace back to pre-unification probate days (before 1977) when the Probate Court was separate from (and inferior to) the District Court.

²⁶ See Kansas Probate Handbook, §§ 2.3.2 (personal property) and 2.3.3 (real property).

²⁷ See K.S.A. 59-2246; see Bartlett, Vol. 3, §§1341-1342; see Kansas Probate Handbook, §2.3.2; KJC Forms 1501 et seq.

²⁸ K.S.A. 59-1407; see Bartlett, Vol. 2, §§ 843-844, 849; see Kansas Probate Handbook, §2.3.2.

²⁹ K.S.A. 59-1405; see Bartlett, Vol. 2, § 830; see Kansas Probate Handbook, §§2.3.2 – 2.3.3.

representative, her family, or related entities if the decedent's will authorizes the sale or the Court approves the sale.³⁰

Estate planning valuation (pre-death) is an enormous topic and catalyst for a host of cases, including discounts, gifts, and federal tax law implications, which are beyond this article's scope.³¹ Probate valuation (after death) is often done by appraisal and discussed in the Kansas Probate Handbook.³² Without plunging beneath the ebbing waves and tides of the estate planning valuation ocean, the goal of probate valuation is disposing of estate property by determining each asset's value as of the decedent's death.³³ Probate valuation provides an accounting to the Court and to the estate's heirs.³⁴

E. Selling the Family Home in Estate Administration

The family home or other real estate will often be a major asset of the Estate. But unless the decedent's will provides the personal representative with power to sell the family home or other real estate, the Probate Court must authorize the sale, after notice to all interested parties, and meeting real estate sales requirements.³⁵ Perhaps reflecting a post-mortem concern for Kansans' homestead rights, Kansas law requires any real estate sold at a private sale to be sold for 75% or more of the appraised value, and the real estate must be appraised by an independent appraiser the personal representative selects and the Court approves.³⁶ The decedent's heirs can decide to sell the family home to pay creditor claims and receive their inheritance in a more liquid form. The family home does not need to be sold in an estate administration unless the home is making the estate illiquid and liquidity is required to pay creditor claims.³⁷ But again, most estates will sell the family home for convenience of the heirs (who may live out of state and/or not want additional home maintenance and property taxes) and to facilitate heirs moving on with their lives enriched by their inheritance. The Kansas Probate Handbook details the legal mechanics of selling the family home and other property and the Kansas Judicial Council has petitions to facilitate the Probate Court's prompt approval of property sales.³⁸

³⁰ K.S.A. 59-1703; see Kansas Probate Handbook, §2.3.2; see Bartlett, Vol. 2, §967.

³¹ See e.g. John R. Price and Samuel A. Donaldson, Price on Contemporary Estate Planning (2013).

³² Kansas Probate Handbook, §4.3.2-(11) ("K.S.A. 59-3306 gives the court discretion to order appraisals ... to resolve valuation questions. The appraisal would presumably be ordered" when the petition was filed and the hearing date set. "[I]f values are or may be disputed, ... arrange for the appraisal before filing the petition," noting appraisal costs as an administration expense under K.S.A. 59-3302(b)(7)).

³³ See Kansas Probate Handbook, § 4.2.5.

³⁴ See Kansas Probate Handbook, § 1.3.8.

³⁵ K.S.A. 59-2303, see Bartlett, Vol. 3, §1495; K.S.A. 59-2304 and 59-2308, and 59-1410, see Bartlett, Vol. 3, §§ 1498, 1510, 849, and Kansas Probate Handbook, §2.3.3. See KJC Forms 1601-1654.

³⁶ K.S.A. 59-2305(b) (sale price must be at least 75% of appraised value) and see Bartlett, Vol. 3, §1503; 59-2307 (private sale real estate must be formally appraised) and Bartlett, Vol. 3, §1507, 59-2307 (personal representative selects, and Court approves, an independent appraiser). If the sale occurs within 6 months of the decedent's death, the inventory appraisal can be used, but if the sale occurs 6 months after the decedent's death, a new appraisal must be done. See K.S.A. 59-2305(e), *Estate of Chestnut*, 4 Kan. App. 2d 694, 695-697, and Kansas Probate Handbook, §2.3.3. Kansas' strong homestead protections are beyond this article's scope but are ensconced in the Kansas Constitution, Art. 15, §9, and should be included in every married real estate owner's durable financial power of attorney.

³⁷ Setting apart the homestead, homestead allowance, or statutory allowances is beyond this article's scope. See Kansas Probate Handbook, §§3.1.15 and 1.3.9(b), and KJC Forms 1401 et seq.

³⁸ See Kansas Probate Handbook, §§2.3.2 – 2.3.4.

F. How to Deal with the Insolvent Estate

An insolvent estate has less money than is required to pay funeral expenses, the last illness expenses, administration costs (including attorney's fees), debts, and taxes.³⁹ Kansas law provides summary proceedings for insolvent estates, and a petition to abandon property or determination of descent may also be appropriate in some cases.⁴⁰

An insolvent estate should not be confused with an illiquid estate, which could be remedied by a personal or real property sale.⁴¹ A solvent estate may be illiquid if a decedent left a large block of closely held stock or controlling interest in a family or small business, or disproportionately large real estate, art, or vehicle assets.

Conclusion

From marshaling assets and probate estate management to creditor issues, valuing property, selling the family home, and handling insolvent estates, we have explored the contours of probate's monetary aspects. As attorneys, our job is to help the personal representative navigate the estate successfully through probate and distribute assets to the heirs in a timely fashion. And as a museum curator's work yields a successful product, so when we as attorneys do our job well, the Estate will be successfully probated and those who view the Estate pleased with the fruits of our labors.

³⁹ K.S.A. 59-618a indirectly defines an insolvent estate as one where creditor claims exceed assets.

⁴⁰ K.S.A. 59-1507 (summary proceedings) and see Bartlett, Vol. 2, §§ 885-886 (summary proceedings to handle insolvent estates) and see "Insolvent Estates," Johnson County Probate Bench Bar CLE, 7 Nov 2011 (on file with the authors). K.S.A. 59-2250 (determination of descent); see Bartlett, Vol. 3., §1353; and KJC Forms 301-308.

⁴¹ See notes 27 (personal property sale) and 34 (real property sale). See Kansas Probate Handbook, § 1.3.7(e).