KEYSTONE
Law Firm & Wealth Partners

ARIZONA'S PROBATE SYSTEM

Guidebook of Common Problems

Table of Contents

Probate & Trust Administration Basics

By: Francisco P. Sirvent, Esq.

Probate Basics

Identifying Probate and Non-probate Assets

The first step in proceeding with administering any estate is to identify which assets (if any) need to be administered. This process commences with establishing which assets are going to be subject to the probate court jurisdiction and which assets pass outside of the probate process. Every asset of the decedent will ultimately fall into one of these two categories. The most important step for a practitioner in this area is to verify title! TITLE IS EVERYTHING when it comes to determining what is included in the probate estate.

It would be a good practice to provide the client with a checklist of documents to gather so that title of each asset can be proven. For bank accounts, the most recent bank statement; for real estate, the most recent deed; for life insurance, the most recent statement, policy, and beneficiary designations. Only after each asset has a corresponding document to prove ownership, can a comprehensive probate strategy be considered.

Probate Assets

Only those assets that are the decedent's separate property or his/her share of community property become part of the decedent's "probate estate". A.R.S. § 14-3101(A). Everything else is not part of the probate estate and is not subject to probate administration, except to the extent necessary to satisfy statutory allowances and creditors claims.

This creates some problems when administering the estate of a decedent who was married and had community property. The decedent's ½ interest of a community home, for example, would be subject to probate during administration. *In re Estate of Shano*, 177 Ariz. 550, 869 P.2d 1203 (App. 1993). Title 25 of Arizona Revised Statutes defines community property as all property acquired during a marriage. Property that is acquired by gift, devise or decent, or property that is obtained after the service of a petition for divorce, separation or annulment (so long as it results in a final decree) is not community property. Likewise, increase, rents, issues and profits are characterized the same type as the principal. If separate property has been commingled during the marriage, additional problems arise in trying to trace back the dollars to their original source. *Cockrill v. Cockrill*, 124 Ariz. 50, 601 P.2d 1334 (1979), appeal after remand, 139 Ariz. 72, 676 P.2d 1130 (App. Div. 1, 1983). Where tracing-back proves impossible, the property is presumed to be community. A.R.S. § 25-211.

In most cases, however, the decedent's estate is easily identified by application of the strict statutory definition: "'Estate' includes the property of the decedent, trust or other person

whose affairs are subject to this title as originally constituted and as it exists from time to time during administration. As it relates to a spouse, the estate includes only the separate property and the share of the community property belonging to the decedent or person whose affairs are subject to this title." A.R.S. § 14-1201.17. "'Property' means anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest in anything that may be the subject of ownership." A.R.S. § 14-1201.43; -10103.13.

The decedent's portion of jointly owned assets is included in the decedent's estate so long as the decedent's interest does not extinguish upon his/her death—like with rights of survivorship.

BEWARE: The "estate" for probate court purposes is not the same as the "estate" for federal tax purposes (Arizona currently has no estate tax in effect). The definition for federal estate tax purposes is much broader and usually results in a larger "estate". A discussion of what constitutes the "estate" for estate tax purposes will not be covered.

Non-probate Assets

Non-probate assets are any assets excluded from the estate by A.R.S. § 14-6101: "a nonprobate transfer on death in any insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement or other written instrument of a similar nature." These transfers are nontestamentary and execution of instruments to create nontestamentary transfers need not follow strict compliance with A.R.S. § 14-2502 (the requirements for execution of a valid will). All that is required to create a nontestamentary transfer is that the **written instrument contains provisions that the decedent's property is to be paid upon his/her death to another person designated in the same or another written instrument**. A.R.S. § 14-6101 can be used to implement various, creative transfers on death. For example:

Father gives his business partner a loan to start a separate business to be paid back in monthly installments at a certain interest rate. The promissory note may contain a provision that upon Father's death, the payments will be made to Father's surviving spouse. Alternatively, it could say that the balance of the note is accelerated and due in full, payable the surviving spouse.

Joint Assets

Joint assets come in two forms: with rights of survivorship (ROS) and without. Joint assets that *do not have* rights of survivorship are probate assets. Whether the joint assets are community property with a spouse or tenants in common with a non-spouse, the result is the same: if the asset was not owned with ROS, the decedent's share must be included in his/her probate estate and administered accordingly. However, the interest of the decedent in joint assets with ROS automatically terminates upon his/her death and will not be subject to probate.

Bank Accounts

Multiple party bank accounts and pay-on-death (POD) designations qualify as non-probate assets. Upon the death of one owner in a multi-party bank account, the bank will pay the balance of the account to the survivor(s) only if the account carries with it a right of survivorship. If no ROS exists, the deceased party's interest in the account is a probate asset. When an account has a POD designation, the beneficiary takes the account balance after all surviving owners have deceased and none of the account balance is included in the last-surviving owner's probate estate. A.R.S. § 14-6201, *et seq*.

Life Insurance / Employee Retirement Plans

Life insurance and annuity proceeds are not typically part of the probate estate because they pass according to the terms of the life insurance contract beneficiaries. The only exception to this is if the policy names the "estate" as the beneficiary or if no beneficiary is named and the policy rules require payments to the estate.

The same is normally true for employee retirement plans (IRA's, 401k's, etc.). These accounts pass strictly according to the terms of their beneficiary designations to the named beneficiaries based on the percentages indicated on the forms, or if none, to the beneficiaries as designated in the policy documents.

Real Estate

Real estate will be included in the decedent's estate unless the decedent's interest extinguishes upon his/her death (such as when the decedent was one tenant in a ROS arrangement). Arizona specifically authorizes the use of a "beneficiary deed" and language to create such a deed is provided by statute. A.R.S. § 33-405.K. A beneficiary deed transfers the decedent's interest in the real estate automatically upon his/her death to the person named as beneficiary in the deed. The deed must be recorded before the death of the last surviving owner to be valid.

If the decedent has an interest in real estate that does not extinguish upon his/her death, the interest is subject to probate administration.

Trusts and other nontestamentary documents

Trusts are widely used to completely avoid probate upon a person's death. Basically, the trust takes the asset out of an individual's name during his/her life and puts it in the name of the trustee (i.e., a deed transferring real estate from "John & Mary Smith" to "John & Mary Smith, trustees of the John & Mary Smith Trust Agreement, dated 1/1/2009 and any amendments thereto") so that upon the individual's death, the asset was not and is not owned in their individual name, removing it from the requirements of administration in the probate court. The trust continues in existence after the death of the grantor, and commences to administer all of its assets in accordance with the terms of the trust by the successor trustee. Similar arrangements can be made using limited liability companies, limited partnerships and other entities if asset protection or tax reduction is necessary. Those topics are beyond the scope of these materials.

Understanding the Various Forms of Administration

Arizona has five increasingly complex levels of probate.

(1) Transfer by Small Estate Affidavit,
(2) Summary Administration,
(3) Informal Probate,
(4) Formal Probate, and
(5) Supervised Administration

making Arizona one of the most efficient and flexible jurisdictions when dealing with probate assets of a decedent. The simpler levels of probate (1 through 3) are suitable for use when asset values are small and the potential for a contest is unlikely. Use of the more complex procedures (4 and 5) provides additional layers of protection to the personal representative. These higher levels provide additional protection to the beneficiaries by requiring notices and waiting periods and/or hearings before distributions are made.

There are three basic steps of administration: (1) collect, protect and manage assets, (2) pay claims, taxes and costs of administration, and then (3) distribute estate assets. In order to properly accomplish these steps, you must first obtain authority to collect and manage assets. That authority is given in different forms depending on the various probate procedures stated above and explained below.

Handling Your 1st Probate Case

In all proceedings except Transfers by Affidavit, the first step will be to file an application or petition for appointment of a personal representative (PR). This application may, but is not required to, include a concurrent request to probate a Will or a determination of heirs if the decedent died without a will (intestate).

The priority of who will be appointed as the PR is as follows:

1. Person nominated by will
2. Spouse who is also a devisee
3. Other devisees
4. Surviving spouse
5. Other heirs
6. Department of Veteran's Affairs
7. Any Creditor (at least 45 days after death)
8. Public fiduciary

A.R.S. § 14-3203(A). If a person with priority is disqualified or renounces their right to serve, priority falls to the next available person. If no person is nominated by will and there are more than one persons who share the same priority, the group must agree or present evidence on who will be nominated. If there is agreement, it is good practice to have the other persons in this group sign renunciations of their right to serve as PR.

The appointment of the PR triggers multiple upcoming deadlines. The deadlines and required notices vary depending on the form of probate initiated (informal v. formal) but for the most part, notification of the appointment of a personal representative and the probate of a will must be provided to all interested persons ("any trustee, heir, devisee, child, spouse, creditor, beneficiary, person holding a power of appointment and other person who has a property right in or claim against a trust estate or the estate of a decedent, ward or protected person. Interested person also includes a person who has priority for appointment as personal representative and other fiduciaries representing interested persons.") immediately after appointment but in no case later than 30 days after appointment. A.R.S. § 14-1401. Notice in formal proceedings will require you to obtain a hearing date and time and provide notice to interested persons and by publication at least 14 days before the hearing. No hearing is required in informal proceedings.

A personal representative may proceed with administration and transfer assets without obtaining the court's prior approval under any form of administration (informal or formal). In formal and supervised probates, however, the court may limit the PR's authority.

You should consider using formal probate proceedings only when it is necessary (i.e., informal proceedings are unavailable), when you cannot locate an heir, when the original Will is lost and you only have a copy, or when it is apparent that someone might contest the proceedings or the validity of the will. Otherwise, informal proceedings are sufficient in most circumstances. Also, you can open a probate case informally, administer it using formal procedures (obtain a hearing on a petition for any issue that may be in dispute during administration), and then close the estate informally. Nothing in the Arizona Probate Code limits the use of the different procedures.

Supervised probates are rarely necessary. A.R.S. § 14-3502 only allows supervised administration when the decedent's will directs it or upon a finding by the court that it is necessary for protection of persons interested in the estate. The statute does not provide any further guidance as to when "it is necessary" and this probably reflects the statutory preference to avoid supervised probates. Even if the decedent's will directs that a supervised proceeding be commenced, the court has discretion to consider if changed circumstances render the need for supervised administration "unnecessary". A supervised proceeding brings the court's authority over all of the PR's actions and prior approval is required before the PR can sell real estate or distribute assets to heirs.

Knowing the Advantages and Disadvantages of Informal Administration and Complying with the Procedures

Informal probate proceedings are the most widely used for all sizes and types of estates. The procedures are relatively straightforward, timely, and conclusive. But informal administration has its limitations, too. In this section, the major strategic advantages and disadvantages of using this particular method will be discussed in more detail.

Advantages

One major advantages to informal probate is that you do not have to give prior notice before commencing the proceeding and obtaining the appointment of a personal representative and can therefore be appointed as the PR as soon as five days after the decedent's death. Historically, obtaining the court's blessing of a will and the appointment of a personal representative required prior notice to interested parties who then had an opportunity to object to the appointment or acceptance of the will. Arizona has removed this step with informal proceedings by allowing the probate registrar to appoint a personal representative and probate a will without first giving notice to interested parties. Once the appointment is made and the will approved, the PR has 30 days to give notice to interested parties who then have an opportunity to contest or challenge the will for the next four months.

The PR can begin managing the estate assets while any (potential) challenge draws itself out. This helps parties avoid the need for the appointment (and expense) of a special administrator, who might otherwise be needed to act in an emergency to protect estate assets. Likewise, a person who will undoubtedly be appointed the PR in the future, can take action for the estate and later ratify those actions after appointed as PR. A.R.S 14-3701. Advanced notice of filing an informal probate is only required if another party had filed a demand for notice or if there had already been a PR appointed who has not been discharged.

Another major advantage to informal probate is the ease of which the statute of limitations is triggered against disgruntled heirs. Upon mailing the notice to the heirs and devisees, each recipient of notice has four months to commence a formal probate proceeding or forever be barred. A.R.S. 14-3306. Persons who do not receive the notice are barred by one of three statute of limitations (Chapter 5, Title 12 of A.R.S.; A.R.S. § 3803 and -3804; A.R.S. § 14-3803(A)(2)); every advantage is obtained by providing every heir and devisee notice by certified, return receipt requested mail.

Somewhat less significant, is the opportunity to convert any informal probate proceeding to a formal proceeding if necessary or beneficial. If there is a doubt as to whether or not heirs or devisees will bring a contest, the waters can be tested by opening the probate through informal means and providing notice. This way the client can be assured if no formal probate is filed within four months, she knows no contests will arise.

Good faith purchasers of estate assets are fully protected by A.R.S. 14-3714, -3910 in their dealings with personal representatives appointed through informal means and distributees of estates administered through informal procedures. No additional title assurances are obtained by formal procedures than what is given with informal procedures. To ensure all matters are closed properly, if any question is at hand, the PR can request a formal closing order to approve its actions, decree title, adjudicate testacy status and approve the distribution.

Otherwise an informal closing statement is filed with the court and sent to all distributees and unpaid creditors. It becomes a final order of the court 12 months after its filing if no objections are raised. A.R.S. § 14-3935.

Disadvantages

Informal probate **is not litigation** so it does not result in an appealable order like formal proceedings do. It does not create a final binding effect until 12 months after the closing statement is filed. Even after this time, if a different will is located than the one informally probated, it can be filed in a formal proceeding and used to set aside the result of an informally probated will.

Informal proceedings, when used for intestate estates, does not determine heirship nor can it cut off an heir who can't be found. Although it may be rare to find an heir who is unknown to the parties, only formal procedures require that the notice of hearing be published. This publication to unknown heirs gives notice and can cut off their claims.

Only a formal proceeding can be used to proclaim an apparently invalid testamentary document void, thereby determining that the decedent died intestate. If informal proceedings are commenced alleging that the decedent died intestate and the PR fully administers the estate, other persons may challenge this result up to two years after the date of death. A.R.S. § 14-3108.

Procedures of Informal Probate

Prepare the following documents and have the applicant (who might also be the person with priority for appointment as PR) sign the where necessary:

- Original Will,
- Application for Informal Probate and Appointment of Personal Representative,
- Statement of Informal Probate,
- Letters and Acceptance of Appointment,
- Order to Personal Representative,
- Notice of Application and Proof of Notice of Application, and
- if applicable to your situation also have ready Waiver of Right to Appointment and Waiver of Bond.

File with the probate registrar and wait for your Statement of Informal Probate, Letters of Appointment and Order to Personal Representative. Send copies of the Notice of Appointment and Admission of Will to Probate, Statement of Informal Probate of Will and Appointment of Personal Representative and Order to PR to all interested persons with 10 days of appointment.

Send the Notice to Creditors for publication (once a week for three consecutive weeks) and to each known creditor of the estate. This will bar any creditors' claims after four months if they fail to file a claim.

Before 90 days after appointed as PR, prepare and file the Inventory & Appraisement. This document must list property details, fair market value, its character as separate or community, and debts or liens against the property. The inventory may be filed with the court (making it public) or it may be mailed to all interested persons and a Proof of Mailing filed with the court (keeping the inventory private). If PR determines that estate size is less than allowances and exempt property ($37,000), Notice to Creditors is not required and PR can close estate by summary procedures.

PR must begin administration, which includes taking possession of all estate property. PR may leave certain assets with their presumptive distributees (real estate and personal property for surviving spouse). PR has duty to determine who the heirs are in an intestate estate, or to locate the devisees under the Will. Prepare a proposed distribution, mail to all heirs or devisees and, if no objection is received in 30 days, the PR can proceed with distributions.

If a summary closing procedure is available (see above), the PR should prepare the closing statement and file it with the court. Otherwise, the PR has two choices: (1) obtain an order of complete settlement, or (2) file an informal closing statement. If the PR has any question about whether or not an heir will challenge certain actions of distributions, file a petition for final discharge to obtain an Order of Complete Settlement. This type of closing will result in a final, appealable order. The Order of Complete Settlement will allow all parties to appear at a hearing where the court will determine heirs, probate the Will, and approve the final accounting. If there are any challenges, the court can decide the issues here. The resulting order will discharge the PR.

If the PR does not anticipate any contests, an informal closing can be filed which recites basic elements (A.R.S. § 14-3933) regarding the handling of the estate, payment of claims, distribution of property, and notice of the final closing. Once the informal closing statement is filed, any person given notice has six months to challenge the statement. The PR's appointment terminates 12 months after the filing of an informal closing statement or immediately if an Order of Complete Settlement is obtained.

Collecting, Claiming, & Collapsing

Considerations for the Small Estate

Arizona's flexible probate system allows for some small estates to be administered *without any formal judicial oversight*. This subset of procedures provides a series of steps that can be used any time 5 days after the death of the decedent. If either a formal or informal proceeding has already been completed, these methods may be available to transfer after-discovered assets.

Transfer by Affidavit

Administration is not mandatory for small estates as long as other tax obligations are met. A.R.S. § 14-3901. In cases where the estate value is below $75,000 (net of liens and

encumbrances), the successor(s) may claim entitlement and recover the personal property by presenting the person in possession of the property with an affidavit. This can be used to gather moneys on deposit in a bank, stock certificates, vehicles, jewelry, money owed to a decedent, and investments, but it cannot be used to transfer real estate.

If the assessed value of real estate is below $100,000 (net of liens and encumbrances), the successor can prepare and file an affidavit with the probate court and, if approved, record it with the county recorder where the property is located to effect a valid transfer to the successor(s).

Summary Administration

Summary administration refers to quickly closing an estate after probate has been opened, a personal representative appointed and the will either proved or the heirs determined. A.R.S. § 14-3973. This procedure is available when the size of the estate falls below the total of the allowance in lieu of homestead ($18,000), exempt property ($7,000), family allowance (not to exceed $12,000), costs and expenses of administration, reasonable funeral expenses, and reasonable and necessary medical and hospital expenses of the last illness of the decedent. At a minimum, this procedure can be used on any estate that does not exceed $37,000, but there is no statutory maximum estate value. The only limit is the exemptions plus the other expenses stated.
PRACTICE TIP: using summary administration allows the personal representative to distribute the estate without giving notice to creditors. The personal representative then can immediately file a closing statement.

Practical Procedures for Opening Estate Accounts

You need the following items to open an account at most banks:

- Certified Letters of Appointment and/or Order Appointing PR
- Certified death certificate
- Tax ID Number
- Opening deposit (optional)

Always have the PR open a new bank account to receive deposits, pay the decedent's claims, and pay any expenses of administration. The PR will need a tax ID number (TIN) for the estate before a bank will open the account. (See next section on obtaining a TIN.)

Restricted Accounts

If the decedent died intestate or the Will did not waive the requirement for a bond, try to get the heirs to sign a waiver of the bond requirement. File the waivers with the court at the time you petition for appointment. If you cannot get the bond requirement waived, the PR will either have to pay for a bond premium (which is dependent on the size of the estate, the credit history of the PR and other factors) or avoid paying the bond premium by including in your petition and order appointing the PR an order that estate funds be

deposited in a "restricted account". With these types of accounts, banks will not allow funds to be withdrawn without a court order. If the estate can wait to pay any claims until final distribution, you will only have to obtain one court order to withdraw all of the funds all at once. Take a certified copy of the order appointing the PR (which states that funds are to be deposited into a restricted account) to the bank with the opening deposit, the TIN, and death certificate, have the bank manager sign a proof of restricted account and file that with the court.

Having the funds in a restricted account is also a nice way to get impatient heirs off the PR's back. It's easy to respond and blame it on the bank "They won't release any money until the bank has the court's final order."

Obtaining Tax Identification Number and Title to Assets

Do you really need to get a separate tax ID number for a probate estate, especially if the estate is not above the federal applicable exclusion amounts? (In 2015, the applicable exclusion is $5.43 million). Yes you do. A dead person cannot earn income; the primary type of tax return an estate may be required to file is an **income tax return**. Interest earned with the decedent's money after the date of death must be reported to the legal owner, which, after the death, is the estate.[1] The PR's social security number *should never* be used as the TIN on the estate's accounts, even if the accounts are properly titled in the name of the estate. (See below for naming convention.) This will allow the bank to report any interest earned inside the account to the estate's TIN.

A rarely used alternative is to ask the bank to set up a non-interest bearing account so that no income will be earned and there is no worry of reporting interest to the wrong tax ID number. The bank may require use of the PR's SSN to complete their records for that account, but since no interest is earned, the PR won't see any income reported on his/her SSN from this account. This is less desireable than obtaining a TIN for the estate. With the IRS now giving out TIN's online in a matter of minutes, there really is no excuse for short-cutting here. Just get the new TIN and use that.

Go to www.irs.gov and request an employer ID number (EIN), which is the same thing as a TIN in this case. Or obtain form SS-4 and request the TIN by mail, fax or phone. If you request it online, you get the TIN at the end of the interview in a matter of minutes.

Obtaining Title to Assets

One of the first duties of a PR is to take possession of all estate assets. This ensures that the PR can fulfill his/her duty to prevent waste of estate assets. It is not necessary to take possession of estate assets if (1) the PR determines that the asset is already in the possession of the person presumptively entitled to it and (2) the value will not diminish should a sale of the asset be needed at a later time to pay claims. If someone appears to be

[1] Only income earned during life is reported using the SSN of the decedent and that income is used to file his/her last tax return (on the 1040). Any income earned after the death is filed on a separate tax return form, 1041. That's particularly why it is useful to have a separate TIN for the estate.

hiding estate assets, the PR can petition the court and force the person to testify regarding papers, documents, assets, property or other interests of the decedent.

The PR should take title to any estate assets in the following format:

> "<<Personal Representative>>, the personal representative of the estate of <<Decedent First Name/Last Name>>".

You can alternatively name it as

> "the estate of <<Decedent First Name/Last Name>> by <<Personal Representative>>, personal representative"

Accounts at financial institutions can usually be transferred to the estate by presenting a certified copy of the death certificate and a certified copy of the letters of appointment to the institution. Real estate transfers should be done by special warranty deed and recorded in the county where the property is located. Vehicles can be transferred from the decedent's name to the heir's or devisee's name. The PR will need all of the proper Department of Motor Vehicle forms and fees, plus a certified copy of the Order Appointing the Personal Representative, and a written release or permission from any lien holder allowing the change of ownership.

Canceling Utilities and Credit Cards

If the decedent owned residential real estate where no surviving spouse or dependents are living, the PR should consider the cost of maintaining utilities until the house is sold or transferred to the heir/devisee and weigh that against simply shutting the utilities off. Some buyers won't consider a house unless they can verify that power and water sources are functioning. Cable, phone and internet should be cancelled immediately after the death.

If the decedent held any credit cards in his/her sole name, those companies will most likely automatically terminate the accounts upon receipt of the Notice to Creditors. But to ensure that the estate's identity is not stolen before that is sent, the PR should diligently contact each account by phone, notify them of the death, shred all credit cards and monitor each account for unauthorized activity. If any activity occurs on the cards after the date of death and the PR has taken these steps, the estate will not be liable for those charges. Also have the PR check with each account to see if the decedent had paid for any form of credit insurance that pays his balance in the event of death. This benefit can be a gift to the residuary heirs and devisees.

Best Strategies for Preparing the Inventory

The inventory and appraisement (presented in one document, "I&A") is due 90 days after the PR is appointed. It must be delivered to all interested persons. The I&A need include only the assets in the probate estate and should exclude any assets that pass by beneficiary designations, joint tenancy, or the like. The I&A will also include the fair market value of each asset as of the date of death. The fair market value is easily obtained for items such as

cash accounts or publicly traded securities, but if there is any doubt about the fair market value of other assets, the PR should hire an appraiser to obtain a report for the value on the date of death. In contested probate proceedings, multiple appraisals may be needed on more valuable items.

When administering estates that are above the applicable exclusion amount and subject to estate tax, the PR can petition the probate court for more time to file the I&A, if necessary or helpful in preparing the estate's estate tax return. Consult with the tax advisor to see if this is necessary.

Traditionally, one main reason people wanted to avoid probate proceedings was to keep their assets private. Individuals feared the I&A after their death because it would have made their financial status known to the world. Arizona has created a system that allows the PR to choose whether to keep the I&A private or make it public. If privacy is desired, the PR can mail the I&A to all interested persons and file a Proof of Mailing with the court that omits all details of the decedent's assets. This way the I&A is kept private within the heirs/devisees and interested persons. Only in the event of a contest would it become public.

Medical Insurance and Public Assistance Claims

When government benefits exist, the PR may or may not have the duty to see to the proper collection of these assets. If the PR is not the recipient of these benefits, the person who is usually has the duty to collect the assets. The same is true for assets that will pass by beneficiary designation form (e.g., life insurance or retirement accounts). Even though these assets may be large in comparison to the probate estate, they will pass directly to the beneficiary named and, unless the beneficiary is the estate, the PR will not control these funds.

When collecting payouts on life insurance policies, you may be asked to surrender the actual policy itself, if it still exists. Be sure to photocopy the entire policy before sending it, the claim form, and a certified death certificate (all by certified return receipt) to the insurance company.

In many cases, the decedent may have experienced a prolonged illness prior to his/her death and incurred significant medical expenses. Make sure to determine whether or not she had health insurance, either through Medicare, AHCCCS, employer or a private policy. Taking full advantage of these benefits can significantly decrease the burden of claims on the estate.

If the decedent was receiving ALTCS benefits to pay for long term care expenses, the PR should research whether ALTCS has filed a lien against any property of the decedent. If an asset was "exempt" while the decedent was alive (which helped him qualify for ALTCS benefits), often times that asset will no longer be exempt after death. The most common asset which loses it exempt status is the decedent's home, which must be used to satisfy any ALTCS lien that arises during the PR's administration.

Priority of Allowances, Claims and Taxes

The PR owes a duty of a fairness and impartiality to all successors of the estate when preparing for distribution. *In re Estate of Fogleman*, 197 Ariz. 252, 3 P.3d 1172 (App. 2000); *In re Estate of Shano*, 177 Ariz. 550, 869 P.2d 1203 (App. 1993).

Claims of an estate should be paid in the order laid out in A.R.S. § 14-3805 (with reference to the sections on allowances):

1. Costs and expenses of administration;
2. If there is a surviving spouse or minor children: Homestead allowance $18,000 (A.R.S. § 14-2402.B.) and exempt property ($7,000.00 A.R.S. § 14-2403.D.);
3. If there is a surviving spouse or minor children, the family allowance not to exceed $12,000 (A.R.S § 14-2404.B.);
4. Reasonable funeral expenses;
5. Debts and taxes with preference under federal law;
6. Reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation of persons attending him;
7. Debts and taxes with preference under the laws of this state;
8. All other claims.

In estates where solvency is not an issue, there should be no hesitation by the PR to pay the just claims regardless of their priority since sufficient assets will remain to fulfill the distributions to the heirs/devisees. Insolvent estates present more complex problems in determine which distributions will abate so that creditors can be paid. If the PR mistakenly pays a claim to the detriment of any other creditor or distributee, the PR is personally liable for the error.

Allowing/Disallowing Claims

The PR has the duty to not only notify known creditors of the probate proceeding, but also to review each creditor's claim and decide whether the claim is proper. The PR has until 60 days *after* the "time for presentation of claims" is complete to disallow any improper claims. A.R.S. § 14-3806(A). The "time for presentation of claims" is the four month period beginning when the first Notice to Creditors was published in the newspaper. Any claims that are not disallowed are automatically allowed. A claim can be disallowed by sending the creditor a Notice of Disallowance of Claim within the time permitted.

The PR should disallow any claim that was barred prior to the decedent's death due to the relevant statute of limitations since the death does not revive a lost claim. If the statute of limitations did not run prior to the death, the death tolls the statute for an additional four months after the death to allow the claimant time to present the claim or commence a probate proceeding as a creditor. All other claims that are not presented during the "time for presentation of claims" are completely barred against the estate. The PR has no authority to pay claims presented after this period without the consent of all affected

parties. (But, see A.R.S. § 14-3803(D)(3), which clarifies that compensation for services rendered or expenses advanced by the PR, the PR's attorney or accountant or the estate's attorney or accountant are not barred if not presented during this time.)

Encumbered Assets

The PR can deal with assets in the estate that are encumbered by lien, mortgage, pledge or other security interest in two manners: (1) pay the encumbrance and take possession of the asset free of any claim, or (2) convey the asset to the creditor to satisfy the lien. In making this decision, the PR must decide what is in the best interest of the estate. Any deficiency that remains on the lien may become a claim against the estate, but the deficiency would fall into the lowest priority of claims under A.R.S. § 14-3805.

If the asset is devised, the devisee is not exonerated from the debt and her share is not increased to offset for the debt should the PR decide to pay the balance of the encumbrance.

Don't get a bar complaint

Who is your client

When being hired by someone for a probate matter, the attorney should, as always, take care to identify the client. In the simplest cases where a challenge is unlikely, the client should only be the person who is applying to act as the PR. Make sure to inform all interested persons that you represent the PR only and do not represent any of them in their capacity as heirs, devisees or beneficiaries.

Once the client is identified, your fiduciary duties are fixed by two cases from the Arizona Court of Appeals: *Fickett v. Superior Court*, 27 Ariz. App. 793, 558 P.2d 988 (1976); *Estate of Shano*, 177 Ariz. 550, 869 P.2d 1203 (App. 1993). Copies of these two cases are included in these materials.

The attorney for a PR has a derivative fiduciary duties of impartiality and fairness (but not necessarily the duty of loyalty) to the decedent's successors. But, A.R.S. § 14-5652 weighs in the direction of eliminating any derivative duties to anyone other than the attorneys client, "Absent an express agreement to the contrary, the performance by an attorney of legal services for a fiduciary, settlor or testator does not by itself establish a duty in contract or tort or otherwise to any third party."

In practice, you will not find many instances of potential conflicting duties to your client and the successors in simple, uncontested probate matters.

Attorney-client privilege

Yes, the privilege survives a client's death. There is no part of A.R.S. § 12-2234(A) that lifts the privilege upon the death of a client. Arizona case law does not provide much further guidance on this issue. Arizona should, however, recognize a limited testamentary

exception for releasing certain pieces of information that will further the client's intent. So, if called to answer questions about a client's testamentary document, the drafting attorney could provide information that would assist in implementing her client's wishes. Until a statute is passed or case opinion written to specifically address this exception, this is a matter to be addressed in your engagement agreement: request permission to release information that you believe will further the client's intent if the client is unable to communicate due to incapacity or death.

Avoiding litigation

Litigation in probate matters can take many forms (will contest, PR breach of duties, etc.). Any form of litigation is initiated by the filing of a petition and the scheduling of an appearance hearing. Costs of administration (e.g., attorneys' fees) are a very high priority claim against the estate, which can sometimes increase the incentive to pursue less than meritorious claims. In this section, we will talk about strategies you can use to help your PR client avoid litigation.

Interim distributions

If the estate has more than enough funds to pay all expenses of administration and all claims (debts), the PR is allowed to make interim distributions during the 120 day claim period. Devisees and heirs can be very impatient even if they know of the required waiting periods. With interim distributions, as with all distributions, it is recommended that you send each devisee/heir a proposed interim distribution notice. This describes the PR's plan to distribute a small portion of the estate assets to the devisees 30 days after the notice is mailed. In that notice, you should describe the amounts each devisee will be receiving, that receipt of the interim distribution is subject to refund should the PR later determine that it is needed to pay higher priority claims of the estate, and it should provide notice that all objections to the proposed distribution are waived if not made within 30 days.

Full disclosure

Some devisees can be kept from filing court actions simply by providing them with regular status reports. A typical probate case can last 9-12 months. Devisees are only required to receive information at the start of the probate case and then 90 days later with the inventory. It isn't required to send them any further information until the time for distribution comes close. That could be nine months later! If your PR client does not object, your office can prepare a standard letter that goes out to all probate clients reminding the devisees of what stage of the case you are in. More information can be provided, as desired by the PR and the devisees.

Timely administration

You cannot over-emphasize to all probate clients, no matter how "simple", that the fastest probate cases take at least six months. There is no getting around that. This is worth repeating here and to your clients: **the fastest probate cases take at least six months!** If there are any problems or delays along the way, an "easy" probate will be on your desk for nine months. Educating your client, and re-educating your client and the devisees/heirs,

will head off complaints that you are taking too long or that your office is using this as a billing exercise.

When you prepare all the initial documents that are needed to initiate an informal probate, go ahead and prepare all of the waivers, notice documents, blank inventory, blank proof of mailings, and closing statements. These will all have missing pieces of information at this early stage, but as the case progresses, that information will become known, which will make it much easier to push the next step out.

No contest clauses

These clauses are sometimes included in wills and trusts to discourage unhappy heirs/devisees/beneficiaries from bringing a challenge against the testamentary documents drafted by the testator. If any beneficiary starts to raise the threat of a challenge, point them to the A.R.S. § 14-2517 and the new case *In re Shaheen Trust* (Ariz. App., 2015).