

# Newsletter

Oregon Estate Planning  
and Administration  
Section Newsletter  
Volume XXI, No. 2  
April 2004



Published by the  
Estate Planning  
and  
Administration  
Section of the  
Oregon State Bar

---

## Advising a Creditor of an Estate if No Personal Representative Has Been Appointed

Oregon probate statutes provide a well-defined process for the resolution of outstanding claims of a decedent if a personal representative has been appointed. ORS 115.003 sets forth the personal representative's statutory obligations to take reasonably necessary actions to locate claimants during the first three months of the personal representative's appointment and to notify potential claimants. Under this claim procedure, a creditor will have a forum to present, and resolve, any outstanding claims against a decedent's estate. Similarly, if a proceeding is commenced by a trustee under ORS 128.258, relating to claims against nontestamentary trusts, a creditor would also have a forum in which to present and resolve claims.

If no personal representative has been appointed, a creditor faces a more difficult task in pursuing an outstanding claim against the decedent's estate. Generally, a creditor must either wait to file a claim until a personal representative is appointed or, if it appears that no probate proceeding will be commenced, take the initiative to petition for the appointment of personal representative as an interested person in the estate.

If a creditor decides to "wait and see" if a probate is opened, the longer the creditor waits, the greater the risk that estate assets may diminish in value or become unavailable for recovery. The creditor must also be keenly aware of the statutory time limitations for presenting a claim against the estate. These limitations changed effective January 1, 2004.

### New Statutory Time Limitations

Before 2004, ORS 115.005(4) barred the payment of claims not presented within two years after the death of the decedent or within the applicable statute of limitation, whichever was earlier. Under ORS 115.215, upon the death of a decedent, a claim is not barred by the statute of limitations until at least one year after the date of death. This bar on claims did not apply (1) to proceedings to enforce a mortgage, pledge or other lien upon property of the estate, or to take certain other actions with respect to the title to property; (2) to the limits of insurance protection, any proceedings to establish liability of the decedent for which the decedent is protected by liability insurance at the time the proceeding is commenced; and (3) to certain claims by the state for the recovery of public assistance.

Because the time limitation runs from the date of death, and not from the date of the appointment of the personal representative, a creditor could be barred from filing a claim against the estate if an estate was not commenced within two years after death.

---

### *In This Issue*

- 1 **Advising a Creditor of an Estate if No Personal Representative Has Been Appointed**
- 3 **FDIC Insurance for Revocable Trust Accounts**
- 4 **Till Death Do Us Part - Revocation on Divorce Statutes**
- 6 **Caregiving For Elderly Parents**
- 7 **Same-Sex Marriage Alert**
- 9 **Order of Priority of Claims Against Estate and Possible Federal Preemption**
- 10 **Oregon DOR Allows Oregon QTIP Election**
- 10 **Practice Alert**
- 11 **Claims Against Estate for Services Rendered to Decedent**
- 12 **Calendar**

Or Laws 2003, chapter 523 removed the ultimate two-year time limitation for the presentation of a claim.

Under the new time limitations, a claim must be presented against the estate before the expiration of the statute of limitations applicable to the claim. Consequently, each claim must be reviewed based on its own applicable time limitation set forth in ORS 12.010 to 12.282. More common types of claims would be actions on certain contracts or liabilities, which would have a six-year time limitation, ORS 12.080, and torts, which would have a two-year time limitation, ORS 12.110. The time limitation for some claims may be as long as 10 years.

This new law applies to claims against the estate of all decedents, without regard to whether death occurs before, on, or after the effective date of Or Laws 2003, chapter 523. The law revives any claim that would have been barred by the former two-year bar unless a decree of final distribution or general judgment has been entered.

Notably, although the two-year limitation is removed for presenting claims, the new law did not include provisions to amend ORS 115.004(5), which continues to require an action against a personal representative for failure to search for creditors or give notice be commenced within two years or the statute of limitations applicable to claims, whichever is earlier.

### Creditor as Personal Representative

If the creditor petitions for appointment as personal representative and an estate proceeding is commenced before the expiration of the statute of limitations, the creditor may then present the claim in timely fashion. Once appointed, the personal representative must be prepared to discharge all duties and responsibilities of a personal representative. Many times, the risks and responsibilities involved in serving as personal representative outweigh the potential benefits. The creditor will need to consider carefully the potential benefits of the appointment and likelihood of any recovery, before petitioning for appointment.

If appointed, a personal representative would have powers normally unavailable to a creditor, which would assist the personal representative in locating and recovering estate assets. Under ORS 114.425, if a probate is opened, the court may order any person to appear and give testimony by deposition if it appears probable that a person has concealed, secreted, or disposed of estate property or any writing or document pertaining to the estate, has knowledge regarding the estate that is necessary for its administration, or has been entrusted with property of the estate and refuses to account for the property to the personal representative.

Under ORS 114.435, if the decedent transferred property with the intent to defraud creditors or transferred property by any means that is in law void or voidable as against the creditors of the decedent, the personal representative has the right to recover that property so

far as necessary for the payment of claims. *See, e.g., Burgoyne v McMillan*, 259 Or 625, 488 P2d 405 (1971) (personal representative set aside conveyance to daughter to extent necessary to pay outstanding medical bills).

Further, if the decedent left insufficient probate assets but significant assets in a self-settled revocable trust, the personal representative should be able to compel the trustee to turn over assets necessary to satisfy the decedent's debts. *See Johnson v. Commercial Bank*, 284 Or 675, 588 P2d 1096 (1978); Jonathan A. Levy & James C. Cavanaugh, "Creditors' Rights and Spendthrift Clauses," in *Administering Trusts in Oregon* § 8.43 (OSB CLE 2000).

Of course, powers of a personal representative are beneficial to a creditor only if assets are available to pay the creditor's claims. Accordingly, before commencing the estate proceeding, a creditor will need to investigate whether assets subject to probate administration exist. This investigation may include discussions with family members (if cooperative), review of financial information previously provided to the creditor by the decedent, examination of public records, and consideration of any other information that may be available to give a creditor some reasonable assurance that the proceeding would allow for payment of the claim.

A creditor must take into consideration other potential claimants that may take priority to their claim pursuant to ORS 115.125. In addition to estimating priority administrative expenses, a creditor may consider obtaining a credit report to assist the creditor in evaluating whether there may be other potential creditors with outstanding claims.

Finally, in evaluating whether to petition for appointment as personal representative, if a creditor is a corporation or other entity, the creditor must consider the availability of a nominee that is willing to serve as a personal representative, with the potential fiduciary liability it would entail.

*Timothy J. Wachter\**  
*Bullivant Houser Bailey PC*  
*Portland, Oregon*

*Jonathan A. Levy*  
*Cavanaugh Levy Twist LLP*  
*Portland, Oregon*

\* The author would like to thank Warren Deras and Tom Davis for their input and comments on the issues discussed in the article.