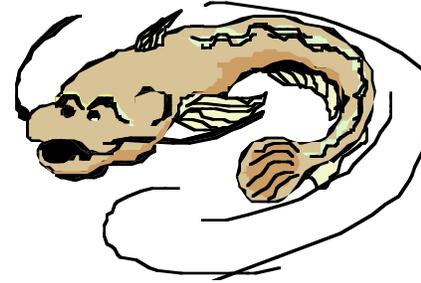


Bottom Fishing in Probate: What to Do When the Claims Outweigh the Assets



1. Background

As recently as 2003, writers in the estate planning field have claimed that as much as \$41 trillion in assets will be changing hands between the generation now dying and subsequent generations.

I'm not sure whether credit card providers read those projections, but judging from the AARP and other seniors publications we receive after we've had decedents' mail transferred to our office, seniors have become a major market for credit card providers. The easy availability of major credit cards, coupled with minimal credit checking, has led in many cases to seniors whose only asset may be a home and some minimal personal property and whose income is only from Social Security carrying large credit card balances.

During the lifetime of those seniors, such creditors are largely out of luck because of homestead exemptions and prohibitions against garnishing accounts containing Social Security funds. However, for seniors who die without a spouse, those exemptions no longer exist and the probate estate or assets transferred by non-probate transfer represent a creditor's last shot to get those assets.

This presentation will consider the personal representative's handling and avoiding of claims made under estates in the probate division of a circuit court, and will not consider claims against property transferred by non-probate transfers to beneficiaries, which is covered by Chapter 461, RSMo..

2. Priorities

Disbursements of money to persons other than the eventual heirs at law or beneficiaries under a will are covered under RSMo. Section 473.397, which reads as follows:

473.397. Classification of claims and statutory allowances

All claims and statutory allowances against the estate of a decedent shall be divided into the following classes:

- (1) Costs;
- (2) Expenses of administration;
- (3) Exempt property, family and homestead allowances;
- (4) Funeral expenses;
- (5) Debts and taxes due the United States of America;
- (6) Expenses of the last sickness, wages of servants, claims for medicine and medical attendance during the last sickness, and the reasonable cost of a tombstone;
- (7) Debts and taxes due the state of Missouri, any county, or any political subdivision of the state of Missouri;
- (8) Judgments rendered against the decedent in his lifetime and judgments rendered upon attachments levied upon property of decedent during his lifetime;
- (9) All other claims not barred by section 473.360.

By the time a general or unsecured creditor is reached, there may be no property left. "Costs" are simply court costs. "Expenses of administration" include both personal representative fees and expenses and those of the personal representative's attorney, and the **minimum** schedule for these is found at RSMo. Section 473.153. This fee is a **minimum** fee, and covers all personal assets administered and all real estate sold. "Exempt property, family and homestead allowances" generally includes all household personal property, \$15,000 in exempt property to the surviving spouse, if any, and one year's support, to be set by the court, also to the surviving spouse. Debts and taxes could include unpaid personal income tax and unpaid FICA and FUTA payments, and could even include debts due any state, city or county hospital or clinic, whether or not that debt was the result of the decedent's last sickness.

If the estate assets are insufficient to pay all creditors and provide anything to the heirs or beneficiaries, as the case may be, the estate can be closed out with a pro-rata payment of creditors. A sample petition and order are attached at A and B.

Make sure the final order allocates sufficient funds for notices and other fees and expenses needed to close the estate out without waivers. A careful reading of the attached petition and order will reveal the numbers in each pleading don't quite add up. Do not plan for waivers to be given by heirs or beneficiaries of an estate when "there's nothing in it for me" and they won't be getting a dime.

3. How to Deal with Out-of-State Creditors

This writer continues to be amazed at out-of-state creditors' ignorance of the probate division procedures in Missouri. Some out-of-state creditors know enough to file a claim in probate, while others only send dunning letters or telephone calls.

Dunning letters or telephone calls are best answered by sending the creditor a notice under RSMo. Section 473.033 that any claim from that creditor must be filed in probate within two months of service of the notice, or be forever barred.

If a claim is filed by an out-of-state creditor who is not represented by a Missouri attorney, wait until the applicable time limit under Section 473.033 has passed, either two months or six months, then notice up the claim for hearing. You will need to send a notice which you can show will actually get to the creditor. Notice can be sent by mail to the creditor, or, if circumstances dictate and local court rules allow, by facsimile.

Getting the creditor's facsimile number may be a bit of an ordeal. This writer suggests the following to assist while you wait to talk to a human being to obtain the correct facsimile number:

Floss

Coffee or something else to drink or eat while you wait

Access to the Internet while you are being told your call is very important to the creditor, so that you can access <http://www.elyrics4u.com/> and see the lyrics of the elevator music you're listening to, if you care to sing along;

Nail clippers

Something to read while you wait

Did I mention floss?

Once you get the facsimile number, send notice of the hearing in the manner specified by your local rules.

You'll need to show up at the hearing and obtain a ruling that the claim is not allowed. Afterwards, absent a motion to reconsider by the creditor, you may ignore subsequent calls and letters from that creditor.

4. Dealing with 500 Pound Gorillas-Claims from the IRS and Medicaid.

Many claims from federal and state governments and government agencies are not subject to the 2-month, 6-month or 1 year statutes limiting claims against decedent's estates. A major example is claims for Medicaid assistance.

The best way to take care of these claims is to be proactive. Look over the decedent's papers and get copies of the decedent's tax returns and bank accounts so you can determine whether taxes were paid. If you have time, have the personal representative or conservator sign a release to allow the IRS to send you the decedent's tax returns.

Unless you are reasonably certain that the decedent was able to pay all of his or her medical or nursing home bills, you should contact the Department of Social Services to see if the decedent's estate owes anything to Medicaid. A sample letter is attached at C.

5. What to Do When the Person in Question is Only Dead from the Neck Up-Conservatorship Cases

The handling of claims against a conservatorship estate is not much different than handling of decedents' estate claims, except that you gain the use of any homestead exemptions and have some opportunity for damage control.

Claims in conservatorship estates.

A major problem in small conservatorship cases is trying to best represent the conservator without running up a major bill, because the estate will be unable to pay that bill.

This writer recently closed out such an estate. The ward was repeatedly asked by various advertisements of a well-known credit card provider "what's in your wallet." Seeing nothing in said wallet, the ward called the provider's toll-free number and was subsequently pre-approved--often. Since all of her mail had been routed to this writer's office, we received a number of such pre-approvals. An angry letter to the credit card provider, with copies to local members of Congress urging that no bankruptcy reform take place until such providers were drawn and quartered, was finally answered by someone from the executive offices of the provider, who offered sound advice to prevent such pre-approvals:

Write all three of the major credit exchanges, inform them of the conservatorship and request that no credit card be issued without the approval of the conservator, whose address is listed. The conservator, of course, is advised to use such pre-approvals properly----as thoroughly shredded mulch. We've had no further problems with credit card pre-approvals. A sample letter is attached at D.

IN THE CIRCUIT COURT OF PETTIS COUNTY, MISSOURI
PROBATE DIVISION FIVE

In the Estate of)
) Estate No. 01PR315080
ELMER FUDD,)
Deceased.)

PETITION FOR INSTRUCTIONS REGARDING THE ALLOWANCE
AND PAYMENT OF EXPENSES OF ADMINISTRATION AND OTHER
ALLOWANCES AND THE PRO RATA PAYMENT OF CLAIMS IN AN
INSOLVENT ESTATE

Comes now the undersigned petitioner and for his petition for instructions regarding the allowance and payment of expenses of administration and the pro rata payment of claims states:

1. Petitioner was appointed personal representative of the estate on July 18, 2001. Respondents are creditors of the estate who have filed claims against said estate. All assets of the estate have been sold and converted to cash. Attached hereto and incorporated herein by this reference as exhibit A is petitioner's interim accounting showing all receipts and disbursements since petitioner was appointed. Petitioner has on hand, as shown by exhibit A, the sum of \$12,734.52.

2. Petitioner, in his capacity as personal representative, has expended substantial time and effort in the operation of the estate, the sale of real estate and personal property, in the determination of the allowability of claims against decedent's estate and the other and usual and ordinary duties and services necessary to fully administer the estate. Petitioner states that reasonable and adequate compensation for such services does exceed the sum allowable pursuant to the schedule of fees set forth in section 473.153. Petitioner attaches as Exhibit B and incorporates by reference a copy of his application for final compensation to be allowed and paid as an expense of administration.

3. Petitioner, in his capacity as personal representative, retained R. Scott Gardner, Gardner, Gardner & Gardner LLP, attorney at law, to represent him in connection with the legal affairs of the estate, including usual legal services all as described in the statement for attorney fees and expenses, a copy of which is attached hereto and incorporated herein by this reference as exhibit C. Petitioner states that reasonable and adequate compensation for such services exceeds the sum allowable pursuant to the schedule of fees set forth in section 473.153. Petitioner attaches as Exhibit B and incorporates by reference a copy of his application for final compensation for legal fees and expenses to be allowed and paid as an expense of administration.

7. If all of the expenses of administration and allowances as set forth in paragraphs 2 and 3 are approved and paid in full, there will be the sum of _____ dollars remaining for the payment of creditors of decedent's estate. Attached hereto

Attachment A

and incorporated herein by this reference as exhibit D is a list of creditors having allowable claims against decedent's estate together with their classification as to priority as specified by section 473.397 and the proposed amount to be paid pro rata on claims of the ninth class.

Wherefore, petitioner prays the following orders of the court:

- a. That notice of hearing be given to each person interested in the estate of the application set forth above;
- b. That the court ratify and approve the interim accounting attached hereto as exhibit A;
- c. That the court authorize the payment of compensation to the personal representative as prayed in exhibit B attached hereto;
- d. That the court authorize the payment of compensation to R. Scott Gardner, Gardner, Gardner & Gardner LLP, petitioner's attorney as prayed in exhibits B and C attached hereto;
- e. That the court authorize the payment of creditors as set forth in exhibit D attached hereto; and
- f. That the court enter such other orders as to the court seems just and proper in the premises.

The undersigned swears that the matters set forth above are true and correct to the best knowledge and belief of the undersigned subject to the penalties of making a false affidavit or declaration.

Gardner, Gardner & Gardner LLP

Elmer Fudd, Personal Representative

R. Scott Gardner #33504
416 South Ohio Avenue
Sedalia, Missouri 65301
Telephone: (660) 827-0204
Facsimile: (660) 826-4443
E-mail: sgardner@gardnerlawfirm.net

Attachment A

Exhibit D List of Creditors

Per RSMo. Section 473.397. Classification of claims and statutory allowances

(4) Funeral expenses.

Weplantum Funeral Home, \$1,024.10

(7) Debts and taxes due the state of Missouri, any county, or any political subdivision of the state of Missouri.

State of Missouri, Department of Social Services, \$8,685.22

(9) All other claims not barred by section 473.360.

Discover Financial Services, Inc. 6011300301001739	\$4,614.00
Discover Financial Services, Inc. 6011006788004134	\$3,149.00

Attachment A

IN THE CIRCUIT COURT OF PETTIS COUNTY, MISSOURI
PROBATE DIVISION FIVE

In the Estate of)
) Estate No. 01PR315080
ELMER FUDD,)
Deceased.)

ORDER UPON HEARING OF
PETITION FOR INSTRUCTIONS REGARDING THE ALLOWANCE
AND PAYMENT OF EXPENSES OF ADMINISTRATION AND OTHER
ALLOWANCES AND THE PRO RATA PAYMENT OF CLAIMS IN AN
INSOLVENT ESTATE

This matter comes on for hearing. Present are Bugs Bunny, Personal Representative, in person and by counsel R. Scott Gardner. The court considers the facts set forth in the Personal Representative's Petition for Instructions, etc. and finds facts in accordance with those set forth in said Petition.

IT IS THEREFORE ORDERED AND DECREED AS FOLLOWS:

1. The court approves the interim accounting showing that the Personal Representative has on hand the sum of \$12,734.52, subject to the court's approval of the final settlement to be filed at the closing of this case.
2. Bugs Bunny is entitled to \$587.50 for his services rendered as Personal Representative. R. Scott Gardner is entitled to \$1,433.77 as compensation for services rendered as attorney for the Personal Representative for reimbursement for mileage and other expenses incurred as attorney for the Personal Representative, as set forth in Exhibit C to said Petition. It is therefore ordered that Bugs Bunny be authorized to pay these sums from the restricted Firstar Bank Checking Account #4346809561. The estate is entitled to withhold the sum of \$400.00 for expenses of notices and publication of notice.
3. Bugs Bunny is authorized to pay the following sums to the following persons or entities filing claims in this case or otherwise entitled to funds, all from the restricted Firstar Bank Checking Account #4346809561:

Circuit Court of Pettis County, Probate Division	\$142.50
Weplantum Funeral Home, Inc.	\$1,024.10
State of Missouri-Public Assistance benefits	\$8,685.22
Discover Financial Services, Inc. 6011300301001739	\$230.71
Discover Financial Services, Inc. 6011006788004134	\$230.72

4. Upon filing of receipts or other proof in the absence of said receipts that said amounts set forth above have been paid, upon proper notice and proof of the same, and approval of a final settlement of the estate Bugs Bunny shall be discharged from his

Attachment B

duties as Personal Representative and the cash bond deposited by his with this court shall be returned to him. **(Did I mention the PR had problems getting a surety bond?)**

Judge

Date

Attachment B

Gardner,
Gardner &
Gardner
LLP

Attorneys and Counselors at Law
416 South Ohio Avenue
Sedalia, Missouri 65301

John T. Martin (1904-1974)

Robert S. Gardner
R. Scott Gardner
Anne C. Gardner

Telephone: (660) 827-0204
Facsimile: (660) 826-4443

April 19, 2004

Linda Maloney
DMS
615 Howerton Court
Jefferson City, Missouri 65101

Re: Elmer Fudd, Deceased
Our File: 4590

Dear Ms. Maloney:

I have been handling this estate, which could be settled after May 19, 2004. Mr. Fudd's date of birth was March 20, 1924; his Social Security number was 555-12-1212; and his Medicaid number was 55512121. Does the estate owe Medicaid anything? Please advise.

Very truly yours,

GARDNER, GARDNER & GARDNER LLP

A handwritten signature in black ink, appearing to read "R. Scott Gardner", written in a cursive style.

R. Scott Gardner

SG/jkg

Attachment C

Gardner,
Gardner &
Gardner
LLP

Attorneys and Counselors at Law
416 South Ohio Avenue
Sedalia, Missouri 65301

John T. Martin (1904-1974)

Robert S. Gardner
R. Scott Gardner
Anne C. Gardner

Telephone: (660) 827-0204
Facsimile: (660) 826-4443

June 12, 2004

TransUnion
Post Office Box 2000
Chester, PA 19022

Equifax Credit Information Services, Inc
P.O. Box 740241
Atlanta, GA 30374

Experian
955 American Lane
Schaumburg, IL 60173

RE: Name: Elmer Fudd
Address: 1234 Dingbat Street, Sedalia, Missouri 65301
Social Security No.: 555-12-1212
Date of Birth: 01/03/1903
Phone No.: (660)827-7373
Our File: 4483

Dear Sir or Madam:

Elmer Fudd is under a conservatorship and cannot sign for credit card offers or other offers of credit himself. Copies of letters of conservatorship are attached. Before extending credit to Elmer Fudd, please send the offer of credit to R. Scott Gardner at 416 South Ohio, Sedalia, Missouri 65301 for the approval of Bugs Bunny, Conservator.

Very truly yours,

GARDNER, GARDNER & GARDNER LLP



R. Scott Gardner

Attachment D

SG/jkg
Enclosure: Letters