

IN THE COURT OF COMMON PLEAS, PROBATE DIVISION, GEauga COUNTY, OHIO
Judge Timothy J. Grendell

Information Sheet
Insolvency

WARNING

This Information Sheet is intended to provide you with an overview of the subject matter, effective as of the date noted in the upper left-hand corner. This Information Sheet is not intended to provide you with all legal information that may be necessary for you to decide upon a course of action, and the information provided may not be error-free, complete, or accurate. Moreover, this Information Sheet may not accurately describe the cited sections of the Ohio Revised Code or cited case law. Finally, this Information Sheet is not intended as a substitute for legal advice from a competent licensed attorney, who is familiar with all of the relevant facts of your case, and therefore the Help Center recommends that you seek legal advice from a competent licensed attorney that you select before taking any action. While the Help Center can provide you with a limited amount of general legal information, neither the Help Center staff nor any other Court employee can give you any legal advice.

Additional Reading

- Before proceeding with this Information Sheet, you should read the probate information sheet titled “Creditor Rights.”
- Additionally, consider reading the Supreme Court of Ohio Bench Card titled “Insolvent Estates.”¹

Background

The probate process is like a business bankruptcy. When a business is in a bankruptcy proceeding, the Trustee will gather the assets of the bankrupt entity, determine and order payments to the creditors based upon their classification, and pay the remaining assets to the business owners. The business owners only receive assets after the creditors have been fully paid. Likewise, when a person dies owning probate property,² upon receipt of an application, the probate court will appoint an executor or administrator in a full administration, (or direct the applicant in the event of a Release from Administration). The Estate Representative³ will identify and gather the Decedent’s probate property, satisfy the rights of a surviving spouse or minor children, determine and pay the Decedent’s creditors and then pay the remaining balance of the probate property to those persons or entities entitled to

¹ <https://www.supremecourt.ohio.gov/JCS/CFC/resources/probateBenchCards/insolventEstates.pdf>

² See generally Information Sheet “Probate Process Overview” for a description of probate property.

³ “Estate Representative” is the person appointed by the probate court to handle the probate estate, whether the probate process is a Full Administration (in which case the name of that person is the Executor, Administrator, or Administrator with Will Annexed), the Commissioner of a Release from Administration, or the applicant of a Summary Release from Administration. Sometimes that person is called a “fiduciary.”

receive the balance of the probate property in accordance with the Decedent's Will admitted to probate, or if none, then in accordance with the statute of descent and distribution.⁴

As permitted by R.C. 2117.15, the Estate Representative may proceed to pay the creditors of the estate without a court order. However, if the Estate Representative believes that the probate estate is insolvent, then the Estate Representative may report that fact to the Court and request that the Court issue an order that the Estate Representative deems necessary to assist the Estate Representative to determine what creditors should be paid and how much should be paid to each creditor. Similar to bankruptcy matters, R.C. 2117.25 describes the classification of creditors. Depending upon the classification of the creditors, certain creditors should be paid in full before any payment is made to other creditors in a lower classification.

Determine Insolvency

A probate estate is insolvent if the total value of a probate property is less than the total amount owed to the creditor(s). Essentially the value of the probate property is determined by the values on the Inventory prepared and filed by the Estate Representative. Determining the amount owed to the creditors is a bit more complex. Again, you should first read the probate information sheet titled "Creditor Rights." There are several factors to consider when determining the creditors.

- First is the concept of "presentation of claim." For most creditors, their claim is only valid for probate purposes if the creditor properly presented its claim in the manner defined in R.C. 2117.06. The general rule is that the creditor must either (i) present its claim to the duly appointed Estate Representative (or the attorney of record) or (ii) file the claim with the probate court after the probate proceeding is commenced, in either case within six months after the date of death. Thus, if the creditor claim is not timely and properly presented, then the claim is void and may not be paid by the Estate Representative. Therefore, with few exceptions, a creditor that did not timely present its claim is not considered when determining insolvency and may not be paid from probate property. The few creditors who need not timely present their claims include: (1) Medicaid Recovery claims, (2) the rights of a surviving spouse and minors for the Allowance for Support,⁵ (3) debts (including taxes) owed to the federal government or State of Ohio, or (4) costs of probate administration (including attorneys' fees). Moreover, there is a concept of contingent claims. A contingent claim is exempt from the six-month rule. A claim is contingent if, as of the time of death, it is uncertain whether the claim will become due. An example is an act by the decedent that caused injury to another person (e.g., a car accident), but no claim has yet been filed by the injured person. Another example is a breach of contract claim where the other party has not yet filed a claim. The key point is that if a decedent's creditor, who has a duty to timely present its claim with six months after date of death under R.C. 2117.06, does not so present its claim, then the Estate Representative must not consider that claim when determining whether the probate estate is insolvent.⁶

⁴ R.C. 2105.06.

⁵ See the probate information sheet titled "Rights of Surviving Spouse."

⁶ R.C. 2117.06(C) states "Except as provided in section 2117.061 of the Revised Code, a claim that is not presented within six months after the death of the decedent shall be forever barred as to all parties, including, but not limited to, devisees, legatees, and distributees. No payment shall be made on the claim and no action shall be maintained on the claim, except as otherwise provided in sections 2117.37 to 2117.42 of the Revised Code with reference to contingent claims."

- Second is the concept of allowance or rejection of a creditor claim.⁷ Even if a creditor timely presents its claim to the Executor or Administrator, nevertheless the Executor or Administrator may decide to allow that claim or reject that claim. If the Executor or Administrator rejects a creditor's claim, then the only remedy of the creditor is to file a lawsuit within two months after the rejection.⁸ Again, see the probate information sheet titled "Creditor Rights" for more information on the allowance and rejection of a creditor claim that was timely presented under R.C. 2117.06. Again, the key point is that if a creditor claim is rejected by the Executor or Administrator, then the Executor or Administrator need not consider that claim when determining whether the probate estate is insolvent. The sole remedy for that creditor is to file a lawsuit against the probate estate.

Reporting Insolvency to the Court.

R.C. 2117.15 makes it clear that the Estate Representative has the authority, without a court order, to pay the valid and payable creditor claims (i.e., creditor claims that were properly presented, if required, and that have not been rejected by the Estate Representative). Presumably, that is true even if the probate estate is insolvent. However, in that event, the Estate Representative, must pay those claims in the order and classification provided for in R.C. 2117.25. Nevertheless, the Estate Representative may decide to report the insolvency to the Court and apply for a court order regarding claims against the probate estate and the priority of payment, which provides the Estate Representative with both guidance and perhaps protection. The Estate Representative has a fiduciary duty to the beneficiaries of the estate not to pay creditor claims that are not required to be paid.

Reporting the insolvency of the probate estate to the Court under R.C. 2117.15 is discretionary upon the fiduciary. However, the Court, on its own motion, may order an insolvency hearing to determine both the validity and priority of payment of claims against the estate.

The Process.

1. Initial Considerations before Preparing Documents.
 - a. Make a list of those creditors who have timely presented their claim as required by R.C. 2117.06 and those creditors are not so required
 - i. As to each creditor, indicate (i) the address, (ii) the amount owed and (iii) whether (a) its claim is allowed or rejected by the Estate Representative, and (b) the creditor has timely and properly presented its claim with the Court as permitted by R.C. 2117.06.
 - ii. Determine whether any of the surviving spouse, heirs, beneficiaries under the decedent's will, and creditors are willing to sign the "Waiver of Notice of Hearing on Representation of Insolvency and Schedule of Assets" (Form GC PF 24.2A).

⁷ R.C. 2117.11

⁸ R.C. 2117.12

- b. Verify that:
 - i. the Inventory and Schedule of Assets has been filed, and
 - ii. the six-month period after appointment of the Estate Representative has expired.
- c. Determine whether notice by publication is required.

2. Initial Filing. Prepare and file with the Clerk the following documents:

- a. "Representation of Insolvency" (Form 24.0).
- b. "Insolvency Schedule of Claims" (Form 24.4)
- c. "Continuation of Insolvency Schedule of Claims" (Form 24.5)
- d. "Insolvency Claims – Class Subtotal" (Form GC PF 24.4A)
- e. "Judgment Entry Setting Hearing and Ordering Notice" (Form 24.1)
 - i. Consider having the surviving spouse, heirs, and beneficiaries under the decedent's Will sign the "Waiver of Notice of Hearing on Representation of Insolvency and Schedule of Assets" (Form GC PF 24.2A).

3. Notice.

- a. "Notice of Hearing on Representation of Insolvency and Schedule of Claims" (Form 24.2)
 - i. The Estate Representative must notify each Interested Person at least 10 days before the Hearing Date, unless the Interested Person signed the "Waiver of Notice of Hearing on Representation of Insolvency and Schedule of Claims" (Form GC PF 24.2A).
 - ii. Service of the notice must be by certified mail, return receipt requested or personal service.
 - iii. The persons to be served are all creditors, claimants, the surviving spouse, the custodians of minor children who are not the children of the surviving spouse, and other persons having an interest in the estate such as beneficiaries under the will or heirs.
 - 1. Note that creditors, whose claims have been rejected by the Estate Representative, must be served, even though their claims need not be paid unless the Estate Representative decides to allow the claim.
 - iv. Consider whether notice by publication is required, especially with respect to heirs or beneficiaries named in decedent's Will. See Geauga Probate Local Rule 78.14.

- b. "Verification of Service – Notice of Hearing on Representation of Insolvency and Schedule of Claims" (Form 24.3). Promptly after service of notice, the Estate Representative shall prepare and file with the Court this verification together with (1) a copy of the Notice and (2) proof of service for each recipient (e.g., the returned "green cards").
 - c. "Judgment Entry of Insolvency" (Form 24.6) – complete the case name and case number at the beginning of Form 24.6 and deliver it to the Court at the hearing.
4. Filing of Exceptions. Any interested person may file an exception with the Court concerning the filings, including the "Insolvency Schedule of Claims" (Form 24.4), as permitted by R.C. 2117.17(B).
 5. Hearing. The Court's primary role at the Hearing is to decide whether the action of the Estate Representative to (1) allow of creditor claims and (2) the classification of creditor claims is proper as set forth in R.C. 2117.25 and in the "Insolvency Schedule of Claims" (Form 24.4). The Court will consider and rule upon any exceptions filed with the Court. If the Court determines that the probate estate is insolvent, then the Court will order the Estate Representative to pay the allowable claims from the probate property in accordance with the class of claims per R.C. 2117.25. Each class of creditor claims will be paid in full before any claims in the following class are paid.

LEGAL PRACTICE IN THE PROBATE COURT IS RESTRICTED BY LAW TO ATTORNEYS WHO ARE LICENSED BY THE SUPREME COURT OF OHIO AND INDIVIDUALS WHO ARE HANDLING THEIR OWN LEGAL MATTERS. IF AN INDIVIDUAL WISHES TO HANDLE HIS OR HER OWN CASE, THAT PERSON MAY ATTEMPT TO DO SO, HOWEVER DUE TO THE COMPLEXITY OF THE LAW AND THE DESIRE TO AVOID COSTLY ERRORS, MANY PERSONS WHO HAVE MATTERS BEFORE THE COURT ARE REPRESENTED BY AN ATTORNEY.

IF YOU CHOOSE TO REPRESENT YOURSELF AND USE THE COURT'S FORMS, BE AWARE THAT STATE LAW PROHIBITS THE JUDGE, MAGISTRATE, AND EMPLOYEES OF THE GAUGA COUNTY PROBATE COURT, INCLUDING THE HELP CENTER STAFF, FROM PROVIDING YOU WITH LEGAL ADVICE. IF YOU NEED LEGAL ADVICE, THEN YOU SHOULD CONTACT AN ATTORNEY OF YOUR CHOOSING.