Fattening Up the Ski Non-Probate Transfe for Pursuing a Decec

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Once upon a time, a creditor with a claim against a decedent could look to a traditional, formal probate estate as a viable source of payment for such debts. But as time has passed, the importance of a decedent's last will and of a court-supervised probate estate have been lessened by the increased usage of *inter vivos* trusts and other legal devices for transferring assets without the need for probate. Non-probate and non-testamentary transfers are so prevalent these days, in fact, that probate estates often possess few assets with which to satisfy statutory allowances and creditor claims. While the probate code affords many rights to claimants and others with an interest in probate estates, a right without a remedy is of little if any value.

Within certain limitations, however, the law provides additional remedies to assist with recovery of assets or funds so as to satisfy valid probate allowances and claims. These remedies should be assessed as soon as a claim is contemplated against a probate estate, since failure to timely follow all required steps may result in a lost opportunity for collection.

The Non-Probate Transfer Statute – § 461.300, RSMo[2]

In summary, this statute allows a person entitled to certain statutory allowances and, more often, creditors, to reach out and recover the value of assets formerly owned by a decedent but that have not been made a part of the probate estate. Certain recoverable transfers, most notably transfers to a trust, beneficiary deed conveyances or jointly held property, can be pulled back into probate and then used to pay these obligations. But action usually must be taken within 16 months of death and can only reach assets that would have been reachable while the decedent was still living. This remedy is distinct from a discovery of assets action that would seek to retitle assets outside of a probate estate that allegedly should be part of the estate ab initio.

What is a Recoverable Transfer?

"Recoverable transfer" is defined, in part, in the statute as "a nonprobate transfer of a decedent's property under sections 461.003 to 461.081…."[3]

Those referenced statutory sections constitute the "Nonprobate Transfers Law of Missouri" (NTLM). Although § 461.300 is part of the same chapter, it is not part of the NTLM. Instead, proceedings under this section are deemed to be proceedings under the probate code per § 461.300.7. But since § 461.300 includes nonprobate transfers as defined by the NTLM, reference

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to that body of law is necessary. As the reader will soon understand, however, discerning what is and what is not covered by the NTLM requires close analysis.

A "nonprobate transfer" under the NTLM initially is defined to include "a transfer of property taking effect upon the death of the owner, pursuant to beneficiary designation."[4] But that statutory definition goes on to then broadly *exclude* from the NTLM survivorship rights in property held as joint tenants or tenants by the entirety, a transfer to a remainderman on termination of a life tenancy, a transfer under a trust established by an individual, either inter vivos or testamentary, a transfer pursuant to the exercise or nonexercise of a power of appointment, or a transfer made on death of a person who did not have the right to designate his or her estate as a beneficiary of the transfer.[5]

Section 461.073 then modifies the scope of the NTLM further and presumptively excludes "accounts or deposits at financial institutions unless the provisions of sections 461.003 to 461.081 are incorporated into the certificate, account or deposit agreement in whole or in part by express reference."[6] Also presumptively excluded are life insurance, annuities "or other product[s] sold or issued by a life insurance company unless the provisions of sections 461.003 to 461.081 are incorporated into the policy or beneficiary designation in whole or in part by express reference."[7]

Thus, this first part of the definition of a "recoverable transfer" starts out appearing to cover transfers pursuant to beneficiary designations, only to then take away so many categories of such transfers that very few real world transactions remain within its scope.

But this narrow first prong of the definition is then supplemented by the much broader second prong that follows. Section 461.300's definition of "recoverable transfers" is broader in scope than the NTLM and captures other transfers that would not fall within the formal definition of "nonprobate transfers," including a number of transactions specifically excluded from the NTLM.[8]

Section 461.300.10(4) also includes as recoverable transfers: "[A]ny other transfer of a decedent's property other than from the administration of the decedent's probate estate that was subject to satisfaction of the decedent's debts immediately prior to the decedent's death, but only to the extent of the decedent's contribution to the value of such property." Here, the focus is on whether the asset in question could have been reached by creditors were the decedent still living. Thus, for example, a 401k plan, an IRA and most life insurance policies would be beyond the reach of a creditor during the decedent's lifetime and would thus arguably fall outside of at least the second half of the definition of recoverable transfers.

By law, a judgment against a person owning these assets would not be executable on such assets. Likewise, although joint property can be reached if the decedent contributed to the value of such property, tenancy by the entirety property (i.e., property owned with a spouse), cannot be reached since Missouri does not allow collection against such property if a judgment is only against one of the spouses.[9]

Section 461.300.8 effectively supplements the definition of a recoverable transfer with respect to trusts and joint property. That section elaborates:

> The recipient of any property held in trust that was subject to the satisfaction of the decedent's debts immediately prior to the decedent's death, and the recipient of any property held in joint tenancy with right of survivorship that was subject to the satisfaction of the decedent's debts immediately prior to the decedent's death, are subject to this section, but only to the extent of the decedent's contribution to the value of the property.

Thus, for example, a joint revocable trust might be responsible for the debts of one co-grantor, but only to the extent of that grantor's contribution. Beneficiary deeds have been held to be within the scope of the recoverable transfers contemplated in this statute.[10]

What Claims and Allowances Are Covered By § 461.300?

The statute may be utilized to recover:

> [T]he statutory allowances to the decedent's surviving spouse and dependent children, and claims remaining unpaid after application of the decedent's estate, including expenses of administration and costs as provided in subsection 3 of this section, and including estate or inheritance or other transfer taxes imposed by reason of the decedent's death only where payment of those taxes is a prerequisite to satisfying unpaid claims which have a lower level of priority. No proceeding may be brought under this section when the deficiency described in this subsection is solely attributable to costs and expenses of administration.[11]

Notably, therefore, a bequest to a legatee under a will would *not* be covered by the statute and an unfunded bequest will therefore remain unfunded absent some other available remedy, such as a discovery of assets action.[12]

Implicit in this analysis is the assumption that the assets of the probate estate are insufficient to cover the claim in question. Usually this will not be a disputed issue, but in some cases – especially where a claim is unliquidated – as with personal injury claims, a question may arise. Also, at a minimum, a person seeking to bring an action under this section will need to have previously filed for a statutory allowance, or filed their creditor claim, in the probate court. Where no probate estate is open, a creditor may need to even open an estate in the first instance, a process that usually takes a number of weeks at a minimum. The strict time requirements for then filing a claim in a Missouri probate estate are well known. It is important to note that the courts have held that a person is a "creditor" upon the filing of a claim, and that that status is not deferred until the claim is allowed.[13] Nevertheless, if possible, it would appear appropriate to finalize the probate claim, especially if it is contested, before investing more resources in an action under § 461.300.

How Can the Rights Conferred by § 461.300 Be Asserted?

Section 461.300.2 allows for a cause of action known as an "action for accounting." This is confusing because an action for an accounting is also a well-known action seeking detailed financial and transactional information from various fiduciaries. But they are obviously not the same. This action for accounting seeks recovery of a money judgment. Section 461.300.7 makes clear that this action may be filed in the probate division of the circuit court.

Who Can Bring This Action?

A "personal representative or a qualified claimant" can bring the action."[14] A "qualified claimant" is defined at § 461.300.10(3) as "a creditor, surviving spouse, dependent child, or a person acting for a dependent child of the decedent." The term "creditor"

is defined at § 461.300.10(1) as "any person to whom the decedent is liable, which liability survives whether arising in contract, tort, or otherwise, and any person to whom the decedent's estate is liable for funeral expenses and the reasonable cost of a tombstone." This definition closely tracks the definition of "claims" given in § 472.010(3). The term "dependent child" is also defined at § 461.300.10(2) as "the decedent's minor children whom the decedent was obligated to support and the children who were in fact being supported by the decedent." The latter part of that definition likely includes stepchildren.

A qualified claimant cannot bring the action unless he or she has first delivered a written demand to the personal representative to do so. If the personal representative does not act upon the demand within 30 days, the qualified claimant may then commence the action.[15] Note that the statute makes clear that the time begins to run upon "receipt" by the personal representative of the written demand.[16] Presumably, simply mailing or sending the demand may not be enough if the personal representative denies receiving it.

If "the personal representative is alleged in a verified pleading to [himself] be [the] recipient of a recoverable transfer from the decedent [a common occurrence], the court may appoint an administrator ad litem to represent the estate in any proceeding brought pursuant to [§ 461.300]."[17] Presumably, even if an administrator ad litem is appointed – a discretionary act on the part of the court – the qualified claimant should nevertheless be prepared to actively participate in the prosecution of the action against the personal representative in his or her individual capacity to ensure that the claimant's interests are well-represented. A qualified claimant with few resources, however, should lobby the administrator ad litem to take an aggressive stand on the basis of the fiduciary duty inherent with that office.

When Must the Action Be Brought?

The personal representative must normally bring the action within 18 months of the decedent's death. The same applies to a qualified claimant although, as referenced above, the qualified claimant must satisfy certain prerequisites before doing so. Section 461.300.2 requires the qualified claimant to make written demand on the personal representative (a demand that must be *received* by the personal representative) within 16 months following the decedent's death. If the personal representative does not then follow through with an action for accounting, then the qualified claimant is free – 30 days after *receipt* of the demand by the personal representative – to commence the action so long as the action is then brought before the ultimate 18-month deadline. But even that 18-month deadline is not inviolate. There are several exceptions to this presumptive time frame.

"[R]emedies should be asserted as soon as a claim is contemplated, . . . since failure to timely follow all required steps may result in a lost opportunity for collection."

Most notably, § 456.5-505.4 contains a specific exception to the 18-month limitation period. That section provides that if a trustee of a trust with the duty or power to pay a decedent's debts publishes notice to creditors in an appropriate newspaper for four consecutive weeks, then any claim that is not presented "within six months from the date of the first publication" of this notice is "forever barred."[18] Since many decedents with substantial estates utilize trusts as their primary estate planning vehicle, an informed trustee can effectively bar some claims through this six-month "non-claim" mechanism if he or she begins publishing the notice soon after death. Conversely, an informed creditor should send written claims for payment to any known or suspected trustee as soon as possible or face the prospect of having the debt effectively extinguished.

A second exception to the 18-month limitation is set forth in § 461.300. Once an action for accounting has been timely commenced, § 461.300.4 then provides that "any party to the proceeding may join and bring into the action for accounting any other recipient of a recoverable transfer of the decedent's property even if the other recipient is not joined until more than eighteen months following the decedent's death." Thus, if one party commences such an action, other transferees may face the prospect of being sued well after the 18-month presumptive deadline. This exception, which by its terms applies to any party to the proceeding, means that, for example, the respondent/defendant in an accounting action may well want to seek out other transferees to share in the burden of satisfying the underlying claim or allowance at the probate court level. Likewise, a personal representative or qualified claimant, having commenced a threshold action against one transferee, may have now bought more time to seek out and discover the identity of other transferees to name to the action at a later time.

The final exception to the 18-month presumptive deadline is set forth in § 461.300.2. That section provides that if a personal representative does not bring an action for accounting after receiving a demand by a qualified claimant, he or she must then "disclose to the qualified claimant[(s)] … who made such written demand all material knowledge within the possession of

the personal representative reasonably relating to the identity of any recipient of a recoverable transfer made by the decedent."[19] If the personal representative does not comply with this obligation, "the eighteen-month limitation is tolled for such recoverable transfer until such time as the personal representative provides such information."[20] This provision is straightforward. If a personal representative attempts to shield a transferee, including himself, from an action for accounting by withholding information from a qualified beneficiary, then tolling of the limitation period occurs. And further, § 461.300.4 provides that if this tolling has occurred and an action against the personal representative is later brought:

> [T]hen the personal representative, or former personal representative, who received a recoverable transfer of the decedent's property shall be liable to account under the provisions of subsection 1 of this section for the value of *all* such property received by such personal representative, or former personal representative, and no other recipient of a recoverable transfer of the decedent's property may be joined or brought into the action, and in such case, full recovery, rather than pro rata recovery, may be had from the recoverable property received by such personal representative or former personal representative.[21]

Thus, a personal representative who either conceals or is not forthright about the receipt of transferred assets loses his or her right of contribution against other transferees who do not wear the mantle of fiduciary responsibility inherent with that office. One could argue as well, given the well-established fiduciary obligations of a personal representative to creditors of an estate, that such lack of cooperation might also rise to a breach of fiduciary duty against the personal representative, a claim that could seek recovery beyond the value of assets received by the personal representative. Section 461.300.7 also makes clear that a personal representative's statements in connection with a recoverable transfer are subject to the fraud provisions of § 472.013.

As with any civil claim, however, timing is often critical. Simply satisfying the statute of limitations is not the end of the inquiry. The recipient of a recoverable asset may squander or further conceal the asset in the 18 months that the statue allows for commencing the action. A probate estate can be opened up to a year after death and, if that occurs, most of the allotted time for bringing an accounting action will have already run. And if commencement of the action occurs 18 months after death, a hotly-contested action might take another year or two to try to a conclusion. It is also important to remember that § 461.300.1 provides that a person bringing an action for accounting may recover an appropriate "share of the value of all such property received." Thus, the action is not one simply to set aside a transfer. Once again, it is an action seeking a money judgment against the transfer recipient. Thus, prudence may often dictate that an action for accounting be commenced as soon as possible, especially if the transferee may be receiving other post-death distributions of some sort that can be levied upon or garnished once a judgment is obtained.

Determination of Value

Valuation of a transfer would seem to be straightforward if the transfer involves liquid funds. But a transfer involving a volatile asset may raise other issues, including the time for fixing the value of the asset and, of course, disputes over its value. For example, stock and land values can change dramatically during a recession and the value at the owner's death may vary greatly from the value six months before death or on the day of a later accounting action trial. Arguably, value should be determined at the time of the transfer – the date of death – since § 461.300 is primarily focused on that event. The only temporal reference in the statutory definition of a "recoverable transfer" is to the time "immediately prior to the decedent's death."[22] It follows that focusing on the value of a transferred asset at that instant for purposes of gauging the value for a money judgment against a transferee is the only logical answer to this question. Regardless, the wise practitioner will line up appropriate experts and/or other evidence to prove value if the issue is disputed.

Attorneys' Fees and Expenses

Section 461.300.3 provides:

> The judgment in a proceeding authorized by this section shall take into account the expenses of administration of the estate including the cost of administering the additional assets obtained in the proceeding, and the costs of the proceeding to the extent authorized by this subsection. The court may order the costs of the proceeding, including attorney fees, to be treated as expenses of administration of the estate.

Thus, this statute represents a clear exception to the American rule regarding attorney's fees. Although subject to the court's broad discretion, the statute makes clear that parties to an accounting proceeding may seek recovery of their legal expenses. No distinction is made in the statute between a successful claimant and

a defeated transferee in terms of an award of fees, so it is arguable that even a losing party might recover fees if the court deemed it appropriate.

No Lien Created

By its terms, the statute makes clear that no lien on any property is created by the statute "except as a lien may be perfected by the way of attachment, garnishment, or judgment in an accounting proceeding authorized by this section."[23] Thus, normally, a judgment is necessary before affirmative steps may be taken to seize assets. Presumably, general prejudgment attachment would be available if a claimant could satisfy the rather rigorous requirements of that statute.[24] Likewise, given that probate courts have full equitable powers, circumstances might arise wherein equity might also offer some relief as, for example, by way of mandatory injunctive relief.

Custodianships

For an accounting action against a custodianship beneficiary under Chapter 404, see § 404.570, which-closely parallels § 461.300.

Conclusion

The Missouri Non-Probate Transfer Statute, § 461.300, provides a vital and effective tool for pursuing collectable assets in order to satisfy valid debts and obligations left behind by a decedent. The wise probate practitioner will know its requirements and limitations in the context of estate planning, in the context of representing creditors, and in representing estate fiduciaries that may be defending against the claims of creditors.

Endnotes

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2 This is the commonly used name for § 461.300, RSMo Supp. 2010. But this term is something of a misnomer since, as will be discussed, the statute involves more than non-probate transfers and is likewise not even part of the "Nonprobate Transfers Law of Missouri."

3 *See* § 461.300.10(4), RSMo Supp. 2010.

4 *See* § 461.005(7), RSMo Supp. 2010.

5 *Id.*

6 Section 461.073.3, RSMo Supp. 2010.

7 Section 461.073.6, RSMo Supp. 2010.

8 *See, In re Estate of Hayden,* 258 S.W.3d 505, 514 (Mo. App. E.D. 2008). (*Hayden* provides an excellent history of the statute, including its 1995 and 2004 revisions.)

9 *In re Estate of Bruce,* 260 S.W.3d 398, 404 (Mo. App. W.D. 2008); *see also, United States Fid. & Guaranty Co. v. Hiles,* 670 S.W.2d 134, 137 (Mo. App. E.D. 1984).

10 *See, In re Estate of Jones,* 280 S.W.3d. 647, 652-53 (Mo. App. W.D. 2009) has a fee simple real estate interest conveyed by deed but with a reserved life estate and a reserved power to revoke the deed. *In re Estate of Hayden,* 258 S.W.3d 505, 512 (Mo. App. E.D. 2008).

11 Section 461.300.1, RSMo Supp. 2010.

12 *See* § 473.340, RSMo 2000.

13 *Ex rel. Hoffmann,* 23 S.W.3d 646, 649 (Mo. App. E.D. 2000).

14 Section 461.300.2, RSMo Supp. 2010.

15 *Id.*

16 *Id.*

17 *Id.*

18 Section 456-5.505.4(1), RSMo Supp. 2010.

19 Section 461.300.2, RSMo Supp. 2010.

20 *Id.*

21 Section 461.300.4, RSMo Supp. 2010 (emphasis added).

22 Section 461.300.10(4), RSMo Supp. 2010.

23 Section 461.300.6, RSMo Supp. 2010.

24 Section 521.010, RSMo 2000.

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