

Ask the Probate Judge—Trusts & Statutory Allowances

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Q: A married man dies. His probate estate does not have enough assets to pay his spousal allowances. He has a revocable living trust with assets. I think the balance of the spousal allowances needs to be paid from the trust because of the status of a spouse as a "super" creditor under the law. By "super" creditor, I mean one that comes before even the IRS. Since trusts cannot avoid creditors, why should they avoid allowances? Do you have an opinion? L.K., Albuquerque

Of course, I have an opinion! I think the Uniform Trust Code contains the answer to your question. Section 46A-5-505 states in part, "...after the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains and statutory allowances to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses and allowances."

For those who dislike legalese, the short answer is, "yes, a trust can be required to pay creditors' claims and statutory allowances."

Let's review the allowances. Two New Mexico laws reserve a certain amount of money from the estate for spouses and children of decedents who lived in New Mexico. These statutory amounts are called the "family allowance" and the "personal property allowance."

The surviving spouse is entitled to the family allowance of \$30,000. If there is no surviving spouse, decedent's minor and dependent children are entitled to receive \$30,000 divided by the number of minor and dependent children. Adult children are not entitled to the family allowance.

The spouse and children have priority over creditors to the \$30,000. I do not know if the IRS would agree with your "super" creditor idea. The IRS might assert a greater right to the money by arguing that federal claims trump state claims. In reality, however, the IRS does not usually attempt to take a family allowance away from a grieving widow or widower.

New Mexico law also allows the surviving spouse to receive from the decedent's estate the personal property allowance of \$15,000. Personal property includes furniture, automobiles, appliances, and personal effects. If there is no surviving spouse, the decedent's children (except those children who are disinherited under a will) are entitled to share the personal property allowance. Minor, dependent, and adult children are all entitled to share the personal property allowance if there is no surviving spouse.

Cash or other assets of the estate can be used to pay the personal property allowance if the decedent's personal property does not equal \$15,000 in value. The spouse or children have priority over creditors to the \$15,000.

These allowances apply whether or not a will exists.

Several recent New Mexico cases ruled that the surviving spouse is absolutely entitled to the allowances even if the decedent's will expresses contrary intentions. Therefore, a spouse cannot, through language in a will, unilaterally disinherit the other

spouse from receiving the allowances. If a spouse leaves his or her assets to children from a prior marriage instead of the other spouse, the surviving spouse is still entitled to the allowances totaling \$45,000.

If a spouse voluntarily agrees in writing, before or after marriage, to waive his or her right to the allowances, they could be waived. One may still state in one's will that the surviving spouse may not receive **more** than the family and personal property allowances.

If the assets of decedent's probate estate are insufficient to pay the allowances, recipients of payable on death accounts, property passing through transfer on death deeds, stock and security accounts that pass via transfer on death designations, and trust property can be compelled to return those assets to pay the allowances.

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