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Decedent Estates — Selected Guidelines For Administering Estates in Tennessee

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LIMITATION

The estate settlement process is rather technical and may be very complex in some situations. This publication should help explain some of the intricacies of the probate process but should not be used as a do-it-yourself probate guide. An attorney should be consulted and retained where there are potential complications or where the personal representative is inexperienced.

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Decedent Estates — Selected Guidelines For Administering Estates in Tennessee

by Ronald W. Todd*

INTRODUCTION

The estate settlement process may be fairly simple or extremely complex depending on the value and nature of estate assets and the diligence of the deceased property owner during his lifetime in planning his estate. Careful estate planning and close pre-death communication with the person chosen to manage the estate settlement process can eliminate many of the complexities of estate administration.

Purpose of this publication is to help familiarize the personal representative with some of the rights, duties, and responsibilities that are routinely encountered in the administration process. A basic knowledge of the information presented should facilitate communication with attorneys and other professionals and help prepare the personal representative to carry out administrative duties in an efficient manner. A glossary is provided at the end of this publication to familiarize the reader with the meaning of terms that may not be explained in the text.

THE PERSONAL REPRESENTATIVE — QUALIFICATIONS AND NATURE OF RELATIONSHIP

The personal representative of an estate is the person given the responsibility of: 1) collecting and liquidating estate assets; 2) paying the estate obligations; and 3) distributing the remainder to estate beneficiaries. The terms "personal representative," as used in referring to those who handle decedents' estates, includes both administrators and executors.

The personal representative will be referred to as executor (male) or executrix (female) when a valid will designates the person to administer the estate and where that person qualifies and accepts the position. The personal representative need not be named in the will for a valid testamentary distribution, and in such case the court will appoint an administrator c.t.a. (with the will annexed). Where no valid will is left, the court will appoint an administrator (male) or administrix (female) to manage the estate settlement procedure.

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Who May Serve?

In Tennessee, any person of sound mind and 18 years of age or older, may by valid will, name one or more persons to serve as personal representative for his estate. Persons so named, after taking oath to faithfully perform the conditions of the will, and posting bond (if not waived by the will), will normally be delivered letters testamentary by the clerk of the probate court authorizing that person or persons to begin the administrative process. Minors or other incompetent persons should not be authorized to serve as personal representative of an estate.

If a personal representative is not named in a will, a statutory scheme of preference will generally be followed.[1] The Tennessee Supreme Court referring to the statute stated "in making said appointment, the next of kin will have preference, unless unfit for the office; next, the appointee of the next of kin, unless unfit; next the largest creditor, and in default of these, such person as the county judge may deem most suitable and proper, . . ."[2] In determining the next of kin, under the statute, the right to serve as personal representative first goes to the surviving spouse, if any, then follows the right to property under the Tennessee Law of Intestate Succession. After the spouse, preference goes to children, then to parents, then brothers and sisters, then to grandparents or descendants of grandparents. This priority will be followed where the applicants qualify, with the court choosing the appropriate person when two or more persons of the same priority class apply. The courts also recognize the rule that the personal qualifications of applicants should be taken into account and may be of such importance, in a particular case, to justify the action of the court in disregarding the statutory scheme of preference in appointing a suitable party.[3]

Nature of Fiduciary Relation

A fiduciary relationship exists between the personal representative and the beneficiaries of an estate. The personal representative is bound to act in good faith and with due diligence to serve the best interest of estate beneficiaries. Fiduciaries should not take advantage of each other in any way but should be completely open in their dealing. Self dealing or dealing to one's own profit in a fiduciary relationship is prohibited. Where profit is derived by the personal relationship in dealing with estate assets, the profit will belong to the estate.[4]

[1] Tenn. Code Ann. §30-109 (1977).

[2] In re Wooten's Estate, 114 Tenn. 289, 313 (1904).

[3] Williams v. Stewart, 64 S.W.2d 194, 195 (Tenn. 1933).

[4] Johnson v. Kay, 27 Tenn. 142 (1847).

SPECIAL RIGHTS OF SPOUSE AND MINOR CHILDREN

In addition to the rights of heirs to inherit property under the Tennessee Law of Intestate Succession or the right to take the decedent's property under a will, certain additional rights have been established by the state legislature. The purpose of these special rights apparently is to provide for maintenance and support of the spouse and minor children and thereby prevent disruption to family life on the death of the family breadwinner.

It should be noted that to receive benefits under the special rights of the surviving spouse and minor children some action must be taken by the recipient and court approval must be obtained. Usually this is accomplished by petitioning the court to set aside the appropriate property.

Exempt Property

Certain personal property of a decedent, including the family Bible and other books, the family automobile, clothing of the deceased, household electrical appliances, all household musical or other amusement instruments and all household and kitchen furniture, utensils, and implements, are made available by statute to the surviving spouse or unmarried minor children of an intestate, or to a spouse who dissents from a decedent's will, without regard to their value.[5] Under this statute the exempt property rights of unmarried minor children exist only where the decedent died intestate. The same statute authorizes the surviving spouse or unmarried minor children of an intestate decedent to take into possession and to use any growing crops, stock, implements and plantation utensils for the purpose of completing, securing, and selling such crop and to use any provisions on hand as may be necessary to support the surviving spouse and family until letters of administration are granted.

The "Personal Property Owners' Rights and Garnishment Act of 1978" provided an additional property exemption. This exemption (after amendment in 1980) is for up to $4,000 plus "all wearing apparel and receptacles necessary to contain same, all family portraits and pictures, the family Bible and school books."[6] This exemption is available to any person who is a bonafide citizen permanently residing in Tennessee and will serve as a bar to execution, seizure, or attachment of up to $4,000 in value of personal property selected by the owner if proper procedures are followed.

In order for a surviving spouse or minor children to claim the

[5] Tenn. Code Ann. §30-801 (1977).

[6] Tenn. Code Ann. §26-209 (Supp. 1979, as amended by Tenn. Pub. Acts, 1980, CH 919 §2).

property under the Personal Property Owners' Rights and Garnishment Act, a petition should be filed with the court showing a valid marriage at decedent's death, in the case of the surviving spouse, or, in the case of minors, that the petitioners were the decedent's minor children and that there was no surviving spouse. It should also be noted that minor children of a testate decedent would not be treated differently from the minor children of an intestate decedent under this statute.[7]

An additional exemption involves the proceeds of life insurance policies. Proceeds of a life insurance policy procured by a married person upon his own life or on the life of the spouse will inure to the surviving spouse and children according to the statutes of intestate succession. Or, if payable to a testate estate, the proceeds will pass under the will. The proceeds will not be subject in any way to the debts of the decedent unless specifically charged therewith by will.[8]

Year's Support

The surviving spouse or unmarried minor children of an intestate or a spouse of a testate decedent who dissents from the will is entitled upon application to the court to a year's support. The year's support entitles the recipient "to a reasonable allowance in money out of the estate for his or her maintenance during the period of one (1) year after the death of the spouse, according to his or her previous standard of living, taking into account the condition of the estate of the deceased spouse."[9] The allowance will normally be made to the surviving spouse, but the court can include the unmarried minor children in the distribution where a more equitable distribution will be effected. If there is no surviving spouse of an intestate decedent, the unmarried minor children are entitled to the year's support. Under the statute, children of a testate decedent are not entitled to the year's support.

The year's support is the absolute property of the recipient. It is exempt from all claims and may not be seized nor taken by execution and should not be considered part of the recipient's share of the estate upon final distribution.

Homestead

The Constitution of Tennessee, as amended in 1978, provides "[t]here shall be a homestead exemption from execution in an amount of five thousand dollars or such greater amount as the General As-

[7] A. Secor, **Tennessee Probate** (1979), pp. 51-53.

[8] Tenn. Code Ann. §§56-1108, 1109 (Supp. 1979)

[9] Tenn. Code Ann. §30-803 (1977).

sembly may establish."[10] The right of homestead gives the recipient the right to occupy and use the surface of the land for life in the case of a spouse or until the youngest child reaches his majority in the case of minor children. The Tennessee Code provides the homestead may be set apart for the surviving spouse, or minor children of the decedent, or if real estate is so situated that homestead cannot be set apart, then realty shall be sold and $5,000 be invested in real estate and held as homestead.[11]

The surviving spouse, or minor children if no spouse survives, is entitled to homestead so long as the decedent owned real estate. Upon the death of a surviving spouse, homestead rights go to any minor children of the deceased property owner. The homestead is free from debts of the decedent, surviving spouse, or minor children. The homestead right does not rise to the dignity of an estate but vests jointly in a man and his wife and may not be affected by the decedent's will.[12]

Elective Share

A surviving spouse has a right of election to take one-third (1/3) of the decedent's net estate free of debts and charges of the decedent incurred after April 1, 1977.[13] "The net estate is defined as all of the decedent's property reduced by funeral and administrative expenses, homestead, exemptions, and the year's support."[14] Previously, under the Acts of 1976, dower and curtesy rights were replaced so that a surviving spouse could receive a distributive share of one-third (1/3) part of the entire estate if not provided for under a will, or if not satisfactorily provided for under the will upon dissent, or without formal dissent, upon suit for the distributive share where the will would have made satisfactory provision but for the whole of decedent's property being taken to pay debts. The Acts of 1977 calls the right of the spouse an elective share and it is not clear as to whether a surviving spouse may take under a will and also take the elective share.[15] The dissent requirement is not mentioned in the Acts of 1977, but logically it would appear that the surviving spouse would be required to effectively dissent from the will to take the elective share.

[10] Constitution of Tennessee Article 11 §11 (Supp. 1979).

[11] Tenn. Code Ann. §30-919 (Supp. 1979).

[12] Springfield v. Stamper 214 S.W.2d 345, 347 (Tenn. App. 1948); Tenn. Code Ann. §31-104 (Supp. 1979).

[13] Tenn. Code Ann. §31-601 (Supp. 1979).

[14] Tenn. Code Ann. §31-602(b) (Supp. 1979).

[15] A. Secor, **Tennessee Probate** (1979), p.52.

In order to claim the elective share, the surviving spouse must file a petition with the court and deliver a copy to the personal representative within nine (9) months after decedent's death, or, if later, within six (6) months after probate of the decedent's will. The court must then notify all interested parties of a scheduled hearing on the matter. After the hearing, the court will determine the elective share and order its distribution to the surviving spouse or his personal representative.[16]

PROBATE

The term probate means to prove. A will is probated or proven by offering sufficient evidence in the appropriate court to show that it is the will of the decedent and that the requirements of a valid will have been met. The person leaving a valid will at death will be said to have died "testate" and will be referred to as "testator" if male and "testatrix" if female. Wills must be proven in the county or probate court of the county where the testator had his usual residence at death.[17] For a written will with witnesses, proof may consist of bringing in one or more witnesses who will testify that at least two witnesses signed the document, which they knew to be the will of the testator, in the presence of the testator and in the presence of each other and that the testator signed it in their presence or told them that the signature already affixed was his own.

If the will is holographic (in the handwriting of the testator) and executed (signed and witnessed) before February 15, 1941, the handwriting and signature of the testator must be proved by three witnesses familiar with his handwriting. Only two such witnesses are required for holographic wills executed after that date.[18] An affidavit of a witness stating the facts of due execution and sworn to before any officer authorized to administer oaths (usually a notary public) may be substituted for the actual appearance of the witness in court.[19] If no witnesses or affidavit can be produced, then the signatures of the witnesses and the testator must be proved by persons familiar with their handwriting.

Probate is also used in a more general sense to include the entire gamut of estate settlement activities whether a will is left or not. In this context probate includes: 1) inventorying estate property and determining its recipients, 2) paying the decedent's debts, and 3) payment of taxes.

[16] Tenn. Code Ann. §31-603 (Supp. 1979).

[17] Tenn. Code Ann. §32-201 (1977).

[18] Id. §32-204.

[19] Id. §32-211.

Forms of Probate

In Tennessee either "common form" or "solemn form" may be chosen for probate of a will with the exception of an oral will which must be probated in solemn form.[20] Availability of witnesses and the anticipation that the will may be contested will have a bearing on the form of probate chosen.

Common form probate is simplest in that no particular formalities are required. The will is simply submitted with a motion that it be admitted to probate. The judge will hear the required proof to see whether statutory requirements have been met. One witness or an affidavit of a witness under oath stating the facts of due execution will normally be adequate to prove a will in common form. Contest of the validity of a will probated in common form may be brought at any time within seven (7) years of the entry of an order to probate the will.[21]

Solemn form probate may be distinguished from common form by the formal notice of probate proceedings given to all interested parties or by their voluntary appearance and intervention.[22] Beneficiaries under the will (or wills where more than one will is found), creditors of the estate, and all persons that would receive property by the laws of intestate succession if the will should be declared invalid are considered interested parties. Notice should be by personal service (actual delivery of written notice to the person to be notified), or where personal service is not feasible publication of notice of the proceedings in a newspaper may be sufficient to bind the court's judgment on interested parties and preclude future contests by them. An interested person who is not properly notified will have the right to contest the will as if probated in common form. When a will has been probated in solemn form, no question of validity of the will can be thereafter raised unless fraud was involved in procuring the judgment as where there was found collusion between the executor and the person contesting the will.[23]

[20] Jenkins v. Jenkins, 77 S.W.2d 805, 806 (Tenn. 1935). An oral or nuncupative will may be effective to dispose of personal property only and up to an aggregate value of $1,000, except that in the case of persons dying while in active military, air, or naval service in time of war the aggregate amount is raised to $10,000. An oral will neither revokes nor changes an existing unwritten will. See Tenn. Code Ann. §32-106, 32-209 for the requirements of an effective oral will.

[21] Tenn. Code Ann. §28-302 (1955)

[22] McClure v. Wade, 235 S.W. 2d 835, 843 (Tenn. App. 1950).

[23] Londer v. Anderson, 4 Tenn. C.C.A. 620 (1914); Jennings v. Bridgford, 403 S.W.2d 289 (Tenn. 1966); Hodges, et al., v. Bauchman, 16 Tenn. 186, 198 (1835).

Type of Estate Administration

The type of property ownership and value of property owned solely by the decedent will indicate the type of estate settlement procedure that should be followed. First, if the decedent owned no property or if all property interests automatically shifted at death (as in joint tenancy with right of survivorship or tenancy by the entireties), court-supervised administration will not be necessary. However, appropriate steps must be taken to assure that federal and state death tax obligations are met.

Second, if the decedent owned property in his own name having a value of under $10,000 (under $6,000 for decedents dying before July 1, 1979), the estate may qualify to use the small estate procedure (sometimes referred to as short form probate). Other qualifying conditions for use of the small estate procedure are: 1) 45 days have passed since decedent's death and no personal representative has been appointed nor has any petition for such appointment been filed; 2) decedent owned no real property; and 3) bond in an amount equal to the total value of the personal property plus life insurance payable to the estate must be posted.[24] The major advantages of the small estate procedure are: 1) substantial reductions in cost, and 2) the requirement of reporting to the court is eliminated. The major disadvantages of short form probate are: 1) it does not apply to real estate; 2) notice to creditors is not provided for, thus claims of creditors are not cut off after six (6) months; and 3) bond is required even if waived in decedent's will. Until recently a fourth disadvantage existed in that there was no procedure for securing release of the bond. The Ninety-first General Assembly of Tennessee enacted an automatic discharge of the bond sureties if within two (2) years after posting bond there has not been filed in court 1) any petition for the appointment of an administrator, 2) any petition for probate of the will of decedent, if any, or 3) any claim against the decedent's estate.[25]

Third, if the decedent owned property in his own name and does not qualify for the small estate procedure, the full administration procedure (sometimes referred to as long form probate) will be required. The added complexity of reporting to the court, additional costs, and delay in distributing decedent's assets are the major disadvantages of long form probate. If the decedent dies intestate, common form probate will be necessary; but if a valid will was left, a choice may be made between common form and solemn form probate.[26]

[24] Tenn. Code Ann. 30 §2001 et seq.

[25] Tenn. Pub. Acts 1980, Ch. 626 §1.

[26] McClure v. Wade, 235 S.W.2d 835, 843 (Tenn. App. 1950).

Probate Property

Probate property may be defined as property that is subjected to the jurisdiction of the county or probate court during the administration process. Generally, the form of property ownership, type of property owned, the dictates of a valid will, and the obligations of the estate relative to the size of the personal estate will determine whether a particular property interest of the decedent will come under the auspices of the administrative process.

Form of property ownership is important because some ownership interests shift at death and are not subject to the probate process. For example, life estates, interests in revocable *inter vivos* trusts, and survivorship interests shift to remaindermen, trust beneficiaries, or survivors of death.[27] The decedent's interests in these assets terminate with death and thus are not considered a part of the probate estate. However, the personal representative may need to consider them when death tax returns are prepared.

Whether property is realty or personalty will generally have a bearing on whether it will be considered a part of the probate estate. The Tennessee Code specifies that title to an intestate's real property vests immediately upon death in the heirs of the decedent according to the statutes of intestate succession[28] and that "upon qualifying, the personal representative shall be vested with the personal property of the decedent for the purpose of first paying administrative expenses, taxes, and funeral expenses and then for paying all other . . . [claims]."[29]

Thus, where a will does not specify that realty be sold it will not generally be subject to the probate process, and all personal property will be probate property. However, the authority to sell realty and thus render it a part of the probate estate will be granted where the

[27] Life estates terminate at the death of the life tenant and remaindermen take the subject property. *Inter vivos* or living trusts are those trusts that are created by living persons and may be either revocable or irrevocable. In revocable trusts, the person establishing the trust, called the grantor, retains the right to revoke the trust and retake the trust assets for his personal use or to change the beneficiary. Survivorship interests exist where property is held as tenants by the entirety or as joint tenants with right of survivorship. Common law survivorship interests have been abolished in Tennessee (Tenn. Code Ann. §64-107, except in tenancy by the entireties, Tenn. Code Ann. §36-602), but a right of survivorship can be created in realty or personalty where the intent to do so is clearly manifested by express words or by necessary implication in the instrument creating the property interest. See Peebles v. Peebles, 443 S.W.2d 1027, 1028 (1947); and Runyons v. Runyons, 207S.W. 2d 1016, 1019 (1948).

[28] Tenn. Code Ann. §§31-203, 31-204 (Supp. 1979). See also Clay Hall, 597S.W.2d 737 (Tenn. App. 1980).

[29] Tenn. Code Ann. §§31-602 (Supp. 1977).

personal representative shows to the satisfaction of the court that the personal estate has been exhausted in satisfying just debts and claims of the estate and that debts or claims for which the sale is sought are justly due to creditors or to the personal representative as reimbursement for advances made by him to pay just demands against the estate.[30]

Probate Courts

Historically, the county courts in Tennessee have had jurisdiction to handle the probate of wills and the administration of estates. Before 1980, however, the Tennessee legislature had placed probate jurisdiction in special probate court or another judicial body in 20 counties.[31]

When the Constitution of Tennessee was amended in 1978, the office and jurisdiction of the county judge was abolished and replaced by the county executive.[32] In June of 1979 the Supreme Court of Tennessee held that certain judicial powers cannot be vested in the county executive.[33] As a result, the 1980 Session of the Ninety-first General Assembly of Tennessee vested probate jurisdiction in the chancery courts in all counties where such jurisdiction had not previously been transferred to special probate courts or another judicial body.[34] This change took effect on May 1, 1980, except in counties having a county judge whose elective term will not expire until August 31, 1982. In such counties, the county court will retain probate jurisdiction until the term of office of the present county judge expires.

If a will is contested or is ambiguous or where accounts are complicated and in dispute, the county or probate courts may not resolve the matter.[35] Where a will is contested it will be certified by the county or probate court to the circuit court which is equipped to handle jury trials.[36] The circuit court may resolve only the issue of *devisavit vel non* (is the purported will actually the testator's will). If

[30] Tenn. Code Ann. §§30-603, 30-604 (1977).

[31] For a detailed discussion of probate courts in Tennessee see 8 Mem. St.U.L. Rev. 189, "The Tennessee Court Systems," pp. 461-499 (Fredric S. LeClercq).

[32] Constitution of Tennessee, Article 11 §11 (Supp. 1979) Tenn Code Ann. §5-606 (Supp. 1979)

[33] Walters v. State ex rel Schmutzer, 583 S.W.2d 756, 760 (1980)

[34] Tenn. Pub. Acts 1980, Ch. 875.

[35] In re Hodge's Estate 99 S.W.2d 561, 564 (Tenn. App. 1936).

[36] Chester v. Turner, 153 Tenn. 451 (1926).

the will is established, it will be returned to the county or probate court to be probated. Where it is determined that the decedent left no valid will, his estate will be administered in the county or probate court and will be distributed according to the laws of intestate succession.

Disputes over issues other than *devisavit vel non* must be resolved in the chancery courts. The county or probate courts have been held lacking in jurisdiction to determine disputed questions arising in the administration of estates—the court of chancery being the proper forum to determine such questions.[37]

DUTIES AND RESPONSIBILITIES OF THE PERSONAL REPRESENTATIVE

The duties and responsibilities of the personal representative of decedent's estates generally are established by law, but may be varied by the provisions of a valid will. The personal representative under a will should, therefore, thoroughly familiarize himself with the provisions of the will at the outset.

Selecting Competent Assistance

An attorney's assistance will be indispensable in handling large complex estates and may be very desirable in simple ones. Where possible, an attorney experienced in probate work should be chosen. Often the attorney who prepared the will or helped with planning estate of the deceased will be chosen.

Attorneys are bound to use reasonable skill and diligence and possess adequate knowledge of the probate process to assure proper performance of their duties. If an attorney does not possess adequate probate skills, he should either decline employment or engage a more experienced attorney to assist him.[38]

It should be noted that most duties and responsibilities of the personal representative cannot be delegated to the attorney. Instead, the personal representative should use the attorney's advice in fulfilling his role. Inexperience and ignorance of the personal representative have failed as a defense in some states where a tax lawyer was retained but failed to choose the most advantageous valuation date for estate property or failed to file the estate tax return timely[39]—resulting in additional taxes, or penalties and interest. The duty of the personal representative to make sure deadlines were met and that returns were

[37] Chester v. Turner, 153 Tenn. 451 (1926).

[38] Estate of Lohm, 440 Pa. 268 (1971). See state ex rel. v. Hardison, 167 S.W.2d 998 (Tenn. App. 1942).

[39] Estate of Geraci T.C.M. 42, aff'd 502 f.2d 1148 (6th cir. 1974).

filed timely in these situations were not delegable, resulting in loss of compensation by the personal representative in one case and personal liability for late penalty and interest in the other.

Possession of Estate Assets

The duty of the personal representative to locate and take possession of decedent's property is established by law and will be affected by: 1) type of ownership interest, 2) type of property, and 3) by provisions of a valid will. Determining what property the decedent owned and the fiduciary responsibilities toward it is one of the first problems faced by the personal representative.

Ownership of real property and certain categories of personal property (such as motor vehicles, for which title registration is required, bank accounts, and other intangibles such as stocks and bonds of which evidence of ownership will normally be with decedent's valuables in a lock box or other place of safekeeping will be rather easy to determine. Ownership of other property will usually be determined by all pertinent facts and circumstances, possession often being a crucial factor.

The duty to take possession of property owned solely by the decedent will depend on whether it is real or personal property unless a valid will specifies differently. The personal representative should follow the provisions of the will; but if the decedent died intestate, he will generally take possession and control of personal property while real property passes directly to decedent's heirs at law.[40]

Inventory and Accounting Requirements

The personal representative is required by Tennessee statute to make a complete inventory of all goods and chattels of the decedent and to file this inventory, verified by oath, with the county court clerk.[41] The statute requires the inventory to be filed before the next county court after the estate administration procedure is begun. Generally, the next county court will be in session within 30 to 90 days depending on the procedures of a particular county. Upon filing the inventory the clerk of the court is required to record it in the book of inventories. The recorded inventory informs interested parties of the personal effects of the decedent and is the beginning point of the personal representative's accounting. Interested parties may show proof that the personal representative filed an incomplete inventory of estate assets at any time before final settlement of the estate. If

[40] Tenn. Code Ann. §31-602 (Supp. 1979)

[41] Tenn. Code Ann. §31-602 (Supp. 1979)

the personal representative cannot show sufficient reason for leaving items out of the inventory, he will be charged with the value of such items.[42]

Historically, clauses in valid wills waiving the statutory requirements of inventorying and accounting have been honored in most counties of Tennessee. However, there is no statutory basis for permitting such waivers and strict compliance with the statute should be practiced.

After the inventory of personal effects have been filed, the personal representative has the responsibility of accounting to the court for all transactions made involving estate accounts. Such accounting is required upon removal or resignation of the personal representative or within 15 months after qualifying to administer the estate with respect to the estate of persons dying after July 1, 1971 (within 18 months after qualifying to administer an estate of a decedent dying before July 1, 1971). Thereafter, an accounting must be made every year until the estate is closed.[43] The clerk of the court is required to serve the "parties interested and resident within his county, or the agent or attorney of such as reside elsewhere, with notice of taking the account at least five (5) days before the time fixed for taking the same, and, if any of said parties do not reside in the county, or have no agent in it, the clerk shall post a notice on the courthouse door ten (10) days before the account is taken, or publish the same in a newspaper in the county."[44] Failure of the personal representative to follow the statutory mandates have led to denial of compensation for administrative services rendered and personal liability for loss of estate assets.[45]

Liquidation and Management of Assets

A will often makes many specific bequests of the testator's personal property. The personal representative may be directed to sell all or part of the remainder to pay debts, funeral expenses, administration expense, or simply for ease of distribution to beneficiaries under the will. The personal representative should carry out the testator's wishes as closely as he reasonably can. The personal representative is authorized to sell certain of the goods and chattels of the deceased to the highest bidder, upon 10 days written notice of the time and place of sale, whether or not so authorized by the will.[46]

[42] Id. §30-1109.

[43] Id. §30-1101.

[44] Id. §30-1104.

[45] State ex rel. v. Hardison, 167 S.W.2d 998, 1000 (Tenn. App. 1942.)

[46] Tenn. Code Ann. §30-503 (1977).

A valid will may direct the personal representative to sell certain real property or it may merely give him a discretionary power to sell.[47] Where the will does not authorize the sale of real estate, court approval must be obtained to sell. Before such sale will be authorized, the personal representative (or an unpaid creditor of decedent) must show proof that: 1) the personalty of the estate is exhausted, and 2) that debts or demands against the estate remain unpaid.[48]

Where a will authorizes, or upon court authorization, the personal representative may provide management and supervision needed to continue a business left by a decedent. If no such authorization is granted by will, the courts may grant such authority for up to nine (9) months, and, for cause shown, may extend such authority beyond the nine-month period.

The personal representative has the duty to keep liquid estate assets invested and income-producing. This is true especially where large sums of money are available beyond the current needs for payment of estate obligations and where considerable time will lapse before payment of death taxes or distribution to estate beneficiaries will take place.[49] The personal representative who is not given broad discretion in the will for making investments probably should consider investing only in assets designated as legal investments by the Tennessee Code.[50]

Claim Filing Procedures and Payment Priorities

The clerk of the court having probate jurisdiction is required by law to notify persons having claims against the estate within 30 days after issuance of letters testamentary or letters of administration. Such notice will name the person who has qualified as personal representative by publication in a newspaper in the county for two consecutive weeks; or if no newspaper is published in the county, written notice may be posted in three public places in the county, one of which is to be the usual place for posting notices at the courthouse.[51]

Persons having claim against the estate must file them in duplicate with the clerk of the court in which the estate is being administered

[47] Pritchard indicates that legal title to real estate need not pass to the personal representative in order to confer upon him a discretionary power of sale but that such legal title does pass where the will directs the personal representative to sell. R. Pritchard, **The Law of Wills and Administration of Estates** 709 et seq. (3rd ed. H. Phillips, 1955).

[48] Tenn Code Ann. §§30-601-604 (1977).

[49] Turney v. Williams, 15 Tenn. 172 (1834).

[50] Tenn Code Ann. §35-302-328 (1977).

[51] Id. §30-509.

within six (6) months of publication of notice or be forever barred from collecting the claim.[52] The personal representative is given discretion to waive the filing requirement and pay any claim not exceeding $500 principal amount. If such payment is brought into question, the personal representative will have the burden of showing the validity of the claim so paid.[53] A lienholder must follow the same procedure as other claimants in order to assert any claim against the liened property while in the hands of the personal representative, but any such lienor is not barred by the filing requirement from enforcing the lien after the administration of the estate is closed or after the liened property is distributed.[54] Tax liens by federal, state, or local governments are not barred by the six-month filing requirement and need not be filed as to other claims to remain collectable.

After the six-month period allowed for filing claims has expired, the personal representative or any interested party may, within 30 days thereafter, except to any claim by filing written exception in triplicate with the clerk of the court in which the estate is being administered. When exceptions to a claim are filed, either party may demand a jury trial and after proper certification to the circuit court will be tried as any other law case. If the personal representative or other interested party does not file an exception to a particular claim, he will have 30 days after the end of the six-month claim filing period before payment of claims need to be made.[55] If the personal representative has not paid a duly filed claim for which no exception has been filed within 90 days after the expiration of the time for entering exceptions to claims, the court may, upon proper application of a claimant, enter judgment therefore against the estate.[56]

The Tennessee Code provides four classes of estate obligations and assigns priorities to them as follows:

First: Costs of administration, including but not limited to, premiums on the fiduciary bonds and reasonable compensations to the personal representative and his counsel.

Second: Taxes and assessments imposed by the federal or any state government or subdivision thereof.

Third: Reasonable funeral expenses.

Fourth: All other demands which may be filed as aforesaid within six (6) months after the date of notice to creditors.

[52] Id. §30-513.

[53] Id. §30-514.

[54] Commerce Union Bank v. Gillespie, 156 S.W.2d 425 (Tenn. 1940).

[55] Tenn. Code Ann. §30-516, 30-517, 30-523 (1977)

[56] Id. §30-519.

The code further provides that no demands of one class shall be paid until the claims of all classes having a higher priority have been satisfied or provided for. For unmatured or contested claims the personal representative is directed to hold sufficient funds to pay the claim when determined to be due or when it has matured.[57] Preferred claims may be paid before the time fixed for making payment; but if claims of a lower priority are paid early and the estate proves insolvent, the personal representative or the sureties on his bond will be liable to each creditor for his prorata share of estate assets.[58]

Preparation of Income, Gift, and Death Tax Returns

Under federal law, the personal representative or virtually any recipient of a decedent's property is potentially liable personally if proper tax returns are not filed and obligations to the U. S. Government are not paid.[59] State law 1) requires the personal representative to file an inheritance tax return and inventory of estate property for estate subject to inheritance tax;[60] 2) prohibits transfers of property without approval by the Commissioner of Revenue before taxes are paid;[61] and 3) places a lien upon estate property until inheritance taxes are paid.[62]

A final income tax return may be required by both federal and state governments. If required, these returns would normally be filed by the surviving spouse; but if there is no surviving spouse, the personal representative will have this responsibility. In addition to the final personal income tax return, a U. S. fiduciary income tax return must be filed (Form 1041) if the decedent's estate has income of $600 or more for the period beginning with the decedent's death and ending not later than the end of the eleventh month following. If decedent's estate receives taxable dividends or interest of over $25 for the same period, the estate must file a Tennessee income tax return.

Gift tax returns, both U. S. and Tennessee, are required at least annually where gifts exceeding $3,000 are made to one or more individuals within one (1) year. Usually, therefore, gift tax returns need to be considered only if decedent had made gifts shortly before death. If decedent is known to have made gifts, it is advisable to check for omitted returns from prior years also.

[57] Id. §30-520.

[58] Id. §30-522.

[59] U. S. Code Ann. §§31-192, 26-2203.

[60] Tenn. Code Ann. §30-1619 (Supp. 1979).

[61] Tenn. Code Ann. §30-1634 (1977).

[62] Id. 30-1622.

A federal estate tax return must be filed if the assets owned by the decedent exceed the following amounts:

Year of Death	Value of Assets
1977	$120,000
1978	134,000
1979	147,000
1980	161,000
1981 and thereafter	175,000

Property owned by the decedent for federal estate tax purposes cannot be briefly outlined. It should be noted, however, that property such as insurance on decedent's life in which some of the incidents of ownership were held by the decedent, property transferred in trust by the decedent where a power to revoke the trust was retained, and survivorship property are includable in computing the federal estate tax though otherwise not a responsibility of the personal representative. Survivorship property will generally be considered owned by the first joint owner to die, for federal estate tax purposes, except to the extent the surviving joint tenant is considered to have supplied consideration for buying the property.[63]

In previous years Tennessee has required proof of contribution to the purchase price of survivorship property to prevent the entire property from being included in the estate of the first joint tenant to die. On February 25, 1980, Tennessee Supreme Court reversed two earlier decisions that had concluded "the question of to whom the property, or any portion thereof, belong was to be resolved by reference to who paid for it."[64] In the recent decision the court stated "one always concludes with reluctance that a prior decision of this

[63] A surviving joint tenant will be considered to have supplied consideration to the extent proven or by showing that the requirements of I.R.C. §2040(b) or (c) have been met. Section 2040(b) provides that where a married couple or either of them individually create, between themselves only, a joint tenancy or tenancy by the entireties in property after December 31, 1977, only one-half (1/2) of such interest will be included in the gross estate of the first to die provided that: 1) in the case of personal property, the creation of joint interest constituted in whole or in part a gift for gift tax purposes, or 2) in the case of real property an election is made under I.R.C. §2515 complete with gift tax return and payment of any gift taxes due. Section 2040(c) was added to the code as part of the Revenue Act of 1978, providing that the services of a spouse who materially participates in the management and operation of a business are to be recognized as consideration furnished for the acquisition of debt-financed jointly owned property used in that business. The spouse would be given credit for services rendered at the rate of 2 percent of the purchase money mortgage for each year of material participation and use of the subject property. The allowance for consideration furnished under this provision is limited to 50 percent of the purchase money mortgage.

[64] In re Abernathy's Estate, 364 S.W.2d 350, 351 (Tenn. 1962). See also Murfreesboro Bank and Trust Co. v. Evans, 241 S.W.2d 802 (Tenn. 1951).

Court was in error but we cannot escape that conclusion with respect to those two decisions. We are unwilling to perpetuate their error. There simply is nothing in the statute to justify the conclusion reached in those decisions. . ."[65] Under the new rule, joint property included in the estate would consist of ". . . such part as may be clearly shown to have belonged to decedent, and in the absence of such showing, then a) a fractional part of the value of such property, to be determined by dividing the value of the entire property by the number of persons in whose joint names it was held; . . ."[66] However, by statute made effective on April 4, 1980,[67] the old rule was reinstated and thus the new rule will apparently apply only to the period between February 25, 1980 and April 4, 1980.

In addition to the Tennessee inheritance tax return, a state estate tax return may be required. This return is required only for estates that would not otherwise be able to claim the maximum allowable credit for state death taxes paid when filing their federal estate tax return. If the taxable estate exceeds seven million dollars ($7,000,000), a Tennessee estate tax return must be filed.[68]

Distribution to Beneficiaries

Under both federal law and Tennessee law the personal representative may become personally liable for taxes that are due if distributions are prematurely made.[69] On the other hand, estate beneficiaries are generally anxious to receive their share of estate assets and find it difficult to understand the delay that is often required before distribution can safely be made. These conflicting pressures may often leave the personal representative in a dilemma as to when property might be safely distributed.

With due regard for law and with proper caution toward premature distribution, some of a decedent's property can safely be distributed at the outset and additional property can be distributed once the personal representative has assured himself that the estate is solvent. Property that is exempt from execution under Tennessee law[70] can safely be distributed relatively early. Motor vehicles, household furnishings, personal effects, and similar assets should be distributed promptly to avoid unnecessary storage and insurance expense and to avoid liability in case of a accident.

[65] Pierce v. Woods, 597 S.W.2d 295, 297 (Tenn. 1980).

[66] Tenn. Code Ann. §30-1603 (1977).

[67] Tenn. Pub. Acts 1980, Ch. 823.

[68] Tenn. Code Ann. §30-1792 (1977).

[69] U. S. Code Ann. §31-192; Tenn. Code §30-1634 (1977).

[70] Tenn. Code Ann. §§30-801 (1977) and 26.202 (Supp. 1979, as amended Tenn. Pub. Acts 1980, Ch. 919 §2).

Major distributions of estate assets probably should not be made until the administration process is fairly complete and final settlement is at hand. Before final settlement can be made, the personal representative should have paid all mature and uncontested claims against the estate and provided for paying unmatured and contested claims, taxes, and administration expenses. The remaining estate should then be paid to the estate beneficiaries, or, if none, into the hands of the county treasurer.[71] The personal representative should obtain from each beneficiary a properly acknowledged[72] receipt for his share of the estate.[73] After all claims mature and contests are decided, final distribution of any remaining assets can be made.

The estate cannot be finally closed until the personal representative has received a receipt from the Commissioner of Revenue for Tennessee showing that taxes have been paid or that the estate is nontaxable.[74] If the estate is large and subject to considerable federal estate tax, it would be advisable to get tentative approval of the estate tax return or to allow enough time to lapse to indicate that the return will not be challenged by the Internal Revenue Service.

COMPENSATION OF THE PERSONAL REPRESENTATIVE

Generally, the probate court has the discretion to determine within reasonable limits, the compensation of the personal representative of a decedent's estate. The Tennessee Code specifies "[t]he clerk. . . shall credit [the personal representative] with a reasonable compensation for his services, and with such disbursements as he supports by lawful vouchers."[75] Tennessee courts have held compensation ranging from 2.5% on bank deposits to 5% where corporate stock and business inventories were sold, without extraordinary effort, to be sufficient compensation for the services of a personal representative administering an estate.[76]

Reasonable compensation for legal advice needed for proper administration of an estate may also be properly paid from the estate as an administration expenditure. However, the personal representative should introduce evidence to show the nature of the advice or the nature of its necessity.[77]

Occasionally a personal representative will be replaced for no fault

[71] Id. §30-1301.

[72] Id. §30-1310.

[73] Id. §30-1308.

[74] Id. §30-1628.

[75] Id. §30-1107.

[76] Ex parte Parker, 19 S.W. 571 (Tenn. 1881).

[77] Hall v. Hall 59 S.W. 203 (Tenn. App. 1900)

of his own such as where someone with a higher position in the statutory scheme of preference requests the position after it has been filled. Where no fraud was involved in securing the appointment, a personal representative so removed is not thereby disentitled to reasonable compensation for the services rendered.[78] However, in other cases where the personal representative is removed for failing to comply with statutory prescription of duty, such as failure to properly file an inventory or annual report, or where he fails to keep adequate records,[79] or is guilty of gross negligence and estate assets are lost,[80] he may be denied compensation and be charged for the lost assets.

Often a will specifies the amount of compensation the personal representative will receive for his services as executor. In such cases the executor, upon accepting the position, is bound by the terms of the will even though compensation provided would generally be considered inadequate.

SUMMARY

The estate settlement process is concerned with: 1) collecting and liquidating estate assets; 2) paying estate obligations; and 3) distributing the remainder to estate beneficiaries. The person having a duty to fulfill these tasks is known as the personal representative of the estate.

Where a person dies testate the personal representative has a duty to follow the dictates of the will; but where no will was left, the decedent's property must be distributed by a statutory scheme known as the law of intestate succession. The personal representative serves in a fiduciary capacity and must not profit nor take selfish advantage of his position in any way. Upon fulfilling his duties, the court will determine a reasonable compensation for the services of the personal representative.

The probate process may be quite involved or it may be bypassed altogether depending on the value of the decedent's assets and the type of ownership involved. If all of decedent's property was held with a co-owner with right of survivorship, then a court-supervised probate can be avoided. If the decedent dying after June 31, 1979 owned property in his own name having a value of under $10,000 and certain other conditions are met, then a small estate procedure or short-form probate may be used. If the decedent owned property in his own name and does not qualify for the small estate procedure, then the full administration process with its additional costs, complexities, and delays in distribution will be necessary.

[78] In re Estate of Hicks, 510 S.W.2d 263 (Tenn. 1972).

[79] State ex rel. v. Hardison, 167 S.W.2d 998, 1000 (Tenn. App. 1942).

[80] Horton v. Cope, 74 Tenn. 155 (1880).

GLOSSARY

Affidavit—A voluntary written statement of facts made by an affiant under oath and before a notary public or other person authorized to administer oaths.

Attachment—A legal proceeding for holding a person's property for paying an obligation or judgment.

Beneficiary—A person or institution receiving or designated to receive property or benefits of property use.

Bequests—A statement in a will specifying the recipient of personal property.

Claim—A set of facts giving rise to a right or purported right to money or property. A valid claim will be enforceable by the courts.

Claimant—One who asserts a claim.

Contested Will—See Wills Contest.

Curtesy—A right of a husband, originating under the common law of England, to a life estate in the property of his deceased wife. Curtesy has been replaced by a one-third (1/3) statutory share in Tennessee.

Decedent—A deceased person.

Descent and Distribution, Law of—Term applied to the statutes that determine the recipients of a decedent's property when no will is left. Used synonymously with the law of intestate succession.

Devise—Traditionally, a statement in a will specifying the recipient of real property. In recent years the term has been employed more broadly to include a testamentary distribution of both real and personal property.

Discretionary Power—The right to do or to refrain from doing something.

Dissent—Under Tennessee law, a spouse of a testate decedent may either accept the terms of the will or dissent from the will and receive one-third (1/3) of the deceased spouse's estate outright.

Estate Tax—A tax, based on the right to transmit property from the dead to the living, chargeable to the estate of a decedent.

Execution—The process of completing an instrument. The execution of a will involves the signing by the testator in the presence of at least two disinterested witnesses or if not in their presence he must acknowledge the signature as his own in the presence of the witnesses, and the witnesses must sign in the presence of the testator and in the presence of each other. The execution of a court judgment for money is the process of enforcing the judgment by

seizing and selling the property of the judgment debtor if payment is not made in another way.

Gift Tax—A tax, based on the right to transmit property between the living, payable by the one making the gift, called the donor.

Heirs—Beneficiaries of the estate of a decedent who died intestate. The term is also used in a nontechnical way to include those who inherit by will or deed.

Incidents of Ownership—Generally those qualities of ownership of an insurance policy which can be exerted to influence or determine who will enjoy the benefits of the policy.

Inheritance Tax—A tax based on the right of the living to receive property from the dead.

Insolvent—A condition in which a person is unable to pay his debts, and would remain unable, even if all assets were immediately available.

Intestate—A person is said to have died intestate when he dies without leaving a valid will.

Intestate Succession—The statutory provision for distribution of a person's property after death that has not effectively been distributed by will.

Jurisdiction—The proof of the court to hear and render judgment in a case.

Letters of Administration—A formal instrument issued by the appropriate court appointing an administrator and empowering him to commence his duties of estate settlement.

Letters Testamentary—A formal instrument issued by the appropriate court appointing an executor and empowering him to commence his duties of estate settlement.

Lien—A charge or claim upon the title to the property of another as security for a debt or claim.

Lienholder—A person who owns or holds a lien upon the property of another.

Liquid Assets—Cash and other assets that are readily convertible to cash.

Personalty or Personal Property—Generally all property that is not land or attachments thereto nor rights arising therefrom.

Petitioner—One who files a petition with a court making a particular request. Many legal proceedings are begun by petition.

Premature Distribution—A distribution of all or part of the assets of an estate before determining whether the estate is solvent.

Realty or Real Property—Land, crops growing thereon, building of fixtures attached thereto, and certain rights arising therefrom.

Remainderman—One who holds an interest in real property that will be possessory by him upon the termination of a present, possessory estate held by another. For example, when one person holds a life estate in real property, another person called the remainderman holds the remainder except in situations where the remainder is to revert back to the original grantor of the life estate.

Surviving Spouse—The spouse who outlives his or her marital partner.

Survivorship Property—Property held in such way that upon the death of one co-owner the remaining co-owners take the share of the deceased. In Tennessee, property held as "tenants by the entirety" between spouses and "joint tenancy with right of survivorship," where the survivorship right is clearly stated in the appropriate document, are considered survivorship property.

Testamentary Distribution—Distribution of a decedent's property according to the dictates of a valid will.

Testate—A person who dies leaving a will is said to have died testate.

Waiver—The relinquishment of a known right.

Will—Generally an instrument by which a person declares how he desires his property to be disposed of after death. A will takes effect at death and may generally be changed at any time before death.

Wills Contest—Generally a lawsuit to determine the validity of a purported will or to determine its meaning.

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