

MHP&S

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Tennessee Bar Association
Representing the Personal Representative
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FIRST STEPS

- Initial Consultation
 - Is the client the proposed Personal Representative (PR)?
 - Use appropriate Legal Representation Agreement (fiduciary vs. non)
 - Death certificate, predeceased spouse DC
 - Original Last Will & Testament
 - Names and addresses of all beneficiaries and heirs
 - List of all debts and assets
- Gauge Client's Competence
 - Any criminal background?
 - Can he/she qualify for a bond?
 - Can you rely on Client to complete Accountings, etc.?
 - Is Client a TN resident? If not, look at 30-1-116, 35-50-107 and Secretary of State nonresident designation form
- Gauge Family Dynamic
 - Can PR act impartially?
 - Is Client a potential creditor?
 - How likely is a Will Contest?
- Is this someone you want to represent?

Personal Representative of Estate

- Administrator vs. Executor (Personal Representative is neutral)
 - Personal Representative can collect a fee and their attorney fees are typically taxed to the Estate as an administrative cost
 - PR has no authority until appointed by the court and Letters are issued, except:
 - T.C.A. 45-2-905(c)(2) – bank required to grant access to safe deposit box to search for Last Will & Testament, burial info, and life insurance; and
 - Funeral Arrangements and Disposition of Remains
- T.C.A 62-5-703 Rights to Control vest:
1. Attorney in Fact under HCPOA
 2. Surviving Spouse
 3. Sole surviving child; or majority of children acting together
 4. Parent
 5. Sibling (same breakdown as with children)
 6. Grandchild (same breakdown as with children)
 7. Grandparent (same breakdown as with children)
 8. Guardian at time of death
 9. Personal Representative of Estate
 10. Other next of kin

Securing Property

- Real estate (if it's in the probate estate)
 - Change the locks/alarm system
 - Utilities/Taxes/Insurance paid
 - Regardless of whether or not the real property is being administered with the Estate, forward the mail, stop the newspaper, etc.
- Personal Property – guns, jewelry, antiques, cars



Is Probate Necessary?

- Will vs. Intestate Succession
- Trust assets
- Beneficiary Designation &/or PODs
- Vesting of Real Property
- Right of Survivorship
- Is there a need for transparency/court supervision?

Choose Forum and Type of Probate

- T.C.A. 32-2-101 – County of Usual Residence at Time of Death (if there is more than one, it can probably be either)
- Common Form:
 - Most widely used
 - Specific info required in Petition (see T.C.A. 30-1-117)
 - Notice of a hearing to appoint PR isn't required (but I do it anyway)
 - Open to Will Contest for 2 years from entry of the Order Admitting Last Will & Testament to Probate
 - Potential to contest even after the case is closed

Forum for and Type of Probate (cont'd)

- Solemn Form Probate:
 - always use this if a Will Contest is likely
 - Contents of Petition are the same, but it more closely resembles a lawsuit
 - Summons issued and process served

(A Will Contest must be certified within 30 days from being served (a Contestant's Bond will be required))
- Small Estate Affidavit:
 - Under \$50,000 and doesn't include real property

Estate “Deadlines”

- Open Probate – No Time Limit, but Letters shouldn’t be issued after 10 years (there are exceptions).
- Within 60 days of appointment as PR (unless ordered otherwise):
 - File Inventory – T.C.A. 30-2-301(a)
 - Importance of Inventory as starting point
 - Narrative Inventory may be necessary
 - Notice to Heirs – T.C.A. 30-2-301(b)(1)
 - File Notice to Heirs Affidavit
- File Request for Release from TennCare (death certificate)
- Notice to Creditors – Clerk should cause to be published within 30 days (make sure the fee has been paid)
 - PR must send notice to known or “reasonably ascertainable creditors”

Estate “Deadlines” (cont’d)

- Exceptions to Claims T.C.A. 30-2-314
 - 30 days after running of 4 month claim period, or if it’s filed outside this period, then 30 days from the date the Claim is filed
 - Claims and Exceptions should be filed in triplicate
 - Litigating Claims – when to do it and what it looks like.

Probate Court Filing Procedures and Forms

- <http://circuitclerk.nashville.gov/probate/probateforms.asp>
- Make sure you're using the newest version because these have all been updated in the last couple of years.
- Annual and Final Accountings – in Davidson County, see Deanna Alexander.
- Your local Clerk's Office is a great place for information

Laws of Intestacy

- T.C.A. 31-2-101 et. seq.
- Intestacy applies if no Will or if the Will doesn't effectively dispose of all assets
 - If no living issue, 100% to surviving spouse
 - If surviving spouse and one child (living or not)– split 50/50
 - If surviving spouse and >1 surviving child/(living or not), 1/3 to spouse, remainder to children equally (and issue of deceased children)
 - Parent or parents equally
 - Siblings and issue of siblings
 - Grandparents (50% to each side if available) and issue

Laws of Intestacy (cont'd)

- Adoption – terminates birth parent and establishes intestate right of adopted child
- Out of Wedlock
 - Child of Mother - fine
 - Child of Father - fine IF:
 - Paternity Established by adjudication before death OR
 - Established by clear and convincing proof BUT
 - Father can't inherit from child UNLESS father treated child as his own and has not refused to support the child
 - If paternity not previously established, the alleged child **must** file a Claim
- Half-Blood inherit as if Full-Blood
- Issue conceived before D's death but born after death inherit equally

Marshalling Assets

- EIN Number
- PR should open a bank account in the name of Estate
- Consolidating property/assets
- Authority and duty to collect Decedent's property for the benefit of all heirs and legitimate creditors
- Prudent Management
- Sell Decedent's personal effects (with court approval if authority not vested in the Will)
- Always give notice of sale to heirs and beneficiaries

Marshalling Assets (Cont'd)

- Should PR sell all marketable securities? Whether to keep certain investments? Should always consider tax consequences for Estate and heirs.
- Do not give tax advice unless you are qualified to do so. Refer PR to a CPA or tax attorney
- Selling Real Property (and the underwriting trolls who control everything)
 - Is the property in the estate? (If not, more on this on the next page).
 - Do all of the heirs agree?
 - Petition to Approve Purchase & Sale Agreement

Insolvent/Maybe Insolvent Estates

- T.C.A. 30-2-402 – Petition to Sell Real Property to pay debts. Heirs must be interpleaded and served (Estate isn't insolvent at this point, but will be without the property).
- T.C.A. 30-5-102 – Notice of Insolvency must be served on creditors via certified mail
- Notice must include an Accounting and a Proposed Plan of Distribution
- Notice must include language that objections shall be filed within 30 days of receipt of notice.

Priority of Claims

- Year's Support is an administrative cost
- Elective Share is superior to general creditors
- Priority of Payment
 - Costs of administration (including bond premiums, PR's fee, attorney fees for the PR, fronted expenses, etc.)
 - Reasonable funeral expenses
 - Taxes and assessments imposed by Federal or State Governments (including claims by TennCare)
 - All other Claims timely filed

Closing the Estate with the Court

- Pass Accounting (if not waived)
- Distributee/PR Statements (in lieu of accountings)
- TennCare Release
- Make sure final tax return is filed (SSN vs. EIN) – request for a speedy resolution with the IRS
- Department of Revenue Release/Affidavit (if applicable)
- All Claims dismissed or released
- Motion to Close (sometimes)
- Order to Close (always)
 - Include language to relieve yourself and your client if you represent the PR
- Pay Court Costs (simultaneously with Order to Close)

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