

LET'S TALK ABOUT **PROBATE**

THE PROCESS AND DUTIES



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PROBATE HANDBOOK FOR ARKANSAS

INTRODUCTION	4
PERSONAL REPRESENTATIVE	5
WHO MAY SERVE AS PERSONAL REPRESENTATIVE.....	5
FUNCTIONS OF ADMINISTRATION.....	5
TITLE.....	5
AUTHORITY	6
RESIGNATIONS	6
BOND	6
ATTORNEY.....	6
INVENTORY	7
ITEMS IN THE INVENTORY	7
CLAIMS.....	8
ACCOUNTING.....	9
RECORDS.....	9
PERSONAL REPRESENTATIVE FEES	10
ATTORNEY FEES.....	10
BANK ACCOUNT	11
SALE OF PROPERTY	11
TAX RETURNS	11
TIMETABLE.....	11
SETTLEMENT.....	12

INTRODUCTION

When a property owner dies in Arkansas, a legal proceeding to settle the estate is required by state law. This proceeding, whether the person dies with or without a will, is called "administration," and it must take place in the Probate Division of the Circuit Court of the county where the deceased resided. If the person dies as an out-of-state resident, an administration proceeding must be started in the Arkansas county in which the person held property.

Two persons are essential in the administration of an estate, (1) the Personal Representative and (2) the attorney for the Personal Representative.

If a person dies leaving a Will, it ordinarily names a Personal Representative. If there is no Will, the law provides that the court give preference to certain relatives and heirs in naming a Personal Representative. Generally, the Personal Representative selects their attorney.

The law places many duties upon the Personal Representative. He or she may, while acting in good faith, incur personal responsibility through a misunderstanding of the manner in which the law requires certain duties to be discharged. That is one reason why it is important that he or she be guided by the advice of an attorney, who, through training and experience, can prevent honest but costly mistakes.

This pamphlet is written to help Arkansas attorneys inform the Personal Representative of their duties and responsibilities and is for general distribution to the public.

PERSONAL REPRESENTATIVES

PERSONAL REPRESENTATIVE

In the administration of an Estate, the Personal Representative is directly responsible for proper settlement of the Estate. If a person dies "testate" (with a Will), the Will nominates a Personal Representative to take charge of the Estate. If a person dies intestate (without a Will), an interested party may petition the Court for the appointment of a Personal Representative, with such Petition nominating the person to be so appointed.

WHO MAY SERVE AS PERSONAL REPRESENTATIVE

Generally anyone may serve who is over 21, of sound mind and bondable. Banks that have trust powers or trust companies are also eligible to serve.

FUNCTIONS OF ADMINISTRATION

The purposes of administering the estate are to:

- 1) Collect property and assets.
- 2) Protect the property of the estate.
- 3) Pay debts and taxes.
- 4) Determine who is entitled to share in the estate.
- 5) Distribute the estate to the proper parties.

TITLE

Legal title to all personal property goes to you as Personal Representative. You also have custody and control over the real property, but not the legal title to it. However, you must obtain court authority before leasing, mortgaging or selling real or personal property, unless you are specifically authorized by the Will to do so.

AUTHORITY

Your authority to act is evidenced by court-signed-and-sealed *Letters Testamentary or Letters of Administration*. The court will issue additional certified copies on request, and each time you transact estate business, you should take a copy with you.

If you fail to perform your duties, you can be held liable for the loss you cause the estate, and the court can order your removal. Also, the court can require the party furnishing your bond to repay the estate. There are severe consequences for an irresponsible Personal Representative.

RESIGNATIONS

If you find that you do not have the time to serve or just do not want to assume the responsibility of serving as Personal Representative, you may resign with the court's approval. The court will then appoint a successor to serve in your place. You can indicate whom you would prefer to be your successor.

BOND

Because the Personal Representative often deals with substantial property and funds, the court usually requires a bond be posted to secure proper performance of his duties. The court sets the amount, based on the estimated value of the estate. Some Wills may exempt the Personal Representative from giving bond, but the court may nevertheless require one.

This bond may be signed by persons who own property in the state, or it may be purchased from a bonding company, in which case it is called a corporate surety bond. The bond is subject to court approval. The cost of the bond is an expense of the estate. If the personal representative is a bank or a trust company whose deposits are insured by the Federal Deposit Insurance Corporation or a trust company chartered and regulated by an appropriate authority, the Court may reduce the amount of the bond or dispense with the requirement of a bond.

ATTORNEY

The attorney will be your closest adviser. Although you are primarily

responsible for the administration of the estate, the law contemplates the retaining of an attorney to help prepare the papers for the proceeding and to see that you comply with the laws of probate. The attorney will make certain that the estate proceeds as quickly as the law allows and will represent the estate at court proceedings.

You must be prompt in obtaining information and reports that your attorney requests; and you should cooperate closely with your attorney in preparation of papers, particularly the inventory described later. Your failure to do this will cause delay in completion of probate and may cause the court to remove you as Personal Representative.

INVENTORY

The law requires that an Inventory be filed within 60 days after you have been appointed to act as Personal Representative. The Inventory shall include all property owned by the deceased at the time of his death, describing each item of property in detail and setting out your appraisal of the fair market value of them as of the date of the death of the decedent. This may be waived under certain instances which your attorney will know.

Ordinarily, the attorney prepares the actual inventory form for the court, but it is your personal responsibility as the Personal Representative to make an accurate accounting of the items and to see that they are properly listed and preserved until the distribution to the heirs, or until they are sold.

ITEMS IN THE INVENTORY

A. *Real Property.* All the real estate in which the deceased had any interest, including the Homestead, together with a legal description of it, and the amount of any encumbrances, liens, etc. against it, and the fair market value of each tract.

B. *Household Goods and Personal Effects.* The list should include, but not be limited to, furniture, household and yard equipment, clothing, jewelry, etc. and the market value of each item.

C. *Other Tangible Personal Property.* The list should include, but not be limited to, automobile vehicles, farm equipment, livestock, agricultural products, stocks of merchandise, any going business enterprise or interest therein, etc., and

the market value of each item.

D. Intangible Personal Property. The list should detail separately: cash on hand; money on deposit, stating names and addresses of depositories; bonds, stating names of issuers, interest rates, classes, maturity dates, serial numbers, face amounts, and dates to which interest is paid; corporate stocks, stating certificate numbers, names of issuers, classes and number of shares; notes receivable, stating the names and addresses of makers, dates, amounts, interest rates and dates to which interest paid, balance due, maturities, and security, if any; accounts receivable, stating names of debtors, dates of last items and balances due; and other intangibles, describing in detail, with their market value as of the date of death. If you have any question about the listing of ownership of property, make notes concerning the property and notify the attorney. This will help complete an accurate inventory.

CLAIMS

The Personal Representative is required to publish notice in a local newspaper promptly after his appointment, advising creditors of the time limit in which they must file claims against the estate. The notice is published once a week for two consecutive weeks. Generally, the time in which to file claims is three months after date of first publication, although certain types of claims for damages predicated upon a decedent's negligence may be filed within six months of date of first publication. The personal representative is required to provide actual notice to all known or reasonably ascertainable creditors, in addition to the publication of notice. The Personal Representative should make a special effort to determine if any services were rendered to the deceased by the Department of Human Services. Such actual notice is to be mailed to such creditors within thirty days of the initial publication.

When each claim is filed, the Personal Representative endorses on the claim the date of such filing and either approves or disapproves the claim. At the time of allowance of claims they should be classified as (1) costs and expenses of administration, (2) reasonable funeral expenses and reasonable medical and other expenses incident to the last illness, and wages of employees of the deceased and (3) claims based on a liability of the deceased for any state tax debt assessed against the deceased, or due at the time of his or her death, or due from the estate as a result of his or her death; and (4) all other claims allowed.

If you do not affirmatively approve a particular claim, a hearing will be held by the court, after giving notice to all interested parties, to determine the validity of the claim.

It is always advisable to secure the advice of your attorney before taking action on a claim.

You should direct any party wishing to file a claim to your attorney or their own attorney or to the Clerk in the county where the estate is in probate. There he can obtain a claim form, so that he may swear to his claim, as the law requires.

After the claims have been approved or disapproved by you, you should forward them to your attorney for filing with the clerk and approval by the court.

ACCOUNTING

The law requires you as the Personal Representative to file a written account with the court when:

- 1) you are ready to settle the estate, after payment of all debts and taxes, and to distribute property to the beneficiaries.
- 2) you resign as Personal Representative, or
- 3) as the judge requires.

The accounting is based upon the records kept by the Personal Representative for all property received and distributed. It can be waived in certain instances which your attorney will know.

RECORDS

A. *Income and Expense of the Estate.* You must keep an accurate record of all money received and spent by you for the estate.

You are held accountable for all money received. It is most helpful to have an account book listing each of these items, showing the date, the person or company from whom received or to whom paid, the purpose and the exact amount. This record should be separate and in addition to the checking account record described in bank accounts below.

B. Time and Expenses of Personal Representative. By law you are entitled to compensation for the amount of time spent taking care of the estate and for your actual expenses, such as travel; so you should keep an accurate record of these items, including, the date, amount of time, travel mileage and items of expense.

PERSONAL REPRESENTATIVE FEES

The law recognizes that the Personal Representative has a responsible position in the probate of the estate by providing a schedule of fees which the court can allow, based on the size of the estate and time spent caring for it. This is a legitimate expense of probate, and is charged in addition to mileage, phone calls and other items of expense. The amount of the fees is the same whether the personal representative is an individual, bank or a trust company. There is just one fee regardless of the time required to close the estate. Ask your attorney for the current rate and for help in preparing your expense record.

ATTORNEY FEES

Since the attorney also has a great responsibility in handling the matters of an estate, the law allows reasonable compensation for these services. Attorney fees in a probate proceeding must be approved by the judge when he or she passes on the final account.

The attorney's fees cover time for court appearances, and later for determining that a proper transfer and record of title is made for the heirs who receive property. The fee is usually based on a percentage of the estate value.

Because probate is governed mainly by written laws which require much detailed work, a substantial amount of time and overhead expenses are involved. And, as the size of the estate increases, the tax problems become greater. Whether the estate is large **or** small, the attorney must exercise great care and assume the responsibility that the proceeding is properly prepared.

BANK ACCOUNT

The attorney for the estate will usually advise you, as Personal Representative, to open a checking account for the estate at a local bank. All money you receive as Personal Representative should be placed in this account. All canceled checks should be kept. Do not put your personal money in this account and never put estate money into your personal account. Funds not needed for current expenses should be deposited in an interest-bearing account.

SALE OF PROPERTY

A. *Real Estate.* Legally, you cannot sell real estate without a court order approving the sale, unless the will permits it. Never make any promises to sell until after you discuss it fully with your attorney.

B. *Personal Property.* Always discuss *sales* of these items with your attorney before you act. If you have to sell an article for less than its appraised value, get his or her approval first. If it is for a substantially reduced price, a court order may be needed. You will have to account to the probate court for selling at these reduced prices. You are not permitted to purchase the property yourself without approval of the court and all interested parties.

TAX RETURNS

As Personal Representative it is your responsibility to see that all tax returns are filed, and you are personally liable for the tax. These include federal and state income tax returns for the portion of the tax year before the death of the decedent; federal and state income tax returns during the period of administration of the estate; and federal and state estate tax returns. This is very important and you should seek the advice of an attorney or accountant (C.P.A.) knowledgeable and experienced in tax matters.

TIMETABLE

It is difficult to predict with certainty the amount of time it will take to settle any estate because each one is somewhat different.

The final accounting cannot be filed until the expiration of the period in which creditors may file claims against the estate. Creditors are generally allowed three months from date of first publication of notice in which to file claims, although certain creditors may have six months in which to do so. After the final accounting has been filed, a hearing to approve the accounting will be held not less than sixty days following such filing; consequently, most estates will be under administration for at least eight months.

If it is necessary to file a federal estate tax return, it will take longer as you have the choice to determine the value of property for this return, which is market value of property as of the date of death or the market value six months after death. The federal estate tax return must be filed not later than nine months after the date of death of the decedent. The estate should not be closed until the federal estate tax return is filed, the return approved by the tax authorities, and the Personal Representative released from personal liability by the government. If the property is distributed before the tax return is audited, the Personal Representative may be personally charged with the tax.

SETTLEMENT

A. *Claims.* As a general rule do not pay any debts or claims until your attorney approves their payment. This usually will be after the court allows the claims.

Where the estate can settle certain claims to take advantage of discounts for prompt payment, such as the funeral bill, this should be done if the funds are available. Again see your attorney before the discount date.

B. *Distribution.* After the court enters the order -- following settlement and payment of claims, expenses and taxes -- your attorney will give you the proper estate receipt forms and instruct you to distribute the shares to the heirs or legatees of the estate. Again, make sure these receipts are properly completed and signed.

C. *Discharge.* After you have distributed the property of estate and the receipts are on file with the court, the court will sign the order discharging you as Personal Representative; and you may be released from your bond if the court required one. This will end your responsibilities.