Hee Haw Deliverance

Presented by
Chancellor Jeffrey M. Atherton
Music by Mason Rush

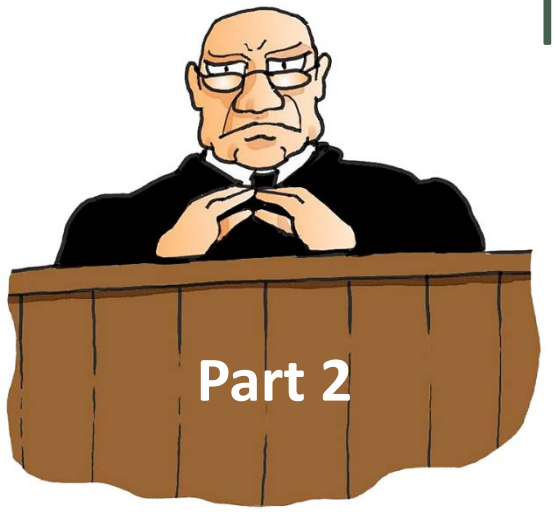
Featuring Special Guests:

a bunch of folks that know stuff- YOU

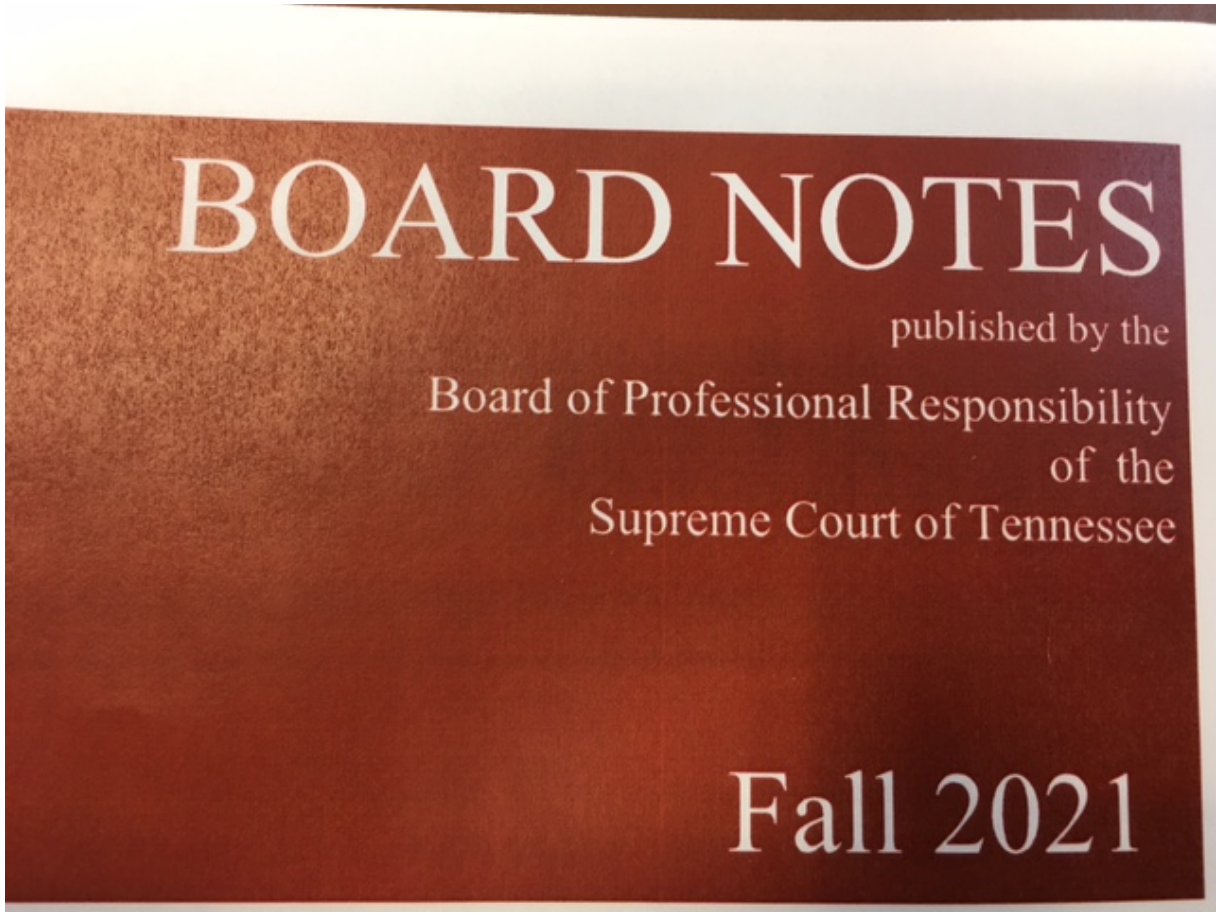
Deliverance is here!

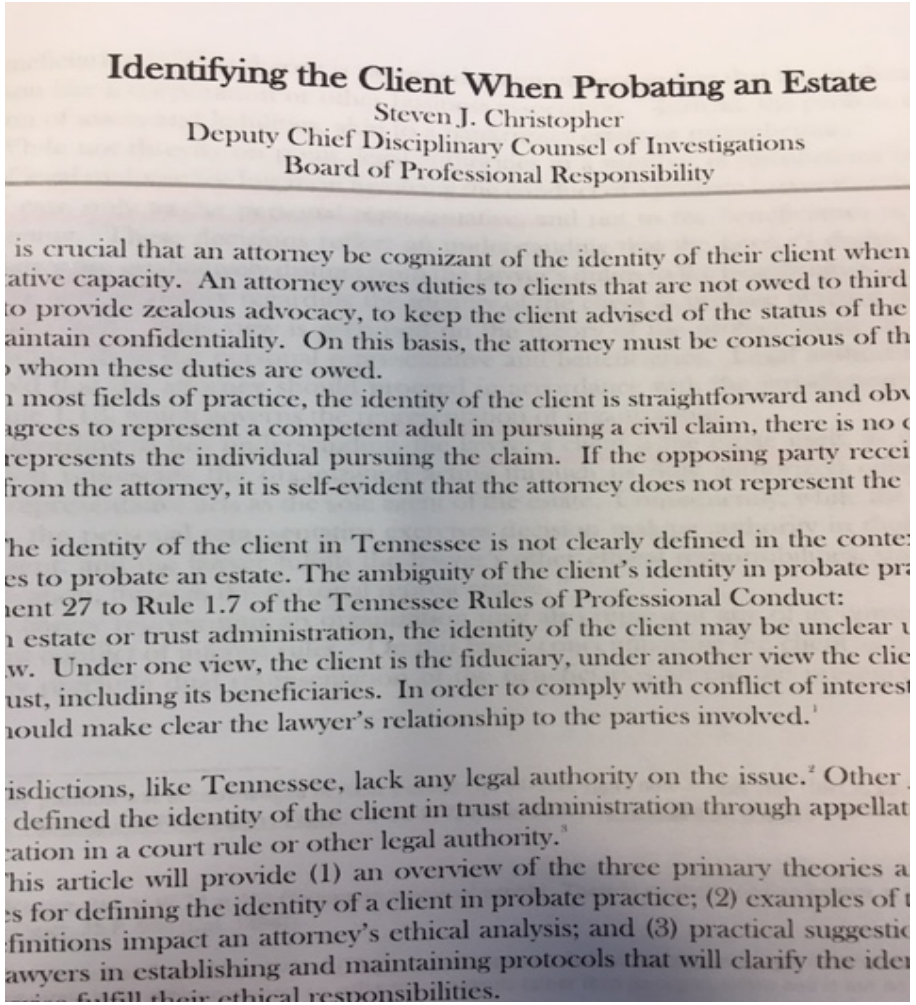
The 900-lb estate-stomping gorilla (aka TennCare) is now like a normal creditor! Well, kinda……

T.C.A. § 30-2-310 (details to come)



Ok, Probate Lawyer, who is your client?





Identifying the Client When Probating an Estate

Steven J. Christopher
Deputy Chief Disciplinary Counsel of Investigations
Board of Professional Responsibility

is crucial that an attorney be cognizant of the identity of their client when
ative capacity. An attorney owes duties to clients that are not owed to third
o provide zealous advocacy, to keep the client advised of the status of the
aintain confidentiality. On this basis, the attorney must be conscious of th
whom these duties are owed.
most fields of practice, the identity of the client is straightforward and obv
grees to represent a competent adult in pursuing a civil claim, there is no
represents the individual pursuing the claim. If the opposing party recei
from the attorney, it is self-evident that the attorney does not represent the

he identity of the client in Tennessee is not clearly defined in the conte
es to probate an estate. The ambiguity of the client's identity in probate pra
ent 27 to Rule 1.7 of the Tennessee Rules of Professional Conduct:
estate or trust administration, the identity of the client may be unclear u
w. Under one view, the client is the fiduciary, under another view the clie
ust, including its beneficiaries. In order to comply with conflict of interest
ould make clear the lawyer's relationship to the parties involved.[1]

isdictions, like Tennessee, lack any legal authority on the issue.[2] Other
defined the identity of the client in trust administration through appellat
ation in a court rule or other legal authority.[3]
his article will provide (1) an overview of the three primary theories a
s for defining the identity of a client in probate practice; (2) examples of t
finitions impact an attorney's ethical analysis; and (3) practical suggestio
awyers in establishing and maintaining protocols that will clarify the ide
fulfill their ethical responsibilities.

TENNESSEE BAR JOURNAL
JANUARY/FEBRUARY 2022 | VOLUME 58, NO. 1 TBA.ORG

WHERE THERE'S A WILL by Dan W. Holbrook

Represent an Estate? Then Who's Your Client?

I'll bet a majority of lawyers in Tennessee have at some time uttered these words: "I represent the estate." Most likely, that was not an accurate statement. The crucial question when representing an estate is who, exactly, is your client? It is rarely if ever the estate, and almost always individuals.

Kudos to Steven J. Christopher of the Board of Professional Responsibility for his recent helpful and well-researched treatise addressing this very question under Tennessee law.[1] Estate lawyers should save it as a reference. This column will highlight a few of its key findings and provide supplemental commentary.

There are three legal theories as to duty to the beneficiaries, akin to representing both an insured and an insurance carrier.

(3) The estate as a legal entity, with a primary duty to the PR as the entity's agent but a secondary duty to beneficiaries, akin to representing a corporation with its concurrent duties to officers and shareholders.

Without knowing which theory governs, almost anyone involved in an estate administration, whether PR, beneficiary or perhaps even a creditor, might reasonably infer that the "estate's lawyer" represents their interests as well or at least has duties on their behalf. The problem, of course, is that so many

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Atherton, Jeffrey

From: Dan W. Holbrook <DHolbrook@emlaw.com>
Sent: Monday, January 10, 2022 11:47 AM
To: Atherton, Jeffrey
Subject: RE: Probate Article in Fall 2021 Board Notes

Honorable Chancellor Atherton,

I am always delighted when someone says they read my column, so thank you.

I wish I had known about your letter and had then asked you to co-author my column, which would have made it better for sure. I'm confident your point about priority on fees would have gotten attention.

In fact, I would encourage you to write a letter to the editor, adding your well-considered analysis and thoughts, as an encouragement to other judges, practitioners, and perhaps the legislature, to clarify roles and duties.

Thanks again.

Dan

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From: Atherton, Jeffrey <JAtherton@HamiltonTN.gov>
Sent: Monday, January 10, 2022 10:46 AM
To: Dan W. Holbrook <DHolbrook@emlaw.com>
Subject: FW: Probate Article in Fall 2021 Board Notes

Dear Mr. Holbrook,
I enjoyed your "Who's Your Client" article in the Jan/Feb Tennessee Bar Journal. I exchanged emails with Mr. Christopher after reading his note last October and I thought you might enjoy the note I sent to him. Although Tennessee ***Appellate*** Courts and the Tennessee legislature have never adopted a specific theory to the exclusion of the others, certain ***trial*** courts (or at least one 😊) have. I have been preaching this for years from the bench and in the probate seminars I conduct and I hope that your article will help establish and/or reinforce an "anti-Alcibiades syndrome" in probate practice.

All the best to you and yours!

Sincerely,
Jeffrey M. Atherton, Chancellor, Pt. 2
11th Judicial District
(423) 209-7385

From: Atherton, Jeffrey
Sent: Friday, October 22, 2021 12:39 PM

Answer: The Personal Representative!

Chancellor Atherton:

Thank you very much for your comments. As I indicated on the phone, I agree with your perspectives regarding the majority rule and its implications.

Steven J. Christopher
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Board of Professional Responsibility
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From: Atherton, Jeffrey <JAtherton@HamiltonTN.gov>
Sent: Friday, October 22, 2021 11:39 AM
To: Steven Christopher <schristopher@tbpr.org>
Subject: Probate Article in Fall 2021 Board Notes

Dear Mr. Christopher,

Thank you for your article. Although I cannot speak for other judicial districts, since I have exclusive probate jurisdiction in the 11th, perhaps I can speak for the 11th Judicial District and those that practice probate here. I have ***un***-reluctantly adopted and unequivocally promote the application of the majority rule (that the attorney represents ONLY the personal representative). By unequivocally, I mean ***REALLY*** unequivocally. When I see a pleading where the attorney has identified himself/herself as the attorney for the estate, I will make a not-so-subtle inquiry as to if they are sure that they know who their client is and why. Uniformly, the attorney amends their pleadings.

Simply stated, there are too many communication obligations and too much potential for a conflict (and the appearance of a conflict) if the attorney holds himself out as the attorney for the estate. Conflicts between the personal representative and beneficiaries arise daily, particularly in light of the increase in the number of "melded" families (meaning, of course that the kids from the first marriage hate the kids from the second marriage and are ready to fight!). Creditors assert a that they are entitled to "cover" from a fiduciary perspective from the attorney, not just the personal representative. Claim hearings and distribution requests are not the only time a conflict is asserted. Personal representatives often become creditors, particularly if they are the surviving spouse and are asserting homestead/years support/exemptions/election against the will, etc. The list of problems continues.

Perhaps the most significant reason, however, for the application of the majority rule is the need for the attorney to be able to escape (a/k/a withdraw). Mismanagement and defalcation occur regularly and this is often by the personal representative, yet the attorney will get the blame. He/she was the attorney for ALL of the folks interested in the estate, right (at least from the perspective of the heirs/beneficiaries and creditors)? Even where the attorney is able to narrowly escape personal liability (*See* In re Estate of John J. Burnette, E2016-02452-COA-R3-CV, Tenn. Court App., 3/21/2018), why run the risk? By representing only the personal representative, in the event of defalcation, lack of communication, or a host of other reasons, the attorney may have proper grounds to withdraw.

In addition, and of particular interest to attorneys that are fond of paying their bills, there is that pesky provision in T.C.A. Section 30-2-317(a)(1) that identifies that it is "reasonable compensation for the personal representative ***and the personal representative's counsel***" that have first priority to get paid from the assets of the estate as a cost of administration. If I am to interpret a statute's language by its plain meaning and assume the legislature "says what it means and means what it says", "Attorney for the estate" is not on the list, except, perhaps in the 4th priority category of "all other demands". Who wants to be 4th instead of 1st when it comes to getting paid? This factor, all by itself, may be that which is providing particular motivation for counsel, at least here.

Simply stated, except in the most extraordinary of circumstances, the only attorney that should identify themselves as representing the estate (at least in the 11th Judicial District, of course) is the Public Administrator. They get that wretched mantle for several reasons, among others being that the first attorney has been permitted to withdraw and I have appointed the Public Administrator to *suo jure* on.

Again, I thank you for your article. I know the Board gets questions from attorneys all the time. Perhaps, if you get a call on this issue, you'll have some ammunition to respond with, "Well, I don't know about anywhere else, but I can sure tell you how that cheeky Chancellor in the 11th looks at it". If you feel I am in error, I'd love to chat with you about it.

Sincerely,

Jeffrey M. Atherton
Chancellor, Pt. 2
11th Judicial District
(423) 209-7385

FORM UPDATE !!!

BEWARE OF QUESTION 5 IN BOTH TESTATE AND INTESTATE PETITIONS

5(a) Petitioner(s) hereby declares that upon his/her/their personal knowledge, he/she/they is not a convicted felon.

_____ (Petitioner please initial)

_____ (Co-Petitioner, if any, please initial)

5(b) Petitioner(s) hereby declares that the value of the assets to be administered is in excess of $50,000 and therefore cannot be administered under the Small Estates Act pursuant to T.C.A. § 30-4-101 *et seq*.

_____ (Petitioner please initial)

_____ (Co-Petitioner, if any, please initial)

5(c) Did the Decedent have an on-going business operating as a sole proprietorship, partnership, single member LLC, or other on-going business operation of any type? ❑Yes ❑No ❑Unknown

WHY THE CHANGE TO QUESTION 5(a)?

5(a) Petitioner(s) hereby declares that upon his/her/their personal knowledge, he/she/they is <u>not</u> a convicted felon.

_____ (Petitioner please initial)

_____ (Co-Petitioner, if any, please initial)

BECAUSE THE LEGISLATURE REQUIRES IT!

FELONS CANNOT SERVE AS PERSONAL REPRESENTATIVES.
SEE T.C.A. SECTION 30-1-111 , AMENDED 2019

WHY THE CHANGE TO QUESTION 5(b)?

5(b) Petitioner(s) hereby declares that the value of the assets to be administered is in excess of $50,000 and therefore cannot be administered under the Small Estates Act pursuant to T.C.A. § 30-4-101 *et seq*.

_____ (Petitioner please initial)

_____ (Co-Petitioner, if any, please initial)

BECAUSE THE LEGISLATURE PERMITS IT!

If the estate has no Will, no real property and is worth less than $50,000.00, use the Small Estates Act, T.C.A Section 30-4-102. It is cheaper and quicker if you can use it! Save your clients some money and save yourself a little time.

WHY ADD QUESTION 5(C)?

5(c) Did the Decedent have an on-going business operating as a sole proprietorship, partnership, single member LLC, or other on-going business operation of any type? ❑Yes ❑No ❑Unknown

BECAUSE I SAID SO!

(***and the legislature is expected to pass specific legislation soon authorizing it. See SB 1680/HB 1665***)

I'm tired of seeing the greatest asset of an estate disappear, waste away or become the greatest liability of the estate.

Technically, to continue to operate a decedent's business, approval is needed pursuant to T.C.A. Section 30-2-322.

A temporary receiver is specifically authorized in absentee estates pursuant to T.C.A. Section 30-3-104 and 105. Expect an amendment to T.C.A. Section 30-1-401 to authorize the appointment of a public receiver in almost any estate, if needed.

WOULDN'T IT BE KIND OF NICE TO KNOW WHAT TO DO, IF ANYTHING, ON THE FRONT END, RATHER THAN WHEN ALL THE GOODIES ARE GONE?

SB 1680/ HB 1665

- Creates the Office of Public Receiver, authorizes changes to forms; and
- SECTION 6. Tennessee Code Annotated, Section 30-1-404, is amended by adding the following new subsection: (c) Upon motion of the personal representative, an interested party, or *upon the court's own motion*, the probate court or chancery court may appoint the public receiver to determine the need for a temporary or permanent receiver. The public receiver must submit a report of its recommendations to the court, which report must be served via United States mail to the personal representative and all known interested parties. The report is subject to the same review as a report of a special master. Upon a hearing, the court may appoint a receiver with such powers as are necessary, consistent with those extended to receivers in absentees' estates.

SO, WHAT ARE WE DOING WITH YOUR CLIENT'S ANSWER to 5(c)?

The short answer:

If your client answers "yes" or "unknown", I appoint a Special Master/Temporary Limited Receiver to investigate and prepare a report to inform me if a receiver is needed (or not). The report is expedited, limited in expense ($150.00) and is subject to T.R.C.P. 53 review and objection.

Practice Point #1

Do you need to open an estate? If so, what do you file?

- Common Form
- Solemn Form
- Small Estate
- Muniment of Title
- Cause of Action

COMMON FORM OR SOLEMN PROBATE REQUIRES AN ATTORNEY

Statutory Authority

23-3-101. Chapter definitions.

(3) "Practice of law" means the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies, or the soliciting of clients directly or indirectly to provide such services.

23-3-103. Unlawful practice prohibited — Penalty.

(a) No person shall engage in the practice of law or do law business, or both, as defined in § 23-3-101, unless the person has been duly licensed and while the person's license is in full force and effect, nor shall any association or corporation engage in the practice of the law or do law business, or both.....

(b) Any person who violates the prohibition in subsection (a) commits a Class A misdemeanor.

(c) (3) The courts are authorized to issue orders and injunctions to restrain, prevent and remedy violations of this chapter, and the orders and injunctions shall be issued without bond.

(4) Any knowing violation of the terms of an injunction or order issued pursuant to this chapter shall be punishable by a civil penalty of not more than twenty thousand dollars ($20,000) per violation, in addition to any other appropriate relief.

Case Authority:

See Elm Children's Educational Trust, 468 S.W.3d 529 (Tenn. Ct. App., 2014)

Secondary Authority

Necessity that executor or administrator be represented by counsel in presenting matters in probate court **19 A.L.R.3d 1104**

Common Form

- Notice of hearing is not required
- Time limitation on filing a will contest: within 2 years from the entry of the Order admitting the will to probate, except for persons under 18 or adjudicated incompetent at the time the cause of action accrues (TCA § 32-4-108)
- If there is a pending or potential will contest action and you need to marshal assets, file a common form probate and get letters to gather the assets as an administrator ad litem

Solemn Form

- Notice of hearing: required for all interested parties
- Time limitation for filing a will contest: before the entry of the order submitting the will to probate
- *In re Estate of Boote*, 198 S.W.3d 699 (Tenn. Ct. App. 2005)
- File solemn form to cut off potential will contest
- The initiation of a will contest temporarily divests the probate court of its authority to enter an order admitting a will to probate in solemn form.
- As soon as the court is made aware of the contest, it must halt the solemn form probate proceedings and determine whether the person seeking to contest the will has standing to pursue a will contest.

Solemn Form

- Date of hearing will be sent out from our office by our probate dept
- At the hearing:
  - Witnesses to the will must be present, if alive
  - Must prove due execution
    - Testator was in the room with the witnesses and they all signed in front of each other
    - Did the testator hold the document out as his/her will?

Small Estate
T.C.A. § 30-4-101 et. seq.

- Estate does not exceed $50,000
- 45-day requirement can be waived/reduced under T.C.A. § 30-4-103(1)(C)
- If there is a will, affiant must be devisee, legatee or PR named in will, otherwise will need declinations unless filing as a creditor
- MUST attach will to affidavit if there is one
- Notice to beneficiaries and/or heirs- best practice, not required by statute
- Claims cannot be filed in a small estate because a PR has not been appointed T.C.A. § 30-2-307(d)

Legislative Update SB 888/ HB 1362

The Small Estate Affidavit Limited Letter of Authority To Act

- If passed, the Affidavit granted is intended to be essentially the equivalent to Letters Testamentary.
- There will still be a 45 day waiting period, and
- There can be no will (requiring probate) and no real property, and
- The monetary limits of a small estate still apply, and
- There will still be a bond requirement, and
- there will be statutory conveyance obligations placed on those holding the deceased's property (time will tell if financial institutions accept them).

Muniment of Title T.C.A. §32-2-111

Regardless of the date of the person's death and any limitation on the time for admitting a will for probate, ***any will when duly proven***, whether of a resident or nonresident decedent, may be admitted to probate for the limited purpose of establishing a muniment of title to real estate and personal property, without the necessity of granting letters testamentary or otherwise proceeding with administration.

(*emphasis added*)

Muniment of Title
T.C.A. § 32-2-111

- Limited purpose of establishing muniment of title to real estate and personal property without the necessity of granting letters testamentary or otherwise proceeding with administration

  MY current requirements:

- Must have a will
- Must give notice to beneficiaries and heirs
- Petitioner must be the named executor in the will or else attorney must file declinations
- Must distribute real and personal property as set forth in the will

LEGISLATIVE UPDATE SB 2123/ HB 2418

- Revision to probate for muniment of title filed:
- The new law would require (among other things):

1. The petitioner must be a named executor and they must wait a year from death before filing it; and

2. The petitioner must notify all beneficiaries and known heirs at law, creditors and TennCare; OR

3. If you don’t wait a year, you still have to comply with 1 and 2., and the judge has great discretion to restrict transfer of property to protect beneficiaries, heirs at law, creditors and TennCare.

So much for that! Crippled, but not dead.

- Passed Senate Judiciary 9-0, but referred to “Summer Study” in the House.
- The need for the law remains, but what to do in the interim?

“any will when duly proven,”

I don’t know about you, but I know what I’m going to do…….

1. Require a hearing, with notice to heirs, beneficiaries, known creditors and TennCare, *in front of me*.

2. Refuse to sign an Order that does not contain a disclaimer specifying that the Order does NOT represent a finding of an interest in real or personal property.

Practice Point #2

Real Property: Is it in or out?

Vesting. T.C.A. § 31-2-103

"The real property of an intestate decedent shall vest immediately upon death of the decedent in the heirs as provided in T.C.A. § 31-2-104. The real property of a testate decedent vests immediately upon death in the beneficiaries named in the will, *unless the will contains a specific provision directing the real property to be administered as part of the estate subject to the control of the personal representative.* Upon qualifying, the personal representative shall be vested with the personal property of the decedent for the purpose of first paying administration expenses, taxes, and funeral expenses and then for the payment of all other debts or obligations of the decedent as provided in 30-2-317…"

The “deadly” language in a will concerning real property:

“OF MY ESTATE”

Simply stated, real property IS NOT PART OF THE ESTATE unless the Will makes it specifically clear. A general “blurb” in the residuary clause does not bring it in! That which is not in the estate cannot be part of a residuary. This is one of the biggest mistakes will drafters are making and this is the peril of using “internet” Wills.

SAMPLE: IN the probate estate

ARTICLE 7

FIDUCIARY POWERS

My Executor (sometimes referred to as "Fiduciary") is to have the following powers, duties and discretions in addition to those now and hereafter conferred by law:

A. Powers Incorporated by Reference. I incorporate by reference all of the fiduciary powers set out in Tennessee Code Annotated Section 35-50-110, as fully as if set out verbatim herein.

B. Authority Over Real Property. I direct pursuant to Tennessee Code Annotated Section 31-2-103 that any interest in real property that I may own at my death be administered as part of my estate subject to the control of my Executor, who shall have full power to grant, bargain, sell, convey, lease, encumber, manage, and otherwise deal in any lawful manner with said real property at any time during the administration of the estate, in the sole discretion of my Executor, without the approval or joinder of any beneficiary and without the necessity of any person or entity looking to the application of any proceeds that may or might result from any acts of my Executor in the premises.

SAMPLE: OUTSIDE the probate estate

5. As to any real property, I direct that it NOT be administered through my estate. Its Angela's anyway! If she dies first, it is still not to be part of my estate unless all four children agree that it would be easier and less expensive to deal with it as an estate asset. Should they so choose, great. Bring it in, sell it, and divide the sales proceeds equally. If not, they can do whatever they want to with it, as they'll own it equally as tenants in common anyway.

Real Property: Is it in or out?

When should you bring real property into the estate?

"…If the decedent's personal property is insufficient for the discharge or payment of a decedent's obligations, the personal representative may utilize the decedent's real property in accordance with title 30, chapter 2, part 4. After payment of debts and charges against the estate, the personal representative shall distribute the personal property of an intestate decedent to the decedent's heirs as prescribed in § 31-2-104, and the property of a testate decedent to the distributes as prescribed in the decedent's will." T.C.A. § 31-2-103

Practice Point #3

What expenses can be paid out of estate funds?

Property maintenance expenses; advances for payment T.C.A. § 30-2-323:

"Unless contrary to the decedent's will, the personal representative of the estate is authorized, but not required, to advance or to pay as an expense of administration for a period of up to four (4) months after the decedent's death the reasonable costs of routine upkeep of any real property passing under the will of the decedent or by intestate succession. These authorized expenditures, which may be made in the personal representative's discretion, shall include those for utility services, day-to-day maintenance, lawn service, and insurance premiums but shall not include mortgage note payments, real estate taxes, major repairs or other extraordinary expenses. None of the foregoing limitations shall apply to any real property that is actually part of the probate estate being administered." (emphasis added)

Practice Point #4

Paying sale proceeds into Court

- Underwriters are now requiring that the funds be paid into Court
- This Court initially started requiring any sale proceeds from real property to be paid into Court because PRs were running off with the money and going to places like, say, Florida or Nebraska and never returning to uphold obligations to the estate such as paying creditors or attorneys

Practice Point #5

Personal Representative's Responsibilities

- Must file tax returns for the deceased in the year Decedent died
- Give actual notice to TennCare and Bankruptcy Court
  - T.C.A. § 30-2-310 (here's where the gorilla comes in)

New law alert!

T.C.A. § 30-2-310

(c) Notwithstanding subsections (a) and (b), § 71-5-116, and §§ 30-2-306 -- 30-2-309:

(1) If the bureau of TennCare receives a notice to creditors as defined in § 30-2-306(b) within twelve (12) months of the decedent's date of death, then the bureau's claims and demands against the decedent's estate are forever barred unless the bureau files a claim with the probate court clerk or brings or revives suit within the later of:

(A) Twelve (12) months from the decedent's date of death; or

(B) Four (4) months from the date when the bureau received the notice to creditors.

(2) If the bureau of TennCare does not receive a notice to creditors as defined in § 30-2-306(b) within twelve (12) months of the decedent's date of death, then the bureau's claims and demands against the decedent's estate are forever barred unless the bureau files a claim with the probate court clerk or files a petition to open or re-open a decedent's estate within forty-eight (48) months of the decedent's date of death.

(3) If a claim is not filed by the bureau of TennCare pursuant to subdivision (c)(1) or (c)(2), then the requirements of § 71-5-116(c)(2) do not apply.

Practice Point #6: Stop The Stealing From the Estate

Defalcation Fund

- Resolution No. 420-10 adopted April 29, 2020 provides:

That the Clerk and Master of Hamilton County Chancery Court is hereby authorized to allocate[] Fifty Thousand Dollars ($50,000.00) of those funds generated each fiscal year (being a part of those funds designated as “excess fees”) for the purpose of paying the costs and expenses associated with the efforts of the Public Administrator seeking and attempting to retrieve any assets of deceased residents of Hamilton County that may be mis-appropriated by the legal representative of said estates.

Defalcation Fund

- Resolution No. 520-23 adopted May 13, 2020 provides:

That Resolution No. 420-10 is hereby amended to provide that any funds expended by the Public Administrator *or any other duly appointed attorney* in reclaiming from any defalcating person(s) who unlawfully and improperly acquired, retained, and secreted assets of decedents shall first by applied by the Clerk and Master of the Chancery Court to replenishing those funds expended by said Public Administrator or duly appointed attorney before making any distribution to the creditors, heirs and/or beneficiaries of the decedent.

Defalcation Fund

- So how do you request reimbursement from the Defalcation Fund?
  - File a motion, setting forth reasons why the fee request should be paid out of the Defalcation Fun
  - Specify details of what steps you took to go after absconded funds
  - May be referred to the Clerk & Master for more detailed analysis and Report

(Yet) Another Probate Bill

Current Law:

- Tennessee Code Annotated §31-4-105. Death of Surviving Spouse

- In the event the surviving spouse dies before the time for electing the elective share expires, the personal representative of the decedent's surviving spouse may, in like manner and every respect, make the election on behalf of the deceased spouse. In like manner, the personal representative may withdraw a demand for an elective share at any time before entry of a final determination by the court.

SB 1800/ HB 2358

It will provide increased protection for the personal representative by:

- The right of election against the estate of the deceased spouse is not an asset of the estate of the surviving spouse.
- The personal representative of the deceased surviving spouse cannot be required to make the election against the estate of the deceased spouse by any person or entity with an interest in the estate of the deceased surviving spouse.
- The personal representative of the deceased surviving spouse is not liable to any person or entity with an interest in the estate of the deceased surviving spouse for loss or damages resulting from the personal representative's discretion to exercise or not exercise the deceased surviving spouse's election rights against the deceased spouse's estate.

Practice Point #7

Appeals in Probate

"Without question, our courts have previously recognized the difficulty of applying the final judgment rule to probate proceedings. *In re Estate of Schorn*, No. E2013-02245-COA-R3-CV, 2015 WL 1778292, at *7 (Tenn. Ct. App. Apr. 17, 2015) (citation omitted). This is in large part due to the fact that probate proceedings frequently contain multiple intermediate orders that are final with respect to discrete issues. *See id.* (citation omitted). As such, an order is appealable in many instances notwithstanding the fact that the probate case has not definitively concluded. For example, when a claim filed against the estate is tried and resolved, "[a] party dissatisfied with the outcome of a trial regarding a disputed claim must file a timely appeal without waiting for a final order closing the probate proceeding." *In re Estate of Trigg*, 368 S.W.3d 483, 497 (Tenn. 2012) (citation omitted)." *In re Estate of McCants*, No. E2017-02327-COA-R3-CV, 2018 WL 3217697 (Tenn. Ct. App. July 2, 2018).

Appeals in Probate

- This means that any order on claims or fees must be appealed immediately.
- Other issues, such as an order on an interim accounting are not immediately appealable. *See* *In re Estate of Schorn*, 359 S.W.3d 192, 197 (Tenn. Ct. App. 2011).

- So why does this matter? *Because I like interim fee requests. They protect the lawyer (orders insulate fees) and avoids heir/benny "sticker shock" at the end of a case.*

The Estate is Broke! Now what?

- Question: Chancellor, can't I just close the estate because: (a) we didn't find what we thought we'd find, or (b) we never should have opened it in the first place, or (c) I really just want to be done with this mess?

- ANSWER: *Sorry, but it doesn't work that way*!

Ways to close an estate:

1. **Old Faithful**- Pursuant to T.C.A §30-2-601 et. seq, file a formal accounting or sworn statement in lieu thereof, get the approval of Annie (*and good luck with that unless it is accurate*!) followed by an Order Closing the Estate (*making sure court costs are paid, since it is good to keep the lights on in the clerk's office*).
2. **Insolvent Estates**- Pursuant to T.C.A. §30-5-101 et. seq., file a Notice of Insolvency and Proposed Plan of Distribution, then file a Motion to Approve Plan of Distribution, then, at the hearing of the Motion (assuming there is no objection), present your Order Approving Plan of Distribution and Closing Estate (*making sure court costs are paid, since it is good to keep the lights on in the clerk's office)*.
3. **Anti-Dust**- Pursuant to T.C.A. §30-2-324, if 18 months have passed without disposition, the estate may be closed, without prejudice, upon motion by the clerk or counsel for the personal representative. Follow your Motion with an Order to Close (*making sure court costs are paid, since it is good to keep the lights on in the clerk's office*).

- **NOTE**: **Simply filing a Motion to Close Estate because it is broke will fail**. T.C.A. Section 30-1-112 *might* get the P.R. out, but it won't close the estate. A Motion to Withdraw by counsel *might* get the attorney out, but it won't close the estate.

COA cases originating from this Court in the past 12 months

- Hunter Ryan Ellis, et al. v. Christina L. Duggan, et al. No. E2020-00723-COA-R3-CV (Tenn. Ct. App. Apr. 21, 2021)
  - Undue influence where POA gifted herself a house
  - In-depth analysis on “independent advice”
  - Attorneys’ fees allowed pursuant to breach of fiduciary duty
- In Re: Estate of Winston Clark, Sr., No. E2020-00912-COA-R3-CV, 2021 WL 2099886 (Tenn. Ct. App. May 25, 2021)
  - Updated forms for notice and order of certification of will contest

The Chancellor's Choppers!
The "Walk of Shame" Docket

- Yes, there ARE filing deadlines in probate
- Attorneys (often) do NOT comply with them
- Estates drag on and on and on……
  - So what can you do about it?
  - 1. Have your clerks keep track of the applicable deadlines (flags on the computer and stickers in the file)
  - 2. When a delay occurs, issue a Citation to Appear (T.C.A. §30-2-602) and, perhaps, remind them of the availability of the issuance of an indictment against them, in circuit or criminal court, should problems continue (T.C.A. §30-2-613).
  - 3. Set a monthly "Walk of Shame" docket for all the dilatory folks to appear. (*Incidentally, I didn't name the docket, the attorneys having to appear did*.)

Clerk Tip:
Probate cases

- Intestate estates:
  - Bonds are always required if there is personalty over $3,500 (attorney's bond can cover anything less). This is required regardless of whether the heirs waive bond.

- When closing an estate that has a bond, please let the probate clerks know when you file the closing documents so that the file can be closed immediately.

Clerk Tip:
Probate cases

- When filing claim releases, make sure your filing includes the name of the creditor. If you are filing what the creditor submitted to you, a cover sheet that describes which claim would be helpful
- When you email file, you do not need to also file an original, unless ordered by the Court to do so- this creates unnecessary duplicates in our records
- All filings shall not be printed on the front and back of a page

Biggest Practice Point of All!
Love your Court Clerks

- Make friends with the clerks in the department(s) where you practice
- Our clerks want to be friends with lawyers, paralegals, secretaries, runners, and other staff members. They want to help you help your client!
- Clerks can make or break you. They will stay late for you to make a deadline or they can save you on a procedural issue you either missed or didn't know

Pro Tip: They like donuts

Clerk & Master Hearings

- So a claim is filed and an Exception is filed. Now what?
- On hearings concerning exceptions to claims
  - Upon the filing of claim, burden is on the claimant to prove, then shifts to objecting party
  - *MBNA America v. Estate of Lavada Jones*, No. E.2004-01614-COA-R3-CV, 2005 WL 1618759 (Tenn. Ct. App. July 11, 2005).
    - "No show" claimant is not sufficient to deny claim in whole; the Master must review the claim unless the exception is a properly sworn denial

Clerk & Master Hearings

- Transcripts
  - A court reporter is not required under TRCP 53 and LRCP 12.05
  - If a court reporter is present, the transcript must be filed prior to the filing of the Master's Report pursuant to TRCP 53.04(1) and LRCP 12.05
  - If a court reporter is not present, the factual findings of the Master are final, but issues of law can still be raised at the hearing before the Chancellor
  - The cost of the transcript is divided equally among the parties pursuant to LRCP 12.05

Clerk & Master Hearings

- Fee applications for executors/administrators/personal representatives or attorneys
  - The party seeking the fees has the burden of proof, so start by going through factors in RPC 8, 1.5
  - MUST have attachment of bank statements, receipts, etc. for a full breakdown of all expenses T.C.A. § 30-2-606
  - Cannot just bring in a summary spreadsheet and expect that to be sufficient

Clerk & Master Hearings

- After the Master's Report is filed
  - For Part 2 cases, the Master's Report is filed with a Notice that provides a date for the parties to appear for the Court to rule on the Report pursuant to TRCP 53.04(2)
  - The hearing before the Chancellor is what our office calls a "Duke" hearing after *In Re Conservatorship of Horace Duke*, 2015 WL 5306125, No. M2015-00023-COA-R3-CV (Tenn. Ct. App. Sept. 3, 2015)
  - If only legal issues raised, the Court will not permit testimony unless there are new facts that have occurred after the filing of the Report
  - If factual issues are raised, the Court *may* allow further testimony
  - After the Duke hearing, the Court may adopt, modify, reject in whole or in part the Report, or the Court may recommit the issue(s) to the Master with further instructions

Clerk & Master Hearings

Necessaries doctrine:

"Generally, under the common law necessaries doctrine, a husband has a duty to provide for his wife's necessary expenses. *See* *Simpson v. Drake,* 150 Tenn. 84, 262 S.W. 41, 41 (Tenn.1923); *State v. Dixon,* 138 Tenn. 195, 196 S.W. 486, 486 (Tenn.1917). The Tennessee Supreme Court later expanded the common law necessaries doctrine to impose mutual support obligations on both husbands and wives. *See* *Kilbourne v. Hanzelik,* 648 S.W.2d 932, 934 (Tenn.1983); *Estate of Francis v. Francis,* No. M2000-01110-COA-R3-CV, 2001 WL 673699, at *6 (Tenn. Ct.App. M.S., June 18, 2001). Therefore, this State recognizes that a "surviving spouse is responsible for providing for the necessaries of his or her deceased spouse, including funeral expenses, if they are not paid by the deceased spouse's estate." *Estate of Francis,* 2001 WL 673699, at *6. However, determining whether a husband is responsible for his wife's funeral expenses is a fact-specific inquiry. *Id.* at *5." *Fryer v. Conservatorship of Fryer,* No. E2009-01009-COA-R3-CV, 2010 WL 3893765 (Tenn. Ct. App. Oct. 5, 2010)

Clerk & Master Hearings

- Necessaries doctrine
- T.C.A. § 47-18-805 Married persons; liability of spouse

"Where the applicant for credit is married, the spouse of the applicant shall not be liable, other than to the extent common law liability is imposed for furnishing necessaries, for any debts, charges, or accounts where the spouse has not signed the application for credit."

Clerk & Master Hearings (and Part 2)

- Can a corporation file an answer through a non-lawyer?

"[A] limited liability company "may only appear in court through counsel." *Collier v. Greenbrier Developers, LLC*, 358 S.W.3d 195, 200 (Tenn. Ct. App. 2009) (quoting 83 Am. Jur. 2d. *Limited Liability Companies* § 1); *see also Elm Children's Educ. Trust v. Wells Fargo Bank, N.A.*, 468 S.W.3d 529, 532 (Tenn. Ct. App. 2014) (noting that our Supreme Court has held that a non-attorney may not represent a corporation in Tennessee courts); *Old Hickory Eng'g & Mach. Co., Inc. v. Henry*, 937 S.W.2d 782, 786 (Tenn. 1996) (stating that "a corporation cannot act *pro se* in a court proceeding nor can it be represented by an officer or other non-lawyer agent")." *Faubion v. Sigerseth*, No. E2018-01556-COA-R3-CV, 2019 WL 2404818 (Tenn. Ct. App. June 7, 2019)

Clerk & Master Hearings (and Part 2)

- Can a corporation file a claim?
- "[F]iling a claim for debts due from a decedent does not require the exercise of the professional judgment of a lawyer. Such claims are in essence demands for payment. Many employees or owners of businesses make similar demands daily and are quite competent to make an informal statement of the amount due with necessary backup documentation. Although the claims statutes require some specific inclusions, the are straightforward and do not require legal training to understand.. . .[M]erely filing a claim against an estate is not the practice of law and, consequently, the claim filed herein by a corporate office or employee was not the unauthorized practice of law." *In re Estate of Green v. Carthage General Hospital, Inc.,* 246 S.W.3d 582 (Tenn. Ct. App. 2007).
- However, once the proceeding becomes adversarial, a lawyer must represent the corporation

What Did I Miss?

- Questions, comments and answers are welcome!