

That Joke Isn't Funny Anymore: Common Mistakes in Estate Administration in West Virginia

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I. INTRODUCTION

W. Va. Code § 44-1-15 (2010) provides that it is the “duty of every personal representative to administer well and truly the whole personal estate of his decedent.” The function of this outline is to provide an overview of the steps necessary to administer an estate under West Virginia law in a proper manner, focusing on a number of opportunities for error and the means of avoiding these common pitfalls. It is important to file all necessary documents in a timely fashion and handle the Estate in a manner consistent with the intent of the decedent. According to West Virginia law, every estate must go through five basic steps. These steps range from probating a decedent’s will to making a final distribution of assets to the appropriate beneficiaries.

II. INITIATING THE PROBATE PROCESS

A. Background

The first step in administering a decedent’s estate is to present the decedent’s will for probate and qualify as executor of the estate. Under W. Va. Code § 41-5-1 (2010), a person having custody of a will must deliver the will to the clerk of the county commission or the executor named in the will within thirty days of the testator’s death. The personal representative must then offer the will for probate within a reasonable time.

B. Common Problems

1. A person who fails to deliver a will to the clerk or the executor named in the will within thirty days of the decedent's death is guilty of a misdemeanor and is civilly liable to the beneficiaries for any damages caused by such neglect.
2. When a person dies intestate, the clerk customarily grants administration to the distributees who apply to be appointed. If a will is located following the appointment of an administrator, the county commission will ordinarily revoke the appointment of an administrator and appoint an executor in accordance with the terms of the will.
3. W. Va. Code § 44-1-4 (2010) provides that a surviving spouse is to be given preference when the clerk determines the proper party to be appointed as administrator of an intestate estate. The clerk is then given the authority to determine which distributee should be appointed to administer the estate in the absence of a surviving spouse. If no one applies to be appointed within thirty days of the decedent's death, the clerk may grant administration to creditors of the estate.

III. PREPARING AN INVENTORY OF THE ESTATE

A. Background

Second, the personal representative must prepare an inventory of the decedent's estate. W. Va. Code § 44-1-14 (2010) requires the personal representative to prepare an Appraisal of the Estate. Similarly, W. Va. Code § 11-11-7 (2009) requires the personal representative to prepare a Nonprobate Inventory of the Estate. These documents serve as the base information for the preparation of the federal estate tax return and the accountings of the

estate. In order to file the Appraisal and the Nonprobate Inventory, it is necessary to gather information concerning the decedent's real estate, tangible personal property, government bonds and securities, shares of corporate stock, and money.

B. Common Problems

1. The Appraisal and Nonprobate Inventory must be filed within ninety days of the qualification of the personal representative. Any personal representative who fails to comply with this requirement, without reasonable cause, is guilty of a misdemeanor. In addition, the failure to comply with this requirement may be grounds for removal in a petition filed by a disgruntled party to remove the personal representative.
2. It is important that the value of assets enumerated on the Appraisal and the Nonprobate Inventory be consistent with the values listed on the United States Estate (and Generation-Skipping Transfer) Tax Return (Form 706) filed by the personal representative. In many instances, this is accomplished by filing an amended Appraised and Nonprobate Inventory at the time the Form 706 is filed.
3. Despite the temptation to use the appraised value of real property as determined by the assessor's office, it is ordinarily prudent to retain the services of an independent appraiser. This is appropriate when the estate is a taxable estate because of the increased scrutiny resulting from the analysis of the property by the Internal Revenue Service. It is also appropriate when the estate is a non-taxable estate because of the step-up in basis afforded by I.R.C. § 1014.

IV. PAYING DEBTS AND ADMINISTRATIVE EXPENSES

A. Background

The third step in administering a decedent's estate is to pay the debts and administrative expenses of a decedent's estate. These include funeral expenses, accountant fees, attorneys' fees, executors' commissions, and miscellaneous administrative expenses. These include utilities, medical expenses, home health care, and income tax liability. An itemized list of the administrative expenses should be found on Schedule J of the United States Estate (and Generation-Skipping Transfer) Tax Return (Form 706). Significantly, all of the debts and administrative expenses of the Estate are deductible under I.R.C. § 2053.

B. Common Problems

1. W. Va. Code § 44-4-12 (2010) provides that a personal representative is entitled to reasonable compensation in the form of a commission on the assets subject to his or her administration. Until 2007, the general standard in West Virginia with regard to the amount of the personal representative's compensation was five percent (5%) of the estate's receipts. *See, e.g., Lapinsky's Estate v. Sparacino*, 132 S.E.2d 765 (W. Va. 1963). In 2007, the West Virginia Legislature adopted a statutory fee schedule which is set forth in W.Va. Code § 44-4-12a (2010). Significantly, however, it may not be advisable for a personal representative to receive such a fee if he or she is the sole beneficiary of the estate because of the income tax consequences of receiving such a fee.
2. In the event that a dispute arises concerning the validity of a claim against a decedent's estate, the personal representative must file a counter affidavit objecting to the validity of claim. In fiduciary commissioner counties, the counter

affidavit must be filed in accordance with the provisions of W. Va. Code § 44-2-6 (2010). In fiduciary supervisor counties, the counter affidavit must be filed in accordance with the provisions of W. Va. Code § 44-3A-7 (2010).

3. Unlike funeral expenses, all administration expenses can be claimed either on the estate's income tax return (Form 1041) or on the Form 706. In order to deduct these expenses on Form 1041, the fiduciary must file a statement waiving the right to deduct the expenses on Form 706, as required under I.R.C. § 642(g).

V. HANDLING TAX MATTERS

B. Background

The personal representative must file all tax returns on behalf of the decedent's estate and, where applicable, pay any taxes due. These tax returns include (1) the decedent's final federal income tax return or returns, (2) the decedent's final State income tax return or returns, (3) the federal estate tax return, (4) the State estate tax return, if required under W. Va. Code § 11-11-1 *et seq.*, (5) the federal fiduciary income tax returns, and (6) the State fiduciary income tax returns. In addition, the personal representative may be required to file a United States Gift (and Generation-Skipping Transfer) Tax Return (Form 709) if the decedent made a taxable gift in the year of his or her death. Similarly, the personal representative may be required to file a U.S. Return of Partnership Income (Form 1065) or U.S. Corporation Income Tax Return (Form 1120) if the decedent owned an interest in a closely-held business. One of the most important duties of the personal representative is to file the federal estate tax return. Under the provisions of I.R.C. § 6075(a) the federal estate tax return must be filed within nine months after the decedent's death, if no extension is requested. W. Va. Code § 11-11-8 (2010) contains a similar filing requirement for the West Virginia estate tax return.

C. Common Problems

1. Under federal law, in order for a disclaimer to be recognized as a qualified disclaimer for tax purposes it must conform to the requirements of I.R.C. § 2518 which includes a nine-month limit on the right to disclaim, measured from the transfer creating the interest. Accordingly, disclaimers must be filed on or before the deadline for filing the federal estate tax return, without extensions.
2. The personal representative must be cognizant of the income tax consequences of handling various assets and the benefits to be derived from utilizing the income distribution deduction. For example, liquidating savings bonds may have a significant income tax result. Similarly, the personal representative must make an informed decisions concerning the handling of individual retirement accounts and qualified plan proceeds.

VI. ACCOUNTING & DISTRIBUTION

A. Background

W. Va. Code § 44-4-2 (2010) requires a personal representative to file annual accountings. The final step in administering a decedent's estate is to make a final distribution of assets to the beneficiaries of the estate. Under West Virginia law, a personal representative is not required to distribute the assets of a decedent's estate until the filing of a final settlement of accounts and entry of an order discharging the personal representative. Upon approval of a final settlement and entry of an order discharging the personal representative, it is appropriate to make a final distribution to the residuary beneficiaries of the Estate.

B. Common Problems

1. W. Va. Code § 44-4-7 (2010) provides that a personal representative who fails to file an annual accounting is not entitled to compensation for fiduciary services during such year.
2. In fiduciary commissioner counties, a personal representative may file a waiver of final settlement in accordance with the provisions of W. Va. Code § 44-2-29 (2010). In fiduciary supervisor counties, a personal representative may file a short form settlement and waiver and application for short form settlement in accordance with the provisions of W. Va. Code 44-3A-4a (2010).
3. As a general rule, a personal representative cannot be compelled to make a partial distribution from the estate until approval of the final settlement of accounts or waiver by the county commission. *See, e.g.* W. Va. Code §§ 44-2-25 and 44-3A-31. Nonetheless, many personal representatives make partial distributions from estates during the pendency of the estate administration. These are at-risk distributions which may be subject to the claims of creditors.

TRUE OR FALSE

	True	False
1. Under the West Virginia lost will statute, a conformed copy of a will is admissible to probate.	_____	_____
2. The children of a decedent receive preferential treatment with respect to qualifying as administrator of a decedent's intestate estate.	_____	_____
3. It is appropriate to file the Appraisement of the Estate & Nonprobate Inventory at the time of filing the federal estate tax return.	_____	_____
4. For tax purposes, it is appropriate to err on the side of undervaluing assets.	_____	_____
5. For tax purposes, it is always appropriate to take a commission for serving as a personal representative.	_____	_____
6. Litigating disputes before a fiduciary commissioner is a cost-effective and timely method of resolving disputes.	_____	_____
7. An estate is entitled to interest on the overpayment of state estate tax.	_____	_____
8. Under the minimum distribution rules, a decedent's IRA must be distributed within five years of the decedent's death.	_____	_____
9. The filing of a short-form settlement abrogates the need for filing annual accountings.	_____	_____
10. A beneficiary may compel a partial distribution from an estate prior to its closing.	_____	_____