

GUIDELINES FOR ACTING AS THE EXECUTOR OF AN ESTATE

You have been named as the Executor. The job of the Executor begins with the death of testator. You have no responsibility until that time. While it may be many years until you actually have to serve, it is important for you to understand your future job.

The purpose of these guidelines is to provide you, as the future Executor, with some general instructions which should be followed in the performance of your responsibilities. **These instructions are not intended to be legal advice.** In specific situations, if you have a question about your authority or the propriety of actions you may be considering, consult a legal advisor before acting, in order to avoid future problems.

What is Probate?

Probate is a court-supervised process to accomplish the transfer of property from a deceased individual (the "decedent") to the decedent's beneficiaries as identified in the decedent's Will. The Executor is appointed by the probate court to handle the administration of the estate. The Executor is a fiduciary with responsibilities to both the probate court and to the beneficiaries.

Types of Decedent's Assets

For the purposes of the administration of the estate, the assets considered a part of the estate may be placed into one of four categories. The character of an asset, as belonging to one of the categories listed below, can determine whether such assets should be reported on various probate and tax forms. It can also affect whether the Executor has title to the asset, as well as the degree of responsibility and accountability that the Executor may have with respect to the asset.

- (1) **Category One.** This category includes personal property, the disposition of which is governed by the provisions of the Will. The Executor receives (for the purposes of estate administration) the title to all such assets and will hold title until such assets are sold or converted to cash and paid out in payment of debts or distributed in cash or in kind to the beneficiaries. Such assets are, in the aggregate, popularly called the "probate estate."
- (2) **Category Two.** This category consists of real property, the disposition of which is governed by the provisions of the Will. The Executor normally does not receive title to real property unless the Will devises the title to the Executor, typically for purposes of sale. In some cases the Executor is given the power of sale under a Will without being given title to the real property. Except as described above, the title to land passes at the moment of death directly to the devisees named in the Will.
- (3) **Category Three.** This category consists of real and personal property which, by reason of either (a) form of ownership, or (b) contractual provisions, upon the death of

the decedent is transferred to third parties, irregardless of the provisions of the decedent's Will. An example of (a) above is property, real or personal, held jointly with right of survivorship. An example of (b) above is a life insurance policy on the life of the decedent payable to a third party beneficiary. On the other hand, interest in personal property owned by the decedent as tenants in common belongs in Category One. Real property interests in real property held by the decedent as tenants in common belong in Category Two.

- (4) **Category Four.** This category consists of property in which under state law, the decedent had no interest at death, but solely for purposes of computing estate tax due (state and/or federal) is considered as part of the decedent's "gross estate." Other than reporting the existence of such property on tax and probate forms, possibly paying a tax based in part thereon, and in some cases collecting some portion of the estate tax from the recipients of such property, the Executor normally has no responsibility for it.

Commencing a Probate Administration

Following is a description of the major steps in a typical probate administration of an estate that is large enough to require the filing of an federal estate tax return (Form 706). **Smaller estates may follow an abbreviated process.** It is also important to consider the filing requirements of state estate tax returns. The major steps of the probate administration include:

- (1) **Selecting a Lawyer and Other Professionals.** The probate administration is a legal proceeding. You will need the services of a lawyer. Our law firm will be glad to talk with you as to how we can help you with this work. There are also several tax returns that will be required to be filed. You will also need to engage a certified public accountant to assist you in preparing these returns.
- (2) **Finding, Reading, and Interpreting Estate Planning Documents.** A decedent's estate planning documents normally consist of a Last Will and Testament and sometimes a Revocable Trust. When a Revocable Trust is used, the dispositive provisions may be contained in each document. The decedent may also leave a memorandum outlining the distribution of tangible personal property, such as furniture, art, clothing, automobiles, china, crystal, silver, etc. It is your responsibility to find these estate planning documents. Often a person signs multiple Wills and Revocable Trusts over a period of years. It is therefore important to make sure that you have the latest version of these documents. Many times there are amendments to these documents. An amendment to a Will is typically called a Codicil. It is your responsibility to read these documents and to fully understand all of the dispositive provisions. If any provisions are ambiguous, it is your responsibility to obtain legal advice on the proper interpretation of these documents.
- (3) **Information Gathering.** Before an estate administration can be commenced, it is necessary to get basic information on the decedent, the estate, and the beneficiaries. This information includes a copy of the death certificate as well as names, addresses, telephone numbers, dates of birth, and social security numbers of all beneficiaries. You

will also need to gather all the other information needed to complete the petition to commence the probate administration.

- (4) **Commencing a Probate Administration.** The probate administration is commenced by filing with the probate court a petition applying for the probate of the Last Will and Testament and the appointment of the Executor. The probate court will review the petition for probate and the appointment of the Executor for the Last Will and Testament. After reviewing the application and receiving any testimony that the probate court deems appropriate, the probate court issues “letters” of administration appointing you as the Executor. Once you have been appointed as the Executor, you have the full authority to act on behalf of the decedent to administer the decedent’s estate.
- (5) **Obtaining Tax Identification Numbers.** An estate is a separate taxpayer. As a result you will have to apply for a tax identification number (“TIN”) for the estate. This TIN will be used by you when opening any bank or other accounts in the name of the estate. This number will also be required for the filing of the estate’s fiduciary income tax return (Form 1041). You will be required to file this return each year during the estate administration. If there is a separate trust, you will be required to get a separate return for that trust and file annual fiduciary returns for each trust.
- (6) **Finding, Protecting, and Valuing Assets.** After being appointed as the Executor, you must file an Inventory describing and placing a value on all of the assets of the estate and the amount of indebtedness secured by liens on such estate assets. This Inventory must normally include a listing of all property. This may include both "probate assets" and "non-probate" assets (such as joint property with right of survivorship and life insurance policies on the decedent). The values of the assets are established by various means. The Executor is not required automatically to use appraisers to establish estate asset values. However, on request of anyone interested in the estate, the probate court may require that appraisers be employed by the Executor, and different kinds of assets may require appraisers with different expertise. That said, it is your responsibility to accurately value the assets of the decedent.

Even if the probate court does not require the employment of appraisers, such employment may be prudent. For example, if the valuation of estate assets might result in disputes with the taxing authorities or among estate beneficiaries, it may be prudent to select well-qualified appraisers. If you desire to employ appraisers, it is prudent for you to discuss potential appraisal fees in advance. Your lawyer can advise you in regard to appraisers and suggest and locate qualified appraisers for you and employ them for you.

One of the major responsibilities of the Executor is to locate and identify anything of value which is part of the decedent's estate at death. Such duty is reflected in the Inventory on which you are required to state under oath that you have listed all of the estate assets.

You should be familiar with the techniques and procedures used to search for assets in order to properly fulfill your obligation to the estate beneficiaries, creditors, and

taxing authorities. Some of the more common asset discovery techniques include the following:

- A review of the decedent's federal income tax returns for several years prior to death to disclose income for which there must be a source. This would include dividend income, interest income, depreciation, depletion, debt payments, etc.
- A review of bank statements, canceled checks, and deposit slips that may also disclose income, the source of which may be an estate asset. Canceled checks and the payment of insurance premiums may lead to an insurance policy. Canceled checks in payment of notes may indicate the existence of other property.
- A search of local public records to disclose property or other assets held of record by the decedent.
- A review of the decedent's fire and casualty insurance policies or schedule of personal effects.
- With respect to United States Government Bonds, the Bureau of Public Debt suggests sending a letter of inquiry to it concerning whether or not the decedent owned any United States Government Savings Bonds.
- If the decedent was known to have invested in securities, a letter of inquiry by you to the decedent's broker or other likely brokers inquiring about brokerage accounts may disclose additional assets.
- You should also consider writing to local banks and savings and loan associations inquiring about accounts, safe deposit boxes, loans, etc.
- For certain kinds of creditors, it is possible the decedent may have credit life insurance on loans.
- Professional and other associations sometimes have accident insurance and other membership benefits. When appropriate, these organizations should be contacted to determine whether that is the case.
- Veterans have certain benefits available and it is your responsibility to inquire about the possibility of such veteran benefits.
- If the decedent was or may have been a beneficiary under another estate, the records of such prior estate should be reviewed in the appropriate probate court to determine what assets the decedent, as a beneficiary, might have received.

All such assets should be included on the Inventory. We will be glad to assist you in the search for these assets, if you wish.

Several types of assets will need more detailed appraisal work. In the case of real property, it is best if a qualified real estate appraiser is retained to review and render a written appraisal of the value of real estate. The appraisal should be detailed and should consider the value of the property using one or more of the three generally accepted approaches to value, namely the cost approach, market approach, and income approach. Any antiques or other valuable personal property, such as jewelry, collections, etc., must also be appraised by a competent appraiser.

If difficulties are experienced in inventorying the assets or in appraising them, the period for filing the Inventory normally can be extended by the probate judge, if requested.

- (7) **Ongoing Probate Estate Administration.** An estate checking account should be opened to receive the income to the estate and pay out estate expenses. Any final payments owed to the decedent should be deposited to this account. Individually held bank accounts of the decedent should be paid over into an estate checking and/or savings account so that records of income and expense can be carefully itemized and the estate assets carefully recorded. The estate checking account should be held by the lawyer for the estate so that the lawyer can monitor payments out of the estate and insure that such payments are made according to the requirements of the law. Your lawyer can prepare the estate checks for you to sign. The bank should be instructed to send statements and canceled checks monthly, so that those records will be available to prepare the estate accountings as required by law.

Some of your tasks during an ongoing probate administration include:

- Transferring all of the decedent's assets into accounts in the name of the estate.
- Protecting assets from waste, destruction, or reduction in value.
- Ensuring that property and liability insurance is in place to protect both the property and you, as the Executor.
- Filing claims to obtain life insurance proceeds for the beneficiary of any life insurance policy.
- Finding and inventorying any safe deposit boxes.
- Paying all proper debts of the decedent.
- Paying all proper debts incurred by you during the administration of the estate.

- Reviewing investments to determine whether the particular investment should be retained by the estate. You will need to consider the risk of holding an investment and the diversification of the investment portfolio.
- Selling inappropriate estate assets.
- Complying with probate court filing requirements and laws.
- Filing the final income tax return for the decedent.
- Filing required fiduciary income tax returns.
- Paying all specific bequests.
- Filing the federal and/or state estate tax return.
- Filing with the probate court any required interim and final fiduciary accountings.
- Paying the remaining estate assets to the residuary beneficiaries.

(8) **Liquidity Needs.** One of your most important tasks will be to make sure that you will have sufficient cash to meet all of the estate's obligations. Cash will be needed to pay i) the debts of the decedent, ii) the expenses of the estate administration, iii) income taxes, iv) estate taxes, and v) certain types of bequests.

(9) **Creditor Claims.** Shortly after the Will is probated, you are required to begin advertising in the newspaper for creditors of the estate to present their claims. The notice will appear for several consecutive weeks. Creditors are directed to file their claims within the required period after the first publication of notice or their claims will be barred. All claims arising before the decedent's death must be presented within the dates specified by state law. Claims must be filed with the Executor and with the probate court. Any claims or bills which you receive should be promptly sent to your lawyer for review. That lawyer will advise you and recommend appropriate dispositions of each creditor's claim. It will be your responsibility as the Executor to review all claims and to disallow any improper claims. Please let your lawyer know about any improper claims.

The creditors may then make claims against the estate for any debts. At that point, you, as Executor, must decide whether to accept or reject those claims. A creditor whose claim was rejected may then decide to sue the estate regarding the claim.

It will be your responsibility to seek out creditors of the decedent. You will need to compile a list of all recent past creditors. All known creditors of the estate (i.e., individuals or entities to whom the decedent owed money during his lifetime) need to be notified of the pending probate proceedings within four months of the petition for

probate. A copy of the creditor notice should be sent to each known creditor. Your lawyer would be glad to assist you in this.

If the decedent owed any money or property to family members or to beneficiaries, a claim from such person should be prepared and filed within the required creditor filing period described above. Otherwise, if the claim is paid even though not properly filed, adverse tax consequences may be incurred by the estate. You should consult with your lawyer before any payment is made from estate funds.

- (10) **Tax Returns.** As noted above, the estate is required to file both fiduciary income tax returns on an annual basis and the estate tax return. (Please see the following discussion on the estate tax return.)
- (11) **Transfer of Real Estate.** The Executor also has a duty to file detailed descriptions of any real property which the decedent may have owned. Your lawyer can assist in this function by preparing and filing for you the necessary real estate descriptions. The real property is transferred by the Executor and the recording of an appropriate deed. This document evidences the transfer of title from the decedent to the beneficiary.
- (12) **Final Accounting.** Upon the settlement and closing of the estate, the Executor must file with the probate court a final accounting showing all of the decedent's assets owned at death and all receipts, disbursements, and interim distributions. At the same time you will file a schedule of distribution for the remaining assets. This schedule shows the proposed distribution of all bequests and assets that must be made before the estate is closed. In this connection, accurate financial record-keeping is absolutely necessary. You should keep careful and detailed records with respect to all monies or assets paid to the estate and all disbursements of any kind made by you, including dates of payment, amounts paid, and reasons for payment. It is always important to remember that the estate is a different taxable and accounting entity. Assets and income coming into the estate must not be commingled with either personal assets of the Executor or with the beneficiaries until the assets are, in fact, to be distributed. The probate court may require that each item of disbursement shown on the accounting may be substantiated by the submission with the accounting of canceled checks, bills marked paid, or signed receipts. Failure to keep such records will result in the expenditure of much time, effort, and expense in preparing these accountings which are required by law.

Tax Returns

You, as the Executor, will also be responsible for filing a number of federal and state tax returns of various kinds:

- (1) **Estate Tax Return.** If the "gross estate" (which means the fair market value of all property in which the decedent owned an interest, undiminished by debts and includes such items as life insurance at face value even though payable to third parties) exceeds the amount protected by the unified estate and gift tax credit in the year of death (under current law \$2,000,000 for calendar years 2007 and 2008), a federal as well as perhaps a

state estate tax return will be due nine months after date of death and any tax which is due must be paid at that time. There are extensions of time available to file and pay if there are extenuating circumstances.

- (2) **Decedent's Income Tax Returns.** The Executor is also responsible for the final state and federal income tax returns of the decedent, not only for the year in which the decedent died, but also for all previous years, if any, for which returns were or will be due but have not been filed. Thus the Executor must determine if sufficient income was received by the decedent during the year of death and for previous years in order to determine whether income tax returns are due.
- (3) **Fiduciary Income Tax Returns.** If the estate receives income during any year, a federal "fiduciary" income tax return must be filed for the estate. A state fiduciary income tax return must be filed as well for any state in which the estate earned income during the estate's administration. Your lawyer will need to consult with you from time to time concerning estate income and, if returns are required, to prepare or have them prepared for you.

Tax Planning

It is your responsibility as the Executor to ensure that proper tax planning is done during the administration of the estate. This involves planning for the decedent's final income tax return, the estate tax return, the estate's income tax return, and the beneficiary's income tax return to reduce the overall estate and income tax burden of the estate and its beneficiaries. This is ordinarily done by 1) equalizing (through timing of distributions) the taxable income of the estate, trust(s), and beneficiaries, 2) claiming available deductions against the highest marginal tax brackets of the estate, trust(s), or beneficiaries, and 3) selecting fiscal year accounting periods to defer the payment of taxes. Administration expenses should be paid in the year in which they will provide the greatest income tax benefit, if there is a possibility that they may be claimed as an income tax deduction. Several types of expenses may be taken as a deduction on more than one tax return. For example, medical expenses incurred during the last illness might be taken either on the final income tax return of the decedent or on the estate tax return. Administration expenses incurred during the administration of the estate may be taken as deductions on either the estate tax return, the estate's income tax return, or potentially the income tax return of the residuary beneficiary.

If the decedent owned any Individual Retirement Accounts (IRAs) and qualified plan distributions at death, you will need to consider all of the requirements for distributions. This is a very complicated topic and needs to be discussed with your lawyer.

Finally, you will need to discuss with the beneficiaries the possibility of using qualified disclaimers to redirect assets to contingent beneficiaries. This may provide for significant estate tax savings. The discussion of qualified disclaimers needs to happen at the very beginning of the estate administration process. This is another very complicated topic and needs to be discussed with your lawyer.

Executor's Fee

The Executor is entitled by law to receive a commission (fee). The method of computation is determined both by the nature of the assets and by state law. Your lawyer will be glad to discuss this with you. The commission will be income to you and taxable when you receive it. You are not required to accept the commission and if you intend to waive it, you should advise your lawyer as soon as possible. The commission will constitute a tax deduction for the estate which may be applied against the estate tax or the income tax of the estate and is reportable income to the Executor.

Closing the Estate

After all of the assets have been collected and the debts and taxes paid, the Executor must then distribute the remaining assets to those persons entitled to receive them. Distributions of estate assets to beneficiaries can be complex. The timing of distributions can have significant tax consequences and there are provisions of state law which alter the amounts beneficiaries may seem to be entitled to receive.

Time Period for Estate Administration

It is usually not possible to complete the administration of an estate in less than about one year. Normally an estate administration takes longer than that, typically up to eighteen months. If there are disputes with tax authorities, it can take even longer. If the estate is required to file an estate tax return, then the estate administration period might be two to three years from the date of death. Consequently, you should not expect to complete the administration of the estate in a very short period of time.

Consulting with a Lawyer

You will need the assistance of a lawyer. There are legal issues that will need to be addressed throughout the administration of the estate.

Conclusion

The responsibilities discussed above will be your major responsibilities when you serve as the Executor for Gary A. Daugherty. It will be necessary for you to be actively involved in the administration of the estate so that the work can be accomplished within the time frames required.