

**ANATOMY OF A PROBATE CASE**

**by**

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## I. INTRODUCTION

This outline provides an overview of estate proceedings, including the dynamics of probate litigation.

## II. IN GENERAL

- A. Probate proceedings\cases have a unique dynamic as compared with litigation in other courts.
- B. Parties are typically under a great deal of stress as they attempt to deal with challenging situations (i.e., death\incapacity of loved one, etc.).
- C. Unlike Family Court, at the end of a probate proceeding the parties are still all related to each other.
- D. Most probate cases contemplate ongoing involvement by a fiduciary. Proceedings can be open for months (typically estates) to years (typically guardianships and conservatorships). Contrast this with other court proceedings, which involve the resolution of specific disputes, almost always involving unrelated parties.
- E. Structure of Probate Court Proceedings – Adverse Parties vs Multiple Parties
  - 1. Litigation of cases in other courts involves adverse parties (i.e., plaintiff vs defendant, prosecutor vs accused, etc.).
  - 2. Probate proceedings involve a group of people (interested persons).
    - a. They have the right to be notified of a case and to become involved if they choose to.
    - b. They cannot veto an action by the Judge, but are entitled to provide input and state their preferences\opinions on the case to the court.
    - c. See **MCR 5.125** for a listing of interested persons in probate proceedings.

**Remember** - In decedent cases, the personal representative is your client, not the estate. **MCR 5.117(A)**.

### **III. ESTATE PROCEEDING OVERVIEW**

#### **A. In General**

1. A probate proceeding is the process by which the estate of a decedent is opened and a will admitted (if any). It involves two steps:
  - a. Opening the Estate (Application\Petition for Informal\Formal Appointment of Personal Representative).
  - b. Admitting the Will (if any) to Probate\Determination of Testacy Status (Informal\Formal Proceeding).
2. Probate Administration is the process by which an estate is settled and the decedent's probate assets distributed. It involves several steps:
  - a. Choose Type of Administration (Unsupervised, unless Court grants petition for Supervised Administration).
  - b. Filing a Bond\Acceptance of Appointment
  - c. Filing\Submitting an Inventory
  - d. Payment of Claims
  - e. Preparing and Distributing Account
  - f. Payment of Taxes
  - g. Distribution of Estate Assets
  - h. Closing the Estate

#### **B. Choosing an Estate Proceeding – Informal Application vs. Formal Petition**

1. There are two options for opening a probate estate – informal application or formal petition.
2. Key Difference Between Informal Application and Formal Petition.
  - a. In an informal application, a person with the highest priority for appointment can become personal representative immediately, with no prior notification to any other interested persons.
  - b. Notice of Intent to Seek Informal Appointment.

- The person who desires to become personal representative must give notice of intent to seek appointment and a copy of the application to all persons who have greater or equal priority for appointment who have not renounced this right. **MCR 5.309(C)(1).**
  - Notice of intent and a copy of the application must be served at least 14 days (via mail) or 7 days (via personal service) before submitting the application and proof of service to the court. **MCR 5.309(C)(2)&(3).**
  - Form Used: PC 557, Notice of Intent to Request Informal Appointment of Personal Representative.
  - **Practice Pointer:** The 14 day\7 day periods are minimum requirements; there is no maximum time frame by which an informal application must be filed. However, a subsequently filed formal petition (or application if the person had the highest priority or gave notice of intent and filed with the court before the initial application) would “trump” the prior unexecuted application.
- c. In a formal petition, regardless of their priority for appointment, a person can only be become personal representative via a court hearing or with waivers and consents from all interested persons.
- d. Priority for Appointment as Personal Representative.
- Personal Representative nominated in will.
  - Surviving spouse, if devisee under will.\*
  - Other devisees.\*
  - Surviving spouse.\*
  - Other heirs.\*
  - Person in whose right an action exists (can file formal petition immediately; informal application can be filed 28 days after decedent’s death).
  - Nominee of creditor (if court finds suitable) 42 days after decedent’s death.
- Note:** Under EPIC, creditor can file immediately, but no action can be taken on petition until 42 days has passed from decedent’s death.
- Public administrator.

**MCL 700.3203(1).**

\*A person with priority under these bullet points may nominate another to serve as personal representative; they may also renounce their right to appointment or ability to nominate. **MCL 700.3203(3).**

Conservator, or if none, guardian of minor or legally incapacitated individual may exercise right to nominate or waive. **MCL 700.3204(1).**

**Note:** In the interest of justice, court may allow custodial parent who has filed an appearance to file a petition to commence estate proceedings on behalf of minor child if child is an interested person in estate. **MCR 5.302(D).** This rule is not mandatory; if it was used in an estate, the Court could appoint a guardian ad litem.

- e. An objection to appointment of a personal representative can only be made in a formal proceeding. **MCL 700.3203(2).**

**Note:** This means that if a personal representative was appointed via an informal application, a petition for a formal proceeding on the issue of who should be personal representative must be filed if there is an objection.

- f. Appointment of a person not having priority must be done in a formal proceeding. **MCL 700.3204(2).**

**Note:** Court still has ability to refuse appointment if it finds individual to be “unsuitable”; determination of unsuitability must be done in a formal proceeding. **MCL 700.3204(3).**

### 3. Estate Administration.

- a. Whichever method is utilized, estate administration is by default unsupervised (DE case type). **MCL 700.3402(2)(c), .3502.**
- b. If supervised estate administration (DA case type) is sought, this must be requested as part of the formal petition or a stand-alone pleading. **MCR 5.310(B).**

### 4. Factors to Consider in Selecting an Estate Proceeding.

- a. EPIC allows the petitioner\parties to determine the level of court involvement they desire – i.e., what method to utilize to open and administer an estate.
- b. There is no right or wrong answer; you choice depends on the facts and circumstances of each case.

**Practice Pointer:** If the decedent died testate, it is strongly recommended that the estate be opened via a formal petition. The objection period for a will admitted formally is 21 days from the entry of the order. If an informal application procedure is used, there is no time limit to object to the will – it could even be done after the completion of administration, subject only to laches.

- c. An uncomplicated or “typical” estate could be filed under either formal or informal proceedings and use unsupervised administration.
- d. A large, complex estate might be brought under supervised administration to ensure that it is overseen by the Court, no parties are treated unfairly, and all distributions to heirs or devisees are proper.
- e. Additional circumstances to evaluate in determining which estate proceeding to utilize:
  - Anticipated Complexity of Estate Administration.
    - If an estate consists of a handful of assets (i.e., bank account, house, etc.) and it is believed that administration will be relatively straightforward, this militates in favor of filing via application or petition and using unsupervised administration.
    - A large, messy estate with unusual items (i.e., business, significant illiquid assets, etc.) may be more appropriate for filing as a petition and perhaps also under supervised administration.
  - Relationships Between Interested Persons.
    - If heirs\devisees\family members interact harmoniously, and it is anticipated that there will be minor or no disputes in administration, the comfort level for using an informal application (and unsupervised administration) is increased.
    - If the family situation is acrimonious, consider utilizing a formal petition. If there is significant disharmony, it may also be appropriate to bring the case in supervised administration.
  - Comfort Level of Attorney for Estate.
    - If you are confident in your ability to administer an estate and are used to doing so with minimal court involvement, seriously consider the use of the informal application process (unless the decedent died testate).
    - Contemplate utilizing a formal petition with supervised administration if you desire the court to oversee virtually every aspect of the administration of the estate, including approval of legal and fiduciary fees.
    - The more experienced you become at administering decedent estates, the more likely you may be to choose the informal application\unsupervised administration option.

C. Estate Administration Chart – See the Overview of Estate Administration, which is included in the 2018 Attorney Training Materials on the Court’s website, [www.wcpc.us](http://www.wcpc.us).

D. Administration of Estate\Duties and Powers of Personal Representative

1. Personal representative must give notice of appointment and surviving spouse’s right to election within 28 days of appointment. **MCL 700.3705.**

2. Filing a Bond\Acceptance of Appointment

a. Once a person is appointed by the Court to serve as personal representative, they must qualify by filing an acceptance of appointment. The person may also be required to file a bond prior to receiving letters.

b. The personal representative must file an acceptance of appointment whether or not a bond is required by the Court.

c. Once these items have been filed, the Court will issue letters of authority to the personal representative. These letters are evidence of the personal representative’s power to administer the estate.

d. Bonds Under EPIC

- Not required in informal proceedings unless special personal representative appointed, will directs bond, or requested by person with interest of at least \$2,500 in estate. **MCL 700.3603(1).**

- In formal proceedings, court may order bond at time of personal representative’s appointment. If will relieves personal representative of bond, court can only order bond if requested by interested person and court satisfied that bond desirable. If will in formal proceeding mandates bond, it can be waived if court determines bond to be unnecessary. **MCL 700.3603(2).**

e. Filing\Submitting an Inventory

- An inventory is a listing of all assets included in an estate.

- Use of Inventory. An inventory fee is assessed on all decedent’s estates based on the value of their assets. Also, it is used as a check to ensure that all items properly included in the decedent’s estate are listed. A copy of the inventory must be given to all interested parties within 91 days of the personal representative’s appointment. **MCL 700.3706(1).**

- Are all inventories required to be filed with the Court? No. Only in supervised administration (unless the Court grants an independent request that one be filed). In unsupervised administration, the inventory is submitted to the Court for the calculation of the fee, but it is not required to be filed. **MCR 5.310(C)(1) & MCR 5.307(A).**
  - **Practice Pointer:** Most attorneys have their clients file the inventory with the Court unless significant privacy issues\concerns are present.
3. Payment of Claims – A detailed discussion of this topic is beyond the scope of this outline.
  4. Payment of Taxes - The personal representative must ensure that, if applicable, the Federal Estate Tax is paid (it is only due on estates valued at 5,600,000 or greater). A discussion of this topic is beyond the scope of this outline.
  5. Distribution of Estate Assets
    - a. The personal representative is responsible for distributing the assets of the estate to the devisees of the will or the heirs if the decedent died intestate.
    - b. The personal representative should obtain receipts for these distributions.

#### E. Closing Estates

##### 1. Notice of Continued Administration

Note: This is applicable to supervised and unsupervised administration.

- a. What is it? If the estate is not closed within 12 months, within 28 days of the anniversary of the appointment of personal representative, he\she must file notice with court (and send to interested persons) that estate remains under administration and state the reason(s) it has not been closed. **MCL 700.3951(1).**
- b. What happens if the personal representative doesn't file this?
  - If the notice of continued administration is not sent or filed within 28 days, the interested person may petition for a settlement order or for a hearing on the need for continued administration. **MCL 700.3951(2).**
  - If this notice is not filed or a petition is not pending, the court can send notice to the personal representative & interested persons that the estate will be closed unless within 63 days a notice of continuing administration or petition is filed. **MCL 700.3951(3).**



2. Two Methods to Close Estate under EPIC - Order of Complete Estate Settlement and Sworn Statement.
3. Petition for Order of Complete Estate Settlement
  - a. The personal representative or, one year after appointment, an interested person may petition for order of complete estate settlement (it cannot be accepted until time for presenting claims arising before decedent's death has expired). **MCL 700.3952(1).**
  - b. A Petition for complete estate settlement can include request to determine testacy (if not done previously), consider final account, compel\approve accounting and distribution, construe a will\determine heirs, and adjudicate final settlement and distribution. **MCL 700.3952(2).**
4. Sworn Statement
  - a. As long as an estate is not supervised or unless it is prohibited by court order, a sworn statement can be filed by the personal representative not sooner than five (5) months after their appointment. **MCL 700.3954(1).**

**Note:** The personal representative must send a full written account to all distributees whose interests are affected by the administration. It must state amount paid by estate for attorney, fiduciary and other professional fees. **MCL 700.3954(1)(d).**

- b. If no objection received within 28 days, a certificate of completion may be issued. **MCL 700.3958.**

#### F. Small Estates

1. An expedited procedure is available for estates worth \$23,000 or less, indexed for inflation, after deducting funeral and burial expenses. **MCL 700.3982.**

**Note:** The small estate amount is indexed for inflation. It is \$22,000 for persons dying in 2018. For a complete listing of the small estate values for each year, go to the Court's website, [www.wcpc.us](http://www.wcpc.us), under "Information – How to Start a Wayne County Probate Case – Small Estates".

2. Summary of Process. In estates of this size, the Court can order that after the funeral bill has been paid (and proof of this is submitted, along with proof of death), the person who paid these expenses can be reimbursed and the remainder distributed to the spouse or, if no surviving spouse, to the decedent's heirs. The entire procedure can be accomplished in a single visit to the Court if all the documentation is submitted.
3. Inventory Fee: Per a directive from the State Court Administrative Office (SCAO), the value of the lien on real estate cannot be used to determine whether the small estate procedure may be utilized.

Example: Y dies on September 1, 2018. The only asset is a home valued at \$100,000 with an \$80,000 mortgage. This asset is valued at \$100,000 for small estate purposes, but \$20,000 for the inventory fee calculation. A small estate procedure (Petition and Order for Assignment, PC 556) may not be utilized.

4. Debts of Decedent: Unless the heir is a surviving spouse entitled to allowances under the probate code or a minor child of the decedent, for 63 days after the order is issued, the heir receiving the assignment is responsible for any unsatisfied debt of the decedent up to the value of the property received. Claims for these unsatisfied debts are handled by the circuit or district court. **MCL 700.3982(3).**
5. What if the person dies with a will? It is filed with the Court but not used.

#### **IV. CONCLUSION**

- A. The preceding outline is designed to provide a brief overview of estate proceedings and the dynamics of probate litigation.
- B. Feel free to use this item as a “road map” or “cheat sheet” in these areas.

Rev. 7\18