

ATTORNEY DOS AND DON'TS

By

**Hon. David Braxton
Chief Judge Pro Tempore
Wayne County Probate Court**

I. INTRODUCTION

- A. The following rules of thumb and information should be considered when dealing with the Wayne Probate Court or any other Probate Court, whether for administration of a decedent's estate or any other proceeding.
- B. Being aware of these items can help you avoid additional grief and headaches; you ignore this information at your peril.

II. CIVILITY

- A. Contested probate proceedings are frequently volatile. Years of bitterness, hatred, jealousy and resentment can spill out and affect the actions and behavior of interested persons. This can make remaining on good terms with your opposing counsel quite a challenge.
- B. However, it is important to do so, since the lawyers can serve as a moderating influence and help facilitate a settlement of the dispute between the parties.
- C. It is easier on yourself, the Judge, and Court staff if you treat your opponent's lawyer with respect.

III. BAD THINGS TO DO IN PROBATE COURT

- A. **Being rude or abusive towards Probate Court staff.** This is flirting with disaster, not only with your present estate, but also in handling other items in the Court. If an employee is being discourteous or simply not waiting on the public, inform the Court's management.
- B. **Not being prepared for your hearing.** This is lawyering 101. Failure to be ready for your appearance before a Judge wastes the time of the Court, yourself, and your client.
- C. **Being late for your hearing.** See B. Being tardy for your hearing is not a good idea, and certainly will not endear you to the Judge of record or their staff. You also run the risk of having your petition dismissed.
- D. **Failing to give notice to all interested persons and to submit a proof of service to**

the Court. It is required. See **MCR 5.104** as to when a proof of service must be filed with the Court. The entire hearing must be adjourned if notice has not been given. This causes a huge headache for yourself, the Court, and your client. It will also not ingratiate yourself with the Judge.

- E. **Being overzealous in attacking the Guardian Ad Litem (GAL).** The GAL was appointed by the Judge of record and has some respect in the Judge's eyes. It is acceptable to criticize their conclusions, but refrain from engaging in personal attacks.
- F. **"Just one more question".** Don't even say it.

IV. GOOD THINGS TO DO IN PROBATE COURT

- A. **Check the Court's website.** The Wayne County Probate Court has a website, www.wcpc.us. It contains detailed information, including how to start and close a Wayne County Probate Court case, frequently asked questions (FAQs), fees (including an inventory fee calculator), how to conduct business during the health care emergency, and links to other useful sites. Public access to selected case information is also available on-line.
- B. **Be familiar with MCR 5.125 (Interested Persons Defined).** Unlike circuit or district court where one finds plaintiffs and defendants, probate court has interested persons. They are the persons and agencies entitled to notice of various proceedings. It is vital that you know who the interested persons are in any given proceeding. Failure to give proper notice to all interested persons can have serious consequences, including sanctions, setting aside orders and requiring the repayment of funds.
- C. **Be familiar with "net estate" for inventory fee calculation and "gross estate" for small estate threshold determination.** For decedents with a date of death on or after March 28, 2013, a deduction is allowed for any lien on real estate. No parcel can have a value of less than zero, and there is no carryover to the other estate assets. For decedents with a date of death before March 28, 2013, the inventory fee is based on the gross estate. **2018 PA 33; 2012 PA 596; *Estate of Sandra Wolfe-Hadad v. Oakland County and Oakland County Probate Court*, 272 Mich App 323; 725 NW 2d 80 (2006).** Per a directive from the State Court Administrative Office (SCAO), the gross estate amount is to be used to determine whether the small estate procedure may be utilized – no deduction for any lien is allowed for this purpose.
- D. **Make sure you properly administer and close the estate.** **MCR 5.206** creates a duty for the fiduciary and the attorney for the fiduciary to take all actions reasonably necessary to regularly administer and close administration of an estate. Failure to do so can result in the court taking action to close the estate and assessing costs against the fiduciary and the attorney. File a motion to withdraw to avoid sanctions and give notice to the interested persons that there is a problem.
- E. **Keep track of the time requirements and act timely.** Do not wait for the notice of deficiency from the court to prod you into action. Have a reputation for timely,

efficient work. Use the Pre-Notice instead, which is sent via computer 35 days prior to the due date.

- F. **Be prepared.** If you have a hearing, be prepared with the papers you will need in the event your request is granted (i.e. acceptance of appointment [issued by the Wayne County Probate Court in packets for particular petitions or can be downloaded from the Court's website], proposed order, etc.). If your hearing is via ZOOM, send these materials as part of your filing for the petition.
- G. **Make sure your attachments are attached.** Nothing is more annoying for a Judge than to be referred to an attachment-only to find it is not attached.
- H. **Ask the Probate Court for guidance if you are unsure as to whether a contemplated action is permissible.**
1. Discuss your situation with the Probate Court staff. They can often provide procedural feedback as to whether the contemplated action appears to be appropriate, routine, unusual, or unprecedented.
 2. If informal discussions do not sufficiently raise your comfort level, file a **Petition and Order (PC 586)**.
 3. Advantages to obtaining formal Probate Court approval via petition:
 - a. Deterrent to action ever being questioned after the fact by an interested person.
 - b. Obtaining the Court's "blessing" will make it extremely difficult for a disgruntled interested person to contest the propriety of the action.
- I. **Ask the Court, preferably in advance, about its policies and procedures.**
1. Learning the policies and procedures in the Wayne County Probate Court will save yourself, your client, and the Court considerable time and energy.
 2. You will avoid "spinning your wheels" and be able to handle your probate matter in the most expeditious manner possible.
 3. It will also help you avoid being embarrassed in front of your client.
 4. Even if you had not thought to inquire about policies and procedures before coming to Court, ask the probate staff for information regarding the optimum method for achieving your desired result.
- J. **Arrive before the time of your scheduled hearing.** You will be able to check in with the Judge's clerk (either in person or via ZOOM) in a timely manner and also help the Court to begin hearing its docket without any undue delays.

- K. **File your pleadings timely.** Almost as annoying as being unable to find the attachments is being handed briefs on the day of the hearing. This typically requires an unnecessary adjournment or, worse yet, the Court proceeds to hear the argument without the benefit of your brief having already been reviewed by the Court.
- L. **Ask another attorney for advice.** Consulting with an experienced probate lawyer can enable you to avoid potential pitfalls and learn the quickest way to obtain the relief you seek.
- M. **Be cooperative with the Guardian Ad Litem (GAL) appointed to review and make a recommendation on the action which you have petitioned the Wayne County Probate Court for approval.** The GAL serves as the Court's "eyes and ears". If you can explain and convince the GAL of the propriety of your request, your hearing will likely be very brief and your petition will have a better chance of being granted by the Judge. Failure to persuade or adequately explain the rationale and basis for your desired action to the GAL will likely make obtaining approval from the Judge much more difficult.
- N. **Be courteous towards the Probate Court staff.** This goes a long way and will work to your benefit. Do not hesitate to report discourteous treatment to the Court's management, however.
- O. **Give proper notice by publication.** If you are giving notice by publication, make sure the proper name is published with a statement that the result of the hearing may be to bar or affect the person's interest in the matter.
- P. **Give proper notice under the Wrongful Death Act.** Make sure you give notice to all persons who might have a right to notice and participation under the Wrongful Death Act. **DO NOT** assume they are the same persons listed in **MCR 5.125**.
- Q. **Lis Pendens.** Make sure you file a lis pendens with the Register of Deeds when filing a petition or complaint to determine title to real estate. Failure to do so may leave you with no recovery as well as a grievance and potential malpractice claim.
- R. **Match pleadings with Will.** Make sure the information in the Application/Petition and Testimony forms is consistent with the information in the will regarding heirs and devisees.
- S. **Formally admit the Will.** EPIC does not require formal admission of the will, however, it can be distressing to get to the end of administration and have an objection to admission of the will be filed, after all the funds are gone.
- T. **Supplemental Testimony.** Make sure you file the supplemental testimony when there are devisees who are not heirs.
- U. **Other persons with priority.** Make sure that if there are other persons with priority to serve as personal representative that they are properly listed on the application/petition.

- V. **Small estate proceedings.** Become familiar with the small estate proceedings so that you can quickly process probate matters and amaze your clients with your ability to solve the mystery of probate.
- W. **Serve the insurance company and the surety on all accounts.** MCR 5.125(C)(6)(h) requires that insurers and sureties who might be subject to financial obligations as a result of the approval of the account must be served with the notice of hearing and the account. This can work to your advantage as far as No-Fault benefits are concerned.
- X. **Include default distribution language in estate closing orders with missing legatees.** This will eliminate the need to have a new hearing at the end of three (3) years and allow the other heirs to receive payment from the county treasurer's Missing Legatee Fund if the missing individual has not claimed the funds.
- Y. **Be real.**
- Never miscite case law (you are doomed).
 - Never cite a case for a proposition the case does not support.
 - Never ignore or fail to address your opponent's citations (it is a sign of weakness).
 - Never say a holding is "implied".
 - Never say a holding is "overruled" when it is not.
 - Concede the obvious (it is a sign of reasonableness not weakness).