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THE PROBATE PROCESS




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**FIRST STEPS**

- Initial Consultation
  - Is the client the proposed Personal Representative (PR)?
  - Use appropriate Legal Representation Agreement (fiduciary vs. non)
  - Death certificate, predeceased spouse DC
  - Original Last Will & Testament
  - Names and addresses of all beneficiaries and heirs
  - List of all debts and assets
- Gauge Client's Competence
  - Any criminal background?
  - Can he/she qualify for a bond?
  - Can you rely on Client to complete Accountings, etc.?
  - Is Client a TN resident? If not, look at 30-1-116, 35-50-107 and Secretary of State nonresident designation form
- Gauge Family Dynamic
  - Can PR act impartially?
  - Is Client a potential creditor?
  - How likely is a Will Contest?
- Is this someone you want to represent?

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Personal Representative of Estate

- Administrator vs. Executor (Personal Representative is neutral)
  - Personal Representative can collect a fee and their attorney fees are typically taxed to the Estate as an administrative cost
  - PR has no authority until appointed by the court and Letters are issued, except:
    - T.C.A. 45-2-905(c)(2) – bank required to grant access to safe deposit box to search for Last Will & Testament, burial info, and life insurance; and
    - Funeral Arrangements and Disposition of Remains
- T.C.A 62-5-703 Rights to Control vest:
1. Attorney in Fact under HCPOA
  2. Surviving Spouse
  3. Sole surviving child; or majority of children acting together
  4. Parent
  5. Sibling (same breakdown as with children)
  6. Grandchild (same breakdown as with children)
  7. Grandparent (same breakdown as with children)
  8. Guardian at time of death
  9. Personal Representative of Estate
  10. Other next of kin

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Securing Property

- Real estate (if it's in the probate estate)
  - Change the locks/alarm system
  - Utilities/Taxes/Insurance paid
  - Regardless of whether or not the real property is being administered with the Estate, forward the mail, stop the newspaper, etc.
- Personal Property – guns, jewelry, antiques, cars




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Is Probate Necessary?

- Probate v Non-Probate Assets
  - Beneficiary Designation/POD
    - Potential Void/Voidable Transactions
  - Vesting of Real Property 0 TCA 31-2-103
  - Rights of Survivorship
- Intestate v Testate
- Trust assets
- Is there a need for transparency/court supervision?

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### Choose Forum and Type of Probate

- T.C.A. 32-2-101 – County of Usual Residence at Time of Death (if there is more than one, it can probably be either)
- Types of Last Will and signature/witness requirements
  - Standard
    - In Re Bill Morris 2015 WL557970 (Tenn. Ct. App. Feb 9, 2015)
    - TCA 32-1-104(b)
  - Holographic -
  - Nuncupative – TCA 32-1-106
- Common Form:
  - o Most widely used
  - o Specific info required in Petition (see T.C.A. 30-1-117)
  - o Notice of a hearing to appoint PR isn't required (but I do it anyway)
  - o Open to Will Contest for 2 years from entry of the Order Admitting Last Will & Testament to Probate
  - o Potential to contest even after the case is closed
- o Admitting a Copy of a Will

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I do hereby declare that my Co-Executors be excused from making an inventory or accounting regarding the assets of my estate. It is my intent and purpose to simplify the administration of my estate and to minimize the work, difficulty, and expense imposed on my Co-Executors in their capacity as such.

I direct that either my Co-Executors be allowed to serve as such without bond.

IN TESTIMONY WHEREOF, I have hereunto set my signature this 16th day of October, 2008.

*Bill Morris*  
 BILL MORRIS  
 Testator

**AFFIDAVIT**

STATE OF TENNESSEE )  
 COUNTY OF FRANKLIN )

We, the witnesses, whose names are signed to the foregoing Will and printed below, having been sworn, declared to the undersigned officer that BILL MORRIS, in the presence of both witnesses, signed the instrument declaring it to be his last Will, and that each of the witnesses, in the presence of BILL MORRIS and in the presence of each other, signed the Will as a witness.

We declare that at the time of our attestation of this Will, BILL MORRIS was, according to our best knowledge and belief, over the age of eighteen, under no undue duress or constraint, of

making an inventory or accounting regarding the assets of my estate. It is my intent and purpose to simplify the administration of my estate and to minimize the work, difficulty, and expense imposed on my Co-Executors in their capacity as such.

Without bond, take this 16th day of October, 2008.

Will and printed below, BILL, in the presence of P, and that each of the witnesses, signed the Will as

MORRIS was, according to our best knowledge and belief, over the age of eighteen, under no undue duress or constraint, of

next competent to make a

*Michelle Hall*  
 WITNESS  
*Michelle K. Davis*  
 WITNESS

*Michelle Hall*  
 (Printed name)  
*Michelle K. Davis*  
 (Printed name)

Sworn to and subscribed before me, this 16th day of October, 2008.

*Shirley K. Brown*  
 Notary Public  
 My Commission Expires 10/18/11

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### Forum for and Type of Probate (cont'd)

- Solemn Form Probate:
  - o always use this if a Will Contest is likely
  - o Contents of Petition are the same, but it more closely resembles a lawsuit
  - o Summons issued and process served
 (A Will Contest must be certified within 30 days from being served (a Contestant's Bond will be required))
- Small Estate Affidavit:
  - o Under \$50,000 and doesn't include real property
  - o No authority over real property
- o Muniment of Title only TCA 32-2-111

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Laws of Intestacy

- T.C.A. 31-2-101 et. seq.
- Intestacy applies if no Will or if the Will doesn't effectively dispose of all assets
  - If no living issue, 100% to surviving spouse
  - If surviving spouse and one child (living or not)- split 50/50
  - If surviving spouse and >1 surviving child/(living or not), 1/3 to spouse, remainder to children equally (and issue of deceased children)
  - Parent or parents equally
  - Siblings and issue of siblings
  - Grandparents (50% to each side if available) and issue

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Laws of Intestacy (cont'd)

- Adoption – terminates birth parent and establishes intestate right of adopted child
- Out of Wedlock
  - Child of Mother - fine
  - Child of Father - fine IF:
    - Paternity Established by adjudication before death OR
    - Established by clear and convincing proof BUT
    - Father can't inherit from child UNLESS father treated child as his own and has not refused to support the child
    - If paternity not previously established, the alleged child **must** file a Claim
- Half-Blood inherit as if Full-Blood
- Issue conceived before D's death but born after death inherit equally

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Marshalling Assets

- EIN Number
- PR should open a bank account in the name of Estate
- Consolidating property/assets
- Authority and duty to collect Decedent's property for the benefit of all heirs and legitimate creditors
- Prudent Management
- Sell Decedent's personal effects (with court approval if authority not vested in the Will)
- Always give notice of sale to heirs and beneficiaries

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Marshalling Assets (Cont'd)

- Should PR sell all marketable securities? Whether to keep certain investments? Should always consider tax consequences for Estate and heirs.
- Do not give tax advice unless you are qualified to do so. Refer PR to a CPA or tax attorney
- REAL PROPERTY....

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**REAL PROPERTY**

- Is it part of the probate Estate
  - Will
  - Petition to sell land for the payment of debts – T.C.A. 30-2-402
    - Heirs must be interpleaded and served
  - Partition
- Affidavit of Heirship (x2)
- Muniment of Title
- Title Company Woes
  - Hold funds for a period of six (6) months from date of death

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INSOLVENT ESTATES

- T.C.A. 30-5-101 et. seq.
- Notice of Insolvency must be served on creditors via certified mail
- Notice must include an Accounting and a Proposed Plan of Distribution
- Notice must include language that objections shall be filed within 30 days of receipt of notice
  - **OBJECTIONS TO THIS PROPOSED PLAN OF DISTRIBUTION MUST BE FILED WITH THE CLERK WITHIN THIRTY (30) DAYS FROM THE DATE OF RECEIPT OF THIS NOTICE.**

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Priority of Claims

- Year's Support is an administrative cost
- Elective Share is superior to general creditors
- Priority of Payment
  - Costs of administration (including bond premiums, PR's fee, attorney fees for the PR, fronted expenses, etc.)
  - Reasonable funeral expenses
  - Taxes and assessments imposed by Federal or State Governments (including claims by TennCare)
  - All other Claims timely filed

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Closing the Estate with the Court

- Pass Accounting (if not waived)
- Distributee/PR Statements (in lieu of accountings)
- TennCare Release
- Make sure final tax return is filed (SSN vs. EIN) – request for a speedy resolution with the IRS
- Department of Revenue Release/Affidavit (if applicable)
- All Claims dismissed or released
- Motion to Close (sometimes)
- Order to Close (always)
  - Include language to relieve yourself and your client if you represent the PR
- Pay Court Costs (simultaneously with Order to Close)

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