A Personal Representative's Guide to Probate

A longer title for this article would be "What does it mean for you to be the personal representative and for me to be your lawyer?" This guide addresses our respective responsibilities assuming that you as the client are the person seeking and gaining appointment as personal representative and that I as the lawyer represent you. This guide uses the pronouns you, we, and I to indicate who is primarily responsible for an action and how we work together. Key terms are in bold-face when they are first used.

1. Petition to Probate

An initial concept is that I represent you and not the estate or its beneficiaries. This means that I will work to advise you how to administer the estate fairly and consistently with your fiduciary duty and how to keep you out of trouble from any unhappy beneficiaries. Toward that end, the first action I will take is to file a petition to probate the will if there is one, and to appoint you as the **personal representative**, called the **executor** or **executrix** when there is a will or the **administrator** or **administratrix** when there is not a will. I will file this with the District Court. That petition is heard in open court in District Court. I will go to court for you and request that the judge do two things if there is a will: (1) accept the tendered instrument as the last will and testament of the **decedent**, the person who passed away, and (2) appoint you as the executor or executrix of the estate. If there is no will, i.e., the person died **intestate**, the second step is the only step and involves your being appointed administrator or administratrix.

2. Self-proving Wills

Most recent wills are **self-proving** so we may not need the will witnesses to go to court and testify that they saw the decedent execute his or her last will and testament. A self-proving will requires that the **testator** or **testatrix**, the decedent who made the will, signed it in front of two witnesses, and a notary public acknowledged the testator's or testatrix's signature and those of the two witnesses. In addition, the witnesses must have declared that the testator or testatrix was over 18, appeared to be of sound mind, and did not appear to be under any undue influence. The form for the notary's acknowledgment follows:

> We, _____, _____, the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as his last will and that he signs it willingly (or willingly directs another to sign for him), and that each of us, in the presence and hearing of the testator and in the presence of the other subscribing witness, hereby signs this will as witness to the testator's signing, and

> that to the best of our knowledge the testator is eighteen (18) years of age or older, of sound mind, and under no constraint or undue influence.

This paragraph comes directly from the Kentucky Revised Statutes.

3. Oath of Office, Bond, and Certificate of Qualification

Once the District Court judge admits the will to probate, he or she appoints you and you must take the **oath of office**. Courts in some counties permit you to let me serve as an agent to take this oath so that you don't even have to go to court yourself. Jefferson County is one such county. After taking the oath of office, you sign a **bond** that you will faithfully discharge the duties of the office. If we are using a power of attorney, I should be able to sign the bond for you as well as take the oath.

Most wills waive the requirement of **surety** on the bond. Surety means an insurance company agrees to make good on the bond if you can't do so. If the will doesn't waive the requirement of surety or if there is no will to waive that requirement, the beneficiaries must waive it. Otherwise, you will need to pay an insurance company for a bond. This would be an expense of the estate, not of you as an individual.

Once the District Court judge appoints you, the Clerk of Court issues a **Certificate of Qualification**. You may hear this referred to as a "Qual." This is the paper that you use to show that the court appointed you to conduct the estate's business. Other states use the terms "letters testamentary" or "letters of administration" so you may see those used in some financial institutions' instructions for closing or transferring accounts.

Once you are appointed, the work of administering the estate begins.

4. Taxpayer Identification Number

Our first step will be to go online (during the work week as the site is shut down on the weekends) and obtain a **Taxpayer Identification Number ("TIN")** from the IRS, which the IRS calls an EIN, meaning Employer Identification Number. (Most estates don't have employees but the IRS still calls it an EIN.) You will need the social security number of the decedent as well as your own. We will also need to decide what taxable year the estate will use.

5. Bank or Brokerage Account

Once you have a TIN, you can set up a bank or brokerage account for the estate. Many estates don't require a large number of checks and can rely on the starter set financial institutions offer. If the decedent had a bank account or brokerage account, it may be best to open the estate account at that institution. If the decedent had accounts at more than one institution, you should pick one. It is usually easier to consolidate all of the accounts into one place for convenient record-keeping and ultimately for simplified distribution to the beneficiaries. If

the decedent had a brokerage account and you can set up an estate brokerage account on which you can write checks, that may be even more convenient.

The next step is to decide what to do with any stocks, bonds, or other investments the decedent owned. That decision is beyond the scope of this article and you must get a professional investment adviser's input.

6. Inventory and Publication

Two months after your appointment, we must file an **inventory** of all of the assets that have come into your hands or of which you are aware. You will give me the information about the assets and their values and I will prepare this in the court-approved form. This may mean getting **appraisals** of some property. If we need more time, I can make a motion with the court for an extension of time.

While this is all happening, the Clerk of Court will publish a notice in a local newspaper to let creditors know that the decedent has passed away and that the time to make claims is running.

7. Creditors' Claims

Kentucky law gives creditors six months from the date you were appointed to make their claims against the estate. We must evaluate those claims and make any denials within two months of the end of the six-month period. I will prepare any notices of denial so that they warn the creditor that it has 60 days in which to file a lawsuit contesting the denial.

There is an **order of preference** among creditors:

1. After paying secured creditors to the extent of their collateral, you pay your own fee and costs of administration, such as professional fees.
2. You then pay burial expenses.
3. Next, you pay preferred claims, such as for taxes.
4. Last, you pay the unsecured creditors, including the secured creditors to the extent their claims exceed the value of the collateral.

After paying the creditors, it is time to pay taxes, pay yourself, distribute to the beneficiaries, and close the estate.

8. Estate Income Taxes

Estates must pay income taxes if they receive $600 of income in a fiscal year. The income tax returns for an estate are filed using IRS Form 1041 and Kentucky Form 741. Unless the estate's income is very simple, such as strictly interest, you should get help from me, a CPA, or a tax preparer to prepare these returns. One reason is that some tax planning can be done during the administration of an estate by timing distributions of income to the beneficiaries. Beneficiary distributions are reflected on a Form K-1, and each beneficiary pays tax on them

at his or her own marginal rate, which may be lower than that of the estate. In addition, the timing of when expenses are paid can affect the estate's income tax.

9. Personal Representative Fee

You are entitled to a fee as a personal representative. Many personal representatives say they won't take a fee before beginning but change their mind after seeing how much work the job involves. A fee is taxable as income to you but is not generally subject to social security tax. Because it is taxable income to you, it usually only makes sense to take a fee if you are neither the only nor a primary beneficiary. However, there are times when it could make sense to take a fee even if you are a beneficiary. We will calculate whether taking a fee increases your share of the estate after you pay the taxes.

The amount of the fee must be reasonable and that is always subject to the District Court's approval. By statute, the District Court can conclude that 5% is a reasonable fee without extensive proof. However, not all courts automatically approve a 5% fee.

10. Beneficiary Distributions

Hopefully, the estate will be large enough to pay everybody. But, just as there was an order of preferences when paying creditor claims, there is the following order of preferences when paying beneficiaries:

1. If someone is left specific property or funds from a specific source, the latter of which is called a **demonstrative bequest**, you make those distributions.
2. If someone is left a **specific bequest** of an amount of money, you make those distributions.
3. If the estate is small enough, you may have to make pro-rated bequests of the preceding two categories.
4. You distribute what remains to the **residuary beneficiaries**. This is the only bequest that takes place when there is no will.

11. Closing the Estate

Once everyone is paid—or has received everything the estate can pay, there are three ways to close the estate: a formal settlement, an informal settlement, or a proposed settlement.

11.1. Formal Settlement

In a formal settlement, the demonstrative and specific bequest beneficiaries sign receipts (or you present cancelled checks) and we prepare a penny by penny accounting of every receipt and expense of the estate. As with the inventory, you provide the information and I put it in the proper form. The expenses include the personal representative's fee, if you took one, and any professional fees for appraisers, tax return preparers, and attorneys. We submit this to the District

Court, which reviews it in detail and frequently rejects the first submission and requires additional explanation and documentation. Because of the time required for that type of review and the staffing of most District Courts, that process can take several months.

11.2. Informal Settlement

In an informal settlement, the demonstrative and specific bequest beneficiaries sign receipts (or you present cancelled checks) and the residuary beneficiaries waive the formal settlement. This means that you don't have to account *to the court* for every penny spent. Sometimes, the residuary beneficiaries ask to see the accounting but don't rely on the court to approve it. That can save the estate money because even if the beneficiaries and the court have the same question, it is usually more informal and thus less expensive to answer it for the beneficiaries. Even if the residuary beneficiaries approve the way the estate was handled by signing the waivers, the District Court still reviews the personal representative and attorney fees to make sure they are reasonable. Unlike the several-month waiting period for formal settlements, informal settlements are typically approved in as little as ten days.

11.3. Proposed Settlement

The proposed settlement is like the formal settlement in that it involves a penny by penny accounting as well as receipts or cancelled checks from the demonstrative and specific bequest beneficiaries. The difference is that it is submitted before the expenses are paid and distributions are made rather than after. The District Court then holds a hearing in open court to give everyone a chance to object.

The proposed settlement is a useful tool in two cases. One is when the estate is **insolvent**, i.e., the estate doesn't have enough money to pay all of its creditors and/or demonstrative and specific bequest beneficiaries. It is also useful when we anticipate that one or more beneficiaries will object to the handling of the estate. Questions can be resolved more quickly and with less risk of your liability than with a formal settlement.

11.4. Discharge

Once the final tax returns are filed, you and the creditors are paid, the beneficiaries receive their inheritance, and the settlement is approved, the District Court will enter an order discharging you from further responsibility for the estate. The estate is then considered closed.

12. Reopening the Estate

On occasion, that is not the end of the story. Despite your best efforts to find everything, a new asset may show up even years later. When that happens, we can reopen the estate for the limited purpose of administering that asset.