



WORTHINGTON
LAW FIRM

A Personal Representative's Guide to Kentucky Probate

Introduction

This guide addresses our respective responsibilities when you are the person seeking and gaining appointment as personal representative of an estate and I am the lawyer representing you. This guide uses the pronouns you, I, and we to indicate who is primarily responsible for an action and how we will work together. Key terms are in bold type when first used.

I hope this memo will give you an overall view of the probate process as we begin, and that you'll keep it handy so you can refer to it in more detail at each step of the process.

1. Petition to Probate

Keep in mind that I represent you, 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 reduce your liability to any unhappy beneficiaries or creditors. The first action I will take is to file a petition to probate the will if there is one, and to have you appointed as the **personal representative** of the estate. I will file the petition with the District Court, and the judge will hear the petition in open court. It may take two or three weeks after I file the petition for the hearing to occur.

I can attend that hearing for you so you will not need to be there, or you can attend. It's your choice. When there is a will, the judge does two things: (1) accepts the original will (which you will need to provide to me) as the last will and testament of the **decedent**, the person who passed away, and (2) appoints you as the personal representative (the modern name for executor or executrix) of the estate. If there is no will, (meaning the decedent died **intestate**), the first step is skipped, and the judge appoints you as administrator or administratrix of the probate estate. For convenience, we use the term personal representative for all these positions.

2. Self-proving Wills

In the past, the witnesses to a decedent's will had to testify in court that they saw the decedent sign their last will and testament. Today, however, most wills are **self-proving**, which eliminates the need for the witnesses to go to court. 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 three signatures. 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.

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

Once the District Court judge admits the will to probate, they appoint you as personal representative and you must take the **oath of office**. Courts in some counties, including Jefferson County, permit you to sign a limited power of attorney letting me serve as an agent to take this oath so that you don't even have to go to court yourself.

After taking the oath of office, a **bond** is required to provide assurance that you will faithfully discharge the duties of the office. The limited power of attorney will also allow me to sign the bond for you. (Note that the power of attorney does not give me any authority over the estate's finances.)

Surety means that an insurance company agrees to pay back any money the estate loses if you act beyond your authority. Most wills waive the requirement of surety on the bond. However, if the will doesn't waive the surety requirement or if there is no will, the beneficiaries must waive it. Otherwise, you will need to pay an insurance company for a bond, an expense that would come out of the estate. A surety company will issue a bond only to persons with a good credit score. If that presents a problem, we may have to look for alternative persons or entities to serve as personal representative.

Once the District Court judge appoints you, the Clerk of Court issues a **Certificate of Qualification**, sometimes referred to as a "Qual." This is the document 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.)

In Jefferson County, you will receive a bill from the Jefferson County Clerk for the approximately \$50 cost to record the will. That is a legitimate expense, and you should send them a check from the estate account. (Section 5 provides detail about opening the estate account.) The bill will suggest you consult me about it. I will count on you to make that payment because you will know when funds are available.

If the estate includes a residence or other real property, you will probably receive calls and mail about buying it. The probate court's records are public, and there are businesses that comb through them and make cold calls in the hope of buying property cheaply. I can't stop the mail, but I help in one way: I use my phone number instead of yours in the probate petition. That should stop, or at least slow down, the texts and calls.

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

4. Taxpayer Identification Number

Our first step will be to go online and obtain a **Taxpayer Identification Number** (TIN) from the IRS. (The IRS actually calls this an EIN, meaning Employer Identification Number, even though most estates don't have employees. For our purposes, TIN and EIN are interchangeable.) You will need to provide the social security number of the decedent as well as your own. I will help you obtain the TIN, as

we will also need to make a legal judgment about the estate's taxable year.

5. Identifying and Collecting the Estate's Accounts and Other Assets

Once you have a TIN, you can set up a bank or brokerage account for the estate. You will close the decedent's bank and brokerage accounts and open a new estate account. It's usually easier to consolidate all the decedent's prior accounts into this one account for convenient record-keeping and eventually for simplified distribution to the beneficiaries.

The next step is to decide what to do with any stocks, bonds, or other investments the decedent owned. I may give you ideas to consider about these types of assets, but you should get a professional investment adviser's opinion, as I am not a financial advisor.

We will work together to find any non-probate assets. These include retirement benefits, life insurance, and other assets. We will also work together to make a thorough search for all debts, obligations, and contingent liabilities of the estate to determine its financial condition.

I will advise you about other actions that you will need to take to secure, invest, or protect the assets and provide for the payment of liabilities, including taxes, of the estate.

6. Inventory and Publication

Two months after your appointment as personal representative, we must file an **inventory** of all the assets of the estate that have come into your hands and of which you are aware. You will give me the information about the

assets and their values, and I will then prepare the inventory using a court-approved form. This may require getting appraisals of some property or businesses owned by the decedent. You will need to review and sign the Inventory, and I will file it with the Probate Court. If we need more time, I can ask 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 generally gives creditors no more than six months after a person dies to make their claims against the estate. We must evaluate those claims and make any denials within two months after the claims period ends. I will prepare any notices of denial, which will warn the creditor that it has 60 days in which to file a lawsuit contesting the denial.

Kentucky law mandates the following order of preference among creditors:

1. After paying secured creditors to the extent of their collateral, you pay your own personal representative's fee (if you've chosen to take one) and costs of administration, such as professional fees (lawyers, financial advisors, appraisers, etc.).
2. Burial expenses.
3. Preferred claims (usually limited to taxes).
4. Unsecured creditors, including the secured creditors to the extent their claims exceed the value of the collateral.

After making these payments, it is almost time to distribute to the beneficiaries and to close the estate. But first, we will need to address tax returns, payment of taxes, and your personal representative fee.

8. Estate Income Taxes

Estates that receive \$600 or more of income in a fiscal year must pay income taxes. The income tax returns for an estate are filed using IRS Form 1041 and Kentucky Form 741. Unless the estate's income is quite simple (for example, 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. If the estate makes distributions to the beneficiaries, the tax burden is shifted from the estate to the beneficiaries. In addition, the timing of when expenses are paid can affect the estate's income tax.

I will either prepare or coordinate the preparation of the tax returns for the estate. These could include federal estate tax and generation-skipping tax returns, state inheritance tax, any local or state property tax returns, and federal and state fiduciary income tax returns. Each of these returns is due at a different point; I will calculate the due dates and will give you ample notice of when each type of return is due.

9. Post-death Tax Planning

I will analyze and explain to you any post-death planning, such as alternative asset valuation options, use of

disclaimers, funding of trusts as provided for in the estate plan, timing the distribution of assets that are beneficial to the estate and any beneficiaries, and election of income tax benefits to the estate and beneficiaries.

We will work together to plan for the payment of all taxes and the source of funds to be used in payment of any tax obligations.

10. 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 subject to social security tax. Because it is taxable income to you, it usually makes sense to take a fee only if you are not a beneficiary of the estate. Occasionally, however, there are times when it could be beneficial for you to take a fee even if you are a beneficiary. We will calculate whether taking a fee makes sense considering your own tax situation.

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

11. Beneficiary Distributions

We will work together to prepare a plan of distribution of assets held in the estate, either outright or to separate continuing trusts, for the beneficiaries.

Hopefully, the estate will be large enough to pay everybody. But just as with creditor claims, there is an 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 anyone is left a **specific bequest** of an amount of money, you make those distributions.

If the estate is small, you may have to make pro-rated distributions of bequests of the preceding two categories.

3. You distribute whatever remains to the **residuary beneficiaries**. (This is the only bequest that takes place when there is no will.)

12. 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.

A settlement must be filed with the court no later than two years after your appointment as personal representative. Unless a federal estate tax return is involved, estates can usually be closed much sooner than that.

12.1 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. I submit this to the District Court, which reviews it in detail. The court 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.

12.2 Informal Settlement

In an informal settlement, the demonstrative and specific bequest beneficiaries sign receipts (or you present cancelled checks) and the residuary beneficiaries sign written waivers agreeing to go without the formal settlement. This means that you don't have to account to the court for every penny spent, but you should still be able to provide that information. 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 if the beneficiaries and the court have the same question, it is usually more informal and therefore less expensive for you to answer it for the beneficiaries. Even if the residuary beneficiaries sign the waivers approving the way the estate was handled, 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.

12.3 Proposed Settlement

The proposed settlement is more like a 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 situations: (1) When the estate is insolvent (meaning that the estate doesn't have enough money to pay all its creditors and/or demonstrative and specific bequest beneficiaries); and (2) 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.

13. 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 any further responsibility for the estate. The estate is then considered closed.

14. Late-Appearing Assets

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. This doesn't happen often, but if it does, we can reopen the estate for the limited purpose of administering that late-appearing asset. We will work together to minimize the additional time and expense for both of us.

Conclusion

I know this detailed discussion may seem overwhelming. But please rest assured that I have handled estates for over 20 years, from simple to incredibly complex. I will work with you every step of the way so that you are comfortable and confident throughout the process. I look forward to helping make a difficult time a little easier for you.