

## **CLOSING THE ESTATE AND RELATED MATTERS**

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### **The Impact of Medicaid and Other Governmental Programs on Probate:**

Probate estates are subject to the claims of creditors. Certain types of creditors receive special treatment under Wisconsin law. In general, payment of claims is prioritized pursuant to section 859.25 of the Wisconsin Statutes. With an insolvent estate, payment of claims and administrative expenses pursuant to the statutory framework is critical. The statute provides the following language:

#### **859.25 Priority of payment of claims and allowances.**

(1) CLASSES AND PRIORITY. At the time of their allowance, all claims and allowances shall be classified in one of the following classes. If the applicable assets of the estate are insufficient to pay all claims and allowances in full, the personal representative shall make payment in the following order:

- (a) Costs and expenses of administration.
- (b) Reasonable funeral and burial expenses.
- (c) Provisions for the family of the decedent under ss. 861.31, 861.33 and 861.35.
- (d) Reasonable and necessary expenses of the last sickness of the decedent, including compensation of persons attending the decedent.
- (e) All debts, charges or taxes owing to the United States, this state or a governmental subdivision or municipality of this state.

(f) Wages, including pension, welfare and vacation benefits, due to employees which have been earned within three (3) months before the date of the death of the decedent, not to exceed \$300.00 in value to each employee.

(g) Property assigned to the surviving spouse or surviving domestic partner under s. 861.41.

(h) All other claims allowed.

(2) NO PREFERENCE WITHIN CLASSES. Preference shall not be given in the payment of any claim over any other claim of the same class, nor shall a claim due and payable be entitled to a preference over claims not due.

When a Petition for Formal Administration<sup>1</sup> or Application for Informal Administration<sup>2</sup> is filed with the court, the petitioner or applicant must inform the court regarding whether the decedent or the decedent's spouse received certain governmental benefits. For the decedent, the petitioner or applicant must advise the court regarding whether the decedent received any of the following benefits:

1. Medical Assistance/Medicaid<sup>3</sup>;
2. Family Care and/or Partnership benefits (through a Managed Care Organization – MCO/CMO);
3. Community Options Program (COP);
4. Wisconsin Chronic Disease Program; and
5. Whether the decedent was a patient or inmate of a state or county hospital or institution, or whether the decedent was responsible for any person owing an obligation to the state or county.

If the decedent was ever married, the petitioner or applicant must advise the court regarding whether the decedent's spouse received benefits from the Community Options Program (COP) or the Wisconsin Chronic Disease Program. It is common for a decedent

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<sup>1</sup> Form PR-1901. A copy of this form is attached. All probate forms are available online at <http://www.wicourts.gov/forms1/circuit/index.htm>.

<sup>2</sup> Form PR-1801. A copy of this form is attached.

<sup>3</sup> In Wisconsin, Medicaid related programs are often referred to as Medical Assistance. In fact, section 49.43, *et seq.*, which contains Wisconsin's Medicaid law is titled "Medical Assistance." The phrase is defined at WIS. STAT. § 49.43(8).

or decedent's spouse to have been the recipient of one of the above benefits. When you answer "yes" to one or more of the questions on the petition or application, you have just triggered the need to comply with another statutory provision. Section 859.07(2) provides that the personal representative shall provide notice of the bar date for creditors established under section 859.01 of the Wisconsin Statutes, if any of the above benefits were received. To provide notice, you need to complete a "Probate Claims Notice." Oddly, the Probate Claims Notice form is not available on the Wisconsin Circuit Court System website like nearly every other probate related form.<sup>4</sup>

The original Probate Claims Notice is filed with the court. A copy of the Probate Claims Notice must be sent by registered or certified mail to Wisconsin's Estate Recovery Program<sup>5</sup> in Madison, Wisconsin and to the county clerk that has venue over the decedent's estate. The county clerk is not the clerk of courts. The county clerk is a separate county office from the clerk of courts' office. If the decedent or decedent's spouse was a recipient of one or more benefits, then Wisconsin's estate recovery program will file a claim against the estate. The claim will be filed with the court, and a copy of the claim is also typically sent to the personal representative or attorney representing the personal representative. The right of the State of Wisconsin to file a claim against a probate estate applies to all decedents dying after September 30, 1991.<sup>6</sup> If a claim is filed, it must be either paid in full by the personal representative or objected to, because the estate has insufficient assets to pay all claims and other expenses. If this occurs, then section 859.25 of the Wisconsin Statutes, which is set forth above, must be consulted to determine priority of claims. Under section 859.25, other estate related expenses and claims have priority over claims filed by the Wisconsin's estate recovery program. If the claim is not paid in full, the personal representative will need to supply an accounting to

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<sup>4</sup> The Probate Claims Notice form is available on the Wisconsin Department of Health Services website: <http://www.dhs.wisconsin.gov/forms/F1/F13033.pdf>. A blank copy of the form is attached.

<sup>5</sup> Wisconsin's estate recovery program is governed by various statutory sections, including 46.10, 46.27(7g), 46.286(7), 49.08, 49.195, 49.345(11), 49.496, and 49.682. Primarily, the claim filed by Wisconsin's estate recovery program will be for Medical Assistance benefits, and this recovery is governed by section 49.496.

<sup>6</sup> WIS. STAT. § 49.496(6).

the recovery program, in order to cause the program to accept a payment that is less than the full claim amount.

### **Preparing the Estate Accounting**

Section 862.01 of the Wisconsin Statutes obligates a personal representative in formal probate to file a verified account with the court. Normally, this is a written accounting that accounts for all financial activity that has occurred since the decedent's date of death. When an estate is under informal probate administration, the filing of the estate accounting is voluntary.<sup>7</sup> Even though the accounting is not required to be filed by the court in an informal administration, the personal representative is still obligated to provide an accounting to all interested persons prior to closing the estate.<sup>8</sup> Due to this statutory framework, a personal representative is required to prepare an accounting in formal and informal administration. You may file the accounting with the court in an informal administration.

The State of Wisconsin provides a legal form for use in preparing the accounting.<sup>9</sup> The form is a bit cumbersome, but the form does accomplish the required task. For the remainder of this section, the accounting will be referred to as the Final Account.<sup>10</sup> The Final Account cannot be completed until the probate inventory is completed. The first line in the left column begins with the inventory figure.<sup>11</sup> This amount is the total of assets subject to administration as reflected on the probate inventory. Other than this initial amount, all other amounts are connected to schedules that are attached to the accounting. The schedules are labeled from Schedule A through Schedule O.

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<sup>7</sup> Although filing an accounting is technically voluntary under section 862.01, some Register in Probate offices have required that I file final accounts, even though the estate was not in formal probate.

<sup>8</sup> WIS. STAT. § 865.16(c).

<sup>9</sup> Form PR-1814. A blank copy of this form is attached.

<sup>10</sup> Form PR-1814 actually permits you to create an interim accounting, final accounting, and supplemental accounting by checking the appropriate box on the first page. A supplemental accounting is an accounting that is filed after a final accounting is filed. This would be necessary if additional assets were received by the personal representative. Quite often, only a final accounting is necessary.

<sup>11</sup> WIS. STAT. § 862.07.

### Final Account - Schedule A

If additional property is added to the estate's assets after the inventory is filed, then that additional property will be listed on Schedule A. For example, if a bank account is discovered by the personal representative after the inventory is filed, the date of death balance plus accrued interest would be listed on Schedule A. If assets are added to Schedule A, the Register in Probate will levy an additional probate fee for the additional assets when the Final Account is filed with the court.<sup>12</sup> The personal representative will need to account for this additional probate fee on Schedule K of the Final Account in order for the schedules to balance properly.

### Final Account - Schedule B

Schedule B is used to account for dividends that are paid to the estate after the decedent's death. The use of this schedule is only applicable if the decedent owned assets that pay dividends. The most common example is a stock or mutual funds. Any accrued dividend, that is payable to the decedent's estate by reason of the fact that on or before the date of death, the decedent was a stockholder of record, but actually received after the decedent's death, should be included in the inventory value of that particular security.<sup>13</sup> Schedule B is used to include any dividends that are paid to the estate other than accrued dividends that were included as part of the inventory value of assets. Schedule B will not be used if no dividends were paid to the estate.

### Final Account - Schedule C

Schedule C is used to account for interest that is paid to the estate after the decedent's death. The use of this schedule is applicable if the decedent owned a bank account or other interest accruing asset at time of death. Schedule C is commonly used, because most decedents have one or more bank accounts that were accruing interest at time of death and continued to accrue interest after death. Like dividends above, any interest that accrued prior to date of death should be included in the probate inventory

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<sup>12</sup> Probate court fees are governed by WIS. STAT. §§ 851.74 and 814.66. Section 814.66 provides that "a fee of 0.2% of the value of the property subject to administration, less encumbrances, liens or charges" is to be applied by the Register in Probate.

<sup>13</sup> This accounting principal follows estate tax reporting as set forth in TREAS. REG. § 20.2033-1(b).

total.<sup>14</sup> Schedule C is used to report interest that the estate receives after the decedent's date of death less any interest that was already accounted for on the probate inventory. Any dividends or interest that accrued prior to death will also be included on the decedent's final IRS Form 1040 rather than the estate's IRS Form 1041. This schedule would also be used to report interest earned on promissory notes, bonds, or other interest bearing instruments that are owned by the estate.

#### Final Account - Schedule D

Schedule D is used to report gain or loss that is recognized on the sale of assets, which are owned by the estate. This schedule will be used to report gain or loss on the sale of assets that were included on the probate inventory. Schedule D will also be used to report gain or loss on the sale of any asset that is purchased by the personal representative with estate assets and then later sold by the personal representative. With larger estates, it is not uncommon for the personal representative to trade securities or other capital assets after the decedent's date of death.

Proper completion of Schedule D requires a grasp of tax accounting and basis calculation under the Internal Revenue Code. The value of each capital asset<sup>15</sup> listed on the probate inventory establishes the basis of the asset.<sup>16</sup> This value is commonly referred to as stepped-up basis. The amount for which the decedent purchased the asset is generally no longer relevant. After death, basis is now the fair market value of the capital asset as of the decedent's date of death. For example, if the decedent owned one hundred (100) shares of Verizon common stock at time of death, then the total value of the shares as of the decedent's date of death would be included on the probate inventory.<sup>17</sup> If the fair market value of the Verizon stock was \$4,000.00 on the date of death, and later the personal representative sold the stock for \$4,500.00, then the personal representative will

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<sup>14</sup> TREAS. REG. §§ 20.2031-4 and 20.2031-5.

<sup>15</sup> Capital assets are defined by I.R.C. § 1221 and generally include real estate, stocks, bonds, mutual funds, and exchange traded funds.

<sup>16</sup> See I.R.C. § 1014.

<sup>17</sup> Stocks and bonds are valued pursuant to TREAS. REG. § 20.2031-2(b)(2). The fair market value of stock is the value is the average of the high and low selling prices on the date of death. For mutual funds, the fair market value is the Net Asset Value of the fund on the date of death. Mutual fund prices do not fluctuate throughout a trading day; consequently, the closing price of the mutual fund is used for probate inventory purposes.

include a \$500.00 gain on Schedule D. It is best to include a description of each capital gain or loss on Schedule D, including the asset's cost basis, trading date, and sale proceeds amount.

The most common capital asset accounted for on Schedule D will be real estate. Ordinarily, real estate is sold at a loss following the date of death. This loss is triggered because even if the personal representative sells the real estate for the appraised price, which is the basis and probate inventory amount, the closing costs and commissions paid can be added to basis to create a capital loss. The preparer of the Final Account will need to review all HUD Schedules and closing statements closely to properly account for a capital gain or loss related to a sale of real estate.

#### Final Account - Schedule E

Schedule E is used to report receipts that are added to estate assets after the date of death. A common example is rent that is earned on an asset owned by the estate. Schedule E could also be used to account for other income sources that do not fall within Schedules A-D. Be careful not to confuse Schedule E with Schedule A. Schedule E is generally used to report assets earned from estate assets, while Schedule A is used to account for estate assets that were discovered after the probate inventory was filed.

#### Final Account - Schedule F

Schedule F is used to report funeral expenses, including amount paid by the personal representative to a funeral home, cemetery, or mausoleum. This schedule may also be used to report amounts paid by the personal representative for worship service costs, flowers, stationary and other sundry items related to the funeral for the decedent.

#### Final Account - Schedule G

Schedule G is used to account for debts of the decedent that were paid by the personal representative after the decedent's date of death. A common example is a medical bill. It is quite common for a decedent to receive bills after his or her date of death. If these bills are for debts owed by the decedent, then the personal representative will include the amounts on Schedule G.

#### Final Account - Schedule H

Schedule H is used to account for claims that are paid by the personal representative. If one or more claims are filed against the estate, and the personal representative pays the claims, then the claimant's name and amount paid must be included on Schedule H. A claim could also be classified as a debt. If a debt is paid, but the creditor never filed a claim, then the amount of the debt is listed on Schedule G. If the creditor filed a claim with the probate court, then the amount paid is included on Schedule H.

#### Final Account - Schedule I

Schedule I is used to report all taxes that are paid by the personal representative. This schedule could be used for a variety of entries. If the personal representative filed a final Form 1040 for the decedent and paid tax with that return, then the amount of tax paid will be listed on Schedule I. If estate tax is paid, the amount of tax is listed on Schedule I. If fiduciary income tax is paid by the personal representative, then the amount of tax paid with the filing of IRS Form 1041 or the applicable state form is included on Schedule I.

Any real estate taxes paid by the personal representative are also included on Schedule I. With this in mind, the person preparing the Final Account will need to account for any real estate tax proration that benefits the buyer of real estate owned by the estate. A real estate tax proration is almost always done when the personal representative sells real estate owned by the estate. This tax proration reduces the sale proceeds that are received by the estate at time of sale. This amount will be located on the closing statement associated with the real estate sale and should be included on Schedule I. If this amount is not included, the Final Account will not balance.<sup>18</sup>

#### Final Account - Schedule J

Schedule J is used to account for any interest that is paid by the personal representative. The most common form of interest relates to an outstanding promissory

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<sup>18</sup> Along this same line of thinking, any other expenses paid by the estate as part of a real estate sale as shown on the HUD-1 or closing statement, which cannot be added to basis, must be listed on the appropriate accounting schedule. For example, if a final water bill is paid, the amount paid should be listed on Schedule K or L. If all deductions from the real estate closing statements are not accounted for, the Final Account will not balance.

note obligation of the decedent. If the personal representative pays the creditor, and a component of the payment is interest, then the interest portion is shown on Schedule J. The principal component paid is shown on Schedule G or H depending upon whether a claim was filed against the estate.

#### Final Account - Schedule K

Schedule K is probably the only schedule that will be used for every probate accounting. Every probate estate has administrative expenses. Schedule K is used to list every administrative expense that is paid by the personal representative from the date of death through the final distribution of assets. Common examples of administrative expenses are fees paid to the Register in Probate, publication fees, costs paid to the Register of Deeds, and appraisal fees.

#### Final Account - Schedule L

Schedule L is a general schedule similar to Schedule E on the left side of the Final Account. If the personal representative made a payment that cannot be classified into one of the other schedules, then the payment is listed on Schedule L. Schedule L is not commonly used.

#### Final Account - Schedule M

Schedule M is used to report distributions that were made by the personal representative to beneficiaries of the estate. Schedule M will only be used if distributions were made during administration and before the Final Account is completed. For example, if the decedent's will called for a \$1,000.00 specific bequest to be made to each of the decedent's grandchildren, and the personal representative paid these specific bequests, then the beneficiary's name and amount received by the beneficiary will be listed on Schedule M.<sup>19</sup> Schedule M is also used to report partial distributions that may have been made to residual beneficiaries of the estate.

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<sup>19</sup> If a specific bequest is made in kind by the personal representative, rather than in cash, the current fair market value of the asset at time of distribution is the property value to be used by the personal representative. See WIS. STAT. § 863.19 and *Estate of Naulin*, 56 Wis. 2d 100, 201, N.W.2d 599 (1972).

### Final Account - Schedule N

Schedule N is almost always used, unless all assets of the estate have been distributed by the personal representative. Schedule N is used to list all assets that are owned by the estate and under the control of the personal representative at the time the Final Account is signed. For example, if there is an estate checking account, then the checking account balance is included on Schedule N. If there are other inventoried assets that have not been sold or distributed, then those inventoried assets are included on Schedule N.

Once Schedule N is completed, the preparer of the Final Account will need to make certain that the two columns balance. If the two columns do not balance, then assets listed on the inventory, income, losses, or distributions were missed or accounted for incorrectly. A full review of the personal representative's records may be necessary to remedy the situation. Taking a detailed look at every asset listed on the probate inventory and tracking each asset to either sale or distribution is a logical course of action. You may need to review all check book registers used by the personal representative, deposit receipts, copies of cancelled checks, and closing statements associated with real estate sales. If your personal representative is organized, the preparer's task will be much easier. Unfortunately, we cannot always adequately control or monitor the personal representative's accounting of estate assets.

Fees due the personal representative, attorney, or Guardian *ad Litem* are listed under the columns. Once these expenditures are subtracted from the amount listed for Schedule N, the final schedule to create is Schedule O.

### Final Account - Schedule O

Schedule O lists the names of beneficiaries and the amount of assets to be received by each beneficiary. These amounts or percentages must match the decedent's will or the provisions of the intestacy statute if the decedent died intestate.<sup>20</sup>

The accounting process is tedious. It takes great attention to detail to prepare a probate final accounting. Once the Final Account is signed by the personal

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<sup>20</sup> See Chapter 852 of the Wisconsin Statutes for Wisconsin's intestacy law.

representative, if the case is in formal probate, then the accounting must be approved by the court according to the procedures set forth in Chapter 862 of the Wisconsin Statutes. If the case is an informal administration, then a copy of the Final Account must be provided to every interested person of the estate.<sup>21</sup> Interested persons have the right to object to the Final Account.<sup>22</sup>

If properly done, the Final Account will be the chief resource used to prepare fiduciary income tax returns for the estate. With this in mind, the accuracy of the Final Account is critical. Also, it may be helpful to add the date to each line item entries on the Final Account schedules. This will help you place the income or expense item into the correct tax year for purposes of income tax filings.

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<sup>21</sup> A person interested in the estate is defined by WIS. STAT. § 851.21. *See also* WIS. STAT. § 862.11.

<sup>22</sup> WIS. STAT. § 862.13.

## **Trust Administration and Termination in Probate**

As time marches on, the pervasiveness of testamentary trusts will slowly fade away. The number of testamentary trusts being created by clients is much lower than 50 years ago. Today, most trusts are *inter vivos* trusts. If you are dealing with a testamentary trust, which is a trust that is written into a decedent's will, you must address additional court related procedures and tax requirements. If a decedent dies, and assets from his or her estate are to be distributed by the personal representative to a trustee of a trust created under provisions of the decedent's will, then you have a testamentary trust. There is no additional trust instrument; the will contains the trust language.

If a testamentary trust is involved, then when the Petition of Application for Probate is made, you must ask the court to appoint a trustee for the trust.<sup>23 24</sup> Typically, the decedent will have nominated the trustee in his or her will. Assuming no objection is made, the court will issue Letters of Trust to the trustee.<sup>25</sup> This document is similar to Domiciliary Letters that are issued to a personal representative. The Letters of Trust and the will constitute a validly created trust under Wisconsin law. Once created, the trust must obtain its own Federal Employer Identification Number ("FEIN"), which is similar to an estate. Generally, all testamentary trusts are irrevocable trusts after the decedent's death. The trust will need to file an income tax return for any year in which the trust has gross income of \$600.00 or more or if the trust has any net income.<sup>26</sup>

After the personal representative closes the probate estate, the trust administration will live on pursuant to the terms of the trust instrument. The same court case number used for the probate case will apply to the trust administration. To begin, the trustee must

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<sup>23</sup> WIS. STAT. §§ 856.29 and 865.08(6).

<sup>24</sup> The appointment and other provisions related to testamentary trustees are found in WIS. STAT. § 701.16.

<sup>25</sup> Most court forms associated with a testamentary trust can be found at <http://www.wicourts.gov/forms1/circuit/formcategory.jsp?Category=26>. Simply click on the hyperlink for trusts. Letters of Trust are Form PR-1931. A blank form is attached.

<sup>26</sup> I.R.C. § 6012(a)(4). *See also* I.R.C. § 6012(a)(5). Notice that there is a subtle difference between the trust's tax filing requirement and the estate's tax filing requirement. An estate is only required to file an income tax return if the estate has gross income of \$600.00 or more for the taxable year. In contrast, a trust must file an income tax return for any year in which the trust has taxable income or gross income of \$600.00 or more.

file a trust inventory for every testamentary trust created by the decedent's will.<sup>27</sup> In addition, every year, the trustee must file an annual accounting with the probate court.<sup>28</sup> In most cases, the annual accounting requirement does not apply to corporate trustees.<sup>29</sup>

Ultimately, each testamentary trust will come to a close and need to be formally terminated with the trustee discharged. This will likely occur because the beneficiary has reached a final distribution age or the term of the trust has ended. At this time, the trustee will need to petition the court to terminate the trust.<sup>30 31</sup> As part of the termination process, the trustee will need to provide a final accounting to the court.<sup>32</sup> If the petition is approved by the court, the court will issue an Order on Petition for Termination of Trust.<sup>33</sup> This is the first of two orders that relate to termination of a testamentary trust.

When final distributions are approved by the court, the trustee must secure trust receipts<sup>34</sup> from all trust beneficiaries.<sup>35</sup> After the court is satisfied that the trustee has accounted properly, appropriately distributed trust assets, and filed a Closing Certificate for Fiduciaries from the Wisconsin Department of Revenue<sup>36</sup> with the court, the court will discharge the trustee by entering a final order related to the trust.<sup>37</sup> A form created by the courts is used for this purpose.<sup>38</sup>

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<sup>27</sup> WIS. STAT. § 701.16(3). Form PR-1932. A blank copy is attached.

<sup>28</sup> WIS. STAT. § 701.16(4). Form PR-1937. A blank copy is attached.

<sup>29</sup> WIS. STAT. § 701.16(4)(am).

<sup>30</sup> WIS. STAT. § 701.13(3).

<sup>31</sup> Until recently, a standard petition related to termination of a trust did not exist. The courts came out with Form PR-1940 a few years ago. While helpful, it is almost impossible to provide proper information related to the termination of a trust without providing an attached explanation to Form PR-1940. A blank version of this form is attached.

<sup>32</sup> WIS. STAT. § 701.16(5).

<sup>33</sup> Form PR-1941. A blank copy is attached.

<sup>34</sup> Form PR-1938. A blank copy is attached.

<sup>35</sup> WIS. STAT. § 701.16(6).

<sup>36</sup> A Closing Certificate for Fiduciaries for a trust is obtained by filing Schedule CC with the Wisconsin Department of Revenue. This procedure is similar to obtaining a closing certificate for an estate.

<sup>37</sup> WIS. STAT. § 701.16(6). *See also* WIS. STAT. § 701.13(3).

<sup>38</sup> Form PR-1933. A blank copy is attached.

## **Shopping for Probate Case Management Software**

The use of computer software to assist with management of client files has mushroomed in recent years. There are several companies that manufacture software for use with probate and trust administration. My firm does not use any of the software vendors listed below. The following are options that may be considered if you are seeking an application to assist with case management or accounting:

1. Fiduciary Accounting for Professionals by Legal Automation
2. TotalTrust by Exhibit One Software
3. DPS Software
4. Trust e Solutions, which is a division of Financial Software Solutions
5. Infoprofessionals, which is located in Fond du Lac, Wisconsin, also offers a probate forms database that incorporates use of the circuit court forms. Many Wisconsin attorneys use Infopro software related to the creation of deeds and other real estate documents.

There are also several other applications that are used solely for fiduciary accounting. Most of the additional programs are for use with trust administration. Software options and reviews are readily available online. Also, Trusts & Estates magazine and website conducts regular reviews of technology products that are used in the estates and trusts practice area.

## **Common Probate Mistakes to Avoid**

With any area of practice, there are always mistakes to avoid. The following provides a list of common mistakes that must be avoided:

1. Do not assume that a probate administration is unnecessary. Also, if the estate's assets subject to administration do not exceed \$50,000.00, then consider a summary proceeding under chapter 867 of the Wisconsin Statutes.
2. Make certain that the personal representative maintains adequate and accurate records. The preparation of a probate inventory and accounting will be nearly impossible if you are dealing with a disorganized personal representative. It is the attorney's job to keep the personal representative in check. In certain cases, you may need to take management of the estate's checkbook so that accurate records can be maintained.
3. Make certain that your personal representative does not distribute assets prematurely or without precise following of the decedent's will. For example, it is common for a personal representative to distribute the decedent's personal effects without full consideration of all beneficiaries. Make certain that all beneficiaries are accommodated when distributing estate assets.
4. Make certain that true fair market values are listed for assets on the probate inventory. The probate inventory must reflect date of death values. If not, the ultimate fiduciary accounting will not match the probate records.
5. If the decedent owned assets jointly with another person, make certain that appropriate steps are taken to terminate the decedent's interest in the real estate or financial account. For real estate, a Termination of Decedent's Property Interest will need to be recorded with the Register of Deeds.<sup>39</sup>
6. Before distribution of residual assets, make a final check with the court to make certain that no additional claims have been filed against the estate. All claims must be paid or objected to prior to distributing estate assets.

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<sup>39</sup> For real estate, this form is known as Form HT-110. The form is available on the Wisconsin Register of Deeds website at <http://www.wrdaonline.org/forms/index.htm>.

## **Property Disputes**

Considering human nature, disputes in probate matters are almost inevitable. Family property and money is involved, and people love money. I tell clients regularly that it is easy to divide a dollar; it is quite difficult to divide dad's gold watch. If the decedent was specific regarding distributions of personal effects, then the personal representative's task will be much easier. Many disputes that arise in probate can be anticipated and countered by concise estate planning. Unfortunately, most estate plans are not thoroughly done, and instead of leaving a legacy, the decedent often leaves a mess. To counter disputes, immediate steps should be taken when a dispute is anticipated.

### **Disputes Centered on Personal Effects**

The most common disputes center around distribution of personal effects. As an attorney, to address these disputes, you should do the following:

1. When legal representation begins, give the personal representative clear instructions regarding the need to account for and properly distribute personal effects and other estate assets. Routinely, by the time you meet with the nominated personal representative, personal effects will have already been taken or distributed. This is a violation of law. No person has the right to help himself or herself to the decedent's personal effects. Moreover, the nominated personal representative has no authority to distribute the decedent's personal effects.
2. Make certain all beneficiaries of personal effects are included in the process used to distribute personal effects. This point is critical. If one sibling is left out, you are almost inevitably creating a dispute. Advise the personal representative to create a fair means of distribution for personal effects by including all the beneficiaries in the procedure. If the personal effects can be distributed without dispute, then the personal representative is well on his or her way to a smooth administration.
3. If the beneficiaries are unable to agree upon an equitable means of distribution of personal effects, then the personal representative may have to engage the

assistance of a mediator or other conciliatory force to help with the process. As an attorney, I have even been present to monitor the division and distribution of personal effects. In addition, I have marshaled gold coins and other more valuable heirlooms in an effort to alleviate confrontation and argument. Obviously, these procedures are costly, but if the beneficiaries cannot agree, then increased costs are portended.

### Marital Property Disputes

If the decedent was married at time of death, disputes often center on the classification of property owned by the decedent. The application of Wisconsin's Marital Property Act<sup>40</sup> becomes a centerpiece of attention. Classification of property owned by the decedent is first described on the probate inventory. If an interested person disagrees with the personal representative's classification of the property, then the interested person has the right to object to the inventory. Ultimately, if the parties cannot come to a resolution, a trial may occur before a judge to decide the matter. Of course, the circuit court opinion may be appealed.<sup>41</sup>

The debate is typically focused on whether individually owned property has become mixed with marital property with the result being marital property, "unless the component of the mixed property which is not marital property can be traced."<sup>42</sup> In a blended family, the children normally want the property to be classified as individual property of the decedent, and the surviving spouse wants the property classified as marital property. Tracing of property components is a tedious task. Classification of marital property is also a concept that some judges in Wisconsin do not fully understand.<sup>43</sup>

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<sup>40</sup> See Chapter 766 of the Wisconsin Statutes and particularly sections 766.31, 766.53, and 766.63. With the increase of second and third marriages, disputes involving the classification of property between spouses are rampant.

<sup>41</sup> Attorney Vogel has represented clients in a few marital property classification matters that have been ultimately decided by the Wisconsin Court of Appeals. None of the opinions were recommended for publication. When emotions are high, the expenditure of inheritance money seems to become an afterthought.

<sup>42</sup> WIS. STAT. § 766.63.

<sup>43</sup> The most useful resource on marital property in Wisconsin is Keith A. Christiansen, *et al.*, *Marital Property Law in Wisconsin* (4<sup>th</sup> ed. 2010). This is a three-volume set that is published by the Wisconsin

Whether an asset should be included as an asset of a probate estate is also an area that can breed controversy. In this realm, the typical dispute concerns whether the decedent forgave debt of a beneficiary or gave an asset to a beneficiary. Of course, the beneficiary benefitting from the forgiveness or ownership of the asset holds to one position, and the other beneficiary or beneficiaries hold to an opposing position.

For example, if a decedent loaned money to a beneficiary prior to death, the beneficiary will often argue that the debt was forgiven and should not be included on the probate inventory as an asset of the decedent's estate. The dispute is one of gift versus loan. This dispute is quite common among beneficiaries and personal representatives. A recent Wisconsin Court of Appeals' decision is instructive on this issue.<sup>44</sup>

If you maintain a vibrant probate and trust administration practice, you will need to deal with various disputes. Without question, disputes will surface related to what an attorney may consider the most menial issue. As an attorney, be cautious when agreeing to become engaged in inheritance disputes. Regardless of your skill level, you may be in a losing situation related to fees and ultimate respect from the client. Know your facts well, and choose your clients wisely.

### **Current Legislative/Case Law Updates and Forecast**

Probate is not an area of law that changes quickly. Many attorneys monitor the Supreme Court and Court of Appeals digests that are published on a monthly basis in Wisconsin Lawyer. Over the past year, to my knowledge, there has been only one probate case that was reported on in the digests of the Wisconsin Lawyer.<sup>45</sup>

The most important legislative update and forecast relates to the federal estate tax. The current federal estate tax system is very unstable. Currently, the federal estate tax

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State Bar. For published cases related to marital property classification, *see also Estate of Lloyd*, 170 Wis. 2d 240, 487 N.W.2d 647 (Ct. App. 1992); *Estate of Koblyski*, 178 Wis. 2d 158, 503 N.W.2d 369 (Ct. App. 1993); *Bille v. Zuraff*, 198 Wis. 2d 867, 543 N.W.2d 568 (Ct. App. 1995); *Matter of Geise*, 132 B.R. 908 (Bankr. E.D. Wis. 1991) (providing excellent insight into the proper division of marital and nonmarital assets); *Krueger v. Rodenberg*, 190 Wis. 2d 367, 527 N.W.2d 381 (Ct. App. 1994); and *Torgerson v. Torgerson*, 128 Wis. 2d 465, 383 N.W.2d 506 (Ct. App. 1986). There are also several unpublished decisions from the Wisconsin Court of Appeals that are instructive related to marital property disputes.

<sup>44</sup> *See In Re Estate of Hansen*, 2012 WI App 20, 339 Wis. 2d 460, 810 N.W.2d 358.

<sup>45</sup> *See Id.*

exemption<sup>46</sup> amount is \$5.12 million per decedent for 2012. If federal legislation is not passed to extend the current exemption amount or pass more permanent legislation, the exemption amount will fall to \$1 million per decedent beginning for deaths that occur on January 1, 2013.<sup>47</sup> If the federal estate tax exemption reverts back to \$1 million, this will also bring back Wisconsin's estate tax system, which has been dormant since December 31, 2007.<sup>48</sup>

A \$1 million exemption amount will certainly increase the probate attorney's workload, as many more estates will be subject to federal estate tax and the accompanying requirement of filing a federal and Wisconsin estate tax return. At this point, no commentator has the answer. All we can do is speculate about the estate tax system that will be in effect on January 1, 2013.<sup>49</sup>

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<sup>46</sup> Most professionals refer to the amount as an exemption. Technically, the figure is referred to as the "applicable exclusion amount." See I.R.C. § 2010(c).

<sup>47</sup> See The Taxpayer Relief Act of 1997, Pub. L. No. 105-34 (providing for an increase in the estate tax exemption to \$1 million by 2006).

<sup>48</sup> Wisconsin's estate tax statutory provisions are found in Chapter 72 of the Wisconsin Statutes.

<sup>49</sup> A clue into President Obama's position is contained in his most recent budget. The proposed budget for 2013 (issued on February 13, 2012) would permanently restore the estate tax exemption amount that was in effect for 2009 (*i.e.*, a \$3.5 million exemption).