

A Handbook to Guide Personal Representatives

"The Road to Success"

A Joint Project of the Council of Probate Court Judges of Georgia and the Fiduciary Law Section of the State Bar of Georgia.

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Introduction

You have been appointed by a Probate Court in Georgia as the "Personal Representative" of an Estate of a deceased person. The term "personal representative" includes executors and co-executors of the Will of the deceased person and administrators and co-administrators of estates of persons who died without a valid Will or whose Will named no executor (or no named executor will qualify). In this booklet, "PR" will refer to the personal representative.

Before receiving authority to administer the estate, you were required to take an oath of office by which you swore or affirmed (promised) to perform the duties of your office in full compliance with the law. As evidence of your authority to administer the estate, you were issued one of the following: "Letters Testamentary," "Letters of Administration with Will Annexed," or "Letters of Administration."

It is now your duty and responsibility to administer fully and completely all of the estate, and you may, in certain circumstances, be held personally liable for any loss suffered as a result of your failure to properly administer the estate. It is strongly advised that you hire an attorney to represent and advise you while you serve in this important position. At any time during the administration of the estate, if anything comes up that causes you concern about your legal responsibilities or liabilities, please consult an attorney before you proceed further.

It is also important that you understand the responsibilities of the Probate Court by which you were appointed. The Judge and the staff of the Court may not act as your legal advisors and may not give you legal advice. The Judge is ethically prohibited from advising PR's and from discussing with any PR any matter involved in an estate which might become a contested issue unless all parties have been given the opportunity to be present.

If you are required to file returns or reports with the Probate Court, it is your responsibility to prepare them, and you should not expect the Court staff to prepare them for you. (See Section 7 for more information about reports to the Court.)

Your "**Road to Success**" has been mapped out for you in this booklet. You are to (1) gather all of the assets, (2) sell assets if necessary, (3) pay all debts and expenses of administration, (4) distribute the remaining estate, and (5) close the estate. However, this booklet presents only a basic outline of your duties and responsibilities; no attempt has been made to address every situation or legal issue that could arise in the administration of an estate. Every estate is

different. On your "**Road to Success**," there may be requirements that do not apply in every case (for example, the requirement to file tax returns, Section 5, and/or the requirement to file reports with the court, Section 7). If the sale of property becomes necessary, you may need the court's permission or authority before you are able to sell it (See Section 4).

I. Marshaling the Assets

One of a PR's first duties is to locate, identify, and take possession of all of the deceased's assets which are controlled by the estate administration. These are called "probate assets." Probate assets are any type of property owned by the deceased, including personal effects (such as furniture, jewelry, works of art and gun collections), automobiles and boats, investments (such as stocks, bonds, bank accounts and brokerage accounts), and real estate. Probate assets would also include any ownership interests the deceased held in any closely held business or partnerships, which may require administering.

The deceased may also have owned property which is not defined as a "probate asset." The three most common forms of non-probate assets are:

1. jointly owned bank or brokerage accounts which pass automatically by operation of law to the surviving co-owner;
2. life insurance policies payable upon the death of the deceased to the named beneficiaries, rather than to the deceased's estate; and
3. pension benefits or other types of deferred compensation or retirement accounts which are payable to named beneficiaries, often the surviving spouse, rather than to the deceased's estate. With any type of non-probate property, the PR will probably need to obtain documentation about the asset for tax purposes and may well need to facilitate the receipt of the asset by the designated beneficiary or co-owner, even though the asset itself is not technically a part of the deceased's probate estate.

Although it is presumed that bank accounts in joint names were created with an intent of joint ownership, if it can be shown that the account was created by the deceased and opened in joint names as a convenience for the deceased, the estate of the deceased may be entitled to the funds in the account. It is the PR's duty to ascertain whether the estate has a claim for funds in a joint account, and the PR should seek legal advice if the ownership is in doubt.

Life insurance policies payable to a deceased's estate and pension or deferred compensation benefits payable to a deceased's estate are probate assets, and it is the responsibility of the PR to collect the proceeds or benefits.

The process of securing (marshaling) probate assets varies depending on the type of property. With respect to personal effects, often located within the residence of the deceased, marshaling may simply require securing the premises where the property is located. The title certificates to titled vehicles, trailers, etc., should be secured and protected pending a sale or distribution. The same applies to real estate titled in the deceased's name; the PR must take control of the property, making certain that it is secured and managed. This includes insuring that all pertinent

communication about the property, such as property tax bills, utility bills, etc., is directed to the PR. It is also the PR's responsibility to maintain appropriate insurance on the estate assets.

Financial investments such as stocks, bonds, and accounts should, in most cases, be transferred into an estate bank or brokerage account titled in the name of the PR as executor or administrator of the deceased's estate. By doing this, the PR has the ability to manage it during the period of the estate administration, pending sale or distribution.

Closely held business interests or partnership interests owned by a deceased require special attention. There may be restrictions governing, directing or limiting the disposition of the deceased's interest(s). If the deceased was involved in the management of the business or partnership, the PR may be obligated to assume those duties, if only temporarily, to insure continuity of management of the business. While it is a good idea for any PR to consult an attorney about the particulars of an estate administration, the presence of business interests, whether active or passive, heightens the responsibilities and potential liabilities of a PR, making the advice and guidance of an experienced estate lawyer all the more important.

If someone interferes with a PR's ability to secure or administer estate assets, then the PR may need to take legal action to protect the estate's interest or to prevent the interference with the PR's administration of the estate assets. The type of action the PR must file and the court in which the action is properly filed depend upon the circumstances of the interference and the certainty of the deceased's ownership interest. Any legal proceeding of this type is likely to be adversarial and should not be undertaken without legal representation.

II. Paying the Debts and Expenses of Administration

A PR may be ready to pay creditors after a few months. Creditors must be paid before the PR can safely distribute inheritances. When should estate debts and expenses be paid? Which bills should be paid first?

While the law gives the PR six months after appointment in which to determine the condition of the estate, during which heirs or beneficiaries may not demand a distribution, the PR must notify creditors much earlier.

The PR must publish a notice to debtors and creditors within 60 days of the date the PR takes office. This notice to creditors must run for four consecutive weeks in the official newspaper in the county where the estate's Probate Court is located. This notice is traditionally coupled with a notice to debtors owing money to the estate and is often called a "notice to debtors and creditors." Probate Courts have sample copies of these relatively short, concise notices.

The published notice starts the countdown clock for creditors. Creditors must make known their demands for payment directly to the PR, not the court, within three months after the fourth publication of the notice. There are consequences to creditors who fail to make their demands known; however, a creditor's failure to demand does not extinguish the debt. Both the PR and the creditors may benefit from legal advice should questions arise whether a claim is valid and what notice or action, if any, should be filed.

If the PR published the notice to creditors in a timely manner as the law requires, the PR should receive all creditors' demands for payment before the end of the initial six month estate examination period.

Which creditor is paid first? The legislature has set out the order in which estate debts are to be paid. If the assets run out before all debts are paid, those creditors lower on the list are not paid.

The highest priority claim against estate assets is an award of year's support to the family, which has top priority and which is paid before all creditors.

The deceased's funeral bills are second in line for payment. If the funeral bills were paid prior to the appointment of a PR, the person(s) making the payment may be entitled to priority reimbursement.

Third in priority are the necessary expenses of administration. This category may include court filing fees, advertising costs, professional services such as legal and tax advice, surety bond premiums, costs of sale, the PR's commissions, and similar items. Some items are subject to special rules. In cases of doubt, it is best to obtain legal advice regarding whether a particular item is all or partly an "expense of administration."

Occupying the fourth level of priority are reasonable expenses of the deceased's last illness. In some cases in which the physical decline was slow or the medical conditions complicated, the PR may need assistance to determine whether a particular treatment expense is indeed attributable to the "last illness" thereby giving it priority at this fourth level. If it is not, the treatment expense may fall down to a lower priority level.

Unpaid taxes or other debts due the State or the United States are fifth in line for payment.

Sixth in priority are judgements against the deceased, secured loans, and other liens created by the deceased during life. These liens have priorities amongst themselves according to other laws enacted by the legislature unrelated to estates, and they must be paid as those separate priorities dictate. A security interest or lien on a specific piece of property, such as real estate or a vehicle, is preferred only to the extent of such property. Payment of these types of debts requires specialized assistance in most cases.

Last in priority are all other debts not mentioned above.

The PR must first apply the assets of the estate to the highest priority claims. If estate assets are sufficient to pay all claims, then the priority scheme obviously does not matter. On the other hand, if assets are insufficient to pay all claims, those debts with highest priority must be paid first or the PR may be held liable to a higher priority claimant who is not paid. If the assets will run out within a certain priority level, the creditors in that level are paid pro rata (except secured creditors and lien holders).

The PR should consider help and advice regarding payment of creditors because there are special rules beyond the scope of this handbook. Specific assets may be liable for certain debts.

Especially in cases where the assets are not sufficient to pay all debts in full, the PR must take precautions to avoid liability for having paid claims improperly.

Debts must always be paid (or be assured of payment from assets of the estate) before distribution is made to the heirs or beneficiaries. When all debts have been paid, distributions to heirs or beneficiaries can be made.

III. Selling Estate Property

In the course of administering an estate, the PR may need to sell property, either to be able to pay debts or expenses, or to be better able to distribute an estate among the beneficiaries. A PR may be required under a Will to sell property, while, at other times, it may be advisable to sell property as a part of managing an estate during the period of administration.

In all cases, the PR must have the authority to sell the property in question. This authority of the PR to sell may: (1) be granted under the terms of a Will; (2) be granted by law; (3) be granted by blanket order of the court at the time of appointment or at a later date; or (4) be granted by the court on a petition concerning specific property.

Even when the PR does not have specific authority by Order or Will to sell estate property, Georgia law permits any PR to sell publicly traded stocks or bonds at private sale without having to obtain a special court order, provided the securities are sold at the current stock exchange price or at the published bid price.

If a PR without specific authority holds perishable property (defined as property either liable to deteriorate if retained or too expensive to retain), the PR may need to sell this property as soon as possible. A petition must be filed in the Probate Court seeking authority from the Probate Court Judge to sell the perishable property in a manner set forth in the petition. The Probate Judge will determine what type of notice and to whom notice is to be required and will determine the approved method of sale.

When a PR needs authority to sell, rent, lease or exchange other types of property, such as real estate or business interests, the PR must petition the court for the authority to do so. The petition must set out the particulars of the proposed transaction, including its purpose, the purchase price, and other details. Heirs or beneficiaries of the estate must be notified of the proposed transaction and given an opportunity to object prior to a hearing on the petition. The court may, according to the circumstances of the case, direct either a public or private sale in accordance with the Judge's determination as to what is in the best interest of the estate and the heirs or beneficiaries. After receiving a specific order authorizing the PR to sell, rent, lease or exchange property, the PR will be required to make a full report back to the Court.

When selling estate property, a PR should be particularly cautious in any transaction which gives rise to a conflict of interest or even an appearance of a conflict of interest. A potential conflict of interest exists anytime the PR is the proposed purchaser, is related to the proposed purchaser, or holds a joint interest in the subject property. Except when specifically authorized by a Will, a PR should petition the court for authority to sell in any case of a potential conflict of interest,

with full disclosure to the court and the heirs or beneficiaries. Otherwise, the transaction may be considered fraudulent, subject to being set aside by the Probate Court or some other court in the future.

As always, the PR should consult the estate's attorney concerning whether and how to sell estate property.

IV. Tax Returns

The PR is responsible for filing certain tax returns and may be held liable for failing to pay taxes due from estate assets. The PR will often use the deceased's tax preparer because that person already knows the deceased's financial situation. State tax returns may be required in addition to federal tax returns.

The deceased's final income tax return is due by April 15th in the year following the year of death. If the deceased died before filing a previous year's tax return, the PR may be required to file more than one income tax return: (a) the income tax return(s) for the previous year(s); and, (b) the final income tax return for the year of death. If the deceased is survived by a spouse, the PR should consult with the surviving spouse to determine whether joint returns may or should be filed.

In addition to the tax returns for the deceased, the PR will be required to file income tax returns for the estate if the estate has or earns income beyond the death of the deceased.

A federal employer identification number (EIN) from the IRS may be required for accounts opened by the PR in the name of the estate at financial institutions. This EIN will also be used on tax returns filed by the PR for the estate.

If required, the PR is also responsible for filing an estate tax return. Professional tax advice should be sought as soon as possible as some requirements must be met within a short time after death (usually 9 and 15 months). Appraisals of properties may be necessary as proof of values. An estate tax return may be required even when no tax is due.

If trusts are involved in the estate, there may be other returns due, which may or may not involve the PR. The PR may be able to take action to reduce the number of tax returns due.

There is no substitute for timely and qualified legal and tax advice.

V. Distributing the Estate to Heirs or Beneficiaries

After the PR has settled and paid all claims, expenses and taxes of the estate, the remaining assets may be distributed to the heirs or beneficiaries of the estate. Normally, a final accounting is prepared and presented to the heirs or beneficiaries for approval prior to distribution. As stated in the section on taxes, in some estates, important tax considerations are involved in making distributions from an estate, and the PR should consult the estate's attorney for assistance.

When there is a Will, the PR is required to distribute the assets of the estate to the beneficiaries as directed in the Will. If the Will includes specific bequests of property of the estate, and the estate contained the specific property when the decedent died, then the PR must distribute the specific item(s) as provided in the Will. If the decedent disposed of the item before his or her death, then the gift is no longer valid. There are many variations of ways that property is given in a Will, and the PR should consult the estate's attorney for assistance to ensure that the property is being distributed as required by the Will.

If there is no Will, then the PR is required to distribute the assets of the estate to the heirs as required by the laws of intestacy in the State of Georgia. Heirs are the closest relatives of the decedent, including the decedent's spouse, if living, and the children of the decedent, including adopted and children born out of wedlock. Stepchildren are not heirs. If a child has died before the decedent, that child's children (grandchildren of the decedent) receive the deceased child's share of the estate. If the decedent is survived by a spouse but not by children, the spouse is the sole heir and is entitled to the entire estate. If the decedent is survived by a spouse and children (or descendants of a child), then the spouse shares equally with the children; however, the spouse is always entitled to at least one-third of the estate. If any property is to be distributed to a minor, then the PR is in some cases required to pay over the funds to a duly appointed conservator for the minor or the Probate Court to be deposited into a custodial account for the minor. The PR should consult the estate's attorney before making any distribution to or for the benefit of a minor.

When there is a Will, personal property is distributed or divided as provided in the Will. If there is no will, the personal property is to be distributed to or divided among the heirs. If agreed to by those entitled to personal property, it may be given to whoever shows an interest in the specific items; if no one wants the remaining items, it may be donated to charity.

Real property is usually distributed by the PR giving an "Assent to Devise" or other document to be filed in the real estate records of the county where the real property is located. This evidences on the real estate records the transfer of the decedent's interest in the property to the heirs or beneficiaries.

Property in an estate can be divided equally among the heirs or beneficiaries so that each owns a common interest in the specific property, or it can be divided by giving items separately to heirs or beneficiaries in such a manner as to effect an equal distribution based on value. If there is a dispute as to how the property is to be divided, the PR should consult the estate's attorney; in certain circumstances, an action may be required to have the Probate Court determine a fair distribution.

VI. Filing Returns or Reports with the Probate Court

The PR may be required to file certain reports or returns with the Probate Court in which the PR was appointed. The Letters issued to you by the Court will generally reflect any reporting requirements which apply from the time of your appointment. However, any PR, even those who may have been initially relieved of the requirement of filing, may be called upon to file reports with the Court to count fully for the administration of the estate.

Every PR should keep complete and accurate records of all dealings in the administration of the estate at least until such time as the PR has been discharged.

When required, the following are the usual reports which must be filed with the Probate Court:

Inventory - An Inventory of the assets of the estate is due within six (6) months of the date of the PR's appointment. The Inventory is an itemized list of all property owned by the decedent at the time of death which is subject to administration by the PR and a statement of the approximate value of the assets. A formal appraisal is generally not required, but the PR is expected to set forth an estimate of the fair market value. The form for the Inventory is not a standard form. The PR should use the form required by the appointing Probate Court and should complete it in as much detail as required by that Court. The Inventory must be attested under oath by the PR as being true and complete, and the PR must certify to having mailed a copy of same to each heir, if the decedent died without a Will, or to each beneficiary, if the decedent died with a Will. However, the PR is not required to mail a copy of the Inventory to any heir or beneficiary who is a minor or incapacitated adult or to any heir or beneficiary who has waived in writing the right to receive the Inventory.

Accountings (Returns) - An annual return is due within sixty (60) days of the anniversary date of the date of appointment, each and every year until the PR is discharged. A final return is due with the Petition for Discharge. Each return is an accounting, under oath, of the receipts and expenditures on behalf of the estate during the year preceding the anniversary date, together with a statement of any other facts which are necessary to show the true condition of the estate. Each return is to contain an updated inventory of the assets of the estate as to each anniversary. With the return, the PR must either file with the Court the originals of all vouchers, bills, statements of account, or other evidence of the correctness of the entries on the return or file an affidavit that the PR has compared the originals with the entries on the return and the return is correct. The Probate Court may, at any time, require the PR to file the original vouchers to support a return. The PR must certify to having mailed a copy of each return to each heir, if the decedent died without a Will, or to each beneficiary, if the decedent died with a Will. However, the PR is not required to mail a copy of the return to any heir or beneficiary who is a minor or an incapacitated adult or to any heir or beneficiary who has waived in writing the right to receive the return.

Other reports on the condition or administration of the estate may be required by the terms of a Will of a decedent or by court order.

VII. Closing the Estate

When all debts, taxes and expenses of administration have been paid, all tax returns have been filed and audited (if required), and all remaining assets have been distributed, the PR (through the estate's attorney, if any) should apply to the Probate Court for discharge from office and all liability. This is done by filing a Petition for Discharge. The heirs or beneficiaries of the estate and any creditors whose claims have not been paid are entitled to receive notice of this petition. The Probate Court will examine the condition of the estate, and anyone interested in the estate has an opportunity to be heard regarding the estate distribution. If the PR was required to file returns or reports with the Probate Court (See Section &), these documents will be reviewed at

the time the application for discharge is made. Once the Court is satisfied that the administration has been proper and that the PR has faithfully performed the duties required, the Court will issue an order discharging the PR from office and any further liability. The PR cannot be discharged from liability to any minor heir or creditor unless the minor is represented by a guardian-ad-litem in the discharge proceedings. The Order for Discharge formally closes the estate, terminates any further requirement of filing returns, discharges the PR from office and the surety on the PR's bond, if any, from liability.

A discharge solely from office, but not from liability, may also be obtained in an abbreviated procedure, if desired.

Congratulations, upon your discharge, you will have accomplished your duties!

VIII. Glossary of Terms

As used in this pamphlet, the following terms are defined. The terms defined below may also have other or expanded meanings when used in other contexts.

Accountings (Returns) - annual accounting to the Probate Court of the receipts and expenditures of the estate for the previous year, together with facts that show the true condition of the estate; the accounting must be made within 60 days of the anniversary of appointment every year until the PR is discharged; accounting may be waived in the Will or by consent of all the heirs. (See Section 7)

Administrator - person appointed to administer an estate where there is no valid Will; an administrator must post a surety bond as security for the property administration of the estate, although this bond may be waived if all heirs consent to the waiver.

Beneficiary - the designated recipient of a benefit under a Will or contract; a beneficiary should be distinguished from an heir.

Caveat - formal objection to a probate proceeding; a caveat may challenge the validity of a Will offered for probate.

Common Form Probate - probate of a Will without notice to the heirs; common form probate is not conclusive on anyone having an interest in the estate for a period of four years; if only for actions done to collect and preserve assets and to pay debts of the estate; common form probate may be granted immediately, however, because it is conclusive only after four years, title attorneys frequently require solemn form probate for the sale of real property from the estate.

Discharge - an executor or administrator who has performed all duties or who has been allowed to resign may petition to be discharged from liability. If no objections are filed to the petition, the probate judge grants the discharge, releasing the personal representative from liability. If objections are filed, the judge must hold a hearing and examine the condition of the estate and the conduct of the personal representative. (See Section 8)

Estate - the name given to all of the collective assets of a deceased person; also may be used to refer to the entire case involving a particular deceased (e.g., Estate of John Doe).

Executor - person named in a Will by the testator to manage the estate and carry out the directions of the Will; the Letters Testamentary issued by the probate court give the executor power and authority to carry out the provisions of the Will.

Fiduciary - a person having the duty to act primarily for another's benefit in matters assigned or undertaken by the person; a person holding the character of a trustee.

Guardian-ad-litem - a person appointed by the court to investigate and represent the best interest of a child or incompetent adult with regard to a particular matter pending before the court.

Heir - those persons who inherit the estate of an individual who dies without a valid Will; heirs should be distinguished from beneficiaries, who are named as recipients in the Will, whereas heirs are the recipients recognized by law in the absence of a valid Will.

Incapacitated Adult - an heir for whom a guardian or conservator has been duly appointed or an adult under a legal disability.

Inventory - a description of all assets and liabilities of the decedent, including a list of all personal and real property owned by the decedent at the time of death which is subject to the PR's administration, along with the approximate values of the property; the PR must mail a copy of the inventory to the heirs or beneficiaries. (See Section 7)

Letters of Administration - the formal document issued by the court to evidence the appointment of an administrator of an estate and the authority of the administrator then to act; an administrator has no authority to act until Letters have been issued.

Letters of Administration with the Will Annexed - letters granted to an administrator where the decedent made a Will but did not appoint an executor or where the appointed executor failed to or could not serve; unless restricted by the probate court, an administrator with the Will annexed has the same powers and rights as the executor.

Letters Testamentary - the formal document issued by the court to evidence the appointment of an executor of an estate and the authority of the executor then to act; an executor has no authority to act until the Letters have been issued.

Minor - a person who is under the age of 18, the age of majority in Georgia.

Personal Property - any property other than real estate; everything which is subject to ownership other than land or an interest in land; personal property includes not only tangible things (e.g., furniture, automobiles, merchandise, clothes and jewelry, etc.) but also intangible things (e.g., stocks, bonds, money on deposit, patents, copyrights, etc.).

Petition - a formal, written application to a court requesting judicial action on a certain matter.

Power of Attorney - an instrument authorizing another to act as one's agent or attorney-in-fact (as opposed to an attorney at law); the agent is called an "attorney-in-fact;" a power of attorney may be given for financial affairs or for health care decisions or both; a power of attorney may be general or limited.

Pro Rata - proportion or proportionately; shares calculated in proportion to the total available.

Real Property - land and generally whatever is erected, growing upon or affixed to the land.

Solemn Form Probate - probate that is conclusive against all who have been given notice; notice must be given to all heirs (not beneficiaries).

Surety - one who undertakes to pay money or to do any other act in the event the principal fails to pay or to act; the guarantor on the bond or a fiduciary, usually an insurance company specially licensed to write surety bonds.

Surety Bond - the obligation of another to guarantee the proper performance of a duty and to pay any loss caused by the failure to so perform; the bond of a personal representative secures the interests of creditors and heirs or beneficiaries; the guarantor, called a "surety," agrees to pay any loss suffered if the PR fails to perform the duties of the office properly (mismanagement, loss through negligence, misappropriation, theft, etc.).

Testator - a person who has executed a valid Will.

Will - an instrument by which a person disposes of his or her property, which takes effect after that person's death and which is revocable during the lifetime of that person; the legal declaration of a person's intentions which he or she wants to be performed after his or her death.

Year's Support - an award made from an estate for the maintenance and support for one year to a spouse and/or minor children of the decedent; an award of year's support must be made within 24 months of the death of the decedent and can only be made by the surviving spouse who has not remarried or by children who have not reached the age of 18.