

THE LAW OFFICE OF
MICHAEL J. HOWELL, P.A.
112 Executive Center
1 Corpus Christi Place, #112
Hilton Head Island, SC 29928

HiltonHeadEstatePlanning.com

Michael J. Howell
Licensed in Florida and South Carolina
Certified by the South Carolina
Supreme Court as a Specialist
In Estate Planning and Probate Law

Margaret Rhea Howell
Licensed
In
Florida and
South Carolina

MEMORANDUM

To: Personal Representatives

Re: Duties and Responsibilities in Settling an Estate

In order to commence the administration of an estate, there is certain background information which is useful. One of the more important uses of this memo is to provide you with information concerning the administration of an estate.

Since it is in written form, it will be available to you throughout the process of administration; therefore, you will have it to refer to when questions come up. It has been our experience that during a time such as this, many questions come when we might not be available, like in the middle of the night. This memo should help answer many of your questions during these times. You may also want to obtain a copy of our short checklist, and our long checklist of duties and responsibilities, as well as our representation agreement, which provides even more detail.

Generally, the Personal Representative's duties consist of collecting the assets of the estate, ascertaining and paying debts, taxes, and expenses of administration, and distributing the remaining assets to those persons or entities entitled to receive them.

One of the first items to be taken care of is simply for you to obtain the Will. The Will is supposed to be filed with the probate court within 30 days and, if not, it can be a misdemeanor; although, the criminal sanctions are rarely imposed.

Sometimes the Will is in the decedent's safe deposit box, sometimes in the attorney's safe deposit box, or possibly already in your possession. Notwithstanding that some attorneys will hold original Last Wills and Testaments; it has been our policy for well over 20 years not to hold any original documents, such as Wills, in our files.

If the Will is in a bank safe deposit box, you should take a photocopy of the Will with you in case they ask to see it. The Will shows that you are the Personal Representative of the Estate and therefore entitled to the Will. In all likelihood, the bank will want to inventory the safe deposit box at the time they open it. If they do not suggest this, you

should do so, or you should have someone who is not related to you by blood or by marriage inventory the contents of the box with you.

In order to inventory the box, the bank will likely need an officer to assist. Therefore, you should call prior to going in. If you need any assistance, we can call the bank before you go there. Please remember, we will need the original Will to forward it to the probate court. If our assistance is needed in the inventory, please let me know.

The next thing to be done is for us to prepare and file with the probate court, an application for Informal Probate of the Will. If an administration and the appointment is necessary, then we also file an application for Informal Appointment of the Personal Representative.

Informal Probate of the Will is the process whereby the Will becomes the valid Last Will and Testament of the decedent. We recommend this process even if administration and the appointment of a personal representative is not required because once the Will becomes the valid Last Will and Testament, if assets are discovered years in the future, the probated Will serves as a document of transfer and the work required is often much less than if the Will was not probated, but was merely "filed" with the probate court.

The other procedures known as formal Probate and "Part Five Administration" are more complicated than Informal Probate, but in some cases are necessary and helpful, most often to protect the personal representative from disgruntled devisees (beneficiaries) and aggressive creditors. These types of procedures are also used where there might be a Will being contested. What follows in this memorandum deals almost exclusively with Informal Probate and Administration.

Once the Will is found, we file it for Informal Probate using a statutory application. Unless there is an objection to the filing of the Will for Informal Probate, no one has to appear in court. Most probate documents can be handled through the mail. This is beneficial because probate court hearings and appearances are expensive.

Within ninety (90) days after being appointed as Personal Representative, you will need to file an "Inventory and Appraisement". This will describe all probate assets of the Estate and show values for them. There are currently no requirements by the probate court that you have appraisers. However, there are still certain requirements for estate tax purposes. Generally we will need to use an appraiser for the real property and other property which does not have a readily determinable market value.

Another of your responsibilities is to search out and locate all estate assets. Hopefully, there are good records.

We would appreciate your putting together copies of the most recent brokerage account and bank account statements. This will provide much of the needed information not only for the probate court but also the South Carolina Tax Commission and the Internal Revenue Service, if necessary. Copies of any deeds to real property and the title to any automobile(s) will be helpful. Additionally, copies of any property tax statements on the house and cars, as well as the last three income tax returns, will also be beneficial.

Although the above sounds rather complicated, most of the work associated with it will be taken care of through our office, assuming you can provide the information. Please keep in mind throughout this process that we are here to assist you.

If difficulties are experienced in inventorying the assets and/or appraising them, the ninety (90) day period for filing the Inventory and Appraisal can be extended by the Probate Judge. In many cases, we file an extension and they are liberally granted. However, an extension inevitably increases the time that it takes to complete our work and ultimately the cost.

As soon as the Will is probated, the Probate Court, in Beaufort County, but not all counties, begins advertising in the newspaper for creditors of the estate to present their claims. The notice will appear once a week for three consecutive weeks. Creditors are directed to file their claims within an eight month period after the first publication of notice, or their claims will be barred except for certain secured creditors such as mortgage lenders and those who lend on automobiles and other secured properties, but even these creditors need to file a claim if there is a deficiency between the value of the security and the amount of the debt. Any claims or bills which you receive should be reviewed by us prior to paying them.

Within twelve (12) months of your appointment, or thirty (30) days after you receive an IRS closing letter for the Estate Tax Return, if one is filed, you must file the first and final accounting with the Probate Court. The accounting will show all receipts and disbursements of the estate. In this connection, accurate financial record keeping is necessary. You should keep careful and detailed records with respect to all monies or assets paid to the estate and all disbursements of any kind made by you, including dates of payments, amounts paid, who was paid, and the reason for each payment. If help is needed, we will be here to assist.

Although it is rare, the probate court may require that each item of disbursement shown on the accounting be substantiated by submission with the accounting of copies of cancelled checks, bills marked paid, or signed receipts. If this were to become necessary, much time, effort and expense could be incurred in preparing this accounting. If possible, all cash transactions should go through a separate estate checking account so that they can be accounted for. With these records, we can prepare the accounting for you.

Notwithstanding the above, our Probate Code provides for an early termination procedure for the estate in certain limited circumstances. In the proper case, it can save a substantial amount of hourly legal fees because it allows you to terminate the probate proceeding without the final closing papers. In other cases, it may reduce probate costs somewhat; although, the tax responsibilities and their related costs are not affected, so the overall savings are much less.

The procedure can only be used when the personal representative is also the sole devisee or the personal representatives are the sole devisees. In other words, the personal representative or representatives must be exactly the same as those who take under the Will. By filing for summary proceeding and an accounting with all creditors and devisees, no further papers need be filed and the estate is automatically terminated one

year later, subject to any challenges by heirs, devisees, creditors or other interested parties.

I hasten to add that this procedure is used somewhat sparingly. This is because you can often accomplish the same result and close the case more quickly by filing additional closing papers.

If the statute of limitations has not expired and if there are debts, the creditors can pursue them against the beneficiaries (devisees). To this extent, there is less finality but if the personal representative knows there is no reasonable probability of creditor problems, this procedure can be very helpful.

It should also be kept in mind that there is a special two year statute whereby creditors can go after and get paid from joint accounts. Also, under the new South Carolina Trust Code, which is a version of the Uniform Trust Code, assets in trusts that are revocable up to the date of death, can be liable for debts for up to one year. It can be longer if proper procedures are not followed.

You will also be responsible for filing a number of Federal and South Carolina tax returns of various kinds as follows:

1. If the gross estate exceeds \$5,000,000 including previous taxable gifts and death occurs after 2010 and prior to 2013, a Federal Estate Tax Return will be due nine months after the date of death. There are extensions of time available to file and pay if there are extenuating circumstances. The estate tax law is scheduled to sunset in 2013.

The term gross estate includes all property in which a decedent had an interest, undiminished by debts and estate administration expenses. It also includes such items as life insurance at its face value even though payable to you or a third party, as well as property owned as joint tenants with right of survivorship. With respect to property owned as joint tenants with right of survivorship, there is a 50% reduction for property owned jointly with a spouse. This definition is somewhat different from that of probate assets which means at times there will be assets which require no probate but which are reported for Estate Tax purposes and vice versa.

If the surviving spouse is not a United States Citizen, and the estate is above the limits mentioned above, additional measures may be necessary to reduce the taxes. If you are not a United State Citizen or your spouse was not, please let me know as soon as possible.

2. You will also be responsible for the final State and Federal Income Tax Returns for the year of the decedent's death. If for any reason help is needed, either your CPA or the decedent's CPA, if different, normally prepares the individual income tax returns.
3. If the estate receives more than \$600.00 of income during any year, then a Federal and a South Carolina Fiduciary Income Tax Return will be due

and must be filed for the estate either by your or by a CPA. Additionally, even if there is no such income, a return should be filed in an attempt to preserve a deduction on the beneficiary's or beneficiaries' own personal return as the residuary beneficiary for the expenses paid during the administration. Normally legal fees are not deductible on a beneficiary's (technically referred to as a devisee) personal return, however, if you properly document everything, they may be deductible against income of the estate, if any, but you must file the Fiduciary Income Tax Returns for the estate. These deductible expenses not only include attorney fees but Probate Court fees and the Personal Representative's commission, if any.

You are entitled by law to receive a commission. Generally speaking and as a rough calculation, the commission can be up to 5% of the estate property, exclusive of such items as land, sometimes jointly owned property, insurance payable to a third party, and assets held in trust. There is also an additional 5% of income earned by the estate. We can compute the commission and give you a better estimate of it if you wish. However, if you take the commission, it will be income to you when received and deducted from the estate's income. If you will receive all or most of the assets, free of taxes, then you may want to waive your commission. You are not required to take it. You should talk to your CPA about waving the commission.

If you intend to waive it, please let us know so that we can prepare the necessary papers. If you wait until late in the administration, the IRS can tax you on the commission even if you do not actually take it.

After all of the assets have been collected and the debts, taxes, and expenses are paid, you must then distribute the remaining assets to those persons entitled to receive them under the Will, called devisees. Certain distributions of estate assets can also have income tax consequences. In addition, for your protection, certain Receipt and Distribution Agreements and also Receipt and Releases need to be obtained from the devisees under the Will. For these reasons, we ask that you check with us prior to making any distributions of estate assets.

Another reason for consulting with us prior to making distributions is that we may need to file a proposed Schedule of Distribution with the probate court and prepare Deeds of Distribution for all the assets, as well as receipts for them. Normally the Schedule of Distribution and the Deeds of Distribution are prepared simultaneously with the Accounting and the Petition for Discharge and all of this will occur at or toward the end of administration.

It is not practically possible to complete the administration of an estate in less than ten months to a year, even with a very simple estate. Normally, an estate administration takes about one year, and if tax returns are involved which show substantial income or assets, it can take as long as three years. If there are disputes with tax authorities, it can take even longer. Consequently, you should not expect to complete the administration of the estate in less than twelve months.

The bulk of all work is performed in five (5) major phases, as follows:

1. Probating the Will and having the Personal Representative appointed.

2. Changing title to all Estate assets, paying debts, taxes and expenses and also making investment decisions, where necessary.
3. Preparing and filing the Inventory and Appraisement with the Probate Court.
4. Preparing and filing Estate and/or Income Tax Returns with Federal and State tax authorities.
5. Filing the Petition for Discharge, Accounting, Schedule of Distribution, Deeds of Distribution, making final distributions and obtaining Receipt and Releases and Receipt and Distribution Agreements.

Our current hourly fees for legal services are as follows: \$295.00 per hour for Michael J. Howell's time, \$170 per hour for Margaret R. Howell's time, and \$125.00 per hour for all non-attorney staff member time. Resumes for both Michael and Margaret can be found on our website at hiltonheadestateplanning.com.

In addition to our hourly fees, we also offer a percentage fee as outlined in our fee schedule. We also offer a fee match and a 5% reduction for published fee schedules from local law firms that employ a certified specialist in estate planning and probate law, or have comparable experience, training and education. See our representation/engagement letter for additional information and details.

By the time the Inventory is filed with the probate court, on average, 40%-55% of our work and your work will have been completed. By the time the estate tax returns are filed, on average, 66%-75% of our work and your work will have been completed. By the time the final accounting is filed, on average, 75%-95% of our work and your work will have been completed.

Although it is extremely hard to estimate, because each case is different, in over 95% of the estates which we handle on an hourly fee basis, the total legal fees are 1-3% of the gross value of the estate for estate tax purposes. However, the actual fee depends upon the amount of time it takes to complete the work. Much of the actual charge also depends upon the amount of cooperation and help from the Personal Representative and the other beneficiaries.

Our representation letter and accompanying fee schedule provide a good outline of when the amounts are more or less than estimated and the causes. You should also receive a copy of our representation letter. If not, please ask us for it and we will provide you with a copy. We must have this prior to filing any documents with a probate court or doing any work past the first office conference. You can also find a copy on our website.

We will also provide you with our short checklist. This is designed to determine the amount of work necessary. Unless or until we know that a probate administration is necessary, we do not open a probate estate; although, we have to file the Will with the probate court. If you have not already received the short checklist, please ask us and we will provide a copy to you. You can also find a copy of the short checklist on our website at hiltonheadestateplanning.com.

Once we decide that there is a probate administration, an estate tax return, or other unusual circumstances, we will provide you with a 20+ page checklist of duties and responsibilities. We like to go over this with you and it can take up to three hours. However, we have found that ultimately this meeting substantially contributes to a much smoother administration and that the converse is also true.

The responsibilities discussed above are the major ones. Please do not be annoyed or intimidated by the length of this letter. As mentioned earlier, it is simply designed to provide you with good background information. We will meet from time to time to help take care of the administrative details.

Although the above appears to be a lot of information and a lot of work, your work will be significantly reduced to the extent that there are assets owned as joint tenants with right of survivorship, held in trust, or handled by beneficiary designation. These types of ownership help facilitate the process of administration.

Although these assets are reported for estate tax purposes and on the probate court Inventory and Appraisal, they are not normally probate assets and do not require quite as much documentation. Therefore, please keep this in mind when you re-read this letter.

Please be aware that we represent the Personal Representative in their capacity as Personal Representative, only, and do not represent any of the beneficiaries, unless we previously represented them. We will also need a signed consent form to do any dual representation.

Throughout this process, please keep in mind that we are here to assist you. If you have any questions whatsoever, you should let us know.

Very truly yours,

Michael J. Howell
MJH/mh