

**ORPHANS' COURT JUDGES' ORIENTATION**  
**Judicial Institute Of Maryland**  
**February 26, 2015**

**1.0 Jurisdiction of the Orphans' Court**

**1.1 Limited Jurisdiction – History**

The constitutional provisions fail to describe the jurisdiction of the Orphans' Court except to state that such courts shall have the power of Orphans' Courts that existed at the time of the enactment of the Constitution. Thus, the constitutional underpinning of the Orphans' Court jurisdiction represented a codification of colonial practice. The jurisdiction (or more precisely, the limits on the jurisdiction) grew from the power granted to the Colonial Governor to probate matters according to "law, equity and good conscience." See Northrop and Schmuhl, *Descendants' Estates in Maryland*, § 2-1 (Michie 1994).

**1.2 Limited Jurisdiction – Statutory Framework**

Est. & Trusts Article § 2-102 sets forth the jurisdiction of the Orphans' Court:

"(a) *Powers.* The court may conduct judicial probate, direct the conduct of a personal representative, and pass orders which may be required in the course of the administration of an estate of a decedent. It may summon witnesses. The court may not, under pretext of incidental power or constructive authority, exercise any jurisdiction not expressly conferred."

To a large degree, the Maryland Constitution and statute begs the issue of the limitations on the jurisdiction. Indeed, one cannot determine the jurisdiction of the Orphans' Court without first knowing the scope of probate. Thus, it has been largely left to court decisions to articulate the jurisdiction of the Orphans' Courts.

**1.3 *Kaouris* – Jurisdiction to Construe Written Documents**

In 1991, the Court of Appeals addressed the issue of whether the Orphans' Court had the jurisdiction to interpret a marital settlement agreement. *Kaouris v. Kaouris*, 324 Md. 687, 598 A.2d 1193 (1991) is an appeal from the Orphans' Court for Worcester County (Judges Shockley, Bowden and Leister). The Court used that case to summarize jurisdictional issues in general as related to the Orphans' Court.

The facts in *Kaouris* are as follows: Mr. and Mrs. Kaouris entered into a marital settlement agreement that provided that the parties had agreed to live separate and apart and that they would (in consideration of other transfers of property) give up all rights to inherit from each other and any right or claim against the estate of the other. The parties, however, never divorced. When Mr. Kaouris died, the widow filed for her elective share and for the family allowance. The personal representative opposed these claims, asserting that the widow had waived her rights in the marital settlement agreement. The issue before the Orphans' Court was whether the marital property

agreement was an effective waiver of the widow's right to the spousal allowance and/or elective share.

The Orphans' Court ruled against the personal representative, concluding that "the agreement was void because the appellee and the decedent had never separated as the agreement contemplated." *Kaouris* at 713. The personal representative filed an appeal directly to the Court of Special Appeals, and the Court of Special Appeals certified the jurisdictional issues to the Court of Appeals.<sup>1</sup>

The basic issue in *Kaouris* was whether the Orphans' Court had jurisdiction to determine the validity of the marital settlement agreement, necessary to determine whether the widow had waived certain rights in the estate or whether her waiver in that agreement was ineffective because of a material breach of the agreement by the decedent. The Court of Appeals held that the Orphans' Court did have the right to make that determination.

The Court of Appeals held that the Orphans' Court has jurisdiction to construe a written document if the construction of the document is necessary in order for the Orphans' Court to carry out its express jurisdiction. Thus, the focus is not on the type of document examined but rather *why* the document is being examined:

"We therefore reiterate: whether the orphans' court has the power to construe a written document, be it a release, a will, or another instrument, *is* dependent on what the party is asking the court to do and whether, when the court construes that document, it does so consistent with, and in furtherance of, an express grant of power." *Kaouris* at 706.

Under this test, the Court of Appeals held that the Orphans Court was well within its rights to interpret whether the marital settlement agreement was an effective waiver of the elective share amount.

Interestingly, the Court of Appeals discussed and distinguished *Clarke v. Clarke*, 291 Md. 289, 435 A.2d 415 (1981), which upheld the trumping of the Orphans' Court jurisdiction by a Circuit Court in a will construction case. In *Clarke*, the will directed the personal representative to pay the debts and then gave Mr. & Mrs. Ignatius Clarke "permission to farm the land for a period of five (5) years, if they so desire." At the end of that period the farm was to be sold and divided equally among various persons. The Orphans' Court ordered the property sold to pay debts and administrative expenses and denied Ignatius Clarke's motion to cancel the sale. Ignatius Clarke then filed an action in the Circuit Court to enjoin the sale and have the court construe the will.

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<sup>1</sup> Appeals from the Orphans' Court may either go to the Circuit Court or to the Court of Special Appeals. Under Courts & Judicial Proceedings § 12-502, a party may appeal to the Circuit Court for the county from the final judgment of the Orphans' Court. The appeal is heard de novo by the Circuit Court (as if it were a new proceeding and as if there had never been a prior hearing or judgment by the Orphans' Court). The appeal to the Circuit Court, however, does not apply to Harford or Montgomery Counties. The appeal to the Court of Special Appeals is pursuant to Courts Article § 12-501 which states, in part: "[I]f the final judgment was given or made in a summary proceeding, and on the testimony of witnesses, an appeal is not allowed under this section unless the party desiring to appeal immediately gives notice of his intention to appeal and requests that the testimony be reduced to writing." As with appeals in general, it will only lie from a "final order."

As discussed in *Kaouris*, a "complexity test" was applied in *Clarke*:

"In *Clarke*, while generally recognizing the power of the orphans' court to construe wills incidental to administration and final distribution of a decedent's estate, we also acknowledged that there are instances in which construction of a will more appropriately should be done by the circuit court...Application of the *Clarke* complexity test does not resolve whether, when the circuit court exercises jurisdiction in a complicated construction matter, the orphans' court is divested of jurisdiction or is simply precluded from acting by virtue of the superior jurisdiction of the circuit court. Stated differently, does the determination that a construction matter is 'complicated' affect the orphans' court's *power* to resolve the issue or merely the *propriety* of its doing so? This issue was not directly addressed by *Clarke*. Nevertheless, we think it clear both from the circumstances and a fair reading of *Clarke*, that it affects only the propriety of the orphan's court acting." *Kaouris* at 706, 708.

In other words, the *Clarke* "complexity test" is not directed against the jurisdiction of the Orphans' Court but simply whether that jurisdiction should be exercised. This approach begs two questions: (1) to what degree does the circuit court have direct jurisdiction over probate issues when the Orphans' Court is involved – in other words, how would the Circuit Court reach into the proceeding and get jurisdiction, and (2) can the Orphans' Court by its own direction send something to the Circuit Court for interpretation if the Orphans' Court believes it is overly complex and that it would be inappropriate for the Orphans' Court to act? Generally, of course, the Circuit Court does not go looking for disputes. Instead, litigants bring the disputes to the Circuit Court by way of a complaint for injunctive relief as was the case in *Clarke*. If a litigant believes that the issue should be tried in the Circuit Court, there is a mechanism (framing of issues) to bring that issue before the Circuit Court. There does not appear to be, however, a mechanism for the Orphans' Court to remove an action for determination by the Circuit Court if the Orphans' Court so desires.

Because issues are limited to factual interpretations, to the extent the interpretation or construction of a document is a legal determination, it may not be sent to the Circuit Court on that basis. Most legal questions, however, involve an interpretation of fact – the intent of the testator or drafter, for example, for a will. Earlier cases holding that the Orphans' Court could not construe a will based these decisions, in part, on the conclusion that interpretation is a matter of law that can only be determined by a court of equity. See *Myers v. Hart*, 248 Md. 443 (1968). *Kaouris* has "explained" these earlier decisions and shifted the emphasis away from a blanket prohibition against interpretation of documents to a determination that an interpretation of a document is appropriate if it is ancillary to the Orphans' Court primary jurisdictional functions. Given *Kaouris*, it would seem that the issue of a testator's intent may now be a factual matter that could be subject of the framing of an issue for transmittal.

#### **1.4 Declaratory Judgments**

An interested person may circumvent the Orphans' Court jurisdiction to interpret wills by seeking a declaratory judgment in the Circuit Court. *Shipley v. Matlock*, 130 Md. App. 459, 776 A.2d 74 (2001); *Click v. Click*, 204 Md. App. 349, 40 A.3d 1105 (2012); Courts and Judicial Procedures §§ 3-401 – 3-415 (the Maryland Uniform Declaratory Judgment Act).

## 1.5 Concurrent Jurisdiction Over Guardianships

Est. & Trusts § 13-105(a) grants the Orphans' Court concurrent jurisdiction for guardianships of the person and property of a minor. The Court of Appeals applied the *Kaouris* limitation so that the guardianship must be incidental to a probate case. *In re Adoption/Guardianship of Tracy K*, 434 Md. 198, 73 A.3d 1102 (2013). Also, the law was changed in 2009 to provide that the Orphans' Court has guardianship jurisdiction if its presiding judge is a lawyer and the Orphans' Court may transfer the guardianship to the Circuit Court. Est. & Trusts § 13-015(c)(1)&(2).

## 1.6 *Radcliff v. Vince: The Power to do What Necessary*

The idea that the Orphans' Court has the power to do those things necessary to implement its primary jurisdiction was also addressed in *Radcliff v. Vance*, 360 Md. 277 (2000). In that case, the Orphans' Court had erroneously ordered a personal representative to pay, without notice to interested parties, a claim that would have benefited the personal representative. The Orphans' Court was held to have acted in its jurisdiction when it later ordered the claimant to refund the money to the estate. The Court of Appeals held: "The power of the Orphans' Court exercised in this case is comparable to an equity court's power to order restitution in similar situations. Where a litigant has been deprived of property by order of a court, and the court is subsequently reversed, the equity court may order restitution."

## 1.7 Issues

Estates & Trusts Article § 2-105 provides: "In a controversy in the [orphans'] court, an issue of fact may be determined by the court", and, "[a]t the request of an interested person made within the time determined by the court, the issue of fact may be determined by a court of law. When the request is made before the court has determined the issue of fact, the court shall transmit the issue to a court of law." This has been held to apply only to questions of fact and not of law. *Nugent v. Wright*, 277 Md. 615 (1976). Indeed, there should be only one issue framed for each question of fact. *Id.*

Maryland Rule 6-434 provides:

"In any proceeding, the orphans' court, upon petition, may transmit contested issues of fact within its jurisdiction for trial to the circuit court of the county in which the orphans' court is located. The petition shall set forth separately each issue to be transmitted. Each issue shall present a single, definite, and material question of fact."

Although usually seen in caveat proceedings, transmittal of issues may be requested by petition in any matter. It is necessary, however, that issues of fact and not issues of law are framed. *Nugent v. Wright*, 277 Md. 615 (1976). Issues related to law, of course, are the subject of appeals, not of shifting to another court. Once there is an issue transmitted to the Circuit Court, a jury trial can be prayed – traditionally one of the reasons for the transmittal of issues.

After issues have been transmitted, the Orphans' Court, upon petition, can modify the framed issues, but only with leave of the circuit court if within 15 days of the trial date. The

Orphans' Court's functions are suspended until the verdict from the trial court. *Hill v. Lewis*, 21 Md. App. 121 (1974); *Forsythe v. Baker*, 180 Md. 144 (1941). The fact that an issue is in the law court does not affect the jurisdiction of the Orphans' Court. 62 Op. Atty Gen'l 900 (1977). The transmittal of issues should not operate to stay any proceedings in the Orphans' Court that could carry forward as long a litigant's rights are not jeopardized, depending on the determination of fact by the Circuit Court.

## **1.8 Proceedings in Multiple Courts**

Given the ability of litigants to appeal cases and the ability to have issues framed and transmitted to the Circuit Court, a question remains whether the proceedings in the Orphans' Court are in limbo until the other courts deal with the appealed and/or transmitted issues.

In the case of the transmitting of issues, it would seem clear that only those issues are sent to the Circuit Court for determination. The Orphans' Court does not have any interruption of its fundamental jurisdiction and it continues to oversee probate.

On an appeal from an Orphans' Court decision, there is an automatic stay of the proceedings in the orphans' court concerning the issue appealed. The stay, however, only covers the issue appealed. Indeed, Courts Article § 12-701(a)(2) provides: "[a]n appeal from an orphans' court or circuit court does not stay any proceedings in the orphans' court that do not concern the issue appealed, if the orphans' court can provide for conforming to the decision of the appellate court." It is established Maryland law that the appeal only stays such proceedings as are thereby affected and which could not be consistently carried on until the determination of the appeal. *Jones v. Jones*, 41 Md. 354 (1875). On an appeal of the removal of a personal representative, the removal is stayed according to the statute. The personal representative, however, is held to have only the powers of a special administrator during the appeal.

## **2.0 Appointment of Personal Representative**

### **2.1 The Statute:**

#### **"§ 5-104. Order of rights to letters**

In granting letters in administrative or judicial probate, or in appointing a successor personal representative, or a special administrator as provided in Title 6, Subtitle 4 of this article, the court and register shall observe the following order of priority, with any person in any one of the following paragraphs considered as a class:

- (1) The personal representatives named in a will admitted to probate;
- (2) The personal representatives nominated in accordance with a power conferred in a will admitted to probate;
- (3) The surviving spouse and children of an intestate decedent, or the surviving spouse of a testate decedent;
- (4) The residuary legatees;
- (5) The children of a testate decedent who are entitled to share in the estate;
- (6) The grandchildren of the decedent who are entitled to share in the estate;
- (7) Subject to §§ 3-111 and 3-112 of this article, the parents of the decedent who are entitled to share in the estate;

- (8) The brothers and sisters of the decedent who are entitled to share in the estate;
- (9) Other relations of the decedent who apply for administration;
- (10) The largest creditor of the decedent who applies for administration;
- (11) Any other person having a pecuniary interest in the proper administration of the estate of the decedent who applies for administration; or
- (12) Any other person."

**"§ 5-105. Restrictions on right to letters**

- (a) "Serious crime" defined. –
  - (1) In this section, "serious crime" means a crime that reflects adversely on an individual's honesty, trustworthiness, or fitness to perform the duties of a personal representative.
  - (2) "Serious crime" includes fraud, extortion, embezzlement, forgery, perjury, and theft.
- (b) In general. -- Subject to § 5-104 of this subtitle, the register or court may grant letters to:
  - (1) A trust company;
  - (2) Any other corporation authorized by law to be a personal representative; or
  - (3) Subject to subsection (c) of this section, any individual.
- (c) Persons excluded. -- Letters may not be granted to a person who, at the time a determination of priority is made, has filed with the register a declaration in writing that the person renounces the right to administer or is:
  - (1) Under the age of 18 years;
  - (2) Mentally incompetent;
  - (3) Convicted of a serious crime, unless the person shows good cause for the granting of letters;
  - (4) Not a citizen of the United States unless the person is a permanent resident of the United States and is:
    - (i) The spouse of the decedent;
    - (ii) An ancestor of the decedent;
    - (iii) A descendant of the decedent; or
    - (iv) A sibling of the decedent;
  - (5) A full-time judge of a court established under the laws of Maryland or the United States including, a judge of an orphans' or probate court, or a clerk of court, or a register, unless the person is the surviving spouse or is related to the decedent within the third degree; or
  - (6) A nonresident of the State, unless there shall be on file with the register an irrevocable designation by the nonresident of an appropriate person who resides in the State on whom service of process may be made in the same manner and with the effect as if it were served personally in the State on the nonresident."

**2.2 Select Issues Concerning Appointment**

The statutory order to the right to letters is stated in mandatory terms ("... the court and register shall ..."). From time to time, the Section Council of the Maryland State Bar Association has recommended changing this to non-mandatory. (The so-called "Grace Connelly Bill" after the Register of Wills/Orphans' Court Judge in Baltimore County). Such a change would permit the

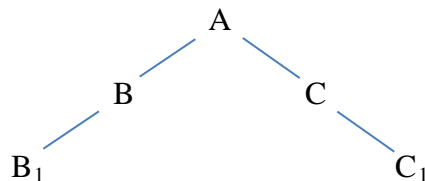
Orphans' Court to appoint out of order when it appears that a strict application of the statutory order would be imprudent. This proposed legislation has never been enacted. See, however, *Preston Phillips v. Lynn Krause, personal representative* (Md. Ct. Spc. Appeals, May 20, 2002) (unreported) (If the Court has reason to remove a person as personal representative it can not appoint the person in the first place.")

Section 5-104 characterizes each person in each category of priority as a "class." The Court of Appeals has held that the Orphans' Court, within its sound discretion, may appoint one member of an equally entitled class to the exclusion of others in the same class. *Kuene v. Loffler*, 266 Md. 468, 295 A.2d 219 (1972) (one sister appointed with a second sister petitioning to become a joint personal representative. The second sister's petition was denied.) Est. & Trusts § 5-106, however, states that all personal representatives named in the will are entitled to probate.

Est. & Trusts § 5-104(2) effectively elevates a personal representative named "in accordance with a power conferred in a will" to be treated as named by the testator. An example of this would be when a personal representative has the authority in the will to name his or her successor. Such a nominated personal representative is treated as if named in the will for § 5-106 purposes.

A guardian of a person entitled to serve as personal representative cannot serve in their stead. *Courtney v. Lawson*, 97 Md. App. 471, 631 A.2d 102 (1993) (mother of minor child of decedent not entitled to letters).

Est. & Trusts § 5-105 lists persons not qualified to be appointed personal representative. This includes persons convicted of a "serious crime." Serious crime is a defined term meaning a crime that "reflects adversely" on that person's trustworthiness. Non-citizens of the United States are not qualified unless such a person is "a permanent resident" and related to the decedent. Judges are disqualified except for estates of spouses or of persons related with in the third degree:



"C" is related in the third degree to "B<sub>1</sub>". Non-residents may serve as personal representatives only if a resident agent is on file.

### **3.0 Administrative Probate**

#### **3.1 The Statute:**

##### **"§ 5-301. Nature of proceeding**

Administrative probate is a proceeding instituted by the filing of a petition for probate by an interested person before the register for the probate of a will or a determination of the intestacy of the decedent, and for the appointment of a personal representative. Subject to the provisions of § 5-402 of this title, the proceeding may be conducted without prior notice, and is final, to the extent provided in § 5-304 of this subtitle, subject to the right of an interested person to

require judicial probate as provided in Subtitle 4 of this title."

**"§ 5-304. Finality of action in administrative probate**

(a) In general. -- Unless a timely request for judicial probate has been filed pursuant to subsection (b) of this section, or unless a request has been filed pursuant to § 5-402 of this title within six months of administrative probate, any action taken after administrative probate shall be final and binding as to all interested persons. Except as provided in subsection (b) of this section, a defect in a petition or proceeding relating to administrative probate shall not affect the probate or the grant of letters.

(b) Exceptions. -- An administrative probate may be set aside and a proceeding for judicial probate instituted if, following a request by an interested person within 18 months of the death of decedent, the court finds that:

(1) The proponent of a later offered will, in spite of the exercise of reasonable diligence in efforts to locate any will, was actually unaware of the existence of a will at the time of the prior probate;

(2) The notice provided in § 2-210 of this article was not given to such interested person nor did he have actual notice of the petition for probate; or

(3) There was fraud, material mistake, or substantial irregularity in the prior probate proceeding."

**3.2 General Principles of Administrative Probate**

Administrative probate is conducted under the supervision of the Register of Wills and requires no formal court hearings. Generally it is based on the statements in the petition for probate.

Judicial probate, on the other hand, is within the exclusive jurisdiction of the Orphans' Court, requires notice and a formal hearing (see below).

**3.3 Finality of Administrative Probate**

As noted, Est. & Trusts § 5-304 makes any action conducted in administrative probate "final and binding" except under certain defined circumstances. One such circumstance is if there is an "irregularity in the prior probate proceeding," in which case judicial probate case be triggered.

The failure to give a statutory "interested person" notice of an action is an "irregularity." In *Radcliff v. Vance*, 360 Md. 277 (2000) (see section 1.6 of these materials, above), the Court held that failure to give an interested person the statutory notice is an irregularity for the purpose of finality. [*Radcliff* involved notice under Est. & Trusts § 7-502, proposed payment to an attorney.] The notice, however, must be to the "interested person" as defined by Est. & Trusts § 1-101(i). Thus, when a trust is the legatee, the trustees not the trust beneficiaries are the statutory interested persons. The beneficiaries, however, may under the common law object to an accounting but they are not included under the statutory definition and therefore not entitled to notice. *Vito ex rel. Vito v. Klausmeyer*, 216 Md. App. 376 (2014).

**4.0 Judicial Probate**

**4.1 The Statute:**



### **"§ 5-401. Nature of proceeding**

Judicial probate is a proceeding instituted by the filing of a petition for probate by an interested person, or creditor, with the court for the probate of a will or a determination of the intestacy of the decedent, and for the appointment of a personal representative. The proceeding is conducted after notice as provided in § 5-403 of this subtitle, and is final except as provided in § 5-406 of this subtitle. If no petition is filed within a reasonable time the register may file it with the approval of the court."

### **"§ 5-402. When mandatory**

A proceeding for judicial probate shall be instituted at any time before administrative probate or within the period after administrative probate provided by § 5-304 of this title.

- (a) At the request of an interested person;
- (b) By a creditor in the event that there has been no administrative probate;
- (c) If it appears to the court or the register that the petition for administrative probate is materially incomplete or incorrect in any respect;
- (d) If the will has been torn, mutilated, burned in part, or marked in a way as to make a significant change in the meaning of the will;
- (e) If it is alleged that a will is lost or destroyed."

## **4.2 Triggering Judicial Probate**

Judicial probate can be triggered by the Register if the petition for probate is materially incomplete or incorrect in any respect. It is also triggered if the will is torn, mutilated or marked up in a way to significantly change the meaning of the will.

It is also triggered by the right of an interested person. Interested person is a defined term: "The Estates & Trusts Article imposes limits on who has standing to file a petition for judicial probate: only "interested persons" and creditors may file such a petition. ET § 5-402. An "interested person" is defined by ET § 1-101(i) as:

- (1) A person named as executor in a will;
- (2) A person serving as personal representative after judicial or administrative probate;
- (3) A legatee is being, not fully paid, whether his interest is vested or contingent;
- (4) An heir even if the decedent dies testate, except that an heir of a testate decedent ceases to be an "interested person" when the register has given notice pursuant to § 2-210 or § 5-403(a).

And a "legatee" is defined as "a person who under the terms of a will would receive a legacy," ET § 1-101(m), that is, "any property disposed of by will." ET § 101(l). An heir, on the other hand, is defined as "a person entitled to property of an intestate decedent." ET § 1-101(h)."

*McIntyre v. Smyth*, 159 Md. App. 19, 30, 857 A.2d 1235, 1241 (2004).

In *McIntyre*, children of a decedent filed for judicial probate. The will was accepted for probate which poured most assets to a trust. The children did not caveat the will. Thus, they were no longer interested persons as "heirs."

In *McIntyre*, however, the children were left tangible personal property. The estate claimed there was no such property because the decedent had given the property to her children before her death. If this was true, of course, then the children would not be interested persons. The issue was held by the appellate court to be a question of fact so it reversed the lower court's summary judgment for the estate. The court observed, however, if on remand the Orphans' Court found that the children's legacies were, in fact, adeemed then they had no right to demand judicial probate.

As noted above, persons such as trust beneficiaries as a real party or interest may also challenge administrative proceedings. (See Section 3.3 of these materials.)

Est. & Trusts § 5-207(b) holds that the filing of a petition for caveat has the effect of a request for judicial probate.

## **5.0 Personal Representative: Duties Generally**

### **5.1 The Statute:**

#### **"§ 7-101. Duties of personal representative generally**

(a) Fiduciary responsibility. -- A personal representative is a fiduciary. He is under a general duty to settle and distribute the estate of the decedent in accordance with the terms of the will and the estates of decedents law as expeditiously and with as little sacrifice of value as is reasonable under the circumstances. He shall use the authority conferred upon him by the estates of decedents law, by the terms of the will, by orders in proceedings to which he is party, and by the equitable principles generally applicable to fiduciaries, fairly considering the interests of all interested persons and creditors.

(b) Time for distribution. -- Unless the time of distribution is extended by order of court for good cause shown, the personal representative shall distribute all the assets of the estate of which he has taken possession or control within the time provided in § 7-305 of this title for rendering his first account.

(c) Exoneration for certain payments. -- The personal representative does not incur any personal liability by his payment of claims or distribution of assets even if he does not consider claims for injuries to the person prosecuted under the provisions of § 8-103(e) or § 8-104 of this article, if at the time of payment or distribution:

- (1) He had no actual knowledge of the claim; and
- (2) The plaintiff had not filed on time his claim with the register."

#### **"§ 7-102. Possession and control of estate**

A personal representative has a right to and shall take possession or control of the estate of the decedent, except that property in the possession of the person presumptively entitled to it as heir or legatee shall be possessed by the personal representative only when reasonably necessary for purposes of administration. The request by a personal representative for delivery of property possessed by the heir or legatee is conclusive evidence, in an action against the heir or legatee for possession, that the possession of the property by the personal representative is

reasonably necessary for purposes of administration. The personal representative may maintain an action to recover possession of property or to determine its title."

## **5.2 Introduction – Duties of Personal Representatives**

The Personal Representative of an estate has certain responsibilities and obligations that are set by statute and case law. According to the Annotated Code of Maryland, Est. & Trusts Article, § 7-101, a Personal Representative is a "fiduciary." "He is under a general duty to settle and distribute the estate of the decedent in accordance with the terms of the will and the estates of decedents' law as expeditiously and with as little sacrifice of value as is reasonable under the circumstances."

Each estate is quite unique and consequently requires individualized attention. Nevertheless, the administration of an estate follows a logical progression of gathering assets, paying debts, and following the dictates of the will (or, in the absence of a will, the dictates of the intestacy statute).

The purpose of this discussion, however, is not to set forth the specific tasks of a personal representative. Instead, this discussion will focus on the nature of the fiduciary obligation of the personal representative.

In general, the Personal Representative has a duty to settle and distribute the estate in accordance with the terms of the will or in accordance with the laws of descendants as expeditiously and with as little sacrifice of the value as is reasonable under the circumstances. In order to accomplish this task, the Personal Representative takes possession and control of the estate. The Personal Representative has a duty to notify the heirs and legatees and to prepare and file an inventory of the estate. The Personal Representative must arrange for appraisals of all of the property of the estate in order to pay the inheritance tax to the state and any estate tax due the federal government. The Personal Representative has a duty to account for the management of the estate to the Orphans' Court and to the heirs. The Personal Representative may be held liable by the creditors of the estate, the heirs of the estate, or by any other taxing authorities if the Personal Representative fails to properly execute the duties of his or her office.

## **5.3 The Duty of Loyalty**

One fundamental duty of a Personal Representative is that of loyalty. According to Est. & Trusts Article § 7-101, this duty is to "all interested persons and creditors" of the estate. Every action that a Personal Representative takes must take into account the impact that class of beneficiaries and/or creditors.

A Personal Representative should never place him/herself in a position that may favor the Personal Representative's interest over the interest of the beneficiaries and/or creditors. The Personal Representative must consistently avoid conflicts of interests. Aside from a reasonable fee for services, a Personal Representative must not derive any personal advantage from, or realize a profit in, dealing with the estate.

## **5.4 The Duty of Prudence**

The Personal Representative has a duty to exercise care, diligence, and prudence in dealing with the estate's property. The Personal Representative's conduct will be considered reasonable if he or she acts as a "prudent person" would act. The "prudent person" theory means that the Personal Representative must act with the care and skill that a prudent person would exercise in his or her own affairs.

## **5.5 Preserving the Assets**

The Personal Representative is under a duty to preserve and protect the assets of the estate. This includes such assets as real estate held by the estate, household furniture, furnishings, and collectibles. The Personal Representative is under a duty to provide adequate security and protection for these and other items. It is important that the decedent's insurance agent be contacted and that the Personal Representative review all of the insurance coverage for assets belonging to the estate.

## **5.6 Conduct in Investing**

With regard to investing, the Personal Representative's first duty is to protect capital and avoid undue risk. The Personal Representative is also under a duty to use reasonable care and skill to make property productive, within the guidelines of the will and of state law restrictions. If the Personal Representative invests estate assets in speculative ventures, he or she is risking personal liability in the event that a loss is sustained, unless that investment is authorized specifically by the terms of the will. The bottom line is that a Personal Representative must exercise prudence, discretion, and intelligence to safeguard the estate's principal, but at the same time generate as much income as is reasonably possible.

Fortunately, it is the conduct of the Personal Representative, rather than the investment performance, that is judged by the courts. The Personal Representative will be personally liable only when losses result from his or her imprudent conduct, rather than because investment performance has not been as good as possible. The Personal Representative may retain non-income-producing-assets, but only if the will specifically authorizes him or her to hold those assets (or if there is some overriding reason for keeping them).

Maryland law (Est. & Trusts Article § 15-106) provides a list of "lawful investments." This is a list in the statute of various investments, generally an investment guaranteed by the federal or state government or an agency of the federal or state government. The statute establishes guidelines but does not insure protection for the Personal Representative. Reasonable care must still be exercised in selecting securities by the Personal Representative. The fact that there is a statute providing certain "lawful investments" does not mean that any other investment is unlawful in any sense. The duty to use reasonable care and skill in selecting investments is the fundamental test in reviewing a Personal Representative's activity.

The Personal Representative must be more concerned with the safety of the principal than with enormous profits. Diversification is the key to safety in this area. Even with special language in the will relieving the Personal Representative of the obligation of diversifying assets, we suggest that the Personal Representative maintain records showing why he or she did not diversify. Again, the key in this area is the use of reasonable care in managing investments.

Est. & Trusts Article § 15-114 establishes guidelines and standards for the investment of assets. This provision, by its terms, only applies to trust companies or persons who made an election to be governed by this Section. Generally, § 15-114 permits the portfolio as a whole to be reviewed rather than focusing on an examination on an asset by asset basis. Additionally, the guidelines set forth considerations the fiduciary may take into account when making an investment decision, including: the general economic conditions, the possible effect of inflation, the expected tax consequences of a decision, the role each investment plays in the portfolio as a whole, the expected total return of the investments, the reasonableness of any costs associated with an investment, and the status of the related assets of beneficiaries. Although arguably Maryland law already dictates a "whole portfolio" approach to fiduciary investments, we recommend following these guidelines.

### **5.7 Maintaining Accurate Records**

Maintaining accurate records is another important duty. The Personal Representative must account periodically to the beneficiaries. Keeping beneficiaries informed is an extremely good way to avoid litigation and maintaining accurate records greatly reduces the possibility of having a successful suit against a Personal Representative. In addition, accurate records ease the task of rendering the formal account to the Orphans' Court and/or Register of Wills. If accurate records are not maintained, the preparation of various accounting can become a nightmare.

### **5.8 Duty Not to Delegate**

Personal Representatives may not delegate his or her fiduciary responsibility. This duty "not to delegate" is derived from the nature of the position as Personal Representative. Obviously, a Personal Representative is entitled to employ counsel, accountants, and others to help in the tasks. The Personal Representative, however, has a duty to carefully monitor all work and, of course, "signs off" on every task.

In the case of several Personal Representatives, each Personal Representative is under a duty to the beneficiaries to participate in the administration of the estate and to use reasonable care to prevent other Personal Representatives from breaching the fiduciary responsibilities.

### **5.9 Timeliness**

If you are going to make any investment changes, timeliness is the key. This means that the Personal Representative must implement his or her plan as quickly as possible after prudent decisions have been made.

An astonishing number of lawsuits involve a Personal Representative's failure to file tax returns in a timely manner. Unless the Personal Representative has reasonable cause for not complying with the time requirement, he or she will be held personally liable for interest and possibly penalty charges resulting from taxes paid late or not paid.

### **5.10 Powers of a Personal Representative**

In order to properly administer an estate, the Personal Representative must be given the power to perform his or her duties. In many instances the will enumerates a broad range of powers

given to the Personal Representative. In the absence of certain powers delegated by the will, State law enumerates a long list of powers that the Personal Representative may exercise in carrying out his or her duties. (The statutory powers may also be in addition to any power authorized by a will, unless such powers are limited by the will). The statutory powers include the power to hold assets, receive assets from other sources, deposit funds in estate accounts, pay or settle any claims with a creditor of the estate, pay the funeral expenses, pay taxes, insure property, pay off debt, continue to operate an unincorporated business venture that the decedent was engaged in at the time of his or her death, perform the contracts of the decedent, exercise options on life insurance policies, employ attorneys and other specialists, prosecute or defend litigation, and make partial and final distributions.

## **6.0 Special Administrator**

### **6.1 The Statute:**

#### **"§ 6-401. Appointment; qualifications**

(a) When appointed. -- Upon the filing of a petition by an interested party, a creditor, or the register, or upon the motion of the court, a special administrator may be appointed by the court whenever it is necessary to protect property prior to the appointment and qualification of a personal representative or upon the termination of appointment of a personal representative and prior to the appointment of a successor personal representative.

(b) Qualifications. -- A suitable person may be appointed as a special administrator, but special consideration shall be given to persons who will or may be ultimately entitled to letters as personal representatives and are immediately available for appointment."

#### **"§ 6-403. Powers and duties**

A special administrator shall collect, manage, and preserve property and account to the personal representative upon his appointment. A special administrator shall assume all duties unperformed by a personal representative imposed under Title 7, Subtitles 2, 3, and 5 of this article, and has all powers necessary to collect, manage, and preserve property. In addition, a special administrator has the other powers designated from time to time by court order."

### **6.2 Special Administrator – in general.**

Basically, a special administrator is used "to protect the property" until other issues can be resolved. Thus, the special administrator's powers do not include distributions unless specifically authorized by a court order.

## **7.0 Fees and Commissions**

### **7.1 The Statute:**

#### **"§ 7-601. Compensation of personal representative and special administrator**

(a) Right to compensation. -- A personal representative or special administrator is entitled to reasonable compensation for services. If a will provides a stated compensation for the personal representative, additional compensation shall be allowed if the provision is insufficient in

the judgment of the court. The personal representative or special administrator may renounce at any time all or a part of the right to compensation.

(b) Computation of compensation. -- Unless the will provides a larger measure of compensation, upon petition filed in reasonable detail by the personal representative or special administrator the court may allow the commissions it considers appropriate. The commissions may not exceed those computed in accordance with the table in this subsection.

| If the property subject to administration is: | The commission may not exceed:                     |
|---|--|
| Not over \$ 20,000.....                       | 9%   |
| Over \$ 20,000.....                           | \$ 1,800 plus 3.6% of the<br>excess over \$ 20,000 |

(c) Appeal. -- Within 30 days a personal representative, special administrator, or unsuccessful exceptant may appeal the allowance to the circuit court, which shall determine the adequacy of the commissions and increase, but not in excess of the above schedule, or decrease them.

(d) Commission on sale of real property. -- If the personal representative retains the services of a licensed real estate broker to aid in the sale of real property, the commissions paid to the real estate broker are an expense of administration and may not be deducted from the commissions allowed by the court to the personal representative in accordance with subsection (a) of this section."

**"§ 7-602. Compensation for services of an attorney**

(a) In general. -- An attorney is entitled to reasonable compensation for legal services rendered by him to the estate and/or the personal representative.

(b) Petition. -- Upon the filing of a petition in reasonable detail by the personal representative or the attorney, the court may allow a counsel fee to an attorney employed by the personal representative for legal services. The compensation shall be fair and reasonable in the light of all the circumstances to be considered in fixing the fee of an attorney.

(c) Considered with commissions. -- If the court shall allow a counsel fee to one or more attorneys, it shall take into consideration in making its determination, what would be a fair and reasonable total charge for the cost of administering the estate under this article, and it shall not allow aggregate compensation in excess of that figure."

**"§ 7-603. Expense of estate litigation**

When a personal representative or person nominated as personal representative defends or prosecutes a proceeding in good faith and with just cause, he shall be entitled to receive his necessary expenses and disbursements from the estate regardless of the outcome of the proceeding."

**7.2 Personal Representative's Commissions.**

Est. & Trusts § 7-601 sets out certain rules governing personal representative's commissions: (1) commissions set out in a will shall govern unless too low, (2) a personal

representative is entitled to "reasonable compensation for services", (3) upon a petition "in reasonable detail" the court may allow commission it considers appropriate but not to exceed certain statutory limit (the "9 + 3.6" provision).

These commissions are to be divided among joint personal representatives and/or successive personal representatives and special administrators. *St. Mary's Female Orphan Asylum of Baltimore v. Hankey*, 137 Md. 569 (1921). This division of commissions, at least as between co-personal representatives, seems to be held equal regardless of the allocation of work. *Hohman v. Orem*, 169 Md. 634 (1936); *Crothers v. Crothers*, 123 Md. 603 (1914); *Richardson's Adm'x v. Stansbury*, 4 H.&J. 275 (1817). See, also, *Cearfoss v. Snyder*, 182 Md. 565 (1943) (equal shares even when one joint personal representative did all of the work). These are old cases, however, and the statutory authority to allow commissions as the court "considered appropriate" may give it latitude in apportionment.

### **7.3 Relationship of Attorney's Fees to Commissions**

There is a direct relationship between attorney's fees and personal representative's commission for those fees an attorney charges for normal administrative tasks. Est. & Trusts § 7-602 provides that an attorney is entitled to reasonable compensation but such fees along with the commissions should not exceed the aggregate compensation under Est. & Trusts § 7-601.

There are important limitations on the interplay of these two sections. Attorney fees that represent charges for necessary services not encompassed in the normal administrative tasks are not included in the calculation. Thus, attorney compensation for tax filings (final 1040, fiduciary income tax returns and estate tax returns) are seen as additional services if stated separately. *Riddleberger v. Goellen*, 263 Md. 44 (1971) (distinguishing between "routine" matters and "extraordinary" matters such as the work required associated with tax filings). *Riddleberger* makes clear that the Orphans' Court is not determining whether a lawyer's fee is appropriate just how much can be a charge against the estate: "The laborer is worthy of his hire. By this opinion we are not to be understood as in any way setting the total compensation to which the attorney may be entitled."

Aside from the "routine ministerial" vs. "extraordinary" distinction, Est. & Trusts § 7-603 entitles the personal representative to receive his or her attorney fees from the estate whenever he or she defends or prosecutes a proceeding "in good faith." The good faith test is not whether he or she wins the suit. See *Piper Rudnick LLP v. Hartz*, 386 Md. 201 (2008) (the personal representative was entitled to attorney fees and costs to defend his removal, including an appeal to the circuit court).

### **7.4 Payment of Attorney's Fees**

Generally, attorney's fees should not be paid from the estate without prior court approval. *Beyers v. Morgan State University*, 139 Md. App. 609 (2001), off'd, 369 Md. 335 (2002); *Attorney Grievance Comm'n v. Owrutsky*, 322 Md. 334 (1991).

### **7.5 Consent to Compensation to Personal Representative or Attorney**

Court approval may be avoided if all interested persons consent and the combined commissions and fees do not exceed the limits in Est. & Trusts § 7-601. Est. & Trusts § 7-604.



Once a consent is entered, the amount is listed as the payment of an expense.

Consents do not govern amounts in excess of Est. & Trusts § 7-601 (to pay an attorney for extraordinary services, for example) or for litigation expenses.