

# **Orphans' Court Judges' Orientation**

**Judicial Institute of Maryland  
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The Law of Estates and Trusts  
Planning · Administration · Litigation

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Jack served on the law review at Washington and Lee University and was a Burks Scholar Writing Fellow. He served as a law clerk with the Honorable Pamela White in the Circuit Court for Baltimore City. He is a member of various local and national bar associations.



### Publications

Lawyers of the firm have published articles on tax and other topics related to their professional interests, including: *"Medicaid Planning for Maryland Family Lawyers,"* MARYLAND BAR JOURNAL, Vol. 49, No. 2 March/April 2016 (Co-Author with Phyllis J. Erlich); *"Self-Settled Asset Protection Trusts for Married Couples in Maryland,"* Steve Leimberg's Asset Protection Planning Newsletter (April 2015); *"The Terms of the Trust: Extrinsic Evidence of Settlor Intent"* ACTEC JOURNAL, Spring 2014 (Co-author with Anna Katherine Moody); *"Benevolent Benefactors Be Aware: Changes in Medicaid Policy Result in Fairer Treatment of Gifts,"* MARYLAND BAR JOURNAL, Vol. 47, No. 3, May/June 2014 (Co-author with Laurie S. Frank); *"Is this the Death of Ahlborn? The Self-Defeating Expansion of States, Authority to Seek Reimbursement Under the Medicaid Secondary Payer Act,"* NAELA NEWS, February/March 2014 (Co-author with Jason A. Frank). *Resisting the Contractarian Insurgency: The Uniform Trust Code, Fiduciary Duty, and Good Faith in Contract,* ACTEC JOURNAL, Winter 2010; *"Asset Protection and Tenancy by the Entirety,"* ACTEC JOURNAL, Spring 2009; *"Perfect Ambiguity: The Role of the Attorney in Maryland Guardianships,"* MARYLAND JOURNAL OF CONTEMPORARY LEGAL ISSUES, 1996.

### Lectures/Course Presentations

Lawyers of the firm participated as lecturers in various continuing education programs for lawyers, including: *"Succession Planning: Not Just for Senior Lawyers"* (MSBA 2018); *"A Survey of the Common Types of Fiduciary Litigation"* (University of Baltimore Law Forum 2018 Symposium); *"Estate Planning for Federal Employees"* (U.S. Census Bureau 2018); *"Deadman Statute and Hearsay Issues and Objections for Orphans' Court Judges"* (Judicial College of Maryland 2018); *"Elder Financial Abuse: 2018 Update"* (MSBA 2018); *"Pesky and Persistent Evidentiary Issues in Estate & Trust Litigation"* (MSBA 2018); *"Contested Guardianships"* (NAELA Maryland-DC Chapter 2017); *"Transmittal of Issues from Orphans' Court to Circuit Court"* (Judicial College of Maryland 2016); *"ABA Section of Real Property, Trust & Estate Law Domestic Asset Protection Trust Planning: Jurisdiction Selection Series"* (eCLE, ABA 2015); *"Document Drafting for the Elder Law*

*Practitioner"* (MSBA 2015); *"Orphans' Court Judges' Orientation,"* (Judicial Institute of Maryland 2015); *"Maryland Trust Act,"* (MSBA 2014); *"Heirs, Legatees and Related Issues,"* (Judicial Institute of Maryland 2013); *"Estate/Tax Implications of DOMA after the Windsor Case"* (MSBA 2013); *"Asset Protection, An Overview for Maryland Estate and Trust Lawyers,"* (MSBA 2013); *A Beneficiary's Right to Information,"* (MSBA 2012); *"Trust Litigation: The Enforcement of Beneficiary Rights,"* (MSBA 2011); *"Asset Protection: An Overview for Maryland Estate and Trust Lawyers,"* (MSBA 2010); *"Back to the Future, Schoukroun and the Spousal Election,"* Hot Topics in Elder Law, (MICPEL 2009); *"A Match Made In Heaven – Using Tenancy by the Entirety for Creditor Protection Without Sacrificing Estate Planning,"* (MSBA 2009); *"Asset Protection – A Guide for Maryland Estate and Trust Lawyers,"* (MICPEL Advance Estate Planning Institute 2006); *"Revocable Inter Vivos Trusts,"* (MICPEL 2004 and 2006); *"Valuation Discounting,"* (MICPEL 2003; MSBA 2002 and 2003); *"Business Valuation,"* (MICPEL 1998); *"Family Partnerships,"* (MICPEL 1996); *"Avoiding Probate - Will Substitutes,"* 1996; *"Basic Estate Planning,"* (MICPEL 1993).

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## **1.0 Jurisdiction of the Orphans' Court**

### **1.1 History of the Orphans' Court**

The Orphans' Court was established by an act of 1777 when Maryland was a colony of Britain. After it became a state, Maryland enacted a Constitution that established the Orphans' Court as one of the courts within the State of Maryland. The constitutional provisions failed to describe the jurisdiction of the Orphans' Court except to state that such courts shall have the power of Orphans' Courts as that existed at the time of the enactment of the Maryland Constitution.<sup>1</sup> Thus the constitutional underpinning of the Orphans' Court and its jurisdiction carried forward and, indeed, was a codification of colonial practice.

This murky beginning is complicated by multiple courts having jurisdiction over probate-related matters in England in the 18<sup>th</sup> century which, in turn, informed colonial practice. The British jurisdiction over probate involved three separate courts with overlapping authority:

The complete administration of an estate could and often did require judicial proceedings in three different courts: the ecclesiastical, common-law, and chancery (or equity) courts. With respect to some probate-related matters, these courts excised jurisdiction exclusively of one another, whereas in some such matters they exercised concurrent jurisdiction.<sup>2</sup>

#### **1.1.1 The Ecclesiastical Courts**

Historically, the primary jurisdiction over the probate of wills and the administration of estates of persons dying intestate rested with the ecclesiastical courts. Yet there were important difficulties with this jurisdiction: (1) the ecclesiastical courts had limited powers to enforce its rulings and were subject to de novo appeals, and (2) its authority was limited to the disposition of personal property only and it had no authority over the disposition of real estate.

The power of the ecclesiastical courts was ineffective and its holdings easily circumvented:

Orders of the court would ordinarily be enforced by excommunication only, or, if this was ineffective, chancery might be asked to issue an attachment so that the refractory party might be imprisoned until he obeyed the order of the court. Review of decisions of the ecclesiastical court was by appeal, not by writ of error, and the appellate court would re-examine questions of fact as well as of law and come to a decision de novo.<sup>3</sup>

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<sup>1</sup> Md. Const. Art. 4, §§ 1, 1A (1867).

<sup>2</sup> Peter Nicolas, FIGHTING THE PROBATE MAFIA: A DISSECTION OF THE PROBATE EXCEPTION TO THE FEDERAL COURT JURISDICTION, 74 S.Cal.L.Rev. 1479, 1503 (2001).

<sup>3</sup> Lewis M. Simes and Paul E. Basye, THE ORGANIZATION OF THE PROBATE COURT IN AMERICA, 42 Mich.L.Rev. 965, 970 (1944).

Under the common law, real property passed directly to the devisee regardless of the probate procedure:

[T]he ecclesiastical court had no jurisdiction over the devises of land. That was ordinarily a matter for the common-law courts. This does not mean that wills of land were probated in the common-law court, for they were not. But, with respect to the land devised by it, a will was operative without any probate whatever. Title passed to the devisee immediately on the death of the testator, just as title passes to the grantee in a deed immediately upon its delivery. If a will disposed of both personalty and realty, the action of the ecclesiastical court, in admitting it to probate or in refusing to do so, did not determine whether the will was a valid devise of real estate. And, if a will disposed of real estate only, the ecclesiastical court had no jurisdiction to admit it to probate. When an heir or devisee wished to test the validity of a devise of land, he brought some action to try title, such as ejectment or trespass.<sup>4</sup>

### 1.1.2 The Law Courts

The lack of authority over the disposition of real estate meant that the probate of a will by the Maryland Orphans' Court only determined the effectiveness of that will over the personal property. This was the case even if the will had provisions for the disposition of both personal property and real property. In *Warford v. Colvin*, 14 Md. 532 (1859), a caveat was tried before a jury on issues that were relayed to the Circuit Court for an evidentiary hearing. The jury determined, and the Orphans' Court followed, a determination that the will was not a product of undue influence. This finding, however, did not preclude the heirs-at-law from retrying the case as an ejectment action to gain possession and title of the real property from the devisees under the will determined valid by the Orphans' Court. The Court of Appeals held that the common law doctrine of estoppel could not apply to the jury finding of the validity of the will because the Orphans' Court had no jurisdiction to determine the validity of a will as it pertained to real property. Accordingly, the heirs-at-law were able to retry the issue in an equity ejectment action.

The common law disposition of real property as going directly to a devisee in a valid will or to the heirs-at-law and effectively bypassing the probate process was the rule in Maryland until the enactment of Estates & Trusts § 1-301 (Property of Decedent Subject to the Estate Law). That provision was added to Maryland law in 1969 as a result of the Henderson Commission Report to update and modernize the Estates & Trusts article of the Maryland Code.<sup>5</sup> Before 1970, however,

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<sup>4</sup> Id. at 971.

<sup>5</sup> The Second Report of the Governor's Commission to Study and Revise the Testamentary Laws of Maryland (December 5, 1968), is universally called the "Henderson Commission Report" after its chair, William L. Henderson, former Chief Judge of the Maryland Court of Appeals. See generally Shale D. Stiller and Roger D. Redden, STATUTORY REFORM IN THE ADMINISTRATION OF ESTATES OF MARYLAND DECEDENTS, MINORS AND INCOMPETENTS, 29 Md.L.Rev. 85 (1969)(detailing the work of the Henderson Commission). As a result of the Henderson Commission



Maryland law as to the title of real property did not involve the participation of the Orphans' Court or the Register of Wills:

We note first that at the time of Mrs. Squire's death in 1947, the applicable testamentary law held that title to a decedent's real property devolved directly to her heirs-at-law upon her death, without the necessity of administration by an administrator or personal representative.

\* \* \*

The law changed in 1970 with the legislature's rewriting of the testamentary laws. Since 1970, all real and personal property of a decedent passes directly to the personal representative who holds legal title for administrative and distribution purposes.<sup>6</sup>

### 1.1.3 Chancery (or Equity) Courts

The third jurisdiction involved in estate administration during the colonial era was that of the chancery (or equity) courts. Its prominence in estate and probate matters grew out of two shortcomings of the ecclesiastical courts: the narrow scope of the remedies available to the ecclesiastical courts and the ease with which a contestant could force decisions of the ecclesiastical courts to be reviewed *de novo* by chancery. Unlike the modern practice, upon such a *de novo* review the chancery court retained the jurisdiction for the entire estate administration:

While the writs of prohibition crippled the jurisdiction of the ecclesiastical courts, the common-law courts from which they issued had no machinery adapted to the administration of estates. The net result was that chancery, with its more flexible procedure, tended more and more to take over matters of administration. Though the will would be admitted to probate and the personal representative appointed by the ecclesiastical court, a creditor or distributee might file his bill to have the estate administered in chancery. This jurisdiction might be sought for the purpose of discovering assets, because a trust was involved, or, though no actual trust was involved, because the estate was regarded as a kind of trust fund and the personal representative as a kind of trustee. But, for whatever reason jurisdiction was assumed, chancery ordinarily continued with the administration until it was complete. Notices to creditors were published; actions by creditors in

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Report, the General Assembly in 1969 repealed and replaced most of the laws then governing estates in Maryland. The effective date, however, for the provision revamping the testamentary laws, as opposed to the laws affecting guardianships, was 1970. In 1974, that new testamentary code was reenacted as the Estates & Trusts Article continuing in effect currently.

<sup>6</sup> *Dillow v. Magraw*, 102 Md.App. 343, 358 and fn. 7 (1994).

common-law courts were enjoined; assets were brought in and distributed to creditors and legatees or next of kin.

\* \* \*

Chancery never assumed the jurisdiction to probate a will or to appoint an executor or administrator. But, as to all subsequent steps in the process of administration, it might take jurisdiction if an interested party filed a bill asking for it. The concurrent jurisdiction of the ecclesiastical courts continued, it is true; but the chancery procedure was regarded as so much more satisfactory that administration in equity became a common practice.<sup>7</sup>

#### 1.1.4 Maryland Colonial Practice

In Maryland, the colonial governor was granted the power to oversee the probate of decedent's estates according to "law, equity and good conscience."<sup>8</sup> A structure similar to that of 18<sup>th</sup> century English practice was followed in colonial Maryland. The role of the ecclesiastical courts was assigned to the office of the commissary general but, as with the ecclesiastical courts, the authority of the commissary general was limited to proving the will and administering the personal property of the estate.<sup>9</sup> When Maryland became a state, the Orphans' Court grew from this colonial structure:

The Orphans' Court was created in 1777 with its legal structure, and even its name, hailing from our English forefathers. In 1776, Maryland's first constitution authorized a Register of Wills to oversee probate in each county and in the spring of 1777, the General Assembly formerly established the Orphans' Court as the mechanism for probate administration, with the Register of Wills as the courts chief clerk. It was founded as the people's court.

Orphans' Courts were then formed in each county, with each served by a Register of Wills. Chapter VIII of the Maryland constitution, acts of February 1777, established the Orphans' Courts stating:

[I]t is intended that the office of commissary general should be abolished and that an Orphans' Court and a Register of Will under the control of said court should be appointed in every county.

The Act gave Orphans' Court judges, all of whom were justices of the peace named by the governor, the "power, authority and

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<sup>7</sup> Id. at 972.

<sup>8</sup> Hon. Albert W. Northrop & Robert A. Schmuhl, DESCENDANTS' ESTATES IN MARYLAND, § 2-1 (Michie 1994).

<sup>9</sup> *Massey v. Massey's Legacies*, 4 H.&J. 141, 146, 1816 WL 630 at 5 (1816).

jurisdiction with regard to executors, administrator, guardians, and orphans that the county courts by law hereintofore used and exercised."<sup>10</sup>

The name giving the probate court was derived from the Court of Orphans' which was the primary court in the City of London dealing with the wardship of orphans (defined as those without fathers) and the administration of estates. This court operated in conjunction with chancery whose operations were basically founded on principles of equity.<sup>11</sup> Since established in 1777, the Maryland Orphans' Court jurisdiction was clarified, and indeed expanded, by statute and interpretation by the Court of Appeals. Nevertheless, its early roots are still evident, notably in the right of interested persons to have a fact determined by a court of law and by the right to a de novo appeal from the Orphans' Court decision.

## **1.2 The Modern Jurisdiction of the Orphans' Court**

### **1.2.1 The Statutory Framework**

The Maryland Code, Estates & Trusts § 2-102 (Power and Jurisdiction of the Court) sets out its jurisdiction:

#### **In general**

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

#### **Rules of practice and procedure**

(b) The court may not establish rules of practice and procedure inconsistent with the Maryland Rules or with any statute.

#### **Petitions by interested persons**

(c) An interested person may petition the court to resolve any question concerning an estate or its administration.

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<sup>10</sup> Janet Stidman Eveleth, THE PEOPLE FRIENDLY COURT – MARYLAND ORPHANS' COURT, 42-Aug. MDBJ 38 (2009).

<sup>11</sup> Charles Carlton, CHANGING JURISDICTIONS IN 16<sup>TH</sup> AND 17<sup>TH</sup> ENGLAND: THE RELATIONSHIP BETWEEN THE COURTS OF ORPHANS AND CHANCERY, 18 American Journal of Legal History 124 (1974); see also Simes and Basye at 979 ("In Pennsylvania, Maryland, Delaware, Virginia and New Jersey separate orphans' courts were early established. 'The idea was taken from the court of orphans of the City of London, which had the care and guardianship of children of deceased citizens of London in their minority, and could compel executors and guardians to file inventories, and give securities for their estates ...')(internal citations omitted).

### Construction with § 1-301

(d) This section may not be construed to limit the court's authority under § 1-301(b) of this article.

Est. & Trusts Art. § 2-102(a) and (c) track the statute as it was presented by the Henderson Commission Report in 1969 with minor stylistic changes.

Est. & Trusts Art. § 2-102(b) does not address the Orphans' Court jurisdiction per se but instead prohibits the Orphans' Court from establishing rules of "practice and procedure inconsistent with the Maryland Rules or with any statute." This conforms with the abolition of local rules of practice for courts in Maryland. Md. Rule 1-102 (1984). Est. & Trusts Art. § 2-104 applies the Maryland Rules for summoning witnesses and for depositions and discovery to all Orphans' Court actions. The power of the Orphans' Court to summons witnesses and order depositions existed prior to the Henderson Commission. That Commission expanded the existing rule to encompass discovery in general. The Henderson Commission Report comment to what is now Est. & Trusts Art. § 2-104 states: "The court may prescribe such other rules as it deems advisable, not inconsistent with the Maryland Rules. The Court of Appeals may also prescribe rules for the Orphans' Courts." Recently, the Court of Appeals did so by extending the authority for the Orphans' Court to mandate mediation of disputes in certain circumstances. Md. Rule 17-601 through Md. Rule 17-605 (effective 7/1/18).

Est. & Trusts Art. § 2-102(d) was added to the jurisdictional section of the Code effective October 1, 1994. Unlike § (c) discussed above, this provision expanded the jurisdiction of the Orphan's Court. Prior law held that the Orphans' Court lacked jurisdiction to determine title to personal property or, for that matter, real property, except under very proscribed circumstances. *Talbot Packing Co. v. Wheatley*, 174 Md. 365, 190 A.833 (1937); Henderson Commission Report, cmt. to 2-102 ("These rules (on Orphans' Court jurisdiction) prohibit the Court from exercising jurisdiction over questions of title ..."). In 1994, Est. & Trusts Art. § 1-301(b) was added to permit the Orphans' Court to determine questions of title to personal property not exceeding \$20,000 in value for the purposes of determining what personal property is includible in the estate. In 2009, this limit was increased to \$50,000 of value. Est. & Trusts Art. § 1-102(d) merely requires that the general jurisdictional rules of the Maryland Code recognized this change to Maryland law. Other than this expanding power to determine title for matters up to \$50,000 of value of personal property, however, the traditional rule that the Orphans' Court lacks such jurisdiction to determine any questions of title to personal property continues unabated.

Est. & Trust Art. § 2-102(a) and (c) carry forward the statement of the Orphan's Court jurisdiction as set forth in the Henderson Commission Report with minor stylistic changes. The definition of such jurisdiction of the Orphans' Court is not spelled out in any detail ("May conduct judicial probate, direct the conduct of a personal representative ..."). Indeed, the most definitive statement in this section which sets forth the jurisdiction of the Orphans' Court is an expression of the limited nature of its jurisdictional scope: "The court may not, under pretext of incidental power or constructive authority, exercise any jurisdiction not expressly conferred." This lack of detail was intentional: "This Commission did not feel that it was necessary to describe in detail all the rules which the Court of Appeals of Maryland has developed in setting forth those areas in which

the Court does not have jurisdiction. These rules, for example, prohibit the Court from exercising jurisdiction over questions of title, administration of trust, or disinterments. The Commission does, however, intend that all of the rules which have been developed by the Court of Appeals for determining whether the Court has jurisdiction over any particular matter will continue to be the law." Henderson Commission Report cmt. 2-102. Accordingly, the jurisdiction of the Orphan's Court is largely left to the common law of Maryland. Its origins grew from the murky history of the authority of the ecclesiastical courts of England in the 18<sup>th</sup> century as amplified over time by the rulings of the Court of Appeals. Because of its nature as a court of limited jurisdiction, more often than not those rulings focus on the limited nature of Orphans' Court jurisdiction.

### **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. Although almost 30 years old, this case remains the starting point for understanding Orphans' Court jurisdiction.

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>12</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

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<sup>12</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."

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 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.

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.<sup>13</sup>

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). In *Myers*, the Orphans' Court transmitted issues that purported to be issues of fact but which the Court of Appeals held were, in truth, issue of law (the construction of a document – a will). The *Myers* Court held (1) that only issues of fact could be transmitted, and (2) the Orphans' Court did not have jurisdiction over issues of law. *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.

The distinction between issues of fact and issues of law is not as clear cut as those early cases suggest. The rule for will construction is well established: "[T]he intention of the testator is the polar star, and must prevail, if consistent with rules of law[.]" *Walters v. Walter*, 3 H.&J. 201, 204 (1811). So its intent is not the presumed intent but the expressed intention "gathered from the four corners of the will." *Reedy v. Barber*, 353 Md. 141, 148 (1969). The words in the will, however, should be understood in conjunction with the pertinent circumstances surrounding the testator at the time of its execution. See *Castruccio v. Est. of Castruccio*, 239 Md.App. 345 363 (2018). (Many, many Maryland case have stated or applied the proposition that, to understand or explain the words that a testator has written, a court may consider evidence of the circumstances that surrounded the execution of the will." Thus, the construction of a will often involves both legal and factual elements. Nevertheless, it is seen as a question of law. As such, *Kaouris* suggests will construction is within the jurisdiction of the Orphans' Court but not transmittable to the Circuit Court as a factual issue. Questions of law could be heard by the Circuit Court by de novo appeal or directly brought to the Circuit Court on a declaratory judgment petition.

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

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<sup>13</sup> Md. Rule 6-434(a) states: "In any proceeding, the orphans' court, upon petition, may transmit contested issues of fact within its jurisdictions for trial to the circuit court ..." (Emphasis added).

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."

## **1.5 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).

## **1.6 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). The law was changed in 2009 to provide that the Orphans' Court has guardianship jurisdiction of the person regardless of whether it is incidental to a probate case if its presiding judge is a lawyer and the Orphans' Court may transfer the guardianship to the Circuit Court. Est. & Trusts § 13-105 (c)(1)&(2).

## **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 as a litigant's rights are not jeopardized, depending on the determination of fact by the Circuit Court.

The rule governing the impact of transmitting issues is similar to that governing the filing of a caveat. A caveat does not stay the entire proceeding; instead, a petition to caveat simply prevents the Orphans' Court from admitting the will to probate until after the judicial proceedings are concluded. It does not stop all of the proceedings related to the will. *Sheaten v. Straka*, 459 Md. 68 (2018).

## **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 Setting Out Order of Appointment

### § 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.

#### 2.1.1 Priority of 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.")

Generally, however, the Orphans' Court is bound to follow the priority as set forth in the statute. In an early case, *Phillips v. Clark*, 176 Md. 578 (1930) two brothers were in equal status to become the personal representative of their deceased sister. One brother renounced his right to be the personal representative and attempted to assign his right to letters to his daughter (the deceased sister's niece). The *Phillips* court held that the surviving and non-renouncing brother also renounced: "[B]efore a selection may be made from among the nephews and nieces of the testatrix, the surviving brother must be unqualified or renounce or decline to qualify as administrator."

If more than one person is in a designated class entitled to appointment, selection of one of them is within the discretion of the Orphans' Court. *Longfellow v. Longfellow*, 189 Md. 88 (1947); *Lewis v. Logan*, 120 Md. 329 (1913).

By statute, the Orphans' Court may appoint to more than one person within the class entitled to letters. E & T § 5-106(a). Also, the Orphans' Court may be granted to two or more persons in different classes as long as those in the higher class consent. E & T § 5-106(b). The Orphans' Court must, however, appoint all of those named in the will or otherwise appointed by someone given authority to nominate a personal representative by the testator in the will. E & T § 5-106(a).

If a member of a preferred class cannot serve due to a disability, his or her guardian does not serve as a surrogate. In *Courtney v. Lawson*, 97 Md.App. 471 (1993), the Court of Special Appeals held that the mother of a minor child of the decedent who died unmarried did not step in the shoes of her child. The *Courtney* court determined that prior law permitting a guardian to exercise the priority to serve was a statutory, not common law, right and that statutory authority terminated under the Henderson Commission reforms of 1969.

## **2.2 The Statute Setting Forth Eligibility For Grant of Letters**

### **§ 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.

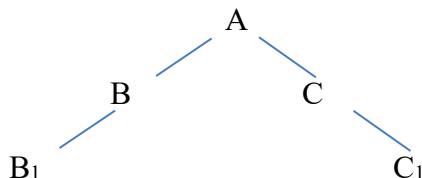
### 2.2.1 Restrictions on Letters

Someone convicted of a "serious crime" is not entitled to letters unless the person shows good cause for the granting of letters. "Serious crime" is defined as one that reflects badly on one's trustworthiness such as fraud, extortion, theft and similar crimes. Defining what constitutes a serious crime was added to the statute in 2004 thereby effectively reversing the decision in *LaGrange v. Hinton*, 91 Md.App. 294 (1992) where a sister removed her brother, who was the named personal representative in their mother's will, on the basis of a conviction for a consensual sexual act that was then a crime. In that case, the court equated "serious crime" to any crime for which one would be entitled to a trial by jury regardless of whether it involved dishonesty. The statute now focuses on whether the crime is of a character demonstrating that the person may defraud the estate.

A person is entitled to letters as long as he or she is not "mentally incompetent." The degree of competency is that "sufficient for the execution of a valid deed or contract." *Mobley v. Mobley*, 149 Md. 401 (1926). In *Mobley*, a brother of an unmarried and childless decedent qualified as the personal representative although he was paralyzed, bedridden and unable to physically write: "All argue (however) that his mind was clear and his mental processes remained intelligent." The *Mobley* court also held that it is permitted for a personal representative to delegate some tasks to

an agent as long as the personal representative uses reasonable diligence in selecting the agent and in supervising the agent's conduct. See, *Bastian v. Laffin*, 54 Md.App. 703 (1983).

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 "B1".

Non-residents may serve as personal representatives only if a resident agent is on file.

### **3.0 Administrative Probate**

#### **3.1 The Statutes Establishing the Framework**

##### **§ 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 SS 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.

Prior to the changes to Maryland law flowing from the Henderson Commission Report, the probate process varied from county to county. In many jurisdictions, the Register could not authorize the appointment of the personal representative unless the Orphans' Court was not then in session. If in session, all petitions for probate had to be presented by the petitioner to the Orphans' Court. In most, not all, jurisdictions informal probate could be commenced, however, when the Court was not in session: "This has led to a widespread practice of purposely offering wills for probate during the hours when the Orphans' Courts are not in session .... The theory of the new legislation (introduced in 1969) is that in most situations the Register should be responsible enough to admit wills to probate and appoint personal representatives whether or not the Orphans' Court is in session."<sup>14</sup>

Administrative probate is similar, in concept but not in detail, to the approach to the probate of decedents' estate taken by the Uniform Probate Code ("UPC"). Under the UPC, there are also two tracks: a non-judicial track ("informal probate") and a judicial probate track ("formal probate.") As with the Maryland system, the probate system is designed to offer as little or as much supervision as may be appropriate under the circumstances. Rather than adopt the UPC which was in draft form during the time the Henderson Commission was considering revisions to the Maryland Code, Maryland embraced the "home-grown" method then in practice in most Maryland counties. As will be discussed below, Est. & Trusts §§ 5-401 and 5-402 permit the judicial track to be readily available but no longer the default track.

### **3.3 Finality of Administrative Probate**

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.

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<sup>14</sup> Shale D. Stiller and Roger D. Redden, STATUTORY REFORM IN THE ADMINISTRATION OF ESTATES OF MARYLAND DECEDENTS, MINOR AND INCOMPETENTS, 29 Md.L.Rev. 85, 100-1 (1969).

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 1.4 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 Statutes Triggering Judicial Probate**

#### **§ 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 the 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 can also be triggered by an interested person. Interested person is a defined term for the mandatory right to trigger judicial probate:

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 Statutes Outlining a Personal Representative's Duties and Responsibilities**

#### **§ 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) Distribution of assets of estate. -- 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.

Fiduciary duty defines not only the relationship of a personal representative to all interested persons and creditors of an estate, it also defines the relationship of a trustee to beneficiaries, of an attorney to his/her client, as well as other legal relationships. Indeed, probably the most quoted description of the fiduciary relationship involved that relationship among partners which was characterized as a "duty of finest loyalty":

Many forms of conduct permissible in a workaday world for those operating at arm's length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive is then the standard behavior.<sup>15</sup>

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

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<sup>15</sup> *Meinhard v. Salmon*, 249 N.Y. 458, 463-4, 164 N.E. 545, 546 (N.Y. 1928) (Cardozo). Ironically the revised uniform partnership code restricted somewhat the pure, broad fiduciary duty. See *Clancy v. King*, 405 Md. 541 (2008).

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.

Conflicts of interest created by the testator, however, is not presumed to constitute a breach of the fiduciary duty. In *Goldman v. Rubin*, 292 Md. 693 (1982), the testator named as his personal representatives four out of five directors of his closely held corporation with the expectation that they oversee the redemption of his stock to that corporation. The obvious conflict of interest did not preclude them from continuing as personal representatives because the testator contemplated, indeed created, the conflict. Thus to determine whether these personal representatives breached their duty when structuring the corporate redemption, the court below should have examined the fairness of the transaction and not merely removed them due to the inherent conflict.

### **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 undo 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.<sup>16</sup>

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<sup>16</sup> See *Board of Trustees v. Mayor and City Council of Baltimore*, 317 Md. 72 (1989). The trustees of various city pensions sued claiming that its obligation of prudence in investing was impaired by ordinances requiring divestment of holdings in companies doing business in South Africa. The Court of Appeals ruled against the trustees holding that such a limitation of the scope of investments was not material given the number of other investment opportunities.

## **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.

The rule that a personal representative may not delegate responsibility does not mean that he/she cannot delegate. In *Mobley v. Mobley*, 149 Md. 401 (1926), discussed in section 2.2.1, for example, the personal representative while mentally competent was not physically able to attend to many tasks required by a personal representative. The *Mobley* court held: "It has long been recognized in this state that an executor or administrator may, within certain limitations, delegate his authority as a personal representative to an agent."<sup>17</sup>

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

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<sup>17</sup> Also see *Bastian v. Laffin*, 54 Md.App. 703 (1983) holding that the test is whether the personal representative acts in good faith in selecting and overseeing the agent.

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.

The special administrator, if named in the will as the personal representative, has a duty to defend the will in a caveat proceeding and is entitled to his/her attorney's fees as an expense of estate litigation under Est. & Trusts § 7-603. *Webster v. Laramore*, 268 Md. 153 (1973).

## 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:
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Not over \$ 20,000.....	9%
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Over \$ 20,000.....	\$ 1,800 plus 3.6% of the excess over \$ 20,000
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(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.