Legal Services Developer Program's *Training for Aging Professionals*

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Probate 101

Part 2

By Tammie J. Lund-Smith

TIME TO OPEN PROBATE

- Who will be the Personal Representative?
- Do they have priority according to statute?
  - If they don't have priority a Renunciation and Nomination must be signed and filed with the other Court Documents.

MCA 72-3-502

- Priorities For Appointment
- **72-3-502. Priorities for appointment.** Whether the proceedings are formal or informal, persons who are not disqualified have priority for appointment in the following order:
- (1) the person with priority as determined by a probated will, including a person nominated by a power conferred in a will;
- (2) the surviving spouse of the decedent who is a devisee of the decedent;
- (3) the custodial parent of a minor decedent;
- (4) other devisees of the decedent;
- (5) the surviving spouse of the decedent;
- (6) the parent of an adult decedent who was survived by issue, none of whom is an adult;
- (7) other heirs of the decedent;
- (8) public administrator;
- (9) 45 days after the death of the decedent, any creditor.

Documents needed:

- Prepare the documents to initiate:
  - Application
  - Renunciation and Nomination – if needed
  - Order
  - Letters
  - Notice to Creditors
  - Notice and Information to Heirs and Devisees
  - Authorization (to obtain financial information – I like mine to have a notary on it)
  - Affidavit of Mailing
    - You will mail a copy of the Notice and Information to Heirs and Devisees, usually this is covered with a Certificate of mailing at the bottom of appropriate document.

AUTHORIZATION FORM

- A SIMPLE FORM:
- TO WHOM IT MAY CONCERN:
- I have retained the law firm of ___________________________, as legal counsel for the Estate of ____________________________, deceased and hereby authorize said law firm to make inquiry into any and all financial transactions involving ___________________ as an individual and/or as a Joint Tenant with another person.
- DATED this _________ day of __________________, 20___.

____

________, Personal Representative

of the Estate of _________________________, deceased.

Begin the process

Step 1: Initiate the Probate

Step 2: Mail the NHD to the heirs

Step 3: Publish Notice to Creditors

Step 4: Start filling out your Excel Spreadsheet so you don't miss your PROCEDURAL deadlines.

Probate Deadline Checklist

	Input Box
Decedent's Name	JANE DOE
Date of Birth	January 1, 1965
Place of Birth	Glasgow, MT
Date of Death	February 10, 2009
Place of Death	Cascade County
Social Security Number	122-12-1222
Last day of the month prior to death	31-Jan-09
Date of PR Appointment	February 25, 2009
First Publication of Creditor's Notice	March 10, 2009

Note: If any deadline set out below falls on a Saturday, Sunday, or holiday the applicable diary entry should be made on the last previous working day.

Note: This spreadsheet is based on statutes as they existed as of 2005

		Estimated Date	Deadline	Statutory Reference
1	Deadline to Send Notice to Heirs		March 27, 2009	Mont. Code Ann. 72-3-603
	Calendar reminder for Affidavit of Mailing		April 6, 2009	
2	First Publication of Notice to Creditors		March 10, 2009	Mont. Code Ann. 72-3-801
	Second Publication of Notice to Creditors		March 17, 2009	Mont. Code Ann. 72-3-801
	Third Publication of Notice to Creditors		March 24, 2009	Mont. Code Ann. 72-3-801
	Calendar reminder to file Affidavit of Publication		April 23, 2009	
3	Deadline for presentment of Creditors Claims		July 11, 2009	Mont. Code Ann. 72-3-801(1)
	(4 months after 1st publication)			
4	Deadline for disallowance of Creditors Claims		September 9, 2009	Mont. Code Ann. 72-3-805(1)
5	Deadline for Creditor suing after disallowance		November 8, 2009	Mont. Code Ann. 72-3-804
6	Determine Tax year		May 10, 2009	
	(3 months from date of death)			
7	Alternate Valuation Date - Federal Tax Return		August 9, 2009	
	(6 months after Date of Death)			
8	Inventory and Appraisment		November 10, 2009	Mont. Code Ann. 72-3-607
	(9 months from date of death)			
9	Deadline to File Disclaimer		November 10, 2009	
	(9 months from date of death)			
10	Federal Tax Return Due		November 10, 2009	
	(9 months from date of death)			
11	Fiscal year end		January 31, 2010	
12	Fiduciary return due		May 16, 2010	
	Calendar reminder for fiduciary return		March 17, 2010	
	(3 months after the end of the first fiscal year)			
13	Closure of Estate		February 25, 2011	Mont. Code Ann. 72-3-1015
	(2 years from date of appointment)			
14	The soonest the Estate can be closed		August 24, 2009	
	(6 months from date of appointment)			

Deadlines to flag

- 1.) What date is the final date the creditors have to file their creditors claim against the Estate?
  - What happens if they miss that deadline?

2.) What date is your deadline to Disallow the Creditors Claims?

What happens if you miss that deadline?

What happens if you file a disallowance?

What happens if you file a disallowance and the Creditor petitions for allowance?

Is there a deadline for the Creditor to Petition for Allowance?

Reasons to Hire an Attorney

- 1.) To Guarantee you receive your step up in tax basis.
- 2.) To guarantee you transfer the real estate appropriately.
- 3.) If there are debts/creditors to disallow what you can.
- 4.) To claim any and all spousal allowances you are entitled to.
- 5.) If there is not enough money in an Estate to pay all debts there is a priority on what debts get paid, if any.

Classification Of Claims As To Priority Of Payment

- **72-3-807. Classification of claims as to priority of payment.** (1) If the applicable assets of the estate are insufficient to pay all claims in full, the personal representative shall make payment in the following order:
- (a) costs and expenses of administration;
- (b) reasonable funeral expenses and reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation of persons attending the decedent;
- (c) federal estate and Montana state estate taxes;
- (d) debt for a current support obligation and past-due support for the decedent's children pursuant to a support order as defined in **40-5-201**;
- (e) debts with preference under federal and Montana law;
- (f) other federal and Montana state taxes;
- (g) all other claims.
- (2) A preference may not be given in the payment of any claim over any other claim of the same class, and a claim due and payable may not be entitled to a preference over claims not due.

APPLY FOR ESTATE EIN:

- Does the estate need a checking account?
  - It probably does.

  - File for the EIN online:
    - You will get it assigned within seconds:
    - Here is the site:
    - https://sa1.www4.irs.gov/modiein/individual/index.jsp

If for some reason this site doesn't work just remember to go to the IRS site and type in apply for EIN online and that should get you started in the right direction. Your PR will need an EIN and the LETTERS to open an Estate checking account.

DO NOT PAY TO APPLY FOR AN EIN – I HEAR PEOPLE ARE PAYING $300 TO APPLY FOR A FREE EIN, THEY ARE ON A 3RD PARTY SITE.

DO FOLLOW UP REMINDERS

- MAIL LETTERS TO FINANCIAL INSTITUTIONS
  - It is easy to send a date of death inquiry letter to a financial institution and several weeks go by and you forget to follow up.
  - Each letter should include a signed Authorization form.
    - Every letter you mail out do a follow up reminder in your calendar of who to follow up with and when.
    - If you get a response back before the reminder instead of taking the reminder off just put a note in the reminder of when it came in and a summary of the response.

TOOL TIPS:

- SAVINGS BOND WIZARD:
  - Go to the internet type in savings bond wizard (It can be found at Treasury Direct) and download the savings bond wizard to your own PC. This tool will help you value the decedents savings bonds as of date of death. An example of this is labeled Inventory Report and included as a attachment.

Input fields:

- The savings bond wizard input fields are data found on the savings bonds:
  - Serial #
  - Denomination
  - Series
  - Issue date
    - The report provides you with the remainder…
    - The price , the interest, the value the rate, the yield the next interest date, the final maturity date and it provides you with the following notes to advise your clients on:

Notes:

- CI =Bond was Cashed in
- Ex= Bond was Exchanged for an HH bond
- MA = Bond is matured and not earning interest;
- NE = Bond in not yet eligible for payment (unless a death)
- NI = bond has not yet been issued
- P5 = bon is a Series I or EE, was issued in or after May 1997 and includes a 3 month interest penalty until the bond is 5 years old
- * bond is a Series I or EE, was issued in or after January 1990 and may be tax exempt if used for post-secondary education
- () bond was Cashed in or Exchanged for an HH bond, but is being priced on a date prior to the cashed or exchanged date.

Montana Cadastral Mapping:

- Real Estate Ownership records:
  - Find the decedents ownership by going to the following site:
    - http://gis.mt.gov/

What will this site do for you?

- It will allow you to parcel search by county and person name;
- It will tell you the assessed/taxed value;
- It will give you a partial legal description;
- It will give you a good idea of ownership;
- It will give you a location of the property;
- It will give you the type of property;
    - Note: you should search the surrounding counties of the county your decedent died in.
        - CAUTION: There may be other properties in other counties you didn't search in or other states and there may be oil and gas interests.

What will this site not do?

- It will not tell you with 100% certainty the owners and how it is deeded in all cases but will in most.(TC, JTWROS or sole owner).
- It most likely will not give you a usable legal description;
- Will not give you a usable value for the Inventory and Appraisement.

Need to value the real estate:

- In most instances a full blown appraisal is necessary but costly.
- In cases if the real estate is being sold you can use the sale value of the real estate for the Inventory and Appraisement.

CMA vs. Full Appraisal

- In some cases ie. smaller estates, such as if the family gets along, a CMA can be done to value the real estate rather than a full appraisal, saving the estate money. Some realtors will agree upfront to do a CMA and if they get the listing, should the family choose to sell the real estate they will not charge the CMA fee – so get that agreement upfront.

DNRC SITE:

- DNRC Water Right Query System (mt.gov)

Why is the DNRC Water Rights site important?

- This site needs to be checked before every land transaction is done whether a probate or Quit Claim Deed is done.

  - Why?

Answer:

- It is our obligation to make sure that the land that is being sold or transferred doesn’t have water rights connected to it.
  - The site I provided to you is simple, type in the name of the person transferring the land (the decedent) and see if that piece of land or any other piece of land he owns may have water rights, it will have multiple purposes, such as lead you to another piece of property in a county not checked or allow you to transfer the water rights with the property.

NOTE:

- There are only two types of deeds that can come out of the Probate. (If the real property was in the name of the decedent alone:
  - Deed of Distribution: If distributing to heirs of the estate.
  - Deed of Conveyance: If the estate is going to sell the real estate.
- If owned jointly with another it is deemed outside of the probate and handled with an Affidavit to Terminate Joint Tenancy form.

Property Tax Site:

- https://gis.missoulacounty.us/propertyinformation
- The benefit of this is to determine if the decedent was current on his/her property taxes. Not all counties are available online yet – Missoula County is.

Is the decedent a farmer?

- Do you have to worry about government payments?
  - Why worry? This could be income to the estate causing the need for a fiduciary income tax return. (FID-3 & 1041)

Inventory and Appraisement

- All Court Appointed Personal Representatives have a fiduciary duty to get the highest value of all assets in an estate and to gather all assets.

- An Inventory and Appraisement must either be filed with the Court or Mailed to all heirs of the Estate. – Debts do not get included on this document.

The 706 Return

- If you have to do a 706 Return and don't have the software, go to the following site and use the fill-in form that you can save on your own PC.

- http://www.irs.gov/pub/irs-pdf/f706.pdf

Facts to remember:

- *Applying the Unified Credit to Estate Tax*
- Basically, any unified credit not used to eliminate gift tax can be used to eliminate or reduce estate tax. However, to determine the unified credit used against the estate tax, you must complete Form 706.
  - In the past years we have become unconcerned with the Federal Estate Tax or the Unified Credit; however, we should never be so complacent we forget it.

- *Filing an Estate Tax Return*
- An estate tax return, Form 706, must be filed if the gross estate, plus any adjusted taxable gifts and specific gift tax exemption, is more than the filing requirement for the year of death.

- **Filing requirement.** The following table lists historical filing requirement for the estate of a decedent and then decedents dying in 2021. I also bring up a proposal pending in the legislature currently.

- This tax is known as the death tax.
- It is also referred to as the double tax – your income was taxed to buy the asset and to continue to own it, now you are taxed on it because you died owning it, already were taxed on it over the course of your life.

The Early Years

1984-1997

Exemption through the Years

Year	Exclusion Amount	Highest Tax Rate
1984	$325,000	55.0%
1985	$400,000	55.0%
1986	$500,000	55.0%
1987-1997	$600,000	55.0%

Year of Death:	Filing Requirement:
2002 & 2003	1,000,000
2004 & 2005	1,500,000
2006, 2007, & 2008	2,000,000
2009	3,500,000

2021 Death Tax

- For 2021, the threshold for Federal Estate Taxes is $11.7 million, which is UP slightly from $11.58 million in 2020. For married couples, this threshold is doubled, meaning they can protect up to $23.4 million in 2021.
- The majority of us Americans will never need worry about this for 2021 but what is in store for 2022 or later? $1.0 mil –$3.5 mil

2022 Death Tax Proposals

- There are legislative proposals in Senate to reduce the $11.7 Million Estate Tax Exemption to $3.5 Million and a reduction of the gifting exemption to only $1.0 Million in 2022.
  - That still sounds high, right?

I encourage everyone to create a spreadsheet of all assets, imagine no estate planning. All assets are in the name of the surviving spouse only. Value these assets in today's market, then imagine passing away to allow your children to inherit your assets. Will they need to pay a Federal Estate Tax to the Government in order to inherit?

NOTE: your debts against them do not count, the Government only wants to know what your GROSS ESTATE VALUE IS AS OF THE SECOND BEFORE YOUR DEATH. Does your GROSS ESTATE VALUE get close to $3.5 Million? Did you do any gifting to your kids over the course of your lifetime to reduce that $3.5 million?

Next, will that $3.5 million be reduced again along with the $1 million gifting exemption?

Taxable Estate
The allowable deductions used in determining your taxable estate include:
Funeral expenses
Debts you owed at the time of death,
The marital deduction
The charitable deduction
and
The state death tax deduction – it is similar to an inheritance tax but paid to the state the decedent lived in to share in the Federal Estate Death Tax.

Closing the Probate:

- All of the assets are either sold or everyone has decided how to distribute them in-kind
- 1.) We must draft the following documents:
  - First and Final Account
  - Receipts and Disbursements
  - Instrument of Distribution for all non-titled items
  - A Personal Representative’s Sworn Statement to Close Estate.

First and Final Account

- The First and Final Account is fluid, meaning you must calculate all expenses that must be paid first, then any outstanding fees, ie PR Fees, then what each heir should receive based on the Will and/or the remainder

Receipts and Disbursements

- This is taken from the Estate Bank Statements and put into a spreadsheet and explained to the Court and the Heirs in detail.

Instrument of Distribution

- This document is used to show who received specific items from the Estate when there is no title or deed to distribute them.

Deed of Distribution

- This is used if you are distributing real estate to heirs instead of selling the real estate – it is categorically a Personal Representative's Deed because only a Personal Representative can sign it.
- Again, you are not a Personal Representative until the Court Appoints you.

Deed of Conveyance

- This is used if you selling real estate while the probate is opened – categorically it is also a Personal Representative’s Deed because only a Personal Representative can sign it.

- Again, you are not a Personal Representative until the Court appoints you.

Personal Representative's Sworn Statement to Close Estate

- This document is what will close the estate with the Court. You must make sure you have either disallowed any Creditors Claims or paid them all. This document states the Personal Representative has distributed everything necessary.

Acknowlegment of Receipt and Release

- After all Heirs have received all money and assets they are entitled to they should be requested to sign an Acknowledgment of Receipt and Release.
  - This document merely acknowledges that they have received everything that they feel they are entitled to (note: by this time they have received all of the closing documents) and they are releasing everyone from their duties, responsibilities and liabilities.

FORMS

- There are packets available for SMALL ESTATES, but they are incomplete, and they do not offer to disallow creditors, they do not have a Notice to Creditors option.
- They do not have Deed of Distribution or a Deed of Conveyance option.
- Never use these forms if you have real estate or have creditors.

THE END

- Thank you for the opportunity to present this material to you. If you have any questions, please do not hesitate to ask.

- Tammie J. Lund-Smith