What is “Probate” in Kansas?

Closing the Estates of the Deceased and Managing the Estates of the Living

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In Kansas, the people who are speaking about a court case being in “probate” are normally talking about administering a decedent’s estate. Sometimes the “Probate Court” will supervise the administration of the estate of a living person under a legal impairment, such as a Conservatee or Ward. This article discusses Decedent’s Estates, Conservatorships and Guardianships.

Decedent’s Estate Administration

Probate of a Decedent’s Estate (“Estate”) takes two forms in Kansas, “*testate*” (the decedent died with an enforceable Last Will and Testament) and *“intestate”* (no such instrument existed). In both cases an interested person, such as a close relative or beneficiary of the estate, hires a lawyer who files a Petition with the Court and he or she asks to be appointed as Executor (testate) or Administrator (intestate). The Petition will ask that the Last Will and Testament, (“Will”) be admitted to probate. Interested persons are given formal notice of a hearing and this notice is often printed in the newspaper in accordance with the Kansas statute. If interested persons believe that the Will is invalid or that the Petitioner should not be appointed as the fiduciary for the Estate (both Executors and Administrators are fiduciaries and have special responsibilities), such persons may object and the Court will have a hearing; this seldom occurs.

If a person dies having written a Will, that Will must be preserved and filed with the Court within six months, even if it is later determined that a probate estate will not be formally opened with the Court.

Typically, the fiduciary is formally appointed at a hearing held about 30 days following the filing of the Petition. If a bond requirement has not been waived by the Decedent in the Will, then the Court will require the fiduciary to obtain a bond with the help of his or her attorney, and also sign an oath of office. When these requirements are met, the Court will then issue “Letters Testamentary (testate) or Letters of Administration (intestate) (“*Letters*”). These formal *Letters* are often used by the fiduciary to establish a bank account for the Estate or to obtain information from insurance companies and financial institutions.

While it is rare, creditors of the Estate have the power, in Kansas to open an estate on behalf of the decedent, particularly when other interested persons have not come forward to do so. A creditor who does not do this risks losing its rights to collect the indebtedness, as the Decedent's family may believe that potential claims of creditors can be avoided by doing nothing and waiting.

The fiduciary's lawyer will work with the fiduciary to prepare an Inventory of the Estate's assets that usually must be filed within 30 days of the appointment of the fiduciary. Sometimes final values of certain assets are not known at this time, but to the extent the asset is know it should be listed, as should be liabilities of the Estate. Often, assets and liabilities are found later and the Inventory may be supplemented as more details are determined.

During the period of administration, the fiduciary will work toward liquidating certain assets such as real estate, motor vehicles, and other personal property. Often the Court will need to approve the sale of the same. However, the fiduciary generally does not have the power to distribute any assets of the Estate to relatives or beneficiaries without a specific Court order. Sometimes it is necessary or practical to ask heirs to hold or store certain assets during the probate proceeding, but the same is done with the understanding that the asset may have to be sold to pay creditor claims.

The Executor or Administrator while acting as a fiduciary has to act in the best interests of the Estate and never in his or her own best interest. Lawyers serve in a fiduciary capacity when representing clients and Guardians and Conservators also are fiduciaries.

Creditors have four months to file claims in the Estate and if they do not timely make a claim, their claim is subsequently barred. Thus, estates must be left open a minimum of four months, but generally are open longer, particularly if more time is required to liquidate certain assets.

When the assets have been liquidated or the other instructions of the Will have been followed, it is time to close the Estate. The lawyer will prepare a Petition for Final Settlement, asking the Court to approve the payment of creditors, the payment of the fiduciary fees, those of the lawyer, and to approve the final distribution of the remaining assets of the Estate. If it is a testate proceeding, then the distribution will be made as provided in the Will. If it is an intestate proceeding, the distribution will be made to the heirs at law. While state intestate statues are more complex than stated here, generally in Kansas ½ of the estate will go to the surviving spouse and ½ to the

children of the decedent, or to the descendants of any pre-deceased children. This distribution to heirs is "*per stirpes and not per capita*." This is a legal term of art that means that an estate of a decedent is distributed *per stirpes* if each branch of the family is to receive an equal share of an estate. When the heir in the first generation of a branch predeceased the decedent, the share that would have been given to the heir would be distributed among the heir's children in equal shares.

At the time the Petition for Final Settlement is filed, the fiduciary will also file a final accounting, containing the assets of the estate, the known liabilities, and a clear description of all income received and expenses paid during the administration of the Estate. Thus, it is generally a good policy for the fiduciary to consolidate all accounts of the Estate into one account that he or she is the sole signatory. Account entries in the final accounting often can be taken from the "stub book" for the checking account.

Many assets are not distributed through a Probate proceeding in Kansas. These assets that are outside of Probate include: proceeds from a life insurance policy when a beneficiary is named as part of the insurance contract or trust; joint tenant real estate and financial accounts; and accounts payable on death. The amount of money or the value of assets distributed outside of probate often has little effect on determining the amount of assets distributed through the probate proceeding unless the Will provides otherwise.

As the fiduciary makes the Court-approved distributions to the creditors (the lawyer and beneficiaries of the estate) each must sign a Receipt indicating receipt of their rightful payment. The Receipts are then filed with the Court and the fiduciary then obtains a much earned Final Discharge from the Court and the Estate will be closed. This Final Discharge should be provided to the bonding company if a bond was required, so that the bond is released and no further premiums will be charged.

The fiduciary and his or her lawyer work together in performing these tasks with the lawyer leading the way and preparing the necessary paperwork. Often professionals must be hired to appraise and help sell assets of the Estate. The lawyers of Woner, Glenn, Reeder & Girard, P.A. work in Courts throughout Kansas and are experienced in helping clients achieve a proper and orderly winding-up of the Decedent's affairs in a professional, competent and economical manner. Fees are charged on an hourly basis and are never based upon the value of the probate estate. Fiduciaries are often entitled to receive payment for their time and expenses in connection with their service to the estate. However, accurate records must be kept of the expenses incurred as well

as the amount of time and its purpose for each day the fiduciary performs service for the estate.

Conservatorships for Impaired Individuals

Impaired persons who are not legally competent to take care of their own financial affairs sometimes need the services of a Court appointed Conservator. Children under the age of 18 who receive large sums of money generally will need a Conservator appointed to manage their financial affairs until they turn age 18. Parents may be required to be appointed as a Conservator in some instances. Other impaired individuals may have a similar need. Sometimes such individuals can voluntarily consent to the appointment of a Conservator, but other times they may not be capable of doing so and an Involuntary Conservatorship will need to be established.

An interested individual, often a family member, will hire a lawyer to Petition the Court to be named the Conservator of the impaired person who is called a Conservatee or a Ward. If the Conservatee does not voluntarily consent and is over the age of 18, then medical examinations may be required before the Court holds a hearing to determine whether a Conservatorship is necessary.

A Conservator will usually be required to sign an oath and procure a bond based upon the size of the Conservatee's estate. Often the bond amount may be lowered if the Court, the Conservator, and the financial institution agree to enter an order "freezing" a portion of the assets to prevent liquidation without further Court order.

The Conservator must act in a fiduciary capacity for the benefit of the Conservatee. The Conservator must prepare an initial Inventory of the assets and liabilities of the Conservatee and file it with the Court. The Conservator then can pay the reasonable and necessary expenses of the Conservatee as they become due; provided however, that the Conservator cannot pay themselves or the attorney without Court approval.

The Conservator may liquidate assets of the estate, if that is in the best interest of the estate, but sometimes must seek and obtain court approval with the help of his or her lawyer, before doing so.

Annually, the Conservator must file an accounting with the Court setting forth all the income and expense of the estate during the preceding year. At that time the

Conservator can petition the Court for payment of the Conservator's and the attorney's fees. The Conservator can be paid for his or her time, but detailed records must be kept showing the date, the amount of time spent and the purpose.

Reasonable and necessary expenses that the Conservator can pay without pre-approval by the Court, may often vary under the circumstances, based upon the needs of the Conservatee and the standards that the Conservatee may have become accustomed. When in doubt, the Conservator should petition the Court in advance of incurring the expense and ask the Court to approve the payment.

Generally, Conservatorships continue until the legal impairment of the Conservatee ends (such as the Conservatee obtaining age 18, the Conservatee is no longer legally incompetent or the Conservatee dies). Before funds can be paid to the Conservatee or his or her estate, the Conservator will need to be discharged by the Court which will require approval of a final accounting. Upon payment of the assets to the Conservatee or the Decedent's Estate, the Conservator will obtain a receipt for the same that is filed with the Court. The Court will then enter an Order of Final Discharge and the Order may be provided to the bonding company to allow the termination of the bond and the cessation of premiums.

Woner, Glenn, Reeder & Girard, P.A. lawyers are experienced in helping clients petition and serve in this fiduciary capacity when circumstances so require. Generally, there is minimal involvement by the lawyers after the Conservatorship is established unless special circumstances arise or needs occur.

Guardianships for Impaired Persons in Kansas

Guardians can be appointed for any legally impaired person. Often such persons are minors, under the age 18, but they can also be elderly or otherwise impaired individuals in need of someone who can make legal decisions and consents on their behalf.

Generally, parents are the natural Guardian of their children and there is no legal reason to formalize further. However, when parents both die or are incapable of parenting their minor children, other persons must be found and appointed as legal Guardian for the minor child or children. If there is a Last Will and Testament, then there is a good chance that the deceased parent will have nominated the person he or she believed to be the most qualified person to perform this service and the Court will generally appoint the same. When this is not the case, often a relative or good friend will come forward and volunteer for this job.

When minors are the subject of the Guardianship, there are often responsibilities of raising the child in the home that come along with the Guardianship. However, this is not always the case, particularly when the Ward is legally impaired and lives in an institution. The Guardian is the person that has the legal power to make the decisions that are in the best interest of the Ward.

Think of Guardianship as the non-financial part of taking care of someone. Oftentimes, the Guardian and the Conservator is the same person and is simultaneously appointed in the same proceeding. However, there are instances when a person may need a conservator and not a Guardian or vice versa.

Although a Guardian has no reporting obligations for the finances of the Ward, a Guardian must file annual reports showing the frequency and quality of interaction with the Ward and others on his or her behalf. One cannot make responsible decisions for a Ward without knowing and visiting the Ward frequently. If the Ward is in a nursing home, the Guardian should try to monitor the quality of care and see that the needs of the Ward are being met.

A Guardian can qualify for payment of his or her fees if there is financial ability of the Guardianship estate to pay the same.