

MSBA Probate & Trust Law Section Newsletter

A Publication of the Minnesota State Bar Association Probate & Trust Law Section

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If you have any questions about the publication or would like to submit an article for a future issue, please contact Catherine Clifford or Chad Bigalke.

MSBA



www.mnbar.org

Message from the Chair

Fall seems to have descended upon the Twin Cities almost over night and the Probate and Trust Section Council is off to a busy start. Our 10 Committees and their members have been quite active both over the summer and in the Council's initial two months. If you want to know what we are up to, take a look at the website (<http://www2.mnbar.org/sections/probate-trust/index.asp>) or talk to any of the Council members. We are happy to talk to you about the good things we are trying to accomplish. If you would like to join us at our regular meetings, they are on the third Thursday of every month at the MSBA offices in Minneapolis. The year will pass quickly and we want to accomplish as much as we can in the limited time that we have. If you have suggestions about anything that you think we should be working on, please let us know, we would love to hear from you.

Susan Link
Probate & Trust Section Chair
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Litigation Committee

In addition to planning the upcoming November Luncheon ("A View From the Probate Bench"), the Committee is meeting periodically to discuss and comment on the substantive and procedural issues arising from the Legislative Committee's review of the Uniform Trust Code.

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Wills for Heroes

Congratulations and great job volunteers!! After only four years, the Wills for Heroes and it's volunteers have provided close to 4,000 first responders and their spouses with Wills, Health Care Directives, and Powers of Attorney.

Now booked through 2013, MN Wills for Heroes will continue helping those who, everyday, make it their profession to keep Minnesota and it's citizens safe. If you are interested in becoming a volunteer attorney or volunteer data entry personnel, please contact Susan Link at susan.link@maslon.com OR Andrea Bischoff at andrea.bischoff@maslon.com OR you can call the WFH number at 612-672-3493.

Gene Daly Award

The Gene Daly Award is periodically awarded to Section members who have made a strong and positive impact on the estate planning practice in Minnesota.

If you would like to nominate someone for the award, please contact Andrea Breckner at (612) 455-1002 or abreckner@olsonbreckner.com.

Greater Minnesota Study Group

The Greater Minnesota Study Group meets by phone once each month to discuss estate planning, trust and estate topics of interest to the members. The members are lawyers from outstate communities. Usually five to eight members of the Probate and Trust Law Section participate in the calls. Bradley Hanson, of the Quinlivan firm in St. Cloud, sets up the monthly call and leads the

discussion. This study group provides both the opportunity for mentoring as well as the challenge of analyzing complex legal issues.

JoEllen Doebbert

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36th Annual Minnesota Probate & Trust Law Section Conference

Mark your calendars! The 2011/36th Annual MN Probate and Trust Law Section Conference will be held on June 6 & 7 at the St. Paul River Center. Stay tuned for more information.

Probate & Trust Law Section Council Meeting Dates

The Council is scheduled to meet on the following dates:

November 18, 2010

January 20, 2011

February 17, 2011

March 17, 2011

April 21, 2011

May 19, 2011

All meetings begin at 3:30 and are held at the Minnesota State Bar Association Offices President's Room at 600 Nicollet Mall in Minneapolis.

Tax Update

New License Requirement and Annual Fee for Tax Preparers. The IRS continues to post proposed regulations and updates thereto regarding its new tax preparer licensing

requirements. The rapidly expanding program now requires all tax preparers who prepare for compensation all or substantially all of any federal tax return filed after January 1, 2011, to now register with the IRS and pay an annual fee now proposed to be \$64.95. Contrary to earlier announcements, all tax preparers who currently have a PTIN (preparer tax identification number) must also apply and pay their annual fee starting immediately. The IRS will re-assign their current PTIN to those who have them now. At this point, attorneys, CPAs and enrolled agents are still not expected to be subject to the testing requirements, however, all others will be. That testing program and its related fee is not expected to be announced until some time in 2011. A September 16 check of the IRS' website (www.irs.gov) notes that the sign-up system is expected to be available in "late September."

Federal Electronic Filing Mandates. In a letter to local tax practitioners dated September 2, 2010, the IRS not only notified practitioners of the new licensing requirements, but also of the mandatory electronic filing requirements enacted by Congress as a revenue offset to an earlier stimulus package. This requirement pertains to "individual or trust returns, " presumably income tax return filings of Forms 1040 and 1041, beginning with filings made in 2011. The mandate applies to the first tax return filed in the year, but is dependent upon the number of returns that the preparer anticipates preparing during the entire calendar year. If the anticipation for the calendar year 2011 is 100 or more returns, all returns must be filed electronically. Beginning with the 2012 calendar year, the threshold drops to 11 anticipated returns for the entire year.

For more tax updates please refer to www.practicelaw.org.

IRS Issues Final Regulations Regulating Paid Tax Preparers

John R. Bedosky

On September 28, 2010, the IRS issued final regulations under Section 6109 of the Internal Revenue Code of 1986, as amended (the “Code”) that affect every tax preparer who prepares tax returns for another (“paid tax preparer”).¹ According to the accompanying IRS news release:

With 60 percent of American households using a tax preparer to help them prepare and file their taxes, higher standards for the tax return preparer community will significantly enhance protections and service for taxpayers, increase confidence in the tax system and result in greater compliance with tax laws over the long term. Currently, many return preparers do not have to meet any government or professionally mandated competency requirements before preparing a federal tax return for a fee.²

New IRS Tax Preparer Requirements – Paid Professionals Must Register for a PTIN

Effective January 1, 2010, the final regulations require paid tax preparers to apply for and obtain a Preparer Tax Identification Number (PTIN).

Until these regulations issued, PTINs were routinely used as alternatives to personal Social Security Numbers of paid tax preparers. Paid tax preparers have always been required to sign tax returns prepared by them and to include their personal Social

Security Numbers on the returns for identification purposes. A paid tax preparer who preferred not to provide a Social Security Number could use an IRS-issued PTIN instead. The final regulations make the use of a PTIN mandatory.

The IRS will implement a new online application for PTINs at the Tax Professionals page of irs.gov.³ As an alternative, preparers may submit a paper application by using Form W-12,⁴ IRS Paid Preparer Tax Identification Number Application. The IRS estimates it will take four to six weeks to respond to paper applications.

In Addition to Registration, Paid Preparers Are Required to Test and to Fulfill Continuing Education Requirements, Exam & Continuing Education Registered Return Preparers

According to the IRS, “taxpayers need and deserve tax preparers who are ethical, fully qualified, and able to provide the best possible service.” (FS-2010-1).

To ensure the public that its paid tax preparers are ethical and competent, and to facilitate tax administration by ensuring that tax returns are prepared accurately, the IRS will not only require PTIN registration, it will also require that paid tax preparers pass a qualifying exam and meet certain continuing education requirements. Although these rules also are effective on January 1, 2011, the testing and continuing education

requirements will not begin to be implemented until sometime in mid-2011. At that time, the IRS will begin administering the testing requirement. Until testing begins, all paid tax preparers will simply apply for and obtain a PTIN. The fee is \$64.25.

Once testing begins to be implemented, any paid tax preparer who is not already a licensed attorney, CPA, enrolled agent, enrolled actuary, or enrolled retirement plan agent will have pass a competency exam in order to register. Any paid tax preparer who obtained a PTIN before testing begins and does not otherwise meet one of the excepted professional categories will have until December 31, 2013 to pass the test. Presumably, this means that one would have until December 31, 2013, to qualify for one of the exceptions.

IRS Competency Test & Continuing Education Requirements

It is expected that paid tax preparers will be required to pass a test that is constructed to determine their competency for the specific type of tax returns they prepare (for example, individuals only, corporate, individual with business income on Schedule C, etc.).

After the testing requirement goes into effect, a continuing education requirement will be implemented. While details are still unclear, it appears that paid tax preparers will be required to obtain 15 hours of qualified continuing education per year in order to remain registered.

Status of Nonsigner Exemption from Testing Requirements Unclear

In its news release describing the plan implemented by the final regulations, the IRS left unresolved whether it would exempt

certain “nonsigning tax preparers” who are supervised by other qualified professionals and signing preparers from the testing requirements.

“Pending finalization of guidance, the IRS has under serious consideration extending similar treatment [not testing supervised nonsigning preparers] to a discrete category of people who engage in return preparation under the supervision of someone else—for example, some employees who prepare all or substantially all of the return and work in certain professional firms under the supervision of one of the above individuals who signs the return,” IRS in a news release (IR-2010-99).

Will this exception apply only to employees of CPA firms or also to legal assistants who prepare returns under the supervision of a tax lawyer?

IRS Intends to Publish Searchable Online Database of Registered Tax Preparers

To assist taxpayers in finding qualified paid tax preparers, the IRS will publish a searchable online database of all registered tax preparers. When this will become available is unknown. Until that time, taxpayers should exercise the same due diligence they would use before hiring any professional.

Notes

¹ T.D. 9503 (http://www.irs.gov/pub/irs-utl/td_9503.pdf).

² IR-2010-99 (Sept 28, 2010).0

³ <http://www.irs.gov/taxpros>.

⁴ www.irs.gov/pub/irs-pdf/fw12.pdf.

Prying Cash from Warm Hands: Debt Collection from the Deceased

Catherine R. Thatcher

During the recent recession it has become more common for people to be in debt when they die. Debt collectors are becoming more aggressive in trying to collect these debts from both family members of the decedent and from their probate estate.

Collection from Family Members

Many collection agencies and the law firms representing them call debtors to ask for payment of debt, and when they find out that the debtor is deceased, they ask family members to pay. An article in the September 19, 2010 issue of the Minneapolis Star Tribune states that one of the largest of such debt collectors is DCM Services LLC of Golden Valley, MN, which is considered to be “the only collection agency in the U.S. focused exclusively on deceased accounts.” Its website, www.dmcservices.com, indicates that it focuses on collecting from probate estates and has a large database to determine dates of death, probate court filings and time limits for making claims across the country. Other local law firms which attempt to collect from deceased debtors are Gurstel Chargo and Messerli & Kramer.

Many debt collectors employ tactics developed to persuade grieving family members to pay, and rely on guilt or misinformation to get people to pay. The elderly are particularly vulnerable to these tactics and will sometimes pay just to stop the phone calls. Unfortunately, the spouses and other family members of decedents in debt are often also in poor financial condition and cannot afford to pay.

Some consumer advocates believe that the families of deceased debtors are being harassed and misled by debt collectors and the Star Tribune article mentioned several court cases such debt collectors. However, well known consumer attorney Sam Glover said that some debt collectors train their agents to be nice and to listen as a way to persuade the family to pay, but thinks that such tactics are inherently harassment. Others defend the practice of contacting family members, saying that if there are assets, creditors should be paid. Probate proceedings are not commenced for every decedent, sometimes because the decedent had no assets, but other times because the decedent’s assets are hidden in a trust or joint tenancy.

Many creditors and collection agencies do try to collect directly from family members. However, a family member is not necessarily liable for the debts of deceased relatives. Even a spouse is not always liable for debts of the other spouse. Minn. Stat. §519.05 provides that a spouse is not liable to a creditor for any debts of the other spouse except for necessary medical services or household articles and supplies used by the family. No one is personally liable for debts of their parents, children or other relatives. Unless the debt is a joint debt or the survivor was a co-signer, debt is not transferred to a survivor.

The Fair Debt Collection Practices Act (FDCPA) prohibits debt collectors from using abusive, unfair or deceptive practices to collect debts. They cannot lie and state that a person is liable for the debts of another if

they are not. They cannot threaten to take legal action or to seize assets unless they are permitted by law to do so. They cannot repeatedly call someone to annoy them or misrepresent the amount owed. Minnesota Senator Al Franken is sponsoring a bill to strengthen the FDCPA by requiring collectors to furnish consumers with more information about their debts and increasing the damages allowed in private lawsuits over debt collection tactics. Minneapolis Star Tribune, September 27, 2010.

A family member who receives such a telephone call from a debt collector should give them the contact information for the personal representative of the decedent's estate, if any, or tell them that no probate proceedings will be started, and tell them not to call again. If the calls persist, they can send a certified letter telling them to stop contacting them.

Claims in Probate Court

A creditor may make a claim in a probate estate within 4 months of the date of the Notice of Creditors by mailing or delivering a written statement of the claim to the personal representative or to the probate court. This notice must be published in a legal newspaper in the county where the probate is commenced and be mailed to all known creditors. Under Minn. Stat. §524.3-801(c), which was revised in 2008, a creditor is known if "the claim of the creditor would be revealed by a reasonable diligent search for creditors of the decedent in accessible financial records known and available to the personal representative." A bill sent to the decedent is considered sufficient to make a claim.

A claim of a creditor with notice via publication or mail who does not make a claim within the 4 month period is barred.

Certain liabilities of the decedent are not considered claims and do not have to be presented within the time period, including tort claims, taxes, liens against real property, funeral and medical expenses, and expenses of administration of the probate estate.

A personal representative who disagrees with the claim of a creditor must disallow the claim within two months after the expiration of the 4 month period to make a claim. If a claim is not timely disallowed, it is deemed to be allowed. A creditor whose claim is disallowed may contest the disallowance in probate court.

However, even if a claim is allowed by the personal representative, the claim might not have to be paid if the estate is insolvent, that is, if the total amount of claims exceeds the value of the assets in the estate. Also certain assets are exempt from claims.

Homestead

A decedent's homestead passes to the surviving spouse or children (minor or adult), or issue of deceased children, either by will or by intestate succession, free of most claims. See Minn. Stat. §524.2-402. The only claims that have to be paid if the homestead is going to the spouse or descendants are (1) valid claims against the property such as a mortgage or mechanic's lien, (2) claims for state hospital care (Minn. Stat. §246.53) and (3) claims for Medical Assistance (Minn. Stat. §256B.15). If the homestead is sold, the proceeds remain exempt from any other claims, such as unsecured debts or expenses of administering the estate. See the recent unpublished Minnesota Court of Appeals case, In re Estate of John G. O'Neil, A06-1224 (April 24, 2007), and related cases cited in that opinion.

In situations where the decedent had no

spouse or descendants, or has given the homestead to someone else in a will, it is subject to all claims. If there are not enough liquid assets to pay all debts, the homestead must be sold and the proceeds used to pay the debts.

In addition to the homestead, the spouse and minor children of the decedent are entitled to personal property worth \$10,000 and one automobile (regardless of value) free of claims (Minn. Stat. §514.2-403). The surviving spouse and minor children are also entitled to receive maintenance payments of \$1,500 per month for twelve months if the estate is insolvent (eighteen months if the estate is solvent). These assets are referred to as exempt assets and are not used to pay debts.

Priority of Claims in Probate Estates

If non-exempt estate assets are insufficient to satisfy all claims in full, Minn. Stat. §524.3-805 sets out the priority for payment. All claims in each higher priority must be satisfied in full before any payment is made on a lower priority claim. If there is not enough to pay all claims in a category in full, the claims in that category must be paid on a pro-rata basis. The order of priority is:

- (a) Costs and expenses of administration;
- (b) Reasonable funeral expenses;
- (c) Federal taxes and other debts with preference under federal law;
- (d) Reasonable medical expenses for decedent's last illness, including claims for Medical Assistance;
- (e) Reasonable medical expenses incurred for care during the last year of decedent's life;
- (f) State taxes and other debts with preference under Minnesota law;
- (g) All other claims.

Most unsecured debts, such as credit card or

utility bills, fall into the last category, and do not have to be paid unless there are enough assets in the estate to pay all the claims with higher priority.

The first category of administration expenses includes court and publication fees and also attorneys' fees. If there are not enough non-exempt assets to pay all of these fees, the attorney for the estate will not get paid unless the family has personally guaranteed payment of these fees. Thus probate attorneys should consider including a personal guarantee in their retainer agreements. This would be especially important when there are few assets other than the homestead or the estate is likely to be insolvent.

An insolvent estate must be closed formally to obtain a court order determining how the assets are to be distributed among creditors according to the above priorities. This court order protects the personal representative from liability for failing to pay all claims. It also limits the length of time an aggrieved party can appeal. Generally, a probate court order can be appealed for six months after the order is filed. However, serving a copy of the Order on interested parties shortens the appeals period to sixty days. Therefore, it is prudent to serve a copy of the Order on all claimants who are not paid in full. It is also prudent to wait until the end of the 60 days period to distribute the assets to creditors pursuant to the Order so that no one can appeal after all the assets have been paid out.

If it is known that an estate will be insolvent, it should be opened as a formal estate, as this will save time and money later. However, sometimes an estate is opened informally, and then unexpected debts come up which make the estate insolvent. Then the estate must be converted to formal. There must be publication of the notice of hearing

and usually another filing fee is also required. Then a hearing is held and the court makes the following formal determinations:

- Adjudication of intestacy or formal probate of Will;
- Confirmation of appointment of Personal Representative;
- Confirmation of acts of Personal Representative;
- Approval of Final Account;
- Determination of heirs, in intestacy situation;
- Issuance of Decree specifying how the estate is to be divided.

Even if no probate proceedings are commenced or a probate estate is insolvent, creditors may still want to file a claim with the court in the county where the decedent lived to preserve their rights to collect if assets turn up later. For example, if real estate thought to be held in joint tenancy is later found to be held as tenants in common, a probate proceeding will be necessary before it can be sold. If a creditor has filed a claim, it will have to be notified of the proceeding.

In situations where no probate proceedings have been commenced by the family of the decedent, a creditor may petition to be appointed the personal representative of the estate 45 days after the date of death. As personal representative, the creditor could then collect assets of the decedent, pay claims and distribute remaining assets to the heirs. This does not happen often because it is expensive for the creditor and would not be worth the time and effort involved unless the debt was large and the decedent did have assets that could be used to pay the debt. And if the decedent had sufficient assets, the heirs would probably commence the probate proceeding themselves.

Conclusion

Family members are not usually liable for a decedent's debts, other than a spouse for some debts or a person who was a joint debtor or co-signer. If family members are contacted by debt collectors, they should not pay in most situations. The creditor is more likely to be able to collect the debt by making a claim in probate court. A probate estate does have to pay a valid claim unless the estate is insolvent.

Interview of Referee Bruce Kruger

On August 6, 2010, Referee Bruce Kruger retired from the Hennepin County probate bench. Our reporter managed to ask Referee Kruger some questions about his years on the bench.

1. How many years were you on the Bench in Hennepin County Probate Court?

A. 20 years

2. How many years on the bench in another jurisdiction?

A. 3 years (St. Louis County Court)

3. Is there a case or party that you remember, for good or bad, more than any other? Why?

A. One especially. Mother died (father predec.) intestate and sole asset was the family homestead. There were 8 children, seven married and one single. The single daughter had stayed home, cared for her father, and then cared for her mother. Petition was for decree of descent, and all 8 children and 7 spouses appeared. I expected a contest, so [I] proceeded very carefully—full introductions and then a question if folks were there to support, object or just observe. A son, who proved to be the family spokesperson, rose, and said, “We’re here to see that she (the single dtr) gets the house.” The other 7 children and 7 spouses all nodded affirmatively. I explained that the law requires that the home descend to all 8

children equally. He stood again, and told me I did not understand. The seven married children all left home, started careers, got married and raised families. She stayed with our parents. She gets the house. I explained that I could not do that, but the 7 and their spouses could gift it, using gift splitting and annual exclusions—over a period of years. A short course in gifting 101. That seemed good for them, and they told their young lawyer to get it done. I should mention that the home was on Minnehaha Creek and had an Assessor’s MV of over \$500,000 nearly 10 years ago. Renewed my faith in families and humanity.

4. If you could give a new probate attorney any advice, what would it be?

A. Be prepared on the facts and the law.

5. If you could advise an experienced probate attorney, what would it be?

A. Be prepared on the facts and the law.

6. Which holds more persuasive affect in a case, the legal pleadings or oral arguments? Can you explain?

A. Pleadings and memos. They usually are better organized and more thoughtful, and it was frequently some time between the hearing and the order-writing (short term memory, you know).

7. I assume you may have had pet peeves in the court room, can you describe some?

A. Lawyers who blamed secretaries or assistants for omissions or mistakes.

8. What did you respect the most when attorneys appeared before you?

A. Well prepared lawyers who were straight-forward.

9. What trends do you see in the probate court?

A. Huge rise in contested matters.

10. What are your plans for retirement?

A. Part time mediation, and more time fishing and traveling (especially to Europe).

11. Do you think too many cases are becoming contested without a strong basis to proceed?

A. I tend to agree with the assessment that too few lawyers are giving their client the bad, but honest news. Perhaps due to fact we have many more attorneys than when I started. I think ADR will grow (that's in part why I am at L & V), but I hope it does not become mandatory in probate and trust matters. There is no point in trying to mediate if the parties do not want to discuss a compromise.

12. What will you miss the most?

A. The flow of folks through the court—all ages, shapes, sizes, etc. A true spectrum of humanity.

13. How many judges did you go through

A. Six—Belois, Neville, Alton, Albrecht, Kaman and Quam

14. Favorite setting – trust, probate, or guardianship/conservatorship?

A. Probate – best combination of fact issues and the law. Trusts are pretty much pure legal, and guardianship/conservatorship has very little law.

Referee Kruger is now working as a probate Mediator. He can be contacted at:

Bruce Kruger

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