PROBATE FOR NEW JUDGES

COURTESY OF JUDGE RANDY KENNEDY

At the outset, let me tell you how delighted I am to join my fellow judges in welcoming you to the Tennessee judicial family. All of you are to be commended for having been chosen to serve as a judge in your community. Hopefully, during our brief time together I can provide you with some valuable tips that will help you enhance your service to the litigants and the lawyers who will appear before you in your role as a probate judge.

Whether you are going to be presented with only a few probate cases as part of your daily caseload or find yourself handling a significant volume of estate matters; there are some basic materials and sources of information that will help you in achieving your goals.

1. **REFERENCE MATERIALS & SOURCES.** As a new judge with jurisdiction over probate matters, the following research materials & informational sources should become a part of your Probate Tool Kit. They are:

    a. TENNESSEE CODE ANNOTATED, Volumes 6 & 6A
    b. PRITCHARD ON WILLS AND ADMINISTRATION OF ESTATES
    c. TENNESSEE RUES OF COURT (STATE OF LOCAL)
    d. TENNESSEE LAW OF EVIDENCE
    e. WESTLAW

In virtually every case involving a decedent's estate, the cause of action before you will involve statutes found in Volume 6, Titles 30, 31 and/or 32 of the Tennessee Code. For those judges who also have jurisdiction over conservatorships, guardianship, and/or trusts you will frequently be looking at Volume 6A, Titles 34 and 35, respectively.

Therefore, it is incumbent upon judges who handle these cases to become intimately familiar with the foregoing statutes.

It can be especially challenging for a new probate judge (or even a veteran judge whose probate experience is limited) when dealing with pro se litigants or when dealing with inexperienced lawyers. On other occasions, when attorney(s) of record in a probate case are unfamiliar with the applicable law or less knowledgeable than they should be, or when the wrong statute has been cited by the attorney(s); your expertise in probate law will be critical to the outcome of the case.

For that reason, I always kept my Tennessee Rules of Court (State and Local) and Tennessee Law of Evidence in our courtroom and on my bench. I strongly recommend you do the same.

Likewise, when your own interpretation of the law differs from that of the parties, or their respective counsel; you want to be confident that your decision is right. As a result, even in cases where you require pretrial briefs you want to be as well versed in the applicable case law as the most skilled attorneys, who appear in your court.

Consequently, it is incumbent on you to have access to Westlaw and/or Lexis Nexis.

2. **CASE MANAGEMENT.** Most judges exercising jurisdiction over probate cases in Tennessee also have a daily caseload that includes a variety of non-probate proceedings. The duties of these

judges frequently range from handling virtually every type of civil and/or criminal matter under the Tennessee sun!

So, in order to make oversight of your probate cases less burdensome; it will be helpful for you to identify the various types of probate cases that are going to be presented to you by category. Then, you will be able to determine how and when you wish to have them placed on your already busy docket.

I have identified from my own experience as a probate judge, some major case categories along with some statutory references (not all-inclusive), which you will likely encounter as follows:

1. Petitions to Open Intestate Estates and To Appoint Administrator (T.C.A. §30-1-117, et seq.)
2. Petitions to Admit Will and To Appoint Executor (T.C.A. §30-1-117, et seq.)
3. Small Estate Proceedings (T.C.A. §30-4-101, et seq)
4. Petitions to Appoint Administrator Ad Litem (T.C.A. §30-1-109)
5. Petitions to List and/or Sell Real Estate and/or To Approve Contracts to Sell Real Estate (T.C.A. §30-2-401, et seq.)
6. Petitions to Establish Lost Will (T.C.A. §32-1-105)
7. Hearings on Exceptions (T.C.A. §30-2-314) to Claims (T.C.A. §30-2-306) against Estates *
8. Hearings on Admission to Probate for Establishing Muniment of title to Real Estate & Personal Property (T.C.A. §32-2-111)
9. Motions (without Opposition) (Tennessee Rules of Court [State and Local])
10. Conservatorships (T.C.A. §34-1-101 et seq), Guardianships (T.C.A. §34-1-101 et seq), and Trusts (T.C.A. §35-15-101, et seq.) **

Almost all the foregoing case categories (other than category #7 above) begin in an uncontested format. If prepared in conformity with the appropriate statutes and case law and provided they remain uncontested (requiring only brief testimony and/or statement of counsel) you should be able to grant the relief sought and enter an Order (if prepared by counsel) in less than 10 minutes per case (courtroom time).

*With specific regard to Category #7 (Hearings on Exceptions to Claims), most hearings on exceptions filed by estate fiduciaries are regarding claims that have been filed by credit card vendors, physicians' offices, utility companies, hospitals and other retail creditors. Frequently, these hearings result in a failure to appear by the claimant in support of their claims. Consequently, most exceptions to these claims are granted for failure to prosecute, and those claims are dismissed.

3. **CONSERVATORSHIPS AND GUARDIANSHIPS.**

**Regarding Conservatorships, Guardianships and Trust cases, it's been my experience that most petitions to establish conservatorships over disabled adults, as well as most petitions to establish guardianships over the property of a minor fall into the uncontested variety. Nevertheless, your pretrial preparation for those matters (as well as Petitions to Establish, Modify, or Dissolve a Trust) if they should be presented to you generally takes longer than many of our other uncontested categories.

Time will not permit me to provide you with any extensive instruction regarding conservatorship cases, today. So, let me recommend for those of you who have jurisdiction over these matters to look at the Metro Nashville website which is provided through our Office of Conservatorship Management (OCM).

The OCM was created by our Trial Courts several years ago at my request to assist our court in providing oversight for the more than 4,000 open conservatorship cases in our judicial district. A significant amount of helpful information is provided at https://officeofconservatorshipmanagement.nashville.gov;

Likewise, Guardianships are an area that comes under the Probate Court's jurisdiction. Juvenile Courts also have jurisdiction over guardianships over the person of a minor (exclusively in neglect and dependent cases). However, as a probate judge you will be presented with petitions for appointment of a guardian over the property of a minor from time to time (and may be presented with petitions seeking the appointment of a guardian over person "and" property pursuant to T.C.A. §34-2-101 (a), et seq.).

Probate courts have concurrent jurisdiction with juvenile courts over petitions to appoint a guardian over the person of a minor (except in neglect and dependent proceedings as mentioned above). In these cases as well as in any probate matter involving a minor (who is an heir at law of an intestate estate, a will or trust beneficiary, or is a designated beneficiary of a life insurance contract or bank account) the judge has the discretion (and often the affirmative duty) to appoint a guardian ad litem.

There will likely be many occasions when the probate case before you necessitates the appointment of a Guardian Ad Litem (See T.C.A. §34-1-107) and/or an Attorney Ad Litem (See T.C.A. §34-1-125).

Consequently, I recommend to you that you develop a list of those local members of the bar who you believe will best serve as either a Guardian ad Litem (GAL) or Attorney ad Litem (AAL). Let's call it your ***Panel of GAL/AAL attorneys***. Once you have targeted these candidates for service on your panel, I strongly recommend that you elicit assurances from these lawyers that they are willing to accept appointments that are pro bono as well as those where they can expect to be compensated.

Unfortunately, some lawyers have never served as a GAL or an AAL. So, it is appropriate for you to point out to these attorneys that the two roles are distinctively different as evidenced by their statutory definitions, as follows:

Guardian Ad Litem: Pursuant to T.C.A.§ 34-1-107 (a) (1) "The court may appoint a guardian ad litem in any proceeding and, except as provided in this section, shall appoint a guardian ad litem on filing a petition for appointment of a fiduciary…" And "(d)(1) The Guardian ad litem ***owes a duty to the court to impartially investigate the facts and make a report and recommendations to the court.*** The guardian ad litem serves as an agent of the court and is ***not an advocate for the respondent or any other party."*** (emphasis added). Simply stated, the GAL serves as the eyes and ears of the court.

Attorney Ad Litem: Pursuant to T.C.A. §34-1-125 (a) "The court shall appoint an attorney ad litem **to represent the respondent** on the respondent's request, upon the recommendation of the guardian ad litem or **if it appears to the court to be necessary to protect the rights or interests of the respondent. The attorney ad litem shall be an advocate for the respondent in resisting the requested relief.**" (emphasis added). Simply stated, the AAL is serving as the attorney for the respondent.

Over the course of my own career as Judge, I estimate that well in excess of 90 % of all my probate cases (including those initiated by self-represented litigants) have been completed on an uncontested track.

While most of my uncontested matters have been without serious controversy; some of the uncontested cases have been and are complicated for a myriad of reasons. You will certainly find yourself having to modify, correct, educate, and rewrite many of the proposed orders that are presented to you.

By way of example, with respect to pro se small estate affidavits (SEA) and other pro se actions you may find yourself having to assist the Affiant or Petitioner as the case may be in modifying or amending the SEA or initial pleading for the benefit of the self-represented Affiant or Petitioner in order to conduct a hearing. Sadly, many pro se folks don't have a clue as who the heirs at law are in their own families and as a result, they will write down numerous relatives' names who are part of the extended family of the

decedent but who are not in line to inherit anything. You will most assuredly have to prepare the accompanying Orders for these types of cases.

As a timesaving mechanism, I recommend that you create a form order in addition to a form affidavit for litigants to use in all your SEA cases. As a judge who tries between 5 and 10 SEA cases every week (in addition to the other 100+ matters that appear on our weekly dockets), I'm thankful that we had the foresight to prepare such forms.

Notwithstanding the availability of detailed forms and instructions on how to fill out those forms; more than half of pro se litigants appearing before me fail to properly fill out the SEA.

Although adoption of the Small Estate statute was intended by the legislature to make it easier and less expensive for self-represented litigants to probate small estates (estates valued at no more than $50,000 and consisting of only personal property) without a lawyer; it has resulted in increasing the workload of the probate judge considerably. A recent amendment to that statute which became effective on July 1, 2022 prohibits self-represented litigants or attorneys representing an affiant from presenting a SEA for any estate where the decedent has a Last Will and Testament.

As a result, I anticipate that you will be encouraging pro se litigants who attempt to file a SEA with a Last Will and Testament to hire an attorney or to at least amend their affidavit and convert the case to a traditional probate case which results in admitting the Will of the decedent. In any event you will want to consult with your clerk on the mechanics of converting improperly filed SEA cases.

4. **LOCAL RULES & CHAMBERS RULES.**

If for any reason your predecessor has not adopted Local Rules and or Chamber Rules for your court (or even if there are Local or Chambers Rules in existence for your Probate Court), I recommend you immediately begin the process of determining what Rules you would like to adopt for those attorneys and self-represented litigants who come before you.

After all, while practicing attorneys cannot and should never guarantee outcomes for their clients; uniform rules and appropriate guardrails in your court will enhance your reputation for consistency and predictability in the legal community. In addition, this will give the lawyers (who read and understand your rules) a better understanding of your expectations.

In Davidson County, the Nashville Bar Association (NBA) has a standing committee for Probate and Estate Planning which has been in existence for many years. And, over my 18+ years on the bench, I have frequently reached out to members of that committee for feedback on changing Local Rules of Court. You may wish to examine our Local Rule 39 as a model for your own Local Rule as a format for those Local Rules you may wish to adopt.

I cannot tell you how many times the existence of those Local Rules served to make my job easier and less complicated. Our NBA Probate Court Committee has been a great sounding board for me throughout my judicial career.

I suggest you enlist the assistance of attorneys in your local bar or throughout your judicial district who are veteran probate lawyers and who you determine are the types of folks that can contribute positive and constructive input for the adoption of Local Rules that are beneficial to the operation of your court.

Finally, with regard to Local Rules and Chambers Rules, If your judicial district has the luxury of maintaining a website for its judiciary like we have in Music City (See Nashville.gov/Circuit Court Clerk and

Nashville.gov/Probate Court); let me recommend you request that your Local Rules and Chambers Rule both be published on the Website for both the general public and for the lawyers who will be coming into your court.

5. **ADVERSARY PROCEEDINGS.**

If you have had the opportunity during your legal career to participate as a litigator in various types of contested or disputed actions as a trial lawyer for plaintiffs or defendants; then adapting those skills to serving as probate judge in adversary proceedings should not be an insurmountable task.

The most difficult step for you in the probate arena or in any judicial activity is accepting your obligation to set aside your desire to be an advocate. You may have spent your entire career fighting for the benefit of individual clients, but those days are behind you.

To paraphrase U.S. Supreme Court Chief Justice John Roberts, it is our duty and function to "call balls and strikes." We aren't taking the field to hit a home run, make a spectacular catch, pitch a no-hitter or to please the "Home Team." We really are referees, and umpires. You are now the decision makers. It is a hard transition into a new role that you have chosen.

Consequently, it is appropriate to recognize a non-exclusive list of categories (with some non-exclusive statutory references) that you will probably oversee in your new position as Probate Judge.

1. WILL CONTESTS (T.C.A. §32-4-101 et seq.)
2. BREACH OF FIDUCIARY DUTY ACTIONS AND TO REMOVE FIDUCIARY (T.C.A. §30-2-504, 506, 602, 607, 608, 701)
3. FEE DISPUTES (Rules of Professional Conduct Rule 8, R.P.C. 1.5(a) (b) see also (Local Rules [LR] for your judicial district [ex. twentieth Judicial District LR39.14]) (See also T.C.A. §30-1-407)
4. MOTIONS CONTESTED (T.R.C.P. , Rule 56 is not always fun☺)
5. PETITIONS TO PARTITION
6. SPOUSAL ENTITLEMENT ACTIONS (T.C.A. §30-2-101, et seq., §30-2-201, et seq. and Twentieth Judicial District LR 39.12)
7. OBJECTIONS TO ACCOUNTINGS, INVENTORIES & PROPERTY MANAGEMENT PLANS (T.C.A. §30-2-601 et seq, §30-2-301, §34-1-110, et seq.)

Regardless of the type of adversary Proceeding before you, preparation for these matters is critical and is dependent upon your ability to provide a fair and impartial forum for the litigants.

When I first began my judicial career, I did not truly appreciate the benefit of having a pretrial brief from the parties in adversary proceedings. I hope you will encourage lawyers who appear in your court to brief your contested cases.

In a perfect world, you would always have unlimited time in all of your bench trials. With the exception of a few Will Contests and a few Breach of Fiduciary Duty cases, all of my cases have been non-jury cases. To simply review the pleadings, hear testimony of parties and argument of counsel, and make a ruling from the bench is your ultimate goal; but as we know, we don't live in that "perfect world." Consequently, pretrial briefs are invaluable in aiding you as the probate judge in all adversarial actions.

Finally, I anticipate many of your probate hearings are going to involve two categories that we have already touched upon. Both bear a little more scrutiny. They are:

1. Petitions to Open Intestate Estates and To Appoint Administrator (T.C.A. §30-1-117, et seq.)
2. Petitions to Admit Will and To Appoint Executor (T.C.A. §30-1-117, et seq.)

You will observe that both types of cases operate out of the same statute. Much of the information that shall be provided in the initial pleading is the same whether the decedent died with or without a Last Will and Testament. Over the years in my own pre-hearing preparation for both intestate and testate estates, I have developed a checklist for review that allows me to achieve the best result. I recommend you do the same. It will help you to be more efficient and afford you the satisfaction of knowing that the Order you sign is accurate and consistent with Tennessee probate law.

My own checklist contains the following:

1. Do I have subject matter jurisdiction to probate the estate? In other words (unless this is an ancillary administration or an ad litem appointment), was the decedent a resident of this county at the time of her death?
2. Does the Petitioner have standing to file the Petition? Who is he? Family member and how related? Or is he a creditor? If there is a Will, was he named Executor? Or alternate Executor?
3. Who are the Heirs at Law, by name, age and relationship and address? Even if there is a Will and even if the Heirs and Will Beneficiaries are the same, don't let the lawyers give you next of Kin make them give you both a list of Heirs and Beneficiaries.
4. If the decedent left a Will, did we have a copy filed with the petition and has the original now been filed for my examination?
5. If the decedent left a Will, what are the names, relationships, ages and addresses of all (devisees and legatees) beneficiaries?
6. If there was a Will, does the Petition recite whether bond, inventory, and/or accountings are waived? If so, where in the Will does it waive any of these requirements?
7. If bond, inventory, and/or accountings were not waived in the Will, or Decedent died intestate does Petitioner have Consents to Waive any or all statutory requirement?
8. If bond was not waived in a Will or consents have not been obtained to allow you to waive bond, what is the estimated value of the estate? It has been my practice to set bond equal to the estimated value of the liquid portion (or Personal Property portion) of the estate or to reserve bond where the liquid asset values are unknown until an Inventory can be filed and to set a review hearing after the Inventory has been approved by our Probate Master
9. Was the Petition Verified by Petitioner? Don't allow Lawyers to be the only one signing the initial pleading it must be sworn by the Petitioner.
10. Has the Petitioner (or whoever is requesting to be appointed administrator or Executor) ever been convicted of a felony, a misdemeanor, or sentenced to the Penitentiary?
11. If there is a Will, do you find from your examination of the original that it is duly and properly executed and presumptively valid?
12. If the Will is a Holographic Will, do we have two disinterested witnesses to prove the document in Open Court or affidavits from two disinterested witnesses attached to the document?