

Discussion of Intestate Estate Administration in Mississippi

Presented by Brian A Montague
July 29, 2011

Topics To Be Covered

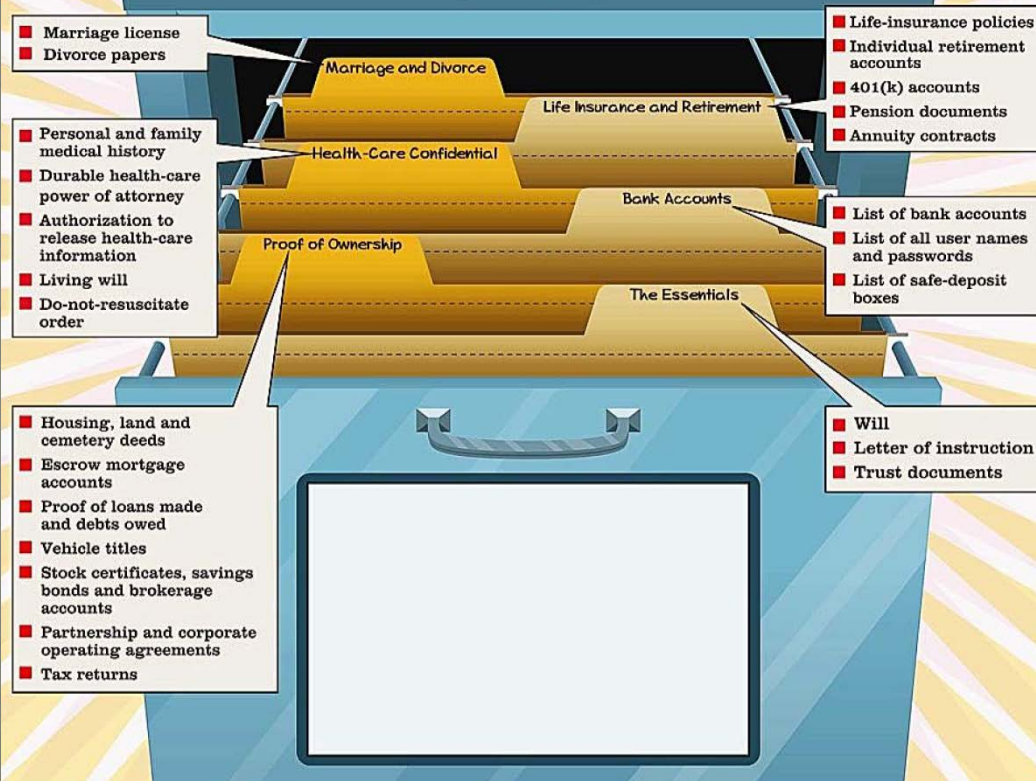
- Helpful Resources for Chancery and Occasional Chancery Practitioners
- Attorney Fees
- Distributions without Estate Administration
- Choosing the Right Administrator
- Wrong County: Transfer or Dismiss?
- When you Can Waive Bond
- Homestead and Other Exemptions
- Keeping the Business Running
- Workers Comp Commission v. Chancery
- Requirement that Fiduciaries Personally Sign and Swear To

Helpful Resources

- Wall Street Journal's "Death Dossier"
 - Reminiscent of Army's "Legal Checklist" for Deploying Soldiers
- "Essential Readings for Chancery Court Practitioners," Chancery Court Judge Gene Fair
- Judge Larry Primeaux's Blog at:
 - chancery12.wordpress.com
- *Mississippi Probate and Estate Administration*, 3rd Edition, Robert E. Williford

The 25 Documents You Need Before You Die

Design Your Death Dossier Soon—or You Could Be Setting Up Your Heirs for Frustration and Financial Pain



“Death Dossiers”

A Wall St Journal prescription for avoidance of frustration and financial pain by heirs

**A Reading List for Chancery Practitioners
(as well as those who try to handle an occasional matter in Chancery)**

Chancery Court Cases

As allowed by Section 159 the Mississippi Constitution, the cases heard by the Chancery Court include the following categories.

- * All matters in equity; (which includes cases of fraud or mistake, property rights, preservation of property, conveyances of property, mortgages and liens on property, trusts, accountings, injunctions, specific performance of contracts)
- * Divorce and alimony; (including annulment, separate maintenance, child custody, child support, division of marital assets/property)
- * Matters testamentary and of administration; (including probate of wills, handling of estates either with or without a will)
- * Minors' business; (including emancipation of minors, approving settlement of claims of minors, appointment and removal of guardians)
- * Cases of idiocy, lunacy, and persons of unsound minds; (including commitments to institutions); and
- * All matters of which Chancery Court had jurisdiction when the state constitution came into existence

Trial by Checklist

<http://chancery12.wordpress.com/2010/07/05/trial-by-checklist/>

“Some years ago an old Chancellor complained to me that we were being reduced to “trial by checklist,” what with all the cases being handed down that spelled out factors that the trial court must address in adjudicating certain issues. Over the years, those so-called checklists have multiplied, so that Chancellors are required to consider and address factors in determining:”

- * Child custody
- * Equitable distribution
- * Periodic and rehabilitative alimony
- * Lump sum alimony
- * Grandparent visitation
- * Separate maintenance
- * Modification of child support
- * Adverse possession
- * Attorney's fees

“Remember that these factors are the ones that must be decided by the judge in order to decide your case. In essence, the factors are the elements of the case that will determine its outcome. If you are not putting on proof as to each factor that applies in your case, you are **running** the risk that the Chancellor will find that there is not enough evidence to rule in your favor.” - **Chancellor Lawrence Primeaux**

Local Chancery District Rules and Uniform Chancery Court Rules:

<http://www.mssc.state.ms.us> - *Click Rules*

Judge Fair's Recommended Readings for Chancery Practitioners

Contains a “view from the bench” list and recitation of important readings, particularly in the estate and domestic areas *

* Distributed here with Judge Fair's Permission

12th CHANCERY COURT DISTRICT OF MISSISSIPPI

News and helpful information about practice in Lauderdale and Clarke Counties, Place 2.

HOME

ABOUT

TAKING CARE OF BUSINESS

MY BACK PAGES

Archive for the ' Estates and Administrations ' Category

"A PERILOUS MISTAKE" IN HANDING FIDUCIARY MATTERS

July 11th, 2011 Posted in Estates and Administrations · Guardianship · Practice and Procedure · Professionalism

Lawyers in my district are aware that I have begun cracking down on the handling of estates, guardianships and conservatorships. Delinquent and inadequate accountings, lack of inventories, absence of vouchers and other deficiencies are no longer tolerated. My motivation in part has been the fact that there are lawsuits pending against local lawyers claiming mishandling of fiduciary matters. On [[READ MORE](#)]

A COMPENDIUM OF ESTATE POSTS

July 5th, 2011 Posted in Real Property · Practice and Procedure · Pleading · Estates and Administrations · Process · Statutes · Rules

Before you file the pleadings, ask yourself whether it is necessary to open an estate in this case. And here's some more info on how to pass assets without an estate. Exempt property is not a part of the estate. Here's a guide to what is exempt and what is not. The original will must be [[READ MORE](#)]

UPDATED CHECKLIST OF CHECKLISTS

May 27th, 2011 Posted in Divorce · Separate Maintenance · Equitable Distribution · Real Property · Child Custody · Alimony · Practice and Procedure · Child Support · Estates and Administrations · Evidence · Guardianship · Attorney fees

Proving your case by proving certain factors is a fact of legal life in Mississippi. I've referred to it as trial by checklist. If you're not putting on proof of the factors when they apply in your case, you are wasting your and the court's time, as well as your client's money, and you are [[READ MORE](#)]

FIVE TIPS TO IMPROVE YOUR PROBATE PRACTICE

April 19th, 2011 Posted in Estates and Administrations · Guardianship

Always accompany the executor, administrator, guardian or conservator to the bank or other financial institution to open the estate account. That way you can make sure that the funds are properly deposited into a restricted account, and that the fiduciary does what she is supposed to do. Always ask that a duplicate bank statement be [[READ MORE](#)]

CHECKLIST FOR DOING AN ACCOUNTING IN A PROBATE MATTER

April 11th, 2011 Posted in Attorney fees · Estates and Administrations · Guardianship · Practice and Procedure · Rules · Statutes

_____ State the time period covered by the accounting, starting with the date of the last accounting, or if a first account with the date the estate, guardianship or conservatorship was

WELCOME TO

THE BLOG OF CHANCERY JUDGE
LARRY PRIMEAUX

RSS FEED

Search

SEARCH OLDER POSTS BY
CATEGORY

Estates and Administrations

WHAT PEOPLE HAVE BEEN READING
ABOUT

ALL THAT GLITTERS IS NOT GOULD

UPDATED CHECKLIST OF
CHECKLISTS

TRIAL BY CHECKLIST: CHILD
CUSTODY FACTORS

FINAL DECISION-MAKING AUTHORITY
IN JOINT LEGAL CUSTODY

PERILS OF PROCESS BY
PUBLICATION, EPISODE THREE

GET BELL ON YOUR CALENDAR

WHY NOT MISSISSIPPI?

JUDGE ROBERTS' PRIMER ON
ADVERSE POSSESSION

COA SINKS ANOTHER APPEAL FROM
A LESS-THAN-FINAL JUDGMENT

AN OLD LAWSUIT SCAM POPS UP
AGAIN

COURTS AND THE BAR

Mississippi Bar

State of Mississippi Judiciary

DISTRICT 12 LAW FIRMS

“The Blog of Chancery Judge Larry Primeaux”

- Currently about
Forty Estates and
Administrations
Posts / Articles

- Always Timely

- Continually
Updated

- Read by Many
Chancellors,
Including Locally

YOUR CHANCE TO SHINE!

*Multiple Choice Q & A (with Some True –
False)*

Always a Crowd Favorite!

*Great Way to Atone for the Diploma
Privilege!*

QUESTION ONE: ATTORNEY FEES

- The administration of many estates lasts years, and requires significant investment of attorney hours and expense. The statutes (MCA §§ 91-7-281 and -299) speak to an administrator's capacity to seek approval of attorney fees only in the context of either "the annual or final settlement". Which is the best statement of the law on whether an administrator may be reimbursed from the estate for attorney fees paid without prior court approval:
 - a. Fees charged and paid without first obtaining court approval are not reimburseable from the estate;
 - b. The Supreme Court abhors the practice of withdrawing fees on an unscheduled, periodic basis with no prior court approval and strongly counsels against such an approach;
 - c. Administrators can pay attorney fees without prior court approval, but they do so at their peril;
 - d. Both b and c?

- **Best answer is “D”.** See *McCaffrey v. Fortenberry*, 592 So.2d 52 (Miss. 1991) (Court “abhors the practice of withdrawing fees on an unscheduled, periodic basis with no prior court approval and strongly counsels against such an approach”); *Harper v. Harper*, 491 So.2d 189 (Miss. 1986) (fiduciary who acts without prior court approval does so at his peril)
- See Uniform Chancery Court Rule 6.12 (petitions for allowance of attorney fees)
- Eight Factors to be Considered in determining reasonable estate attorney fees: *In re Estate of Johnson v. Moore*, 735 So. 2d 231, 237 (¶27) (Miss. 1999) (quoting *Moreland v. Riley*, 716 So. 2d 1057, 1062 (¶16) (Miss. 1998)).

QUESTION TWO: DISTRIBUTIONS WITHOUT ESTATE ADMINISTRATION

- Not all distributions to heirs require estate administration. For instance, all these statements are correct, EXCEPT:
 - a. Personal property owed to the decedent (debts, stocks, choses in action, etc.) valued at no more than \$50,000 excluding liens and encumbrances, may be transferred on the basis of an affidavit.
 - b. Assets in banks not exceeding \$12,500 may be transferred to a “successor” without estate administration.
 - c. Accrued but unpaid wages due a deceased employee may be collected without estate administration.
 - d. Transfers of stock never require letters of administration.

- The best answer is “D”.
- “a” is correct under MCA § 91-7-322
- “b” is correct under MCA §§ 81-5-63 and 81-12-143
- “c” is correct under MCA § 91-7-323

QUESTION THREE: ORDER OF PREFERENCE ON SELECTION OF ADMINISTRATOR

- An intestate decedent is survived by a spouse and children. They don't get along and all want control of the estate. More than one seeks appointment as administrator, none within thirty days of death. Who should the Court select?
 - a. The surviving spouse;
 - b. One of the children;
 - c. A neutral third party;
 - d. Other

- Arguably “a” (the surviving spouse), but the statute does not make that a “given.” MCA § 91-7-63 (1) provides that “[t]he court *shall* grant letters of administration to the relative who may apply, preferring first the husband or wife and then such others as may be next entitled to distribution if not disqualified, selecting amongst those who may stand in equal right the person or persons best calculated to manage the estate; or the court may select a stranger, a trust company organized under the laws of this state, or of a national bank doing business in this state, if the kindred be incompetent. If such person does not apply for administration within thirty (30) days from the death of an intestate, the court may grant administration to a creditor or to any other suitable person.”

QUESTION FOUR: TRANSFER OR DISMISS

- The administrator filed his petition for issuance of letters of administration in the wrong county. Can the matter be transferred to the correct county?

- The answer, under the Supreme Court's current interpretation of the estate venue statute (MCA § 91-7-63 (1)), is that the case cannot be transferred. It must be dismissed and refiled. Action taken by the transferee court is void and not merely voidable. *National Heritage Realty, Inc. v. Estate of Boles*, 947 So.2d 238 (Miss. 2006), *reh. den.* February 8, 2007.

QUESTION FIVE: WAIVING BOND

- Your client is one of three surviving children of the decedent (the only heirs); she is the eldest and is trusted by the other two to manage the estate. In petitioning on her behalf for issuance of letters of administration, you ask for waiver of bond and you make sure your client personally signs the petition under oath. The other two heirs are properly served with process, to include Rule 81 notice of the hearing on the petition. Since no one but your client appears, you present to the judge a proposed order approving the petition and waiving bond. What's the best statement of applicable law in this instance?
 - a. Since Rule 81 service was proper, the judge can sign the order;
 - b. Since at least one heir personally signed the petition under oath, the judge can sign the order; or
 - c. The Court cannot waive bond unless all heirs so request in a sworn petition.

- **The best answer is “c”.** The Administrator is required to give a bond equal to the value of all of the personal estate. § 91-7-67, MCA.
- Bond may be waived or reduced if (1) Administrator is the sole heir, or (2) all of the heirs are competent and agree in their sworn petition to waive or reduce bond, BUT
- The court can still require a bond if the court deems it necessary to protect creditors' interests. *Smith by and through Young v. Estate of King*, 501 So.2d 1120 (Miss. 1987).

QUESTION SIX: EXEMPT PROPERTY

- “You’re handling an estate of a decedent whose spouse predeceased him. The decedent was a man of modest means with a two-bedroom home in town, some furniture and appliances, an older car, some savings and \$6,000 in a 401(k) account. There’s not enough cash to pay all the creditors’ claims. The surviving children and grandchildren want you to close the estate as soon as possible. Do you advise them to sell the furniture at an estate sale to muster up enough cash to satisfy the creditors? Or should you get court approval to sell the house, pay the debts, and distribute what’s left?” *

* Judge Larry Primeaux’s Blog, October 28, 2010

- **Most, if not all, of the described assets are exempt.** See MCA §§ 91-9-19 (general exemption statute), 85-3-21 (homestead exemption), and 91-7-117 (duty of appraisers to set aside exempt property). Exempt property descends automatically, not through the estate. Judges Fair and Primeaux have both issued reminders that attorneys for estates have a duty to determine what assets need to be declared exempt and not included in the Estate. “In moderate estates,” Judge Primeaux comments, “it could mean the difference between survivors getting nothing and the survivors getting something.”

QUESTION SEVEN: LOSING HOMESTEAD EXEMPTION

- The intestate, divorced father of two, died unexpectedly while living in a \$500,000.00 house alone. His children are all well established, live out of state, and have no desire to move into the house. It's a down market, and the house remains unoccupied and unsold longer than expected. Can the heirs successfully claim homestead exemption from ad valorem taxes? The best answer is:
 - a. Yes, since heirs may designate homestead;
 - b. Yes, so long as someone makes the annual written application before April 1; or
 - c. Yes, so long as someone occupies the vacated house and makes timely application.

- **The best answer is “C”.** Under MCA § 27-33-3 (1), the ad valorem tax exemption requires actual occupancy of the home.
- Compare MCA § 85-3-33: “In all cases where a deceased person has left a widow or husband, as the case may be, or other heirs at law, then such widow or husband or other heirs at law, or both, who may be entitled by law to inherit from the deceased person, shall be entitled to have the homestead exempt, whether selected, designated or declared for by said decedent in his lifetime or not, and such person or persons so entitled to inherit by law may select, designate or declare for such homestead on or any of the real property of which said decedent died seized and possessed, and have the same set apart to them, or either of them, as the homestead of the decedent.”

QUESTION EIGHT: KEEPING THE BUSINESS RUNNING

- Bob dies intestate, owning a small retail business. He leaves behind a spouse who, thanks to a felony conviction, cannot serve as administratrix, and a son who, being a lawyer, has little business sense. Nevertheless, the son becomes administrator of the estate and, wanting to know what it's like to make a profit, is determined to keep the business going somehow. Which is the best statement of the law on how long the son may keep the business operating as a going concern:
 - a. 3 years from date of letters of administration;
 - b. Possibly longer than 3 years, depending on the corporate or LLC status of the business; or
 - c. Both a and b.

- **The best answer is “c,” depending on circumstances.** While the statute (MCA § 91-7-173) does provide that the “chancery court ... [can] authorize the ... administrator of a decedent ... to continue as a going concern for a period of not exceeding three (3) years after the grant of letters, the business in which the decedent was engaged at the time of his death,” the Supreme Court has held that that applies to unincorporated businesses. See *Harper v. Harper*, 491 So.2d 189 (Miss. 1986).
- Compare MCA §§ 79-4-7.24 (corporations authorized to accept votes of administrators voting for shareholder) and 79-29-709 (when LLC member dies, personal representative of member’s estate may exercise member’s governance rights for purposes of settling estate).

QUESTION NINE: WORKERS COMP COMMISSION or CHANCERY

- A man dies in an on-the-job accident, caused by a third party tortfeasor with minimal liability insurance and few assets. He's survived by a wife and minor children. You open an estate, seek appointment of a GAL, submit an inventory, accounting, publish notice to creditors, obtain a determination of heirs and wrongful death beneficiaries, and meet other requirements. Workers Comp Death Benefits are paid. You request chancery approval of the settlement w/ the third party of the WD claims, including those of the minors, which the Chancellor grants. Regarding final approval authority where no WD suit was ever filed, the better answer is the following:
 - a. As no WD suit was filed and as the matter involves minors and an estate, the Chancellor may approve the settlement; or
 - b. As WC Death Benefits were paid and as no WD suit was filed, the Workers Comp Commission must approve the settlement under MCA § 71-3-71 ("settlement ... before an action is brought shall be subject to the approval of the commission") even after the Chancellor approves it.

- The “easy” answer is, the Workers Comp Commission should approve under MCA § 71-3-71. See *Powe v. Jackson*, 109 So.2d 546 (Miss. 1959) (“settlement between Powe and Jackson was executed at a time when there was no action pending in the circuit court against the third party, Jackson. ... The statute clearly prohibits such settlements without approval of the Commission.”) But note!
 - Chancery Court with primary, if not exclusive, jurisdiction has already spoken on the matters of the equity of the settlement and its distribution (including of the minor's share), on who the wrongful death beneficiaries are, on authorized attorney fees, and on how distributions should be made.
 - MCA § 71-3-51 provides that “no controversy shall be heard by the Commission ... while the same matter is pending ... in any court of this state.” See also *Long v. McKinney*, 897 So. 2d 160 (Miss. 2004) (powers of Chancery Court in context of wrongful death claims).

QUESTION TEN: “PERSONALLY SIGNED AND SWORN TO”

- It has sometimes been the practice for estate pleadings to be signed either by the fiduciary’s attorney or by that attorney with the fiduciary signing above a separate, non-sworn acknowledgement, then attached. Under applicable Uniform Chancery Court Rules, is this acceptable?

- **This is not correct.** Uniform Chancery Court Rule 6.13 provides that “all pleadings, including accounts and reports, filed by a fiduciary shall be personally signed and sworn to by him.”

CONCLUSION

- Contact Information:

Law Offices of Brian A Montague PLLC

25 Town Center Square

Hattiesburg, MS 39402

601-450-1111

brian.m@montaguelawyer.com

www.montaguelawyer.com

- Questions ?