

Foundations of Estate Administration in Wyoming and Preparing to Begin the Administration Process

By: Kris Koski

**NBI Seminar (Estate Administration Procedures:
Why Each Step Is Important)**

December 12, 2013

I. FOUNDATIONS OF ESTATE ADMINISTRATION DEFINED

A. Identifying Probate and Non-Probate Assets

Identifying probate and non-probate assets early on is critical because identification will often determine whether probate is necessary at all and what, if any, estate administration procedure should be followed. The identification of probate and non-probate assets involves both a legal analysis and an analysis of a decedent's intent.

i. Rights of Survivorship

The first question to ask is whether a potential probate asset has a right of survivorship. Any asset that has a right of survivorship is by definition a non-probate asset. A right of survivorship may come from a joint tenancy or tenancy by the entireties ownership.

a) Tenancy In Common Presumed

In *Choman v. Epperley*, 592 P.2d, 714 (Wyo. 1979), the Wyoming Supreme Court held that joint tenancies were not to be presumed without clear language on the face of the vesting instrument indicating an intent to create a right of survivorship. Therefore, the default form of co-ownership in Wyoming is a tenancy in common. A tenant in common interest is included in a decedent's probate estate. The title vesting document determines the specific tenancy in common share of the decedent. If the title vesting document is silent, equal tenancy in common ownership is presumed. For example, if a deed identifies three (3) grantees and is silent as to the allocation of ownership, each grantee is presumed to own equal undivided one-third (1/3) shares of the grantor's interest.

Wyoming also recognizes tenancy by the entireties in both real and personal property. *Lurie v. Blackwell*, 51 P.3d 846 (Wyo. 2002). A tenancy by the entireties is a concurrent ownership, by a husband and wife, of an interest that includes a right of survivorship. The key distinction from a joint tenancy is that a tenancy by the entireties may not be unilaterally severed by one of the tenants or the creditors of one of the tenants. Similarly to joint tenancies, tenancies by the entireties are disfavored and typically not to be presumed in Wyoming. *Oatts v. Jorgenson*, 821 P.2d 108, 114 (Wyo. 1991).

b) Language On Vesting Instrument

As stated in *Choman*, whether a right of survivorship is created depends upon the language of the vesting instrument.

While a tenancy by the entirety is typically not presumed, *Peters v. Dona*, 54 P.2d 817 (Wyo. 1936) held that where the vesting instrument conveys to two grantees and specifically states as “husband and wife,” a tenancy by the entireties is created. As *Choman* did not specifically overrule *Peters v. Dona*, it is believed that a conveyance to a married couple that includes the words “husband and wife” creates a tenancy by the entireties. However, the Wyoming Supreme Court has held that title to a vehicle in the name of “husband and/or wife” did not create a tenancy by the entireties ownership. *Rupe v. First Nat. Bank at Douglas*, 485 P.2d 384 (Wyo. 1971). Due to the ambiguities in the current law, we suggest that any attorney drafting a title instrument should explicitly state the type of co-ownership, if any.

c) Affidavit of Survivorship

If there is a right of survivorship, the asset is not included in the decedent’s probate estate. While legal title to the property effectively passes to the surviving tenant(s) upon the decedent’s death, the surviving tenant(s) should record an Affidavit of Survivorship in accordance with Wyo. Stat. § 2-9-102 in order to effectively establish record marketable title. The Affidavit of Survivorship should be recorded with an attached certified copy of the official death certificate of the decedent.

ii. Joint Accounts

Often in probate, an attorney will be faced with the situation where the decedent owned a joint bank account with a spouse, child or another caregiver. The issue that arises is whether the joint account is a probate asset.

Wyo. Stat. § 2-1-203(b) provides that a financial institution may pay out any deposits, or interest thereon, to any surviving owner of a joint account. However, no Wyoming case has held that that this statute determines ownership of a joint account after the death of a decedent; the statute’s express language simply relieves a financial institution from any liability associated with a distribution to a surviving owner of a joint account.

In *National Bank of Newcastle v. Wartell*, 580 P.2d 1142 (Wyo. 1978), the Wyoming Supreme Court held that in order to create a joint tenancy or tenancy by the entireties in personal property, there must be one of the following minimum requirements: (1) the existence of the four unities of interest, time, title and possession; or (2) language on the instrument itself that the parties thereto intended to create a right of survivorship. However, the existence of the four unities does not ipso facto create a joint tenancy or tenancy by the entireties if other evidence suggests a manifestation of intent otherwise. *Choman*, 592 P.2d at 715. Therefore, whether a joint account is a probate asset or not becomes an issue of intent of the decedent. An attorney should ask the surviving joint account owner whether the decedent intended the surviving joint account

owner to own the account or whether the decedent intended that the joint account be includable in the decedent's estate. In situations where there are multiple children of the decedent and only one child is listed on the joint account, it is often likely that the account should be treated as a probate asset. *See Rossel v. Miller*, 26 P.3d 1025 (Wyo. 2001).

iii. POD and TOD Assets

Payable on death ("POD") and transfer on death ("TOD") assets/accounts are typically non-probate assets and are not included in the probate estate of the decedent. Bank accounts may be POD accounts and payment may be paid by the financial institution to the POD payee upon presentation to the financial institution of proof of death of the original party to the account. Wyo. Stat. 2-1-203(d). Many other types of accounts such as 401Ks, insurance or retirement accounts may have a TOD designation or may have a death benefit payable to a designated beneficiary. Brokerage accounts may or may not have a TOD designation and the attorney should check with the brokerage company to determine whether one exists. If an account does not have a POD/TOD designation or if the decedent's estate is listed as the POD/TOD beneficiary, then the account is a probate asset.

iv. Trust Assets

Assets that are held by a trustee of a trust are not probate assets. In fact, decedents often convey their assets to a trust during their lifetime for the purposes of probate avoidance. The distribution of trust property following a decedent's death is made by the trustee or successor trustee of the trust pursuant to the trust's terms and the Wyoming Uniform Trust Code (Wyo. Stat. §§ 4-10-101 through 4-10-1103), as well as common law and equitable principles not inconsistent with the trust terms or the Code. However, an attorney should be aware that the titling of an asset is often determinative and that an asset may be a probate asset of the estate if record title to the asset was never effectively transferred to the trustee of the trust.

v. Tangible Personal Property

Tangible personal property is personal property that can be physically relocated such as furniture and jewelry. Determining whether tangible personal property is includable in the decedent's estate or whether it is either not owned by the decedent or owned jointly with rights of survivorship is often difficult. One way to determine the ownership of tangible personal property is to examine insurance policies such as homeowner's insurance policies to inquire as to whether the decedent listed the specific tangible personal property as their asset. However, the ownership of specific items of tangible personal property often becomes a pure fact trial type question for the court to determine.

B. Understanding the Various Forms of Administration

Wyoming is NOT a Uniform Probate Code state and the various forms of estate administration differ significantly from the neighboring states.

i. Determination of Heirship

Wyo. Stat. §§ 2-9-201 through 2-9-204 provide a procedure for the transfer of title from an intestate decedent that died at least two years prior to the petition for the determination of heirship. This procedure may be used when it is discovered long after the death of an intestate decedent that the intestate decedent owned real property in the State of Wyoming. This scenario is most likely to arise in the context of mineral ownership when an oil and gas company or other mineral exploration company discovers that an intestate decedent died owning a mineral interest in the land in which they desire to explore for oil, gas and other minerals. However, in the interest of reducing client costs, this procedure should typically only be utilized when the real property at issue is valued at greater than \$200,000 as of the date of the death of the intestate decedent due to the availability of the Distribution by Affidavit and Summary Procedure under Wyo. Stat. §§ 2-1-201 through 2-1-205.

According to Wyo. Stat. § 2-9-201, any heir of the deceased, or other person having derived title from the deceased, may file a petition for the determination of heirship in the county in which the deceased was a resident at the time of his/her death, or in the case of an out of state decedent in the county in which the real property is located. Upon filing of the petition, notice shall be mailed to the surviving spouse (if any), all of the heirs of the decedent and all reasonably ascertainable creditors of the decedent. The notice shall include the time and place of the hearing, the date of the decedent's death, the decedent's residence at the date of death and a description of the real property which the decedent died seized of. This notice shall also be published in a newspaper of general circulation in the county in which the petition was filed for four (4) consecutive weeks prior to hearing.

ii. Summary Procedure For Distribution of Real of Personal Property

The Summary Procedure for distribution of a decedent's real and/or personal property is available when: (1) the value of the decedent's probate estate does not exceed \$200,000 (as valued as of the date of the decedent's death); (2) at least thirty (30) days have passed since the decedent's death; and (3) no application for the appointment of a personal representative has been granted or is pending in any county in the state. Wyo. Stat. § 2-1-205.

Unlike a formal probate, the application for a summary decree of distribution is made by the distributee(s) of the estate who are entitled to distribution of the real or personal property and no personal representative is appointed by the Wyoming court. The application should be filed in the county in which the property is located, sworn to by all applicants claiming an interest in the decedent's estate and accompanied with a "sworn report of appraisal" made by a disinterested person showing the value of the decedent's estate as of the date of death of the decedent. Wyo. Stat. § 2-1-205(b). A disinterested person means a person that is not inheriting from the decedent's estate and is also a person unrelated to the decedent either by blood or marriage.

Upon filing the application, a notice of application shall be published, in a newspaper of general circulation in the county in which the application is filed, once a week for two weeks. Wyo. Stat. § 2-1-205(c). If no adverse claims are made and if it appears that the facts stated in the application are not in dispute, then the court shall enter a decree establishing the right and title to the property. *Id.*

iii. Wyoming Formal Probate

A Wyoming supervised probate procedure is required when the Wyoming probate estate assets are in excess of \$200,000 regardless of whether the decedent was a resident of Wyoming. This probate procedure is guided by Wyo. Stat. §§ 2-6-101 through 2-7-815.

The proper venue where a will is proved and letters testamentary or letters of administration are issued is the county in which the decedent was a resident at the time of his/her death or, if the decedent was not a resident of Wyoming, in the county in which any part of the estate may be located. Wyo. Stat. § 2-2-102.

A petition for a probate of a will is made pursuant to Wyo. Stat. § 2-6-201 and shall include: (1) facts related to the court's jurisdiction; (2) statement as to whether the executor named in the will consents to act or renounces the right to act; (3) the names, ages and residences of the heirs and devisees of the decedent (as known by the petitioner); (4) the probable value and character of the decedent's real and personal property; and (5) the name and right of the person seeking letters testamentary. Once the petition is filed, the court may hold a hearing to admit the will to probate and no notice is required prior to the hearing. Wyo. Stat. § 2-6-203. After a will has been admitted to probate, any interested person may contest the will or validity of the will by filing a will contest petition, within three (3) months of the date of the first publication of notice, praying that the probate of the will be revoked. *See* Wyo. Stat. §§ 2-6-301, 2-6-122 and 2-7-201.

Once a court admits a will to probate and issues letters testamentary (or letters of administration for an intestate estate), the personal representative shall take possession of

all of the decedent's real and personal property. Wyo. Stat. § 2-7-103. The personal representative shall arrange for notice to be published for three (3) consecutive weeks in a newspaper of general circulation in the county in which the probate is pending. See Wyo. Stat. § 2-7-201. The personal representative shall also arrange for notice to be mailed to the surviving spouse (if any), all intestate heirs of the decedent and all beneficiaries named in the decedent's will within one (1) week after first publication. See Wyo. Stat. § 2-7-205. Mailings of notice to any reasonably ascertainable creditors should be mailed no later than thirty (30) days prior to the expiration of three (3) months after first publication of notice. *Id.*

iv. Foreign Wills and Ancillary Administration

Often, a personal representative will approach an attorney regarding an ancillary administration of a decedent's estate that may have already been probated in the decedent's domiciliary. The Wyoming Probate Code does offer various administration options for this scenario. However, unlike the UPC (Uniform Probate Code) states, Wyoming does not offer an "informal" ancillary administration and therefore the Summary Procedure should be used when available.

a) Uniform Foreign Probate Act

The Uniform Foreign Probate Act is codified under Wyo. Stat. §§ 2-11-101 through 2-11-105 and provides a procedure for the filing of a foreign will in this state. Basically an authenticated (also referred to as an exemplified) copy of the will is filed in any district court in which some or all of the decedent's Wyoming estate lies. "If it appears to the court that the instrument should be allowed in this state as the last will and testament of the deceased, the copy shall be filed and recorded and the will has the same effect as if originally proved and allowed in the court." Wyo. Stat. § 2-11-105(b). After the foreign will is admitted to probate, the same procedures for formal estate administration of a domestic will are applied (Wyo. Stat. §§ 2-6-101 through 2-7-815.).

b) Ancillary Administration

Wyo. Stat. §§ 2-11-201 and 2-11-202 provide an ancillary administration procedure for Wyoming estates that do not exceed the value of \$200,000. In order to conduct a Wyoming "Ancillary Administration," the petitioner must file a petition with the appropriate Wyoming District Court (*see* Wyo. Stat. § 2-2-102) setting forth the facts together with certified copies of the: (1) foreign state's probate petition; (2) foreign state's order of appointment; (3) foreign state's notice to creditors; and the (4) foreign state's inventory that must also include the Wyoming property. See Wyo. Stat. § 2-11-202. The foreign state's court must also issue an order authorizing the person representative to sell or otherwise dispose of the Wyoming property. Wyo. Stat § 2-11-202(a)(ii). Notice is then made by publication for three (3) weeks and if no objection to

the petition is made, “the judge shall make an order admitting the certified copies of the proceedings in the estate and the order authorizing sale or other disposition of Wyoming property to record in his court and they shall be considered and treated from that time as original proceedings in his court and shall be conclusive evidence of the facts therein.” Wyo. Stat. § 2-11-202(a)(iv).

One drawback to this proceeding is that in many cases the proceedings in the other jurisdiction are informal and the domiciliary court does not issue an order of final decree of distribution. Therefore, because the statutory limit is identical to the statutory limit for a Summary Procedure, a Summary Procedure is typically recommended. However, an attorney may desire to use the ancillary administration procedure in instances in which it is desirable for the estate’s assets to be controlled by the personal representative.

v. Probate of Will Without Administration

Pursuant to Wyo. Stat. § 2-6-122, any party who would be entitled to letters testamentary under Wyo. Stat. § 2-6-208 may file a petition with the clerk for the probate of a will without administration. The petition shall show: (1) the date and place of death of decedent and county and state of decedent’s last residence; (2) names, ages and residences of the heirs and devisees of the decedent; (3) a statement that a true copy of the will and petition have been mailed to each of the heirs and devisees of the decedent; and (4) request for the probate of the will without administration.

Upon filing of the petition, proceedings to admit the will to probate shall be conducted pursuant to Wyo. Stat. §§ 2-6-203 through 2-6-206. After the court enters an order admitting the will to probate, the petitioner shall publish notice for three (3) consecutive weeks in a newspaper of general circulation in the county which the probate was granted. Wyo. Stat. § 2-6-122(d). If no action to set aside the will is commenced within three (3) months of the publication of the first notice, any future action to set aside the will is forever barred.

C. Considerations For the Small Estate

There are a few considerations that an attorney should take into account before pursuing a summary decree distribution of property under Wyo. Stat. §§ 2-1-201 through 2-1-205.

One consideration is whether the estate is even large enough to justify any type of administration. Often, an estate may only consist of low value personal property or small fractional mineral interests. In the case of mineral interests, small non-producing interests may be virtually valueless. Furthermore, often times an oil, gas or mineral company may be willing to rely on an “affidavit of heirship” and not require any

administration to release bonus and royalty payments to the heirs and devisees of an estate. In the case of low value personal property, all of the heirs or devisees of an estate may agree to a distribution of the assets. In these instances, the executor of an estate would be wise to get a signed written agreement among all heirs and devisees for the distribution of the estate's assets that includes an indemnification against those responsible for administering the estate. However, the attorney should caution any client that Wyoming law still provides a penalty of up to one (1) year in jail and/or a fine of five hundred dollars (\$500) for "any person, except one acting under provisions of W.S. 2-201 and 2-1-202, who administers the personal estate of any person dying after the passage of this act, or any part thereof, without proving the will of the deceased or taking out letters of administration" Wyo. Stat. § 2-7-102. Our office is unaware of any person ever being prosecuted under this statute, but it is on the books nevertheless.

Another consideration is identifying the appropriate applicant(s) for the summary decree. In some instances the heirs or devisee under the will of a decedent may have disclaimed or previously conveyed their interest. Our understanding of Wyo. Stat. § 2-1-205 is that an appropriate applicant is any person entitled to possession or ownership of the decedent's real or personal property and is not necessarily an heir or devisee of the decedent.

D. Knowing the Advantages and Disadvantages of the Summary Procedure Administration and Complying with the Procedures

There are both advantages and disadvantages to utilizing the summary procedure under Wyo. Stat. §§ 2-1-201 through 2-1-205. The big advantage is that the summary procedure is much quicker and less costly than a "formal probate" administration.

The lack of an appointment of a personal representative may be an early disadvantage. In many instances, instant access to funds is necessary to handle funeral and burial costs. The summary procedure may not even be initiated until at least 30 days after the date of the decedent's death. In such a scenario, it may be necessary to file a formal probate petition in order to quickly appoint a personal representative.

Another issue is notice to creditors. *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988) holds that the Due Process Clause of the Fourteenth Amendment requires notice by mail or other means to reasonably ascertainable creditors of a decedent's estate in order to ensure actual notice for the purposes of barring a subsequent creditor claim. The summary procedure statutes do not require actual notice to creditors. Therefore, the lack of statutory authority leaves this area a murky issue. We suggest to mail notice of the summary decree application to all known and/or reasonably ascertainable creditors with a return receipt requested.

Account holders of decedents may also be leery of distributing funds to persons claiming to be entitled to distribution. Wyo. Stat. § 2-1-201(d) provides that “upon presentation of an affidavit as provided in subsections (a) and (c) of this section, any bank, savings and loan institution, credit union or any other like depository shall pay any deposit in the sole name of the decedent, together with the interest and dividends thereon, to the distributee or distributees...a receipt for the payment by the distributee paid is a valid and sufficient release and discharge for the payment made.” A presentation of this statutory language should be enough to convince the financial institution to release the account. However, in extreme instances, the lawyer may suggest that the distributees also agree to indemnify the financial institution for the release of the decedent’s funds.

II. PREPARING TO BEGIN THE ADMINISTRATION PROCESS

A. Understanding the Laws of Intestacy and How They Affect the Estate

The laws of intestacy apply to a decedent’s estate when the decedent dies without a valid will. A valid will in Wyoming must either be in writing and executed by the testator in front of two competent witness pursuant to Wyo. Stat. § 2-6-112, a holographic will pursuant to Wyo. Stat. § 2-6-113 or a self-proving will pursuant to Wyo. Stat. § 2-6-114. The laws of intestacy dictate who is entitled to a decedent’s assets when there is no valid will.

Wyo. Stat. § 2-4-101(a) and (c) dictate the rules of descent and provide:

(a) Whenever any person having title to any real or personal property having the nature or legal character of real estate or personal estate undisposed of, and not otherwise limited by marriage settlement, dies intestate, the estate shall descend and be distributed in parcenary to his kindred, male and female, subject to the payment of his debts, in the following course and manner:

(i) If the intestate leaves husband or wife and children, or the descendents of any children surviving, one-half (1/2) of the estate shall descend to the surviving husband or wife, and the residue thereof to the surviving children and descendents of children, as hereinafter limited;

(ii) If the intestate leaves husband or wife and no child nor descendents of any child, then the real and personal estate of the intestate shall descend and vest in the surviving husband or wife.

(c) Except in cases above enumerated, the estate of any intestate shall descend and be distributed as follows:

(i) To his children surviving, and the descendents of his children who are dead, the descendents collectively taking the share which their parents would have taken if living;

(ii) If there are no children, nor their descendants, then to his father, mother, brothers and sisters, and to the descendants of brothers and sisters who are dead, the descendants collectively taking the share which their parents would have taken if living, in equal parts;

(iii) If there are no children nor their descendants, nor father, mother, brothers, sisters, nor descendants of deceased brothers and sisters, nor husband nor wife, living, then to the grandfather, grandmother, uncles, aunts and their descendants, the descendants taking collectively, the share of their immediate ancestors, in equal parts.

In *In re Estate of Fosler*, 13 P.3d 686 (Wyo. 2002), the Wyoming Supreme Court interpreted Wyo. Stat. § 2-4-101(c)(iii) as providing a per capita distribution to the root generation of “grandfathers, grandmothers, uncles and aunt” and to their descendants per stirpes.

Wyo. Stat. § 2-4-201 dictates the persons entitled to administer an intestate’s estate and provides the following order in which an administrator shall be chosen: the surviving spouse, the children, the father or mother, the brothers or sisters, the grandchildren, the next of kin entitled to distribution, the creditors or if none of the foregoing are willing to serve than any person legally competent. However, an administrator must be of the age of majority and competent. Wyo. Stat. § 2-4-203. Relatives of the decedent may only administer the estate when they are a rightful distributee. Wyo. Stat. § 2-4-201(a).

B. Knowing What to Get Out Of Client Interview

The initial meeting should typically involve the personal representative(s) named under the will or, for the case of an intestate, the person(s) willing to serve as administrator. The person(s) at the initial meeting will help guide the attorney-client engagement.

In the first client interview, the attorney will want to get the information that is necessary to file the probate petition. This will include figuring out the family tree and obtaining the addresses of all family members entitled to notice. This will also include figuring out the addresses of all distributees named in the will. The probate petition does require a “probable value” of the decedent’s real and personal property. Therefore, the attorney should try his or her best to obtain the real and personal property information from the client with a rough eyeball appraisal of the estate’s assets. Also, the attorney will want to identify all of the aliases of the decedent in order to include the aliases on the probate petition.

The attorney should also request that the client provide the personal papers (or copies) of the deceased at the initial meeting. The personal papers of the deceased should

be reviewed to determine the identity of any estate planning and tax advisors. This will include the attorney who drafted the will or trust, the accountant who has been doing tax returns, the life insurance agent for any life insurance coverage, and any stock broker or other financial planner who may have been familiar with and possibly even has custody of some of the assets of the deceased. The employer/sponsor, trustee or other custodian for any retirement plan benefits (such as an IRA account or 401(k) plan) should also be determined. Identifying these parties is critical as each of these parties should be notified of the death of the decedent and these parties may provide much of the information the attorney and client need to compile.

The attorney and client should review the personal papers of the decedent to determine any debts of the decedent and whether there are any unpaid bills. The attorney should also examine any papers regarding business interests of the decedent. The business planning documents will often include buy/sell agreements or succession plans for the decedent's business interests.

Finally, the attorney should also discuss with the client any potential adversarial issues that may be encountered in the probate. These often arise in situations of second marriages, disinherited children or relatives that just plain don't get along. Identifying these issues early on may ease any headaches later.

C. Determining the Survivors' Immediate Needs

i. Monetary Needs

The first immediate need is often times money for things such as bill paying and/or funeral expenses. Therefore, if money is an immediate need, this will guide the attorney's selection of the administration procedure. The affidavit procedure may not be initiated until at least thirty (30) days after the decedent's death to distribute personal property. *See* Wyo. Stat. § 2-1-201. Therefore, the attorney may need to immediately file a formal probate petition to give the personal representative or executor of the estate access to the estate's monetary assets. If the estate is fairly small, the attorney can later ask the court for a dismissal of the probate and commence a summary procedure administration.

Another potential source for money is a life insurance policy. All life insurance applications will require a death certificate and the original policy. The life insurance agent, if known, should be contacted in order to obtain a death benefit claim form. A Form 712 should be requested from the insurance company if it is expected that the estate will file a federal estate tax return (i.e. estates greater than \$5.25 million in 2013). The life insurance policy will typically have a payable on death beneficiary and therefore

payment is not subject to the probate process. If the circumstances regarding a death are not suspicious, the policy benefit may be paid fairly quickly by the insurance company.

ii. Accounting Needs

The attorney will also want to help the personal representative open a new estate account at a bank. In order to accomplish this, the bank will require a new tax identification number. Therefore, a tax identification number should be applied for early on and this can be done by the attorney. *See* EIN Individual Request, <https://sa2.www4.irs.gov/modiein/individual/index.jsp>. The client may request that the decedent's former bank account be used and there may be no harm in using the old account if it is non-interest bearing; however, it is typically best to open a new estate account. The attorney should also advise the executor to note on all deposits what the deposits are for (i.e. principal or income) in order to aid the accounting that will occur prior to the inventory being filed. If the executor needs to add money to the account, this should be noted as a loan on the deposit slip and the loan should be repaid without interest as soon as is feasible. The attorney should also advise the client that all estate bills should be paid through the one checking account and not through the executor's personal account or any other accounts of the decedent.

iii. Allowance for Surviving Spouse and Minor Children

Wyo. Stat. §§ 2-7-501 through 2-7-509 address the right of persons to a homestead exemption and additional support. "When a person dies leaving a spouse or minor children, the spouse or minor children are entitled to remain in possession of the homestead, all wearing apparel of the family, and all household furniture of the decedent until letters are granted and the inventory is returned." Wyo. Stat. § 2-7-501(a). The court may also grant a reasonable allowance out of the estate as is "necessary for the maintenance of the family." Wyo. Stat. § 2-7-502. In fact, when any resident of Wyoming dies leaving a spouse or minor children, the court shall set over the homestead exemption of the decedent to the surviving spouse, and if none to the minor children, as their absolute property. The right to the homestead exemption is in addition to any share of the estate the surviving spouse or minor children are otherwise entitled to. The homestead exemption is currently \$30,000. *See* Wyo. Stat. § 2-7-508.

It is important to note that the homestead exemption is separate and distinct from the surviving spouse's elective share. A surviving spouse is entitled to an elective share in instances in which the will deprives the surviving spouse of more than their elective share under Wyo. Stat. § 2-5-101. *But see In re Estate of George*, 265 P.3d at 231-33 (holding the surviving spouse's elective share does not include the value of property transferred to by the deceased spouse to a trust during the deceased spouse's life).

iv. Misc.

Overall, determining a survivor's immediate needs may vary wildly on a case by case basis. An attorney may be required to be more hands on dependent upon the situation. Sometimes the decedent was the caregiver for the surviving spouse and so the attorney may be faced with helping arrange for a new caregiver for the surviving spouse. A decedent also often leaves pets. Typically relatives will take over control of the pets but there may be instances in which relatives are either unable or unwilling to take care of the pets. The decedent's will may provide for the distribution of pets (including tangible personal property necessary for their care) to specific individuals.

D. Examining the Safe Deposit Box: Identifying Important Documents

One issue that may arise with a safety deposit box is access. This situation may occur when the will of the decedent is located in the safe deposit box at a bank. Without the will, letters testamentary cannot be issued to give the personal representative access to the box. Therefore, an attorney may be forced to initiate an intestacy proceeding to appoint an administrator and then subsequently petition the court to convert the intestacy proceeding to a proceeding to probate the last will after the will is located in the box.

It has been our experience that rarely are relevant important documents located in the safety deposit box but that oftentimes assets of value (i.e. jewelry, coins) are located in the safety deposit box. Therefore, we recommend that a witness be present when either the attorney or personal representative examines the contents of the safety deposit box. The safety deposit box may contain other relevant documents such as old stock certificates and life insurance policies. However, the safety box may also contain marriage certificates, birth certificates and other documents that are unnecessary for the probate of the estate.

E. Locating the Will and Knowing What to Do Next

If the will is not located in a safe deposit box, it may be located in another location such as a filing cabinet in the decedent's residence. The decedent's former attorney may also have an original or copy of the will. The Wyoming State Bar provides a service of sending out an email, upon request, to area attorneys in order to assist in locating the will. Locating the will is typically an issue of the custodian of the will becoming aware of the decedent's death. According to Wyo. Stat. § 2-6-119, "every custodian of a will, within ten (10) days after receipt of information that the maker thereof is dead, shall deliver the same to the clerk of the district court having jurisdiction of the estate or to the executor named therein." A copy of a will may be probated but only if "it is proved to have been in existence at the time of death of the testator, or is shown to have been fraudulently

destroyed in the lifetime of the testator, nor unless its provisions are clearly and distinctly proved by at least two (2) credible witnesses.” *See* Wyo. Stat. 2-6-207.

Once the will is located, the attorney should examine it for its validity. A valid will in Wyoming must typically be in writing and executed by the testator in front of two competent witnesses. Wyo. Stat. § 2-6-112. Newer wills are more likely to be “self-proving” in accordance with Wyo. Stat. § 2-6-114. “If the will is not self-proving, proof of a will may be made by the oral or written testimony of one or more of the subscribing witnesses to the will.” Wyo. Stat. § 2-6-205. Wyoming also recognizes holographic wills, whether witnessed or not, so long as it is entirely in the testator’s handwriting and signed by the testator. Wyo. Stat. § 2-6-113.

The attorney should also examine the will in its entirety as to the distribution of the estate’s property and any specific devises or bequests. Often times it must be determined whether to honor a specific devise or bequest (i.e. ademption vs. nonademption) or whether such device or bequest shall be included in the residuary estate. Wyo. Stat. §§ 2-6-106 through 2-6-109 address these issues. The will may also give specific instructions regarding specific bequests of securities; but, if not, the provisions under Wyo. Stat. § 2-6-108 should be consulted.

A will often will address the tangible personal property of the decedent. According to Wyo. Stat. § 2-6-124, a “will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money, evidences of indebtedness, documents of title, securities and property used in a trade or business.” In order to be effective, this writing must be dated, in the testator’s handwriting and include a reasonably certain description of the item.” *Id.* As this writing may be prepared and altered after execution of the will, this writing will often be located in the decedent’s home or other place where the decedent may keep important documents.

F. Considerations in Appointing and Counseling the Personal Representative

A testator of a will may name anyone who is a resident of the United States to serve as executor. However, if the executor is an out of state resident, the executor must designate an agent or attorney located in Wyoming whom will accept service of process on behalf of the executor. Wyo. Stat. § 2-11-301. If the nonresident executor fails to appoint an agent or attorney, the court shall revoke the executor’s authority to act. *Id.*

As with any other types of matters, an attorney should always disclose his/her fees upfront through a signed engagement letter. However, the engagement letter should limit the attorney’s fees to the statutory fee in Wyo. Stat. § 2-7-804 or state that any fees above the statutory fee shall only be granted by leave of the court in extraordinary

circumstances. The statutory attorneys' fees can be summarized as 2% of the decedent's estate plus \$350. The attorney is always free to negotiate a lower fee than the statutory fees. Regardless as to the specific fee agreement, the attorney should only collect fees from the estate "upon order of the court." Wyo. Stat. § 2-7-805.

The attorney should also counsel the personal representative on the personal representative's fees. The statute pertaining to personal representative's fees is nearly identical to the statute pertaining to attorneys' fees and the statutory fee may be summarized as 2% of the decedent's estate plus \$350. *See* Wyo. Stat. § 2-7-803. Personal representative's fees also may only be collected upon "order of the court." *See* Wyo. Stat. § 2-7-805. Any fees collected by the personal representative are considered income and should be reported on the personal representative's income tax return.

G. Practical Tips for Obtaining Information Concerning Assets

Determining the assets of a decedent can be challenging because oftentimes the decedent did not disclose their financial affairs to their heirs or executor during their life. One good way to determine asset ownership is to monitor the decedent's mail to intercept any statements that may come in the mail. Therefore, we advise that arrangements be made with the Post Office to re-route the decedent's mail to the home of the executor or to another location where it can be viewed every day. The executor will want to cancel and seek refunds for any pre-paid items such as magazine subscriptions and health insurance premiums. However, in this day and age, many decedents receive various statements via email. Therefore, the executor will want to obtain access to the decedent's email account as well.

When dealing with mineral assets, the attorney is often times provided with royalty statements for payments on production for oil and gas wells. These statements typically do not reflect a decedent's undivided mineral ownership underlying a particular parcel of land but rather reflect a decedent's royalty interest in a well. The attorney is not required to run full title on the land and may simply probate all of the decedent's "right, title and interest" in and to the various wells and lands covered thereby. As mineral estates can become very complex and subject to numerous title issues, it is typically best for the probate order to transfer all of the decedent's interest in certain lands rather than a defined undivided fractional amount as to avoid an underconveyance.

Other typical probate assets that may be overlooked are co-operative capital credits, intellectual property and airline miles. An attorney may want to quiz the executor in an attempt to identify any of these commonly overlooked assets.

H. Renunciations and Election of Statutory Share

A surviving spouse is entitled to an elective share in instances in which the will deprives the surviving spouse of more than their elective share under Wyo. Stat. § 2-5-101. This elective share is equal to one-half (1/2) of the decedent's estate if there are no surviving issue of the decedent or if there are surviving issue of the decedent who are also issue of the surviving spouse. *Id.* Otherwise, the elective share is equal to one-fourth (1/4) of the decedent's estate. *Id.* The surviving spouse must petition the court to take the "elective share within three (3) months after the admission of the will to probate or within thirty (30) days after being advised of the right of election, whichever limitation last expires." Wyo. Stat. § 2-5-105. If the surviving spouse or his/her personal representative or guardian "fails to exercise the right of election within the time provided in W.S. 2-5-105, the will shall govern and control the distribution of the estate." Wyo. Stat. § 2-5-101(d). *But see In re Estate of George*, 265 P.3d at 231-33.

Wyo. Stat. § 2-5-104 provides that the "court shall advise the surviving spouse of his right of election." However, it has been our experience that the court never advises the surviving spouse of the right of election. Therefore, the attorney should advise the surviving spouse of the right of election and should also advise the surviving spouse that he/she has the right to seek their own attorney in order to ensure the time to make the election runs. At least one Wyoming attorney has received a private reprimand for, in part, failing to notify a personal representative/surviving spouse that she was entitled to claim an elective share, in violation of Wyoming Rule of Professional Conduct 1.1 regarding competence. *See* Wyo. State Bar, Disciplinary Summary (Oct. 2013), http://www.wyomingbar.org/pdf/Disciplinary_Summary.pdf.

A surviving spouse may waive the elective share, exempt property, homestead allowance and family allowance, or any of them, "totally or partially before or after marriage, by a written contract, agreement or waiver signed by the party waving, after fair disclosure." Wyo. Stat. § 2-5-102. The use of the language "waiver of all rights" in the property or estate of a present or prospective spouse is considered to be a waiver of all rights to the elective share, homestead allowance, exempt property and family allowance and a renunciation of all benefits which would otherwise pass by intestate succession. *Id.*

I. Using Disclaimers Correctly

"Any person may disclaim any interest in property which without a disclaimer he would receive by gift, bequest, devise, inheritance, beneficiary designation, the exercise of a power of appointment or would pass by right of survivorship." Wyo. Stat. § 2-1-401. To qualify as a disclaimer: (i) there must be a written irrevocable refusal to accept an interest in property; (ii) the writing must be delivered to the transferor or holder of the

legal title to the property within nine (9) months of the day on which the transfer creating the interest in the person is made or the day on which the person attains the age of twenty-one (21), whichever is later; and (iii) the party making the disclaimer must not have accepted the interest or any of its benefits. *See* Wyo. Stat. § 2-1-403. While not expressly required by the statute, we typically advise that the disclaimer be filed with the court pursuant to the estate administration proceeding.

The attorney should be advised that there can be thorny tax issues with disclaimers. A late disclaimer (i.e. after nine months) is considered a gift made by the disclaimant. Because the estate tax exemption has been increased, we expect to see fewer disclaimers in the future.

J. **Notice Requirements**

As noted above, all of the various forms of Wyoming estate administration have their own specific notice requirements. However, the attorney should always keep in mind the constitutional notice requirements as set forth by the Supreme Court in *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988) which require an executor to provide actual notice to any reasonably ascertainable creditors of the estate.

We typically deadline on our system thirty (30) days from the expiration of the three (3) month period from the date of first publication as the date to mail creditor notices. This ensures that the notice deadlines under Wyo. Stat. §§ 2-7-201 and 2-7-205(a)(ii) align such that there are as few days as possible for any creditor receiving actual notice to make a claim. If the creditors miss the deadline, then the estate does not have to pay them.