

**S T A T E O F T E N N E S S E E**  
**OFFICE OF THE**  
**ATTORNEY GENERAL**  
**425 FIFTH AVENUE NORTH**  
**NASHVILLE, TENNESSEE 37243**

May 7, 2001

Opinion No. 01-071

Preparation of Forms; Practice of Law Regarding Probate

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**QUESTIONS**

1. Whether a personal representative of an estate may prepare and file petitions, orders and similar documents without the assistance of an attorney?
  
2. Whether it is appropriate for a non-attorney member of the Clerk and Master's office to prepare and distribute form petitions for use by persons seeking to administer an estate without the assistance of an attorney?

**OPINION**

1. Yes, a personal representative of an estate may prepare and file petitions, orders and similar documents without the assistance of an attorney.
  
2. Because the preparation of such a form to be used before a probate court clearly calls for the professional judgment of a lawyer and would therefore constitute the "practice of law" as set forth in Tenn. Code Ann. § 23-3-101(2), it is not appropriate for a non-attorney member of the Clerk and Master's office to prepare and distribute form petitions for use by persons seeking to administer an estate without the assistance of an attorney.

**ANALYSIS**

In Tennessee, traditionally, personal representatives have prepared and filed petitions, orders and similar documents without the assistance of an attorney.<sup>1</sup> A personal representative is a fiduciary

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<sup>1</sup>A personal representative may consult with an attorney or retain counsel to make appropriate decisions regarding the estate. This opinion does not discuss whether a personal representative should consult with or retain an

and is entrusted with the property of the decedent. The duties and responsibilities of a personal representative have been described as follows:

In the custody, management, and disposition of the estate committed to his charge, as in the collection of the assets, the representative is bound to perfect good faith, and to the exercise of that degree of diligence, prudence, and caution which a reasonably prudent, diligent, and conscientious business man would employ in the management of his own affairs of a similar nature; and he is responsible for any negligence causing loss, or for any want of good faith producing injury in case of failure to perform the duties required of him according to this rule.

*In Re: Estate of Inman*, 588 S.W.2d 763, 767 (Tenn. Ct. App. 1979).<sup>2</sup>

These duties consist almost exclusively of reviewing information about the deceased's property and managing the deceased's property. Inherent in the duties of the personal representative are identifying, protecting and distributing the assets of the decedent. The personal representative is, in effect, a trustee; he or she is entitled to the property in another's right. Entrustment of the custody and distribution of the effects and the legal title to the effects exists for certain special purposes. The personal representative has legal title to the property, but the property comes to him or her with the charge to dispose of the assets according to the direction of the will or the statute of intestate succession. Jack W. Robinson and Jeff Mobley, *Pritchard on the Law of Wills and Administration of Estates* § 669 (5<sup>th</sup> Ed. 1994).<sup>3</sup>

While imposing the duty of the personal representative to collect and reduce to his possession and control the assets of the estate, the law clothes the personal representative with the authority necessary to perform his or her duties. The personal representative is given the authority to petition the courts for necessary relief. The personal representative may maintain all actions as may be necessary to obtain and protect the possessions of the goods and collect the debts of the estate. The personal representative is ordinarily the only party who has the right to maintain a civil action to recover debts or other assets due the estate of a decedent. Jack W. Robinson and Jeff Mobley, *Pritchard on the Law of Wills and Administration of Estates* § 684 (5<sup>th</sup> Ed. 1994).

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attorney. Inherent in the role of the personal representative is the decision whether to consult with or retain an attorney.

<sup>2</sup>Generally, the duties to be performed by the personal representative are in relation to personal property of the decedent. In limited circumstances, the personal representative may petition the court in equity for sale of realty pursuant to Tenn. Code Ann. § 30-2-403.

<sup>3</sup>*Pritchard* is "an authority recognized by both the bench and the bar of this state," and has been cited innumerable times by Tennessee courts. *American Nat'l Bank & Trust Co. v. Mander*, 36 Tenn. App. 220, 253 S.W.2d 994, 999 (1952).

To assist the personal representative, the General Assembly has enacted several statutes concerning the management, settlement, and distribution of the testate or the intestate estate. By virtue of these statutes, codified at Tenn. Code Ann. § 30-2-301, *et seq.*, the personal representatives may file petitions, orders and similar documents.<sup>4</sup> The filing of the petitions are inherent in the duties and responsibilities of the personal representative as is the decision whether to retain legal counsel to assist. In addition, neither the Legislature, the Courts or the Board of Professional Responsibility has mandated legal assistance in cases where petitions, orders or similar documents will be required.

Therefore, the services performed by personal representatives on behalf of the deceased do not constitute the practice of law.

However, it is not appropriate for a non-attorney member of the Clerk and Master's office to prepare and distribute form petitions for use by persons seeking to administer an estate without the assistance of an attorney.

The definition of “[p]ractice of law” as set forth in Tenn. Code Ann. § 23-3-101(2) includes “the drawing of papers, pleadings or documents . . . in connection with proceedings pending or prospective before any court . . .” This statutory definition must be read in conjunction with Tennessee Supreme Court Rule 8, EC 3-5, which provides that “the practice of law relates to rendition of services for others that call for the professional judgment of a lawyer.” Thus, the acts included in Tenn. Code Ann. § 23-3-101(2) constitute the unauthorized practice of law, if performed by a non-lawyer, only if doing of those acts requires “professional judgment of a lawyer,” the essence of which is a lawyer's educated ability to relate general body and philosophy of law to a specific legal problem of a client. Tenn. Code Ann. § 23-3-101(2); Tennessee Supreme Court Rule 8, E.C. 3-5 *See also In re Petition of Burson*, 909 S.W.2d 768, 776 (Tenn. 1995).

There is not a uniform petition sanctioned by the courts or by the Tennessee Legislature. In addition, there are no uniform rules promulgated by any court that define what information should or should not be included in a petition used by persons seeking to administer an estate. Thus, petitions differ from county to county as well as on a case by case basis in a given county. The facts, circumstances and certain legal issues (*e.g.* jurisdiction and venue) specific to each case must necessarily be considered in drafting the petition.

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<sup>4</sup>*See*, Tenn. Code Ann. § 30-2-301 (personal representative shall make a complete and accurate inventory of the estate); Tenn. Code Ann. § 30-2-303 (personal representative may sell the personal property of decedent); Tenn. Code Ann. § 30-2-322( the probate court of the county of decedent's residence at the time of his decease may authorize the personal representative to continue the decedent's business); Tenn. Code Ann. § 30-2-323 (personal representative may pay the reasonable costs of routine upkeep of real property);Tenn. Code Ann. § 30-2-402 (personal representative may file a petition in court for the sale of the decedent's land); Tenn. Code Ann. § 30-2-403 (personal representative may petition the court in equity for sale of realty).

In addition, by preparing and distributing form petitions for use by persons seeking to administer an estate, the non-attorney members of the Clerk and Master's Office may be asked by non-attorneys to answer questions regarding the form petitions. It is foreseeable that non-attorneys may ask members of the Clerk and Master's Office questions regarding venue or filing deadlines. If a member of the Clerk and Master's Office answered these or similar questions, this could constitute the unauthorized practice of law.

The definition of "[p]ractice of law" as set forth in Tenn. Code Ann. § 23-3-101(2) and adopted by the Tennessee Supreme Court is broad and would preclude a non-attorney member of the Clerk and Master's office from preparing and distributing form petitions for use by persons seeking to administer an estate without the assistance of an attorney.<sup>5</sup> Preparation of form petitions to be used before probate court clearly calls for the professional judgment of a lawyer.<sup>6</sup>

In conclusion, it is the opinion of this Office that a personal representative of an estate may prepare and file petitions, orders and similar documents without the assistance of an attorney. However, because the preparation of such a form to be used before a probate court clearly calls for the professional judgment of a lawyer and would therefore constitute the "practice of law" as set forth in Tenn. Code Ann. § 23-3-101(2), it is not appropriate for a non-attorney member of the Clerk and Master's office to prepare and distribute form petitions for use by persons seeking to administer an estate without the assistance of an attorney.

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<sup>5</sup>The same conclusion has been reached by previous opinions issued by this Office. *See* Op. Tenn. Atty. Gen. U94-101(September 9, 1994) (preparation of certain legal documents for a fee by persons not licensed as attorneys constitutes the unauthorized practice of law); Op. Tenn. Atty. Gen. 92-02 (Jan. 9, 1992) (a paralegal, who acts independently of and is not supervised by a person licensed to practice law, cannot for a fee provide the service of completing legal documents such as bankruptcy petitions, uncontested divorce petitions, wills, or premarital agreements for individuals); Op. Tenn. Atty. Gen. 91-54 (May 29, 1991) (a non-attorney "managing agent" may not, either in an individual capacity or as an employee of a partnership or corporation, prepare a detainer warrant or other civil warrant pleading for an owner of real property and subsequently appear in General Sessions court without the owner and without an attorney to prosecute such warrant, since such representation would constitute the unauthorized practice of law); Op. Tenn. Atty. Gen. 90- 91 (May 17, 1990) (a general power of attorney does not authorize an individual to represent another individual or a partnership before the General Sessions courts).

<sup>6</sup> However, it is well settled that the trial courts of this State have the authority to make and implement reasonable local rules of practice and procedure in their respective courts, as long as these local rules do not conflict with a substantive rule of state law. *Richie v. Liberty Cash Grocers, Inc.*, 63 Tenn. Ct. App. 311, 471 S.W.2d 559 (Tenn. Ct. App. 1971); *Brown v. Daly*, 884 S.W.2d 121 (Tenn. Ct. App. 1994). Pursuant to that rule making authority, courts may, of course, develop practice forms for use in their respective jurisdictions and may make them available for distribution through the court clerk's office.

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