

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
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September 15, 2009

Opinion No. 09-156

Filing Petitions and Orders as Personal Representative of Estate as Practice of Law

QUESTION

In Op. Tenn. Att’y Gen. 01-071 (May 7, 2001)(“the 2001 opinion”), this Office concluded that a personal representative of an estate may prepare and file petitions, orders, and similar documents without the assistance of an attorney. Is this opinion still valid?

OPINION

To the extent that the 2001 opinion suggests that preparing and filing a petition to be appointed an executor or administrator of an estate, or similar document, would never require the professional judgment of a lawyer, the opinion is withdrawn.

ANALYSIS

In this request, this Office reconsiders Op. Tenn. Att’y Gen. 01-071 (May 7, 2001). In that opinion, we considered two questions: first, whether a personal representative of an estate may prepare and file petitions, orders, and similar documents without the assistance of an attorney and, second, 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.

Tenn. Code Ann. § 23-1-109 provides that “[a]ny person may conduct and manage the *person’s own case* in any court of this state.” (Emphasis added). Under Tenn. Code Ann. § 23-3-103(a), no person may engage in the practice of law or do law business unless the person has been duly licensed. The term “practice of law”:

means the appearance as *an advocate in a representative capacity* or the drawing of papers, pleadings or documents or the performance of any act *in such capacity* in connection with proceedings pending or prospective before any court, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies, or the soliciting of clients directly or indirectly to provide such services[.]

Tenn. Code Ann. § 23-3-101(3) (emphasis added). The term “law business”:

means ***the advising or counseling for a valuable consideration*** of any person as to any secular law, or the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights, ***or the doing of any act for a valuable consideration in a representative capacity***, obtaining or tending to secure for any person any property or property rights whatsoever, or the soliciting of clients directly or indirectly to provide such services[.]

Tenn. Code Ann. § 23-3-101(1) (emphasis added). The purpose of this statute is to prevent the public from being preyed upon by those who for a valuable consideration seek to perform without adequate qualifications services that require the skill, training, and character of a licensed professional. *Haverty Furniture Co. v. Foust*, 174 Tenn. 203, 124 S.W.2d 694, 698 (1939); *Union City & Obion County Bar Association v. Waddell*, 30 Tenn. App. 263, 205 S.W.2d 573 (1947).

The 2001 opinion analyzes the duties of the personal representative of an estate and the statutes governing that function. The opinion concludes, first, that these duties consist almost exclusively of reviewing information about the deceased's property and managing that property. Second, the opinion notes that statutes governing management, settlement, and distribution of the testate or the intestate estate explicitly authorize a personal representative to file petitions, orders, and similar documents. *See, e.g.*, Tenn. Code Ann. § 30-2-301 (personal representative shall make a complete and accurate inventory of the estate). The opinion concludes that "the services performed by personal representatives on behalf of the deceased do not constitute the practice of law."

At the same time, however, the opinion concludes that 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 opinion concludes that providing such assistance to these individuals could constitute the unauthorized practice of law if it requires the "professional judgment of a lawyer," the essence of which is a lawyer's educated ability to relate the general body and philosophy of law to a specific legal problem of a client. The opinion cites Tenn. Code Ann. § 23-3-101(2) (then defining the "practice of law"), Tennessee Supreme Court Rule 8, E.C. 3-5,¹ and *In re Petition of Burson*, 909 S.W.2d 768, 776 (Tenn. 1995).²

The 2001 opinion, therefore, concludes that a personal representative of an estate may prepare and file petitions, orders, and similar documents without the assistance of an attorney,

¹ The phrase "professional judgment of a lawyer" adopted by the Supreme Court in *Burson* in 1995 originated from this Supreme Court rule. The Supreme Court replaced this rule with the Rules of Professional Conduct, effective March 1, 2003. The Tennessee Court of Appeals has stated, however, that the standard adopted in *Burson* continues to govern. *Estate of Green v. Carthage General Hospital, Inc.*, 246 S.W.3d 582, 585 (Tenn. Ct. App. 2007), *p.t.a. denied* (2007).

² The opinion also states that there is no uniform petition or any uniform rules defining what information should or should not be included in a petition used by persons seeking to administer an estate. We note that Tenn. Code Ann. § 30-1-117 does describe the information and documents that should be submitted with an application for letters of administration or letters testamentary to administer the estate of a decedent. But this statute does not change the conclusion in this part of the 2001 opinion that assisting an individual in the filling out of a petition could constitute the "practice of law" under Tennessee statutes.

but that it is not appropriate for a non-attorney member of the Clerk and Master’s Office to assist persons seeking to administer an estate to prepare and file a petition. Thus, an individual may prepare the petition himself or herself, but a non-attorney member of the Clerk and Master’s Office should not assist him or her in doing so. The opinion thus tacitly acknowledges that preparing the petition may, in some cases, require the professional judgment of a lawyer. At the same time, the first part of the opinion suggests that the duties of an executor or administrator never require the professional judgment of a lawyer. These conclusions are inconsistent. We think that, in some circumstances, filing a petition to serve as an executor or administrator of an estate or other similar documents may require the professional judgment of a lawyer. To the extent that Op. Tenn. Att’y Gen. 01-071 concludes that the duties of an executor or administrator never require the professional judgment of an attorney, it is withdrawn.

But, in order to violate state statutes regarding the practice of law, an individual must be acting as an advocate in a representative capacity. No authority binding in this state has found that a person filing a petition to be the representative of an estate is appearing as an “advocate in a representative capacity” or acting “in such capacity” within the meaning of Tenn. Code Ann. § 23-3-101(3) defining the “practice of law.” Similarly, no binding authority in this state has found that a person filing a petition to be the representative of an estate has prepared the petition “in a representative capacity” within the meaning of Tenn. Code Ann. § 23-3-101(1) defining the “law business.” There is some authority from other jurisdictions suggesting that, where the duties of an administrator or executor in probate court are of such a representative nature as to amount to the practice of law, such duties must be performed by an attorney. *See* “Necessity that executor or administrator be represented by counsel in presenting matters in probate court,” 19 A.L.R.3d 1104 (2009). But the Tennessee Supreme Court has never explicitly adopted this rule.

The Tennessee Supreme Court exercises original jurisdiction over issues pertaining to the practice of law, including the right to regulate and prevent the unauthorized practice of law. *In re Petition of Burson*, 909 S.W.2d 768, 773 (Tenn. 1995). As the request indicates, some probate courts have adopted local court rules requiring that any individual filing a petition to be appointed as an administrator or executor of an estate must be represented by an attorney. In our view, only the Supreme Court has the authority to impose such a requirement.

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