STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

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Opinion No. 14-08

Interpleader Actions by Real Estate Brokers as Unauthorized Practice of Law

QUESTIONS

1. May a real estate broker who is not a licensed attorney, acting in his or her capacity as sole proprietor, personally interplead disputed funds in the general sessions court without engaging in the unauthorized practice of law in Tennessee?

2. May a real estate broker who is not a licensed attorney, acting as agent for a brokerage firm, personally interplead disputed funds in the general sessions court without engaging in the unauthorized practice of law in Tennessee?

OPINIONS

1. Yes.

2. A real estate broker who is not a licensed attorney, acting as an agent for a brokerage firm, would engage in the unauthorized practice of law by interpleading disputed funds in the general sessions court when interpleading such funds requires the exercise of legal training, skill, or judgment. Such an inquiry is highly fact-specific and therefore beyond the scope of this opinion.

ANALYSIS

"The remedy by bill of interpleader," according to the Tennessee Supreme Court, "is designed to protect a stakeholder against the vexation of proceedings by two or more doubtful claimants when the whole matter may be settled in a single suit." *Woodard v. Metropolitan Life Ins. Co.*, 24 S.W.2d 888, 889 (Tenn. 1930). Guidance material distributed by the Tennessee Real Estate Commission (TREC) describes the nature of the interpleader action in the context of real estate brokers as a "process . . . [that] allows a company holding contested earnest money to deposit the funds with the Court resulting in the Judge making the decision as to who receives the funds." David Flitcroft, *Interpleader Q & A*, Tenn. Real Est. News-J., Fall 2008, at 4, http://www.tn.gov/regboards/trec/documents/NewsJouranalfall08color.pdf.

Tennessee law allows "actions in the nature of interpleader, in which the value of the money that is the subject of the action does not exceed the jurisdictional

limit of the general sessions court" to be filed in general sessions court.[1] Tenn. Code Ann. § 16-15-731(a). "Any such action involving money in the custody or possession of a person acting in the capacity of a real estate broker may be filed on forms prescribed by the Tennessee real estate commission . . . ." *Id.*

Pursuant to Tenn. Code Ann. § 16-15-731, the TREC has promulgated an "Interpleader Form" as part of its "Rules of Conduct" for real estate brokers. Tenn. Comp. R. & Regs. 1260-02-.34. The rule containing the interpleader form states that the form "may be used, as appropriate, alone, or in conjunction with the forms currently used by the General Sessions Court in which the action is to be filed." Neither the rule nor the statute on which it is based specifies whether the person who prepares and files the form in the general sessions court must be licensed to practice law.

1. *Broker as sole proprietor.* In Tennessee, only duly licensed persons with an active law license may "practice law or do law business, or both." Tenn. Code Ann. § 23-3-103(a). However, "[a]ny *person* may conduct and manage the person's own case in any court of this state," notwithstanding the prohibition against engaging in the unauthorized practice of law. Tenn. Code Ann. § 23-1-109 (emphasis added). If a broker, as sole proprietor, qualifies as a "person" under Tenn. Code Ann. § 23-1-109, the broker would have authority to conduct and manage an interpleader action, including the initiation of the action, even if such conduct constituted the practice of law.

There is no Tennessee statute that creates or defines a sole proprietorship.[2] Lacking a statutory definition, Tennessee courts have adopted the definition of sole proprietorship found in *Black's Law Dictionary*. "A sole proprietorship is defined as '[a] form of business in which one person owns all assets of a business in contrast to a partnership and corporation. The sole proprietor is solely liable for all the debts of the business.'" *Hitt v. Hitt*, No. 02A01-9310-CV-00218, 1994 WL 618608, at *2 (Tenn. Ct. App. Nov. 9, 1994) (quoting *Black's Law Dictionary* 1248 (5th ed. 1979)); *see also In re Heil*, 289 B.R. 897, 909 & n.10 (Bankr. E.D. Tenn. 2003) (quoting

[1] The jurisdiction of general sessions court extends to $25,000 in all civil cases. Tenn. Code Ann. § 16-15-501(d)(1). If the amount of money in dispute exceeds the jurisdiction limit of the general session courts, then the interpleader action would be filed in circuit or chancery court.

[2] Though sole proprietorships are referred to throughout the Code, *see, e.g.*, Tenn. Code. Ann. § 67-6-223 (tax treatment of sole proprietorship upon sale to corporation); Tenn. Code Ann. § 50-6-102 (sole proprietorship treatment under Tennessee Workers' Compensation Laws); Tenn. Code Ann. § 62-11-111 (locksmith licensing and sole proprietorships); Tenn. Code Ann. § 62-18-207 (land surveyor licensing and sole proprietorships), they are nowhere specifically defined or created. *See generally* Mitchell F. Crusto, *Unconscious Classism: Entity Equality for Sole Proprietorships*, 11 U. Pa. J. Const. L. 215, 219 & n.4 (2009) (failing to find *any* state statutes that create or define sole proprietorships and concluding that "[s]ole proprietorship law is . . . curiously absent from . . . state statutory development, reflecting that a sole proprietorship can be developed without any formality").

Black's Law Dictionary 1392 (6th ed. 1994) and holding that the assets of the business, as a sole proprietorship of the debtor, were property of the bankruptcy estate); *State v. Pendergrass*, 13 S.W.3d 389, 395 (Tenn. Ct. Crim. App. 1999) (quoting *Hitt*, 1995 WL 618608, at *2).

It is generally held that a sole proprietorship has no legal existence or identity separate or apart from the sole proprietor. *See, e.g.*, *NLRB v. Consol. Food Servs., Inc.*, 81 F. App'x 13, 14 n.1 (6th Cir. 2003); *Wilson v. Acacia Dermatology PLLC*, No. 1:11-cv-00069, 2011 WL 3651779, at *1 (M.D. Tenn. 2011); *In re Christenberry*, 336 B.R. 353, 356 (Bankr. E.D. Tenn. 2005); 18 C.J.S. *Corporations* § 4 (2013); Crusto, *Unconscious Classism*, *supra* note 2, at 226-27; *see also Bellis v. United States*, 417 U.S. 85, 87-88 (1974) (privilege against self-incrimination extends to the sole proprietorship, but not to collective or corporate entities); *Duke v. Replogle Enterprises*, 891 S.W.2d 205, 205 (Tenn. 1994) (affirming trial court's dismissal of plaintiff's case where plaintiff failed to timely name the defendant in the case and instead sued the business name of the sole proprietorship which "had no legal existence and was not capable of being sued"); *Pendergrass*, 13 S.W.3d at 395 (defendant's knowledge of criminal conduct could be imputed to his sole proprietorship). As sole proprietorships have no legal existence of their own, the individual owner may "represent" a sole proprietorship in a *pro se* capacity. *See, e.g.*, *Consol. Food Servs., Inc.,* 81 F. App'x at 14 n.1; *Acacia Dermatology*, 2011 WL 3651779, at *1.

In light of the foregoing, it is reasonable to conclude that a sole proprietor is a "person" for purposes of Tenn. Code Ann. § 23-1-109. Therefore, a real estate broker who is not a licensed attorney, acting in his or her own capacity as a sole proprietor, does not engage in the unauthorized practice of law by interpleading disputed funds in the general sessions court.

2. *Broker as agent for a firm*. When a real estate broker serves as an agent for a firm,[3] as opposed to representing himself or herself as a sole proprietor, then the provisions of Tenn. Code Ann. § 23-1-109 do not apply. In these circumstances, it is necessary to determine whether and when the initiation and management of an interpleader action would constitute the practice of law or law business.

The term "practice of law":

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[3] "Firm" is used here to mean any business enterprise that is not a sole proprietorship and therefore has a separate legal existence from the individual. *See, e.g.*, *Acacia Dermatology*, 2011 WL 3651779, at *1 (quoting *Collier v. Greenbrier Developers, LLC*, 358 S.W.3d 195, 200 (Tenn. Ct. App. 2009)) (stating that an LLC may not proceed *pro se* because, "unlike a sole proprietorship, '[a] limited liability company has an existence separate from its members and mangers . . . . '"); *Old Hickory Eng'g & Mach. Co. v. Henry*, 937 S.W.2d 782, 786 (Tenn. 1996) (a corporation has a "separate and distinct existence from its officers and shareholders," and the right to proceed *pro se* "is not applicable to corporations, even when the person undertaking to act for the corporation is an officer or shareholder."); *Investors Grp, I, Ltd. v. Knoxville Cmty. Dev. Corp.*, No. E1999-00395-COA-R3-CV, 2001 WL 839837, at *2 (Tenn. Ct. App. 2001) (partnership may not proceed *pro se*).

> 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). The term "law business":

> means the advising or counseling for valuable consideration of any person as to any secular law, the drawing or the procuring of or assisting in the drawing for valuable consideration of any paper, document or instrument affecting or relating to secular rights, the doing of any act for 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).

The Tennessee Supreme Court, in holding that it has "inherent supervisory power to regulate the practice of law," has concluded that the definitions contained in Tenn. Code Ann. § 23-3-101 should be read in conjunction with the rules of that Court and that the enumerated acts constitute the practice of law or law business only if they require the "professional judgment of a lawyer." *In re Petition of Burson*, 909 S.W.2d 768, 773, 776 (Tenn. 1995).[4] The Court further warned against taking a formalistic approach to defining the practice of law:

> It is neither necessary nor desirable to attempt the formulation of a single specific definition of what constitutes the practice of law. Functionally the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client . . . . Where this professional judgment is not involved, non-lawyers, such as court clerks, police officers, abstracters, and many governmental employees, may engage in occupations that require a special knowledge of law in certain areas. But the services of

[4] The *Burson* Court adopted the phrase "professional judgment of a lawyer" from Tennessee Supreme Court Rule 8, EC 3-5 of the Code of Professional Responsibility. The Supreme Court replaced the Code with the Rules of Professional Conduct, effective March 2003, but the Tennessee Court of Appeals has stated that the standard adopted in *Burson* continues to govern. *See Estate of Green v. Carthage Gen. Hosp., Inc.*, 246 S.W.3d 582, 585 (Tenn. Ct. App. 2007); *Tenn. Envtl. Council, Inc. v. Tenn. Water Quality Control Bd.*, 254 S.W.3d 396, 406 (Tenn. Ct. App. 2007).

> a lawyer are essential in the public interest whenever the exercise of professional legal judgment is required.

Id. at 775 (quoting Tenn. Sup. Ct. R. 8, EC 3–5); *see also Fifteenth Judicial Dist. Unified Bar Ass'n v. Glasgow*, No. M1996-00020-COA-R3-CV, 1999 WL 1128847, at *3 (Tenn. Ct. App. 1999) ("Thus the acts included in Tenn. Code Ann. § 23-3-101 constitute the unauthorized practice of law if performed by a non-lawyer only when performing those acts requires the professional judgment of a lawyer." (citing *Burson*, 909 S.W.2d at 776)).

Courts in Tennessee have held that the "drafting of pleadings and legal documents or the selection and completion of form documents constitute the practice of law" because those activities require the professional judgment of a lawyer. *See Glasgow*, 1999 WL 1128847, at *4 (citing *Old Hickory Eng'g & Mach. Co. v. Henry*, 937 S.W.2d 782, 786 (Tenn. 1996)). Conversely, it has been held that preparing and filing a claim for a debt against an estate of a decedent pursuant to Tenn. Code Ann. § 30-2-307 does not require the professional judgment of a lawyer. *Estate of Green v. Carthage Gen. Hosp., Inc.*, 246 S.W.3d 582, 586 (Tenn. Ct. App. 2007). The courts' conclusions hinge partially on an exploration of the nature of the underlying legal process. In *Old Hickory*, the underlying process was a complaint for a claim of negligence and "Rule 11 [of] the Tennessee Rules of Civil Procedure . . . makes the signing of a pleading by an attorney of record or the party an essential condition to the validity of a pleading." 937 S.W.2d at 785. In *Carthage*, the claim against the estate was "essentially a demand for payment," 246 S.W.3d at 584, and such claims have "never been considered a pleading governed by the Rules of Civil Procedure," the underlying process being "described as an '*informal* statement of the cause of action.'" *Id.* (quoting *Wilson v. Hafley*, 226 S.W.2d 308, 311 (Tenn. 1949)) (emphasis added in *Carthage*).

When determining whether an initial filing requires the professional judgment of a lawyer, the courts also analyze the formality of the proceedings triggered by the submission. *See Tenn. Envtl. Council v. Tenn. Water Quality Control Bd.*, 254 S.W.3d 396, 404-09 (Tenn. Ct. App. 2007) (*Tosh Farms*). If the proceeding is "informal," for instance focusing on "information gathering," without adhering to the rules of evidence or involving direct or cross examination of witnesses, the representation may not require the professional judgment of a lawyer. *Id. See also Burson* 909 S.W.2d at 771 ("Hearings before the [Assessment Appeals Commission] are informal."). If the proceeding is a formal, adversarial hearing, the professional judgment of a lawyer is required, and thus representation by a non-lawyer at such a proceeding is the practice of law. *Tosh Farms*, 254 S.W.3d at 409. The nature of each case, and the proceedings that stem from any particular action must therefore be part of any analysis of whether the professional judgment of a lawyer is required for an action.

Indeed, Tennessee courts have found that "[c]ases involving the unauthorized practice of law are heavily fact-dependent. They require the courts to focus specifically on the conduct of the person alleged to be practicing law without a license." S*ee Glasgow* 1999 WL 1128847, at *3; *see also Tosh Farms*, 254 S.W.3d at 404; *Tenn. Envtl. Council v. Tenn. Water Quality Control Bd.*, No. M2005-02425-COA-R3-CV, 2007 WL 2827470, at *6 (Tenn. Ct. App. 2007) (*Cumberland Yacht Harbor*). Most decisions containing a detailed discussion of whether certain actions constitute the unauthorized practice of law in Tennessee include a fact-specific inquiry into *exactly* what actions the non-lawyer took, followed (at least after *Burson*) by an analysis of whether such actions require the professional judgment of an attorney. *See, e.g.*, *Burson*, 909 S.W.2d at 771-72, 777 (determining after thorough review of each stage of proceedings before the local and state boards of equalization that nothing in those proceedings required the professional judgment of an attorney); *Glasgow*, 1999 WL 1128847, at *4 (fact-specific inquiry found that defendant was "preparing legal documents that require more legal knowledge than is possessed by ordinary lay persons . . . eliciting information from her clients and then incorporating the information into unique legal documents that she creates . . . [and] advising her clients concerning how and when to file the papers she prepares); *Carthage*, 246 S.W.3d at 583-85 (engaging in detailed analysis of the nature of and procedural requirements for a creditor's claim against an estate and finding no unauthorized practice of law where the claim was filed by a non-lawyer employee of a hospital because nothing about the proceeding required the professional judgment of an attorney). The Tennessee Court of Appeals has found, after a detailed analysis of the proceeding at issue in two interrelated cases, that even though a statute authorized non-attorneys to participate in proceedings before the Water Quality Control Board, the *particular proceeding* at issue in both cases was so complex that the professional judgment of an attorney was required. *See Tosh Farms*, 254 S.W.3d at 409-10; *Cumberland Yacht Harbor,* 2007 WL 2827470, at *8. Thus, determining whether an activity constitutes the unauthorized practice of law requires a fact-intensive inquiry into whether the service rendered by the non-lawyer requires the professional judgment of an attorney.

From a broker's perspective, an interpleader action allows the broker to deposit contested funds with the court and have no further involvement as a party to the legal proceedings. In such circumstances, a broker might reasonably argue that such action is ministerial or clerical and does not require legal judgment. However, based on the authorities cited above, a broker who is not licensed to practice law should proceed cautiously in such a case. Unlike the situation in *Estate of Green*, in which the plaintiff hospital was simply filing a claim as part of the administration of a decedent's estate, a broker would be initiating a formal legal proceeding by filing a "petition to interplead funds" with the general sessions court. The decision to file such a pleading—and to request that the petitioner be dismissed from the resulting action, as stated in the TREC form—could be construed to require the exercise of legal judgment in evaluating the amount of funds to

interplead and the validity of the various claims to the funds. Nor would the fact that the broker is using a form to prepare the petition necessarily be a defense. *See Fifteenth Judicial District Unified Bar Association*, 1999 WL 1128847 at *4 (Tennessee is aligned "with the majority of jurisdictions holding that the drafting of pleadings and legal documents or the selection and completion of form documents constitutes the practice of law").

As previously noted, Tennessee courts possess inherent supervisory power to regulate the practice of law. No Tennessee court has yet ruled on whether a broker filing an interpleader petition with a general sessions court on behalf of a firm constitutes the unauthorized practice of law. As also noted, such an inquiry requires a detailed, fact-specific inquiry into the actions taken. Accordingly, this Office cannot provide a definite opinion on how a court would rule on this issue.

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