The Quest Continues for Uniformity of Practice in Probate Courts

By Joan C. Von Handorf

Although it seems there will never be uniformity of practice in probate courts, the council of the Probate and Estate Planning Section of the State Bar of Michigan has continued its efforts to achieve this elusive goal. Indeed, uniformity of practice is a win-win situation for all parties involved. Uniformity of practice helps both courts and practitioners become more efficient. It makes practitioners more efficient because it takes the guesswork out of what probate courts require, such as which forms to file and how to complete the forms. Further, it helps the courts become more efficient because court personnel spend less time "advising" practitioners about forms and procedures.

The Probate and Estate Planning Section Council sent a questionnaire requesting information regarding uniformity of practice issues to all probate practitioners listed in the Institute of Continuing Legal Education's database. This article discusses the responses to the survey questions regarding decedent estates and conservatorships.

Because responses were not received from attorneys who practice in certain probate courts, the information in this article is incomplete in some areas.[1] Additionally, the information in this article is only as accurate as the practitioners' responses to the survey. The survey results are posted on the Probate and Estate Planning Section's website.[2]

Opening Decedent Estates

When opening a decedent estate, the personal representative must publish notice to creditors so that they can file claims against the estate.[3] Arrangements for publication can be made at the following courts by presenting to the court a notice to creditors[4] at the time of filing the application or petition: Charlevoix, Genesee, Gladwin, Grand Traverse, Lenawee, Macomb, Oakland, Oceana, St. Clair, and Wayne. If the court does not arrange for publication, a practitioner may either contact the court to ask for information about the appropriate newspaper or publish notice in a legal newspaper in the county in which the estate is being administered.

Fast Facts:

The fee for letters of authority for a decedent estate varies from $0 to $12.

Deduction for liens is no longer allowed in calculation of the inventory fee for a decedent estate.

Value of joint property shown on a conservatorship inventory varies from court to court.

After the petition or application has been filed and approved by the court, and the personal representative or the personal representative's attorney has filed a bond[5] or acceptance of appointment,[6] the court will issue letters of authority.[7] Previously, the acceptance of appointment form required the appointed personal representative to provide his or her driver's license number and date of birth. However, a driver's license number is personal information that the court is now prohibited from requiring.[8] The personal representative's date of birth is still required to allow the names of personal representatives who misappropriate estate funds to be posted on the Law Enforcement Information Network.

The fee courts charge for each letter of authority differs from county to county. Pursuant to MCL 600.2546, the cost of certified copies is $10 plus $1 per page. However, courts interpret this provision differently. The courts in the counties of Benzie, Manistee, Montcalm, Osceola, Presque Isle, and St. Clair do not charge for the first letter of authority, while the courts in the counties of Alger, Delta, Dickinson, Gladwin, Huron, Kent, Marquette, Muskegon, Newaygo, and Wexford charge $10 for each letter. Additionally, the courts in the counties of Barry, Charlevoix, Cheboygan, Emmet, Genesee, Grand Traverse, Hillsdale, Ingham, Isabella, Leelanau, Livingston, Luce, Macomb, Marquette, Monroe, Ontonagon, Ottawa, Van Buren, Washtenaw, and Wayne charge $11 for each letter of authority. Jackson County charges $10 if the personal representative provides the letter of authority and $11 if the personal representative does not provide the letter. Finally, the courts in the counties of Alpena, Antrim, Bay, Berrien, Calhoun, Clinton, Eaton, Kalamazoo, Lenawee, Midland, Oakland, Oceana, Saginaw, St. Joseph, and Tuscola charge $12 for each letter of authority. These courts count each side of the letter as a separate page, so they reason that the cost of certification is $10 plus $1 for each of the letter's two pages. While the difference in fees is minimal, it is frustrating for attorneys who practice in more than one county. Therefore, the Probate and Estate Planning Section Council intends to propose stating on the letter of authority form that the cost of each letter of authority is $12.

Inventories for Decedent Estates

Before November 15, 2005, one of the most frustrating uniformity of practice issues involved the calculation of the inventory fee. This is because some courts allowed deductions for secured loans for property listed on the inventory,[9] while others did not. Further, some courts allowed deductions for additional items, such as unpaid property taxes incurred before the death of the decedent. In an attempt to achieve uniformity of practice with regard to calculation of the inventory fee, MCR 5.307(A) was amended to provide that deductions shall be permitted only for secured loans on property listed on the inventory, but no other deductions would be allowed. For example, if a house listed on the inventory was valued at $100,000 and had a mortgage of $75,000, the value placed on the inventory under the "estate's interest" column would be $25,000. Therefore, the inventory fee would be calculated on $25,000 rather than $100,000. Most courts rationalized that it was unfair to calculate the fee on a value that the estate could not obtain for the sale of the house.

However, the apparent solution to this uniformity of practice issue was voided in *Wolfe-Haddad Estate v Oakland Co,*[10] in which the Michigan Court of Appeals held that there could be no deduction for liens on property listed on the inventory, and nullified the recent amendment to MCR 5.307(A). Based on this, there are now *no* deductions for liens on property listed on the inventory. Although uniformity of practice in the calculation of the inventory fee has been achieved, the current law seems nonsensical. Therefore, as a result of *Wolfe-Haddad,* the Probate and Estate Planning Section Council intends to propose changes to MCL 600.871 that would provide that liens *must* be deducted from the value of property in calculating the inventory fee.

> Determining market value is a difficult concept to comprehend, much less put into practice.

Another issue regarding calculation of the inventory fee involves the charge for the inventory fee for decedent estates with assets valued at $0. This often occurs when an estate is opened to file suit, and proceeds from the suit have yet to be determined. Pursuant to MCL 600.871, the inventory fee for an estate valued at less than $500 is $5. Following the statute, some counties charge $5 for an inventory with assets valued at $0; these include Alger, Alpena, Antrim, Bay, Benzie, Calhoun, Charlevoix, Cheboygan, Delta, Dickinson, Eaton, Emmet, Grand Traverse, Kalamazoo, Leelanau, Livingston, Manistee, Marquette, Midland, Monroe, Montcalm, Saginaw, Tuscola, and Van Buren. However, several counties do not charge an inventory fee for an estate with assets valued at $0; these include Barry, Berrien, Calhoun, Clinton, Genesee, Gladwin, Hillsdale, Huron, Ingham, Isabella, Jackson, Kent, Lapeer, Lenawee, Luce, Macomb, Muskegon, Newaygo, Oakland, Oceana, Ontonagon, Osceola, Ottawa, Presque Isle, St. Clair, St. Joseph, Washtenaw, Wayne, and Wexford. The Probate and Estate Planning Section Council intends to propose changes to MCL 600.871 that would provide that, when the value of the assets on the inventory is $0, the inventory fee should also be $0.

Closing Decedent Estates

Yet another uniformity of practice issue arises at the closing of decedent estates. Specifically, some probate courts *require* the filing of an affidavit of incumbency before closing a decedent estate when the assets are being distributed to a trust. However, this requirement is not supported by MCR 5.501(E), which provides: "The trustee or the attorney for the trustee *may* establish the trustee's incumbency by executing an affidavit to that effect…" (emphasis added). The counties that require an affidavit of incumbency are Berrien, Calhoun, Eaton, Grand Traverse, Huron,

Jackson, Macomb, Montcalm, Muskegon, Oakland, Ottawa, Presque Isle, St. Clair, Tuscola, Washtenaw, and Wayne. While it appears that these courts are trying to ensure that assets are properly distributed, such practice is not supported by the court rule.

Conservatorship Inventories

If a protected person holds property jointly or in common with another, it is not clear what value to place for such property in the "estate's interest" column on the inventory. The Probate and Estate Planning Section Council tried to resolve this issue by adding a sentence to the end of MCR 5.409(B)(2). While the Michigan Supreme Court agreed to change this court rule, it did not agree with the council's proposed changes. The last sentence of MCR 5.409(B)(2), as approved by the Supreme Court, currently provides: "Property the protected person owns jointly or in common with others must be listed on the inventory along with the type of ownership." However, this change does not resolve the issue. Because there is no clear guidance for valuing joint property held by a protected person, courts have devised several different valuation methods. The majority of courts require joint property to be valued at the percentage held by the protected person. For example, if the names of the protected person and one child appear on the title to a home, 50 percent of the value of the home is shown on the inventory in the "estate's interest" column. However, two other approaches to valuing joint property exist. The courts in Berrien, Grand Traverse, Hillsdale, Midland, Oceana, and Osceola counties require joint property to be valued at $0 on the inventory, while the courts in Bay, Clinton, Eaton, St. Clair, Van Buren, and Wexford counties require joint property to be valued at 100 percent of its value. Calhoun and Ingham counties will accept any of the above three methods for valuing joint assets on the inventory, but Ingham County may request an amended inventory after further review.

The Probate and Estate Planning Section Council intends to propose changes to MCR 5.409(B)(2) that will provide a uniform method of valuing joint property listed on the inventory.

Conservatorship Accounts

Another issue concerning valuing property in a conservatorship arises with the filing of annual accounts.[11] When an account is filed, the assets that remain in the conservatorship at the end of the accounting period must be listed and valued. MCR 5.409(C)(5) requires that liquid assets must be valued at the market value at the end of the accounting period. However, there is no guidance for valuing non-liquid assets, such as real property. The majority of courts allow non-liquid assets to be valued at the same value as shown on the inventory. However, the courts in Alpena, Dickinson, Genesee, Huron, Ingham, Jackson, Kalamazoo, Livingston, Luce, Ottawa, Saginaw, Van Buren, and Washtenaw counties require that these assets be valued at their market value.

Valuing non-liquid assets at market value presents a problem for most in pro per conservators, and possibly some attorneys. Determining market value, and then showing the increase or decrease in value in the income or disbursements section on the account, is a difficult concept for most in pro per conservators to comprehend, much less put into practice. Therefore, it appears that the practice of the majority of courts, allowing a conservator to value non-liquid assets at the value shown on the inventory, is preferable. The Probate and Estate Planning Section Council has proposed an amendment to MCR 5.409(C)(5) to address this issue.

Conclusion

Practitioners should be aware that some uniformity issues have been resolved, such as the calculation of the inventory fee and the reduction in the number of special forms.

Court personnel who were contacted with questions about the contradictory survey results were surprised that attorneys did not know the procedures of a particular court. An observation was made that if courts made a greater effort to educate attorneys about special court procedures by posting information on the courts' websites, attorneys would be better informed about the probate courts' procedures. This would benefit both courts and practitioners because court personnel have to spend time and effort when pleadings are filed that do not comply with local requirements. Although posting information online makes uniformity problems easier to deal with, it does not resolve the problems associated with the lack of uniformity of practice among Michigan's probate courts. The Probate and Estate Planning Section Council is therefore committed to continue its quest for uniformity of practice in the probate courts. ■

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FOOTNOTES

1. Responses were not received from attorneys who practice in the counties of Alcona, Allegan, Alger, Arenac, Baraga, Branch, Cass, Chippewa, Clare, Crawford, Gogebic, Gratiot, Houghton, Ionia, Iosco, Iron, Kalkaska, Keweenaw, Lake, Mackinac, Mason, Mecosta, Menominee, Missaukee, Montmorency, Ogemaw, Otsego, Roscommon, Sanilac, Schoolcraft, and Shiawassee. Not surprisingly, some practitioners from the same county responded differently to particular questions in the survey. In those situations, the answer provided by the majority of practitioners in that county was used in drafting this article. If there was no clear answer to a question, the court was contacted to ensure that the information set forth in this article is correct.
2. State Bar of Michigan, *Probate and Estate Planning Publications* <http://www.michbar.org/probate/pdfs/UniformityPracticeSurvey.xls> (accessed September 2, 2007).
3. MCL 700.3801, MCR 5.306(A).
4. PC 574. All forms referred to in this article are issued by the Supreme Court Administrative Office.
5. PC 570.
6. PC 571.
7. PC 572.
8. MCR 5.302(A).
9. PC 577.
10. *Wolfe-Haddad Estate v Oakland Co,* 272 Mich App 323; 725 NW2d 80 (2006).
11. PC 583 or PC 584.