

Trust and Estates 101
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The Estate Administration

What should I discuss with the Personal Representative or
Trustee at the first meeting for an estate administration?

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Initial Probate Conference

1. **Timing** of conference
 - a. Before funeral, not recommended
 - b. Take opportunity to meet with Heirs and Beneficiaries from out of town
2. What **to bring** to the conference
 - a. Original will or key to safe deposit box
 - b. Trust documents
 - c. Names and addresses of heirs and interested parties with email address.
 - d. Creditors names and addresses and estimated debt and collateral.
 - e. Ownership of assets
 - f. Last 3 years of tax returns, 1099s may suggest ownership
3. Talking topics on **initial conference**
 - a. Condolences – listen to the story, both decedent and family; listen.
 - i. Acknowledge loss of loved one
 - ii. Gain a general feeling of family members and family dynamics.
 - (1) who will be available to meet with lawyer
 - (2) who will not be available to meet with lawyer
 - iii. Is there family unity or dysfunction?
 - iv. Are multiple families involved?
 - v. Family members that have special needs.
 - vi. Funeral status

- b. **Will and Intestate succession**
- i. Take custody of original will or gain access to safe deposit box
 - (1) Need the key to safe deposit box
 - (2) Have surviving party that **has signature authority** to access the safe deposit box remove the will from the safe deposit box. [decedent's power of attorney does not work]
 - (3) Plead with a **bank officer** that access to safe deposit box is needed to locate and remove the original will from the safe deposit box.
 - (4) Seek **appointment of a PR** without the will (intestate) and amend pleadings later after the will is located, or plead a lost will and informally open the estate proceedings with a copy of the will and appoint the PR, later offering the original will with **amended** pleadings.
 - (5) Currently before the legislature is **LB 988** that provides a procedure to access a decedent's safe deposit box without appointment of a personal representative to remove the original will, burial plot and burial instructions. A death certificate is required to be attached to designated affidavit
 - ii. Discuss question of **other wills** and issues of **testamentary capacity**
 - iii. §30-2301. **Intestate estate**. Any part of the estate of a decedent not effectively disposed of by will passes to heirs as prescribed in the following sections of this code.
 - iv. §30-2302. The **intestate** share of the **surviving spouse** is:
 - (1) if there is no surviving issue or parent of the decedent, the entire intestate estate;
 - (2) if there is no surviving issue but the decedent is survived by a parent or parents, the first fifty thousand dollars (\$50,000), plus one-half of the balance of the intestate estate;
 - (3) if there are surviving issue all of whom are issue of the surviving spouse also, the first fifty thousand dollars, (\$50,000) plus one-half of the balance of the intestate estate;
 - (4) if there are surviving issue one or more of whom are not issue of the surviving spouse, one-half of the intestate estate.
 - v. §30-2303. Share of **heirs** other than surviving spouse. The part of the intestate estate not passing to the surviving spouse under section §30-2302, or the entire intestate estate if there is no surviving spouse, passes as follows:

- (1) to the **issue** of the decedent; if they are all of the same degree of kinship to the decedent they take equally, but if of unequal degree, then those of more remote degree take by representation;
 - (2) if there is **no surviving issue**, to his **parent** or parents equally;
 - (3) if there is no surviving issue or parent, to the **issue** of the parents or either of them by representation;
 - (4) if there is no surviving issue, parent or issue of a parent, but the decedent is survived by one or more **grandparents** or issue of grandparents, half of the estate passes to the paternal grandparents if both survive, or to the surviving paternal grandparent, or to the issue of the paternal grandparents if both are deceased, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take by representation; and the other half passes to the maternal relatives in the same manner; but if there be no surviving grandparent or issue of grandparent on either the paternal or the maternal side, the entire estate passes to the relatives on the other side in the same manner as the half;
 - (5) if there is no surviving issue, parent, issue of a parent, grandparent or issue of a grandparent, the entire estate passes to the **next of kin** in equal degree, except that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor shall be preferred to those claiming through a more remote ancestor.
- c. §30-2304. Requires that an heir survive decedent for one hundred twenty (**120**) hours.
- d. Pass on **Formal reading** of will, give each a copy to take home
- i. Read pertinent portions and explain.
 - ii. Fiduciary responsibilities
 - iii. Dispositive provision of Will and Trust, who gets what
- iv. **Bond** required except:
- (1) Waived in will §30-2446(1)(a)
 - (2) Waive by heirs or devisees §30-2446(1)(b)
 - (3) If PR is in the trust business §30-2446(1)(c)
 - (4) If small estate under §30-127 summary procedure
 - (5) The bond amount is the inventory value plus one year anticipated income unless changed by the court §30-2447

- e. Surviving Spouse **Election Against Will**, §30-2317
- f. **Renunciation and Disclaimer**, §30-2352
- g. **Agreement Among Heirs**,
 - i. Private agreements among successors to decedent binding on personal representative. §30-24,110. Subject to the rights of creditors and taxing authorities, competent **successors may agree among themselves to alter the interests, shares**, or amounts to which they are entitled under the will of the decedent, or under the laws of intestacy, in any way that they provide in a written contract **executed by all** who are affected by its provisions. The personal representative shall abide by the terms of the agreement subject to his obligation to administer the estate for the benefit of creditors, to pay all taxes and costs of administration, and to carry out the responsibilities of his office for the benefit of any successors of the decedent who are not parties. Personal representatives of decedents' estates are not required to see to the performance of trusts if the trustee thereof is another person who is willing to accept the trust. Accordingly, trustees of a testamentary trust are successors for the purposes of this section. Nothing herein relieves trustees of any duties owed to beneficiaries of trusts.
 - ii. Statutory allowances:
 - (1) The **homestead allowance** of **\$20,000 for post January 1, 2011 deaths** and has priority over all claims against the estate and is in addition to the succession interest. Neither home ownership nor probate estate is required. This allowance applies to the surviving spouse domiciled in Nebraska, if any, or to minor or dependent children of the Decedent. §30 2322.
 - (2) **Exempt property** not to exceed **\$12,500 for post January 1, 2011 deaths** and in value is deductible only to the extent actually taken from the probate or non-probate estate by surviving spouse, if any, otherwise by the adult or minor children of the Decedent. It includes household furniture, automobiles, furnishings, appliances and personal effects, together with such additional other assets of the estate as may be necessary to distribute a total of \$5,000. This deduction has priority after homestead allowances, except that the right to any assets to make up a deficiency of exempt property shall abate as necessary to permit prior payment of homestead allowance and family allowance. §30-2323.
 - (3) The **family allowance** not to exceed **\$20,000**, and except by Court Order **for past January 1, 2011 deaths**, may be paid either in a

lump sum or by installments when required to maintain the surviving spouse and minor or dependent children of the Decedent during the administration of the estate. The allowance is payable to the surviving spouse, if living; otherwise, to the children or persons having their care and custody. The allowance is only for one year except by Court Order and is deductible only to the extent actually paid from the probate estate. §30-2324.

- (4) Homestead allowance, exempt property and family allowance **are in addition** to all other shares provided a spouse or qualifying children unless a Will provides otherwise or unless disclaimed under §30-2352; and calculations should be made accordingly.
- h. **Probate assets** are held in the decedent's name alone or tenants in common or in a fractional share and are subject to disposition as designated in the decedent's will
- i. **Non-probate assets** subject to disposition in accordance with the title document,
 - i. joint tenants with rights of survivorship
 - ii. Pay on death POD
 - (1) Bank accounts
 - (2) Government Bonds
 - iii. Transfer on death TOD
 - (1) Stock and brokerage accounts
 - (2) Motor vehicles (§30-2715.01)
 - (3) Nebraska Uniform Real Property Transfer on Death Act, Neb. Rev. Stat. §§76-3401 to 76-3423. A cover sheet and death certificate are to be recorded upon death of Transferor, Neb. Rev. Stat. §76-2,126 along with a Real Estate Transfer Statement, Form 521
 - iv. Life estate
 - (1) reserved life estate
 - (2) remainder interest subject to a life estate
 - v. Real Estate Transfer Statement, Form 521 is to be filed when the title to real estate changes or a death certificate is filed §76-214.
 - (1) Affidavits describing the succession of trustees are now required to be accompanied by a Form 521. I assume this helps with the coordination of County Assessor and County Treasurer records.
 - (2) a cover sheet is required with filing of a death certificate indicating the title to the document, the previously recorded document data, and the Grantor, surviving Grantee, and legal description of the property. §76-2,126

- vi. Retirement Benefits with a named beneficiary
 - (1) IRA
 - (2) Qualified Plan
 - (3) Non-qualified Plan
- vii. Annuity with a named beneficiary, contact agent;
 - (1) death benefit or cash value or
 - (2) annuitized [one receives fixed payments on an investment for a lifetime or for a specified number of years]
- viii. Trust
 - (1) Revocable Grantor Trust
 - (2) Deceased Spouse Marital Trust
- ix. Life Insurance
 - (1) Owner
 - (2) Insured
 - (3) Beneficiary
 - (4) Death Benefit
 - (5) Order from insurance company IRS form 712
 - (6) Estate as owner and beneficiary (subject to NE Inheritance Tax)
 - (7) Retained incidents of ownership of life insurance
 - (a) Transfer of life insurance **within 3 years** of death
- j. Income Tax issues
 - i. **Employer Identification Number** is required for an estate, Appendix I
 - ii. **Inheritance** is generally not subject to income tax
 - (1) except for income earned after death
 - (2) except income in respect of a decedent
 - (a) installment land contract
 - (b) series E bonds
 - (c) annuity
 - (d) retirement and IRA benefits
 - (3) Estate and non-grantor trusts highest income tax bracket of 39.6% federal plus 6.84% Nebraska, for 2014 is \$12,150 and for 2013 is \$11,950. Add 3.8% for ObamaCare – Affordable Care Act on investment income in excess of highest bracket
 - (a) To avoid high bracket on probate asset income
 - (i) Offset income with expenses (such as legal fees)
 - (ii) Distribute income to heirs, in tax year or within 65 days after close of tax year. No provision to identify the nature of income distributed such as investment income.

- (iii) The successor to non-probate assets pays taxes on the post-death income on the asset and the decedent's estate pays income taxes as a debt against the estate on the pre-death income.
- iii. Step up in Basis
 - (1) Sale of asset listed in the inventory has tax basis increased to the inventory value and holding period for long-term capital gain is tacked on to decedent's holding period.
 - (2) Depreciate business assets after death using the stepped up inventory asset value, which is the new basis. [no §179 or bonus depreciation]
- iv. An estate may have a fiscal year in which the first fiscal year cannot be over 12 months and ends on the last day of a month. This is an important election that is made on the initial 1041 income tax return.
- k. Death Taxes
 - i. **Federal Estate Tax**
 - (1) Unified Credit Exemption, \$5,250,000 for 2013 and \$5,340,000 for 2014 [\$14,000 annual gift tax exclusion has not changed] Rev. Pro. 2013-35
 - (2) Taxable estate includes prior gifts in excess of annual exclusion taxed at date of death tax rates, not date of gift tax rates.
 - (a) Need prior gift tax returns.
 - (b) Need prior gifts subject to gift tax where gift tax return was not filed
 - ii. **Inheritance Tax**, paid to county of residence except to county where real estate is located. Tax on receipt of property.
 - (1) Tax; rate; transfer to **immediate relatives**; exemption. 77-2004. In the case of a **father, mother, grandfather, grandmother, brother, sister, son, daughter, child** or children legally adopted as such in conformity with the laws of the state where adopted, any lineal descendant, any lineal descendant legally adopted as such in conformity with the laws of the state where adopted, any person to whom the deceased for not less than ten years prior to death stood in the acknowledged relation of a parent, or the spouse or surviving spouse of any such persons, the rate of tax shall be one percent (**1%**) of the clear market value of the property in excess of forty thousand dollars (**\$40,000**) received by each person. Any interest in property, including any interest acquired in the manner set forth in section 77-2002, which may be valued at a sum less than forty thousand dollars shall not be subject to tax. In addition, the homestead allowance, exempt property, and family

maintenance allowance shall not be subject to tax. Interests passing to the **surviving spouse** by will, shall **not** be **subject to tax**.

- (2) Inheritance tax rate; transfer to remote relatives. 77-2005. In the case of an uncle, aunt, niece, or nephew related to the deceased by blood or legal adoption, or other lineal descendant of the same, or the spouse or surviving spouse of any of such persons, the rate of tax shall be thirteen percent (**13%**) of the clear market value of the property received by each person in excess of fifteen thousand dollars (**\$15,000**). If the clear market value of the beneficial interest is fifteen thousand dollars or less, it shall not be subject to tax.
- (3) §77-2006. Inheritance tax; rate; other transfers. In all other cases the rate of tax shall be eighteen percent (**18%**) on the clear market value of the beneficial interests in excess of ten thousand dollars (**\$10,000**). Such rates of tax shall be applied to the clear market value of the beneficial interests in excess of ten thousand dollars (\$10,000) received by each person. If the clear market value of the beneficial interest is ten thousand dollars (\$10,000) or less, it shall not be subject to any tax

I. **Is probate necessary?** Small Estate Affidavit, under \$50,000 personal property probate assets; no limit on non-probate assets, §30-24,125 and §30-24.129 for real property probate assets under \$30,000.

- i. LB 693 proposes to increase §30-24,129 real estate value to \$50,000 less liens and encumbrances, including real estate taxes.
- ii. The Nebraska Department of Motor Vehicles has a small estate affidavit: <http://www.dmv.ne.gov/dvr/pdf/affdecendent.pdf>. Note this is the small estate affidavit under §30-24,125 and requires that all personal property less encumbrances in the decedent's estate be under \$50,000, and is not limited to just vehicles under \$50,000. Personal property in decedent's estate is probate property; non-probate property is not a part of the decedent's estate. Title to the non-probate property passes according to the succession provisions as provided in the non-probate property documentation. Appendix J

m. What is the **source of funds to pay the bills?**

- i. Pay with **probate assets** estate debts, expenses and claims and if insufficient then pay from non probate assets. PR is personally liable to claimant who is injured by payment before claim date or payment is made with negligence or willful fault of the PR. Claims are barred after two months from the date of the first publication of the notice to creditors [claim date §30-2489].

- n. When to pay bills?
 - i. A reoccurring problem is the desire to follow the decedent's nature to promptly pay their bills. All of the decedent's bills should be paid out of the estate bank account or out of the trust bank account. If necessary reimburse such bill paying to gain the tax deductions.
 - ii. Probate estate may be **insolvent** or **illiquid** and non-probate estate may have liquidity.
 - (1) Pay from **joint** or non probate assets
 - (2) Pay as a **loan** from joint or non-probate assets.
 - (3) Is there **provision in the will or trust** for payment of estate debts, expenses and claims from non-probate assets?
- o. Documents to Open Bank Account
 - i. Have checks written at the law office & bank can print a couple dozen checks
 - ii. Have Bank Statements mailed to law office
 - iii. Bank Authorization, See Appendix E
 - iv. Bank Letter (request ownership data and date of death balances) See Appendix D
 - v. Need Quicken accounting reports, sort by fiscal year and category. Attach to financial reports submitted to the court, see Appendix H
 - (1) Check Register
 - (2) Summary Report
 - (3) Detail By Category Report
- p. Legal fees, hourly verses percent and estimated fee, variables that may affect fees, Letter of Engagement, See Appendix A
- q. Pleadings to Open a Probate (always have these signed at first meeting.)
 - i. Informal open 98% of the time – if dispute open informal, to take control then open formal.
 - ii. Pleadings (Informal Testate):
 - (1) Application For Informal Probate Of Will And Informal Appointment Of Personal Representative, NCLE 220, §30-2414 & §30-2412
 - (a) Decedent's Name
 - (b) Residence
 - (c) Age at death
 - (d) Any codicils to wills
 - (e) Personal Representative
 - (i) Name & address
 - (ii) Indebted to or creditor of decedent
 - (f) Names of interested parties
 - (g) Names and addresses of creditors

- (2) The initial filing fee is \$43.00. See Nebraska Judicial Branch, Filing Fees and Court Cost in the state of Nebraska, <http://supremecourt.ne.gov/4800/filing-fees-and-court-cost>
 - iii. Acceptance, NCLE Form 300, §30-2444
 - iv. Waiver of Bond, NCLE Form 135, §30-2446(1)(b)
 - v. Registrar's Statement Of Informal Probate, NCLE Form 221, §30-2415, §30-2416 & §30-2402
 - vi. Notice of Appointmentment of PR and Claim Date, Affidavit of Mailing Notice NCLE Form 109, §30-2220(c)
 - (1) Remember to notify Nebraska Health & Human Services with Social Security Number and Social Security Number of deceased spouse
 - (a) Department of Health & Human Services
301 Centennial Mall South
PO Box 95026
Lincoln NE 68509
 - vii. **Inventory is due** within three (3) months after appointment of the PR indicating the fair market value as of the date of death and the amount of any encumbrance against the item. §30-2467
 - viii. If a distribution is anticipated to cause controversy, give 30 days notice of a right to object to the distribution. §30-24,104(b).
- r. **Trust Administration** after death of settlor
- i. **Affidavit** and Agreement Confirming Title in **Successor Trustee** – Appendix F to evidence successor trustee and create record of the change in trustees against real estate with a Real Estate Transfer Statement form 521.
 - (1) This evidences acceptance of the trusteeship by a successor trustee and helps establish a chain of title. §30-3857(a)(2)
 - (2) Title to all trust property shall be owned by and vested in any successor trustee without any conveyance, transfer or assignment by the prior trustee. §30-3863
 - ii. **Notice** of Trust to qualified beneficiaries is required Appendix G
 - (1) within 60 days after a successor **trustee accepts trusteeship** and within **60 days** after a trust becomes irrevocable (i.e. Death of Settlor of a revocable grantor trust). §30-3878(b)(2) & (3).
 - (2) If **Notice** is given of the time allowed for commencing a proceeding to contest a revocable trust **after the settlor's death** then the period in which to contest the validity of a revocable trust is 120 days after the trustee sends a copy of the trust informing of the trust's existence and the trustee's name and address. Otherwise the time limit is one year after the settlor's death. §30-3856. Note a trustee shall furnish a copy of the trust instrument upon request of a beneficiary. §30-3878.

- (3) Upon a **vacancy in a trusteeship**, unless a co-trustee remains in office, a **report** must be sent to the **qualified beneficiaries** by the former trustee. A personal representative, conservator, or guardian may send the qualified beneficiaries a report on behalf of a deceased or incapacitated trustee. (d) A beneficiary may waive the right to a trustee's report or other information otherwise required to be furnished under this section. §30-3878(c) & (d)
 - (4) Upon termination or partial termination of a trust, the trustee may send to the beneficiaries a **proposal for distribution**. The right of any beneficiary to object to the proposed distribution terminates if the beneficiary does not notify the trustee of an objection within thirty days after the proposal was sent but only if the proposal informed the beneficiary of the right to object and of the time allowed for objection. §30-3882(a)
 - (5) A trustee may give notice of a proposed action such as **income distribution** and mail notice of the proposed action to all adult beneficiaries who are entitled to receive income or principal upon termination. Time to object shall be at least thirty (30) days from the mailing the notice of the proposed action. §30-3121 Uniform Principal and Income Act.
 - (6) Permissible methods of notice or for sending a document include first-class mail, personal delivery, delivery to the person's last-known place of residence or place of business, or a **properly directed electronic message**. §30-3809
- iii. Employer Identification Number (**EIN**) is necessary when a revocable grantor trust becomes irrevocable by reason of death– See Appendix I
 - iv. Order Death Certificates – See Appendix C
 - v. IRC Section 645 permits the trustee of a “qualified revocable trust” and the executor of the grantor’s estate to elect to have the trust’s income, deductions, and distributions reported with the estate’s income tax **return using the estate’s fiscal year**, for the first two years after the grantor’s death. Use IRS Form 8855 – See Appendix M
 - vi. §30-3837 **Modification** or Termination of noncharitable irrevocable **trust** by consent.
 - (1) (a) If, upon petition, the court finds that the **settlor and all beneficiaries consent** to the modification or termination of a noncharitable irrevocable trust, the court shall approve the modification or termination even if the modification or termination is inconsistent with a material purpose of the trust.
 - (2) (b) A noncharitable **irrevocable trust may be terminated** upon **consent of all of the beneficiaries** if the court concludes that continuance of the trust is not necessary to achieve any material

purpose of the trust. A noncharitable irrevocable trust may be **modified** upon **consent of all of the beneficiaries** if the court concludes that modification is not inconsistent with a material purpose of the trust.

- vii. A Trust will avoid a probate proceeding, but an **inheritance tax proceeding** will still be required with an inventory disclosure of Trust assets and identification who gets what assets. As a part of the inheritance tax proceeding, a Certificate Involving Real Estate must be signed by the Court and filed in the real estate records.
 - (1) The inheritance tax proceeding will require filing a Certificate of County Court Proceeding Involving Real Estate to be signed by the Judge and recorded with the Register of Deeds. NCLE Form 332, §25-2708

- 4. **Research real estate** on County Assessor Website & Nebraska Taxes Online
 - a. Print assessor records, assessed value and type of real estate
 - b. Determine if the real estate taxes are paid
 - i. Are the real estate taxes due as of date of death? They are due December 31 and are a debt against the estate and a deduction against death taxes.
 - c. Ask for common name of each farm parcel

All references to Nebraska statutes are found under the Nebraska Probate Code, the Uniform Trust Code unless otherwise designated.

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