Pass It On Well:

All You Need to Know about Estate Planning, Wills, Trusts, Powers of Attorney, and (Avoiding) Probate

I. DON'T BE THIS GUY....

A. TIP 1: Don't die like Hendrix. No, I'm not talking about dying young from substance abuse (but don't do *that*, either). Rock legend Jimi Hendrix died tragically young, unmarried, with no children and no will. That meant his father got everything. He later left the remainder of Jimi's fortune to a daughter he adopted from a later marriage — totally disinheriting Jimi's beloved brother, Leon. **The Moral: Take care of business, now.** Because you just never know.

B. TIP 2: Don't die like Elvis. The King of Rock 'n' Roll is also the poster child for lousy estate planning. When Elvis went to that great peanut butter-and-banana sandwich in the sky in 1977, he left behind a $10 million estate — which would be nearly $36 million in today's dollars. But a whopping 73% of it was eaten up in a never-ending probate, leaving his heirs with far less than they might otherwise have received. **The Moral: Get good advice on how to protect what you've worked so hard for.**

C. TIP 3: Don't DIY your estate plan. U.S. Supreme Court Chief Justice Warren Burger may have left this life with more dignity than Hendrix or The King, but he still left what we estate lawyers call "a big ol' hairy mess." When Justice Burger died in 1995, he left a $1.8 million estate and a 176-word will that he typed up himself. His family ended up paying $450,000 in estate taxes, which meant his "free" will ended up costing his loved ones about $2,557 a word. And since his self-written will didn't have all that boring fine print, his executors had to pay to go to court for approval to do things like sell real estate and take other action to get his taxes paid and his estate closed. **The Moral: The fruits of your life's work are at least as important as the transmission in your car.** You'd get a pro to fix your transmission; **get a pro to help put together a solid estate plan.**

McKinney & Tillman, P.C.
1019 Orchid Avenue
Knoxville, Tennessee 37912
(865)525-8700
www.ammtaxlaw.com
www.YouTube.com/ladysingsthenews

II. Tool #1: Personal Information Record Book.

A. Allows you to inventory your assets and indicate to your family what and where your assets are.

B. Helps you to analyze your debts, obligations and charitable desires and begin the process of achieving your goals.

C. Allows you to indicate any funeral preferences.

D. Provides a great tool for showing your family how much you care.

III. Tool #2: Living Will OR Advance Care Plan.

The Tennessee legislature has determined that every person has a fundamental and inherent right to die naturally and to accept, refuse, withdraw from, or otherwise control decisions relating to the rendering of his or her own medical care, specifically including palliative care and the use of extraordinary procedures and treatments.

Living wills and advance care plans (also called "individual instructions") let you exercise these important rights.

What legal effect does an individual instruction have? A valid individual instruction must be honored by any health care provider or institution, and if a health care provider or institution cannot in good conscience comply with the provisions of such individual instruction, then that provider or institution must immediately make all reasonable efforts to assist in the transfer of the patient to another health care provider or institution that is willing to comply with the instruction or decision. If such measures are not taken, the health care provider or institution could face civil liability, with reasonable attorneys' fees and costs, and professional disciplinary action (in the case of living wills).

Additionally:

1. The absence of a living will or advance care plan does not create a presumption concerning the intention of an individual regarding the use, withholding or withdrawal of medical care.

2. The signing of a living will or advance care plan does not affect the sale, procurement or issuance of any policy of life insurance, nor is

it deemed to modify the terms of an existing policy of life insurance. No policy of life insurance will be legally impaired or invalidated by the withholding or withdrawal of health care.

3. If a living will or advance care plan is signed by an individual in another state and then he or she moves to Tennessee, the living will is given effect in Tennessee if the living will is in compliance with either the provisions of Tennessee law or the laws of the state in which the individual was a resident.

A. Definition of Living Will: A living will is a written declaration, stating an individual's desires for medical care or noncare, including palliative care, and other related matters such as organ donation and body disposal.

Therefore, the living will contains directions regarding health care decisions when an individual has a terminal condition, which means any disease, illness, injury or condition from which there is no reasonable medical expectation of recovery and which, as a medical probability, will result in death, regardless of the use or discontinuance of medical treatment implemented for the purpose of sustaining life, or the life process. IF the person signing the living will wants simple nourishment and fluids withdrawn if they are in this condition, the living will must specifically state that preference.

Who may sign a Living Will? Any competent adult person may sign a living will, but it must also be signed in the presence of two witnesses **or** in the presence of a notary public. Both witnesses must be competent adults and neither may be appointed in the document as an agent. At least one of the witnesses must not be related to the person signing the document (the principal) by blood or marriage or adoption; and must not be entitled to any portion of the principal's estate under any will or codicil.

What to do with a Living Will? The living will should be delivered to the individual's attending physician or health care provider, and it will be given effect until revoked either by a written revocation, signed and dated by the individual, or by an oral statement or revocation made by the individual to his or her attending physician. As to the revocation of the living will, the individual's mental state or competency is irrelevant.

B. Advance Care Plan (also called an Advance Directive). This straightforward, two-page form is far more specific than a living will and allows the person signing the form to direct whether certain treatments will or will not be given in specific medical situations. It also allows an

individual to appoint a Health Care Agent to make health care decisions if he or she is unable to make such decisions.

The **Advance Care Plan** form includes at the outset the appointment of a person to make health care decisions for the "principal" (a term used interchangeably in the act with the terms "individual" and "patient") "*when I can no longer make those treatment decisions myself*," and also includes the appointment of an alternate agent if the person first named "is unable or unwilling" to make health care decisions for the principal. (This portion of the form will be contrasted with the Appointment of Health Care Agent discussed below.) Three separate sections follow in the form, one exhibiting choices to indicate the individual's desired quality of life, one with options related to "medically appropriate treatment," and one related to "other instructions" with the suggestion of "burial arrangements, hospice care, etc." The form can obviously be signed **either** in the presence of two witnesses **or** in the presence of a notary public, and the requirements for witness qualification are indicated on the form.

Who may sign an advance directive? Any competent adult or emancipated minor may execute an advance directive, but it must also be signed in the presence of two witnesses **or** in the presence of a notary public. Both witnesses must be competent adults and neither may be appointed in the document as an agent. At least one of the witnesses must not be related to the person signing the document (the principal) by blood or marriage or adoption; and must not be entitled to any portion of the principal's estate under any will or codicil.

What to do with an advance directive? An advance directive should be delivered to the principal's attending physician or health care provider, and it will be given effect until it is revoked. The designation of an agent for health care decision-making can only be revoked by the principal in a signed writing or by personally informing the supervising health care provider. Any other advance directive may be revoked at any time and in any manner that communicates the principal's intent to revoke. Although as to the revocation of the living will, the principal's mental state or competency is irrelevant, by contrast the Health Care Decisions Act's revocation provisions refer to "an individual having capacity."

IV. Tool #3: Durable Power of Attorney OR Appointment of Health Care Agent.

A. Definition of Power of Attorney: "Durable power of attorney for health care" means a durable power of attorney to the extent that it authorizes an

attorney-in-fact to make health care decisions for the principal. Health care means any care, treatment, service or procedure to maintain, diagnose or treat an individual's physical or mental condition.

What are the requirements of a Power of Attorney for Health Care? To be enforceable the durable power of attorney for health care must comply with the following statutory requirements: 1) it must specifically authorize the attorney-in-fact to make health care decisions on behalf of the principal; 2) it must set forth the date on which it was signed; and 3) it must also be signed in the presence of two witnesses **or** in the presence of a notary public. Both witnesses must be competent adults and neither may be appointed in the document as an agent. At least one of the witnesses must not be related to the person signing the document (the principal) by blood or marriage or adoption; and must not be entitled to any portion of the principal's estate under any will or codicil. ***The document should state that it is HIPAA compliant at the top.***

What legal effect does the Power of Attorney for Health Care have? Unless the durable power of attorney for health care provides otherwise, the attorney-in-fact has priority over any other person to act for the principal in all matters of health care decisions including the decision to withhold or withdraw health care permitting the principal to die naturally. If following the signing of a durable power of attorney for health care a court appoints a conservator for the principal, that conservator *does not* have the power to revoke or amend the durable power of attorney for health care nor to replace the attorney-in-fact designated in such durable power of attorney, unless the court order provides otherwise.

What rights does the attorney-in-fact have? Under a durable power of attorney for health care, the attorney-in-fact has the same rights as the principal to receive information regarding proposed heath care, to receive and review records, and to give consent to the disclosure of medical records. He or she can consent to the withholding or withdrawal of health care necessary to keep the principal alive; however, such authority does not override any objection made by the principal and can be disregarded by the health care provider without incurring liability.

The signing of a durable power of attorney does not affect the sale, procurement or issuance of any policy of life insurance, nor is it deemed to modify the terms of an existing policy of life insurance. No policy of life insurance will be legally impaired or invalidated by the withholding or withdrawal of health care.

How is it revoked? The principal may revoke the power of attorney for health care by notifying the attorney-in-fact orally or in writing or by notifying the principal's health care provider orally or in writing. It is presumed that the principal has the mental capacity to revoke his or her power of attorney for health care; therefore, the burden to prove otherwise falls on anyone opposing the revocation. The dissolution or annulment of the principal's marriage to the person previously appointed automatically revokes any designation of the former spouse to serve under a power of attorney for health care.

What if the document is signed elsewhere, and then the principal moves to Tennessee? Finally, if a durable power of attorney for health care is executed in another state and then the principal moves to Tennessee, the durable power of attorney will be given effect in Tennessee if that durable power of attorney for health care is in compliance either with the provisions of Tennessee law or the laws of the state where the principal previously resided.

B. **Appointment of Health Care Agent.** This form is much abbreviated compared to the Advance Care Plan: the only decision indicated on the form is the appointment of the individual's health care agent to make health care decisions "*if I cannot make decisions for myself, including any health care decision that I could have made for myself if able.*" The language used in the appointment section of the form for the designation of an alternate agent is also slightly different from that used in the Advance Care Plan: "If my agent is unavailable or is unable or unwilling to serve . . ." As in the Advance Care Plan, the form may be signed in the presence of two witnesses **OR** in the presence of a notary public, and the same witness qualifications are clearly indicated on the form itself.

C. **Surrogate Decision Maker.** Under Tennessee's law, if a patient (*an adult or an emancipated minor*) has not signed an advance directive nor appointed an agent to make health care decisions on his or her behalf, the designated physician or supervising health care provider may appoint a surrogate to make health care decisions on behalf of the patient. The law provides that a "surrogate shall be an adult who has exhibited special care and concern for the patient, who is familiar with the patient's personal values, who is reasonably available, and who is willing to serve." Preference for the appointment of the surrogate is as follows: (a) the patient's spouse, unless legally separated; (b) the patient's adult child; (c) the patient's parent; (d) the patient's adult sibling; (e) any other adult relative of the patient; or (f) any other adult who satisfies the requirements of subdivision (c)2. noted above.

D. **Where can I get more information?** More information is available at the following web site: **http://tn.gov/health/article/advance-directives**

E. **Durable Power of Attorney for Finances.** This is usually a separate document appointing another person (and normally a successor) to take care of financial and business matters for the individual who signs the Power of Attorney.

V. Tool #4: Last Will and Testament.

A. Provides a statement (preferably prepared for you by an attorney) of the disposition of the property that is in your name alone upon your death.

B. Can be handwritten or attested (with two witnesses in most states).

C. Requires that you be of sound mind, usually eighteen (18) years of age or older.

D. Can include an affidavit of the witnesses so that they do not have to be located upon your death (called a **"self-proving will"** and recognized in many states).

E. Allows you to name an executor to handle your assets at your death.

F. Allows you to name a guardian for the care of your minor children.

G. Furnishes you with an opportunity to reduce the costs of probate by eliminating such expenses as the posting of a bond, filing of an inventory and preparation of accountings for your estate.

H. Can be drafted to save death taxes and to include gifts to charity, either outright in fixed dollar amounts or in percentages of the value of the estate, or in trust, first for your loved ones and then, after their deaths, to the charity.

VI. Tool #5: Trust.

A. Can be established during your lifetime or in your will.

B. Allows you to provide for a handicapped child/parent/friend.

C. Furnishes you with an opportunity to provide for your spouse during his or her lifetime, but to leave the remainder of your property to your children (perhaps by a prior marriage) upon your spouse's death, or to your chosen charity.

D. Can be used to avoid probate, keep your financial matters private, retain control of a family business, provide for a surviving spouse and then for children upon the spouse's death, prevent the loss of your children's inheritance if your surviving spouse remarries, save on death taxes and pass significant amounts to charity.

VII. Tool #6: Knowing the Basics of Gift, Estate and Inheritance Taxes

A. The crystal ball is broken.

1. President Trump has stated that he intends to repeal the federal estate tax.

2. However, it's impossible to predict:

   (a) Whether the federal estate tax (and the so-called "generation skipping transfer" or GST tax) will be repealed
   (b) Whether it will be replaced by another tax, such as a capital gains tax at death, or how such a tax would work
   (c) Whether the federal gift tax might also be repealed
   (d) Whether a future administration would reinstate these federal taxes and, if so, under what terms

3. So, today we'll be talking about these taxes **as they are right now**

B. What is a gift and when is a federal (IRS) **gift tax return** required?

1. A gift is any transfer of property for less than an adequate payment in money or money's worth requiring:

   (a) Capacity of the donor (the person making the gift)
   (b) Completed delivery to the donee (the person receiving the gift)
   (c) Acceptance by the donee

2. Any outright gift of more than $14,000 in value per person per year must be reported on a federal gift tax return Form 709; however,

there is a full "marital deduction" for federal gift tax purposes for most gifts between husband and wife

3. Any gift of a **future interest** must be reported, no matter what the value; the most common types of future interests are created in trusts, and by making a deed of property with a life estate retained by the person making the gift.

C. What property is taxed in your estate? When is a federal **estate tax return** required?

1. All property owned in your name alone: real estate, stocks, bonds, bank accounts, notes receivable, cash, **life insurance,** miscellaneous property like jewelry, silver, guns, antiques, artwork, partnership interests, etc.

2. Joint property held with spouse and/or with others

3. Transfers of property made with ***strings*** attached (life estates retained, certain trust transfers, etc.)

4. Pension plans, certain annuities, and powers of appointment

5. All gifts made in prior years since January 1, 1977, if those gifts were reportable on gift tax returns

6. A federal estate tax return is required to be filed, on Form 706, if the **fair market value** of all the property listed above equals or exceeds the following amounts (depending on the year of death):

1977 -	$120,000	**1986 -**	500,000
1978 -	134,000	**1987 - 1997:**	600,000
1979 -	147,000	**1998 -**	625,000
1980 -	161,000	**1999 -**	650,000
1981 -	175,000	**2000 - 2001:**	675,000
1982 -	225,000	**2002 - 2003:**	1,000,000
1983 -	275,000	**2004 - 2005:**	1,500,000
1984 -	325,000	**2006 - 2008:**	2,000,000
1985 -	400,000	**2009 -**	3,500,000
2010 -	**$5 Million; unless an election was made for the tax-free amount to be UNLIMITED (but with carry-over basis)**		
2011 -	**$5,000,000 with a 35% rate on the excess**		
2012 -	**$5,120,000 with a 35% rate on the excess**		

2013 - $5,250,000 with a 40% rate on the excess
2014 - $5,340,000 with a 40% rate on the excess
2015 - $5,430,000 with a 40% rate on the excess
2016 - $5,450,000 with a 40% rate on the excess
2017 - $5,490,000 with a 40% rate on the excess
Indexed for inflation from 2010 onward.

*During the most recent presidential campaign, the **lowest** estate tax-free amount advocated by a major candidate was $3.5 million, with a maximum tax rate of 65%.*

D. If your estate is large enough that you must file an estate tax return, what items may be **deducted** before any tax is figured?

1. Funeral and administration expenses
2. Debts of the decedent, including mortgages
3. All property transferred in certain ways to the surviving spouse
4. All property transferred in certain ways to eligible charities

E. What is the **rate** of the federal estate tax?

1. First, the exact rate of the estate tax varied in the past, depending upon the year in which the person died.

2. From 1977 to 1982, the top rate of estate tax was **70%** on amounts over $5,000,000; this highest rate of 70% has been gradually reduced to the current rate of **40%.**

F. Is there a **gift** and/or **inheritance tax** imposed by the **State of Tennessee** in addition to the federal tax? NO.

There is **no** Tennessee gift tax as of January 1, 2012. The Tennessee inheritance tax has also been repealed.

VIII. Tool #7: Knowing How Tennessee Handles Wills

A. What types of wills are recognized in **Tennessee?**

1. Oral wills (must be made in fear of impending death; limited to $1,000 of property; must be committed to writing within 30 days after death)
2. Handwritten wills
3. Attested wills (the best)
4. Codicils to the will (additions or changes)

B. What are the requirements to make a valid will in **Tennessee?**

1. Sound mind and age of 18 years or more

2. Subscription — signature of person making the will

3. Acknowledgment — statement/indication by person making the will that it represents his/her last will and contains his/her signature

4. Attestation — signature of two or more disinterested witnesses that the person making the will signed and/or acknowledged it to be his/her last will in the presence of both witnesses and at the same time

5. Publication — the act of letting it be known to all the witnesses that the paper to be signed is the last will and testament of the person making the will

C. What are some reasons that a will can be ***broken*** or set aside (in whole or in part) after death?

1. Failure to prepare and sign the will according to Tennessee law

2. Mental incapacity of the person making the will

3. Undue influence used upon the person making the will by someone who benefits under the will's provisions

4. Fraud

5. Mistake

D. What happens when you die without a will? The State of Tennessee (or whichever state you live in when you die) will determine just how your property will be distributed: If you die without a will, Tennessee law has a plan laid out for you:

1. If you have a surviving spouse but no children, <u>all</u> of your property passes to your surviving spouse

2. If you have a surviving spouse and only one child, your property will pass in equal shares to your surviving spouse and your child

3. If you have a surviving spouse and two or more children, your property will pass one-third to your surviving spouse and two-thirds will be divided among your children (whether you have two, three or ten children)

4. If you have no surviving spouse, your property will be divided equally among your children (or the descendants of a deceased child)

5. If you have no surviving spouse and no descendants, your property will pass to your parents equally. If one of your parents is deceased, all of your property will pass to your other parent

6. If you have no surviving spouse, no descendants and no living parents, your property will pass to your brothers and sisters in equal shares (or to the descendants of a deceased sibling)

7. If you have no surviving spouse, no descendants, no living parents and no brothers and sisters or their descendants, your property will pass in two equal shares: one share to the descendants of your Father's parents; and one share to the descendants of your Mother's parents

8. If there are NO descendants of either your Father's parents or your Mother's parents, your property will be distributed to the State of Tennessee; your property is said to "escheat" to the State in this situation

9. As noted above, in all of these examples, if a relative (other than your spouse) is deceased, leaving children who survived him or her, the children will take their parent's share

E. What <u>else</u> happens when you die without a will?

1. It usually costs your family members MORE to settle your affairs, but NOT always!

2. You have lost the right to name a good, competent **Executor** to handle your assets at your death, and to save in ***bond*** fees; you have also lost the ability to excuse the Executor from filing an ***inventory*** of your assets and ***periodic accountings*** in the Probate Court records (which are open to public inspection); only if family members are all adults and all agree can bond, inventory and accountings be waived and then only by written agreement

3. The court will name a **guardian** for your minor children

4. Jointly-held property and simultaneous death problems can occur

5. You have lost your right to provide for particular assets to go to named persons; for assets to go to persons not entitled to get your property at all if you die without a will; or for assets to go to *charity*

6. You have increased the time and costs of **probate,** which is the process of proving that the will is valid in a court of law and empowering your named **Executor** (or, if you die without a will, then your **Administrator**) to collect the assets, pay debts/taxes, determine who is entitled to receive the property, and distribute the property

7. You may have **increased death taxes**

F. Does your will cover **everything**?

1. Some properties are not affected by what your will says:
   (a) Joint property with right of survivorship
   (b) Life insurance proceeds paid to a named beneficiary
   (c) Retirement/company plan benefits paid to a named person
   (d) Trust property — such as a revocable living trust or an irrevocable trust

2. What if children were born who have not been considered in the will?

3. What if you get a divorce and die before changing your will? What about IRA and life insurance policy beneficiary designations?

4. What if the size/nature of your estate changes (after an inheritance, etc.)?

5. What if your state of residence has changed?

G. If your surviving spouse doesn't like your will, can he or she break it?

1. **Without a premarital agreement**, a surviving widow or widower can **elect** to take a **certain percentage** of your net probate estate (depending on how long you have been married: 10% if married less than 3 years; 20% if married 3 to 6 years; 30% if married 6 to 9

years; 40% if married over 9 years), **regardless of the provisions of the will**; and transfers made fraudulently to children or to others can be voided by the surviving widow/widower if the transfers were made to cheat her/him out of a rightful share of the estate; the surviving spouse can also take furniture, furnishings, car, etc., up to a value of $50,000, plus something called a "year's support," as well as what is called "homestead interest" if the marital home was not jointly owned, but was owned in the name of the deceased alone

2. **A premarital or "antenuptial" agreement** can be signed which allows each spouse to make a will leaving his or her property to any beneficiaries they choose, and avoid the claims listed in the preceding paragraph

3. Children **can** be disinherited

IX. Tool #8: Strong Soldiers — Your Executors and Administrators

A. Who can serve in Tennessee as your Executor/Administrator? If you die with a will, the person you name to settle your estate is called your "Executor," and generally, he or she may serve alone as your Executor **without being a resident of Tennessee**. If you die without a will, the person who handles the property in your probate estate is called your "Administrator," and Tennessee law provides a list of the persons who are entitled to serve as administrator in order of preference as follows: your surviving spouse; your next of kin; or any one of your creditors

B. What are the Executor/Administrator's duties? After calling the Social Security Administration and the homeowners' insurance carrier and making sure there is someone staying at the home during the funeral and afterwards, here are the duties of the person settling an estate:

1. First and most important, when someone dies the person(s) who will be settling the estate must **make sure that there are assets that were in the deceased person's name <u>alone</u>**; if there are NO assets which were in the separate name of the deceased (and which were NOT payable to a named beneficiary, joint with one or more other persons, in a trust, etc.), **there is no need to go through probate, even if the deceased left a Last Will and Testament**

2. If there are assets that were in the separate name of the deceased, the Executor/Administrator (called generically a "personal representative") must file a **probate petition** requesting that he or she be appointed to serve (this is basically applying for the job of personal representative); other family members can object (although if the person applying was named in the will, it is difficult to oppose his or her appointment successfully); and the petition normally contains a statement concerning the size of the estate; Knox County's Clerk and Master in particular requires an estimate of the actual fair market value of the estate as of the date of death

3. The personal representative must post a **bond** (unless the bond requirement is excused under the terms of the will or waived by all of the adult heirs)

4. Within 60 days after being appointed, the personal representative must determine and collect together all of the assets that were owned in the decedent's name alone and all assets that were directed to be paid to the estate after the decedent's death; and then the personal representative must prepare and file with the court a listing of all of those assets ("**inventory**") unless this requirement is excused under the terms of the will or is waived by the heirs of the estate

5. Also within 60 days after being appointed, the personal representative must **send a copy of the will** to all of the persons who are named as beneficiaries under the terms of the will, and if there is no will, the personal representative must determine all of the persons who stand to inherit from the deceased and must send them a letter notifying them that the probate process has begun

6. The personal representative must **notify all of the creditors** of the deceased that he or she has died to make sure that all just debts are paid; this notice is often handled by paying to print a formal Notice to Creditors in a newspaper of general circulation, but the law also requires that the personal representative give **actual notice** to any potential creditor of the estate of whom the personal representative was aware or should have been aware, so the personal representative must **prepare a list of the doctors, hospital(s), utility companies, credit card companies and other persons who may be creditors of the estate** in order to notify each creditor individually of the death of the decedent; a creditor who is NOT notified **may have up to a year in which to file a claim against the estate**

7. If a claim is filed against the estate, the personal representative must **file an exception to any claim that is disputed** within thirty (30) days after the claim is filed or after the period allowed by law for claims to be filed (which is four months from the time the Notice to Creditors is first published in the paper), whichever is longer; if an exception is not TIMELY filed, the claim is treated as completely valid and **must be paid; each claim filed is treated as a mini-lawsuit against the estate**

8. The personal representative must **file all state and federal income tax returns that are due for the deceased**, both from prior years and for the last year of life; and the personal representative must **file all state and federal income tax returns that are due for the ESTATE of the deceased** (or, if the deceased used a revocable living trust, then for the trust itself) for all periods from the date of death forward; and finally, the personal representative must file the **federal estate tax return** within nine months after the date of death; the decedent's estate or trust must have a separate **federal tax identification number** for which the personal representative must apply from the IRS; the personal representative is **personally liable for filing accurate returns** (many are signed under "penalty of perjury") **and for paying the taxes due**

9. The personal representative is authorized **to hire attorneys, accountants, appraisers** and/or any other professionals required to assist in fulfilling these duties; and ALL of the heirs will be required to share the expenses for the services of these professionals out of the decedent's estate

10. If the assets (other than real estate) in the deceased's name alone are insufficient to pay all debts and expenses (funeral bills, probate fees, attorneys' fees, accountants' fees, appraisal fees, etc.) and taxes due, then unless the will is drafted very carefully, the personal representative must **apply to the probate court for permission to sell real estate to pay debts, expenses and taxes**

11. All assets must be safeguarded until they are distributed to the heirs, and the personal representative normally must establish a **separate bank account for the estate** in order to pay debts and expenses and **keep track of all income, receipts and refunds as well as expenses, debts and taxes paid** (whether the inventory and other recordkeeping has been excused by the will or not); and

the personal representative must **furnish originals of the "letters testamentary" or "letters of administration"** issued by the probate court to anyone who holds assets of the estate in order to get those assets transferred to the proper beneficiaries; sometimes **tax waivers from the federal government must be obtained** for each asset which is sold or transferred in the probate process; sometimes, **affidavits of domicile** are also required to get assets transferred

12. **Receipts and releases** from all creditors who have filed claims against the estate must be obtained and **filed in the probate court,** and **releases** must also be obtained **from each beneficiary of the estate and filed in the probate court** to assure the court that all persons are receiving the property to which they are entitled (even if the decedent left someone just one dollar!); this means the personal representative must **make sure that all of the proper heirs of the estate have been accurately identified**

13. In Tennessee, after the four-month creditors' notice period has run, the personal representative may **pay all debts under $1,000** if they are valid debts (**whether or not a claim was filed in the probate court**), but technically if a debt is greater than $1,000, a claim must be filed in the probate court

14. Most specific gifts (called "**bequests**") **must be paid within one year after the date of death**; if paid after the one-year period, interest must be paid on the bequests; no interest is paid on gifts to the recipients of the "residue" of the estate

15. Regular **court accountings** are required to be filed unless accountings are excused under the terms of the will or if all the heirs of the "residue" of the estate are adults and they all consent to waive the accountings; however, even if accountings are excused by the will, **any heir of the "residue" can demand to receive an accounting and/or an inventory any time**

16. The personal representative is entitled to receive **reasonable compensation for the value of his or her services in settling the estate**

17. After all debts, expenses, taxes, bequests and other items have been distributed and the receipts have been filed and other paperwork has been completed, the personal representative must **file affidavits in the probate court** affirming that all creditors have

been properly notified and that all beneficiaries have proper notification as well; for larger estates, the personal representative must **wait until the federal government has approved the death tax return** before the estate can be closed

18. The personal representative must obtain a **release from the Bureau of TennCare** certifying that the deceased person was not receiving TennCare benefits for certain expenses, such as nursing home care, or certifying that all benefits provided have been paid. If the person did receive applicable TennCare benefits, the personal representative must work with TennCare to satisfy any claim that it may have against the estate, because probate cannot be closed without the TennCare release

19. Finally, the personal representative files a **petition to close probate** and if the court approves, an **order to close** the estate is filed and the personal representative is discharged

C. **When does probate have to begin?** Interestingly enough, there is no requirement or time limit in which one must begin a probate in Tennessee, although a person named as Executor is supposed to act with diligence in beginning this process

D. **Where is probate required to be handled?** Probate is properly conducted in the county in which the decedent resided at the time of his or her death

E. **How can you get rid of an Executor or Administrator who isn't doing a good job?** If you are not happy with the performance of an Executor or Administrator of an estate in which you are a beneficiary, you have the right to ask questions and to get answers about how the assets are being handled. If the Executor or Administrator is not doing a good job, you will probably need to hire your own attorney to get him, her or it removed, but this should not be an impossible task if there has been mishandling or wrongdoing in the estate's administration

F. **Little-Known Fact:** If there is enough cash, stocks, bonds, and other personal property in the estate to pay all debts and expenses, **the Executor/Administrator does not <u>normally</u> have control over the real property owned by the decedent.** In other words, if you are one of five children who are the equal heirs of your widowed Mother's estate, and if the funeral bill and all other expenses are adequately covered by the cash in your Mother's name alone at her death, each of you and your siblings is automatically an equal owner of your Mother's real property. (This is true

unless your Mother's will says that her Executor is in charge of the real estate.) Each of you has the right and/or the responsibility to maintain, rent, repair, and otherwise manage the property from the moment of your Mother's death. **So don't wait for the Executor to decide what to do about the real estate!**

G. Little-Known Fact: Most of the trouble among family members going through probate comes from the failure of the Executor or Administrator of the estate to keep the other family members who are heirs informed about what is going on, and vice versa

X. Tool #9: Avoiding Probate — Trusts and Other Tools

A. Probate can be a pain — but you can avoid it with joint accounts or real estate with right of survivorship, life insurance, pension benefits (IRAs, 401(k)s, etc.), trust property (irrevocable or revocable living trusts), "POD" or "Payable On Death" accounts, etc. In other words, revocable living trusts offer one of many ways in which to avoid probate

B. What good are revocable living trusts?

1. To **avoid probate,** and particularly dual or triple or more probates if you own property in MORE THAN ONE STATE

2. To **discourage crackpots** from filing frivolous (but expensive) claims against your estate and prolonging the agony of court proceedings for months or even years

3. To **reduce (or hopefully eliminate) probate and attorneys' fees** and expenses and (perhaps) reduce death taxes

4. To maintain **privacy** as to your estate plan

5. To **make things easier on you** if you become disabled (avoiding a conservatorship), and after your death, to make things easier for your spouse, the kids and/or your other heirs

6. To **discourage a will contest** and other bickering among your heirs

7. To **avoid (perhaps) the claims of a second spouse** if no premarital agreement was signed