

WHAT DO I NEED TO KNOW ABOUT  
**Probate Litigation?**



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A Professional Corporation

# WHAT IS PROBATE?

The word “probate” generally refers to the administration of intestate estates (dying with no will), the admission of last wills and testaments, the formation, modification or termination of trusts, and the establishment of adult guardianships or conservatorships. Probate matters are handled by courts with probate jurisdiction. In Tennessee, the court is either the Probate Court or the Chancery Court. In Mississippi, it is the Chancery Court.

## WHAT IS LITIGATION?

Litigation is the settling of controversies or disputes in court or through the judicial system or process. Litigation involves a complaint or petition by the plaintiff, an answer or response by the defendant, discovery such as interrogatories (written questions) and requests for documents, experts, depositions, various motions, multiple hearings and a trial.

## WHAT IS PROBATE LITIGATION?

Most probate matters are uncontested, which means all of the family members or interested parties agree on the outcome. However, probate matters can be contested, requiring a court to resolve the differences between the parties. Contested probate matters are referred to as probate litigation.

## WHAT ARE SOME EXAMPLES OF PROBATE LITIGATION?

Examples of probate litigation may include: (a) challenges to the validity of a Will; (b) petitions for declaratory judgment to determine the construction or meaning of Wills and Trusts; (c) claims by a disinherited spouse for a spousal share and homestead; (d) challenges to the validity of a pre-nuptial agreement disinheriting a spouse; (e) disputes regarding the validity of creditors’ claims against an estate; (f) partition actions to force the sale or division of real property inherited by more than one person as tenants in common; (g) demands for the removal of an executor for conflicts of interest, or for failing to perform certain duties, or for misuse or misappropriation of funds; (h) suits for breach of fiduciary duty by a trustee; (i)

requests to modify the distribution terms of, or to terminate, a Trust; and (j) contests over who should serve as guardian or conservator of a disabled person.

## WHEN IS PROBATE LITIGATION MORE LIKELY?

Probate litigation is more common under the following fact patterns: (a) second marriages, (b) sibling rivalries, (c) non-lawyer drafted documents; (d) omission of a spouse or child as a beneficiary; and (e) poor or non-existent communication by executors and trustees.

## HOW CAN A WILL BE CONTESTED?

A Last Will and Testament can be contested for one or more of the following reasons: (1) lack of mental capacity of the decedent; (2) improper execution of the Will; or (3) undue influence of the decedent by the beneficiary.

## WHAT MENTAL CAPACITY IS REQUIRED TO MAKE A WILL?

To be mentally competent to make a Will, a person must be of sound and disposing mind and memory. In other words, the testator (person making the Will) must “know the natural objects of his bounty,” must “know the nature and extent of his property,” and must understand the consequences of making the Will. Knowing the natural objects of a person’s bounty is the person knowing his or her close family members. Knowing the nature and extent of a person’s property is the person knowing the general location and value of his or her assets. Understanding the consequences of making a Will is the person understanding what will happen upon his or her death to the person’s assets and who will inherit what.

## HOW SHOULD A WILL BE EXECUTED OR SIGNED?

Wills may be typewritten or handwritten.

A handwritten Will is referred to as a holographic Will. To be valid, a holographic Will must be wholly in the handwriting of the decedent and signed by the decedent. No witnesses or notary are required for a valid holographic Will.

A typewritten Will has more requirements or “formalities” to be valid. The decedent must declare that the document is the decedent’s Will in the presence

of two witnesses. The decedent must sign the Will in the presence of the two witnesses. The witnesses must sign the Will in the presence of the decedent. The witnesses must sign the Will in the presence of each other. Any failure of these “formalities” may render the Will as invalid.

## WHAT IS UNDUE INFLUENCE?

For a Will to be valid, the making of the Will must be the voluntary act of the testator. Undue influence occurs when a person other than the testator substitutes that person’s thinking or decision for the thinking or decision of the testator. In other words, are the terms of the Will what the testator wanted or what another person wanted? Undue influence can be the result of verbal threats or physical force. However, most undue influence is based on less obvious pressures, such as the imposition of and acting on subtle fears or



unrealistic hopes. One court defines undue influence as a moralistic force, amounting to coercion, which the testator, in a spirit of submission, has not the power to resist. In other words, undue influence involves one person taking advantage of a position of power over another person, to the extent that the person cannot exercise his or her own free will or independent decision making.

## WHEN CAN A COURT TERMINATE AN IRREVOCABLE TRUST?

A Court can terminate an irrevocable trust and distribute the assets of the trust to the beneficiaries for the following reasons: (a) if the trust is uneconomical, or (b) if no purpose of the trust remains to be achieved,

or (c) if the purposes of the trust are no longer possible to achieve, or (d) if all of the beneficiaries agree to terminate the trust and the continuance of the trust is not necessary to achieve any material purpose of the trust.

## WHAT IS A CONTESTED CONSERVATORSHIP?

A conservatorship or adult guardianship is the legal process by which someone is appointed by a Court to make financial and medical decisions for a disabled or incapacitated adult. A “Conservator of the Person” is appointed by a Court to make healthcare and personal care decisions for the disabled adult. Examples of decisions made by the conservator of the person include: housing arrangements; nutrition, food and meal preparation; medical, dental, and vision care; personal hygiene; and personal care and protection. A “Conservator of the Estate or Property” is appointed by a Court to make financial decisions for the disabled adult. The conservator of the property takes possession of the disabled person’s assets and income and is responsible for protecting, investing and spending the assets and income solely for the benefit of the disabled person. Examples of decisions made by the conservator of the property include: investment decisions; payment of bills, invoices and debts; the sale of property; budgeting for expenses; and safekeeping of property.

A contested conservatorship occurs when the family members or close friends of the disabled adult cannot agree on who will serve as the conservator of the person or the conservator of the property.

## WHO SHOULD I ENGAGE TO ASSIST ME WITH PROBATE LITIGATION?

An attorney with probate and litigation experience who has represented executors, trustees, beneficiaries and creditors in court should be engaged to represent you in a probate litigation matter.

## THE BAILEY LAW FIRM

The Bailey Law Firm concentrates its legal practice in the areas of wills and trusts, estate taxation and planning, asset protection planning, charitable gift planning, business succession planning, elder law, and estate administration and probate. The Bailey Law Firm has attorneys licensed to practice law in the states of Mississippi and Tennessee.

### OLEN M. "MAC" BAILEY, JR.

The Bailey Law Firm was founded by Olen M. "Mac" Bailey, Jr. Mr. Bailey received his Master of Laws (LL.M.) degree in Elder Law with honors from Stetson University College of Law, his J.D. from Vanderbilt University School of Law, and his B.A. from Millsaps College. Mr. Bailey is an accredited attorney with the Department of Veterans Affairs.

### ESTATE PLANNING

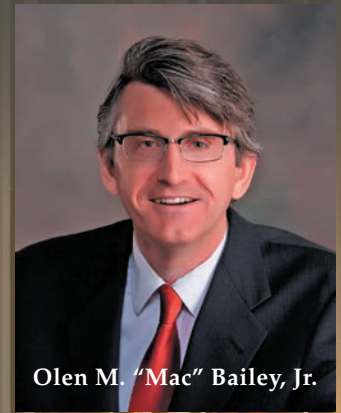
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- Conservatorships

### PROBATE

- Will Contests
- Estate Administration
- Trust Administration
- Estate Disputes



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