Deceased Account Holder Issues

Presented by

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I. Introduction.

On many occasions, banks are faced with the death of an account holder or borrower and the attendant issues which arise at that time. In many situations, the heirs of the deceased look to bank personnel for practical advice as to how to handle the affairs of the deceased account holder and/or look to the bank for guidance as to how property held by the bank may be distributed or disposed of. Several issues also arise upon the death of a borrower or guarantor related to continued repayment of an obligation and/or title to collateral held as security for an obligation by the bank. This article will first give a general primer on types of probate or administration then address several of the issues which may arise with a deceased customer.

II. Probate or Administration.

Although it is never a good idea for a bank to offer advice to the heirs of a deceased as to what actions to undertake with regard to the estate of the deceased, it is helpful for bankers to have some basic knowledge of the probate or administration process and the need for same. In Georgia, there are several technical subdivisions of the probate or administration process. However, for purposes of this article, we will cover only the basic probate or basic administration of an estate. The initial determination for any heirs or a personal representative is to determine whether or not the deceased had a validly executed will. If there was a valid will, the Georgia Code indicates that the will should be probated and the personal representative named in the will qualify to act on behalf of the estate of the deceased individual. If there is no will, the heirs or other persons interested in the assets of the deceased, may undertake an administration of his or her estate through the probate court. Finally, in some limited situations, there may be simply a need to determine shares in property for the heirs but no need for formal administration. In this instance, a "Petition for No Administration Necessary" may be filed.

A. Probate.

1. Is there a will?

Among the most important initial considerations for heirs of a deceased individual is to determine if the individual left a will, in

which event the probate of the will can be considered. If the decedent died without a will (intestate) an entirely different proceeding (administration) will need to be considered.

B. Probate in Common or Solemn Form. The Georgia code states that the probate of a will may be in common form, solemn form or both.

1. Common Form. In common form probate, there is no requirement to notify either heirs or beneficiaries in advance of the probate of the will and once the petition has been completed and filed, the named executor can immediately qualify assuming that the will is self-proving. The effect of common form probate is that it is not conclusive on anyone who is adversely interested (creditors, other heirs) in the will of the decedent. The Georgia code provides that common form probate becomes conclusive on all parties in interest four (4) years from the date of probate except upon minors who file a caveat within four (4) years after reaching majority. Given this inconclusive nature, common form probate is very rarely used.

2. Solemn Form Probate. Solemn form probate requires notice to all heirs at law, and assuming that the will is otherwise in proper form, the judgment approving the will for probate in solemn form is conclusive upon all heirs that have been notified.

3. Notifications to Creditors. O.C.G.A. § 53-7-41 provides that:

"[T]he personal representative shall be allowed six (6) months from the date of the qualification of the first personal representative to serve in which to ascertain the condition of the estate. Every personal representative shall, within sixty (60) days from the date of qualification, publish a notice directed generally to all the creditors to render an account of their demands. The notice shall be published once a week for four weeks in the official newspaper of the county in which the personal representative qualifies. Creditors who fail to give notice of claims within three (3) months from the date of publication of the personal representatives' last notice, shall lose all rights to an equal participation with creditors of equal priority to whom distribution is made before notice of such claims is brought to the personal representative, and they may not hold the personal representative liable for a misinterpretation of the funds."

This notification procedure allows creditors to notify the personal representative of an estate of their claim, the amount of the claim and allows a priority to be established for the claim within the

estate. It is good practice for a creditor to diligently review obituary notices and other evidences of possible death of their customers such that these notification periods do not "slip by". Failure of a creditor to notify the personal representative during this time period is not fatal to their claims but may result in a lower priority of payment (and in practicality non-payment) of their claims. Although it is a good practice, it is not absolutely necessary that a fully secured creditor notify the personal representative of their debt. Fully secured creditors stand a much better chance of recovery given that they have collateral for their debt and may exercise their rights in that collateral should the debt ever be in default.

4. Payment of Debts by Estate. Pursuant to O.C.G.A. § 53-7-42, the personal representative is not required to pay the debts of the estate in whole or in part until six (6) months from the date of qualification of the first personal representative to serve. However, when payments are made, the payments must be made on a pro rata basis on debts of equal priority and all payments must continue to be pro rata until all debts of the estate are paid.

C. Administration. Administration is the procedure used to name a personal representative of the estate of a deceased individual when that individual did not leave a valid will for probate. The duties of an administrator and notifications to creditors by the administrator are largely the same as that of an executor as noted hereinabove.

1. Determination and Payment of Debts by a Personal Representative. As stated above, a personal representative has a duty to pay the debts and claims of an estate to the fullest extent possible even if this results in leaving nothing for distribution to heirs or beneficiaries.

2. A personal representative has a duty to ascertain all debts and claims of the estate. The general method to ascertain these claims is the notice to creditors detailed hereinabove. Once the notice of creditors is published and creditors have had an opportunity to make their claims, the personal representative has a duty to satisfy debts and claims in order of their priority as set forth in O.C.G.A. § 53-7-40. According to O.C.G.A. § 53-7-40 "judgments, security interests and other liens created during the decedent's life" maintains sixth (6^{th}) priority in payment of claims and all other claims, including unsecured claims maintain seventh (7^{th}) and last priority in payment of claims. The import of this Code section means that a personal representative is entitled to satisfy several expenses with assets of the estate prior to paying any claims of

creditors. Once the personal representative begins to pay claims of creditors, the personal representative must pay them in accordance with their priority and must pay all debts and claims within the same level of priority on a pro rata basis if estate assets are not sufficient to pay them in full.

3. It is very important to note that nothing in Section 53-7-40 effects a secured creditor's right to foreclose or repossess its collateral in satisfaction or partial satisfaction of the secured debt. It is further worth noting that if a creditor fails to render their account within the time period provided by the notice to creditors, it loses the right to complain if the personal representative pays other creditors of equal priority more than is paid to the creditor who does not render its account.

4. Exemption from Creditor's Claims. O.C.G.A. § 53-7-41 gives a personal representative six (6) months to ascertain the condition of the estate before being required to pay debts of the estate in whole or in part. The Code section further provides that no action to recover a debt due by the decedent shall be commenced against the personal representative until the expiration of six (6) months from the date of qualification of the first personal representative to serve. It is clear that a personal representative may waive the six (6) month protection period by consenting to the bringing of suit. It is further clear that this six month exemption does not effect foreclosure of a deed to secure debt, the continuation of an action brought prior to the decedent's death, or an action to levy or collect on a judgment in place prior to the decedent's death.

D. Petition for No Administration Necessary. There is a possibility that, if all the assets of a deceased individual may be transferred to his heirs without the need for probate or administration, another proceeding may be utilized.

1. The "Petition for No Administration Necessary" is generally utilized to clear the title to real estate so that property can either be sold or pledged as collateral for a loan to be made.

(a) This proceeding allows the Court to enter an order setting forth the names of the decedent's heirs and their respective percentages of entitlement which ultimately translates into their percentages of ownership in the real estate of the decedent.

(b) O.C.G.A. § 53-2-40 provides that such a petition may be filed if an individual has died intestate (without a will) and there has been no personal representative appointed.

(c) Any heir of the decedent may file a petition praying for an order that no administration is necessary.

(d) The petition filed must state that either the estate owes no debts or that there are known debts and all creditors have consented to the petition.

(e) If all the necessary requirements for such a petition are satisfactorily met, the effect of a final order is to confirm the vesting of title of real property in the heirs in the proportions described in the laws of intestacy or in accordance with the agreement signed by all of the heirs if there is any change to these percentages.

III. Specific Issues Facing Lenders.

A. Accounts. The Georgia Code provides extensively for dealings of a bank or financial institution with a deceased depositor's account. The provisions within the Georgia Code may be easily divided into two (2) separate classifications, those for individual accounts and those for multiple party accounts.

1. Individual Accounts.

(a) O.C.G.A. § 7-1-239 authorizes a financial institution, when a person dies intestate (without a will) and has on deposit at a financial institution not more than $10,000.00, to pay the proceeds of such deposit directly to the surviving spouse; if no surviving spouse to the children of the deceased pro rata; if no children then to the father and mother of the deceased pro rata; or if none of the above then to the brothers and sisters of the decedent pro rata. Should none of the above persons make application for the deposits within ninety (90) days of the death of the intestate depositor, the financial institution is also authorized to pay not more than $10,000.00 of the deposits of a deceased depositor in payment of funeral expenses and expenses of the last illness.

(b) Section 7-1-239 provides that payments pursuant to these Code sections operate as a complete discharge to the financial institution of any liability by any heir, distributee, creditor or any other person.

(c) If deposits of the intestate depositor are over $10,000.00, the financial institution is entitled to act under Section 7-1-239 and pay up to $10,000.00 of the deposit they hold.

(d) The Code section further provides that when any person dies intestate and another person is left in possession of monies belonging to the deceased, which does not exceed $10,000.00, the person may deposit the monies into a savings account in the name of the deceased in a financial institution, such that the monies may be treated in accordance with this Code section.

(e) To operate under the Code section, a financial institution must receive an affidavit by the claimant or claimants stating that they qualify as the proper relation to the deceased to be able to claim the deposits. The financial institution may rely on a properly executed affidavit in disbursing the funds according to the Code section.

(f) Keep in mind, the above provisions apply only where the deceased dies without a will. In the case of a deceased party having a will, then the executor or executrix of the will will be empowered to deal with the contents of an account at your bank. Keep in mind also that all of these provisions continue to recognize the contractual right of setoff a bank or financial institution may have against the contents of a deposit account upon the death of a depositor.

2. Multiple Party Accounts.

(a) O.C.G.A. §§ 7-1-810 through 7-1-821 deal with multiple party accounts held by financial institutions in the State of Georgia.

(i) Multiple party accounts include a joint account, a payable on demand account or trust account among other types of accounts.

(ii) Multiple party accounts specifically exclude deposit of funds for a partnership joint venture or other association for business purposes or accounts controlled by one or more persons as an agent for a corporation, unincorporated association, charitable or civic organization.

(b) Code sections 7-1-812 through 7-1-814 are relevant to disputes between parties of multiple party accounts, beneficiaries of multiple party accounts and their creditors or other successors and are instructive regarding this area of the law.

(i) Section 7-1-812 sets forth that a joint account "belongs", during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent. The Code section further provides that a payable on demand account belongs to the original payee during this lifetime and not to the POD payee or payees.

(ii) Section 7-1-813 provides that "sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent, unless there is clear and convincing evidence of a different intention at the time the account is created."

(c) Code section 7-1-816 through 7-1-821 relate to protection for financial institutions in multiple party account situations. These Code sections are instructive in the deceased party situation but also in other situations in dealing with multiple party accounts.

(i) Section 7-1-816 provides that any multiple party account may be paid, on request, to any one or more of the parties on the account. It further provides that a financial institution shall not be required to inquire as to the source of funds received for a deposit to a multiple party account or to inquire as to the proposed application of any sum withdrawn from an account.

(ii) Section 7-1-817 provides that "any sums in a joint account may be paid, on request, to any party without regard to any other party who is incapacitated or deceased at the time the payment is demanded; but payment may not be made to the personal representative or heirs of a deceased party unless proof of death is presented to the financial institution showing that the decedent was the last

surviving party."

(iii) Section 7-1-820 provides that a financial institution is protected and discharges the financial institution from any and all claims for amounts paid pursuant to the above-referenced Code sections when the payment is made consistent with the provisions thereof.

(iv) Finally, Section 7-1-821 reiterates that notwithstanding any contractual provision, if a party to a multiple party account is indebted to a financial institution, the financial institution has a right of setoff against the account in which the party has or had immediately before his death a present right of withdrawal. The Code section does limit the amount of the account subject to setoff to that proportion to which the debtor is or was immediately before his death beneficially entitled and in the absence of proof of net contributions an equal share with all parties having a present right of withdrawal.

B. Safe Deposit Boxes.

The procedures on death of a person owning a safe deposit box are set forth in O.C.G.A. § 7-1-356.

1. That particular Code section states that upon satisfactory proof of death of an owner of a safety deposit box, a financial institution shall permit any person named in an order granted by the probate court having jurisdiction of such person's estate to open and examine the contents of any safe deposit box leased by the deceased or to examine the property left by such person for safekeeping in the presence of an officer of a financial institution.

(a) In most instances, an order of the probate court will require the financial institution to deliver to the probate court any writing purporting to be a will of the deceased which is located in the safe deposit box of the deceased. The order may also require any deed for a burial plot or any writing giving burial instructions to be given to the person named in the order and/or require any document purporting to be an insurance policy on the life of the decedent to be given to the beneficiary named in the policy.

2. The Code section does provide that no other contents shall be removed from the box.

3. Under 7-1-356(b), within five (5) banking days after order of the probate court is presented to the financial institution, the institution shall permit the person named in the order to inventory the contents of the safe deposit box leased or rented.

   (a) The Code section provides that the inventory be conducted in the presence of an officer or employee of the financial institution by the person named in the order and that the inventory be signed by the person named in the order and a copy thereof be retained by the financial institution.

   (b) The section provides that the inventory may be filed with the probate court. The best advice here is to make sure that any inventories taken are filed with the probate court by the bank.

4. The Code section provides a safe harbor for financial institutions which act in accordance with the Code section and in accordance with orders of the probate court from any and all claims of liability.

5. After a personal representative is named for the estate of the deceased, whether that be an executor or an administrator, upon presentation of the letters of the executor or administrator's authority, the financial institution must grant the personal representative access to the safe deposit box or property in safekeeping and permit the representative to remove from such box any part or all of the property without liability.

C. Loans Where the Deceased is Borrower/Guarantor.

Many times issues will arise among heirs or family members related to loans held by a financial institution in which their deceased family member is a borrower or guarantor. In fact, in many instances, none of the family members wish to take responsibility for the indebtedness and the financial institution is left with exercising its rights in collateral.

1. A situation arises frequently where a husband or wife dies and is the sole owner and maker on a promissory note to a financial institution collateralized by the deceased's residence. The deceased shares the residence with the surviving spouse and either the surviving spouse or the children of the couple receive the house as an heir under a will. In this instance, the bank or financial institution may want to renew notes putting on the new notes the person to remain liable for the debt. This situation may entail a

check of the title records to determine the current title situation and the priority of the security interest of the institution, as well as the execution of a new deed to secure debt and/or a hypothecation agreement if for instance the house will be owned by the children but the surviving spouse will remain liable upon the debt. These are all issues which must be sorted through in consultation with your attorney such that your security interest remains viable.

D. General Collection Issues.

The above materials have covered many of the situations which will arise upon the death of an account holder or deceased maker of a loan. The main concern when an account holder dies and the account is in collection or about to be in collection is that the financial institution make the appropriate claims with the probate court and continue in any efforts to foreclose and/or repossess collateral. A specific provision mentioned above which prevents a claim against the executor or administrator for a period of six (6) months from the qualification of the executor or administrator is important. However, as mentioned above, continued collection upon an already rendered judgment or continued repossession of collateral or foreclosure of collateral would be permissible. It is also worthy to re-highlight the necessity that an institution take whatever actions may be necessary to setoff on funds and accounts in which the deceased customer held an interest upon his or her death if the institution believes that the debts owing to the institution will not be paid by the heirs or the estate.