

KENTUCKY BAR ASSOCIATION
Unauthorized Practice of Law Opinion KBA U-37
Issued: May 1983

Question: May an individual, not an attorney, prepare and file Petitions, Orders and various documents in District Court on behalf of an estate, without the assistance of an attorney?

Answer: No.

References: Frazee v. Citizens Fidelity Bank & Trust Co., Ky., 393 S.W.2d 778 (1964); SCR 3.020; Carter v. Brien, Ky., 309 S.W.2d 748 (1956); Winkenhofer v. Chaney, Ky., 369 S.W.2d 113 (1963); DR3-101(A); KBA v. Tiller, 641 S.W.2d 421 (Ky. 1982).

OPINION

It should be pointed out that this opinion is not directed toward the issue of whether a personal representative in an estate should retain competent legal counsel to assist in the administration process and filing of legal papers. Certainly it would be advisable. A conscientious layperson may stumble through the process in a simple estate. In more complex estates, there is an increased likelihood of confusion and perhaps financial loss. What must be considered, however, is that wholly apart from the advisability of retaining legal counsel, Kentucky by statute gives the personal representative of an estate an enormous amount of power and responsibility. There is no statutory requirement that the personal representative retain a lawyer for advice. However, he may well be held accountable for errors made which could have been avoided with proper guidance from an attorney.

The Bar Association defeats its very purpose of serving the public in a conscientious manner if it needlessly restricts what individuals may legitimately attempt to accomplish for themselves without the assistance of an attorney. However, our concern for protecting the right of an individual to act in his own behalf in no way diminishes or lessens our responsibility to the public.

It is this responsibility to the public which is the basic consideration in deciding questions as to what constitutes the unauthorized practice of law. Thus, in Frazee v. Citizens Fidelity Bank & Trust Co., Ky., 393 S.W.2d 778 (1964), the Court of Appeals stated:

Public interest dictates that the judiciary protect the public from the incompetent, the untrained and the unscrupulous in the practice of law. Only persons who meet the educational character requirement of this Court and who, by virtue of admission to the Bar, are officers of the Court and subject to discipline thereby, may practice law. The sole exception is the person acting in his own behalf. Id at 782.

There are no reported case decisions or unauthorized practice opinions which directly deal with the issue at hand. However, SCR 3.020 offers a basic definition of what constitutes the practice of law. That definition is as follows:

The practice of law is any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services. But nothing herein shall prevent any natural person not holding himself out as a practicing attorney from drawing any instrument to which he is a party without consideration unto himself therefor. (Emphasis added.)

The only Kentucky case which discusses the role of laymen in the handling of estates is Carter v. Brien, Ky., 309 S.W.2d 748 (1956). In that case, proceedings were brought by the Chairman of the State Bar Association's Committee on Unauthorized Practice to punish a County Court Clerk, who was not a lawyer, for contempt of Court. It was alleged that the Clerk had assisted individuals by preparing and filing in the Probate Court petitions for probate of Wills and appointment of personal representatives. The Court ruled that the Clerk was in contempt of Court, fixed his fine at \$1.00 because he had acted innocently and in good faith and directed that the practice should cease. The Court reasoned as follows:

When Brien (the Clerk) was acting upon the advice or under the directions of the court attorney, County Judge or any other duly licensed lawyer, his position is sound that he was serving only in the capacity of an amanuensis and not practicing law. However, when he was acting purely on his own volition for some friend, political supporter or business associate in drawing probate papers to be filed in his office, even though they were to be signed by the applicant, he was engaged in the unauthorized practice of law.

The Court stressed that to come within the exception of SCR 3.020, one who is not a lawyer must not only act without consideration for his services in drawing the paper, but he must be a party to or his name must appear in the instrument as one to be benefited thereby.

The problem of clerks being asked to complete legal forms on probate matters and render legal advice in the context of handling estates or incompetency proceedings has remained a recurrent and difficult dilemma. Clerks are asked daily to assist individuals in the completion of certain forms or in preparing legal documents. They often feel caught between the political realities compelling them to assist the person and the legal prohibition telling them not to render such advice or assistance. Clearly there are gray areas which laypersons ask broad general questions of clerks relating to the preparation of legal forms. It is submitted that clerks need to exercise extreme caution in this area. Certainly they may indicate which forms must be completed and give out the forms to individuals who request them. However, the clerks should refrain from filling out probate or incompetency forms for individuals or providing assistance in this regard. Neither should the clerk attempt to render legal advice as to how the estate or incompetency proceedings should be handled.

The central rule of the Carter case was that preparing and filing petitions for probate of wills, appointment of personal representative and final settlements is unauthorized practice of law when done voluntarily by persons without a beneficial interest in the estate. See also Winkenhofer v. Chaney, Ky., 369 S.W.2d 113 (1963). Fiduciaries are in no different position, with respect to the practice of law, than the County Court Clerk in the Carter case. The party who is excepted from the definition of the practice of law in SCR 3.020 is one who is a natural person who has a beneficial interest in the estate, and acts without consideration. Thus, it is the conclusion of this opinion that as a general rule, the filing of petitions, orders, pleadings, settlements or papers of any kind on behalf of an estate constitutes the practice of law. The only exception, based upon SCR 3.020 and case authority, is where the personal representative is a natural person acting without fee and is a beneficiary of the estate.

Why should the exception be limited to natural persons? First, the text of SCR 3.020 makes specific reference to "natural person". Secondly, the Frazee v. Citizens Fidelity Bank & Trust Co., Ky., 393 S.W.2d 778 (1964) case specifically precludes corporations, banks and trust departments from filing specific probate and fiduciary documents in probate court unless they are in the name and by the authority of a licensed attorney. This aspect of the Frazee decision has all too often been overlooked or ignored in practice. It is hoped that this opinion will serve to reemphasize the importance of this prohibition.

If the personal representative attempts to collect a fee for his services, he cannot claim to be acting without consideration. Therefore, he cannot come within the exception embodied in SCR 3.020. If a commission is charged, the services of an attorney are required under the rule. Finally, the personal representative must have a beneficial interest in the estate. Only when all three requirements - (a) natural person, (b) acting without consideration, (c) having a beneficial interest in the estate - are present can a person come within the exception. Otherwise, under the rule and in the public interest, all documents must be filed by a licensed attorney unless expressly exempted by the Frazee decision.

It should be specifically noted that in addition to the above, the Disciplinary Rule 3.101 (A) provides as follows:

A lawyer shall not aid a non-lawyer in the unauthorized practice of law.

Furthermore, the Bar and members of the general public should be alerted to the recent case of Kentucky Bar Association v. Tiller, 641 S.W.2d 421 (Ky. 1982).

Note to Reader

This unauthorized practice opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). Note that the Rule provides in part: "Both informal and formal opinions shall be advisory only."