

# GSRM

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## GSRM News: Estate Planning & Probate from the Bench

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In the summer of 2010, GSRM launched its inaugural issue of **Estate Planning and Probate from the Hill**, a newsletter reporting on significant probate and estate planning laws passed by the Tennessee General Assembly during its most recent legislative session. We received many positive responses to **Estate Planning and Probate from the Hill**, inspiring us to create this companion newsletter, **Estate Planning and Probate from the Bench**. Our companion newsletter contains summaries of selected decisions reported from the Tennessee courts concerning estate planning and probate matters. GSRM intends to publish **Estate Planning and Probate from the Bench** each fall to report on cases from the prior year, and periodically throughout the year if cases are published which may be especially helpful or interesting to our friends and professional colleagues.

### Recent Tennessee Cases

#### **TennCare Claims**

*In re Estate of Tanner*  
295 S.W.3d 610 (Tenn. 2009)

Under *Tanner*, the Tennessee Supreme Court determined that TennCare was not bound by the one year statute of limitations on filing claims against a decedent's estate under T.C.A. § 30-2-310, as it existed prior to amendments made effective January 1, 2007. Because *Tanner* was decided under the law as it existed before January 1, 2007, it is uncertain if the new language in the amended statute binds TennCare by the one year statute of limitations for decedent's who die after January 1, 2007.

#### **Effect of Death on Divorce Proceedings**

*Blackburn v. Blackburn*  
270 S.W.3d 42 (Tenn. 2008)

In *Blackburn*, separate counsel for a wife and husband announced in open court that the parties had reached a full divorce settlement. However, no court reporter was present and the trial court made no written notations or memoranda indicating the court's intent to enter the judgment on the date of the hearing. Prior to the judge signing and entering a final divorce decree, the husband died in an automobile accident. The wife subsequently filed a Suggestion of Death and a Motion to Dismiss the divorce proceeding. The *Blackburn* Court held that the divorce proceeding was still pending because there was no writing definitively reflecting the intention of the trial court to finalize the divorce on the day of the hearing. Under Tennessee law, a surviving spouse is entitled to take under a decedent's will even if the husband and wife were legally separated and a divorce proceeding was pending upon the death of one the parties. This ruling highlights the importance of timely updating estate planning documents and beneficiary designations if divorce or legal separation is contemplated, assuming that such actions are not restricted by court order.



Jack Robinson, Sr.



Mark H. Westlake



Andra J. Hedrick



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## **Will Execution Requirements**

*In re Estate of Stringfield*

283 S.W.3d 832 (Tenn. App. 2008)

An affidavit of a witness cannot cure the faulty execution of a will when attesting witnesses did not properly attest the signing of a will pursuant to T.C.A. § 32-2-110. In *Stringfield*, the witnesses failed to sign the attestation clause of the will. However, the witnesses did supply an affidavit of attesting witnesses purporting that they had signed the will. The Tennessee Court of Appeals, in denying the will for probate, held that an affidavit of attesting witnesses properly executed pursuant to T.C.A. § 32-2-110 did not operate to negate or satisfy the requirements of attesting witnesses to sign the will in the presence of the testator and in the presence of each other. The *Stringfield* Court's opinion stresses the importance of properly executing a will and the dire consequences that can result if not properly executed.

## **Vesting of Real Property Upon Death**

*In re Estate of Pickard*

No. M2008-02028-COA-R3-CV; 2009 Tenn. App. LEXIS 58

In *Pickard*, the Court of Appeals ruled that the language of the will directing the sale of real estate was sufficient to make the real estate a probate asset. Under T.C.A. § 31-2-103, the real property of a testate decedent vests immediately upon death in the beneficiaries named in the will, unless the will contains a specific provision directing the real property to be administered as part of the estate subject to the control of the personal representative. It is important to have a will which clearly expresses the testator's intention as to authority over real estate. This can help avoid uncertainty, delay, and expenses associated with disputes between executors and beneficiaries as to such authority.

## **Disposal of Bodily Remains**

*Seals v. H & F, Inc.*

301 S.W.3d 237 (Tenn. 2010)

Pursuant to *Seals*, where a decedent does not make a pre-mortem election for the method of disposal of his or her remains, the legal right to direct the disposal of remains descends to the following parties, in order of priority: 1) the spouse of the decedent; 2) adult children of the decedent; 3) parents of the decedent; 4) adult siblings of the decedent; 5) adult grandchildren of the decedent; 6) grandparents of the decedent; and 7) an adult who has exhibited special care and concern for the decedent. Thus, the right of a surviving parent (who would be third in priority), absent an election of the decedent to the contrary, will control over the wishes of a fiancée or minor child, to whom priority would never descend. This case illustrates the importance of making a pre-mortem election as to disposal of remains, making wishes as to remains known to loved ones, and authorizing or directing a trusted loved one to carry out such wishes.

## **Rights of Beneficiaries & Creditors under the Uniform Fraudulent Transfer Act**

*Perkins v. Brunger*

303 S.W.3d 688 (Tenn. App. 2009)

The *Perkins* Court held that remedies provided under the Uniform Fraudulent Transfer Act (UFTA) are limited to creditors of debtors. Therefore, a beneficiary of a decedent's estate is not entitled to any relief under UFTA because a beneficiary is not a creditor. Furthermore, the relief a creditor may obtain under UFTA is limited to avoidance of the transfer "to the extent necessary" to satisfy its claim. This ruling clarifies that a beneficiary may not rely on UFTA to bring assets back into an estate and that a beneficiary is not entitled to receive property brought back into an estate under UFTA to satisfy a creditor's claim.

## **Executor's Duty to Collect Assets**

*Ware v. McKeithan*

No. M2008-01332-COA-R9-CV; 2009 Tenn. App. LEXIS 302

In *Ware*, the Court of Appeals reversed the Probate Court's allowance of a beneficiary's intervention in the estate administrator's suit to recover estate assets misappropriated by a third party. The Court of Appeals held that so long as a beneficiary's interest is adequately represented by the administrator of a decedent's estate, intervention is not permissible. The Court of Appeal's further held that an administrator of an estate has the exclusive right and duty to pursue the recovery of misappropriated assets and the discretion to determine which claims are to be pursued and to what extent they should be pursued. It is important for the beneficiary of an estate to timely inquire as to the personal representative's intent to pursue (or not pursue) recovery of allegedly misappropriated funds. If the personal representative elects not to pursue recovery, over the objection of the beneficiary, the beneficiary has the option of seeking removal of the personal representative.

## Attorney's Fees

*In re Estate of Arthur*

302 S.W.3d 284 (Tenn. App. 2009)

In *Arthur*, the Court of Appeals affirmed the Probate Court's ruling and held that the Probate Court has authority to award an attorney's lien against an executor in his or her personal capacity. The executor, in his personal capacity, argued that the probate court did not have jurisdiction to hear a dispute over a personal debt of the executor of the Estate. However, relying on T.C.A. § 16-16-107, the Court of Appeals held that the Probate Court has jurisdiction to grant a lien for attorney's fees where the money or property that is the subject of the lien is within the control of the Probate Court.

If you have general questions or need additional information regarding the contents of GSRM's Estate Planning & Probate from the Bench, please contact a member of the firm's Estate Planning & Probate Section at 615.244.4994.

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