A PRACTICAL GUIDE TO NAVIGATING THE UNIQUE PROCEDURAL ISSUES OF TRUST AND ESTATE LITIGATION

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I. INTRODUCTION

A. In today's litigious world, a fiduciary must not only consider its duties in making investment and distribution decisions, but also the possibility that commencing or participating in a legal action may be a necessary component of the fiduciary's proper estate settlement or trust administration. Litigation involving wills, estates, and trusts ("Fiduciary Litigation") often necessitates the use of certain pleadings that other types of civil litigation do not typically require. To manage Fiduciary Litigation correctly requires not only an understanding of the fiduciary perspective, but a strong grasp of the unique procedural aspects and requirements. Although a trusts and estate practitioner may be the person best suited to grapple with complex substantive legal issues presented by Fiduciary Litigation, the myriad procedural requirements involved in obtaining a legally binding resolution may be less familiar—albeit equally as important—to him or her.

B. This outline will not focus on exploring the substantive merits of Fiduciary Litigation. Rather, it will provide an overview of the types of Fiduciary Litigation that a practitioner is likely to run across, including actions properly brought before both the District and Circuit Courts, and will address the various procedural requirements to consider.

II. GENERAL CONSIDERATIONS FOR FIDUCIARIES

A. Trustees and personal representatives are charged with collecting and preserving their estates, which may require the fiduciary to initiate legal proceedings to recover a debt or enforce a lien or other right. A trustee, and not the beneficiary, is the proper party to sue to recover trust property.\(^1\) Similarly, the administrator or personal representative, and not the heir, must sue for a debt due the decedent and the enforcement of a lien by which it is secured\(^2\) and is charged with protecting the estate against invalid claims for the benefit of creditors and devisees or heirs.\(^3\) Generally, a trustee is also under a duty to defend the trust itself and although the exact nature of this duty is not entirely clear, when the attack is on the existence of the trust, the trustee has a duty to defend it.\(^4\)

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\(^1\) See, e.g., Forester v. Werner, 191 S.W. 884, 885 (Ky. 1917).

\(^2\) Boyd v. Jones, 2 S.W. 552, 553 (Ky. 1887).

\(^3\) Whitlow's Adm'tr v. Saunders' Adm'tr, 36 S.W.2d 659, 661 (Ky. 1931).

\(^4\) Scott and Ascher on Trusts, §17.10 (5th ed. 2006).
However, the trustee may not be under a duty to defend actions that are in essence merely disputes among beneficiaries, even if the claim is styled as an attack on the trust terms. In this situation, the trustee's primary duty is to act impartially and in good faith as to all parties.\(^5\)

B. Although a fiduciary's duties of loyalty and impartiality are often the subject of litigation instituted by beneficiaries, these duties may also, at times, compel a fiduciary to commence an action in a situation where a non-fiduciary could otherwise choose not to litigate. In addition, certain rules pertaining to litigation, such as non-transferability of claims, do not apply to a successor trustee who can maintain the same actions or suits the original trustee could have maintained.\(^6\)

C. If a trustee improperly fails to bring an action against third parties who commit torts with respect to trust property or fail to pay debts held in the trust, the beneficiaries can compel the trustee by a suit in equity to do so and join the third party as a co-defendant. Primarily, however, the right of action against third parties is in the trustee; it is through the trustee that the beneficiaries ordinarily pursue the third party.\(^7\) Moreover, if the trustee does not commit a breach of trust in failing to bring an action against a third party, the beneficiaries cannot maintain a suit against the trustee or third party.\(^8\)

D. Personal representatives are considered trustees for collection of assets, payment of debts, and distribution of the balance to appropriate beneficiaries.\(^9\) As such, they are liable for the management of their trusts, and if a debt is lost by the negligence of the executor or administrator, he is personally liable for it, even though he was not guilty of bad faith, willful default, fraud, or gross negligence.\(^10\) If the estate contains outstanding debts when the fiduciary receives his trust, he has a duty to recover those assets, through a law suit if necessary. However, in a case where an administrator, from mistake of law, neglected to bring suit to recover an estate assets until he was barred by the statute of limitations, the court refused to make him personally responsible for the loss since he had not acted with bad faith or gross negligence.

E. Alternatively, the duty of prudence can compel a fiduciary to cease, abandon or settle litigation where a non-fiduciary can choose to press forward. While an individual can elect to continue to incur expenses in

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\(^5\) Scott and Ascher on Trusts, §17.10 (5th ed. 2006).

\(^6\) Scott and Ascher on Trusts, §28.1.3 (5th ed. 2006).

\(^7\) Scott and Ascher on Trusts, §28.1 (5th ed. 2006).

\(^8\) Scott and Ascher on Trusts, §28.2.1 (5th ed. 2006).


\(^10\) Frazier v. Cavanaugh's Adm'r, 4 Ky.L.Rptr. 711, 1883 WL 7105 *2 (Ky. Super. 1883).
pursuing his claim, a fiduciary's decisions in this regard must be reasonable and in accordance with his duties.

1. A trustee, incurring expenses on behalf of the trust is under a duty to act prudently, and implicit in the trustee’s duties is a duty to be cost-conscious.\textsuperscript{11} As a personal representative is also a trustee of his estate, these same duties apply to executors and administrators. The trustee cannot pay the attorney more than is reasonable under all of the circumstances, and a trustee who unreasonably engages in litigation is not entitled to reimbursement.\textsuperscript{12} When coupled with the fiduciary's duty to preserve assets of the estate or trust, at some point the fiduciary may be forced to put a stop to litigation for the sake of avoiding a potential future claim of waste or mismanagement. In asserting claims held by the trust, or defending claims against the trust, the duty of the trustee is to do what is reasonable under the circumstances. The trustee has a certain amount of discretion and will be liable only for abuse of that discretion by failing to do what is reasonable in the circumstances. For example, there may be a situation where it is proper for a trustee to pay a claim, even if the trustee believes that the claim is not well founded, if, under all the attendant circumstances, in view of the amount involved and surrounding doubts, it is reasonable to do so.\textsuperscript{13}

2. Accordingly, for example, if a trust’s liability for a minimal amount of inheritance tax in another state is debatable and it would cost more to litigate the issue than the amount in question, the trustee’s decision to pay the tax should not cause him to be personally liable for the amount even though the estate was not subject to the tax.\textsuperscript{14} Compromise and submitting to arbitration, in claims both against and in favor of the trust, may also be proper actions by the trustee under the same rationale.\textsuperscript{15}

3. A question may also arise as to whether a trustee has standing to appeal a judgment rendered in litigation among beneficiaries as to the extent of their interests. Ordinarily, if none of the beneficiaries choose to appeal and the trustee is merely a stakeholder, the trustee lacks standing. However, if the judgment affects the rights of unrepresented, unascertainable or incompetent beneficiaries, a deviation from the trust, or if the effect of the judgment is the total

\textsuperscript{11} Scott and Ascher on Trusts, §18.1.2.6 (5th ed. 2006).

\textsuperscript{12} Scott and Ascher on Trusts, §18.1.2.6 (5th ed. 2006).

\textsuperscript{13} Scott and Ascher on Trusts, §17.10 (5th ed. 2006).

\textsuperscript{14} Id.

\textsuperscript{15} Scott and Ascher on Trusts, §17.10 (5th ed. 2006).
or partial destruction of the trust, the trustee ordinarily has standing to appeal.\textsuperscript{16}

III. FIDUCIARY LITIGATION

A. Adversary v. Non-Adversary Proceedings

1. The Circuit Court is a court of general jurisdiction; it has original jurisdiction of all justiciable causes not exclusively vested in some other court.\textsuperscript{17} District Court has exclusive jurisdiction over matters involving probate, except matters contested in an adversary proceeding. Such adversary proceeding shall be filed in Circuit Court in accordance with the Kentucky Rules of Civil Procedure and shall not be considered an appeal.\textsuperscript{18} Matters not provided for by statute to be commenced in Circuit Court shall be deemed to be "nonadversarial" and therefore are within the jurisdiction of the District Court.\textsuperscript{19}

2. When considering the topic of Fiduciary Litigation, actions to contest the validity of a will or to seek damages from a trustee for breach of fiduciary duty are likely to be the first that come to mind. These and other adversary proceedings are heard in Circuit Court, but fiduciary litigation also encompasses a variety of proceedings that take place in District Court.

B. District Court

1. Actions in District Court involving a will or trust cover a wide range of administrative and fiduciary issues. While some of these proceedings are authorized by statute, like a petition to convert a trust to a unitrust or terminate a trust with assets under $50,000, many of them are grounded more generally on the District Court’s exclusive probate jurisdiction and the terms of the will or trust at issue. Such actions may include:

   a. Petition to remove a trustee and appoint a successor trustee when a trust is silent on the matter;

   b. Petition to divide a single trust fund into separate shares for each beneficiary to allow the trustee to engage in more individualized investment strategy;

\textsuperscript{16} Scott and Ascher on Trusts, §17.10 (5th ed. 2006).


c. Petition to convert an income beneficiary's interest in a trust to a unitrust;
d. Petition to reform a trust to correct a scrivener's error;
e. Petition to terminate trusts with less than $50,000 in assets pursuant to KRS 386.185;
f. Petition to permit a trustee to appoint trust assets to another trust pursuant to KRS 386.175;
g. Petition to determine persons entitled to property passing by intestate succession pursuant to KRS 391.035.

2. Although actions in District Court involving matters of probate are nonadversarial and generally subject to fewer procedural requirements than actions in Circuit Court commenced pursuant to CR 3, fiduciaries must nevertheless take care to ensure that all necessary parties are before the court and that all parties' interests are represented and protected. In particular, the potential interests of minor and unborn beneficiaries must be considered any time a matter is brought before the District Court.

C. Circuit Court

1. Action to contest will.

If "any person" is "aggrieved" by a District Court's decision to admit a will to record or to reject it, the person may bring "an original action" in Circuit Court to contest the action of the District Court.\(^{20}\) The "mere opposition" of a party to the probate of a will or codicil does not create the "adversary proceeding" or divest the District Court of jurisdiction; instead, KRS 394.240 provides for an original action in the Circuit Court after the District Court has rendered its decision.\(^{21}\)

2. Fraud on the dower.

If a person dies intestate, his surviving spouse has a right to one-half of the real estate and one-half of the personal property left by the decedent.\(^{22}\) When a husband or wife dies testate, the surviving spouse may release what is given to him or her by the will, if any, and instead receive his or her share under KRS 392.020 as if no will had been made. However, in such case he or

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she will only be entitled to one-third of the real estate owned by the deceased spouse, not one-half. If a decedent transfers property away from his or her estate prior to death in an attempt to defeat or reduce his surviving spouse's dower rights, an action for fraud on the dower may be warranted. Such transfers could take the form of the decedent naming children from a previous marriage as payable-on-death beneficiaries or co-owners of an account, or making outright gifts to persons other than the spouse prior to death.


The District Court has original jurisdiction over cases involving the removal of a personal representative, while in situations where mismanagement, fraud, deception or other causes which require proceedings adversary in nature the Circuit Court has jurisdiction. Similarly, if there is no dispute surrounding the existence of an executor's debts to the estate, the executor's removal for a conflict of interest is not adversarial and the District Court has jurisdiction, not the Circuit Court.

4. Proposed final settlement.

If a fiduciary chooses to file a proposed settlement with the District Court pursuant to KRS 395.617 and the District Court approves the proposed settlement, an "aggrieved party" has thirty days thereafter to institute an adversary proceeding in the Circuit Court pursuant to KRS 24A.120(2). This is not an appeal, but an original action.

5. Appeals v. original actions.

i. If a party is unhappy with a decision rendered by a District Court or Circuit Court, he or she can appeal the decision. If the decision was rendered by District Court, the party would appeal to the Circuit Court. However, it is important to note that there is a distinction between appealing from a District Court's decision and initiating a will contest pursuant to KRS 394.240. If a person is "aggrieved" by the action of the District Court in admitting (or rejecting) a will, he or she may "bring an original action in the Circuit Court

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24 Lee v. Porter, 598 S.W.2d 465, 467 (Ky. App. 1980).
to contest the action of the District Court."\(^{27}\) If however, there is a District Court decision not involving the admission or rejection of a will that a person wishes to appeal, he or she can appeal it to the Circuit Court. For example, if a person is unhappy with the decision rendered by the Circuit Court in a will contest action initiated pursuant to KRS 394.240, he or she can appeal to the Court of Appeals. If the final decision is not appealed, it shall be a bar to any other proceedings questioning the admission / rejection of the will.\(^{28}\)

ii. In the event a party wishes to appeal a decision from Circuit Court, he or she must follow the requirements of the Civil Rules. First, the Notice of Appeal must be filed within thirty days after the date of notation of service of the judgment or order.\(^{29}\) The Notice must specify the names of the appellants and appellees, as well as the judgment or order (or part) being appealed. It should also contain a certificate of service on all parties. Thereafter, the party appealing must be sure to adhere to the additional procedural requirements, including but not limited to, perfecting the appeal and certifying / designating the record on appeal. These additional pleadings and procedural requirements are beyond the scope of this discussion, but should be carefully considered by the practitioner.

6. Petition to settle the estate.

i. In some instances, even after a personal representative has been appointed by the District Court, it becomes necessary to file a separate action to settle the estate in Circuit Court. For example, if the decedent was a personal guarantor on one or more business loans when he died, or there are numerous tax liens and other liabilities attached to real estate clouding the title, an estate settlement action may be necessary in order to ascertain a fair and equitable distribution of the estate. Alternatively, if a creditor has been unable to receive payment from the decedent or the decedent's family, this statute enables the creditor to force action in the estate.

ii. The purpose of the estate settlement suit is to bring the entire estate of the decedent, and a statement of his debts, within the jurisdiction of the court when there is a genuine


\(^{29}\) Ky. R. Civ. Proc. 73.02 (LexisNexis 2013).
issue as to the proper distribution and settlement of the estate. It may also provide some comfort to a personal representative with respect to the finality of the final settlement, as the only option to challenge the finding of the court is to file an appeal with the Court of Appeals. Conversely, settlements made in probate court, even if approved, may be open to challenge later in the form of an equitable "surcharge" action. A line of cases\(^{30}\) suggests that a party aggrieved by the approval a settlement in District Court has the option of surcharging the settlement in Circuit Court after it has been confirmed. According to the cases, the basis for this action is "equity." A settlement that has been confirmed by the lower court is at least "prima facie correct," and anyone wishing to attach it has the burden of proof to show the settlement is in error.\(^{31}\) It has also been suggested that if exceptions to the settlement have been filed in the lower court, an original action cannot be maintained in the Circuit Court.\(^{32}\) However, in order to have this effect there must be formal, written exceptions filed and tried upon their merits; merely dismissing the exceptions does not preclude a surcharge action in Circuit Court.\(^{33}\) However, it appears the presumption of correctness only extends to the evidence on file to support the settlement;\(^{34}\) should even a single voucher go missing the prima facie status is lost.\(^{35}\)

iii. KRS 395.510 permits "a representative, legatee, distributee or creditor of a deceased person" to bring the action. However, only the personal representative is permitted to bring such an action within the first six months of his qualification. Thereafter, any of the designated persons can bring the action.\(^{36}\)

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\(^{30}\) Dees' Adm'r v. Dees' Ex'r, 61 S.W.2d 301 (Ky. 1933); Rose v. Ratliff's Adm'r, 36 S.W.2d 43 (Ky. 1931); Harper v. Lamb, 261 S.W.280 (Ky. 1924).


\(^{32}\) Merritt, Probate Practice and Procedure, 2d ed (West Publishing Co. 1984) citing Rose v. Ratliff's Adm'r, 36 S.W.2d 43 (Ky. 1931).

\(^{33}\) Merritt, supra, citing Caplinger v. Pritchard, 124 S.W. 352 (Ky. 1910).

\(^{34}\) Merritt, supra, citing Herndon v. McDowell, 89 S.W. 539 (Ky. 1905).

\(^{35}\) Id. citing Commonwealth v. Graves County Banking & Trust Co., 167 S.W. 411 (Ky. 1914).

iv. An action to settle an estate divests the District Court of jurisdiction over the probate case. A Notice of Action (discussed above) must be filed after the action has been initiated in Circuit Court, and the Circuit Court ultimately decides the issues and settles the estate. It is important to remember that all necessary parties must be before the Court. This includes a) the representatives of the decedent, b) all persons having a lien upon or an interest in the property left by the decedent, or any part of that property, and c) the creditors of the decedent, so far as known to the plaintiff. All of these parties must be joined as either plaintiffs or defendants.\textsuperscript{37}

v. The person initiating the action should take care to include all required parties, including the spouses of each beneficiary of the estate. The spouses must be included as a result of their dower interest in the property of the estate that may be distributed to their spouse as beneficiary. If the identity of the spouse is not known, he or she can be named as "Unknown Spouse of [John Doe]." If there are "Unknown Spouses" named in the Complaint, the clerk will appoint a Warning Order Attorney who will attempt to make contact with the unknown person and inform him or her of the lawsuit. The Warning Order Attorney will then file a report informing the court of the efforts taken to locate the unknown party.

vi. The Petition must state a) the amount of the debts, and b) the nature and value of the property (real and personal) of the decedent, as far as known to plaintiff. If it appears there is a general issue concerning the right of any creditor, beneficiary, or heir-at-law to receive payment or distribution, or if there is a genuine issue as to what constitutes a correct and lawful settlement of the estate, or a correct and lawful distribution of the assets, such issues may be decided by the court. If it appears that the personal property is insufficient to pay all debts, the court may order the real estate (or a portion thereof) be sold for the payment of the debts.\textsuperscript{38}

vii. After the Petition has been filed, the Petitioner may need to make a motion to the Circuit Court requesting an Order pursuant to KRS 395.520\textsuperscript{39} for creditors to appear before the Master Commissioner and prove their claims. The

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\textsuperscript{37} Id.


Order should name a day by which the creditors should appear and prove their claims, with notice given by publication pursuant to KRS Chapter 424.

viii. If the personal representative of an estate must institute an estate settlement suit, his or her attorney will be compensated out the funds of the estate as an expense of administration. However, an attorney will be denied his fee if it is shown that the settlement suit was clearly unnecessary and brought for only a self-serving purpose by the attorney. For attorney fees to be paid out of the estate, it must be shown that there was a good reason for bringing the estate settlement suit which benefits either the estate or the other beneficiaries.

ix. If a settlement suit is filed by someone other than the personal representative, attorney fees may still be recovered from the estate as long as the purpose of the suit could be accomplished only through litigation or where the benefits of the suit will be shared equally by the distributees of the estate.

7. Declaratory judgment.

i. There may also be more subtle situations where fiduciaries find themselves faced with a question regarding the proper construction of their governing instrument. For example, the final successive lifetime beneficiary of a longstanding trust dies without any descendants, and the trust specifically leaves all remaining assets at such person's death to his or her "issue" or "children," with no alternative disposition if no such remaindermen exist. In such a situation, the fiduciary may have no other option but to ask for judicial guidance in light of its duties to administer the trust or estate for the benefit of all potential beneficiaries. Kentucky's declaratory judgment statute, KRS 418.040,

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40 White v. White, 883 S.W.2d 502 (Ky. App. 1994). An interesting case in this area is Holburn v. Pfanmiller's Ad'm'r, where the court much maligns an administrator and creditor for bringing a fruitless settlement suit. In rendering its opinion, the Court stated ..."This brings us to the consideration of another feature of this suit; that is, the right of the administrator to maintain this action under the circumstances, and especially of the liability of decedent's real estate to the rather extraordinary bill of costs brought about by this suit. No one could have died with less personal estate than Lawrence Pfanmiller had, for he had none. The record shows that he had not even a rag, nor was it supposed that he had." Holburn v. Pfanmiller's Ad'm'r., 71 S.W. 940 (Ky.1903). Needless to say, the Court elected not to approve the attorney's fees in bringing the estate settlement suit.

41 Johnson v. Ducobu, 258 S.W.2d 509 (Ky. 1953).

42 Gernert v. Liberty Nat. Bank & Trust Co. of Louisville, 145 S.W.2d 522 (Ky. 1940).
provides: "In any action in a court of record of this Commonwealth having general jurisdiction wherein it is made to appear that an actual controversy exists, the plaintiff may ask for a declaration of rights, either alone or with other relief; and the court may make a binding declaration of rights, whether or not consequential relief is or could be asked." As the Circuit Court is the court of general jurisdiction, any action for declaratory judgment must be brought in Circuit Court. As a result, an executor or trustee may be required to bring an otherwise strictly probate matter before the Circuit Court in order to properly adjudicate parties' rights.

ii. In a typical civil suit the attorney will present to the court a singular view of the facts most advantageous to his client, construing every detail in the best light possible for his client and attacking any evidence offered to the contrary. In filing a Petition for Declaratory Judgment however, the fiduciary must be careful in stating its case so as to avoid any appearances of partiality to a particular beneficiary or class of beneficiaries. In this situation the attorney preparing the pleadings must keep in mind that there may be multiple ways of viewing the situation, and that a fiduciary cannot strongly advocate for one of these views without violating its duty of impartiality.

iii. Alternatively, a trustee may find itself in the position of having to assert its own claim(s) in response to a Petition for Declaratory Judgment, under its duty to defend the trust. For example, when beneficiaries petition the court for construction of a pour-over Will that diminishes the amount of assets to be delivered into the Trustee's hands. Often such actions involve different classes of beneficiaries of the same trust, and in arguing its case the trustee must balance its duty to preserve and protect trust assets with its duty to act impartially toward all beneficiaries.

IV. NECESSARY PARTIES

A. Whether the action is one in which wrongdoing has been alleged, as in the case of a breach of fiduciary duty or fraud on the dower action, or one in which the fiduciary requests the guidance of the court with respect to the construction of testamentary language, the litigant must ensure that all "necessary parties" are before the Court. This aspect of the litigation process can be uniquely difficult in the context of Fiduciary Litigation, and is crucial in obtaining a judgment that is valid and enforceable.

B. In civil actions involving contracts or torts, the parties involved are usually fairly easy to identify. For example, one of the parties to a contract breaches the agreement, or an employee causes a car accident that injures the other driver. Even in situations where the potential defendants may not be readily identifiable (e.g., a medical malpractice case where the injured party does not know the identity of all the persons involved in their treatment), they are for the most part competent adults whose identities can be determined through discovery. In the context of trust and estate litigation, however, the fiduciary cannot only look to the current beneficiaries as necessary parties. The executor or trustee must also be mindful of whether there are potential remainder beneficiaries, minor or unborn beneficiaries, or incompetent adult beneficiaries, who need to be included in the lawsuit. If the interests of these persons are not represented, then all "necessary parties" have not been brought before the Court and any settlement or final judgment will be ineffective as to them.

C. Guardian Ad Litem

If litigation involves a trust or estate with minor (under age eighteen) children or incompetent adults who are beneficiaries, or a trust in which the eventual remainder beneficiaries are as yet undetermined because the current beneficiary(ies) are still living, the fiduciary should move the Court (District or Circuit) for the appointment of a Guardian Ad Litem ("GAL"). This representative acts on behalf of those persons are considered legally incompetent to defend themselves or their interests, including potential remainder beneficiaries who may be born after the judgment but prior to the final distribution of the trust assets. GALs ensure that the final judgment will be valid and enforceable against all persons. Of course, if a minor child or disabled adult already has a court-appointed guardian residing in Kentucky, a separate GAL does not need to be appointed for that person and service can be made upon the existing guardian. It is important to note that a child's parent is not automatically that child's legal guardian for purposes of being authorized to act on the child's behalf in legal proceedings within the meaning of the statutes.

1. The Guardian Ad Litem is an attorney selected by the Court, and once he or she is appointed he or she may contact the plaintiff /petitioner's attorney (or the plaintiff/petitioner if he or she is not represented by counsel) to discuss the aspects of the case. He or she may also meet or speak with the person(s) whom they have been appointed to represent regarding their opinions depending on the circumstances.

2. If the GAL is being appointed in connection with an action in District Court, the Petitioner typically files a Motion to Appoint a GAL with an unsigned and unfiled copy of the proposed Petition as an Exhibit. Once the GAL is appointed by the Court, he or she will review the proposed Petition, make determinations about the proposed action, and make a report to the Court. Thereafter, the
Petitioner files a Petition with the Court and the judge considers the Guardian Ad Litem's report and either approves or disapproves the proposed action. The Guardian Ad Litem will then move the Court for payment of legal fees which are typically paid by the Petitioner.

3. If the GAL is being appointed to represent minor, incompetent, or unborn beneficiaries in an original Circuit Court action, the Motion to Appoint a GAL should be made after the Complaint has been served on the parties pursuant to the Civil Rules.

4. Pursuant to KRS 387.305 and CR 17.03, the Motion to Appoint the GAL should include an executed affidavit by the moving party, or his or her counsel, stating that such minor or incompetent person has no guardian residing in the state.

5. The plaintiff may not specifically request the Court appoint a certain attorney as GAL.

6. "No judgment shall be rendered against an unmarried infant or person of unsound mind until the party's guardian or committee or the guardian ad litem shall have made defense or filed a report stating that after careful examination of the case he is unable to make defense." 44

7. Pursuant to CR 17.03(5), the Court shall allow the GAL a reasonable fee for services, to be taxed as costs. 45

V. JURISDICTION OVER NECESSARY PARTIES

The court with jurisdiction over the subject matter of a fiduciary litigation is decided by KRS 23A.010 and 24A.120, as discussed above. In addition to ensuring proper subject matter jurisdiction, the fiduciary must also be sure that the court has jurisdiction over the necessary parties.

A. Decedents' Estates – Quasi In Rem

1. It has been observed that the principles regarding jurisdiction in probate proceedings, i.e., that the proceeding is in rem, though statutory provisions for notice to interested parties give it character of action inter partes, apply equally to an application for letters of administration. 46 Thus, the probate of a will and the appointment of a personal representative are considered binding as against the world, subject to later attack.


2. A judgment *quasi in rem* affects the interests of particular persons in designated property. Proceedings *in rem* and *quasi in rem* are subject to less exacting service and notice standards relating to interested parties and may be pronounced in an action in which the defendant has been notified by constructive process; whereas a personal judgment may be pronounced only be personal service upon the defendant. Generally, proceedings in District Court relating to a decedent's estate will be *in rem* or *quasi in rem*, and will only require giving notice to interested parties.

3. There are several statutes permitting the District Court to summon interested parties in the context of probate matters. KRS 394.170 permits a person intending to offer a will for probate to obtain from the clerk of the court process directed to the officer of another county, requiring him to summon any interest person to appear and show cause why the will should not be admitted to record. KRS 394.180 authorizes the District Court to cause all persons interested in the probate of a will offered to probate to be summoned to appear on a certain day. Similarly, KRS 394.190 states that any person interested in such probate may be summoned, or proceeding against by warning order, and if an infant or mentally disabled person, a guardian ad litem shall be appointed.

4. Many of the statutes governing administrative matters in decedents' estates contain specific notice procedures and identify the interested parties that should receive such notice. Such parties' interests in the estate may be bound by the result of the proceedings, but personal judgments against those parties cannot be obtained.

B. Trusts – Actions *Quasi In Rem*

1. KRS 386.675, permits interested parties to initiate judicial proceedings concerning "the internal affairs of trusts." These matters could include administration and distribution of trusts, a declaration of parties' rights, or the determination of other matters involving trustees and beneficiaries. The statute specifically contemplates actions to, appoint or remove trustees, review trustee's fees and settle accounts, to ascertain beneficiaries, instruct trustees, determine the existence or nonexistence of any immunity, power, privilege, duty, or right, and resolve questions of trust construction. Thus, this statute authorizes the initiation of

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48 Id. at 49 (citations omitted).


50 Id.
actions in both District Court (e.g., appoint and remove trustees, review and approve trustees’ accounts) and Circuit Court (declaration of rights or questions of construction via Petition for Declaratory Judgment). As a result, it is frequently the basis for initiating an action regarding a trust, whether or not any wrongdoing is being alleged.

2. KRS 386.665(2) provides that "[t]o the extent of their interests in the trust, all beneficiaries of a trust properly registered in this state are subject to the jurisdiction of the court of registration for purposes of proceedings under KRS 386.675, provided notice is given pursuant to subsection (3) of this section." Thus, the rights of particular parties in a particular thing are being determined; actions based on this statute are actions quasi in rem and even non-resident beneficiaries are subject to the jurisdiction of the court of registration for purposes of proceedings pursuant to KRS 386.675 to the extent of their interests in the trust.

3. KRS 386.665(3) provides that notice of the time and place for the hearing shall be given by a) mailing a copy in accordance with the Civil Rules, b) by delivering a copy to the person personally in accordance with the Civil Rules, or c) if the address / identity is unknown, by publishing once a week for (3) consecutive weeks, a copy of the notice in a newspaper of general circulation, with the last publication at least (10) days before the hearing.

4. KRS 386.680 provides: "Venue for proceedings under KRS 386.675 involving registered trusts is in the place of registration. Venue for proceedings under KRS 386.675 involving trusts not registered in this state is in any place where the trust properly could have been registered, and otherwise by the venue statutes of Kentucky." Thus, the proper county in which to initiate an action pursuant to KRS 386.675 is the county in which the trust is registered, or if it is not registered in Kentucky, in the county where it could have been registered. Testamentary trustees have a duty to register the trust under KRS 386.655 which provides that "[t]he trustee of a trust having its principal place of administration in this state shall register the trust in the court of this state at the principal place of administration." For purposes of this statute, unless the trust instrument provides otherwise, the principal place

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52 Id. (emphasis added).


of administration is the trustee's "usual place of business where the records pertaining to the trust are kept, or at the trustee's residence if he has no such place of business." 56 If there are co-trustees, the principal place of administration is the usual place of the corporate co-trustee, or if not, the usual place of business or residence of the individual trustee who is a professional fiduciary, or if none, the usual place of business or residence of any of the co-trustees as agreed upon by them. However, the duty to register a trust under this section does not apply to inter vivos trusts, whether revocable or irrevocable, unless the settlor of the trust so directs. 57

5. By registering the trust with the District Court, and providing notice in accordance with KRS 386.665(3), the trustee gains personal jurisdiction over the beneficiaries to the extent of their interest in the trust. Although trustees of inter vivos trusts are exempt from the statutory duty to register their trust, in the event they wish to initiate an action pursuant to this statute they may wish to register the trust for jurisdictional purposes.

C. Personal Jurisdiction over Non-Resident- Kentucky's "Long Arm" Statute

1. Any person that resides in Kentucky is subject to personal jurisdiction in courts of the Commonwealth. In some cases, however, a fiduciary may find it necessary to bring an action against an out-of-state defendant in which the fiduciary is seeking personal judgment against the party. In such a situation the fiduciary is bringing an in personam action against the party, not an action quasi in rem.

2. KRS 454.210 is Kentucky's "long-arm" statute and prescribes the necessary elements that must exist before a party can hale a nonresident into a Kentucky court and seek a personal judgment. Conversely, an out of state fiduciary may find itself subject to the jurisdictional reach of the long-arm statute. If personal jurisdiction is being asserted pursuant to this statute, there are particular service requirements to be followed as discussed in Section V(6)below.

VI. SERVICE OF PROCESS

In an adversary proceeding brought in Circuit Court, the fiduciary must be sure that all necessary parties to the action are brought before the Court so that all parties' rights can be adjudicated.

56 Id.
57 Id.
A. A civil action is commenced by the filing of a complaint with the court and the issuance of a summons or warning order thereon in good faith.\footnote{58}{Ky. R. Civ. Proc. 3 (LexisNexis 2013).}

B. Resident Individuals

CR 4.01 contains the requirements for serving the complaint and summons, which may be personally served or may be served by registered or certified mail return receipt requested. If served by mail, the clerk thereafter files the return receipt(s) with the record, and shall be proof of the time, place and manner of service. If served by an authorized individual, his or her endorsed return shall be proof of the time and manner of service.

C. Minors and Incompetent Adults

CR 4.04(3) states that service shall be made on unmarried infants and persons of unsound mind by serving his or her resident guardian or committee, or if none, by serving his father or mother located in Kentucky, or if none, by serving the person in Kentucky having control of the person. Thereafter, the plaintiff should move the Court for the appointment of a Guardian Ad Litem if no court-appointed guardian exists. In many cases, a single Guardian Ad Litem may be appointed to represent multiple persons if their interests align.

D. Out of State Individual

CR 4.4(8) states that service may be made upon an individual out of this state, other than an unmarried infant, a person of unsound mind or a prisoner, either by: 1) certified mail in the manner prescribed in Rule 4.01(1)(a), or by 2) personal delivery of a copy of the summons and of the complaint (or other initiating document) by a person over 18 years of age.

E. Constructive Service

CR 4.05 describes the specific situations in which a party may be constructively served by warning order. For example, an individual defendant whose name or place of residence is unknown to the plaintiff.\footnote{59}{Ky. R. Civ. Proc. 4.05 (LexisNexis 2013).} Thereafter, a warning order attorney is appointed as attorney for the unknown defendant, who shall attempt to inform the defendant concerning the action and thereafter inform the court of the result of his efforts. If unable to inform the defendant, he must make a defense by answer if possible.\footnote{60}{Ky. R. Civ. Proc. 4.07 (LexisNexis 2013).} A defendant constructively summonsed shall be
deemed to have been summoned on the thirtieth day after the entry of a warning order and the action may proceed accordingly.61

F. Service Pursuant to Long-Arm Statute

When personal jurisdiction is authorized over non-residents by KRS 454.210, service of process may be made on such person, or any agent of such person, in any county in this Commonwealth, where he may be found, or on the Secretary of State who, for this purpose, shall be deemed to be the statutory agent of such person.62 The procedure for serving a non-resident under the statute is as follows:

1. The clerk of the court in which the action is brought shall issue a summons against the defendant named in the complaint. The clerk shall execute the summons by sending by certified mail two true copies to the Secretary of State and shall also mail with the summons two attested copies of plaintiff's complaint.

2. The Secretary of State shall, within seven days of receipt thereof in his office, mail a copy of the summons and complaint to the defendant at the address given in the complaint. The letter shall be posted by certified mail, return receipt requested, and shall bear the return address of the Secretary of State.

3. The clerk shall make the usual return to the court, and in addition the Secretary of State shall make a return to the court showing that the acts contemplated by this statute have been performed, and shall attach to his return the registry receipt, if any. Summons shall be deemed to be served on the return of the Secretary of State and the action shall proceed as provided in the Rules of Civil Procedure.63

VII. ATTORNEYS' FEES

The issue of attorneys' fees in the fiduciary litigation context will invariably come up and it will be important to justify both how much was spent and who paid the fees.

A. Fiduciaries are generally authorized to retain counsel to assist them in performing their obligations with respect to their trust or estate, and these attorneys may be paid reasonable compensation for services required by the fiduciary.64 In situations where a personal representative is pulled into

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63 Id. at §454.210(3)(b).
64 See, e.g., Curtis v. Citizens Bank & Trust Co., 384 S.W.2d 328, 329 (Ky. 1964).
needless litigation by virtue of its duty to see that the estate is admin-
istered properly, courts are generally willing to allow attorney fees
incurred in connection with the litigation. For example, in upholding the
attorney fees paid by an administrator in litigation that was both "needless
and useless," the court in Skinner v. Morrow65 recognized that the
administrator had the duty to see the estate was properly administered
and distributed, and that it "could not simply stand back and let the heirs
counteract the litigation to suit themselves."66 Furthermore, there is authority
for the proposition that one who engages an estate in unnecessary
litigation should be required to pay the attorney fees and costs incurred
by the personal representative in connection with the action – or at least
an apportionment of said fees should substantial fees be attributable to
unwarranted claims made by a party.67

B. If a trustee employs an attorney for his own benefit, and not for that of the
trust, the trustee is personally liable for those costs. In addition, when the
results of the litigation are such that the trustee prevails in part but is also
found to have breached a fiduciary duty or been otherwise at fault, the
court may allocate to the trust estate only those fees attributable to the
successful aspects of the Trustee's defense.68 Trustees are ordinarily
entitled to indemnity for all reasonable expenses incurred in bringing,
defending, or settling any lawsuit, regardless of outcome, when the
propriety of the trustee's conduct is not at issue. When the trustee's
conduct is at issue, indemnification seems to turn on the outcome of the
proceeding.69

C. A trustee is empowered by Kentucky law to defend actions for the
protection of the trust assets and of the trustee in the performance of its
duties. KRS 386.810(y) (emphasis added). Trustees are also authorized
to retain counsel to assist them in performing their obligations with
respect to their trust, and these attorneys may be paid reasonable
compensation for services required by the fiduciary.70 When a trustee
successfully defends itself against beneficiaries' claims of mismanage-
ment, it is entitled to reimbursement of its attorney fees from the trust

65 318 S.W.2d 419 (Ky. 1958).

66 Id. at 425.

67 Id. at 425-26. See also Fleming v. Wilson, 6 Bush 610, 1870 WL 4993 (Ky. 1869) (when a
trustee is subjected to unnecessary litigation by the trust beneficiaries, the costs of the litigation
should be paid from the trust fund).

68 Scott and Ascher on Trusts, §18.1.2.4 (5th ed 2006).

69 Scott and Ascher on Trusts, §22.1 (5th ed 2006) (citing Restatement (Second) of Trusts §246,
cmt. a & illus. 2 (1959); Restatement (Third) of Trusts §88 cmt. d (Tentative Draft No. 4, 2005).

70 See, e.g., Curtis v. Citizens Bank & Trust Co., 384 S.W.2d 328, 329 (Ky. 1964); see also, Ky.
funds.\textsuperscript{71} In holding that trustees are entitled to their attorney fees at the conclusion of the litigation, the court in \textit{Salmon} specifically acknowledged that "a litigious beneficiary will bear a significant portion of the litigation costs, because if the trustee prevails, litigation expenses will be paid out of the trust property."\textsuperscript{72}

D. Similarly, the court in \textit{Sierra v. Williamson},\textsuperscript{73} recently observed that the successful defense of a suit for breach of fiduciary duty has been considered part of the administration of a trust by various courts, and that the proper procedure is for the defendants to be reimbursed from the trust for their reasonable attorney fees at the conclusion of the case.\textsuperscript{74} The court in \textit{Sierra} considered the hardship imposed by requiring a trustee to wait until the conclusion of the litigation to recover its attorney fees, but noted that "because all the parties have agreed that no distributions from the Trust shall be made to beneficiaries during the pendency of this action, there is no concern that sufficient funds will not be available should the Court decide to award attorney's fees from the Trust at a later time."\textsuperscript{75} The court in \textit{Sierra} contemplated the trustee's concern that there would be insufficient funds at a later date, but was satisfied that the parties' agreement not to make any distributions while the litigation was ongoing would alleviate that concern. It is not clear what the outcome would be if such an agreement had not been reached by the parties to the litigation.

E. If, at the conclusion of the litigation the trust's remaining assets are insufficient to pay the defendant trustee's attorney's fees, the fees may be recovered from the beneficiaries personally.\textsuperscript{76} As the \textit{Restatement} makes clear, defendants can recover their fees from the beneficiaries if trust assets have been conveyed to the beneficiaries without any deduction for the fees incurred to defend against the breach of fiduciary duty claim: "If the trustee is entitled to indemnity out of the trust estate for expenses incurred in the administration of the trust and conveys the trust estate to the beneficiary without deducting the amount to which he is entitled as indemnity, he is entitled to indemnity from the beneficiary personally to the extent of the property so conveyed."\textsuperscript{77}


\textsuperscript{72} \textit{Id.} at *13-14 (citations omitted).

\textsuperscript{73} 784 F.Supp.2d 774 (W.D. Ky. 2011).

\textsuperscript{74} \textit{Id.} at 777.

\textsuperscript{75} \textit{Id.} at 778.

\textsuperscript{76} \textit{Restatement} (Second) of Trusts, § 249(2) (1959).

\textsuperscript{77} \textit{Id.}
VIII. RESOLUTION

Although obtaining a final judgment from the Court is always an option, in some instances the interests of the client and the other parties are better served by settling the matter out of court. Whether accomplished by a family settlement agreement or a form of alternative dispute resolution, these methods of settling Fiduciary Litigation can greatly reduce the expense to the estate or trust. Just as identifying the necessary parties is a crucial component to Fiduciary Litigation, when seeking to resolve the matter it is imperative that all necessary parties participate.

A. Mediation

If it is not possible for the parties or their counsel to negotiate among themselves regarding the terms of a settlement agreement, mediation may provide the solution. Mediation is defined as "a nonadversarial process in which a neutral third party encourages and helps disputing parties reach a mutually acceptable agreement. Recommendations by mediators are not binding on the parties unless the parties enter into a settling agreement incorporating the recommendations." 78

B. Arbitration

Unlike mediation, in arbitration the parties are typically bound by the decision made by the arbitrator. Unlike court opinions, arbitration rulings tend to be non-public and it may be easier to make them confidential. In addition, the duration of the arbitration is likely to be greatly reduced as compared to seeing an action through to final judgment in a court. Once an award has been made in arbitration, it is enforceable in the United States courts in the same manner as a court-entered final judgment. Although a trial by jury is not available in arbitration, the potential for reduced cost and time spent litigating may make it an attractive option.

C. Settlement Agreement

If the parties are capable of resolving the conflict among themselves without the interjection of a third-party decision-maker, negotiating a settlement agreement may be the most cost-effective form of resolution. Including all necessary parties in the process from its inception will help ensure the process moves along as efficiently as possible. If there are minor or incompetent adults involved, it is advisable to seek judicial approval of the settlement as well. Settlements of family disputes over wills and trusts are generally looked upon favorably by courts, as it prevents drawn-out litigation that depletes assets and damages family relationships. However, the court must make certain findings of reasonableness, fairness, and consideration, in addition to noting the deviation from the instrument in question that is the subject of the settlement/agreement.

1. Family compromises of estate/trust disputes.
   
a. Public policy.
   
i. Generally.

   The law favors the distribution of a decedent's property by agreement among the possible heirs,\(^{79}\) and it is the policy of the law to look with favor on the settlement of such family matters.\(^{80}\)

   ii. Terms of agreement.

   It is not necessary, to sustain the compromise of a doubtful right, that the parties shall have settled the controversy as the law would have done. It is immaterial upon which side the right ultimately proves to be, and the compromise may be sustained, although it afterwards develops that the right is on the other side.\(^{81}\)

b. Existence of *bona fide* controversy.

   i. Generally.

   There must exist some good faith controversy before a compromise may be entered into that modifies the dispositions/language of a will or trust. For example, a question of a child/potential heir's legitimacy.\(^{82}\) A threat to contest a will must be made in good faith in order that the surrender of the right may constitute consideration for a family settlement. Frivolous claims leading to forbearance of contest is not good consideration, or if the party threatening to contest the will knew his threat was groundless.\(^{83}\) Although compromise settlements, especially of family disputes, are favorites of the

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\(^{79}\) Ranney v. Zimmerman, 284 S.W.2d 835, 837 (Ky. 1955) (*citing* Justice v. Justice, 237 S.W.2d 866 (Ky. 1951)).

\(^{80}\) See Brakefield v. Baldwin, 60 S.W.2d 376 (Ky. 1933).

\(^{81}\) Berry v. Berry, 209 S.W. 855 (Ky. 1919).

\(^{82}\) See *e.g.*, Justice v. Justice, 237 S.W.2d 866 (Ky. 1951).

\(^{83}\) See *generally* Creutz v. Heil, 12 S.W. 926 (Ky. 1890); Sellars v. Jones, 175 S.W. 1002 (Ky. 1915); Murphy v. Henry, 225 S.W.2d 662 (Ky. 1950).
law, that does not dispense with the necessity for some consideration to render them valid.\textsuperscript{84}

ii. Agreement not to probate/contest will.

In the absence of fraud, an agreement by all the heirs that a will be destroyed without probate and the estate be divided equally among them is supported by consideration and is valid.\textsuperscript{85} Agreement of parties in a will contest to disregard the will, in whole or in part, and make a different distribution than that provided by the terms of the will has been held valid.\textsuperscript{86}

iii. Modification or termination of trust.

When there is litigation by family of the settlor to have trust set aside or declared invalid (for incapacity, undue influence, violation of RAP, etc.) the parties can get together and form a plan for alteration or termination of the trust. The parties then apply to the court for the approval of the compromise and distribution of the trust accordingly.\textsuperscript{87} Where the heirs of the testator are beneficiaries of the trust, all of the heirs, being competent to contract, may eliminate the trust by an agreement made to settle a controversy concerning the validity of the will.\textsuperscript{88} According to Bogert, the courts do not distinguish sharply between termination by action of the beneficiaries themselves and termination of the trust by the court

\textsuperscript{84} Hardin's Adm'r s. v. Hardin, 256 S.W. 417, 418 (Ky. 1923).

\textsuperscript{85} Ranney v. Zimmerman, 284 S.W.2d 835, 837 (Ky. 1955) \textit{citing} Brakefield v. Baldwin, 60 S.W.2d 376 (Ky. 1933).

\textsuperscript{86} \textit{Id.} \textit{citing} Henry v. Spurlin, 125 S.W.2d 992 (Ky. 1939).

\textsuperscript{87} George Gleason Bogert and George Taylor Bogert, \textit{The Law of Trusts and Trustees} §1009.

\textsuperscript{88} Ranney v. Zimmerman, 284 S.W.2d 835 (Ky. 1955) (Testatrix owned stock in a corporation, her son was president of the corporation and together their voting of their stock controlled the corporation, she created a trust in the will out of her stock and stated that son was to receive perpetual voting power. Son bought enough stock to control the corporation without voting her stock, so the son and two sisters agreed not to probate the will, divided the stock equally, and when son died the sisters sued his legatees and corporation to establish a trust in the stock under the will. Held: agreement to suppress the will and divide the stock was valid, and any trust was terminated by the agreement, or by the death of the son.)
on application of the beneficiaries, but it seems that the latter approach is preferable.\footnote{Bogert, §1007. (citing to Brown v. Owsley, 248 S.W. 889 (Ky. 1923)).}

iv. Compromise of doubtful claim.

If there is a doubtful claim or right asserted by a party, it is appropriate for the matter to be resolved by compromise.\footnote{See Berry v. Berry, 209 S.W. 855, 857 (Ky. 1919).} If there is a question between parties, about which reasonable men might differ as to the outcome, the parties themselves may adjust it by way of compromise, and the agreement will be upheld by the courts.\footnote{Id.} Other jurisdictions have also specifically held that agreements among beneficiaries are also appropriate where there is real doubt as to the meaning of a will, for example, when it is unclear who is entitled to the corpus of a trust after the death of the life tenant.\footnote{See Montclair Trust Co. v. Walkley, 32 A.2d 176 (N.J.Ch. 1943) (holding that where one possible construction of will would deny to five minor children any interest in testamentary trust, and other possible construction would entitle them to little more than that which they would receive under proposed settlement, the settlement was approved based on reasonableness of the guardian ad litem’s agreement with the adult children). See also Case v. Marshall, 152 A. 261 (Md. 1930) (where the members of the testator’s family are in doubt as to the construction of the will provisions concerning the right to income from a trust, they may resolve the doubt by written agreement providing for distribution of income).}

c. Court ratification.

i. Generally.

Ratification is necessary to ensure that the settlement terms are reasonable and that all classes of beneficiaries have received adequate representation.\footnote{See generally George Gleason Bogert and George Taylor Bogert, The Law of Trusts and Trustees §1009. See also Bennett’s Guardian v. Cary’s Ex’r & Trustee, 276 S.W. 818 (Ky. 1925).} Family agreements looking to settle the rights in property of a deceased family member will be set aside where fraud, undue influence, or overreaching has been practiced, especially when there is a confidential relationship between the parties in respect to property rights.\footnote{Hall’s Adm’r v. Hall, 149 S.W.2d 24 (Ky. 1941).}
ii. Jurisdiction.

a) *Inter vivos* trusts.

If there is pending litigation in the Circuit Court involving an *inter vivos* trust (as in a petition for declaratory judgment) and a settlement agreement is reached between family members, it should be ratified by the circuit court. If there is no pending litigation, the trust would have to be registered with the probate court and the settlement/accounting presented/filed with that court for approval. (or if the parties wanted to agree on termination, ask the court to approve).⁹⁵

b) Testamentary trusts.

Where an express trust is created by will, or deed probated or recorded in the county where the parties live, or where the evidence of the trust is required to be recorded, the tribunal for settling such trusts is with the county court where the evidence of the trust or the writing creating it is recorded.⁹⁶

c) Decedents' estates.

In Kentucky, the probate court through which the estate of the testator is to be administered is deemed to have jurisdiction to approve and order performance of a family agreement to disregard a will and to make a different distribution of the estate from that provided by the will.⁹⁷ Once an action has been instituted for the settlement of a decedent's estate, the approval of a compromise must be secured from the circuit court in which the action is pending.

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⁹⁵ See *Cunningham v. Fraize*, 2 S.W. 551, 552 (Ky. 1887).

⁹⁶ *Id.* (The Court held that the trustee of a testamentary trust may apply to the circuit court of the county where the trust is recorded for its proper construction, or the beneficiary may sue in that county to enforce the trust, or require a settlement, but when the trustee only wants to settle his accounts, he should go to the county court where the evidence of the trust is recorded and make his settlement.)

⁹⁷ *Strother v. Day*, 279 S.W.2d 785 (Ky. 1955).
The personal representative no longer has authority to enter into a compromise.\(^98\)

2. Practical application/settlement agreement procedure.

   a. Necessary parties.

      Beneficiaries. The parties to a compromise or settlement agreement seeking termination by court approval must show that they constitute the entire class of beneficiaries and are competent to execute the agreement.\(^99\) Any minor beneficiaries must be represented by a guardian ad litem or virtual representation, and the court must be satisfied that their interests are being adequately protected.

   b. Findings to be made by Court for approval.

      Generally. Provisions in the proposed settlement that deviate from the documents and court orders governing the trusts should be found, and the court should determine that the controversy settled by the agreement is sufficiently bona fide so as to justify any deviation from the settlor's direction and that such deviation was reasonable under the circumstances. The court should determine that the compromise is in the overall best interests of all the beneficiaries or would-be beneficiaries, including minor and unborn beneficiaries. The court should also find that all adult beneficiaries consent.

      The court should exhibit that the interests of the minor and unborn beneficiaries are sufficiently presented and protected in the ratification proceeding through a guardian ad litem or virtual representation. There is an exception to the availability of virtual representation, however, if the interests of the members of the class of beneficiaries who are made parties and the interests of those who are not parties are adverse.\(^100\)

3. Tax considerations.

   Generally. Any time heirs or beneficiaries are contemplating a family settlement agreement, careful analysis should be conducted with respect to the potential tax consequences of such an

\(^98\) See Trevathan's Ex'r v. Dees' Ex'rs, 298 S.W. 975 (Ky. 1927); Hudson's Adm'x v. Collins, 38 S.W.2d 975 (Ky. 1931).

\(^99\) Bogert §1009, supra.

\(^100\) See 80 Am.Jur.2d Wills §1285.
agreement. Although the settlement itself should provide adequate consideration to support any transfer or relinquishment by a beneficiary such as to eliminate the possibility of a gift tax being assessed, other tax liabilities may result. For example, if a trust was created by the beneficiaries’ grandfather and is not completely exempt from Generation Skipping Transfer (GST) taxes, an agreed-upon modification or termination of the trust could have a significant adverse tax impact on the trust or the beneficiaries.