

STANDARD FOR REMOVAL OF PERSONAL REPRESENTATIVES

By Curtis E. Shirley

The trial court has discretion to remove a personal representative if he or she is “unsuitable or incapable of discharging the representative’s duties, has mismanaged the estate, [or] failed to perform any duty imposed by law ...” See *Indiana Code Section 29-1-10-6; Inlow v. Henderson Daily*, 787 N.E.2d 385 (Ind.App. 2003).

The personal representative is regarded as a trustee appointed by law for the benefit and protection of creditors and distributees. *Fall v. Miller*, 462 N.E.2d 1059, 1061 (Ind.App. 1984). The fiduciary character of the relationship extends to all legatees. *Fall*, at 1063. The Probate Code specifically charges the personal representative with the responsibility of collecting and preserving all assets of the estate. *Indiana Code Section 29-1-13-1; Fall*, 462 N.E.2d at 1063. The language of Indiana Code Section 29-1-13-1 is mandatory: the personal representative "shall" take possession of all of the decedent’s property.

The personal representative has a duty to file a complaint against those that owe the decedent money or those that harmed the decedent prior to her death. *I. C. §§ 29-1-13-1; 29-1-13-10; 29-1-16-1; 29-1-1-3* (personal property includes “choses in action”, defined as a right to bring an action to recover a debt, money or thing); *Inlow v. Henderson Daily*, 787 N.E.2d 385, 391 (Ind.App. 2003) (“In short, Indiana Code section 29-1-13-1 gives a personal representative the right to the decedent’s contract and tort claims, along with the decedent’s other property interests”); *Fall*, 462 N.E.2d at 1061; *Diaz v. Duncan*, 406 N.E.2d 991, 1002 (Ind.App. 1980); *Ind. Dept. of Revenue v. Cohen*, 436 N.E.2d 832, 836 (Ind.App. 1982); *Oberting v. Jutte*, 150 N.E. 796 (Ind.App. 1926).

“The personal representative is regarded as a trustee appointed by law for the benefit and protection of creditors and distributees. *Fall v. Miller* (1984), *Ind.App.*, 462 N.E.2d 1059, 1061. The fiduciary character of the relationship extends to all legatees. *Id.* at 1063. The personal representative bears a heavy burden in this regard for it is his duty to guard against error in the distribution by exercising the greatest possible care to see that all available evidence is fully and truthfully presented to the court in a hearing on a petition for distribution of the estate. *Diaz v. Duncan* (1980), *Ind.App.*, 406 N.E.2d 991, 1002. The personal representative owes a duty to all interested parties to administer an estate impartially. *Ind. Dept. of State Revenue v. Estate of Cohen* (1982), *Ind.App.*, 436 N.E.2d 832, 836.

“The Indiana Probate Code specifically charges the personal representative with the responsibility of collecting and preserving all assets of the estate. *Fall*, 462 N.E.2d at 1063. The language of *I.C. 29-1-13-1* is mandatory: the personal representative "shall" take possession of all of the decedent's property. To perform this duty, the personal representative is given the power to maintain suit for the recovery of possession of any property of the estate. *I.C. 29-1-13-10*. Indeed, *I.C. 29-1-13-10* specifically authorizes a proceeding where there is a dispute as to ownership between the estate and another person. It is the personal representative's duty to bring an action for conversion. *Oberting v. Jutte* (1926), 84 *Ind.App.* 208, 210, 150 N.E. 796. A personal representative who fails to use due

diligence in collecting a claim due the estate becomes personally liable for any loss caused thereby. Cohen, 436 N.E.2d at 836. See also, I.C. 29-1-16-1(c).”

Estate of Banko, 602 N.E.2d 1024, 1028-29 (Ind.App. 1992) reversed on other grounds, 622 N.E.2d 476 (Ind. 1994).

If the personal representative does not file a complaint that could increase the value of the estate, then any interested person can object to the final accounting. I.C. §§ 29-1-11-10; 29-1-14-11; 29-1-16-1. Williamson v. Williamson, 714 N.E.2d 1270 (Ind.App. 1999); Inlow v. Henderson Daily, 787 N.E.2d 385, 393 (Ind.App. 2003) (“the heir may seek the removal of the personal representative altogether, petition for the collection of indebtedness and the appointment of a special administrator if necessary, or sue the personal representative for loss to the estate”); Estate of Burmeister v. Burmeister, 621 N.E.2d 647 (Ind.App. 1993) (executor surcharged for not selling stock that rapidly declined in value).

The question of suitability includes the removal of a personal representative who has a conflict of interest. See Matter of Swank’s Estate, 375 N.E.2d 238 (Ind.App. 1978); Hauck v. Second Nat. Bank, 286 N.E.2d 852 (Ind.App. 1972).

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