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STATE OF ALABAMA  
OFFICE OF THE ATTORNEY GENERAL

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TROY KING  
ATTORNEY GENERAL

500 DEXTER AVENUE  
MONTGOMERY, AL 36130  
(334) 242-7300  
WWW.AGO.STATE.AL.US

Honorable Luke Cooley  
Houston County Judge of Probate  
Post Office Drawer 6406  
Dothan, Alabama 36302

Probate Courts – Administrators and  
Executors – Personal Representative –  
Relatives – Fiduciaries

A personal representative has a duty to use reasonable diligence to ascertain potential heirs. An administrator, as a personal representative, may employ an heir-finding service to fulfill this duty under section 43-2-843(17) of the Code of Alabama.

The cost of an heir-finding service must be paid directly from the estate and not from the distributable shares under section 43-2-371 of the Code of Alabama.

Dear Judge Cooley:

This opinion of the Attorney General is issued in response to your request.

QUESTIONS

1. What fiduciary duty does an administrator or personal representative have in locating heirs?
2. Is section 43-2-843(17) of the Code of Alabama applicable to an administrator?
3. In light of the technology now available, is it prudent for an administrator to use an heir-finding service?

4. If so, is the cost of the service paid from the gross estate account or monies set aside as these heirs devise?

#### FACTS AND ANALYSIS

Your request states that there is an administration, and there are adult distributees known to the administrator, but their whereabouts either in or out of state are not known. You further state that the estate is fluid so funds are available to hire an heir-finding service.

Either the administrator, in the case of an intestate estate, or the executor, in the case of a testate estate, is the personal representative of the estate. ALA. CODE § 43-8-1(24) (1991). The following duty is found among the other duties of the personal representative in filing a settlement of the estate with the probate judge:

He must, at the same time, file a statement, on oath, of the names of the heirs and legatees of such estate, specifying particularly which are under the age of 19 years; and, if any of them are persons of unsound mind, it must be stated; but if the names, ages or condition of such heirs or legatees are unknown and they reside out of the state, they may be made parties as unknown heirs or legatees.

ALA. CODE § 43-2-502 (1991).

The statute does not specifically require the personal representative to seek out unknown heirs. The Alabama Supreme Court has held that an administrator commits a fraud on the probate court under the statute when the administrator knowingly conceals the name of an heir or distributee. *Stone v. Gulf American Fire & Cas. Co.*, 554 So. 2d 346 (Ala. 1989); *Fidelity & Deposit Co. of Maryland v. Hendrix*, 215 Ala. 555, 112 So. 117 (1927). Thus, although the Alabama appellate courts have addressed the representative's obligation as to known heirs, they have not addressed the extent of the obligation to unknown heirs. The courts of several of our sister states, however, have done so.

The Georgia Supreme Court stated the following in facing a similar statutory dilemma:

After considering the foregoing methods and goals of the probate proceeding, we conclude that the legislature undoubtedly meant that before a propounder might correctly state that heirs were 'unknown,' *he must have exercised at least some reasonable diligence in ascertaining the heirs*, and may not simply rely upon his personal knowledge without reasonable inquiry. . . .

Our decision that some 'reasonable diligence' must be exercised to ascertain the heirs-at-law is consistent with the approach of certain of our sister states. E.g., *Vogel v. Katz*, 64 Ill.App.2d 126, 212 N.E.2d 295 (1965); *Daft v. John & Elizabeth Whiteley Foundation*, 363 Mich. 6, 108 N.W.2d 893 (1961). This is also the requirement of the Uniform Probate Code (not adopted in Georgia) which in § 1-401(a)(3) requires 'reasonable diligence' to learn identities and addresses of those entitled to notice.

*Oakley v. Anderson*, 221 S.E. 2d 31, 33-34 (Ga. 1975) (emphasis added).

The Mississippi Supreme Court has likewise concluded that "an administratrix is under a duty to use reasonable diligence to ascertain potential heirs." *Estate of Johnson v. Harris*, 705 So. 2d 819, 823 (Miss. 1996); *accord Smith, By and Through Young v. Estate of King*, 501 So. 2d 1120 (Miss. 1987). The Court has explained that this duty stems, not only from an affirmative statutory requirement under Mississippi law, but from the fact that an "administratrix is a fiduciary and as such is under a duty to perform as a trustee, both to the court creditors, and to the heirs." *Id.* at 1122.

The same fiduciary and trustee relationship exists under Alabama law. The Alabama Supreme Court observed the following in *Stone*:

Stewart, as administrator, and Smith, as administratrix, held the position of a trustee, and their administration of the estate was that of a trust. See *Clark v. Clark*, 287 Ala. 42, 47, 247 So.2d 361, 365 (1971); *Keith & Wilkinson v. Forsythe*, 227 Ala. 555, 557, 151 So. 60, 61 (1933). In *Maryland Casualty Co. v. Owens*, 261 Ala. 446, 451, 74 So.2d 608, 612 (1954), this Court recognized that

“[a]n executor occupies a position of trust with respect to those interested in the estate and is the representative of the decedent, of creditors and of the legatees and distributees.”

(Citing *Durden v. Neighbors*, 232 Ala. 496, 168 So. 887, 889 (1936); and *Amos v. Toolen*, 232 Ala. 587, 168 So. 687, 692 (1936).)

*Stone*, 554 So. 2d at 359.

Moreover, “diligence” is one of the factors listed in section 43-2-848(a) of the Code of Alabama to be considered in determining the representative’s compensation, indicating the Legislature’s intent that the representative discharge all responsibilities diligently. ALA. CODE § 43-2-848(a) (Supp. 2008). Based on these authorities, it is the opinion of this Office that the personal representative is under a duty to use reasonable diligence to ascertain potential heirs.

An extensive listing of transactions in which the personal representative can engage is set forth in section 43-2-843 of the Code of Alabama. ALA. CODE § 43-2-843 (Supp. 2008). Section 43-2-843(17) grants broad authority to “[e]mploy necessary persons . . . to advise or assist the personal representative in the performance of administrative duties.” ALA. CODE § 43-2-843(17) (Supp. 2008). Pursuant to this section, the representative may hire an heir-finding service to fulfill the duty regarding potential heirs.

As a fiduciary, a personal representative, of course, must “observe the standards in dealing with the estate that would be observed by a prudent person dealing with the property of another.” ALA. CODE § 43-2-833(a) (Supp. 2008). This Office makes determinations of law and not of fact. ALA. CODE § 36-15-1(1)(a) & (b) (2001); opinions to Honorable Dewey D. Mitchell, Chairman, Lauderdale County Commission, dated July 22, 2003, A.G. No. 2003-197; Honorable Casandra Horsley, Winston County Judge of Probate, dated April 19, 1996, A.G. No. 96-00189; Honorable Clarence F. Rhea, Attorney, City of Attalla, dated April 19, 1996, A.G. No. 96-00190. Whether it is prudent to use an heir-finding service in a given case is a determination of fact that must be made by the representative. This Office cautions that the service should not be used when its cost would exhaust the fund to be distributed. 31 AM. JUR. 2d *Executors and Administrators* § 388 (2009), citing *Bankers Trust Co. v. Allen*, 135 N.W.2d 607 (Iowa 1965).

Finally, you question if the cost of an heir-finding service is paid from the shares of any heirs that are located. Section 43-2-371 of the Code of

Alabama governs payment of the debts of the estate. This section lists an order of preference for payment of specific types of debts, preceded by the following language: "The debts *against the estates* of decedents are to be paid in the following order." ALA. CODE § 43-2-371 (1991) (emphasis added). This section requires that debts be paid directly from the estate. No provision is made for their indirect payment from the distributable shares.

CONCLUSION

A personal representative has a duty to use reasonable diligence to ascertain potential heirs. An administrator, as a personal representative, may employ an heir-finding service to fulfill this duty under section 43-2-843(17) of the Code of Alabama.

The cost of an heir-finding service must be paid directly from the estate and not from the distributable shares under section 43-2-371 of the Code of Alabama.

I hope this opinion answers your questions. If this Office can be of further assistance, please contact Ward Beeson of my staff.

Sincerely,

TROY KING  
Attorney General  
By:



BRENDA F. SMITH  
Chief, Opinions Division

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