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Daniel F. Carmack

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## *Common Problems in Administration of Decedents' Estates*

*Daniel F. Carmack\**

**P**ROBABLY THE WORST PITFALL in the administration of decedent's estates is the fact that the law relating to it has so few pitfalls. As opposed to workmen's compensation practice, for example, the statutes covering administration and the devolution of decedent's property are relatively all-inclusive. There is a statute to cover most situations, and if the lawyer will read them, he will probably do a creditable job in most situations. This encourages the average practitioner to think of probate practice as an opportunity to shoot fish in a barrel, and get well paid for doing it. As we shall see, there are pitfalls and problems all along the line; and because they are often latent, the lawyer must be especially careful to avoid them.

### **The Statute of Descent and Distribution**

This statute determines who is entitled to administer, and who is entitled to notice of probate of a will, as well as who is entitled to distribution in case of intestacy.<sup>1</sup> While it is seemingly straightforward, one must interpret it with care.

This is especially true in those areas that conflict with common conceptions of what should be done with a decedent's property. For example, most laymen would be horrified to learn that if they died without a will and without issue, but with a parent or parents living, their widow would not get all of their property. Yet in such circumstances the parent or parents take  $\frac{1}{4}$ th and the widow  $\frac{3}{4}$ ths.<sup>2</sup> Many people assume that a widow takes all, whatever the family situation might be.

Similarly, many laymen believe that relatives in the generation nearest to the decedent (for example, children, or brothers

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\* B.A., Ohio State University; LL.B., University of Virginia; Member of the law firm of Armstrong, Speer, Mackey, Millious and Carmack, of Columbus, Ohio; Former Chief Deputy Clerk, Probate Court, Franklin County, Ohio. [This article is a revision of a speech made at the 1964 Probate Law Conference of the Ohio Legal Center Institute.]

<sup>1</sup> Page's Ohio Revised Code, Sec. 2105.06. Hereinafter this will be cited as Ohio Revised Code.

<sup>2</sup> *Id.*, Sec. 2105.06(D).

and sisters) take to the exclusion of issue of deceased members of their generation. And most laymen would be surprised to know that brothers and sisters of the half-blood share equally with brothers and sisters of the whole blood.<sup>3</sup> This conflict of statute and "common sense" places upon the lawyer the duty to take pains at the first reasonable opportunity to develop completely the family picture. If the client says that there are only himself, and another brother and sister, don't let it go at that—find out if there are dead brothers and sisters, and whether they had children. If it appears that the survivors are sisters and brothers, find out if the parents were married more than once, and if they had children by the other marriages. With all the divorces and remarriages we have had of recent years, this shouldn't be too uncommon an occurrence.

Remember that ages are important, too. One of the most dangerous and ill-founded general practices extant today is that of listing the ages of those heirs who have reached majority merely as "Adult." It's possible for a person to execute a will, put it in a safety deposit box, forget it, and have more children before he dies twenty-five or thirty years later. If you don't get the exact ages of these now adult heirs, how are you ever going to find a case of pretermission? It should be a fixed practice to obtain exact ages in all cases. If it isn't, you may overlook it on occasions when it might become important.

Don't be afraid, also, to develop all the facts about adjudications of incompetency, criminal detention, or service in the Armed Forces. A waiver of probate obtained on visiting day at the penitentiary will look just as good as any other, and before you say that this is a long-shot, remember that we are hearing a lot these days about the increased incidence of crime.

Beware of the phrase "next of kin," which can mean different things in different parts of the Ohio Revised Code. For intestate succession purposes, next of kin are determined by the rules of the civil law.<sup>4</sup> Under the statute of descent, "next of kin" inherit on failure of all prior classes of relatives.<sup>5</sup> Since all next of kin, by descent, or by ascent through common ancestors of the decedent, who are grandparents or closer, are provided for else-

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<sup>3</sup> *Id.*, Sec. 2105.06(F).

<sup>4</sup> *Id.*, Sec. 2105.03.

<sup>5</sup> *Id.*, Sec. 2105.06(H).

where,<sup>6</sup> you needn't worry yourself about the rules of the civil law, unless the intestate had no wife, no issue, no brothers or sisters of the whole or half-blood, parents or grandparents, or their lineal descendants at time of death.

Note that a lineal descendant of one grandparent (*e.g.*, aunts and uncles of the half-blood) do not inherit as "next of kin,"<sup>7</sup> since the statute of descent makes no distinction between the whole and the half-blood for this purpose.<sup>8</sup>

Civil law requires that generations be counted from the intestate beginning with the parent up to the common ancestor and then down to the particular relation.

It is a mistake, therefore, to assume that all next of kin will be related to the same level of common ancestor. Generations are longer in different families; so a second cousin related through a maternal great-grandparent, and a first cousin, twice removed, related through a paternal great-great-grandparent, would both be related in the sixth degree. Therefore, if you are in a next-of-kin situation, you must account for all the reasonable possibilities of relationship in equal degrees derived from each different level of common ancestors.

There is no representation among next of kin. This is obvious because if there were representation, the degrees of consanguinity would have no meaning. In other words, the term "next of kin," for intestate succession purposes only, is understood in the primary sense of those nearest to the intestate by blood.

On the other hand, the phrase "next of kin," when used in reference to appointment of administrators or administrators *de bonis non*,<sup>9</sup> means those who would inherit under the laws of intestacy, and this causes a great deal of confusion. For this purpose, next of kin resident of the county are second in priority for appointment only to spouses resident of the state. Thus, representatives of deceased members of a generation will be "next of kin" for appointment purposes, assuming that the deceased ancestor is a "next of kin" and assuming also that representation applies. For example, a nephew has an equal right with a sister,

<sup>6</sup> *Id.*, Sec. 2105.06(A) through (G).

<sup>7</sup> *Shepard v. Wilson*, 61 Ohio App. 191 (1938).

<sup>8</sup> *Sheeler v. Barkhart*, 62 Ohio Law Abs. 356 (1951).

<sup>9</sup> Ohio Rev. Code, Sec. 2113.06 and 2113.07.

if both are resident in the county;<sup>10</sup> and a grandchild, resident in the county, is superior in right to a non-resident child.<sup>11</sup> Many lawyers interpret "next of kin" under these statutes in the sense of those most closely related to the decedent by blood. As a result, waivers or declinations of administration are obtained only from, for example, children resident in the county, to the exclusion of resident grandchildren, whose parents are deceased. While the statute appears to require waivers from, or citations to take or renounce of, all persons of the same or higher priority than the applicant as a jurisdictional matter, the courts do not seem to so interpret it. The sense of the cases seems to be that failure to obtain waivers or to cite is merely grounds for removal of the administrator. Nevertheless, the careful practitioner would wish to avoid possible removal proceedings which could only be expensive and time-consuming.

The statute of descent and distribution constantly contains the phrase "*per stirpes*." As a result, lawyers fall into the trap of being "stirpital-minded"—the idea that representatives of deceased heirs should divide only what the deceased heir would have taken, were he alive. The Legislature, however, assumes that, an intestate decedent would want his heirs, if all are equally related by consanguinity, to share equally.<sup>12</sup> That is, if *all* of the descendants of an intestate, *in a direct line of descent*, are on an equal degree of consanguinity to the intestate, they share equally "however remote such equal degree of consanguinity may be." Note that the statute specifies that *all* of the descendants must be on an equal degree of consanguinity. Note further that the statute applies not only to lineal descendants, but also to collaterals.<sup>13</sup> Thus, first cousins who are all of the representatives of deceased maternal grandparents will share equally.

Note that I was careful to specify in the last example that the first cousins were all the representatives of *maternal* grandparents. The statute of descent in effect divides the estate into two equal parts, when the intestate is survived by grandparents (or their representatives) on both the maternal and paternal sides.<sup>14</sup> The general rules are applied separately to each half.

<sup>10</sup> *In re Estate of Applegate*, 61 Ohio Law Abs. 277 (1951).

<sup>11</sup> *In re Estate of Fields*, 44 Ohio Law Abs. 284 (1944).

<sup>12</sup> Ohio Rev. Code, Sec. 2105.12.

<sup>13</sup> *Snodgrass v. Bedell*, 134 Ohio St. 311 (1938).

<sup>14</sup> Ohio Rev. Code, Sec. 2105.06(G) and 2105.06(H).

Thus, if an intestate is survived only by six first cousins on his father's side, and twenty first cousins on his mother's side, the paternal cousins will each take 1/12th, and the maternal cousins, each 1/40th. The regular rules apply on each side, however, so that in the above example, the fact that one deceased maternal aunt or uncle had ten children, another six and another four, makes no difference.<sup>15</sup> All the first cousins share in the half passing to their side of the family, equally.

### Per Stirpes or Per Capita

How do you make a stirpital division when one is called for? The rules for this are often considered to flow from the equal degree of consanguinity statute, but since that statute postulates that all of the descendants must share a common degree of consanguinity, it would not apply to a situation in which, by definition, the descendants are related in unequal degrees. Therefore the stirpital rules are a manifestation of the common law and have no real relation to the consanguinity statute discussed previously.<sup>16</sup>

There are three steps in determining a stirpital distribution. First, find the generation of heirs having living members, *nearest in relationship to the intestate*. This is the root generation. Second, count the members in this generation who are living at the time of decedent's death, as well as those who have predeceased the decedent but left lineal descendants who have survived the decedent. These are the roots. Third, the living members of the root generation take per capita in their own right; the lineal descendants or representatives of deceased root members take per stirpes in the right of their respective ancestors.<sup>17</sup>

### The Half-and-Half Statute

The so-called "Half-and-Half" statute<sup>18</sup> probably causes Ohio lawyers as much trouble as anything this side of the Internal Revenue Code. While it is complex, the key to a proper understanding of the statute is gathered from its purpose to pro-

<sup>15</sup> Snodgrass v. Bedell, *supra* n. 13.

<sup>16</sup> For a scholarly discussion of this problem see White, Per Stirpes or Per Capita, 13 U. Cinc. L. Rev. 298 (1939).

<sup>17</sup> See Kraemer v. Hook, 168 Ohio St. 221 (1958). Although this case dealt with testate succession, it is a good example of the applicable principles.

<sup>18</sup> Ohio Rev. Code, Sec. 2105.10.

tect the children of a deceased spouse who had transferred property to a relict without consideration. These (and their issue) are the primary beneficiaries of the statute, and if the relict or intestate died without leaving issue or a surviving spouse, they take all the identical property. There are only two other classes of relatives of the prior-deceased spouse who are potential beneficiaries and they are the parents (or the survivor of them), and the brothers and sisters of the whole or of the half-blood (and their lineal descendants). If the relict or intestate dies without issue, and the prior deceased spouse likewise has no issue, the identical property, excepting one-half, which in all cases goes to the surviving spouse of the relict or intestate, is divided equally between the heirs of the relict, determined as if the relict had left no surviving spouse, and these two classes of heirs of the prior-deceased spouse, if any, in the order specified by the statute.<sup>19</sup> If there is a failure of all classes of preferred heirs of the prior-deceased spouse, the identical property passes to the heirs of the relict or intestate under the ordinary statutes relating to succession to property.

The first of the several pre-requisites to the operation of this statute is that the deceased relict must have died intestate as to the property in question.<sup>20</sup> Thus, if you find that the relict left a will, you can forget "half-and-half" in most cases. Make sure, however, that the will effectively disposes of all identical property. If there is a lapse which results in partial intestacy as to that property, you may have a "half-and-half" problem.

Second, the relict or intestate have had no issue, adopted child, or designated heir. If he did, you are safely out of "half-and-half."

Third, the intestate or relict must have held at his death the identical property which came to him by gift, devise, legacy, descent, or election to take against the will. Devise, descent, or election to take against the will are fairly self-explanatory, although it must be borne in mind that they are specific and exclusive, and do not include other rights flowing from the marital status, such as property exempt, or year's allowance. The problem usually involves the question of whether a transfer was ac-

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<sup>19</sup> This is the "half-and-half." It is apparent that the title is really a misnomer, since it uses the result in a secondary contingency to describe the entire law.

<sup>20</sup> *Foreman v. Bank*, 119 Ohio St. 17 (1928).

tually a gift. For example, interests which pass to the relict by terms of a contract of the deceased spouse are not gifts.<sup>21</sup> But any recited consideration in a deed will defeat the characterization of the transaction as a gift for "half-and-half" purposes, even though the recited consideration be nominal only.<sup>22</sup>

Identity of property is perhaps the greatest exclusionary factor because if the relict sells the property, those claiming through the prior-deceased spouse cannot trace assets so as to reach the proceeds of sale or property purchased by the relict with the proceeds.<sup>23</sup>

The concept of identity presents a closer question when you are dealing with intangibles. For example, registered securities of a prior-deceased spouse do not lose their identity by reason of having new certificates issued in the relict's name; the property right is the intangible proportionate share of ownership, not the certificate itself, which is merely evidence of title.<sup>24</sup>

The identity of property is fixed as of the relict's date of death, and is not affected by the subsequent act of the relict's fiduciary in selling it, or otherwise dealing in it.

The fourth general criteria is that the prior-deceased spouse must leave issue, parent or parents, or brothers and sisters of the whole or half-blood, or their lineal descendants, surviving the relict or intestate.

### Lapsed Testamentary Gifts

At common law, if a devisee or legatee predeceased the testator, the gift fell into the residuary clause; if there were no residuary clause, or if it failed too, the gift passed under the laws of intestacy.<sup>25</sup> This has been modified by the so-called anti-lapse statute, which generally provides that if the predeceased legatee or devisee is a relative of the testator, who leaves issue surviving the testator, the gift does not lapse, but passes to such issue.<sup>26</sup> Note that the word "relative" includes relatives by

<sup>21</sup> *Berberick v. Courtade*, 137 Ohio St. 297 (1940).

<sup>22</sup> *Thiessen v. Moore*, 105 Ohio St. 401 (1922).

<sup>23</sup> *Riley v. Keel*, 84 Ohio App. 315 (1946).

<sup>24</sup> *Bank v. Allen*, 65 Ohio Law Abs. 27 (1952).

<sup>25</sup> *Foreman v. Bank*, *supra* n. 20; *Heebesch v. Lonsway*, 8 Ohio App. 36 (1947).

<sup>26</sup> Ohio Rev. Code, Sec. 2107.52.



blood only, not relatives by affinity.<sup>27</sup> Thus, a gift to a wife, in-law, or stepchild, who predeceases the testator, is not affected by the anti-lapse statute and is controlled by common law rules.

It is quite common for a testator to divide the residue of his estate among several beneficiaries; therefore, important anti-lapse questions arise when one such beneficiary predeceases the testator without leaving issue. If a relative who is a fractional residual beneficiary predeceased the testator without issue, his share shall be divided ratably among the rest of the fractional residual beneficiaries who are relatives.<sup>28</sup> The real trap in this area was created by the decision of the Supreme Court in *Bank vs. Browning*,<sup>29</sup> which held that a gift of a fractional part of the residue to a non-relative will not lapse, but will pass to the other fractional recipients surviving, whether they be relatives or not. The testator may direct to the contrary, so will draftsmen should keep *Browning* in mind. One practical result of this decision is that you will never have a total lapse when part of the residue is given to any corporation or institution having indeterminate life.

### Pretermitted Heirs

Pretermitted heirs aren't the "bogey" they once were, since the share of an after-born, after-adopted, an after re-appearing child, or an after-designated heir, is restricted to his intestate share of only that part of the estate not devised or bequeathed to a surviving spouse.<sup>30</sup> It seems a necessary corollary of the principle that a will speaks as of the date of death, that this change applies to wills of all testators dying after the effective date of the statute, October 5, 1961, whether or not the will was executed after that date.

It is still necessary to keep this statute in mind, however, when drafting a will. Suppose, for example, that a testator left one-half of his estate to his wife, one-sixth each to his two existing children, and one-sixth to charity. He has one more child after the will is executed and dies before he can execute a new will. Under the pretermitted heir statute, the after-born child would be entitled to one-third of one-half, or one-sixth (*i.e.* his

<sup>27</sup> *Schaeffer v. Bernhardt*, 76 Ohio St. 443 (1907).

<sup>28</sup> Ohio Rev. Code, Sec. 2107.52 (second sentence).

<sup>29</sup> 158 Ohio St. 54 (1952).

<sup>30</sup> Ohio Rev. Code, Sec. 2107.34.

intestate share of the part not devised to the widow, calculated under the clause of the statute of descent and distribution, which would be effective had the testator not left a spouse surviving). The other children and the charity would be required to contribute ratably, leaving them each with only 1/9th. As between the children, this would probably be an unjust result.

There is another reason why it is important to provide always for *all* children, whether they are after-born or not. Most states have pretermitted child statutes, and not all of them are like Ohio's. For example, under California law, a child born anytime, either before or after the will, is pretermitted, unless the will shows a clear intent to disinherit him. Since testators may move out of Ohio, careful attorneys should anticipate this possibility and specifically provide for all children.

### Hearings on Schedules of Debts

The court may inquire into the propriety of the executor's (or administrator's) allowances and classifications of claims; notice must be given to the surviving spouse and all others having an interest in the estate as devisees, legatees, heirs, and distributees.<sup>31</sup> If it appears that the estate is insolvent, creditors and rejected claimants must also be notified. A final order confirming the allowance or classification has the same effect as a judgment binding all persons having notice of the hearing; and in the absence of fraud such allowances and classifications, and payments pursuant thereto, shall not be questioned on the executor's (or administrator's) accounts.<sup>32</sup>

The primary utility of this statute is in insolvent situations in which it is desired that the creditors know why they are not being paid in full, and that they may be bound by an order fixing priorities. But suppose there is a claim which is probably but not certainly valid, to which the widow objects bitterly. A rejection could easily involve the estate in litigation at considerable expense and loss of time. If the executor allows the claim and has a hearing on the schedule of debts, the widow can present her side. If the Court sustains the allowance, the fiduciary is absolutely protected in paying the claim, in the absence of fraud.

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<sup>31</sup> *Id.*, Sec. 2117.17.

<sup>32</sup> *Ibid.*

On the other hand if a borderline claim is probably not allowable, a rejection would likely bring a separate lawsuit. If the fiduciary is sure that another party is ready, willing and able to oppose the claim, he might allow the claim to have a hearing on the schedule of debts. Do this only in borderline cases. Note that if the claim is rejected by the court, the claimant still has his right in common pleas, municipal, or county court; but many people merely want their day in court, and are satisfied if they get any kind of a fair and impartial hearing.

### Determination of Heirship

This action is a full-blown civil action, complete with service of process and pleadings.<sup>33</sup> It is really in the nature of an interpleader because the fiduciary, as such, has no interest in who gets the property, although he has a duty to find the heirs, or unnamed devisees, in a situation where a gift is made to a class.

The fiduciary may make final distribution in reliance on the court's determination, and with his bondsman, be discharged from liability arising from such determined interest, and that the title to any property thereupon purchased from such fiduciary, shall be free from such determined interest.<sup>34</sup>

Whenever there is a class of beneficiaries more remotely related to the decedent than grandparents, heirship proceedings should be considered. This would always depend somewhat on your ability to account for all of the family members and their descendants, but whenever you find a great number of members in the root generation, leaving a plenitude of descendants who will probably inherit, determination of heirship is in order.

Second, proceedings to determine heirship should be initiated at the earliest date commensurate with a diligent effort to find the heirs. Often, effective action is dependent upon giving notice to the heirs, and this would be especially true when a land sale is necessary. It is a common practice to join unknown heirs and devisees of persons whom everyone has lost track of, as defendants in land sale proceedings, and there is some authority for this. It does seem the better practice, however, to obtain a determination of heirship first. For one thing, Section 2123.02, Revised Code, specifically requires the joining in determination

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<sup>33</sup> Ohio Rev. Code, Ch. 2123.

<sup>34</sup> *Id.*, Sec. 2123.07.

proceedings of heirs and distributees whose names are unknown. For another, the purchaser is protected, by an heirship determination. Heirship should therefore be determined prior to instituting a land sale in all situations when it would be sought in any case.

Note that the court determines not only the identity of the heirs, but also what proportion each takes.<sup>35</sup>

Don't confuse the presumed decedent's law,<sup>36</sup> with heirship determination. If the decedent had a son, who had been absent from his residence without word for eight years prior to the decedent's death, don't seek a finding of presumed death under the presumed decedent's law. Heirship determination is the proper remedy, otherwise an action under the presumed decedent's law, would, in effect, resuscitate a man the common law had considered dead, so as to make him an heir. This follows from the fact that the presumptive date of death under the presumed decedent's law is the date of entry of the first decree of presumed death. To put it another way, the presumed decedent's law does not repeal the common law rule of presumption of death. This remains for use whenever the occasion demands in other actions, including determination of heirship. The presumed decedent's law is the vehicle for obtaining a declaration of death, only in those cases where administration is contemplated for a person who possessed an estate in his own right.<sup>37</sup>

### Declaratory Judgments

Actions for declaratory judgment<sup>38</sup> and actions to construe a will<sup>39</sup> both give the probate court wide powers to determine controversies involved in the administration of estates. In fact, declaratory judgment relief<sup>40</sup> is so broad that it encompasses almost all of the power of the probate court to render judgment relative to decedent's estates under other sections of the Revised Code.

Declaratory judgment is a most useful tool, and it ought to be used in all cases where the title to personal property is at

<sup>35</sup> *Speidel v. Schaller*, 73 Ohio App. 141 (1943).

<sup>36</sup> Ohio Rev. Code, Ch. 2121.

<sup>37</sup> See *Baker v. Myers*, 160 Ohio St. 376 (1953).

<sup>38</sup> Ohio Rev. Code, Ch. 2721.

<sup>39</sup> *Id.*, Sec. 2107.46.

<sup>40</sup> *Id.*, Sec. 2721.03 and 2721.05.

issue, and the claim of the opposition is not so tinged with wrongfulness or criminality that concealment of assets<sup>41</sup> would apply.

### Problems Relating to Land

Land is not, strictly speaking, part of the probate estate, since it descends immediately upon death to the heirs or devisees, subject only to the duty of the executor or administrator to reach it for payment of the decedent's debts. Very often, however, the primary reason for having an administration is to clear title to real estate. Therefore, it seems to me that the goal of the lawyer for the estate which includes real estate (and here I am using the word "estate" in its non-technical sense) should be to present the heirs a title of record in the county where the land is situated, free of cloud insofar as the probate proceedings are concerned. For that reason, it seems to be good practice to have the abstract continued, or to procure a title certificate at the outset, whether or not land sale proceedings are expected. It is quite possible that items such as a federal tax lien, sales tax or unemployment compensation lien, would be unearthed that might not otherwise come to your attention. Remember that presentation of personal property and intangible tax claims is required only within ninety days of the receipt by the Tax Commissioner of the preliminary notice for inheritance tax purposes.<sup>42</sup> Otherwise, the State is not required to present claims, and in any case, claims secured by lien need not be presented. The heirs might be justifiably unhappy, if they were presented with a claim by the State, when they thought their title had been rendered free and clear in the probate court.

The courts of many counties require the production of a certificate of title for all real estate of the decedent. It also has the admirable side effect of impelling the client into a lawyer's office.

The admission of wills to record is required in the probate court of each county wherein real estate of the testator is situated;<sup>43</sup> there is permissive authority to admit wills proved in foreign states or territories to record in the county of situs.<sup>44</sup> More

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<sup>41</sup> *Id.*, Sec. 2109.50.

<sup>42</sup> *Id.*, Sec. 2117.06.

<sup>43</sup> *Id.*, Sec. 2107.21.

<sup>44</sup> *Id.*, Sec. 2129.05.

important is the permissive authority to present for record authenticated copies of the record of extra-county administration proceedings in the probate court of each county where the decedent owned real estate.<sup>45</sup> This statute is commonly overlooked. Most Franklin and Cuyahoga County title examiners will, probably, require that extra-county proceedings be put of record in the county, but most other counties, have instances of extra-county administrations, which were not recorded under this statute. To minimize the burden on individual heirs who would have to pay for such extra-county investigations, it ought to be part of the ordinary procedure to file the authenticated record in any county wherein the decedent owns realty.

A little known provision gives the surviving spouse the right to purchase the mansion house, and subject to limitations, other personal and real estate, at their appraised value.<sup>46</sup> More golden opportunities for easy, legally unassailable answers are missed here through sheer ignorance than anywhere else. In nine cases out of ten, when lawyers are scrounging around looking for some way to dispose of real estate, for example selling it to pay costs of administration, it is because they didn't take advantage of the widow's election. Unless financial considerations render it impossible, a residence should never remain with minor heirs where a spouse survives. Since the spouse has credits of one-third to one-half by intestacy, in addition to property exempt, and if she is a widow—year's allowance, and possibly funeral expenses paid by insurance, these instances of financial impossibility would be few in number.

The election must be filed within thirty days after the inventory is *approved*, not filed. This will be important in counties where notice of hearing on the inventory is given by publication, and perhaps thirty days or more intervene between filing and approval.

Suppose a home-made will leaves a residence or some other real estate in trust—with no power of sale—for some improvident or sub-competent child. Waste, wear and tear, or general economic conditions, at some time will oblige a prudent man trustee to sell this item. How can it be done? The probate code merely says that the Probate Court has jurisdiction to "author-

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<sup>45</sup> *Id.*, Sec. 2129.01.

<sup>46</sup> *Id.*, Sec. 2113.38.

ize the sale or lease of any estate created by will if the estate is held in trust on petition by trustee.”<sup>47</sup>

It is submitted that the answer is not in the probate code, but in the sections of the Revised Code relating to disentailment proceedings.<sup>48</sup> Obviously a trust is not a common law entailment; but these sections clearly were intended to cover situations other than strict entailment. The use of the word “disentailed” in the popular name is merely a convenience.

### Attorney's Fees

There are several factors which contribute to the proper determination of an attorney's administration fee, but one of them, that is, responsibility, or size of the estate, has been over-emphasized, to the extent that the unwary may be confused. There is a good reason for this. Clients like to know where they stand on fees, and it is nice to be able to tell them at the first conference, that the probate court allows 6% of the first \$1,000, 4% of the next \$4,000, etc., or 5% of the first \$5,000, etc., according to the formula followed in the particular court. Percentages are easily understood and computed; but percentages totally ignore such other relevant criteria as time spent, difficulties encountered, the art or expertise with which the services were performed, and the results achieved. An advantageous settlement of a creditor's claim, or the relinquishment of a federal tax assessment, for example, should be considered when calculating the fee. Fee schedules, then, are guides, not absolute criteria, as are the statutory commissions for ordinary services of the fiduciary.<sup>49</sup>

While many lawyers and judges categorize attorney fees into “ordinary” and “extraordinary” fees, this is a distinction unknown to the law. Thus, an application and entry for attorney fees should never seek and grant the percentage figure for “ordinary” fees, and some additional sum for “extraordinary” services. An entire fee for all services should be sought and allowed.

Fee schedules probably will never be abandoned. After all, they are useful. But evidence must be presented to support an

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<sup>47</sup> *Id.*, Sec. 2101.24(N).

<sup>48</sup> *Id.*, Sec. 5303.21 ff.

<sup>49</sup> *Id.*, Sec. 2113.35.

allowance of attorney fees.<sup>50</sup> For this reason, every lawyer handling probate matters should keep track of his time spent and otherwise be prepared to detail the basis on which he values his services, even if he plans to fix his charge on the basis of a court rule, or a bar association fee schedule. Furthermore, he should explain to the executor or administrator, again at the initial conference, that while the particular schedule is a guide, there are other factors, perhaps unseen, which might increase the fee. Failure to do this probably accounts for the controversies about fees, which occasionally crop up. The client is not made to understand that he has not been given a quotation, in the nature of a contractor's or garageman's bid.

### Taxes

It is true, I think, that one of the most common pitfalls in probate practice is the assumption that probate practice is one thing and tax practice is another. Taxes, particularly federal income, estate, and gift taxes, are mystical and mysterious to many. But they cannot be divorced from probate practice and a satisfactory service done for the client. We are often at a loss to show the client what we have accomplished for him. The nuances of a clear and marketable title are apt to escape him, but he does understand money, that is, tax deductions, tax discounts, and tax avoidance. One striking example of a golden opportunity for a probate lawyer to show his client a tangible return of this nature is the provision which may permit the heirs, distributees, or residual beneficiaries, to deduct the costs of administration, including attorney fees, from their adjusted gross income for federal income tax purposes in the year during which distribution is made if the estate or trust cannot use it.<sup>51</sup> In other words, they can pay your fee and make the federal government eat it, too. To me, this example points out, better than any other, the theme which we have all been hearing for many years—"Get acquainted with your tax laws, both state and federal."

<sup>50</sup> *In re Estate of Verbeck*, 173 Ohio St. 557 (1962).

<sup>51</sup> Internal Revenue Code, Sec. 642(h) (1954), 26 U. S. Code, Sec. 642(h).