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Omission of Realty in Probate Administration*

By R. G. PATTON**

As chairman for several terms of the Probate Division of the American Bar Association and of its committee which drafted the Model Probate Code,¹ the writer could not help but observe that the probate codes of some states omitted provisions essential to complete coverage of the subject. The most common was a lack of provision for adjudication in the court of probate of the parties constituting the decedent's heirs or the parties constituting the donees of a class gift.²

The title to the real estate of a testate or intestate owner vests in the devisee or in the heir, as the case may be, at death of the owner.³ The personalty goes to the executor or administrator⁴ but the latter usually has nothing to do with administering the realty other than to collect the rent therefrom or to make a sale when necessary to pay debts, legacies or costs of administration of the estate.⁵ On the basis of these fundamental principles, the statutes of some states contemplate that only the personalty shall be included in the inventory.⁶ In others, though included in the inventory, it forms no portion of the administration assets and is not mentioned except when needed to pay claims, legacies or administration expenses.⁷ When there is no such need for the executor or administrator to make use of decedent's real estate, there is in theory no need of its express inclusion in the probate of his will and no need for probate of his estate if he dies inte-

* For a companion article by the author on *Improvement of Probate Statutes*, see IOWA L. REV., Spring Issue 1954.

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¹ MODEL PROBATE CODE (Callaghan & Co., 1946).

² Some years ago, a comparable hiatus was found in the penal codes of some states when there occurred a first case of kidnapping; the only crime chargeable against the offender was assault.

³ *Lehr v. Switzer*, 213 IOWA 658, 239 N.W. 564 (1931); *Bass v. Adkinson*, 280 Ky. 548, 133 S.W. 2d 921 (1939); *Tarr v. Robinson*, 158 Pa. 60, 27 Atl. 859 (1893); 4 PAGE ON WILLS (3d Ed. 1941) sec. 1404; *Id.*, sec. 1586, n. 9.

⁴ ATKINSON ON WILLS secs. 115, 122 (2d Ed., 1953).

⁵ *Id.*, sec. 123.

⁶ Examples: N.C. GEN. STAT. (1943) sec. 28-50; TENN. CODE (1932) sec. 8189. Cf. KY. REV. STAT. (1953) sec. 395.250 (no specific requirement).

⁷ Example, IOWA CODE (1950) sec. 635.23.

state; at death his realty passes to his successors by virtue of a will or by the laws of descent. Probate of the estate, or expiration of a statutory period for enforcement of claims will show whether the realty may be subject to liability for the decedent's debts. The probate of a will which specifically devises a particular tract of land may serve as a muniment in the chain of title without any judicial construction provided, as in the case of any muniment, its terms are too clear to be in need of construction. But when the devise is to a class, or when the owner dies intestate, or intestate as to land to which the title is under examination, something more is required than a mere clearance from probate claims. The needed additional record may relate to one or more of several items: adjudication as to who constitute the decedent's heirs, whether the land involved was or was not his homestead, who constitute the members of a class to which land is devised, or who constitute the residuary beneficiaries, differing in different successions. Without this, probate of the deceased owner's estate has fulfilled part only (often only a proof of death) of what is necessary to make a record of a transfer of title based upon succession at death of the owner.

Various devices have been used to overcome this hiatus in chains of title. The most common is the use of affidavits to establish the fact of death, intestacy and the parties comprising the decedent's heirs. Without a statute on the subject they usually have no evidentiary value⁸ and can at most serve as an estoppel against the affiant.⁹ However several states have provided that the record of an affidavit of death and heirship constitutes prima facie proof thereof.¹⁰ In some states, the record cannot be impeached after it has existed without attack for a specified period of time.¹¹ Prior to adoption of the present Kansas probate code, which provides for a decree determining the succession to owner-

⁸ *Reeves v. Roberts*, 294 Mo. 593, 242 S.W. 956 (1922); *Myrick v. Leddy*, 37 S.W. 2d 308 (Tex. Civ. App. 1931).

Evidentiary value independent of statute: *Attebery v. Blair*, 244 Ill. 363, 91 N.E. 475, 135 Am. St. Rep. 342 (1910); *Perry v. Ritze*, 110 Neb. 286, 193 N.W. 758 (1923).

⁹ *Asbach v. Chicago, B. & I. Ry. Co.*, 86 Iowa 101, 53 N.W. 90 (1892).

¹⁰ Colorado Laws (1941), c. 182, sec. 1; Idaho Laws (1945), c. 84; KY. REV. STAT. (1953) sec. 382.120; TENN. ANN. CODE (1934) sec. 8350; WIS. STAT. (1951) sec. 235.46.

¹¹ Florida Laws, 1941, c. 20954, p. 2504 (7 years allowed to prove otherwise); IOWA CODE (1950), sec. 558.8 (after 3 years the presumption is conclusive).

ship of the decedent's real property,¹² it was the general practice in that state to prove descent by a recorded affidavit,¹³ and this appears to be the current practice in several states.¹⁴

Another method of showing of record that the grantors in a deed are the heirs of the record owner is by a recital to that effect in the deed. To a limited extent, such recitals have been made prima facie evidence of the facts recited,¹⁵ and in a few states limitation statutes bar all rights inconsistent with the recitals after the deeds have been of record a designated period of time.¹⁶ However in the absence of an adequate statute, or of any statute, on the subject, these recitals are not competent evidence of either the death of the owner or as to the parties constituting his heirs.¹⁷

In Iowa, the list of heirs filed by the administrator in concluding administration of the estate of an intestate is commonly treated as a determination of heirship.¹⁸ Although the Iowa court has said by way of *dictum* that the list of heirs is presumed to be correct,¹⁹ the approval of the final report does not amount to an adjudication on that point and does not estop an unmentioned heir or his creditors from asserting the rights of said heir in the decedent's property.²⁰ As has been stated as to the statutes of that state, "where heirs claims under one who dies intestate and . . . where there is a devise to a class under a will, the members of which are ascertainable at the death of the testator, a statute making the final report of the administrator and the executor conclusive is needed."²¹

But a better method of establishing the transmission of title at death of an owner is by including among the final steps of administration the entry of an order determining the heirs or de-

¹² KAN. GEN. STAT. (1949) secs. 59-2249, 59-2251.

¹³ Schmidt v. Fronton, 112 Kan. 535, 211 Pac. 630 (1923).

¹⁴ States listed in notes 10, 11 *supra*.

¹⁵ Mo. STAT. ANN. sec. 1687, p. 3979.

¹⁶ IOWA CODE, sec. 10079.

¹⁷ McCarthy v. Rochel, 85 Iowa 427, 52 N.W. 361 (1892); Wolf v. Holton, 104 Mich. 107, 62 N.W. 174 (1895); Scott v. Mangrum, 7 Tenn. App. 437 (1928).

¹⁸ Ladd and Brooke, *Decree in Probate Proceedings*, 16 IOWA L. REV. 195 at 199 (1930).

¹⁹ Sutherland v. Briggs, 182 Iowa 1170, 1179, 166 N.W. 477, 479 (1918). However in the case of estates where the personal property is all consumed in the payment of claims and costs of administration, there may be no occasion to list the heirs. Under that situation the probate proceeding is of no aid in determining the heirs who have succeeded to the title of the decedent to unadministered real estate.

²⁰ Crosley v. Calhoun, 45 Iowa 557 (1877).

²¹ Ladd and Brooke, *op. cit. supra* n. 18, p. 202.

vises, as the case may be, of the decedent. Provision for this appears in statutes of Arizona,²² California,²³ Idaho,²⁴ Kansas,²⁵ Michigan,²⁶ Minnesota,²⁷ Montana,²⁸ Nebraska,²⁹ Nevada,³⁰ North Dakota,³¹ Oklahoma,³² South Dakota,³³ Utah,³⁴ Vermont,³⁵ Wisconsin,³⁶ and Wyoming.³⁷

The jurisdiction of the probate courts extends to the real estate of a decedent the same as to his personalty³⁸ and they can and should serve the purpose of determining succession as well as the purpose of administering a decedent's assets for the benefit of his creditors or legatees. This was fully recognized in the Model Probate Code³⁹ drafted by the American Bar Association. The Code provides⁴⁰ that "after all claims against the estate . . . have been finally determined and paid, except contingent and unmatured claims which cannot be paid, the personal representative shall . . . render his final account and at the same time petition the court to decree the final distribution of the estate. . . . In its decree . . . the court shall designate the persons to whom distribution is to be made. . . . Every tract of real property so distributed shall be specifically described therein. . . . The decree . . . shall be a conclusive determination of the persons who are the successors in interest to the estate of the decedent. . . . It shall operate as the final adjudication of the transfer of the right, title and interest of the decedent to the distributees therein designated. . . . Whenever the decree . . . includes real property, a certified copy thereof shall be recorded by the personal representative in every county of this state in which any real property

²² ARIZ. CODE (1939), secs. 38-1504, -1505, -2008.

²³ CAL. PROB. CODE ANN. (Deering 1944), secs. 1020-1022.

²⁴ IDAHO LAWS ANN. (1943), secs. 15-1306, -1307, -1515.

²⁵ KAN. GEN. STAT. (Supp., 1943), sec. 59-2249.

²⁶ MICH. STAT. ANN. (1943), secs. 27.3178(165), (166).

²⁷ MINN. STAT. ANN. (1941), secs. 525.481, .483.

²⁸ MONT. REV. CODE (1935), secs. 10327, 10328, 10371.

²⁹ NEB. REV. STAT. (1943), secs. 30-1302, -1303.

³⁰ NEV. COMP. LAWS (Supp. 1941), secs. 9882.233, .243, .244.

³¹ N.D. REV. CODE (1943), secs. 30-2110, -2111.

³² OKLA. STAT. (1941), secs. 631, 632, 711.

³³ S.D. CODE (1939), secs. 35.1705, .1708, .0117.

³⁴ UTAH CODE (1943), secs. 102-12-7, -8, 102-14-16.

³⁵ VT. PUB. LAWS (1933), secs. 2974, 3000.

³⁶ WIS. STAT. (1943), sec. 318.06, subd. 4.

³⁷ WYO. REV. STAT. (1931), secs. 88-3601, -3602.

³⁸ *Bengtson v. Setterberg*, 227 Minn. 337, 35 N.W. 2d 623 (1949).

³⁹ MODEL PROBATE CODE (Callaghan & Co., 1946).

⁴⁰ *Id.* sec. 183.

distributed by the decree is situated." As stated in a comment, "the decree of final distribution . . . is the significant muniment of title. . . . No one should, or is likely, to purchase real estate in reliance upon a will, even though it has been admitted to probate; but he will rely solely on the recorded certified copy of the decree of distribution." On the basis of a similar statute, Standard No. 24 of the Title Standards adopted by the Minnesota State Bar Association provides that "a decree of distribution contrary to the terms of an admitted will or statutes of descent makes a title unmarketable during the time allowed for appealing from the decree; but in the absence of an appeal, such title becomes marketable after the time allowed for appeal has expired." Numerous local decisions are cited as authority for the standard⁴¹ but the principle embodied in the standard is of general application.⁴² The record of the decree affords a conclusive⁴³ adjudication as to the parties who took title at death of the former owner and affords a dependable muniment in the chain of title.

Following the statutory procedures provided in twenty-five states,⁴⁴ the Model Probate Code further provides⁴⁵ that independent of any administration of the assets of a decedent, the probate court may determine his heirs when such time has elapsed since his death that all claims against his estate have been barred by limitation. A digest of the state statutes on the subject is set forth in the published code.⁴⁶

In view of what can be done in the way of providing statutory procedures for the determination by the probate court of succession of a decedent's heirs or devisees to his real estate, it seems unjustified that they or their vendees should continue to be obliged in any jurisdiction to depend upon deed recitals, affidavits or inquiries in pais.

⁴¹ *St. Paul Gaslight Co. v. Kenney*, 97 Minn. 150, 106 N.W. 344 (1906); *In re Estate of John Eklund*, 174 Minn. 28, 218 N.W. 235 (1928); *Bengtson v. Setterberg*, *supra* note 38.

⁴² *Moor v. Vawter*, 84 Cal. App. 678, 258 Pac. 622 (1927); *In re Baxter's Estate*, 98 Mont. 291, 39 P. 2d 186 (1934); *In re White's Estate*, 256 Wis. 467, 41 N.W. 2d 776 (1950); see also ATKINSON, *WILLS* 798 (2d Ed., 1950).

⁴³ See cases at nn. 41, 42 *supra*.

⁴⁴ MODEL PROBATE CODE, *supra*, pp. 366-368.

⁴⁵ *Id.*, sec. 195.

⁴⁶ *Id.*, pp. 369-375.