Apportionment of Compensation of Co-Executors

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NOTES
APPORTIONMENT OF COMPENSATION OF CO-EXECUTORS

At common law the executor did not receive fees, nor a commission for his services. Unless it were otherwise disposed of, he did receive the surplus after the payment of debts and legacies. In this country statutes have very generally provided for the payment of commissions based upon the amount of assets collected and expended as shown by the accounting. Thus, under some statutes compensation is rather strictly limited to a percentage. Other statutes allow either additional compensation for extraordinary services or leave the matter at large authorizing the court to allow a sum in gross based upon a showing as to services rendered.

Statutes applicable to the case of apportionment between co-executors exist in seven states. Of these, five authorize the Probate Court to apportion the compensation according to the services rendered by each. Power in the Probate Court to apportion without express statutory sanction has been asserted in several states. In a few states it is held that the court has

2 Deering's Probate Code of Cal. (1933), Sec. 901; Ga. Code (1933), Sec. 113-2003 (Unitary commission implied); N. J. Comp. St. (1910), p. 3861, Sec. 133; Clevenger's Surr. Practice Act (N. Y., 1935), Sec. 285, par. 8 (Separate full commissions may be allowed to as many as three co-executors where the estate exceeds $100,000); Wyo. Rev. St. (1931), Sec. 88-2609, and see Carter's Estate, 132 Cal. 113, 64 P. 123 (1901); Heard v. Clements, 145 Ga. 146, 88 S. E. 566 (1916); Andress v. Andress, 46 N. J. Eq. 528, 22 A. 124 (1890). In Louisiana each receives a commission on that part of the Succession which falls to his administration. See La. Civ. Code (Dart. 1932), Sec. 1685. In Montana (Rev. Codes (1921), Sec. 10287), it is provided merely, "If there be more than one executor only one commission must be allowed".
3 Hope v. Jones, 24 Cal. 89 (1864) (They are not partners with respect to their commissions and do not have a joint interest in them); Chase v. Lathrop, 74 Colo. 559, 223 P. 54 (1924) (Unitary commission); Hayward v. Plant, 98 Conn. 374, 384, 119 A. 341 (1923) (Unitary principle rejected); Phillips v. Richardson, 27 Ky. 212 (1830) (Unitary compensation. In Kentucky and in some other states administration may be had in a court of equity); Spiers v. Wisner, 88 Mich. 614, 50
no power to apportion the compensation other than equally among the co-executors in the absence of a statute authorizing it.⁴

Frequently the court will apportion according to an agreement made in advance of accounting.⁵ If, however, the court does not apportion but makes an allowance in a lump sum, it has no jurisdiction over an action by one against his associate for the former's share, since no claim against the estate is asserted.⁶ In a few other states the division of the compensation is not necessarily equal nor made upon the basis of services rendered but rather is determined by the accounting, each receiving his commission upon what is shown by his separate receipts and disbursements, it being assumed that separate ac-

⁴ Griswold v. Smith, 116 Ill. App. 223 (Write of error refused, 214 Ill. 323, 73 N. E. 400 (1905) ("In contemplation of law whatever services one or more rendered, were rendered by all in their collective capacity. It is not for the court to distinguish between services of either or to determine how much each earned."); White v. Bullock, 15 How. Pr. 102 (N. Y. Ct. of App. 1857) "(Where the statute awards compensations in general terms, each is entitled to a one-half share irrespective of services performed. It is doubtful if the surrogate could make an unequal apportionment. The rights of co-executors are similar to those of two attorneys in a suit, or of commissioners appointed by the legislature to erect a building.)"

⁵ Groover v. Ash, 132 Ga. 371, 64 S. E. 322 (1909); Mount v. Slack, 39 N. J. Eq. 230 (1884); Wickersham's Appeal, 64 Pa. St. 67 (1870); and see John v. John, 122 Pa. St. 107, 15 A. 675 (1888). See Bush v. McComb, 2 Houst. 546 (Del. 1863) (Action of debt); Slingerland v. Norton, 136 Minn. 204, 161 N. W. 497 (1917) (Where lump sum allowed the apportionment is made in the District Court); Smart v. Fisher, 7 Mo. 530 (1842) (Evidence not admissible in nisi prius court as to the amount of services by each). In Huff v. Thrash, 75 Va. 546 (1881) the remedy was said to be by way of declaring a constructive trust against the withholding co-executor. In Carter's Estate, 132 Cal. 113, 64 P. 123 (1901), held that the Probate Court could give no effect to a contract made by the co-executors inter se respecting the division of compensation. But that the Orphan's court has jurisdiction in such cases, see Pomeroy v. Mills, 40 N. J. Eq. 517, 4 A. 768 (1885), and cf. McManus' Estate, 212 Pa. St. 267, 61 A. 392 (1905).
counts are rendered. 7 Where one co-executor excludes his asso-
ciate from participation in the administration it has been held
that the latter is entitled to one half of the compensation and it
is to be awarded by the Probate Court. 8

It seems entirely appropriate for the Probate Court with-
out the aid of a statute to assume jurisdiction to apportion the
compensation according to services rendered. The same is true
of the Equity court in those states where administration is in-
stituted by filing a bill in equity. If one excludes his associate
from participation in the administration, it is true that the lat-
ter might be left to sue for his damages in a court of general
jurisdiction, but it seems sounder and more expeditious for the
court having control over the administration to apportion to the
excluded associate one half of allowable fees on the principle
that equality is equity. Thus, the associate may file exceptions
to the account and resist the discharge of the other until his
claim has been paid.

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107, 15 A. 675 (1888) (Apportionment prima facie fixed in this way).
See also Louisiana Civ. Code (Dart. 1932), Sec. 1085.

8 Dudley v. Varian, 123 Cal. 256, 55 P. 397 (1899) (The associate
need not make demand to be allowed to participate where the demand
would be useless); Garr v. Roy, 30 Ky. L. R. 1697, 50 S. W. 25 (1899);
Fla. 750 (1880) (Where A sues B for A's share retained by B, it is not
sufficient for A to show that he was at all times ready and willing to
perform his part); Walke v. Hitchcock, 5 Redf. 217 (N. Y. Sur. 1881);
re Hayden's Estate, 54 Hun. 197, 7 N. Y. S. 313, affd., 125 N. Y. 776, 27
Trust Company B were named co-executors. Beneficiaries asked trust
company to withdraw, which it refused to do. A administered the
estate and made distribution and refused to make an accounting.
Held: B is entitled to fees and to attorney's fees for costs. These
are claims against the estate and trust company can require an ac-
counting. Court observes that there is a greater duty on trust com-
pany to undertake the office of executor than there is on a private person).