Denver Law Review

Volume 27
Issue 8 *Institute on Problems of the Average-Sized Estate*

Article 6

June 2021

Practical Administrative Problems in Average-Sized Estates

Barkley L. Clanahan

Follow this and additional works at: https://digitalcommons.du.edu/dlr

Recommended Citation
Barkley L. Clanahan, Practical Administrative Problems in Average-Sized Estates, 27 Dicta 285 (1950).

This Article is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu,dig-commons@du.edu.

PRACTICAL ADMINISTRATIVE PROBLEMS IN AVERAGE-SIZED ESTATES

BARKLEY L. CLANAHAN
of the Denver Bar

The institute committee listed many topics which they deemed desirable to have discussed in connection with the administration of average-sized estates. I shall discuss as many of these topics as I can simply with the hope of raising questions in your mind, so that when you meet these problems you will recognize them.

In all estates, of course, the first problem of the attorney and the fiduciary is to determine definitely what are the assets, where they are located, and what is necessary for their protection. This marshalling of assets immediately raises an important question: Should a special administrator be appointed? The statute permits such appointment during any contests over probation of the will or the right of executorship (in case of either a testate or intestate estate), or indeed, whenever it shall appear to the satisfaction of the court to be in the best interests of the estate that someone be appointed pending issuance of letters to the regular personal representative.[1]

The county court thereupon may appoint any person or persons as special administrator to collect, take charge of, and preserve the estate of the decedent until probate of the will or until administration of the estate is granted. This appointment may be made without notice. The special administrator must qualify as in the case of other personal representatives, and under the order and direction of the court, he thereafter has all the powers, duties, and liabilities of other administrators. It is also provided in the statute that in all cases in which such an appointment is made pending admission of a will to probate, it shall he the duty of the court to appoint as such special administrator the executor named in the will, unless it is made to appear that such appointment would be detrimental to the estate or prejudicial to the rights of contestants.

I have discussed this matter with a number of banks, and they state that they very rarely have a special administrator appointed. Such institutional representatives generally can proceed under a will even though they haven't qualified, and people will respect their authority. They feel that no responsibility or liability will attach in connection with stocks and bonds, and that as a practical matter, they can take over a house or business and run it pending the outcome of a contest.

[1] COLO. STAT. ANN., c. 176 § 80 (1935).

It is a different matter, however, when individual executors are named under a will and the question of the advisability of having someone appointed as special administrator arises. Right here it is well to review the powers of an executor before probate.[2] In general, the statute provides that the power of an executor before probate and issuance of letters, unless a special administrator is appointed, extends only to the burial of the deceased, the payment of the necessary funeral charges, and "the taking care of the estate." If the will is rejected and the executor never qualifies, the person who acted in this capacity is not liable as an executor of his own wrong unless he refuses to deliver-up the estate to the person authorized to receive it.

Thus, it is only after determining the nature of the assets and considering the powers of an executor prior to probate that one is able to make a proper decision regarding the necessity and advisability of appointing a special administrator.

CONTINUATION OF DECEDENT'S BUSINESS

The will may contain powers to carry-on a business, in which event the fiduciary will be able to do so without the necessity of court order. If the will does not so provide, however, or if there is no will, the problem is governed by statutory provision.[3] The statute reads that "if it shall appear to the court that the decedent was engaged in farming, the raising of livestock, *or in any other business,* and that it is to the best interest of the estate that such be continued for a reasonable time, to provide for a better opportunity of liquidation, the court may order such business continued." (Emphasis added.) It may be questioned whether or not this is a form of investment, and as such not allowed by the statutory provision limiting legal investments.[4] I doubt if the Supreme Court would so hold, and I think the fiduciary would be protected by a court order that allowed him to continue the business under the previously mentioned statute. A practical approach which recognizes the type of business and other problems involved is preferable to a strictly legalistic viewpoint. We have a moral as well as a legal duty in all of these matters, and sometimes our moral duty may outweigh our legal duty in determining such questions as whether or not it is wise to continue a business or appoint a special administrator.

DISTRIBUTION PRIOR TO FINAL SETTLEMENT

Another important, practical matter frequently arising during the administration of an estate is partial distribution in advance of final settlement. The widow's allowance is in the nature of such a distribution, though not always thought of in these

[2] *Id.*, at § 113.
[3] *Id.*, at § 148.
[4] *Id.*, at § 126(4).

terms. The covering statute provides that upon the application of a widow, she shall be allowed the sum of $2,000 in cash or the equivalent thereof in real or personal property as her sole and separate property.[5] If there are minor children of the decedent who are stepchildren of the widow, then her allowance will be limited to $1,000, and the legal guardian or next of kin appointed by the court for such children may receive the balance. I think it is well to bear in mind that the full allowance is available to children of the decedent where there is no surviving widow. As fourth class claims, these allowances take precedence over the fifth class claims of creditors, and therefore are of particular value to surviving widows and children.

The allowances are granted upon application of the widow, her personal representative or representatives of the children. It should be noted that the widow is entitled to her allowance independent of her distributive share and regardless of any election she may have made to take her statutory share of one-half the estate.[6] The cases hold, however, that to claim the allowance the widow or child must be resident in the state.[7]

In addition to the widow's allowance, an ordinary distributive share may be obtained prior to final settlement. The court may even approve a partial distribution which the executor or administrator may make prior to the six months period for filing claims. If, however, it is subsequently discovered that there are insufficient funds to pay the claims, the representative may find himself in a delicate position, since it is likely that the distributees have expended their shares. Certainly, it is our duty to advise the fiduciary of this possibility.

After the six months period for filing claims has past and you can present evidence of sufficient funds to pay all claims, not overlooking the possibility of additional inheritance taxes, you will find that the court will be receptive to any reasonable suggestion or recommendation regarding distribution. Other factors permitting, the rules of court allow a distribution of ten per cent without bond. The court may require a refunding bond from the distributee if the distribution is made prior to the expiration of the time for filing claims. You will find, too, that the court will be more lenient in approving distribution prior to the six months period if the fiduciary is under a surety bond.

SALES OF PERSONALTY AND REAL ESTATE

The sale of personal property is governed by statute which permits the fiduciary to retain in an estate almost any personalty which he desires.[8] As a practical matter, I think it may be de-

[5] *Id.*, at § 211.
[6] *Id.*, at § 37. Hodgkins v. Ashby, 56 Colo. 553, 139 Pac. 538 (1914).
[7] Lions v. Egan, 107 Colo. 32, 108 P. 2d 873 (1940); Wiginton v. Wiginton, 111 Colo. 78, 145 P. 2d 980 (1944).
[8] *Id.*, at § 147.

sirable to have all of the personal property appraised in the interest of avoiding arguments with the Inheritance Tax Commissioner and the assessor's office regarding values. If you desire to sell any of the personal property, it must be by order of court unless the will contains such a power. Procuring a court order for the general sale of all personalty at not less than the appraised price and with the manner of sale designated, i.e. public or private, will usually dispose of the matter.

The procedure for the sale of real estate is also purely statutory.[9] Attorneys who do not handle these matters every day should check the statutes carefully before initiating the procedure, although there are forms available for all of the steps. Of course, if the will contains a broad power of sale for real estate, the statutory procedure is unnecessary, but, if there is no such power, or if an intestate estate is involved, the following steps should be taken:

1. Appraisal of property.
2. Petition to sell.
3. Notice of sale.
   a. Service of such notice.
   b. Petition and order of publication, if necessary.
4. Order for sale.
5. Report of sale.
6. Order confirming sale.

At the time of securing this last order, you should have your fiduciary's deed certified by the court. Since the fiduciary's deed contains his name and capacity, it is not necessary to record a copy of the letters of appointment.[10] Where a person has entered into a written contract for the conveyance of real estate but dies before executing it, his fiduciary may be required to perform the contract.[11]

TRANSFER OF CORPORATE SECURITIES

Through the efforts of T. Raber Taylor, of the Denver bar, we now have available a very comprehensive petition and order for the sale of securities which have greatly facilitated their transfer by eliminating the necessity for furnishing letters with each sale. If a will provides the power to sell securities, court procedure is unnecessary, but certified copies of the will must be furnished with each stock transfer. Upon request, some companies will return the copy of the will which may be used again to save some cost to the estate.

If there is no power of sale given in the will and the stock is not quoted on the "big board," it is necessary to have the secur-

[9] *Id.*, at §§ 155 through 193.
[10] Real Estate Title Standard No. 38 of the Denver and Colorado bar associations.
[11] COLO. STAT. ANN., c. 176, §§ 116-121 (1935).

ities appraised. Thereafter, an order of the court authorizing the sale is all that is necessary. No notice is necessary. Armed with certified copies of the order and inheritance tax releases, I suggest you approach your stock broker for further advice and guidance. Each company has different requirements. Some demand affidavits of non-residency, some require local inheritance tax releases, and still others ask for untold and unknown items prior to completing the actual transfer.

FEES OF FIDUCIARIES AND ATTORNEYS

The fiduciary does not have to accept any fee, and in family or small estates often does not take the full maximum allowed him under statute.[12] In an estate where there is a conservator, there is a little joker in the statute which provides that when the estate of any person under legal disability shall require administration for more than one year, the county court may order additional compensation to the personal representative.[13] This may be of help in obtaining a larger fee for your client. It might be mentioned that these maximum fees were set in 1908, and if it is felt that they are too low, the matter must be taken up with the legislature and not with the court.

The minimum fee schedule adopted by the Denver Bar Association on January 3, 1949 recommends as attorney fees in an estate matter four per cent of the gross assets up to $100,000, with a minimum fee of $100. The schedule adopted by the Colorado Bar Association convention of October, 1948, was even more sanguine, recommending a figure of six per cent of the gross assets.

Apparently the Denver County Court has never been aware of these recommended minimums, or if it has, it does not approve, for I have found that the usual fee allowed will run from three to three and one-half per cent of the gross estate. If it is desired to charge over and above that amount, it would be advisable to have all the heirs approve the fee in writing or to discuss the work with the court. Certainly there are many cases where unusual services have been rendered. Under such circumstances, I feel sure that the court will lend a sympathetic ear.

OTERO-CROWLEY BAR ELECTS STRAIN

George L. Strain of La Junta is the new president of the Otero-Crowley County Bar Association. Other officers selected for the new bar association year are Robert A. Trainor of Ordway, vice-president, and John R. Stewart of La Junta, secretary-treasurer.

---

[12] *Id.*, at § 232.
[13] *Id.*, at § 89(5).