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# Survey of El Paso County Court Records Reveals Probate Procedure Is Slow and Costly

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Colorado statute has taken a long stride in letting down the bars to a great field of evidence otherwise not admissible and which is often the only evidence obtainable, or is very important evidence in the determination of a cause. The state is to be highly lauded on expanding the former much too narrow application of the rule as to the admissibility in evidence of dying declarations.

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## SURVEY OF EL PASO COUNTY COURT RECORDS REVEALS PROBATE PROCEDURE IS SLOW AND COSTLY

### Less Than a Third of the Bar Get Four-Fifths of the Work

*Reported by* NORMAN W. BAKER*

LAYMEN often ask the lawyer, "How long does it take to settle an estate?" Although knowing the layman's usual incomprehension of, and impatience with, the time consumed to satisfy requirements of the law, the lawyer in all sincerity is usually apt to reply that it will take approximately a year or fourteen months if the estate doesn't get into litigation or encounter some similar delay. In Colorado such a statement is probably misleading—that is, it is misleading if the experience elsewhere is the same as in El Paso County. A comprehensive survey of the probate records of that county recently completed by the writer brought out the fact that the *average* time elapsed in all the estates from the filing of affidavit of decease or other first paper to the entry of decree of final settlement (or order of discharge, if any) runs from about twice to almost thrice the above time, depending upon the size of the estate.[1]

Before attempting to point out other interesting facts of probate practice revealed by this study, something might well be said about the nature of the survey itself. From the files of every decedent's estate filed in the El Paso County Court in the four-year period from January 1, 1933, to January 1, 1937, wherein the gross inventoried value was $7,500 or more, thir-

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[1]See Table 1 for exact averages.

ty-three different items of information were recorded. This data covered everything from decedent's sex and date of death to the value and kinds of his property and the amount, if any, he left in trust. In order to obtain the averages on various matters discussed herein, the estates were grouped as follows:

Class A—$ 7,500 up to $ 15,000 gross inventory value
Class B—$15,001 up to $ 25,000 gross inventory value
Class C—$25,001 up to $ 50,000 gross inventory value
Class D—$50,001 up to $100,000 gross inventory value
Class E—Over $100,000 gross inventory value.

It was impossible to include estates filed since the end of 1936 because so many of them are not yet closed and the data about them would be only fragmentary.

No attempt will be made to explain those extended periods of administration which existed in these estates. One thing is certain, it is not due to litigation. Out of a total of 198 estates surveyed only eleven of them (seven testate and four intestate) had what may here be termed litigation. By "litigation" is meant, matters contested in court by opposing lawyers—something more than mere routine admission of will, obtaining orders for sale and distribution, decrees, and the like. So those lawyers not yet fully initiated into probate practice who are perhaps hopeful of "a world of litigation in that regard" are unlikely to find it in probate.

Strange how the news of the death of some moneyed gentlemen travels so fast and so far. In several cases where the decedent died intestate, it was amazing how many previously-seldom-heard-from heirs suddenly bobbed up all around—ready and willing to litigate over their alleged place in the distributive sun. And litigate they did. Those contests to determine heirs and those cases for construction of the language of wills seem to be the most prolific sources of what litigation there is.

As is the case in many other fields of the law, probate practice in substantial volume is handled by a relatively few lawyers. The total gross inventoried value of all the estates surveyed was $8,937,996, consisting of $7,177,197 of personal property and $1,760,799 of real property. During the period under consideration there were approximately 61 lawyers in active practice within the county, but a number of them did not act for a single personal representative administering

an estate with gross inventory of $7,500 or more. The survey showed 18 lawyers represented $7,437,777 of the total gross inventoried value of these estates. In other words, thirty per cent of all the lawyers handled eighty-three per cent of the probate work.

The writer is afraid that those younger members of the bar who in dreamy moments visualize themselves as soon achieving a state of opulence through a lusty probate practice are likely to be disappointed. For if this survey is any criterion of the nature of such things, the vast majority of the decedents leaving estates of the values herein described will have aged considerably before passing on. And unless such lawyers have made themselves the cronies, so to speak, of persons of later middle age (or have otherwise received their patronage), it is hardly to be expected that they will be found representing many of these more substantial estates early in their legal life. In this study the average age of all testators at the time of executing their wills was 63 years, while the average age of all testatrices was 67 years.

One of the most interesting of all the wills probated during this period was one written entirely in Yiddish. As far as the writer could determine, the will was written by the decedent himself. The gentleman who made it, while engaged in a manufacturing enterprise on a very modest scale, left an estate considered fairly substantial for the region and the time (1935). Its net value for inheritance tax purposes was $71,488 and a large part of it was in the form of bank deposits. Of course the will was admitted but only after the expense of formalities for its interpretation. Another expense which that particular testator might have saved his estate was for large bond premiums, since the personal representatives were legatees and close relatives of the decedent and had he paid a modest fee to a lawyer for drafting his will, the lawyer might have suggested that the executors be allowed to serve without bond.

It was also found that in six other cases, decedents who were not lawyers had a yen to try writing their own wills and succeeded, at least in producing a will duly admitted to probate. The evidence in two other cases seemed to point strongly to the proposition that banks, acting through their officers, had drawn the wills. In connection with the wills, it should be

stated that out of the 132 testate estates only 23 decedents had provided for testamentary trusts. Of course the 66 intestate decedents created no such trusts at all.

The writer doesn't suppose that any of those present will be interested particularly in the attorneys' fees paid. However, as a purely academic pursuit, a careful record was kept regarding this subject.

The smallest fee paid was in 1934-35 in an estate of $30,604 gross where the decedent's son (a layman) acted as administrator. His only recorded legal expense (and this was confirmed by other research) was $5 paid to a local firm for drafting an affidavit of decease, petition for letters, etc., filed in opening the estate. The largest estate filed during this period had a gross inventory of $880,169 and the attorneys' fees amounted to $7,500. In the third largest estate filed, one with a gross inventory value of $558,864, the lawyer was allowed $4,000 but in this case the executor himself was a lawyer and was allowed an executor's fee of $17,000.

On the other hand, in an estate with gross inventory of $309,628 and net inheritance tax value of $356,836, the court allowed attorneys' fees of $8,300. In each of these estates just mentioned there was no "litigation" as that term has been herein defined. As is thus illustrated, it cannot be said dogmatically that such fees have—nor should they have—any invariable direct connection with the value of the estate. For example, consider that $4,000 attorney fees were allowed in each of the following estates, with gross inventory as shown: $155,000, $199,000, $172,000, $116,000, $558,864, and $192,000. As another example, $500 attorneys' fees were paid in estates with the following gross inventory values: $53,000, $11,000, $36,000, $13,000, $9,000, $85,000 $66,000, $23,000, $25,000, $16,000, $30,000, and $15,000. Probably in each of these cases, there were special circumstances that would account for the wide variation.

Nevertheless, a little help may be derived from the table of percentages of inventory value paid in attorneys' fees, shown in Table 2. In addition, if readers or their clients are interested in the shrinkage of estates and the costs of probate proceedings, Table 1 may be relied upon as carefully compiled from the record.

TABLE 1

| CLASS | Number Testate M | Number Testate F | Number Intestate M | Number Intestate F | Average Months of Administration | Average Administration Expenses Except Attorneys' Fees | Average Executor or Administrator Fee | Average Attorney Fee | Average Colorado Inheritance Tax | Average Federal Estate Tax | Total Expense and Taxes |
|---|---|---|---|---|---|---|---|---|---|---|---|
| A—$7,500 up to $15,000 | 25 | 23 | 24 | 16 | 22½ | $ 425.25 | $ 419.65 | $ 336.44 | $ 96.68 | 0 | $ 858.37 |
| B—$15,001 up to $25,000 | 18 | 14 | 6 | 5 | 24 | 746.44 | 711.83 | 627.75 | 246.36 | 0 | 1,610.55 |
| C—$25,001 up to $50,000 | 19 | 5 | 5 | 1 | 24½ | 1,574.17 | 1,178.32 | 771.25 | 488.00 | 0 | 2,833.42 |
| D—$50,001 up to $100,000 | 9 | 8 | 4 | 0 | 23½ | 3,094.50 | 2,633.75 | 1,361.50 | 1,692.33 | 563.90 | 6,712.23 |
| E—Over $100,000 | 10 | 7 | 2 | 2 | 31 | 7,370.07 | 6,754.46 | 4,357.73 | 12,053.58 | 19,759.28 | 43,540.66 |

Only those items included in the classification "Administration Expense" were taken from the court accountings on the respective estates which beyond any question were directly ascribable to death; in short, what is known as "Administration Expense" is very conservatively figured. As shown below, the fact of death is in most cases responsible for the incurring of numerous other expenses which would not likely be incurred by the decedent during his or her lifetime, though this cannot be proved beyond all doubt.

## ITEMS INCLUDED IN "ADMINISTRATION EXPENSE"

Court docket and filing fees; bond premiums; copies of papers; witness fees; advertising costs—including notice of probate of will, adjustment day, final settlement, etc.; fees of guardians ad litem, discreet persons, out of state attorneys handling depositions, sheriff's fees, transfer taxes and fees; expenses of attorneys generally, including traveling expense; checking and supervising properties of estate, etc.; appraiser's fees; service tax on attorneys' fees; executor's or administrator's fees; and inheritance tax department examination fees.

## ITEMS NOT INCLUDED UNDER "ADMINISTRATION EXPENSE"

Commissions on sales of real estate; salaries of persons to take care of a one-man business, where owner dies; watchmen and caretakers of residence properties; premiums on public liability insurance; costs of monuments or advertising for rentals, etc., etc.

TABLE 2

ATTORNEYS' FEES

Average Percentage of Inventory Values Paid for Attorneys' Fees.

(Only those estates were included in obtaining averages, where the amount so paid was actually shown in files.)

| CLASS | A | | B | | C | | D | | E | |
|---|---|---|---|---|---|---|---|---|---|---|
| Testate or Intestate | T. | Int. | T. | Int. | T. | Int. | T. | Int. | T. | Int. |
| Number in Average | 41 | 28 | 22 | 7 | 16 | 3 | 11 | 4 | 12 | 3 |
| Percentage | 2.87% | 3.56% | 3.06% | 3.6% | 2.2% | 1.36% | 2.03% | 1.52% | 2.19% | 1.9% |