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# ADMINISTRATION OF ESTATES-REQUIREMENT OF NOTICE FOR PROBATE OF WILL OR GRANT OF LETTERS OF ADMINISTSRATION

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## COMMENTS

ADMINISTRATION OF ESTATES—REQUIREMENT OF NOTICE FOR PROBATE OF WILL OR GRANT OF LETTERS OF ADMINISTSRATION*—To lawyers and judges in states which require notice for the initiation of probate or administration, it may come as a shock to discover that there are many jurisdictions in which these proceedings can be had without any notice whatever. It is the purpose of this note to investigate the situation in the various states, in order to show that in nearly half of them notice is not considered essential. The sole question to be considered is notice or no notice; this comment is not concerned with the kind of notice required, nor with the possibility of waiver of notice by interested parties. Nor does it deal with probate of nuncupative

* This comment is the result of research in connection with the Model Probate Code, now in process of preparation by a Committee of the Probate Division of the American Bar Association in cooperation with the University of Michigan Law School. See 42 MICH. L. REV. 961 (1944).—*Ed.*

wills, for which the requirements may be entirely different from those for probate or ordinary wills.

A few words should be said regarding the old English rule as to notice. As far as wills were concerned, probate could be in either common or solemn form, in the former of which no notice was given. Notice was required for probate in solemn form, and interested persons could demand such a probate following probate in common form.[1] The picture is less clear in the case of intestate estates. In *Burn's Ecclesiastical Law* the only mention of notice seems to be in connection with the grant of letters to creditors; it is there said that "the practice is usually for the ordinary first to issue a citation for the next of kin in special, and all others in general, to accept or refuse letters of administration, or shew cause why the same should not be granted to a creditor."[2] The same statement appears in a later edition of this work, following which the editor of this edition interpolates the following statement: "The practice indeed is most correctly stated by Dr. Burns, for it has become an unfailing maxim of the courts of probate, that where a party, whether executor, residuary legatee, or next of kin, has a *prior* title to a grant of administration, he or they must be cited before it is granted to any other person. And where there are two persons equally entitled, *e.g.*, two universal legatees, the court will grant administration to one after a decree with intimation has issued to the other."[3] Another early writer implies that no notice is necessary in case of grant of letters to the surviving spouse, but states that when the next of kin apply, citation is required "against all and singular next of kindred"[4] In any case, there seems to have been no statutory requirement of notice.

The rule today in England remains unchanged as to the probate of wills, and the terms common form and solemn form are still used.[5] In case of intestacy, notice is not required, but may be ordered by the court. Court rules provide that the registrars "may require proof" that notice of the application for letters of administration has been given to those equally entitled,[6] and further require a person intending to oppose the grant of letters to enter a caveat or request for notice.[7] *Halsbury's Laws of England* states that before a citation is signed by

[1] ATKINSON, WILLS 428 (1937).

[2] 2 BURN, ECCLESIASTICAL LAW 637 (1763).

[3] 4 BURN, ECCLESIASTICAL LAW, 9th ed., 366-367 (1832).

[4] CONSET, THE PRACTICE OF THE SPIRITUAL OR ECCLESIASTICAL COURTS, 3d ed., 14 (1708).

[5] 14 HALSBURY'S LAWS OF ENGLAND 205-232 (1934).

[6] Rules for Non-Contentious Business, Rule 28 P.R. and 34 D.R., set out in TRISTRAM AND COOTE, PROBATE PRACTICE, 18th ed., 805 (1940).

[7] Rule 59 P.R. and 72 D.R., id. at 812.

the registrar a caveat must be entered against a grant being made,[8] and states further that "the court usually requires citation of the parties having a claim to the grant" before it issues letters under its discretionary power to one not entitled, "but it will in special circumstances make the grant without citation."[9]

In the United States, notice is required by statute for probate of a will in twenty-eight states. These are Alabama, Arizona, California, Colorado, Connecticut (but the court may dispense with notice for cause shown), District of Columbia, Idaho, Illinois, Iowa, Kansas, Maine, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, New York, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Texas, Utah, Vermont, Wisconsin and Wyoming.[10] In sixteen states, on the other hand, the practice as embodied in the statutes is based on the English system of probate in common and solemn form, with or without modifications, so that probate can be had without notice. These sixteen states are Arkansas, Delaware, Florida, Georgia, Kentucky, Maryland, Mississippi, Missouri, New Hampshire, New Jersey, North Carolina, Oregon, South Carolina, Virginia, West Virginia and Washington.[11] In four states the statutes are silent:

[8] 14 HALSBURY'S LAWS OF ENGLAND § 310 (1934).

[9] Id. § 429.

[10] Ala. Code Ann. (1940) t. 61, §§ 48, 50; Ariz. Code Ann. (1939) §§ 38-206, 38-207; Cal. Prob. Code Ann (Deering, 1944) § 327; Colo. Stat. Ann. (Michie, 1935) c. 176, §§ 50, 51; Conn. Gen. Stat. (1930) § 4884; D.C. Code (1940) § 19-301; Ida. Laws Ann. (1943) §§ 15-206, 15-207; Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 216; Iowa Code (Reichman, 1939) §11865; Kan. Gen. Stat. Ann. (Corrick, Supp. 1943) § 59-2222; Me. Rev. Stat. (1930) c. 76, § 5; Mich. Stat. Ann. (1943) § 27.3178 (99); Minn. Stat. (1941) § 525.24; Mont. Rev. Code Ann. (Anderson & McFarland, 1935) §§ 10025, 10026; Neb. Rev. Stat. Ann. (1943) § 30-217; Nev. Comp. Laws (Hillyer, Supp. 1941) § 9882.11; N.M. Stat. Ann. (1941) §§ 32-204, 32-206; N.Y. Surr. Ct. Act (Cahill, 1937) § 140; N.D. Rev. Code Ann (1943) §§ 30-0508, 30-0509; Ohio Gen. Code Ann (Page, 1937) § 10504-17; Okla. Stat. Ann. (1941) t. 58, § 25; R.I. Gen. Laws Ann. (1938) c. 571, § 3; S.D. Code Ann. (1939) § 35.0206; Tex. Civ. Stat. Ann. (Vernon, 1939) § 3333; Utah Code Ann. (1943) § 102-3-5; Vt. Pub. Laws (1935) § 2763; Wis. Stat. (1943) § 310.04; Wyo. Rev. Stat. Ann. (Courtright, 1931) §§ 88-214, 88-215. Louisiana is not considered in this study, since its system is based on the civil law rather than the common law.

[11] Ark. Dig. Stat. (Pope, 1937) §§ 14540 and 14544; Del. Rev. Code (1935) § 3799; Fla. Stat. Ann. (1941) §§ 732.23, 732.28, 732.29; Ga. Code Ann. (Park, 1938) §§ 113-601, 113-602, 113-607; Ky. Rev. Stat. (1944) §§ 394.170, 394.180, 394.220; Md. Ann. Code (Flack, 1939) Art. 93, § 360; Miss. Code Ann. (1942) §§ 502 to 504; Mo. Rev. Stat. Ann. (1942) §§ 1 and 529; N.H. Rev. Laws (1942) c. 349, § 2, and c. 351, §§ 6 and 7; N.J. Rev. Stat. (1937) §§ 3:2-21 and 3:2-22; N.C. Gen. Stat. Ann. (Michie, 1943) §§ 31-12 and 31-32; Ore. Comp. Laws Ann. (1940) § 19-204; S.C. Code Ann. (1942) § 8932; Va. Code Ann. (Michie, 1942) §§ 5253, 5254, 5259; W. Va. Code Ann. (Michie, 1943) §§ 4065 and 4070; Wash. Rev. Stat. Ann. (Remington, 1932) § 1380.

Massachusetts, Indiana, Pennsylvania and Tennessee. Notice seems to be required in Massachusetts even without a statute, but apparently is not necessary in the other three states.[12]

In the case of intestate estates, statutes require notice in all cases in nineteen states. These are Arizona, California, Connecticut (but the court may dispense with notice for cause shown), District of Columbia, Georgia, Idaho, Kansas, Michigan, Minnesota, Montana, Nebraska, Nevada, North Dakota, Rhode Island, South Carolina, South Dakota, Texas, Utah and Wisconsin.[13]

In thirteen other states notice is not required except under certain circumstances. Thus in one group of states notice is required only to persons preferred over the petitioner to be administrator. In Florida notice must be given "to all known persons qualified to act as administrator and entitled to preference over the person applying."[14] The Illinois statute requires notice to one "entitled either to administer or to nominate a person to administer in preference to the petitioner."[15] In New Jersey all next of kin or parties by law entitled to administer, both residents and non-residents, must be notified if the petitioner does not have preference or when application is made after forty days from decedent's death.[16] In New York, notice must be given to competent residents of the state who have a right to administration prior or equal to that of the petitioner, and if the petitioner is not entitled to share in the distribution of the estate notice must also be given to "all resident infants and adjudged incompetents who are so entitled."[17] The Oklahoma statute provides that no notice shall be given "if the petition

[12] NEWHALL, SETTLEMENT OF ESTATES AND FIDUCIARY LAW IN MASSACHUSETTS, 3d ed., § 28 (1937); I HENRY, PROBATE LAW AND PRACTICE OF INDIANA 760 (1931); 2 HUNTER, PENNSYLVANIA ORPHANS' COURT COMMONPLACE BOOK 1122 (1939). No authority was found for Tennessee, but a local probate expert has advised that notice is not required in that state.

[13] Ariz. Code Ann. (1939) §§ 38-406; Cal. Prob. Code Ann. (Deering, 1941) § 441; Conn. Gen. Stat. (1930) § 4904; D.C. Code (1940) § 20-217 ("such notice . . . as the rules of the court may require"); Ga. Code Ann. (Park, 1936) § 113-1212; Ida. Laws Ann. (1943) § 15-320; Kan. Gen. Stat. Ann. (Corrick, Supp. 1943) § 59-2222; Mich. Stat. Ann. (1943) § 27.3178 (126); Minn. Stat. (1941) § 525.282; Mont. Rev. Code Ann. (Anderson & McFarland, 1935) § 10076; Neb. Rev. Stat. Ann. (1943) § 30-331; Nev. Comp. Laws (Hillyer, Supp. 1941) § 9882.56; N.D. Rev. Code Ann. (1943) § 30-0206; R.I. Gen. Laws Ann. (1938) c. 571, § 3; S.C. Code Ann. (1942) § 8972; S.D. Code Ann. (1939) § 35.0506; Tex. Civ. Stat. Ann. (Vernon, 1939) § 3333; Utah Code Ann. (1943) § 102-4-8; Wis. Stat. (1943) § 311.03.

[14] Fla. Stat. Ann. (1941) § 732.43.

[15] Ill. Ann. Stat. (Smith-Hurd, 1941) c. 3, § 251. But see c. 3, § 252, requiring notice in all cases when letters are sought on presumption of death.

[16] N.J. Prerog. Ct. Rule 4 and 7; Orphan's court rule 2 and 5.

[17] N.Y. Surr. Ct. Act (Cahill, 1937) § 120.

asks for the appointment of some person interested under the law to appointment, and there shall accompany such petition a waiver of all persons having a prior right to appointment." [18] If there is no one with a prior right to appointment, the petitioner may presumably be appointed without even the formality of a waiver of notice.

New Hampshire also belongs in this group, for its statute provides that the judge may at discretion proceed without notice "in the appointment of the person entitled to such trust, or of the person by him nominated, as administrator." [19] Since the surviving spouse, next of kin and suitable persons are equally entitled to administration [20] it is clear that notice is not necessary in the normal case in New Hampshire.

In Washington notice is not required if the application for letters "be presented by or on behalf of the surviving husband or wife." [21] Similarly in Kentucky, notice is required only "if there be no surviving spouse, or if such spouse waives the right of appointment or is not qualified to act and does not nominate a suitable administrator and there are more than one resident heir at law entitled to appointment. . . . Notice of such hearing shall be given to the surviving spouse and all known heirs of the deceased residing in the state." [22] The court may in its discretion dispense with notice altogether in any estate where the gross amount involved is less than $1,000.[23]

In another group of states the only statutory requirement for notice is that the preferred persons be notified if they fail to apply for letters for 30 days and it is sought to appoint a stranger or a creditor. In Maine, any suitable person may be appointed if the preferred persons are unsuitable, "or being residents in the county, they after due notice neglect or refuse for thirty days from the death of the intestate to take out letters of administration." [24] And in Massachusetts a creditor may be appointed "after public notice upon the petition" if the preferred persons renounce or fail for thirty days after the death of the intestate.[25] Similarly in North Carolina, any suitable person may be appointed if those entitled to preference fail for thirty days, after citation to such persons; furthermore, "if no person entitled to administer applies for letters of administration on the estate of a decedent within six months from his death, then the clerk may, in his discretion, deem

[18] Okla. Stat. Ann. (1941) t. 58, § 128.
[19] N. H. Rev. Laws (1942) c. 349, § 2.
[20] N.H. Rev. Laws (1942) c. 352, § 2.
[21] Wash. Rev. Stat. Ann. (Remington, 1932) § 1433.
[22] Ky. Rev. Stat. (1944) § 395.015.
[23] Ky. Rev. Stat. (1944) § 395.016.
[24] Me. Rev. Stat. (1930) c. 76, § 18.
[25] Mass. Ann. Laws (Michie, 1932) c. 193, § 1.

all prior rights renounced."[26] No notice is necessary after the six months have elapsed.[27]

The remaining two states of the twelve which require notice only under certain circumstances are Maryland and Ohio. In Maryland "it shall not be necessary to give notice to a party entitled to administer if he be out of the state, nor shall it be necessary to summon or notify collateral relations more remote than brothers and sisters of the intestate, in order to exclude them from the administration."[28] The only requirement in Ohio is for notice to "the person or persons resident of the county entitled to administer the estate."[29]

In addition to the thirteen states just described, there are three more whose statutes provide for notice at the option of the court. In Arkansas and Missouri notice "may" be given to the preferred persons if they fail to apply for thirty days,[30] while in Oregon the court "in its discretion may, if they reside within the county," order notice to such persons.[31] The wording of the Oregon statute makes it clear that notice is not required, and the same would seem to be true of Arkansas and Missouri. Indeed, this assumption is borne out as to Arkansas by correspondence with a local probate expert, who states that notice is not required there.

In the remaining thirteen states the statutes are silent as to any requirement of notice, creating a presumption that administration may be had without any prior notice. These states are Alabama, Colorado, Delaware, Indiana, Iowa, Mississippi, New Mexico, Pennsylvania, Tennessee, Vermont, Virginia, West Virginia and Wyoming. No case law on the subject has been found, but probate experts in eight of these states—Alabama, Colorado, Delaware, Mississippi, Pennsylvania, Tennessee, Vermont and West Virginia—have advised that notice is not required in those states, although in some of them it is the local practice to give at least some sort of notice. It should be remembered that every state, except Massachusetts and Virginia, requires a published notice to creditors to file their claims, and this notice may to some extent serve as a substitute for notice before appointment, since it gives public notoriety to the fact that an administration has been commenced.

There seems to be no correlation between requirements of notice in testate and in intestate estates. Some states require notice in both cases, some in neither; some states require notice for one and not for the other.

[26] N.C. Gen. Stat. Ann. (Michie, 1943) § 28-15.
[27] Withrow v. dePriest, 119 N.C. 541, 26 S.E. 110 (1896).
[28] Md. Ann. Code (Flack, 1939) Art. 93, § 33.
[29] Ohio Gen. Code Ann. (Page, 1937) § 10509-4.
[30] Ark. Dig. Stat. (Pope, 1937) § 8; Mo. Rev. Stat. Ann. (1942) § 8.
[31] Ore. Comp. Laws Ann. (1940) § 19-211.

The box-score thus stands as follows:

Testate estates:

Notice required in 29 states.

Notice not required in 19 states.

Intestate estates:

Notice required in 19 states.

Notice required only under certain circumstances in 13 states.

Notice never required in 16 states.

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