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Probate Procedure

P. M. Paulsen

PROBATE PROCEDURE

By P. M. PAULSEN*

THE purpose of this article is to clarify certain parts of the probate procedure upon which there is not a unanimity of opinion among the lawyers. A few suggestions for changes in the probate code by legislative enactment will also be included.

The County Court acquires jurisdiction by the filing of a petition and the issuance and service of citation, or the voluntary appearance of all interested parties. Some lawyers still insist on using the old practice of presenting to the Court an order fixing time for the hearing in addition to the citation. Such order is no longer necessary. Requirements for an order approving the inventory and appraisement have also been eliminated, but some attorneys still ask the Court to sign such an order.

Service of the citation is, of course, one of the most important parts of the procedure. A new requirement is included in the 1943 Code when service is by publication. In addition to such publication the petitioner or his attorney must, at least ten days prior to the hearing, mail to each respondent whose address is known, a copy of the citation. In case there are minors or incompetents named as respondents, there must of course be service upon a special guardian as well as personal service upon minors over fourteen years of age and upon the incompetent. Some lawyers do not agree that personal service upon the incompetent is necessary; but it is my opinion that such personal service is required. In proceedings to appoint guardians of minors and incompetents, the question sometimes arises as to whether a special guardian is necessary for the purpose of making service. The statute does not seem to be entirely clear on the subject, but I believe the best practice is to have a special guardian. Without any special guardian, no service of any kind is made on minors under fourteen years of age, and I do not see how the Court can acquire jurisdiction until such minors have been duly served. Incidentally, I think a special guardian should be expected to take some interest in the proceedings and to properly represent the ward's interests in the estate. Too often a

* Judge of County Court, Fargo, North Dakota.

special guardian merely responds to the formality of admitting service of the citation without finding out what the proceeding is all about. Some practitioners provide for payment of a small fee to the special guardian for attending the hearing. I think this practice should be extended, and special guardians required to look after their ward's interests.

There seems to be considerable misunderstanding as to what the law requires to be done with a last will and testament after the testator dies. Section 30-0502 of the Code specifically requires that every person having custody of a will MUST immediately after the death of the testator deliver the same to the Judge of the County Court, and failure to do so may subject him to damages. I have people come to my office repeatedly to inquire about the will of a person who has died, and to discover later on that such will has been retained by its custodian for weeks and sometimes months. The proper thing for a person having such a will in his possession, whether he be a relative of the deceased, or an attorney or friend or banker or other business representative, is to at once turn the will over to the County Court. It might also be noted that wills may be filed in the office of the Judge of the County Court by the maker thereof or anybody on his behalf, at any time, for safekeeping. A receipt is given to the person depositing the will for which service there is no charge. Some people, of course, prefer to leave their wills in safety deposit boxes, and this is perfectly proper. But for people who do not have safe places in which to keep wills, I recommend that they be filed in the County Judge's office. In this connection, it might be well to mention that there is a provision of law for the probate of a lost or destroyed will. This provision requires at least two credible witnesses who can prove the provisions of the will, and that the same was in existence at the time of the death of the testator.

A great deal of difficulty is experienced in keeping guardianship proceedings up to date as required by Chapter 222 of the 1927 Session Laws (Sections 30-1409 to 30-1413 of 1943 Code). A guardian should file an inventory of the estate within three months after his appointment and thereafter make an annual report to the Court. If the value of the estate exceeds $20,000.00 semi-annual reports are required. Provision is also made for the Court to keep a diary and to

notify guardians who fail to file such inventory and make the necessary reports to the Court. We have to send out scores of notices to guardians annually about these matters. The guardians simply do not seem to understand what is required, and I believe attorneys could be of a great deal of assistance to the Courts as well as to the guardians if they would instruct their clients as to the duties of a guardian at the time he is appointed, and perhaps even at intervals thereafter. We have had pamphlets, enumerating the duties and powers of guardians, printed. These pamphlets are handed out to guardians from time to time, but I believe additional instruction by the attorneys would also help.

I think the subject of summary administration of small estates needs to be commented upon, for it does not seem to be clear to all practitioners in what cases the provisions for summary administration are applicable. There are two methods of procedure. One is where the return of the inventory shows that the estate does not exceed the sum of $1500.00, and that there is a surviving husband or wife or minor children; and the other is by petition for summary administration as provided for by Section 30-1702 of the Code. The requirements for such petition are set forth in Section 30-1703, and service of citation is provided for in the next Section. We have had several cases for summary administration filed where there were neither a surviving husband or wife, or minor children. It has been seriously urged by some attorneys that summary administration is permitted in any case where the amount of the estate does not exceed $1500.00. This definitely is not the case. There must be either a surviving husband or wife or minor child (or children) in order for the summary administration statute to be applicable.

Attention should be called to the 1947 Statute specifying the time for filing claims to be three months from the first publication of notice to creditors. Some attorneys still want to follow the old statute in which the time for filing claims is six months. All claims MUST be filed with the County Court. It is not sufficient that they be presented to the administrator. This was changed by the 1943 Code. Unfortunately some claimants will simply hand their claims to the administrator in spite of the statement in the notice to creditors that they must be filed with the Court. The net result is that in such

cases the claims are not filed in time, and the Court cannot allow them. I might also mention that it is not necessary to file claims for such items as funeral services and expenses in connection with last illness. The administrator or executor is permitted to pay such charges without the presentation or filing of formal claims.

Occasionally the question of attorneys fees comes before the Court, usually at the time of hearing on the final report and accounting. Fortunately, in Cass County at least, it is very seldom that the Court is called upon to pass on the matter of fees. This is nearly always adjusted between the lawyer and his client. Recently the matter came to the Court's attention because of a resolution adopted by the Cass County Bar Association. This resolution provided for a minimum fee of three per-cent of the value of the estate, but not less than $100.00. Some attorneys took the position that they were obliged to follow that fee schedule.

After some further discussion with committees, etc., it was brought out that this resolution was merely intended as a suggestion, and that it was not intended to obligatory on the part of the lawyers to follow the same in all cases. This was, of course, the only action the Bar Association could take in the matter. It would be a violation of some of the canons of ethics of the American Bar Association for any local bar group to demand adherance to any obligatory fee schedule. Obviously three percent of the value of the estate would be too high a fee in some cases and not enough in others. The value of a lawyer's services to his client is sometimes difficult to determine. There are a number of factors which enter in such as the lawyer's skill and experience and his professional standing and character; the time and labor consumed, and the results obtained, etc. It is a matter that can best be left to the good judgment of the lawyer and his client. This whole matter of fees is covered in a very able discussion by Herbert G. Nilles of Fargo in the July 1947 issue of Bar Briefs. I recommend that every attorney, in whose mind there is any question as to fees, read this article. I believe it would be especially advantageous to the younger attorneys.

During the last few years joint tenancies, especially between husband and wife, have become quite numerous. A lot of people seem to have the idea that when one of the joint tenants

dies there is nothing the survivor needs to do in order to clear the title to the property in question. This, however, is not quite true. The state is interested in finding out whether the property held in joint tenancy may be subject to inheritance taxes. This question may be taken up and determined directly with the Tax Commissioner, but in most cases a petition is filed in the County Court asking that the value of the property in question be determined and the tax fixed by the Court and submitted to the State Tax Commissioner for approval. The procedure in these cases is not definitely set out in the Code, and lawyers have different ways of going at it. I think the best practice is to file a petition by the survivor, and arrange a hearing before the Court to determine the value of the property. The Court may see fit to appoint appraisers to fix the value; or he may be satisfied to accept the testimony of persons familiar with the property in question, who are able to place a value thereon. Either way is satisfactory. When that has been done an inheritance tax return on the regular form used in probate proceedings is made out, and the Court then issues its order determining the amount of the tax or that it is exempt from any inheritance tax. This return and order is then submitted to the Tax Commissioner for his approval. Then a certified copy of the Court's order and the Tax Commissioners approval of same is recorded in the office of the Register of Deeds. No further proceedings are then required. I might mention in this connection that the Attorney General has recently ruled that it is not necessary to pay the usual probate filing fee of $7.50 in these joint tenancy proceedings.

With reference to suggestions for changes in probate procedure, I have already referred to new provisions in connection with the filing of claims and the service of citations. These changes were very desirable, and mark a distinct improvement in our probate practice. I can think of nothing further to add or suggest for changing the procedure as long as we continue the present system of probate procedure in personam as distinguished from proceedings in rem. I am of the opinion that the latter is the better procedure. This prevails in the state of Minnesota and many other states. I think it might be well to have a committee of the State Bar Association appointed to study this question, and if a change is deemed advisable, submit their recommendations to the State Legislature.