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Executors and Administrators-Sale of Realty in the Estate-Better Price as Reason for Permitting Sale Under "Best Interests of the Estate" Provision

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EXECUTORS AND ADMINISTRATORS—SALE OF REALTY IN THE ESTATE—BETTER PRICE AS REASON FOR PERMITTING SALE UNDER "BEST INTERESTS OF THE ESTATE" PROVISION—Pursuant to a Missouri statute permitting sale of real property for any purpose in the best interests of the estate,[1] administrator filed a petition for power to sell realty in the estate of the decedent for the reason, *inter alia*, that a better price could be obtained at a private sale than at a judicial sale resulting from a suit for partition.[2] The plaintiff heir's subsequent bill for partition of the real estate was dismissed by the trial court, which found that the administrator's petition for power to sell had conferred jurisdiction of the property on the probate court. On appeal, *held*, reversed. The statute authorizing sale of real estate by an administrator deals with the administration of an estate as an entity distinct and apart from the interests of the decedent's heirs or

1 "Purposes for which property may be sold, mortgaged, leased or exchanged. 1. Real or personal property belonging to an estate may be sold, mortgaged, leased or exchanged under court order when *necessary* for any of the following purposes: (1) For the payment of claims allowed against the estate; (2) For the payment of any allowance made to the surviving spouse and minor children of the decedent; (3) For the payment of any legacy given by the will of the decedent; (4) For the payment of expenses of administration, including court costs; (5) For the payment of any gift, estate, inheritance or transfer taxes assessed upon the transfer of the estate or due from the decedent or his estate; (6) For any other purpose in the *best interests of the estate*." MO. REV. STAT. § 473.460 (Supp. 1962). (Emphasis added.)

2 The court noted that the appellee relied exclusively upon this reason in the principal case. Initially, however, the administrator had supported his petition for power to sell with a second reason, that distribution in kind was not feasible. The court said unequivocally, though in dictum, that this is not a sufficient basis for permitting sale of realty. Principal case at 412.

distributees; an administrator's petition for power to sell supported solely by a reason which concerns only the heirs does not confer jurisdiction on the probate court. *McIntosh v. Connecticut Gen. Life Ins. Co.*, 366 S.W. 2d 409 (Mo. 1963).

At common law a decedent's real property was not, in the absence of testamentary authority,[3] chargeable, as was personal property,[4] for his debts, the expenses of administration, or commissions.[5] In all American jurisdictions except Virginia, however, statutory exceptions to this common-law rule exist which permit the sale of realty in the estate when necessary to satisfy the debts of the decedent.[6] Modern legislation has further expanded this area of probate jurisdiction by permitting the sale of realty when necessary to satisfy claims accruing against the estate in addition to debts incurred during the life of the deceased.[7] These statutes, however, have been strictly construed because they derogate from the common law.[8] This narrow construction is exemplified by the requirement imposed in twenty-five states and the District of Columbia that an administrator desiring to sell realty to satisfy any of the statutorily authorized claims must show the probate court that the personal estate is insufficient for this purpose.[9] In the remaining states, a court of probate jurisdiction may order

3 Broadhurst v. Mewborn, 171 N.C. 400, 88 S.E. 628 (1916). See generally Annots., *Implied power of executor or testator-trustee to sell real estate*, 134 A.L.R. 378 (1941); Annot., 23 A.L.R.2d 1000 (1952); ATKINSON, WILLS § 123 (2d ed. 1953).

4 See, *e.g.*, *In re* Estate of Lausterer, 30 Ill. App. 2d 401, 174 N.E.2d 888 (1961); Tobiason v. Machen, 217 Md. 207, 142 A.2d 145 (1948). The common-law theory was that title to realty vested in the heirs or devisees immediately upon the death of decedent. See Blizzard v. Penley, 186 F. Supp. 746 (D. Colo. 1960); *In re* Estate of Fry, 28 Misc. 2d 949, 218 N.Y.S.2d 755 (Surr. Ct. 1961). It is, however, almost universally true in American jurisdictions today that while title to realty vests in the beneficiaries, statutes provide for possession by the personal representative for purposes of settling the estate. See generally JENKS, SHORT HISTORY OF ENGLISH LAW 66 (5th ed. 1938); NATIONAL ASSOCIATION OF PROBATE AND BANK ATTORNEYS, PROBATE LAW DIGEST (1938).

5 JENKS, *op. cit. supra* note 4, at 65-66; ZOLLMAN, TIFFANY'S REAL PROPERTY 826-27 (abridged ed. 1940).

6 ATKINSON, *op. cit. supra* note 3, § 123. In Virginia, the only way in which land may be reached to satisfy creditors' claims is by action against the heir or devisee unless the will provides for payment out of land. Catron v. Bostic, 123 Va. 355, 96 S.E. 845 (1918). This is substantially the common-law procedure.

7 *E.g.*, MICH. COMP. LAWS § 702-53 (1948) (sale authorized to meet "all charges against the estate"); Folley v. Gribling, 128 Ind. 110, 26 N.E. 794 (1891) (expenses of administration); see Ellyson v. Lord, 124 Iowa 125, 99 N.W. 582 (1904) (legacies). See generally ATKINSON, *op. cit. supra* note 3, § 123. However, a number of states still narrowly limit the purposes for which realty can be sold. See, *e.g.*, MD. ANN. CODE art. 16, § 157 (1957), applied in Tait v. Safe Deposit & Trust Co., 70 F.2d 79 (4th Cir. 1934) (realty not liable for expenses of administration); McGaw v. Gorten, 96 Md. 489, 54 Atl. 133 (1903) (debt must be due during decedent's lifetime).

8 See, *e.g.*, *In re* Wetter's Estate, 15 Misc. 2d 190, 179 N.Y.S.2d 738 (Surr. Ct. 1958). See generally ALLEN, LAW IN THE MAKING 442 (6th ed. 1958); Fox, *Sales in Probate Court*, 20 WIS. S.B.A. BULL. 120 (1947).

9 See, *e.g.*, Gilmore v. Roberton, 139 So. 2d 604 (Ala. 1963); Poindexter v. First Nat'l Bank, 247 N.C. 606, 101 S.E.2d 682 (1958); see ZOLLMAN, *op. cit. supra* note 5, at 828: "A sale of realty to pay debts is ordinarily authorized when the personal estate is insufficient, and such facts, to give the court jurisdiction, must appear from the bill or petition." For

the sale of realty in lieu of personalty when such a sale is beneficial to the estate.[10] However, the existence of a claim against the estate is in nearly all jurisdictions a *sine qua non* of the power to sell real assets.[11] An exception to this generalization exists in those states which provide that the probate court may, with the consent of one or more of the interested parties, authorize the sale of realty even though no claims remain to be satisfied.[12]

The Missouri Drafting Committee's comment on the statute applied in the principal case asserts that the Model Probate Code formulation was intended to be adopted.[13] The Model Code comprehensively expands probate jurisdiction over the sale of estate assets. First, probate jurisdiction is enlarged by abolishing the common-law distinction between personal and real property,[14] thereby making it possible to sell realty in the estate even though the personalty is not exhausted. Second, the probate court is authorized to permit the sale of estate assets to satisfy *all* valid claims that arise in the course of administration.[15] Finally, the Code expands probate jurisdiction in situations like that of the principal case by permitting the sale of realty for the purpose of distribution when distribution in kind would prove unsatisfactory.[16] If the Committee Comment were completely

statutory examples, see ILL. ANN. STAT. ch. 3, § 225 (Smith-Hurd 1961); KAN. GEN. STAT. ANN. § 59-1410 (Supp. 1961).

10 See Basye, *Abolition of the Distinction Between Real and Personal Property in the Administration of the Decedent's Estate*, 51 ILL. B.J. 214 (1962). For statutory examples, see CAL. PROB. CODE § 754; MICH. COMP. LAWS § 709.2 (1948).

11 See, *e.g.*, *In re* Estate of Canfield, 107 Cal. App. 2d 682, 238 P.2d 67 (1951); *In re* DaRoza's Estate, 82 Cal. App. 2d 550, 186 P.2d 725 (1947); Magaw v. Emick, 167 Kan. 580, 207 P.2d 448 (1949); Oldham v. McElroy, 134 Ky. 454, 121 S.W. 414 (1909). *Contra*, Offredi v. Huhla, 135 Conn. 20, 60 A.2d 779 (1948); Callahan v. Peltier, 121 Conn. 106, 183 Atl. 400 (1936); Hartman v. Vissage, 191 Ga. 446, 12 S.E. 294 (1940); Warren v. Warren, 104 Ga. App. 184, 121 S.E.2d 343 (1961).

12 ALA. CODE tit. 61, § 245 (1948) allows sale of realty by the executor or administrator, though all claims are satisfied, if an adult heir or devisee files his written consent to sale of the land; ALASKA COMP. LAWS ANN. § 13.30.675 (Supp. 1963) allows sale if the heir or heirs direct in a written request which has been acknowledged as in a deed and filed in the court having probate of the estate; MICH. COMP. LAWS § 709.2 (1948) allows sale if approved in writing by the persons owning a majority interest of the real estate proposed to be sold; N.M. STAT. ANN. § 31-7-11 (1953) allows sale if all interested parties file a written consent.

13 "COMMITTEE COMMENT: Subsection 1 is a *copy* of section 152 of the Model Probate Code and constitutes an expansion of the grounds upon which property may be sold or dealt with." 26 MO. ANN. STAT. § 152, at 163. (Emphasis added.)

14 MODEL PROBATE CODE § 150 (Simes 1946); see Simes, *The Organization of the Probate Court in America*, 43 MICH. L. REV. 113, 125 (1944): "Much can be said for legislation of this character. Certainly there is no justification today for a distinction between real and personal estates with respect to the title of the personal representative." See Basye, *supra* note 10: The advantages of abolishing the distinction are (a) equal treatment of both types of property, (b) improvement of the mechanics of administration, (c) encouragement to adopt uniform laws, (d) prevention of title defects, and (e) equalization of the abatement question.

15 MODEL PROBATE CODE § 152 (Simes 1946). According to this provision, the probate court may authorize sale for funeral costs or expenses of administration as readily as for debts incurred during the life of the deceased.

16 MODEL PROBATE CODE § 152(f) (Simes 1946). The comment following this section

accurate in asserting that the Missouri legislature adopted the pertinent section of the Model Probate Code, it would seem that the Missouri Supreme Court gave the statute an inexcusably narrow reading in denying probate jurisdiction over the realty. However, it appears that the Comment is not correct because the subsection of the Model Code which authorizes sale for the purpose of distribution does not appear in the Missouri code.[17] Thus, the court's strong dictum to the effect that a sale for the purpose of distribution is not permitted accurately interpreted legislative intent. The court likewise properly applied the statute in rejecting the other reason advanced in support of the petition—that a better price could be obtained at a private sale. The statute does not specifically authorize a sale for that purpose; nor does the comprehensive "best interests of the estate" subsection permit sale in this instance because, as the court correctly observed, the price at which assets in the estate are sold concerns only the heirs if there are no claims by creditors.

In the principal case the administrator did not show that the desired sale was sought by any of the heirs. Had he done so, the court might have viewed the petition as presenting a somewhat different question. If it is clear from the demands of one or more heirs that partition will be necessary, the probate court, already having jurisdiction of the estate, can prevent the expense and delay of a suit for partition by granting the administrator's request for power to sell. It has already been noted that statutes in some states make partition properly a part of administration under such circumstances.[18]

The Model Probate Code, in authorizing sale for the purpose of distribution although there are no claims against the estate and no request from any heirs, appears to dictate a result different from that reached in the principal case. In comparing the Missouri statute to the Model Code, the basic policy consideration should be whether the sale of realty for the purpose of distribution or of obtaining a better price at private sale is properly a matter for determination by the administrator. This question should be resolved in the negative. Since sale by the administrator may provide a higher valuation and thereby increase the base for his fee, it seems undesirable to grant the administrator the opportunity so to aggrandize his compensation. This seems a likely basis for the decision of the Missouri legislature to omit this Model Probate Code provision.

Permitting an administrator's sale of real property in the absence of claims against the estate or the consent of the heirs is inconsistent with the

implies that the Code makes no distinction between a sale to satisfy a valid claim and a sale for distribution. This is contrary to the great weight of authority. See note 11 *supra* and accompanying text.

17 Compare the applicable Missouri statute, *supra* note 1, with § 152 of the Model Probate Code, which includes an additional purpose for which estate assets may be sold: "For making distribution of the estate or any part thereof."

18 See note 12 *supra*.

goal of the Model Probate Code to facilitate distribution of the decedents' estates and to dispense with administration in all cases where no protection of creditors is necessary.[19] These goals are better implemented by the rule of the principal case that partition or the possibility of a better sale price of the land does not concern the administration of the estate and, therefore, cannot sustain an administrator's petition for power to sell. It is to be hoped, however, that this decision will not prevent the authorization of an administrator's sale where some of the heirs desire it and where the alternative would involve the expenses of a separate suit in partition.

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[19] Rheinstein, *The Model Probate Code: A Critique*, 48 COLUM. L. REV. 534, 535, 549-50 (1948).