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Descent and Distribution - Effect of Advancements, Debts and Releases When Expectant Distributee Predeceases Intestate

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DESCENT AND DISTRIBUTION—EFFECT OF ADVANCEMENTS, DEBTS AND RELEASES WHEN EXPECTANT DISTRIBUTEE PREDECEASES INTESTATE — To effectuate the policy of the intestate statutes that

equality of inheritance is intrinsically desirable,[1] all states but one, New Mexico, have enacted statutes charging the distributive share of an heir or next of kin with any advancements received by him during the intestate's life.[2] In addition, it is common practice to charge a debt owed by a distributee to the intestate against the distributee's share of the intestate's estate.[3]

It is more difficult to determine what is equality of inheritance, however, when the expectant distributee predeceases the intestate, and his descendants, the grandchildren or nephews and nieces of the intestate,[4] claim a share of the estate. They did not directly receive the advancement or loan, and it is not necessarily true that they were in any way benefited by it. If, on the other hand, they are not charged (and assuming in the case of debts that the debt is uncollectible), the other distributees will receive less than their original shares of the estate while the dead distributee's line receives more than its share. In the case of an advancement, even if the grandchildren gained no direct benefit from the sum advanced, it may well have enlarged the estate left by their parent. This estate would typically be shared by these same grandchildren, who will now also take their parent's share in the grandparent's estate.

The law of advancements is part of the law of intestate succession. But the right of retainer, which allows an offset against a distributee's share of the estate for a debt owed by the distributee to the decedent, is merely a method of debt collection and historically has not been considered as a part of the law of inheritance.[5] For this and other reasons, the law applicable to advancements in this situation is better treated separately from that concerning debts of predeceased expectant heirs. There are also sufficient differences between the treatment given a release and that of either an advancement or a debt to warrant separate discussion.

[1] See Parsons v. Parsons, 52 Ohio St. 470 at 487, 40 N.E. 165 (1895).

[2] See, generally, MODEL PROBATE CODE, Appendix 253 (1946), for the terms of the different advancement statutes.

[3] See MODEL PROBATE CODE §187 and comment following (1946); 34 MICH. L. REV. 395 (1936).

[4] There seems to be no difference in theory whether the claimants are nephews and nieces or grandchildren. In some states, however, children of siblings take by representation while grandchildren take in their own right. For cases in which the claimants were nephews or nieces, see Harrison v. Barber, 200 Ga. 225, 36 S.E. (2d) 662 (1946); In re Estate of Fairchild, 231 Iowa 1070, 3 N.W. (2d) 157 (1942); Head v. Spier, 66 Kan. 386, 71 P. 833 (1903); Kendall v. Mondell, 67 Md. 444, 10 A. 240 (1887); Barnum v. Barnum, 119 Mo. 63, 24 S.W. 780 (1893); Martin v. Martin, 56 Ohio St. 333, 46 N.E. 981 (1897). In this comment when referring to the child of the predeceased distributee, the word "grandchild" will often be used where "nephew" or "niece" would also be appropriate.

[5] Stokes v. Stokes, 62 S.C. 346, 40 S.E. 662 (1901).

I. *Advancements*

Following the early English case of *Proud v. Turner*,[6] the American jurisdictions are nearly unanimous in the view that a grandchild must account for an advancement made by the grandparent to his predeceased child, the parent of the grandchild. Thirty-three jurisdictions have statutes which require this result. In four other jurisdictions the same result has been reached by judicial action. Three other jurisdictions make the grandchild account only under certain circumstances, while in the remaining eleven jurisdictions[7] there is no statute or case law on the subject.

Of the thirty-three states with legislation requiring an advancement to a predeceased expectant heir to be accounted for by the descendant of the predeceased heir, nineteen of the statutes speak in terms of representation,[8] e.g.: "and the amount thereof must be allowed accordingly by the representatives of the heirs receiving the advancement, in like manner as if the advancement had been made directly to them."[9] The other fourteen statutes speak of the "descendants" of the expectant heir to whom the advancement was made.[10] There is a question, therefore, as to the significance of the difference in wording. Are there situations under a statute referring to "representatives" in which an heir does not take as a representative and therefore does not take subject to the advancement? There are no cases in any of the nineteen jurisdictions which so hold. But neither are there cases in these jurisdictions in which it has been argued that the heir took in his own right and therefore was not subject to the terms of the statute. Neither do the local probate books to which the writer has had access provide an

[6] 2 P. Wms. 560, 24 Eng. Rep. 862 (1729).

[7] Alaska, Arizona, Colorado, Delaware, Iowa, Mississippi, New Jersey, New Mexico, Rhode Island, Texas, Wyoming.

[8] Ala. Code (1940) tit. 16, §18; Cal. Prob. Code (Deering, 1953) §1053; Conn. Gen. Stat. (1949) §7058; Fla. Stat. (Supp. 1955) §734.07; Ga. Code Ann. (1937) §113-1016; Idaho Code (1948) §14-111; Mass. Laws Ann. (1955) c. 196, §7; Mich. Comp. Laws (1948) §702.92; Mont. Rev. Code Ann. (1947) §91-416; Neb. Rev. Stat. (1948) §30-117; N.H. Rev. Laws (1955) c. 561, §13; N.D. Rev. Code (1943) §30-2116; Okla. Stat. (1951) tit. 84 §227; S.C. Code (1952) §19-56; S.D. Code (1939) §56.0118; Utah Code Ann. (1953) §74-4-22; Vt. Stat. (1947) §3069; Wash. Rev. Code §11.04.170; Wis. Stat. (1953) §318.28.

[9] California (with slight change in wording), Idaho, Massachusetts (with slight change in wording), Michigan, Montana, Nebraska, North Dakota, Oklahoma, South Dakota, Utah, Washington and Wisconsin.

[10] Ark. Stat. (1948) §61-116; D.C. Code (1951) §18-707; Hawaii Rev. Laws (1945) §12079; Ill. Rev. Stat. (1955) c. 3, §166; Ind. Stat. Ann. (Burns, 1953) §6-210 (c); Kan. Gen. Stat. Ann. (Corrick, 1949) §59-510; Me. Rev. Stat. (1954) c. 170, §6; Md. Code Ann. (Flack, 1951) art. 93, §135; Minn. Stat. (1953) §525.53; Nev. Comp. Laws (Supp. 1942) §9882.305; 13 N.Y. Consol. Laws (McKinney, 1949) §85; Ore. Rev. Stat. (1955) tit. 12, §111.170; Va. Code (1950) §64-17; W.Va. Code Ann. (1955) c. 40, §4094.

answer. It is suggested that the word "representative" is intended to cover only those who take by representation. It will be necessary to look to the law of each state using the term "representative" in the advancement statute to see if any descendant of an heir ever takes in his own right and so not subject to the advancements to his parent.

The four states which follow the majority view by judicial action do so by interpretation of their advancement statutes. These laws expressly provide that an advancee must account for an advancement made to him by the intestate. In three jurisdictions the courts have relied on the policy of equality expressed in the intestacy statute of the particular state, and, particularly, in its advancement sections, to hold that the grandchild must account for advancements made to his parent.[11] The word "child" in the statute was interpreted to include grandchild. In a case in Tennessee, the fourth jurisdiction, the child released his expectant estate in exchange for a present sum. The court treated the money as an advancement in full to the child.[12] Upon his death before his father, the advancee's children were barred under the statute of descent and distribution. The court held that they should receive "the same portion of the estate . . . as their parent would have been entitled to if living,"[13] and since their parent would have had to account for the advancement, they should be forced to do so also.

Pennsylvania, North Carolina and Louisiana resolve the problem by distinguishing between grandchildren who take in their own right and those who take by right of representation. The experience of Pennsylvania best illustrates this distinction. In its first case on this subject the Pennsylvania court followed the English example and the grandchildren's share of their grandfather's estate was charged with an advancement made to their father on the ground that they took as his representative.[14] One year later the court apparently overlooked this case and either also overlooked or else thought inappropriate an 1833 statute which provided that the descendants of a predeceased child take by representation,[15] and held that the grandchildren took in their own right and, therefore, free of their father's debt.[16] In another debt case,

[11] Nelson's Heirs v. Bush's Admr., 9 Dana (39 Ky.) 104 (1839); Estate of Williams, 62 Mo. App. 339 (1895); Parsons v. Parsons, 52 Ohio St. 470, 40 N.E. 165 (1895).

[12] Anderson v. Forbes, 169 Tenn. 223, 84 S.W. (2d) 104 (1935).

[13] Id. at 230.

[14] Earnest v. Earnest, 5 Rawle (Pa.) 213 (1835).

[15] Pa. Laws (1833) No. 143, §2, art. 4c.

[16] Ilgenfritz's Appeal, 5 Watts (Pa.) 25 (1836).

four years later, this holding was overruled. The court cited the original advancement case,[17] and the 1833 statute as authority for its decision.[18] Then, some thirty years later, the court held that where there are only grandchildren surviving an intestate, they take not as representatives of their father but in their own right. Consequently, they were not charged with an advancement to their father.[19]

North Carolina uses two criteria to distinguish between those who take by right of representation and those who take in their own right: first, whether the heirs are all of the same classification, e.g., all children or both children and grandchildren and, second, whether the property to be distributed is real or personal. In the one case in which only grandchildren survived the intestate and only personalty was to be distributed, the court held that the grandchildren took in their own right and, therefore, not subject to advancements to their parents.[20] Where both children and grandchildren (the children of a deceased child) survived the intestate, the grandchildren took by representation and subject to the advancements made to their parent.[21] In the distribution of real estate descent is per stirpes[22] and where both real and personal property descended to surviving grandchildren, the parties were made to account for the advancements made to their parents since they took by representation.[23]

Louisiana provides by statute that when grandchildren take in their own right they do not take subject to advancements made to their parents, but when they take as representatives they take subject to advancements to their parents.[24]

II. *Debts*

In contrast to the thirty-four jurisdictions which have statutes regulating the duty of grandchild to account for an advancement made by the intestate to his predeceased child, there are no statutes prescribing the duty of a grandchild to account for a debt due

17 Earnest v. Earnest, 5 Rawle (Pa.) 213 (1835).

18 M'Conkey v. M'Conkey, 9 Watts (Pa.) 352 (1840).

19 Person's Appeal, 74 Pa. St. 121 (1873).

20 Skinner v. Wynne, 55 N.C. 41 (1854).

21 Headen v. Headen, 42 N.C. 159 (1850). See Parker v. Eason, 213 N.C. 115, 195 S.E. 360 (1938).

22 Clement v. Cauble, 55 N.C. 82 (1854); Cromartie v. Kemp, 66 N.C. 382 (1872).

23 Crump v. Faucett, 70 N.C. 345 (1874). For North Carolina law generally, see 2 MORDECAI, LAW LECTURES, 2d ed., 1345 (1916); 31 N.C.L. REV. 207 (1953).

24 La. Civil Code (1945) art. 1240. For Louisiana law generally, see 10 TULANE L. REV. 613 (1936).

by his parent to the intestate. Nor did the drafters of the *Model Probate Code* include any provision covering the duty of one taking in the place of a distributee to repay a debt owed by the distributee to the intestate.[25]

Lacking statutory guidance, the courts have failed to develop a solution to this problem based on the economic facts involved. As previously shown, Pennsylvania decides the debt question as it decides the advancement question, on the basis of whether the grandchildren take by representation or in their own right. All those decisions which do allow the right of retainer against the grandchildren do so because of the representative character of their inheritance.[26] Conversely, the cases refuse the right of retainer when the grandchildren take in their own right rather than as representatives.[27]

In several states the formalistic differences between debt and advancement determine the result reached by the courts rather than the distinction between taking as a representative or in one's own right.[28] In all of these states the grandchild takes in a representative capacity. The courts hold that the heir is subject to any defenses or equities against his parent arising from the laws of intestacy but not to those arising from independent rights of the intestate against the predeceased heir. Since the right of retainer exists outside the law of intestate succession, the grandchild is free from its effect.

A child is not responsible for the debts of his father.[29] A number of courts reason that the child is, in effect, forced to pay his father's debts when the right of retainer is allowed against the child's share of his grandfather's estate. If the debt was owed to some third person, the entire share would go to the debtor-heir, though possibly subject to creditors' claims. Since a right of re-

25 See, generally, MODEL PROBATE CODE §187 and comment following (1946), for treatment for debts owed by the distributee to the intestate.

26 Head v. Spier, 66 Kan. 386, 71 P. 833 (1903); Adams v. Yancy, 105 Miss. 233, 62 S. 229 (1913); Martin v. Martin, 56 Ohio St. 333, 46 N. E. 981 (1897); Hughes's Appeal, 57 Pa. St. 179 (1868). The same result was reached in Batton v. Allen, 5 N.J. Eq. 99 (1845), but without any reason given.

27 Harrison v. Barber, 200 Ga. 225, 36 S.E. (2d) 662 (1946); In re Estate of Fairchild, 231 Iowa 1070, 3 N.W. (2d) 157 (1942); Calhoun v. Cossgrove, 33 La. Ann. 1001 (1881); Johnson v. Huntley, 39 Wash. (2d) 499, 236 P. (2d) 776 (1951). In Powers v. Morrison, 88 Tex. 133, 30 S.W. 851 (1895), the court noted that the grandchildren would take free of their father's debt if only grandchildren survived the intestate and could see no reason why a different rule should apply when the grandchildren take per stirpes rather than per capita.

28 Kendall v. Mondell, 67 Md. 444, 10 A. 240 (1887); Stokes v. Stokes, 62 S.C. 346, 40 S.E. 662 (1901).

29 16 AM. JUR., Descent and Distribution §117 (1938).

tainer is essentially a creditor's claim, the share of the estate should go to the grandchildren subject to the same claims a third party could make against it. Since a third party could make no claims against the grandchildren's share of the estate, the grandfather's estate should not be allowed a right of retainer.[30] This line of reasoning promotes equality between creditors of the predeceased child. The courts should, however, be more interested in equality among the heirs of the grandfather in conformity with the policy of the intestate statutes than with equality among creditors of the predeceased child.

III. *Releases*

A person who gives a release of his entire expectant intestate share usually does so in exchange for a present grant of money or some other equivalent. The present grant may be more or less what his distributive share would otherwise be. In any case the present use of the money tends to make the gift more valuable than a bequest of a like sum at a later date.

Even though a court may, under certain circumstances, charge a child with an advancement made to his father, it does not necessarily follow that it will allow the father to bind his children by a release of their complete share. There is a solid core of logic in permitting the defense of debt or advancement to be raised against the child as well as against the father, for there is a good chance that the child himself received benefit either directly or indirectly. The benefit that the child receives in the case of a release is limited to the extent of the money or property given in exchange for the release. This is not necessarily even a close approximation of the potential share of the intestate property released. Therefore, even though the child may be charged with an advancement, there is no reason why other distributees should be allowed to gain at the expense of one who had no control over the release and who did not benefit to the extent that his rights were released.[31]

The courts which have allowed a father to release his child's share of the estate have relied upon the argument that what the father received in exchange for the release of his expectancy was an advancement of his full share.[32] Therefore, the doctrine of ad-

[30] Harrison v. Barber, 200 Ga. 225, 36 S.E. (2d) 662 (1946); Russell v. Bulliner, 370 Ill. 260, 18 N.E. (2d) 879 (1939); Barnum v. Barnum, 119 Mo. 63, 24 S.W. 780 (1893); Powers v. Morrison, 88 Tex. 133, 30 S.W. 851 (1895).

[31] See Douglass v. Hammel, 313 Mo. 514, 285 S.W. 433 (1926); In re Merrihew's Estate, 171 Misc. 541, 14 N.Y.S. (2d) 360 (1939); Buck v. Kittle's Estate, 49 Vt. 288 (1877).

[32] Simpson v. Simpson, 114 Ill. 603, 2 N.E. 258 (1885); Anderson v. Forbes, 169 Tenn. 223, 84 S.W. (2d) 104 (1935); Coffman v. Coffman, 41 W.Va. 8, 23 S.E. 523 (1895).

vancements is applied and the child, as representative of his father, is denied any distribution at the death of the intestate. The *Restatement of Property* takes the position that to whatever extent the expectant distributee could release his own interest should he survive the intestate, he may release his descendants' interests should he predecease the intestate.[33] It states that this is true even though by this action the intestate's direct line is cut off and the estate goes to the collateral lines.[34]

Those courts which will not enforce the father's release against the child rely mainly on its contractual aspects.[35] One party cannot by contract relinquish the rights of another, unless he has been given that power by the party affected.[36] Therefore, a father cannot release his children's rights in the intestate property of the grandparent. This reasoning is very similar to that used when it is said that the child is not liable for the debts of his father. Just as the determination that a right of retainer which is enforced against the child is really a method of making the child pay his father's debts leads to the conclusion that the right should be precluded, so the equation of a release with a contract leads to the conclusion that it should not be enforced against the child. Moreover, a party cannot release that which does not as yet exist.[37] Since the right to participate in the distribution of the estate is only an expectancy, these courts reason that it cannot be released.

IV. *Conclusion*

The important consideration in all three situations is that a child of the intestate received money or property at some time previous to the intestate's death and this money or property was either dissipated by the child or passed on to his children on his death. These same children now ask that they receive a share of their grandparent's estate without taking into consideration this money or property.

There are three possible situations present in the release cases. First, the predeceased child may have received less than

33 3 PROPERTY RESTATEMENT §316, comment *g* (1940). There is no case authority to support such a broad statement. The cases cited in note 32 supra are limited by reason of their reliance upon the representative capacity of the heir.

34 3 PROPERTY RESTATEMENT §316, comment *f*, illus. 4 (1940); *contra*, Pylant v. Burns, 153 Ga. 529, 112 S.E. 455 (1922).

35 Mow v. Baker, (Tex. Comm. App. 1930) 24 S.W. (2d) 1. See Douglass v. Hammel, 313 Mo. 514, 285 S.W. 433 (1926). But see Simpson v. Simpson, 114 Ill. 603, 2 N.E. 258 (1885).

36 12 AM. JUR., Contracts §17 (1938).

37 See Buck v. Kittle's Estate, 49 Vt. 288 (1877).

the intestate share of the grandchildren[38] and the release is enforced. In such a case the child and his children together receive less than their allocable share. Second, the child may have received less than the intestate share of the grandchildren but the release is not enforced. In this case the child and his children together take more than an allocable share. Finally, the child may have received more than the share of the grandchildren for the release. Whether the release is enforced or not the child and his children together take more than an allocable share but the disproportion between the heirs is even greater if the release is not enforced. In order to avoid these inequities, releases should not be enforced against the children of the releasor. The money or property received should be treated as an advancement to the extent of its value.

Since in many cases an advancement to or debt owed by the predeceased child did in fact enlarge his estate, and often to the extent of the advancement or debt, the grandchildren should be made to account for both upon their succeeding to their parent's share of their grandparent's estate to the extent of their share of the estate. No distinction should be drawn between advancements or debts because the benefit to the children is the same in either case.[39]

These rules should be provided by the legislature. The fact situations in which the problems arise are simple and relatively repetitive. There is no reason why private parties should be forced to establish these rules by prolonged litigation.

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[38] The child may have received more for the release than what his share would have been had he survived the intestate, but if the grandchildren take per capita, their combined shares may be more than the money or property given for the release.

[39] There are two factors which tend to differentiate debts from advancements. First, debts may arise from nonbargaining situations in which the debtor received no equivalent for the debt, e.g., a tort judgment. Secondly, the impression given by the reported cases is that an offset is usually desired against the grandchildren's share of the estate because the debtor-child died insolvent and could not pay his debt to the intestate. In either case the grandchildren received nothing from their parent and may have a stronger claim to a share in their grandparent's estate.