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# PROBATE PROCEDURES AVAILABLE TO BENEFICIARIES

Daniel Stubbs * †

## I. INTRODUCTION

The purpose of the probate function is to provide for the orderly devolution of property upon the death of the owner after payment of taxes and debts. Usually this is done through the probate court, which is the county court in Nebraska.[1]

It is possible to eliminate resort to the probate court in administration by careful planning with an inter vivos trust, or even by the use of joint tenancy.[2] In any event proceedings in the county court are required to determine the inheritance taxes imposed by the laws of Nebraska.[3]

This discussion is limited to the performance of the probate function by court proceedings, and is directed primarily to questions of what courts and proceedings are available or required to perform the function.

## II. INTESTATE ADMINISTRATION[4]

If there is no will, administration shall be granted by the county court of the county of which decedent was a resident. If he was a resident of the state jurisdiction is limited to the county of residence and the administration extends to property located in every other county.

In the case of a non-resident, administration may be granted in any county where property is located and the administration extends to all property located in every other county of the

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1 NEB. CONST. art. 5, § 16.

2 CASNER, ESTATE PLANNING, Chapter IV.

3 NEB. REV. STAT. § 77-2027 (Reissue 1958).

4 NEB. REV. STAT. §§ 30-314, 1701 (Reissue 1956).

state. The administration first legally granted extends to all property owned by the deceased in the state.

## III. CAUSE OF ACTION FOR WRONGFUL DEATH

A cause of action for wrongful death is an asset belonging to the estate and constitutes property upon which an administration may be commenced.[5] There may be a question of where the cause of action for wrongful death is located. It is controlled by section 25-409,[6] which provides where an action for tort may be brought.

If the decedent is a resident of Nebraska, the administration must be commenced in the county of residency.[7] But, if the decedent is a non-resident of the state, an administrator may be appointed in any county where the defendant may be found[8] or may be summoned.[9] There may be some difference of opinion as to which statute applies.

If the defendant in a wrongful death action is also a non-resident, and the death was caused by a motor vehicle, then service is had on a non-resident motor vehicle operator by serving the Secretary of State personally in his office in the State Capitol, *or elsewhere,* or by leaving a copy of process with a person employed in the office of the Secretary of State who has been designated to receive such process by the Secretary of State.[10]

[5] Missouri Pac. Ry. v. Bradley, 51 Neb. 596, 71 N.W. 283 (1897); Cox v. Kresovich, 168 Neb. 673, 97 N.W.2d 239 (1959). The court stated in Cox v. Kresovich at page 678 "This court is committed to the theory that a cause of action for wrongful death is a sufficient estate or asset to justify the appointment of an administrator. In Missouri Pac. Ry. v. Bradley, 51 Neb. 596, 71 N.W. 283 (1897), in dealing with this question, it was said: 'The authority of the county court did not rest alone upon the few articles of personal property already mentioned which the deceased had upon his person when he died, since the cause of action against the railroad corporation was sufficient estate to justify the appointment of an administrator, had there been no other estate to be administered.' *No case has been found wherein there has been a departure from this pronouncement.*" [Emphasis added]

[6] NEB. REV. STAT. § 25-409 (Reissue 1956).

[7] See *Supra* note 3.

[8] NEB. REV. STAT. § 25-408 (Reissue 1956).

[9] NEB. REV. STAT. § 25-409 (Reissue 1956).

[10] Provided, that notice of the service is sent by the plaintiff to the defendant by registered or certified mail within 10 days, and the plaintiff files an affidavit with the county clerk that he has complied with such requirement. NEB. REV. STAT. § 25-530 (Reissue 1956).

This raises the question whether the proper venue is in the county where the accident took place, or whether it should be in Lancaster County where the Secretary of State may be served, or both.

In *Cox v. Kresovich,*[11] the court expressly disclaimed any settlement of the venue question. The estate involved was the estate of a non-resident defendant-debtor. The deceased was a resident of Illinois who had an accident while driving in Cherry County. He was insured by a company which maintained an office in Lincoln.

The plaintiff-creditor commenced proceedings for the appointment of an administrator in the Lancaster County Court. This application was undoubtedly made under the provisions of section 30-315 which permits a creditor to apply for administration if the widow and next of kin neglect to do so for thirty days after the death of the intestate.

The basis for jurisdiction was that the deceased held an asset in Lancaster County. The asset was the obligation of the insurance company to indemnify the deceased for negligent operation of a motor vehicle resulting in injury to others. The court held this was a sufficient asset to constitute a basis for jurisdiction for administration of an estate, and that Lancaster County was the proper county for the administration because the insurance company could be served with process in Lancaster County. Here the summons could be served on the insurance company's agent in fact who was in Lancaster County. The case did not involve the non-resident motor vehicle act.[12] The situs of the obligation was based on the service of summons.

Now, could the proceedings for administration have been entertained in Cherry County where the accident occurred? It is doubtful, and the *Kresovich* case does not attempt to answer the question. The obligation of the insurance company exists where service may be had on the insurance company. Can process issue out of Cherry County for service on the insurance company in Lancaster County? The obligation of the insurance company is owed to its insured and is a contractual obligation. The accident that occurred in Cherry County created a claim against the insured which triggered the obligation of the insurance company, but they are not the same thing. Section 25-405 provides that the venue in a suit against an insurance company is "where the cause of

[11] See *Supra* note 4.

[12] NEB. REV. STAT. § 25-530 (Reissue 1956).

action arose, or in the county where any contract or portion of a contract entered into by such insurance corporation has been violated or is to be performed." If it can be said that the cause of action arose by the happening of the accident, then the administration can be commenced in Cherry County, otherwise not.

The place of administration of the claimant's estate appears clear. If the deceased is a non-resident, administration may be had in the county where the accident occurred, or in the county where the defendant may be summoned. If the defendant is also a non-resident, this would include Lancaster County because service may be had there on the Secretary of State.

## IV. SPECIAL ADMINISTRATION

The Nebraska Statutes provide another court proceeding which is sometimes necessary. Section 30-317 authorizes the appointment of a special administrator when there is a delay in the appointment of a regular administrator and immediate action is required by some one in authority to preserve the assets of the estate. The delay may be nothing more than the normal delay in the appointment of a regular administrator if some urgency exists to care for, or to preserve, assets of the estate.[13]

## V. PROBATE OF WILL

While the will of a resident of Nebraska must be admitted to probate at the place of domicile,[14] there seems to be a question of whether the will of a non-resident must first be admitted to probate in the state of domicile before it can be offered in Nebraska.[15]

[13] Keegan v. Welch, 83 Neb. 166, 119 N.W. 252 (1909).

[14] NEB. REV. STAT. § 30-213.01 (Reissue 1947).

[15] The statutes do not provide for the original probate of wills of those domiciled at the time of death in other states. See *Infra* note 15 (unless over 2 years have passed, § 30-1705). So the question is whether such jurisdiction exists in absence of statutory authorization? There are no Nebraska cases right on point, however in Board of County Comm's v. Furay, 5 Neb. (Unof.) 507, 99 N.W. 271 (1904) (a case that involved such a probate) the commissioners held that the will of a non-resident of the state at the time of his death could not be probated simply to collect taxes.

There are only a few states other than Nebraska which have no statutory provision specifying the court in which the wills of persons not inhabitants of the state at time of death could be probated. Some of these states are as follows: In Hyman v. Gaskins, 27 N. C. (5 Ired. Law) 267 (1844) the North Carolina Court held that a decree of the probate court admitting a will of a person not domiciled in North

If so, this could result in the necessity of having a will admitted to probate in a state where the testator left no property. Once admitted to probate in the domiciliary state the will may be offered for probate in any county in Nebraska where property of

Carolina to original probate was not void even though the only property the deceased had in North Carolina was accounts receivable, and there was a statutory provision, "that all wills shall be proved in the county, where the testator had his usual place of residence at the time of his death."

In Woodfin v. Union Planters National Bank and Trust Co., 174 Tenn. 367, 125 S.W.2d 487 (1939) the Tennessee court held the will of a non-resident of the state at the time of death could be admitted to original probate in the state if he left two wills one of which applied only to assets within the state, and the other had been admitted to probate in the domiciliary state.

In Parnell v. Thompson, 81 Kan. 119, 105 Pac. 502 (1909) the Kansas court reached the same result as the Tennessee court even though it had no statute like Nebraska which clearly indicated what court had jurisdiction to probate a will.

In Michigan it was held in Corning's Estate, 159 Mich. 474, 124 N.W. 514 (1910) that the courts of that state have no jurisdiction to probate a will there, disposing of personalty in the state, where the testator died domiciled in another state in which the will has not been probated. However, in 1915 the Michigan Legislature changed the law by enacting MICH. STAT. ANN. § 27.3178 (98) (Reissue 1943) which states that a foreign will is admitted to original probate in any county in the state in which there is an estate to be administered.

In Payne v. Payne, 239 Ky. 99, 39 S.W.2d 205 (1931) the court held that the court should dismiss the proceeding to probate the will since no sufficient reasons appear for probating the will in advance of its probate at the place of domicile.

2 WOERNER, AMERICAN LAW OF ADMINISTRATION 764 § 226 (3d ed. 1923) states: "It is held in some jurisdictions that while the courts of the ancillary state have jurisdiction, in the sense of power, to probate a will there before it is admitted to probate in the testators' foreign domicile, and if there is a special occasion will do so, yet as a rule the probate court of an ancillary state should, as a matter of comity, refuse to entertain a petition for probate of a will before it has been proved in the State of the domicile, where it should be primarily established."

The following cases suggest that at common law it was held that the appropriate court of a jurisdiction in which assets of the estate of a non-resident testator are found, may grant probate upon his will, even though the will has not been presented for probate in the state of his domicile.

The court in In re Estate of Washburn, 45 Minn. 242, 47 N.W. 790 (1891) stated: "A will executed according to the laws of this state, whether previously probated in another state or not, and without reference to the domicile of the testator, may be admitted to probate under the provisions of section 4, c. 1 of the Probate Code, provided the testator left any property in this state which is the subject of

the testator is located, and the administration extends to all property in the state.[16]

Where title to real estate is involved, a copy of the will with the certificate of proof attached, together with a certified copy of the final degree, may be recorded in the office of the register of deeds in any county where such real estate is situated. It is good practice to so record even though the statute is not mandatory.[17] Such a filing constitutes notice. Cases wherein such notice became important are scarce but not improbable. When real estate is located in the county where the will is admitted to probate, the probate records of the county court are sufficient notice.[18]

## VI. RESIDENCY OF EXECUTOR[19]

The executor named in the will is required to be appointed if he accepts the trust, gives the bond required by law, and is legally competent.[20] The county court may remove an executor if he is a non-resident of the state.[21] There is no requirement that he be a resident of the county. However, some county judges have sought to impose a ground rule requiring all administrators and executors to be residents of the county. The court has a mandatory duty to appoint the nominated executor, if he is otherwise legally competent.[22]

administration . . . . This power over the estate of deceased persons situated within its jurisdiction is inherent in any state or county on common-law principles, of which the provisions of the Probate Code in that regard are but declaratory."

The court in Knight v. Hollings, 73 N.H. 495, 63 A. 38 (1906) stated: "Neither the statute nor the common law required that the will should be probated first in the state of his domicile; it might be probated in this state first and in Colorado later, even if his domicile was in the latter state."

In Clayson v. Clayson, 26 Wash. 253, 66 P. 410 (1901) where it was contended the Washington court did not have jurisdiction over a Canada will, the court answered: "This objection is met by the statute . . . . It seems, too, that jurisdiction exists independent of statute."

[16] NEB. REV. STAT. §§ 30-221 to -225 (Reissue 1956).

[17] NEB. REV. STAT. § 76-248 (Reissue 1958); NEB. REV. STAT. §§ 30-238, 1302 (Reissue 1956).

[18] NEB. REV. STAT. § 76-632 (Reissue 1958).

[19] See Comments 26 NEB. L. REV. 226, 233.

[20] NEB. REV. STAT. § 30-302 (Reissue 1956).

[21] NEB. REV. STAT. § 30-310 (Reissue 1956).

[22] In re Haeffele's Estate, 145 Neb. 809, 18 N.W.2d 228 (1945).

## VII. PROBATES IN WHICH TITLE TO REAL ESTATE IS INVOLVED

The county court, even when serving as a probate court, does not have jurisdiction where title to real estate is involved.[23]

Since the county court does have jurisdiction to determine the heirs at law and devisees under a will,[24] the rule seems somewhat anomalous. The determination of heirship may determine the devolution of the real estate title—it always does in the case of intestacy. However, the rule has been in existence a long time.[25] Because of the rule, it does not really add anything to describe the real estate owned by the decedent in a final decree. Consequently, it makes no difference if the description is left out or is erroneous.[26]

It is a common practice, however, to describe the real estate in the final decree and usually add language of conveyance setting over title to the land to the heirs at law. It does no harm as long as one realizes that it is only a bookkeeping matter for the convenience of anyone dealing with the real estate title and is not actually binding on anyone.

With respect to the determination of inheritance tax, the county court has exclusive jurisdiction[27] and it is essential to describe the real estate in order to discharge the tax lien.

As pointed out above, if title to real estate becomes an issue in any way in the probate proceedings, an action must be brought in the district court to resolve the question.[28] However, the case of *Wiley's Estate*[29] indicates that a contract for sale of real

[23] NEB. CONST. art. 5, § 16; NEB. REV. STAT. § 24-502 (Reissue 1956).

[24] In Fischer v. Sklenar, 101 Neb. 553, 163 N.W. 861 (1917) the court stated that the decree establishing the will does not settle the identity of the persons named therein, but merely establishes the sole fact that the testator executed the document in conformity with the statute. The court then went on to hold that the decree of the county court finding that Mrs. Hamernik is sole heir of deceased was valid and could not be assailed in the district court. The county court's decree does not unconstitutionally affect the title to real estate because the title passes by the operation of the statute of wills, not by decree.

[25] See Fisher v. Fisher, 80 Neb. 145, 113 N.W. 1004 (1907); Hiatt v. Hiatt, 146 Neb. 652, 20 N.W.2d 921 (1945).

[26] NEB. REV. STAT. § 76-606 (Reissue 1958).

[27] NEB. REV. STAT. § 77-2027 (Reissue 1958).

[28] See *Supra* note 22.

[29] 150 Neb. 898, 36 N.W.2d 483 (1949).

estate does not come within this classification. The court held in that case that a contract for sale of real estate does not involve title to real estate. Since the contract converted the real estate into personality it would fall within section 24-504 (5)[30] because it involves settlement of accounts of executors, and thus is within the jurisdiction of the county court.

## VIII. JURISDICTION TO DETERMINE HEIRS

The county court's jurisdiction to determine heirship[31] is said to be exclusive.[32] However, it has long been held that the district court has original jurisdiction to determine heirs where the question becomes material in a proceeding in which the district court has original jurisdiction.[33] The most common situations are (1) suits for partition of real estate, and (2) suits to quiet title to real estate.

This segment of district court jurisdiction is based upon the broad powers of equity jurisdiction given the court by the Nebraska Constitution,[34] in the following words:

> The district court shall have both chancery and common law jurisdiction, and such other jurisdiction as the legislature may provide; . . . .

The court in *In re Myers Estate*,[35] stated:

> This provision (Article V. § 9 of the Constitution) was quoted in *Lacey v. Zeigler*, 98 Neb. 380, 52 N.W. 792, and commented upon in the opinion as follows:
>
> 'The equitable jurisdiction of the district court is therefore beyond the power of the legislature to limit or control. It may give the district court 'such other jurisdiction' as it may deem proper, but it cannot take away from such court its broad and general jurisdiction in chancery which the constitution has conferred upon it.'

[30] NEB. REV. STAT. § 24-504(5) (Reissue 1956).

[31] NEB. CONST. art. 5, § 16.

[32] State v. O'Conner, 102 Neb. 187, 166 N.W. 556 (1918). See also, Zimmer v. Gudmundsen, 142 Neb. 260, 5 N.W.2d 707 (1942) where in a suit to set aside deeds for fraud, the district court was held without jurisdiction to determine rights of heirs at law with respect to the lands recovered in the absence of a decree determining heirs in the county court.

[33] Dennis v. Omaha Nat'l Bank, 153 Neb. 865, 46 N.W.2d 606 (1957) (action to construe a will).

[34] NEB. CONST. art. 5, § 9.

[35] 151 Neb. 255, 37 N.W.2d 228 (1949).

Once having obtained jurisdiction in matters that are traditionally equitable, the chancery court also obtains jurisdiction to settle all matters in dispute between the parties growing out of the transaction, since equity does not do things by halves. For example: A suit to quiet title to real estate must be brought in the district court as the court of chancery. Having obtained jurisdiction on that ground the district court may determine heirship because it is necessary in order to afford complete relief in the quiet title action.

## IX. JURISDICTION TO CONSTRUE A WILL

The jurisdiction of the district court to determine heirs in a proper case is not claimed to be exclusive. It is exercised only as an incident to the exercise of general chancery jurisdiction in other matters. Where the only question is the determination of heirs, it is still within the original jurisdiction of the county court.[36]

The jurisdiction of the district court to construe a will has developed in another way.

The Nebraska Constitution[37] provides:

> The district courts shall have both chancery and common law jurisdiction, and such other jurisdiction, as the legislature may provide; . . . .

The jurisdiction provided by the Legislature is found in section 24-302[38] which says "The district court shall have and exercise general, original and appellate jurisdiction in all matters, both civil and criminal, except where otherwise provided." Thus, the district court would have original jurisdiction to construe a will in the absence of a special provision disallowing jurisdiction.

There is no statute specifically giving the county court power to construe wills.[39] Therefore, it could be concluded that the district court has exclusive original jurisdiction to construe a will.

[36] NEB. CONST. art. 5, § 16.

[37] NEB. CONST. art. 5, § 9.

[38] NEB. REV. STAT. § 24-302 (Reissue 1956).

[39] See NEB. REV. STAT. §§ 24-502 to -503 (Reissue 1956) which are the statutes stating the jurisdiction of the county court. The NEB. CONST. art. 5, § 16 states that "the county courts shall have original jurisdiction in all matters of probate, settlement of estates of deceased persons, and in such proceedings to find and determine heirship; . . . ." However, it is argued that the probate court has no power to determine questions relating to the constitution or interpretation and legal effect of a will, or to the effect of certain provisions, as

The problem was raised in the recent case of *In re Cranes Estate*.[40] Fred Crane died testate in 1950. His will left all his property to a second wife with the power to sell, and further provided that upon the death of the wife the property received from testator "should there be any property remaining" should go to his daughter. No real estate was involved. The wife died and the daughter filed a claim in the wife's estate praying that the property received from testator should now be given to her. On stipulated facts, the county court ordered the money and property delivered to her. On appeal the administrator objected to the introduction of evidence on the ground that the matter involved was the construction of testator's will, as to which the county court had no jurisdiction, and therefore the district court had no jurisdiction on appeal. The district court agreed and dismissed the case. The supreme court affirmed with a long dissenting opinion by the Chief Justice.

The decision of the majority is based on the proposition that jurisdiction to construe a will is lodged in the original and exclusive jurisdiction of the district court. The Chief Justice, in his dissent, takes issue with this basic proposition. It is arguable that the county court should construe the will. The argument would be based upon the contention that the construction of a will is a county court matter since the construction of a will is necessarily involved in a probate decree.

If the foregoing proposition is true there would still be a question of whether the original jurisdiction of the county court in such matters is exclusive. The Nebraska Constitution[41] gives the county court original jurisdiction in all probate matters and section 24-503[42] states that such jurisdiction is exclusive by the following language: "In such matters it is a court of general jurisdiction . . . within its exclusive jurisdiction, its chancery powers are plenary . . . ." The argument would be that the district court is without original jurisdiction in cases involving construction of a will, where the county court has exclusive jurisdiction, (i. e. such as in probating

between interested parties, and that the power of the county court to construe a will, incidental to its administration in that court is not binding in controversies between an executor or administrator and one claiming adversely to the estate, or between adverse claimants under the will.

[40] 166 Neb. 268, 89 N.W.2d 44 (1958).

[41] NEB. CONST. art. 5, § 16.

[42] NEB. REV. STAT. § 24-503 (Reissue 1956).

a will).[43] However, there are several cases, some fairly recent, in which the matter had apparently been laid to rest.[44] From the standpoint of the practicing lawyer, it is important to know what the rule is, and to recognize the situation when it arises. The *Crane* case is an illustration of what can happen if you fail to recognize that the problem is one of construing a will. In *Bray v. Sedlak*[45] the question of jurisdiction was not even raised in the briefs of the parties.

There is one further problem which should be considered in connection with this subject. Language is found in many of the cases similar to the following in *In re Myers Estate:*[46]

> The county court has jurisdiction to construe wills when necessary for the benefit of the executor in carrying out the terms of the will, . . . .

What does this mean? In the next breath the opinion states:

> . . . but has no jurisdiction to construe wills to determine rights of devisees and legatees as between themselves . . . .
>
> The construction of the will in such a case (in probate court) is for the information and benefit of such executor or administrator only, in order to advise him what course to pursue. It adjudicates nothing beyond his rights and liabilities in the execution of his office. *Controversies between adverse claimants under the devise, or between the executor or administrator and persons claiming adversely to the estate, will not be affected thereby.* [Emphasis added]

Of course, if the order binds only the executor, it is not much protection to him. There is some indication in *Hahn v. Verret,*[47] of what this means and how far one can go in obtaining an order in the county court. This was a suit to quiet title to real estate. In the estate proceedings the county court had directed the executor to collect the rents and had directed postponement of closing the estate until a specific legacy was paid.

In relation to the part of the order directing the executor to collect rents, the supreme court held:

> [the order]. . . was entirely proper in safeguarding the executor in the administration of the estate, but such order was

[43] See Reischnick v. Rieger, 68 Neb. 348, 94 N.W. 156 (1903) & Youngson v. Bond, 69 Neb. 356, 94 N.W. 700 (1903).

[44] Hahn v. Verret, 143 Neb. 820, 11 N.W.2d 551 (1943); DeWitt v. Sampson, 158 Neb. 653, 64 N.W.2d 352 (1954); In re Myers Estate, 151 Neb. 255, 37 N.W.2d 228 (1949).

[45] 168 Neb. 633, 97 N.W.2d 225 (1959).

[46] 151 Neb. 255, 37 N.W.2d 228 (1949).

[47] 143 Neb. 820, 11 N.W.2d 551 (1943).

> not binding upon the devisee or legatee as between themselves *nor between them and the executor.* [Emphasis added][48]

It seems that the only instruction from the county court upon which an executor can safely rely, is one relating to problems of investment and administration. If there is controversy in the construction of the will, the safe course to follow would be to obtain a decree in the district court construing the will and determining the rights of the parties.[49]

[48] See also In re Myers Estate, 151 Neb. 255, 37 N.W.2d 228 (1949) (Instructions by county court to trustee as to investment of funds). In re Gibson's Estate, 130 Neb. 278, 264 N.W. 762 (1936) (Instruction by county court to distribute a note to legatee).

[49] But see: Brownfield v. Edwards, 132 Neb. 325, 271 N.W. 797 (1937) and Weeke v. Wortmann, 84 Neb. 217, 120 N.W. 933 (1909). Where the court held that an administrator cannot ordinarily be personally charged for reimbursement of money he paid out in pursuance to an order of the county court, unless the order was obtained by fraud and the administrator knew of the fraud.