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THE EXECUTOR'S AND ADMINISTRATOR'S STATUTORY COMPENSATION IN TEXAS

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THE STATUTE

The compensation of an executor or administrator of an estate administered in Texas is prescribed by Section 241(a) of the Texas Probate Code.[1] The statutory formula for compensation is stated in simple terms:

> Executors and administrators shall be entitled to receive, and may retain in their hands, a commission of five per cent (5%) on all sums they may actually receive in cash, and the same per cent on all sums they may actually pay out in cash, in the administration of the estate . . . .

The remaining portion of the statute sets forth various specific exceptions:

1. No compensation is allowed on the receipt of cash belonging to the decedent at the time of his death.

2. No compensation is allowed for the disbursement of cash in payment of bequests and inheritances.

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1 TEX. PROB. CODE ANN. § 241(a) (Supp. 1970).
Executors and administrators shall be entitled to receive, and may retain in their hands, a commission of five per cent (5%) on all sums they may actually receive in cash, and the same per cent on all sums they may actually pay out in cash, in the administration of the estate; provided, no commission shall be allowed for receiving cash belonging to the testator or intestate which was on hand or on deposit to his credit in a bank at the time of his death, nor for paying out cash to the heirs or legatees as such; provided, further, however, that in no event shall the executor or administrator be entitled in the aggregate to more than five per cent (5%) of the gross fair market value of the estate subject to administration. If the executor or administrator manages a farm, ranch, factory, or other business of the estate, or if the compensation as calculated above is unreasonably low, the court may allow him reasonable compensation for his services. For this purpose, the county court shall have jurisdiction to receive, consider, and act on applications from independent executors.
Of course, where the will fixes the amount of the executor's compensation, he is entitled only to the compensation specified, and the provisions of the Statute are not applicable. Stanley v. Henderson, 139 Tex. 160, 164, 162 S.W.2d 95, 97 (1942).

3. The aggregate fee may not exceed five per cent of the gross fair market value of the "estate subject to administration."

4. If, as a part of the administration of the estate, the executor or administrator manages a business or other similar asset of the estate, or if the compensation as calculated in accordance with the foregoing rules is unreasonably low, the executor or administrator may make application to the county court for the allowance of a "reasonable compensation" for his services.

The statute, while seemingly clear and explicit, has been found to be unsatisfactory in practice. In the first place, the statutory formula for compensation has little relationship to the services actually performed by the executor or administrator. It does not take into account directly such factors as the nature of the assets under administration, the size and complexity of the estate, the services actually performed, or the results accomplished. Consequently, in some small estates the statutory fee is often insufficient compensation for the work required. On the other hand, in certain larger estates consisting primarily of marketable securities, the statutory fee is grossly excessive.[2] Of course, the five percent limit of the "gross fair market value of the estate subject to administration" and the allowance of "reasonable compensation" by the county court if the fee under the formula is unreasonably low, are both attempts to remedy this, but this does not answer all the objections to the statute. Additionally, the computation of the limit may vary considerably because of the doubt existing as to just what part, if any, of a community property estate is "subject to administration."[3] Still another unsatisfactory aspect of the statutory formula is that the fee is almost impossible to determine in advance because it is based solely on cash flow, which cannot be measured in advance.[4]

SETTLED QUESTIONS

In addition to these fundamental unsatisfactory aspects of the Texas statutory formula, there are other areas of doubt and uncertainty notwithstanding the fact that the basic statute has been with us since

2 Certain responsible corporate trust departments in Texas recognize this. One stipulates in its published fee schedule: "It is often the case that the fee provided by the statute is inordinately high in view of the work performed. When this occurs the bank reduces its charges accordingly."

3 This question is discussed at p. 9, 10 *infra*.

4 Several large corporate trust departments in Texas have reported that it has been their experience that application of the statutory formula usually results in a fee of between 1½ or 2 per cent of the gross value of large estates and 4 per cent for smaller estates. Another corporate trust department publishes in its fee schedule. "The professional administration of any estate can seldom be accomplished for less than $3,000."

1876. These unsettled questions are the basic target of this article. First, however, we might review briefly some of the matters previously settled by court decisions.

"Sums actually received in cash" is not limited to income. It includes proceeds received from the sale of corpus of the estate.[5] This holds true even though the sale is made by one other than the executor himself.[6]

Oil and gas royalties qualify as sums actually received in cash in the course of administration, and a commission is allowed on them.[7]

In spite of the statutory wording, proceeds do not have to be "actually" received to qualify as the basis for a commission, if the executor-administrator had the right to and could demand receipt. For example, an executor-administrator can collect a commission both on proceeds received and on amounts paid out when property is sold at a foreclosure sale and purchased by the foreclosing creditor.[8] However, the opposite is true where the executor did not have the right to demand receipt, as in the case of the gross production tax on oil and gas, which statutorily must be deducted by the purchaser from the purchase price.[9]

The personal representative of the estate is not entitled to a commission on any payment he makes to himself as a creditor of the estate,

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5 Walling v. Hubbard, 389 S.W.2d 581 (Tex. Civ. App.—Houston 1965, writ dism'd n.r.e.); Nations v. Ulmer, 139 S.W.2d 352 (Tex. Civ. App.—El Paso 1940, writ dism'd jdgmt cor.).

Before the adoption of the Probate Code in 1955, Article 3690 TEX. REV. CIV. STAT. ANN. (Repealed 1955) provided:

> A commission shall not be allowed or received for receiving any cash which was on hand at the time of the death of the testator or intestate, nor a commission for receiving money realized from the sale of property to satisfy debts against the property and the paying out of the proceeds in satisfaction of the debt except as to the amount realized from the sale in excess of the debt, nor for paying out money to the heirs or legatees as such. Provided, however, that if the administrator or executor shows to the court that the value of the services rendered the estate in making a sale of property securing a debt exceeds the amount of the commission calculated as above provided, then the court shall allow a commission for a just amount. The amount not to exceed that now allowed by law.

In other words, an executor or administrator could not receive a commission on property sold to satisfy a debt against the property except as to amounts realized in excess of the debt. Nor could he receive a commission for paying out the proceeds in satisfaction of this debt. Cooper v. Schwalbe, 238 S.W.2d 581, 583 (Tex. Civ. App.—Waco 1951, writ ref'd). No provision similar to this one in Article 3690 found its way into the Probate Code, and there is no longer a statutory basis for such holdings.

6 Huddleston v. Kempner, 87 Tex. 372, 28 S.W. 936 (1894); Simpson v. Goggin, 5 S.W.2d 610 (Tex. Civ. App.—San Antonio 1928, writ ref'd).

7 Walling v. Hubbard, 389 S.W.2d 581 (Tex. Civ. App.—Houston 1965, writ dism'd n.r.e.).

8 Huddleston v. Kempner, 87 Tex. 372, 28 S.W. 936 (1894).

9 Walling v. Hubbard, 389 S.W.2d 581 (Tex. Civ. App.—Houston 1965, writ dism'd n.r.e.).

although he is entitled to a commission for collecting the money with which the payments are made.[10]

Commissions are properly allowed on payments made in settlement of federal income taxes assessed against the estate.[11] Commissions are properly allowed on sums paid for repairs and improvements on property belonging to the estate.[12]

When the deceased was engaged in a business, the executor is entitled to the statutory commission upon the amount realized from the sale of goods on hand when he took charge of the estate.[13] However, he is not entitled to the five percent statutory commission on purchases and sales made in carrying on the business. In such a case he must apply to the county court for a reasonable compensation in addition to his ordinary commission as executor.[14] Sometimes difficulty is encountered in determining whether a transaction was conducted in the operation of a business or in the normal administration of the estate. When this occurs, "the proper rule to be applied is to deny commissions on income arising out of the business and an expense reasonably incurred in the production of such revenue, provided the income would not have been realized, or the expense incurred, in the absence of such business operation. . . . The fact that some of the items under general accounting principles would be considered in determining profit or loss is not a controlling factor."[15]

Assets classified as "cash on hand at the time of death,"[16] and thus not qualifying for commission when sold, are United States Post Office Savings Stamps. They are merely an obligation of the United States Government payable on demand, and the cashing of them is merely an exchange of one form of government obligation for another.[17] However, the opposite is true of government bonds.[18]

Time certificates of deposit payable at a future date are in effect promissory notes and are not "cash money on hand" until after the payment date.[19]

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10 Brown v. Walker's Heirs, 38 Tex. 104 (1873).
11 Walling v. Hubbard, 389 S.W.2d 581 (Tex. Civ. App.—Houston 1965, writ dism'd n.r.e.).
12 *Id.*
13 Dwyer v. Kaltayer, 68 Tex. 554, 565, 5 S.W. 75, 80 (1887).
14 *Id.*
15 Walling v. Hubbard, 389 S.W.2d 581, 592 (Tex. Civ. App.—Houston 1965, writ dism'd n.r.e.).
16 TEX. PROB. CODE ANN. § 241(a) (Supp. 1970).
17 Terrill v. Terrill, 189 S.W.2d 877, 878 (Tex. Civ. App.—San Antonio 1945, writ ref'd).
18 Thompson v. Thompson, 230 S.W.2d 376, 380 (Tex. Civ. App.—Galveston 1950), *rev'd in part but aff'd as to this holding*, 149 Tex. 632, 236 S.W.2d 779 (1951).
19 Thompson v. Thompson, 149 Tex. 632, 651, 236 S.W.2d 779, 790 (1951).

Where there are co-representatives of the estate, none of them is entitled to more than his proportionate share of the total commission; and as long as a co-representative is on hand and willing to do his part, he is entitled to his equal share.[20]

UNSETTLED QUESTIONS

Among the unsettled questions under Section 241(a) are these: Does the Statute apply to independent executors? Do insurance proceeds constitute "sums received in cash"? Is the five per cent commission to be calculated on the entire community estate or only on the decedent's half and his separate property?

Although it seems to be assumed in a number of cases that Section 241(a) applies to independent executors as well as to dependent representatives,[21] there is no direct holding to this effect. The last sentence of this section, conferring jurisdiction on the county court to act on applications by independent executors for extra compensation, indicates that the portion of Section 241(a) allowing reasonable compensation if the executor manages a business or if the five percent compensation is unreasonably low, is intended to apply to independent executors. Additionally, Section 241(a) does not require court approval before a representative may appropriate the five percent commission,[22] and only those sections of the Probate Code which require court action are inapplicable to independent executors.[23]

There has been no direct holding as to whether insurance proceeds qualify for the five percent statutory commission. It is probable that the courts will hold that insurance proceeds do not qualify, being equivalent to "cash belonging to the testator on hand at the time of his death." The right of a representative to a commission is given only for receiving and paying out money "in the course of administration."

> It does not arise . . . from the mere receipt of the estate . . . . The

20 Wright v. Wright, 304 S.W.2d 951 (Tex. Civ. App.—Amarillo 1957, writ ref'd).
It is the established policy of practically all corporate trust departments in Texas to contractually avoid this common law rule and not share fees with a co-representative. This policy is justified on the ground that a co-representative, usually an individual, not only does not ease the burden and responsibilities of the corporate representative, but actually increases them.

21 *See, e.g.*, Von Koenneritz v. Ziller, 112 Tex. 126, 245 S.W. 423 (1922); Walling v. Hubbard, 389 S.W.2d 581 (Tex. Civ. App.—Houston 1965, writ dism'd n.r.e.); Terrill v. Terrill, 189 S.W.2d 877 (Tex. Civ. App.—San Antonio 1945, writ ref'd).

22 This is clear from the wording of the statute, which states that executors and administrators "may retain in their hands" a commission. *See* note 1 *supra*. *See also* Smith v. Belding, 237 S.W. 246 (Tex. Comm'n. App. 1922, jgdmt adopted).

23 *See* Woodward, *Some Developments in the Law of Independent Administrations*, 37 TEX. L. REV. 828 (1959).

> administration of the property . . . takes place between its receipt by the administrator and its delivery to those entitled ultimately to receive it from him.[24]

Other important, difficult and unresolved questions are involved in applying the statutory formula to an estate which includes community property. Does the statute permit computation of the commission on the basis of the entire community, or is the representative limited to a commission based only on decedent's half plus his separate property? There is no case authority either way. Under a narrow construction of Section 241(a)—allowing commissions on sums received and paid out "in the administration of the estate"—commissions could not be based on the entire community because the word "estate" is defined as: "The real and personal property of a decedent."[25] On the other hand, it has been recognized that in the administration of such an estate in Texas the representative has burdensome responsibilities and renders valuable services in connection with the surviving spouse's half of the community, for which he should be compensated.[26]

To appreciate the basis of a representative's claim to the statutory commission on cash received and disbursed in connection with the survivor's half of the community property, a brief review of the substantive law applicable to the administration of a Texas estate containing community property is necessary.[27]

Community property is the primary fund for the payment of community debts, and when it is subject to liability for a particular debt, both halves are charged with the debt.[28] For this reason the com-

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24 Spofford v. Minor, 36 S.W. 771, 771-72 (Tex. Civ. App. 1896, writ ref'd).

25 TEX. PROB. CODE ANN. § 3(l) (1956).

26 It is for this reason that as a practical matter most, but not all, Texas corporate fiduciaries consider cash received and cash disbursed from the entire community in com- approval of the surviving spouse for the inclusion of his or her community interest in the administration.

27 For a more comprehensive treatment, *see* Haddaway, *Community Property in the Administration of Estates*, 33 TEX. L. REV. 1012 (1955); Huie, *Changes Made by the Texas Probate Code in the Administration of Community Property*, 34 TEX. L. REV. 700 (1956); and Hudspeth, *The Matrimonial Property Act of 1967—Six Areas of Change*, 31 TEX. BAR. J. 477 (1968).

28 TEX. FAMILY CODE § 5.61 (1970):

> (a) A spouse's separate property is not subject to liabilities of the other spouse unless both spouses are liable by other rules of law.
>
> (b) Unless both spouses are liable by other rules of law, the community property subject to a spouse's sole management, control, and disposition is not subject to:
>
> (1) any liabilities that the other spouse incurred before marriage; or
>
> (2) any nontortious liabilities that the other spouse incurs during marriage.
>
> (c) The community property subject to a spouse's sole or joint management, control, and disposition is subject to the liabilities incurred by him or her before or during marriage.

munity assets are usually administered by wholes rather than by halves. When the fiduciary sells a community asset to pay community debts, he sells the entire title, not just the decedent's half interest. Thus the executor or administrator must take and hold the surviving spouse's share of the community estate, as well as the deceased's share, therefrom to pay the survivor's share of community debts for which the property is liable and thereafter the residue to the survivor. In this capacity, the legal representative still acts as a "statutory trustee" or "out-of-court trustee" for the survivor and the survivor's creditors, even though there no longer exists an express statutory provision to this effect.[29]

These concepts are the basis of various tax rulings and holdings. In *Barbour v. Commissioner*,[30] the Fifth Circuit held that during the period of administration the executor as "statutory trustee" had the right to receive community property income and since he did receive it the surviving wife could not be taxed on a gain derived from the executor's sale of community property. *In United States v. Stapf*,[31] the Supreme Court held that a deduction for estate tax purposes would not be allowed for administration costs allocable to the surviving spouse's community property, and the IRS[32] allows only part of the attorney's fees and one-half of the executor's fees as a deduction on the estate tax return involving a community property estate.[33]

The Probate Code gives the representative of the deceased's estate authority "to administer" all the community property which the deceased had the right to manage during his lifetime.[34]

(d) All the community property is subject to tortious liability of either spouse incurred during marriage.

Before the adoption of the Family Code (January 1, 1970) the statute read: "The community property of the husband and wife shall be liable for their debts contracted during marriage, except in such cases as are specially excepted by law." TEX. REV. CIV. STAT. ANN. art. 4620 (repealed 1970). *See also* Stone v. Jackson, 109 Tex. 385, 210 S.W. 953 (1919); TEX. PROB. CODE ANN. §§ 45, 155, 156 (1956).

29 Repealed Article 3630, Tex. Rev. Stat. Ann. provided: "The executor or administrator of the deceased shall recover possession of all such common property and hold the same in trust for the benefit of the creditors and others entitled thereto."

30 89 F.2d 474, 476 (5th Cir. 1937).

31 375 U.S. 118, 84 S. Ct. 248, 11 L. Ed.2d 195 (1963).

32 Rev. Rul. 66-21, 1966-1 Cum. Bull. 219.

33 For a discussion of the income tax cases, *see* Haddaway, *Community Property in the Administration of Estates*, 33 TEX. L. REV. 1012 (1955); Jackson, *Community Property and Federal Taxes*, 12 S.W.L.J. 1 (1958).

34 TEX. PROB. CODE ANN. § 177(b) (1956), When No Community Administrator Has Qualified.

When an executor of the estate of a deceased spouse has duly qualified, or when an administrator of such estate has duly qualified prior to the filing of application by the surviving spouse for community administration, such executor or administrator, as the case may be, is authorized to administer, not only the separate property of the deceased spouse, but also the community property which was by law under the man-

The Probate Code was enacted at a time when all the community property except the "special community" of the wife[35] was under the control of the husband. This generally meant that upon the death of the husband all the community property passed into administration. In an early leading case it is said:

> When administration was granted on the estate of John Buckley, the wife's control over the community property ceased, and the estate passed under the jurisdiction of the probate court for administration and settlement.[36]

The new Family Code[37] has reshuffled the *inter vivos* powers of the partners over community property, and the authority granted the executor-administrator by the Probate Code must be considered in this new light. Under Section 5.22[38] of the Family Code there are three

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agement of the deceased spouse during the continuance of the marriage; and the surviving spouse, as surviving partner of the marital partnership, is entitled to retain possession and control of all community property which was legally under the management of the surviving spouse during the continuance of the marriage and to exercise over that property all the powers elsewhere in this Part of this Code authorized to be exercised by the surviving spouse when there is no administration pending on the estate of the deceased spouse.

35 "Special community" consisted of the wife's earnings and the rents and revenues from her separate property, and was subject to the wife's sole management and control and was exempt from the nontortious debts of the husband as long as the marriage was in existence. (No cases have been found raising the question whether such exemption continues after the death of the husband.)

36 Waterman Lumber & Supply Co. v. Robbins, 206 S.W. 825, 827 (Tex. Comm'n. App. 1918, jdgmt adopted). *See also*, Lovejoy v. Cockrell, 63 S.W.2d 1009 (Tex. Comm'n App. 1933). *But see* the unusual comment in, of all places, *Minimum Fee Schedule of the State Bar of Texas* 46 (1968):

> Those cases which support the view that after the death of the husband or wife there is an entire community estate of both spouses which is subject to administration in the Probate Court would seem to be in direct conflict with the State Constitution and Burton v. Bell, 380 S.W.2d 561, 565 (Tex. Sup. 1964).

For a possible answer to this comment, *see* Judge Wisdom's dissent in United States v. Stapf, 309 F.2d 592 (5th Cir. 1962), *rev'd* 375 U.S. 118, 84 S. Ct. 248, 11 L.Ed.2d 195 (1963), *rehearing denied* 375 U.S. 981, 84 S. Ct. 477, 11 L.Ed.2d 428 (1964); and 1 DeFuniak, *Principles of Community Property, Dissolution of Marital Community* § 205, pp. 585-86, to the effect that when the manager dies, all the property subject to his (her) control is included in administration in spite of the fact that there is no longer a community.

37 Effective January 1, 1970.

38 TEX. FAMILY CODE § 5.22 (1970).

> (a) During marriage, each spouse has the sole management, control, and disposition of the community property that he or she would have owned if single, including but not limited to:
>
> (1) personal earnings;
> (2) revenue from separate property;
> (3) recoveries for personal injuries; and
> (4) the increase and mutations of, and the revenue from, all property subject to his or her sole management, control, and disposition.
>
> (b) If the community property subject to the sole management, control, and disposition of one spouse is mixed or combined with community property subject to the sole management, control, and disposition of the other spouse, then the mixed or combined community property is subject to the joint management, control, and disposition of the spouses, unless the spouses provide otherwise by power of attorney or other agreement in writing.

classes of community property. One class consists of property that would have been owned by the husband if a single person. The second class is that which would have been owned by the wife if a single person. The first class is subject to the sole management, control and disposition of the husband during marriage. The second class is subject to the same sole powers exercisable by the wife. The third class of community property consists of (1) property which at one time during the marriage fell into either class one or two, but has since been mixed or combined, presumably in such a way that its origin can no longer be determined; and (2) any other community property. Class three, which may be called the "joint community," is subject to the joint management, control and disposition of the spouses during marriage.

Since the Probate Code was enacted at a time when none of the community property was subject to joint management, it contains no specific provision dealing with the representative's right to control and administer this class of property. To remedy this, the Council of the Real Estate, Probate and Trust Section of the State Bar of Texas has recommended an amendment of Section 177(b) of the Probate Code to provide that the representative of the estate shall have exclusive control over the joint community. It would obviously be impractical to divide responsibility and control over the same property between the surviving spouse and the executor.

As intimated above, a commission would be computed on the entire community under a broad construction of Section 241(a), and would only be denied if the strict definition of the word "estate" as used in Section 241(a) was overemphasized. Although a broad construction of legal provisions is not to be preferred over a narrow construction to achieve a goal which was never intended by the legislature, it would seem that the important duties of an administrator-executor relating to the survivor's one-half of the community property would dictate that he be paid for such services. As noted by Judge Wisdom in his dissenting opinion in *United States v. Stapf*,[89] "the executors spent a great amount of their time in connection with the administration of the community. There is no good reason for giving Mrs. Stapf a free ride."

(c) Except as provided in Subsection (a) of this section, the community property is subject to the joint management, control, and disposition of the husband and wife, unless the spouses provide otherwise by power of attorney or other agreement in writing.

[89] 309 F.2d 592, 605 (5th Cir. 1962), *rev'd and remanded* 375 U.S. 118, 84 S. Ct. 248, 11 L.Ed.2d 195 (1963), *rehearing denied* 375 U.S. 981, 84 S. Ct. 477, 11 L.Ed.2d 428 (1964).

A reasonable reading of Section 241(a) indicates that the key word in the section is not "estate", but is the entire phrase "in administration of the estate," with emphasis on "administration." Since under Section 177(b) the representative is authorized to "administer" not only the decedent's half, but also the surviving spouse's half of the community property, it is reasonable to interpret this phrase in Section 241(a) to include all the activities pursued under this power.

CONCLUSIONS

The present statute leaves many areas unclear and unsettled. Moreover, in many instances the present formula does not accomplish its objective, *i.e.*, to provide a fair and reasonable compensation for executors and administrators according to the circumstances. It would seem that a better method for determining the fee could be obtained. But, there is such a wide variation in value and makeup of decedents' estates, in the duties and responsibilities of executors and administrators, and in unanticipated situations arising in the settlement of estates, that it is almost impossible to establish a clear and workable schedule of fees or a set formula for computing fees applicable fairly in all cases.

Most corporate fiduciaries having published fee schedules for executor-administrator fees use the statutory formula modified to provide a minimum fee of approximately $1,000. Such values include the surviving spouse's share of community property if the wife's share is handled by agreement with the fiduciary. Other corporate fiduciaries use a formula based on the value of the estate, *e.g.*, 3% of the first $500,000, 2% of the next $500,000, and 1% over $1,000,000; plus a different scale for real estate, *e.g.*, 3% of sales price if sold through a broker and 5% if sold directly.

Admittedly, a commission based on the value of the probate estate may be no better than one based on cash-flow. But it is interesting to note that the fees customarily charged by corporate fiduciaries for serving as trustee of a trust estate are based on market value rather than cash-flow and are on a graduated scale. A typical schedule may provide for a basic annual fee of ¾ of 1% of the first $150,000 of market value ($300 minimum); ½ of 1% for the next $350,000; ⅓ of 1% for the next $500,000; ¼ of 1% for the next $1,000,000, and ⅛ of 1% for all sums over $2,000,000. An additional real estate management fee, varying with the type of property, may be charged.

Although a cash-flow formula has its difficuties, the principal objections to it are applicable equally to a market-value formula. But if a cash-flow formula is used, it should, in any event, be on a graduated basis: *e.g.*, 8% for receiving and paying out the first $10,000, 5% of the next $40,000, 3% of the next $250,000, and 2% of sums in excess of $300,000. An alternate, simpler formula would be 5% of the first $50,000, 3% of the next $250,000, and 2% of sums in excess of $300,000, with a minimum fee of $500.

Some states, such as Pennsylvania and Massachusetts, seem to get along very well with no fixed statutory rates but leave it to the probate court, in the absence of an agreement or provision in the will, to determine what is fair and reasonable under the circumstances.

A change to a graduated formula is called for in Texas. It is also very important that the statute be clarified in two other areas. First, the status of life insurance proceeds for commission purposes should be clarified. If the commission is to be based on the value of the estate, the statute should provide for the inclusion or exclusion of insurance proceeds from the estate for commission purposes. If the commission is to be determined on the basis of cash-flow, the status of insurance proceeds as "cash on hand" should be statutorily determined. Second, the problems mentioned in a community property estate must be dealt with. Section 177(b) of the Probate Code should be amended according to the suggestions of the Council of the Real Estate, Probate and Trust Section of the State Bar of Texas to provide that the representative shall have exclusive control over the joint community as well as over the community property which was subject to the deceased's sole control. Section 241(a) should then provide that the representative is to be paid for these services based on the entire community in administration as well as for the services rendered in connection with deceased's separate property.