

Opinion No. 57-210

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BY: OPINION OF FRED M. STANDLEY, Attorney General Hilton A. Dickson, Jr.,
Assistant Attorney General

TO: Mr. Charles B. Barker, Attorney, Legal Division, Bureau of Revenue, Santa Fe,
New Mexico

QUESTION

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1. Where an estate consists of community property, the husband being deceased, is the compensation allowed to an administrator or executor properly based on the value of the entire estate or only upon the value of half of the community property?
2. In determining the succession tax due, can the additional fees allowed in such cases to the administrator and the attorney be taken as a deduction?

CONCLUSIONS

1. Entire estate.
2. Yes.

OPINION

ANALYSIS

The instant questions arise from the construction and exact meaning of § 31-10-1, N.M.S.A., 1953 Compilation, which law provides as follows:

"Administrators and executors shall be entitled to a compensation of ten (10) per cent on the first three thousand dollars (\$ 3,000) and of (5) per cent on all amounts in excess of the first three thousand dollars (\$ 3,000) upon property at its appraised value **which shall come into their hands as such**. Provided, that if the said property shall consist of the proceeds of life insurance policies, or cash, including checking accounts, time deposits, certificates of deposit, savings accounts, postal savings certificates, and all United States government bonds, then said compensation shall be not to exceed five (5) per cent of the first five thousand dollars (\$ 5,000) and not to exceed one (1) per cent on all amounts in excess of the first five thousand dollars (\$ 5,000). And, Provided, further, that no compensation or commission shall be paid on account of any real estate, except such amount as may be allowed by the court upon proper cause being shown therefore. The deduction allowable to an administrator or executor in determining

the succession tax due the state of New Mexico on any estate for executor's or administrator's fees shall not be more than the fees provided for in this section."

Two aspects arising from the aforementioned section and suggested by the questions above put, are to be considered. First, the determination of a value placed upon all personal property coming into the hands of an administrator or executor; and, Second, what is intended as "fees" as provided for in the law.

In **York vs. American National Bank of Silver City**, 40 N.M. 123, 55 P. 2d 737, the Court in considering responsibility of personalty during the course of administration stated the following:

"In this jurisdiction on the granting letters testamentary or of administration or on the appointment of an administrator, all personal property belonging to the decedent passes immediately to the administrator or executor as the case may be. Such administrator having the legal title thereto. . . ." See also *Smith vs. Steen*, 20 N.M. 436, 150 P. 925; *Sheley vs. Shafer*, 35 N.M. 358, 298 P. 942.

Accordingly, all personal property whether community or the separate estate of the deceased shall come into the hands of administrators or executors and the value thereof shall be determinative, in part of the compensation to be allowed under administrators or executors.

It is well understood that in keeping with the provisions of Section 31-7-2, N.M.S.A., 1953 Compilation;

"The real estate of a decedent shall pass directly to the heirs or devisees and not to the executor or administrators;"

Nevertheless, administrators and executors are not by reason of the aforesaid law relieved of many duties imposed on them in the management and distribution of realty. Section 31-3-2, N.M.S.A., 1953 Compilation, requires the making and filing of an inventory "of all real and personal property of the decedent which shall come to their knowledge or possession." Also where heirs or devisees are not present personally administrators or executors are charged with the duties of accounting for rents, payment of taxes, paying for real estate, executing deeds heirs and for widows, Section 31-7-2, 31-7-3, 31-7-4 and 31-7-8, N.M.S.A., 1953 Compilation.

Consequently, it is our opinion that in determining the compensation allowed to an administrator or executor that the value of the entire community must be looked to. By proviso in Section 31-10-1, supra;

". . . no compensation or commission shall be paid an account of any real estate, **except such amount as may be allowed by the court upon proper cause being shown therefore.**"

The final sentence of the section provides:

"The deduction allowable to an administrator or executor in determining the succession tax due the state of New Mexico on any estate for executor's or administrator's fees shall not be more than the fees provided for in this section."

A similar limitation is provided for allowable attorneys' fees in Section 31-10-4.

Thus, with reference to your second question, it is our opinion, in considering the language of the aforesaid proviso, along with that of the specified fee schedule found in the first sentence, that the clause "fees provided for in this section" includes not only those fees allowed by the schedule, but also includes any additional compensation as may be approved by the Court.

It is finally our opinion that the sum of all compensation, paid by reason of administration including any part thereof, which is based upon the appraised value of the personal estate as provided by statute as well as that approved by the court for services and management rendered in behalf of the real estate, is a deduction allowable in determining the succession tax due the State of New Mexico.