

**THE ORIGIN OF THE  
TRANSMISSION OF ISSUES  
ESTATES & TRUSTS ARTICLE § 2-105  
By Fred Franke**

**Transmission of Issues: "[B]y any reckoning, an odd practice."<sup>1</sup>**

Estates & Trusts Article § 2-105 (Issue of Fact Determinations), has its roots in pre-1776 English common law.

In pre-1776 England, challenges to testamentary dispositions of real property were handled in the law courts. Those challenges could, like most actions at law, be tried before a jury. At that time, testamentary transfers of real property went directly to the heirs and such property was not administered by the ecclesiastical or Chancery courts (the predecessor of the probate court). Accordingly, a challenge to the validity of a real estate devise was brought as a common law action such as ejectment or trespass in order to challenge the title.<sup>2</sup>

The immediate transfer of the title of real property to heirs at the death of the owner of such property was also the rule in Maryland until 1970 and is, indeed, still the practice in some U.S. jurisdictions. The 1970 change resulted in Estates & Trusts Article § 1-301 (All Property of a Decedent; Devolution at Death), and it was the result of recommendations by the "Henderson Commission."<sup>3</sup> The Henderson Commission was charged with reviewing the existing testamentary laws of Maryland with a view of restating and recodifying those laws: "There is no field of Maryland law whose statutory framework is more archaic, disorganized, cumbersome and illogical." As a result of the recommendations of the Henderson Commission, Maryland law

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<sup>1</sup> *Banashak v. Wittstadt*, 167 Md.App. 627, 679, 893 A.2d 1236, 1266 (2006)("Although it is of ancient lineage, the practice of an Orphans' Court's transmitting issues to a Circuit Court for jury fact-finding is, by any reckoning, an odd practice.")

<sup>2</sup> Josef Athanas, "The Pros and Cons of Jury Trials in Will Contests," 1990 U.Chi. Legal F. 529, 532 (1990). (Hereafter referred to as "Athanas.")

<sup>3</sup> Second Report of Governor's Commission to Review and Revise the Testamentary Laws of Maryland (1968), commonly referred to as the "Henderson Commission" was established in 1965 by Governor Tawes pursuant to a joint resolution of both Houses of the General Assembly of Maryland.

changed the two-tiered system of having personal property governed at death by the probate courts and real property devised governed by the law courts. § 1-301 of the Estates & Trusts Article provides: "All property of a decedent shall be subject to the estates of decedents' law, and upon the person's death shall pass directly to the personal representative, who shall hold the legal title for administration and distribution, without any distinction, preference, or priority as between real and personal property."

The Henderson Commission gave its reason for the change by stating that the old law was an illogical carryover from English common law.

With the general adoption of English law by the American states, and Maryland in particular, the distinction (between real estate and personalty) became embedded in our own law. However, in our modern economy, assets other than land are now the prime source of wealth. As a result, there is little, if any, reason for continuing to exclude a decedent's real estate from the assets comprising its probate estate. In fact, such exclusion causes serious problems which also defeat the intention of the testator, and work against the best interests of the decedent's family and creditors as well.

By eliminating the distinction between real and personal property as it applies to testamentary law, of course, Maryland law did not eradicate a two-tiered system. Increasingly, transfers at death are accomplished by non-probate positions such as beneficiary designations under IRAs, the use of revocable trusts, and the nature of the title of real property as joint or tenants by the entirety ownership. Thus, the law governing the transmittal of wealth at death remains under the jurisdictions of several tiers of courts.

Pre-1776 English law provided that personal property was not governed by the courts of law but was governed by either the ecclesiastical courts or by Chancery. Those courts traditionally did not provide for trials by jury. The Chancery court, however, occasionally would transfer arguments over the validity of a Will to the law courts for the use of its juries even if the Will

regarded real estate. Generally those holdings of the jury were not binding but just advisory to the court of Chancery.<sup>4</sup>

Thus, by the time of the American Revolution, the right to a jury trial in a Will contest was nuanced and complex. Article 5 of the Maryland Constitution, Declaration of Rights (application of common law and statutes of England; trial by jury) provides that Marylanders are entitled to a trial by jury to the degree that the rights existed in England on July 4, 1776 as practiced by the courts of law or equity (equity being the successor to Chancery). By its terms, the Maryland Constitution accordingly would bring forward the practice of pre-1776 English law which, to say the least, was confusing and complex.

Fortunately, Maryland adopted by statute the right to have facts determined by a jury for certain probate matters. That statute held: "At any stage of the proceedings, before final adjudication, either party may require it (an issue) and the court is not at liberty to refuse it" to be tried by a jury.<sup>5</sup> The origin of Estates & Trusts Article § 2-105 is therefore by statute and not by the sweeping inclusionary language of the Maryland Constitution.

Current Estates & Trusts Article § 2-105 provides:

(a) Determination of an Issue of Fact. – In a controversy in the court, an issue of fact may be determined by the court.

(b) Transfer of Determination to Law Court. – At the request of an interested person made within the time determined by the court, the issue of fact may be determined by a court of law. When the request is made before the court has determined the issue of fact, the court shall transmit the issue to a court of law.

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<sup>4</sup> Athanas at 533 ("In cases of this sort, the Chancery court sent that issue (one that impacted real estate) to a common law court, where it was tried before a jury. Chancery judges did not consider themselves bound by a jury verdict; if they deemed the verdict unsatisfactory, they would order a new trial. Thus, while contest of devises of realty continue to be tried in common law courts before a jury, Chancery judges, as a practical matter, could have the final word by ordering new trials until a satisfactory verdict was reached.")

<sup>5</sup> *Pegg v. Warford*, 4 Md. 385, 393-4 (1885).

(c) Order Based on Determination. – After the determination of the issue, whether by the court or after transmission to a court of law, the court shall enter an appropriate judgment or decree.

(d) Exception. – This section does not apply where the estate is administered under the jurisdiction of a court having general equity jurisdiction.

At least the second sentence of § 2-105(b) ("When a request is made before the court has determined the issue of fact ...") can be traced back to the Maryland law of the post-colonial era.<sup>6</sup> The statutory provision permitting a jury trial to determine factual issues in Orphans' Court matters necessarily requires the transmittal of that portion of the proceedings to the Circuit Court only because the Circuit Court is the court with the ability to have juries: "The measure is a child born of necessity. An Orphans' Court, having no jury of its own, sometimes needs to borrow one from someone else, even as it might need to borrow a bailiff or the use of a courtroom."<sup>7</sup> The concept of "borrowing" the Circuit Court for the use of its jury capability explains, in part, why the Circuit Court does not have the ability to change the framed issues if it finds them wanting. Only the Orphans' Court can frame and supplement the framing of issues.<sup>8</sup> Indeed, the Circuit Court is viewed as "a tribunal ancillary to the Orphans' Court, whose aid is invoked for a single purpose of determining issues of fact submitted to it by the Orphans' Court for its guidance in dealing with some matter before it. The court of law to which they have been transmitted has no concern

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<sup>6</sup> *Russell v. Gaither*, 181 Md.App. 25, 29, 952 A.2d 1013, 1015 (2008). The *Russell* court made a distinction between the right of any party to insist on issues being transmitted to the Circuit Court at any time prior to the Orphans' Court having determined that issue of fact in a caveat action and the right of the party to insist on a transmittal of issues in other proceedings. The *Russell* court traces the distinction between caveats and other matters to Philip Sykes, Probate Law & Practice (1956), § 221 which states that "Excepting caveat cases, after the parties have elected to try, and are actually trying the identical facts embraced in the proposed issues, the Court is not required to stop the hearing and send them. Nor can the Court be asked to transmit issues after it has passed an order on the merits of the controversy." *Russell* at 32.

<sup>7</sup> *Banashak v. Wittstadt* at 679.

<sup>8</sup> *Forsythe v. Baker*, 180 Md. 144, 23A.2d 36 (1941) (Decided before Md. Rule 6-434 giving the Orphans' Court authority to grant supplemental issues.)

whatever with anything that transpired in the Orphans' Court in connection with the framing of such issues."<sup>9</sup>

Although the basis for the transmitting of issue statute is to have facts tried before a jury, that is not an essential ingredient. Indeed, once in the Circuit Court for a trial on the facts, a jury trial may be waived.<sup>10</sup>

When the Circuit Court, however, is presiding over the jury, that court has its usual power to regulate the trial and make evidentiary rulings. If there is not sufficient evidence after the trial to justify submission of the issues to the jury, for example, it remains a question of law for the court to decide whether to grant a motion for judgment and remove the case from the jury's consideration.<sup>11</sup>

The only thing transmitted for determination to the Circuit Court is a question of fact, not a question of law. Indeed, each factual matter should be a separate issue. Questions of law, on the other hand, are subject to appeals not shifting the matter to another court for determination.<sup>12</sup>

The "odd practice" of the Orphans' Court transmitting issues of fact to the Circuit Court finds its roots in pre-1776 English common law. It is more of a product of history than of deliberate legislation decision.

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<sup>9</sup> *Holland v. Enright*, 167 Md. 605, 607-8, 175 A 466 (1932).

<sup>10</sup> *Kao v. Hsia*, 309 Md. 366, 378, 524 A.2d 70 (1987); *Schmeizl v. Schmeizl*, 184 Md. 584, 598, 42 A.2d 106, 112 (1945).

<sup>11</sup> *McIntyre v. Saltysiak*, 205 Md. 415, 424, 105 A.2d 70 (1954).

<sup>12</sup> *Nugent v. Wright*, 277 Md. 614, 356A.2d 548, 552 (1976).