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**THE COURTS OF NEW JERSEY -- PART III
(B) PROBATE COURTS IN A UNIFIED JUDICIAL SYSTEM**

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PROBATE COURTS IN A UNIFIED JUDICIAL SYSTEM

The present system for the trial of probate disputes in New Jersey has been described as "mothered by the ecclesiastical courts, grandsired by obsolete concessions to the church and the landed gentry."¹ Simes and Basye, in their recent definitive study of the organization of the probate courts in America,² refer to New Jersey as one of a number of states where remnants of the English ecclesiastical practice of the 17th and 18th Centuries still persist.

"Its intricacies can only be appreciated by a detailed description. Three courts have probate jurisdiction: the surrogate's court, the orphans' court and the prerogative court. There is one prerogative court for the entire state presided over by a chancellor sitting as ordinary or surrogate-general.³ There is one surrogate in each county⁴ and also one orphans' court in each county.⁵ The surrogate is both the judge and clerk of his own court;⁶ he is also clerk of the orphans' court.⁷ The prerogative court has jurisdiction throughout the state to probate wills, grant letters and to hear and finally determine disputes that arise thereon.⁸ The surrogate of each county also has power to probate wills and grant letters except when doubt appears on the face of a will or a caveat is filed against a will or a dispute or contest arises as to the existence of a will or the right to letters.⁹ In any of these cases the matter is transferable to the orphans' court.¹⁰ In general the orphans' courts have no original jurisdiction to probate wills or grant letters. Their sole jurisdiction to do so arises on transfer from the surrogate in case the matter is disputed or contested.¹¹ The orphans' courts also have power to grant allowances to widows and children pending a will contest,¹² to determine heirship of an intestate where real estate is involved,¹³ to approve compromises of will contests or claims of the estate against a third person,¹⁴ to order the sale of real estate for the payment of debts,¹⁵ determine rights of beneficiaries under a will or of the next of kin in an estate,¹⁶ and determine contro-

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1. "Probate Law under a Unified Court System," New Jersey Law Journal, May 8, 1947; 70 N.J.L.J. 149
 2. Simes, L.M. and Basye, P.E., "The Organization of the Probate Court in America," 42 Mich. Law Rev. 985-1008 (Part I) and 43 Mich. Law Rev. 113-154 (Part II)
 3. New Jersey Constitution, Art. VI, Sec. IV, Par. 2
 4. R.S. 2:7-12
 5. R.S. 2:7-1
 6. R.S. 2:31-4 and 16
 7. R.S. 2:7-4
 8. R.S. 3:1-1
 9. R.S. 3:2-22 and 3:7-5.1
 10. Ibid
 11. Ibid
 12. R.S. 3:2-29
 13. R.S. 3:4-1 to 3
 14. R.S. 3:15
 15. R.S. 3:25-23
 16. R.S. 3:26-2 and 6

versies respecting allowances of accounts.¹⁷ In short, the jurisdiction of the surrogate is limited to the probate of wills and issuance of letters in nonadversary proceedings. The remainder of the administration is had in the orphans' court. The probate of a will may be either before the surrogate of the proper county or in the prerogative court.¹⁸ Thus, if a proceeding is initiated before the local surrogate, the services of the orphans' court will certainly be required; but if a proceeding is initiated in the prerogative court in the first instance that court has power to conduct the entire proceeding.¹⁹

Thus, in New Jersey contentious probate matters are now handled by three courts of original jurisdiction. The work of the Prerogative Court, with state-wide jurisdiction and headed by the Chancellor as Ordinary or Surrogate-General, is handled by him and ten Vice-Ordinaries, who are also Vice-Chancellors of the Court of Chancery. Another and larger piece of the work is attended to by the Orphans' Courts, with county-wide jurisdiction; there are 33 Orphans' Court Judges who, sitting as judges in other courts (Common Pleas, Quarter Sessions, etc.) exercise general civil and criminal jurisdiction. And a small piece is the concern of the surrogate's courts, each with county-wide jurisdiction; there is, as noted, a surrogate in each of the 21 counties. Proceedings in the Orphans' Courts are reviewable in the Prerogative Court, and proceedings in the Prerogative Court, both original and appellate, are reviewable in the Court of Errors and Appeals.

It has been estimated that the Vice-Ordinaries and Common Pleas (Orphans' Court) Judges devote less than ten per cent of their time to probate matters, and that the Orphans' Courts refer 60 to 75 per cent of contentious probate business to Masters to report, or to ad hoc Advisory Masters. This situation has been strongly criticized, the most recent comment appearing in the New Jersey Law Journal for May 8, 1947:²⁰

17. R.S. 3:1-2

18. R.S. 3:2-3

19. Simes and Basye, op. cit., pp. 982-3

20. 70 N.J.L.J. 149

"Could any system of courts be worse than that under which judicial business is turned over by the bench to the bar for hearing, with the judicial services of the bar paid for on a fee basis? The Court of Errors and Appeals has put it too mildly: 'The practice of referring Orphans' Court matters to a master should not be encouraged.'"

The criticisms directed against the present system are substantially as follows:

1. Judges exercising probate jurisdiction devote so little time to those matters that, no matter how competent, they cannot achieve the desired expert knowledge necessary for efficiency and dispatch of business. This circumstance is said to underlie the practice of reference to masters, with the resultant expense to estates and litigants.

2. Matters originating in the Orphans' Court are subject to successive appeals to two higher tribunals.

3. Probate courts do not possess jurisdiction to determine all matters which arise in the administration of estates, a notable example being a lack of jurisdiction to construe a will. Frequently, therefore, independent proceedings must be brought in the Court of Chancery.

4. The overlaps of Chancery and probate jurisdiction as to the settlement of accounts, distribution of estates, proceedings for discovery and relief, proceedings to secure the advice and direction of the court, and proceedings for the construction of wills give rise to fruitless litigation as to whether the court has jurisdiction to entertain the cause.

Both the revised Constitution proposed by the Commission on Revision of the New Jersey Constitution in its 1942 Report²¹ and the draft submitted to the electorate by the 168th Legislature in 1944²² proposed a unified court system for New Jersey, with a Superior Court of original general jurisdiction throughout the State in all cases, immediately below the Supreme Court and composed of two sections, a law section exercising civil, criminal and matrimonial

21. Pp. 46-47; Art. V, and particularly Sec. III, Pars. 1 and 2

22. Art. V, and particularly Sec. III, Pars. 2 and 3

jurisdiction, and an equity and probate section "to exercise the other jurisdiction of the court." Each section of the Superior Court was to have such parts as might be provided by rules of the Supreme Court. In the section of their monograph entitled "Standards for an Ideal Probate Court," Simes and Basye spoke of the 1944 proposal as an "example of a scientific and comprehensive legislative approach to probate reform..."²³

Alfred C. Clapp, author of the treatise "Wills and Administration in New Jersey," speaking before the Joint Legislative Committee which considered the Report of the 1942 Commission just referred to, said:²⁴

"Were one to devise a system for the adjudication of probate disputes, could aught be more obvious than to turn the business over to specialist fulltime judges sitting in the Probate Part of a Probate and Equity Section of a court "having original jurisdiction throughout the State in all cases." Such Part could determine as well the construction of wills, inter vivos trusts and devises, as pass upon caveats, settle accounts and distribute estates. Because there would not be enough business for such a specialist in each county, one justice would be assigned to several counties with a weekly, or in the smaller counties a less frequent, motion day in each county, the justice traveling to the litigants and not vice versa. Too, there should be only one appeal as of right instead of two or three; and that to a court en banc--with a further review only if allowed by the banc or the highest court or if there be a dissent in the banc or if a constitutional question be raised. Again the clerical work and non-contentious business of the Probate Part should be handled by a specialist, the present Surrogate; and there should be a single head for all the courts of the State, a Chief Justice, with the fullest administrative powers. Thus there would be offered the specialization making up the genius of the New York Surrogates with their jurisdiction, taken from the Chancellor, over the construction of wills and, taken from the law courts, over land as well as personalty; but added thereto, flexibility for improvement and administration."

If the objections to the present system noted above are to be met, and the present difficulties and deficiencies of New Jersey probate administration eliminated, the probate court should have such jurisdiction as will

23. Op. cit. 43 Mich. Law Rev. 153, footnote

24. Record of Proceedings before the Joint Legislative Committee... to Ascertain the Sentiment of the People...for Change in the New Jersey Constitution, 1942, p. 300. And see 70 N.J.L.J. 149

enable it to handle and completely dispose of matters arising in connection with wills and the administration of estates. In a unified court, like the one recommended in 1942 and 1944 and proposed by authorities on probate practice, probate matters would be handled by a division possessing equitable jurisdiction, with a probate part in such a division to deal exclusively with probate matters.

Such integration would further permit the grouping of probate matters with kindred matters, to be handled by the part of the court specializing in problems common to all such matters. Testamentary trusts are now within the jurisdiction of both the probate courts and the Court of Chancery. Inter vivos trusts, however, are within the exclusive jurisdiction of Chancery. Both kinds of trusts present substantially the same judicial problems and accordingly may well be handled in a single part of a unified court. So also the administration of estates of infants and incompetents -- a jurisdiction now shared by the probate courts and Chancery -- could properly be allocated to the same part, subject to the disposition of the non-contentious aspects of such matters locally before the surrogate or clerk, as in the case of other non-contentious probate matters to be mentioned shortly. It may also be desirable to empower the probate part of the unified court to declare constructive trusts incidentally to the exercise of probate jurisdiction, a power now exercisable only by Chancery.

The Orphans' Courts presently have jurisdiction of some essentially non-related matters, such as adoption and assignment for the benefit of creditors. The disposition of jurisdiction over such matters would appear to be appropriately left to legislative action or rule of court.

In any consideration of probate matters, a distinction must generally be made between non-contentious and contentious matters. With respect to non-

contentious matters -- the probate of wills, issuance of letters of administration, the settlement of estates where neither doubtful questions or controversy are involved -- the need for a simplified, inexpensive practice is apparent. To this end, the present surrogates could serve as clerks of the probate part of the unified court, with the necessary judicial power vested in them to deal with and dispose of non-contentious matters in the respective counties. The right would be reserved to interested parties to appear before a Superior Court Justice assigned to the probate part in any litigated matter, including the right within a limited time to open up a surrogate's common probate decree. The surrogate himself, or the parties, should be authorized to certify or lay before the Justice any non-contentious matter presenting difficulties.

Details for handling non-contentious matters should not, of course, be written into a constitution. It would be more appropriate and practical to leave this aspect of probate practice to legislative action or rule of court, to the end that changing needs may in the future be met quickly.

It is difficult to categorize probate systems of other jurisdictions.²⁵ Historical factors and local considerations, largely geographic, are evident. In general, however, the trend of legal thinking is toward the unification of the probate courts, enlargement of their powers to permit complete disposition of an entire matter in a single proceeding before a single judge, specialization by probate judges where probate business is sufficiently large to occupy the time of one or more judges, and a single appeal. In some instances, this system is established in basic law, and in others it rests upon statute.

25. See Simes and Basye, op. cit.

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