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Probate Jurisdiction Problems

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PROBATE JURISDICTION PROBLEMS

Probate law is currently undergoing considerable nationwide study and change. Many states have recently revised their probate law.[1] The American Bar Association in conjunction with the National Conference of Commissioners on Uniform State Laws has considered drafting a Uniform Probate Code in order to resolve some of the current problems in administration of estates.[2] One of the basic aims of the reform has been to remedy the waste and delay caused by inefficient probate procedure. The problem in Nebraska is a result of the county court, which is the probate court,[3] lacking general and equitable jurisdiction.[4] Because the county court lacks equitable powers, its jurisdiction in probate cannot be exclusive unless it is allowed to encroach upon the district court's equity jurisdiction. The result is a shifting of estate problems between the two courts during administration of the estate. A further source of delay is that the district court may try de novo all matters decided in the county court.[5] The question to be asked is whether trial de novo in the district court and concurrent jurisdiction with the county court meet the need in probate procedure for administrative efficiency.

I. HISTORY

The background of the present probate procedure is a running conflict between the exclusive probate jurisdiction of the county court and the equitable jurisdiction of the district court. The recent trend has been to shift more matters of probate[6] into the district court. Under section 24-302,[7] the district court has jurisdiction "except where otherwise provided" and it has been argued that this gives the district court control over all matters not expressly reserved to the county court.[8] For example, the district

1 Lundy, *Probate-Law Revision in Oregon*, 44 ORE. L. REV. 42, 52-58 (1964). Washington can now be added to this list.

2 Harris, *A Uniform Probate Code*, 104 TRUSTS & ESTATES 337 (1965).

3 NEB. CONST. art. 5, § 16.

4 NEB. CONST. art. 5, § 9. The district court is designated as the court of general and chancery jurisdiction.

5 NEB. REV. STAT. § 30-1606 (Reissue 1964).

6 "Probate" as used here and throughout the article will refer to the regulation, management and settlement of decedent's estate.

7 NEB. REV. STAT. § 24-302 (Reissue 1964) which complements the constitutional delegation of general and chancery jurisdiction to the district court.

8 Stubbs, *Probate Procedures Available to Beneficiaries*, 39 NEB. L. REV. 311, 319 (1960).

court was permitted to construe a will only if such construction was incidental to a recognized equity matter, such as where the action was brought to have a specific bequest declared a lien upon real estate.[9] However, the supreme court has held that the necessity for construction of a will in any suit brings the matter within the scope of the district court's jurisdiction.[10]

During the time period between the two decisions above, there were no constitutional or statutory changes so the reasons for the judicial change lie elsewhere. One reason may be the supreme court's lack of confidence in the lay judges who sit in the county courts of the sparsely populated counties.[11] A statutory recognition of this practical limitation in the county courts is the fact that appeals from the county court are tried de novo in the district court.[12] *In re Marsh*[13] involved a suit in which the will contestant sought to voluntarily dismiss his appeal then pending in district court. The dismissal was granted by the district court and the issue was whether the district court had the power to dismiss the appeal. The procedure for appeals to the district court was set out in detail by the court quoting from *Williams v. Miles*[14] as follows: "The evidence is taken and the cause tried without regard to the evidence in the lower court. The result, not the case itself, is certified back to the county court. After the district court becomes so possessed of the case, the county court will never have

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9 Klug v. Seegabarth, 98 Neb. 272, 152 N.W. 385 (1915). The suit was brought by the administrator of the wife's estate against the heirs of her husband's estate. The bequest was from the husband to the wife and had not been paid to the wife at her death. The court found that her bequest was a lien upon the land which had passed in her husband's will.

10 Lutcavish v. Eaton, 166 Neb. 268, 89 N.W.2d 44 (1958). A beneficiary under Fred Crane's will objected to the estate of Fred's second wife, Maude. The beneficiary claimed that the personal property given by Fred's will to Maude should go to him on Maude's death. As the determination of the claim required construction of Fred's will, the county court could not determine the claim against the estate.

11 NEB. REV. STAT. § 24-501.01 (Reissue 1964), apparently recognizes this thought by providing for lawyer judges in counties of over 16,000 population.

12 NEB. REV. STAT. §§ 30-1606 (Reissue 1964); 24-544 (Reissue 1964); and 27-1305 (Reissue 1964).

13 145 Neb. 559, 17 N.W.2d 471 (1945). In applying the three statutes in note 12, *supra*, the court found that the district court had the power to deal with the suit as though it had been originally filed in that court.

14 73 Neb. 193, 102 N.W. 482 (1905) reports the fifth of seven appeals of this case to the supreme court. The court considered on this appeal a motion for a new trial partly on newly discovered evidence and partly on the previous action being brought in the wrong court.

any further jurisdiction of the issues so removed."[15] Once appeal is perfected to the district court, the county court judgment is vacated. After trial, the district court certifies its decision back to the county court which then completes the administration of the estate. Thus, the trial function of the county court is duplicated in the district court. This delay is not necessary to the proper function of the probate procedure and should be eliminated.

II. TRENDS IN PROBATE PROCEDURE

Through judicial interpretation of the statutes on probate jurisdiction, two theories have been developed. The first is that the probate court has the power to decide equity matters where such matters are incidental to its exclusive probate jurisdiction. The second theory is that where the matter involved is usually decided in the district court, the district court can also decide related probate matters that would otherwise be within the exclusive jurisdiction of the county court. The theories pull in opposite directions, the former extending the jurisdiction of the county court and the latter restricting it. And, as will be seen, the supreme court balances the interests of each court to determine which should prevail.

The first rule was recognized and applied in *Williams v. Miles*.[16] The issue presented in this particular appeal of the *Williams* case was whether the county court could hear a petition to set aside a will after the time for appeal on the judgment approving the will had run. The petitioners also sought to prove another will. The supreme court found that where the county court had exclusive jurisdiction "it may exercise all the powers of a court of general jurisdiction, either legal or equitable, which pertain to the subject over which it is given such jurisdiction."[17] The reason for the rule is simply that the county court should have those powers necessary to carry into effect its probate jurisdiction and to give complete relief to the parties before it. In *Williams* this meant that the county court could provide the equitable relief of granting a new trial. The county court has also been held to have jurisdiction of an action to grant specific performance of an agreement between heirs in settlement of a will contest[18] and of an action to require an executor to account for the difference between the sale price of

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[15] 145 Neb. 559, 563, 17 N.W.2d 471, 474 (1945).

[16] 63 Neb. 859, 89 N.W. 451 (1902).

[17] *Id.* at 866, 89 N.W. at 454.

[18] *In re* Estate of Lee, 137 Neb. 567, 290 N.W. 437 (1940). The agreement here was between a beneficiary under a prior will which was held revoked and the residuary beneficiary under the will admitted to probate.

land he fraudulently sold and the actual value of the land.[19] It remains to be determined, however, when the county court has such exclusive jurisdiction as to allow it to decide equitable matters.

The second rule is illustrated in *Dennis v. Omaha Nat'l Bank*.[20] In *Dennis* the heirs at law of the settlor of the trust brought the suit in the district court to interpret the will, terminate the trust and distribute the corpus of the trust. The supreme court held that although no county court had previously determined heirship,[21] "the district court has original jurisdiction to make such determination where the question becomes material in a proceeding of which such court has original jurisdiction."[22] The supreme court thus approved the theory that where there is an equitable question or similar peg by which the district court obtains original jurisdiction, the district court can decide matters which are otherwise within the exclusive jurisdiction of the county court. The district court has jurisdiction when the action is brought to quiet title,[23] to partition real estate[24] or to settle matters involving trusts.[25] The result of these and similar decisions has been to make the probate jurisdiction of the county court concurrent with the district court, raising the question of which is the proper court.

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19 *In re* Estate of Jurgensmeier, 142 Neb. 188, 5 N.W.2d 233 (1942). The executor's fraudulent conveyance was a sale of land in the estate to his wife for less than the actual value of the land.

20 153 Neb. 865, 46 N.W.2d 606 (1951).

21 State v. O'Conner, 102 Neb. 187, 166 N.W. 556 (1918). The supreme court held that if the heirship of the parties to a suit in the district court was disputed, the district court must abate its action until the county court determines heirship.

22 153 Neb. 865, 870, 46 N.W.2d 606, 611 (1951). The cases cited by the supreme court to support this point are distinguishable in that in each case, heirship was undisputed. See discussion in State v. O'Conner, 102 Neb. 187, 166 N.W. 556 (1918).

23 Best v. Gralapp, 69 Neb. 811, 99 N.W. 837 (1903). The case was properly in the district court where one child of the deceased brought an action to quiet title against the other children of the deceased because real estate and title to property were involved. Both of these areas are within the district court's statutory jurisdiction.

24 Hiatt v. Hiatt, 146 Neb. 652, 20 N.W.2d 921 (1945). The district court had jurisdiction over the suit because of its exclusive jurisdiction over land even though the issue presented was whether the debt of one beneficiary owed to the testator might be retained or charged against his share from the proceeds of the partition sale.

25 *In re* Trust Estate of Myers, 151 Neb. 255, 37 N.W.2d 228 (1949). The trust was created by the county court but the nature of trust questions requires trial in the district court.

III. STATUTORY AND CONSTITUTIONAL INTERPRETATION

The concurrent jurisdiction of probate has raised the central issue of "how far one may get relief in the probate court and how far he must or may go into the courts of general equity jurisdiction."[26] Each of the areas that will be considered—claims against the estate, settlement and distribution of estates, admission and construction of wills and determination of heirship[27]—shows an aspect of the problem created by the overlap of power under the statutes and judicial decisions on probate jurisdiction.

The first area to be considered is the county court's jurisdiction to hear and determine claims and setoffs in the estates of deceased persons. In the case of *In re Wiley's Estate*,[28] the executor's final report to the county court omitted certain property because he claimed title to it. The legatees filed objections to the report alleging that the property claimed by the executor should be part of the estate. The deceased had contracted to sell the land to one Trumbull. Upon Trumbull's default on the contract, the executor brought an action for a foreclosure sale on the contract and bought the land in his own name. He received title to these lands at the foreclosure sale. The county court could decide title to the land in question as the supreme court felt that the county court should decide all questions necessary to carry out its probate power.[29] But in *Lambie v. Stahl*[30] the supreme court apparently narrowed the *Wiley* rule. In *Lambie* a legatee objected to the final account of the administrator and alleged that certain rentals collected by another legatee should be part of the estate. The supreme court held that the county court could not decide title to the rentals. The cases are distinguishable because in *Lambie* a legatee, and not an executor as in *Wiley*, had possession of the property. The court specifically held that the relationship of the legatee to the estate was not enough to give the county court control.[31] In *Graff v. Graff*[32] bene-

[26] POUND, ORGANIZATION OF COURTS 140 (1940).

[27] NEB. REV. STAT. § 24-504 (Reissue 1964). Each of these areas is detailed in this statute and is the basis for most of the county court's probate jurisdiction.

[28] 150 Neb. 898, 36 N.W.2d 483 (1949).

[29] The county court is prohibited both by the constitution, NEB. CONST. art. 5, § 16, and by statute, NEB. REV. STAT. § 24-502 (Reissue 1964), from trying title to real property. However, the equitable conversion of real property to personal property in a contract for sale of real property permitted the county court to determine title here. As more wealth becomes based in personal property, the reasons for this prohibition are weakened.

[30] 178 Neb. 506, 134 N.W.2d 86 (1965).

[31] The result in *Lambie* is illustrative of the delay caused by concurrent

ficiaries of the wife's estate sought to impress a trust upon a note and mortgage in the possession of the personal representative of the husband's estate. The supreme court held that "the district court has exclusive jurisdiction to adjudicate controversies between the executor and persons claiming adversely to the estate."[33] In this area of concurrent jurisdiction the question of just who has possession of the item of property in dispute apparently determines which court is the proper court. Such a question seems essentially irrelevant to the overall job of administering an estate, and should not determine jurisdiction.

The second problem area is the jurisdiction of actions to require executors and administrators to settle their accounts and to account for all the property of the estate that came into their possession. Jurisdiction for this purpose is statutorily vested in the county court.[34] Such accounting, of course, includes a statement showing the distribution of proceeds of the estate. In *Reischick v. Rieger*[35] the action was for an order to distribute part of the estate under authority of a judgment against the executor and to construe a will. The court found that as to both these matters the district court lacked original jurisdiction. However, in *Schick v. Whitcomb*,[36] the district court was held to be the proper court to distribute the proceeds of the estate. The district court obtained jurisdiction because the action in *Schick* was for a partition sale of real estate. The district court is given by statute the power to handle partition sales.[37] The supreme court felt that the district court should be able to distribute the proceeds of the sale to protect the interests of all parties. Although this policy may have been beneficial in this case, especially since certain heirs had received advancements on their shares, it did make distribution another probate matter subject to the overlapping powers of two courts.

The third problem area concerns the county court's jurisdiction over the probate of wills which involves admitting wills to probate,

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jurisdiction. The administrator was ordered to prosecute the claim and then account to the county court.

[32] 179 Neb. 345, 138 N.W.2d 644 (1965).

[33] 179 Neb. 345, 353, 138 N.W.2d 644, 650 (1965). This is quite a change from the statute which gives to the county court the jurisdiction over all claims of the estate. It may be explained however, by the fact that a trust was involved which is within the district court's special competence.

[34] NEB. REV. STAT. § 24-504(5) (Reissue 1964).

[35] 68 Neb. 348, 94 N.W. 156 (1903).

[36] 68 Neb. 784, 94 N.W. 1023 (1903).

[37] NEB. REV. STAT. § 30-1305 (Reissue 1964).

construing wills and determination of heirship under wills. An action to enjoin the probate of a will cannot be brought in district court until the county court first determines whether there is a will.[38] However, "unless it appears from the will itself, without the necessity of applying rules of construction, that a purported will is completely abortive,"[39] the county court must admit it to probate. The county court has exclusive jurisdiction to admit a will to probate but it is without jurisdiction to go beyond the questions raised by statutory formalities required in execution of a will and whether the instrument purports to be a will with designated beneficiaries and testamentary dispositions. But the county court cannot look at the legal effect of a will. In *Father Flanagan's Boys' Home v. Graybill*[40] the supreme court held that the county court had "no jurisdiction to construe wills to determine the rights of devisees or legatees as between themselves, or between the executors and persons claiming adversely to the estate."[41] The executor can have the county court construe the will for his own guidance and this generally protects him from liability.[42] However, in *Hahn v. Verret*,[43] the court held, concerning a county court order directing the executor to collect rents, that the "order was not binding upon the devisee or legatee as between themselves *nor between themselves and the executor*."[44] Although the court said the executor was protected from liability, this language would indicate that an executor could be liable for following a county court order.

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38 Brown v. Webster, 87 Neb. 788, 128 N.W. 635 (1910). The action was brought by the widow of the deceased against the special administrator and the devisees and legatees.

39 Brown v. Applegate, 166 Neb. 432, 436, 89 N.W.2d 233, 236 (1958). This case involved the objection of the sole heir at law to the county court's order admitting a will to probate. His objection was that the will made no valid dispositions, but the supreme court would not consider this ground until after the will was admitted to probate.

40 178 Neb. 79, 132 N.W.2d 304 (1964). The action was brought for a declaratory judgment in the district court for a construction of the will and a determination of the plaintiff's interests as beneficiaries in the estate. The answering parties' objection to the suit being brought in district court was denied.

41 178 Neb. 79, 82, 132 N.W.2d 304, 307 (1964).

42 Brownfield v. Edwards, 132 Neb. 325, 271 N.W. 797 (1937). The action was brought by a devisee against the executor and his bonding company. Although the executor would have been protected had he waited until the county court order was final, his earlier distribution and a subsequent amendment to the decree subjected him to liability.

43 143 Neb. 820, 11 N.W.2d 551 (1943). This action was brought by a devisee to quiet his title to certain real property.

44 143 Neb. 820, 828, 11 N.W.2d 551, 556 (1943). (Emphasis added.)

The same lack of power in the county court that exists in admitting a will to probate and construing a will extends into the area of determining heirship. The supreme court held, in *In re Trust Estate of Myers*,[45] that the district court can determine heirship if such determination is incidental to a matter within its special competence. The policy reason that governs this entire area is simply the necessity for the district court, once it has jurisdiction, to make a full and final determination between the parties. The by-product has been another probate power split between the two courts.

IV. SOLUTIONS

The following solutions are suggested as possible answers to the problems which now exist in Nebraska probate procedure. Probate procedure should permit expeditious handling of the estate through courts which are easily accessible. There should also be some procedure available for uncontested estates when speed and efficiency are paramount values. In any solution, there needs to be special consideration for lay judges on the county court level and for the large geographic areas which some district court judges are forced to serve.

One possible solution is to base Nebraska's system upon the Illinois trial court system.[46] Illinois has one court for all trial work. In the more populous districts, the trial level court has specialized with a separate branch handling all probate matters. This system eliminates questions of which court is the proper one to start in. It would require the creation of a trial level court either from the present county or district court. If the county court were chosen, the question of lay judges would remain to be handled. If the district court were chosen, the question of one district court judge in a large geographic area meeting the needs of that area would have to be met. This solution is gaining favor with many authorities[47] and should be considered.

A second possible solution is to give the county courts complete jurisdiction over all matters of probate. The county court would have to be given complete equity powers in probate matters,

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[45] 151 Neb. 255, 37 N.W.2d 228 (1949). The action involved the proper administration of a trust, which is a task usually delegated to the district court in Nebraska.

[46] Mulliken, *The Unified Trial Court*, 50 ILL. B.J. 668 (1962).

[47] Bierman, *Probate Jurisdiction—Limitations in Questions of Title—A Call for Reform*, 19 U. MIAMI L. REV. 637 (1965). The author suggests this type of solution for Florida, which has nearly the same problems in probate jurisdiction as Nebraska.

which would require eliminating some of the statutory and constitutional restrictions on their jurisdiction. Trial de novo would be eliminated to prevent the delay caused by duplication of trials in the present system. The problem here is the lay bench and the increased case load on the county courts. This solution does present the minimum change needed to correct the existing problems.

A third solution is to transfer the entire probate jurisdiction to the district courts. In this system, the clerk of the district court should have the power to handle all uncontested estates and the ministerial duties connected with the administration of an estate. The clerk would be readily accessible for all necessary filings and this would mitigate the problems of one district court judge in a wide geographic area. This would not increase the trial work load of the district courts since the contested matters are brought into the district court under the present system. It does not radically change the present system as it leaves the county court in existence but without its probate jurisdiction. This system is perhaps best suited, in this author's opinion, to the special problems which Nebraska faces.

These solutions are suggested at least for the purposes of creating discussion among Nebraska lawyers with regard to reform of the present probate procedure. It is significant that in most of the states which have reorganized their procedure the bar has initiated the reform. It is to the credit of the bar when it reforms the judicial system from within. Increasing public awareness of the delay and waste inherent in the present probate jurisdictional system adds to the need for immediate reform.

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