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A Critical Study of the Probate System in West Virginia – I

ROBERT G. RILEY, JR.*

The probate system in effect in West Virginia has been the subject of much criticism in recent years. Much of this criticism emanates from attorneys familiar with the operation of the system. For more than a decade, a standing committee of the West Virginia State Bar Association has striven to arrive at a proposal which would offer "comprehensive improvement of the West Virginia law and procedure relating to the probate of wills, . . . and allied matters . . . ."

There is widespread and continuing concern about the probate system. This paper will review that system, note principal criticisms of it and suggest changes to it.

A BRIEF, GENERAL DESCRIPTION OF THE PROBATE SYSTEM IN WEST VIRGINIA

Each county in West Virginia has a county court which is composed of three elected commissioners.2 The county courts have jurisdiction in all matters of probate, the appointment and qualification of personal representatives, and the settlement of their accounts. They establish the validity of all wills offered for probate, appoint all executors and administrators,3 and appoint appraisers for each estate.4

Each county court is required to appoint not more than four commissioners of accounts, except in Kanawha County where the limit is eight.5 The court must refer each estate of more than 2000 dollars in value to one of its commissioners of accounts for proof and determination of debts and claims against the estate, establishment of their priority, determination of the amount of the respective

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1 The committee was established in 1952. At the 1964 annual meeting, the committee reported that it was in the process of analyzing responses to questionnaires sent to all members of the bar soliciting information and suggestions about the probate system.

2 W. VA. CONST. art. VIII, § 22.

3 W. VA. CONST. art. VIII, § 24.

4 W. VA. CODE ch. 41, art. 1, § 14 (Michie 1961).

5 W. VA. CODE ch. 44, art. 3, § 1 (Michie 1961).
shares of the legatees and distributees, and any other matters necessary and proper for the settlement of the estate.\(^6\)

After an estate is referred to a commissioner of accounts, he must advertise in the newspaper that all claims against the estate of the decedent must be filed with him not less than four months from the date of the first publication nor more than six months from the date of the qualification of the personal representative.\(^7\) The personal representative must within two months after qualification file an inventory of the estate, signed by the appraisers, with the commissioner of accounts,\(^8\) who must inspect it and after giving it his approval send it to the clerk of the county court for recording.\(^9\)

Creditors of the decedent must file their claims against the estate with the commissioner of accounts in affidavit form within the prescribed period.\(^10\) All claims properly filed will be taken to be proved unless the personal representative, a distributee, or a legatee files a counter affidavit before the commissioner denying the claim. If a denial is properly filed, the commissioner will set a date for a hearing and rule on the validity of the claim.\(^11\) After the completion of the hearings on the claims and the period for the reception of proof for and against disputed claims, but not later than ten months from the date of the qualification of the personal representative, the commissioner must prepare a report of claims against the estate. The report of claims must show what claims have been allowed and disallowed, what assets are in the hands of the personal representative, and how they should be applied to the payment of debts and claims. The report must also show what persons are entitled to share in the estate as legatees and distributees, and in what property, amounts, and proportions.\(^12\) After the report is prepared, the commissioner must give notice to all interested parties that the report is available in his office for ten days for examination. Interested parties may file exceptions to the report with the commissioner within the ten-day period. The commissioner must then return the report, evidence, and exceptions to the county court and, until the report is acted upon by the court, it is subject

to further exceptions by interested parties. The county court then has a hearing on the report of claims. If there are no exceptions to the report, it is confirmed by the court, but if excepted to, the court will pass upon the exceptions without having or receiving any new evidence. If good cause be shown for the taking of further proof, the court can refer the report to the commissioner of accounts for the taking of further proof and the making of a supplemental report. Any decisions of the county court on the report and exceptions may be appealed to the circuit court of the county.

After the report of claims has been confirmed by the county court and after one year from the qualification of the first executor or administrator has elapsed, the personal representative may pay the claims allowed against the estate according to the order of payment as set forth in the report. At that time the personal representative may pay legacies and distribute the surplus to those entitled thereto in the amounts and proportions as determined in the commissioner's report. The personal representative may withhold payment of any unliquidated, disputed, contingent, or unmatured claims as determined by the commissioner in his report until such time as they should become payable.

The personal representative must file with the commissioner of accounts a statement of all the money he has received and disbursed within one year from the date of his qualification, or within any succeeding year, together with the vouchers for such disbursements. This statement must be filed within four months after the end of every such year. At the time the settlement is made the commissioner of accounts must examine all securities held by the personal representative. The commissioner is then required to advertise in the newspaper for two consecutive weeks that the account is before him for settlement. After the account has been advertised, the commissioner may make his report on the settlement. Upon the completion of the report of settlement the commissioner must give notice, either verbally or in writing, to all interested parties and hold the report and the vouchers in his office for ten days. During this time any interested party may inspect the documents and file ex-

ceptions thereto.\textsuperscript{19} After the ten-day period has elapsed, the commissioner then must file the report, together with any exceptions, in the office of the court by which he was appointed.\textsuperscript{20} The court must hold the report for at least ten days, during which time additional exceptions may be filed by interested parties. The court must then either confirm it or correct any errors which shall appear from the exceptions or on the face of the account or recommit it to the commissioner of accounts for the taking of further evidence and further report. Any interested party may appeal the findings of the county court to the circuit court of the same county.\textsuperscript{21} The report, to the extent it has been confirmed by the county court or confirmed on appeal by the circuit court, shall be taken as correct and shall be binding and conclusive upon all creditors of the estate and binding and conclusive upon all beneficiaries of the estate, provided they received the proper notices.\textsuperscript{22}

CRITICIZED SEGMENTS OF THE SYSTEM

Inasmuch as any probate system will be subject to criticism, only the major criticisms of the West Virginia system will be discussed.

PROBATE JURISDICTION IN THE COUNTY COURT

History

The institution of the county court originated as early as 1623-1624 in England, and since that time has been one of the most important institutions in respect to the administration of justice and in matters of county police and economy.\textsuperscript{23} In the state of Virginia at the time of the Civil War, probate jurisdiction was exercised concurrently by the county courts and the circuit courts. On June 20, 1863, the northwestern section of Virginia split from the mother state and West Virginia officially become the thirty-fifth state of the Union. At the formation of the new state of West Virginia, the institution of the county courts was completely omitted from the judicial scheme.\textsuperscript{24}

\textsuperscript{19} W. VA. CODE ch. 44, art. 4, § 17 (Michie 1961).
\textsuperscript{20} W. VA. CODE ch. 44, art. 4, § 18 (Michie 1961).
\textsuperscript{21} W. VA. CODE ch. 44, art. 4, § 19 (Michie 1961).
\textsuperscript{22} W. VA. CODE ch. 44, art. 4, § 20 (Michie 1961).
\textsuperscript{23} Haigh v. Bell, 41 W. Va. 19, 23 S.E. 666 (1895).
\textsuperscript{24} Price, Probate Administration and the County Court, 27 W. VA. L. Q. 221, 223 (1921).
and limitations on official authority that characterized the Virginia constitutional system. Although differences in views, problems, and outlook dictated various changes, the general pattern of government remained virtually unaltered. Framed and adopted under conditions of turmoil, high passion and prejudice, the document reflected the dominant unionist outlook, incorporating innovations like the township plan which replaced the county court system."25

By the constitution of 1863, probate jurisdiction in West Virginia was given exclusively to the circuit courts.26 This exclusive jurisdiction continued until the adoption of a new state constitution in 1872. By virtue of the constitution of 1872 the township system in West Virginia was abandoned for a modified county court system composed of commissioners elected by the voters.27 To this body was given the fiscal administration of the county and a general legal and equitable jurisdiction. Thus, the county courts were given concurrent probate jurisdiction with the circuit courts. By constitutional amendment in 1880, the judicial functions of the county court were completely abolished, "except that probate jurisdiction was left to that body in the mis-mated union with fiscal administration which has continued to the present day."28

The circuit courts continued to exercise probate jurisdiction with the county courts since the creation of the latter, but in 1882, this concurrent jurisdiction was abolished by the legislature and since that time the jurisdiction of the county courts has been exclusive.29

Composition of the County Court

One of the most frequent criticisms of the West Virginia probate system is the personal qualification of the members of the county court. The Constitution of West Virginia provides that

"There shall be in each county of the State a county court, composed of three commissioners, and two of said commissioners shall be a quorum for the transaction of business. It shall hold four regular sessions in each year, and at such times as may be fixed upon and entered of record by said court."30

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26 Price supra note 24, at 222.
28 Price, supra note 24, at 222.
29 W. VA. Acts of 1882 ch. 84, § 22.
30 W. VA. Const. art. VIII, § 22.
The constitution further provides that

"The commissioners shall be elected by the voters of the county, and hold their office for the term of six years . . . . Said commissioners shall annually elect one of their number as President, and each shall receive two dollars per day for his services in court, to be paid out of the county treasury."31

In addition to the two dollars per day salary allowed for services in court, the members of the county courts are allowed additional remuneration for the performance of their duties while not in court. The monthly salaries are set by statute and are as low as thirty-five dollars per month in Tucker County to a high of 620 dollars per month in Kanawha County. The average monthly salary of the members of the county courts in fifty four of the counties of the State is 130.74 dollars per month or 1,568.88 dollars per year.32

In Ohio County, by virtue of special legislation pursuant to power conferred upon the legislature by the constitution of 1872, the county clerk serves as the county court and has jurisdiction over probate matters, and a board of commissioners of three members has authority over police and fiscal matters of the county.33 In Ohio County the annual salary of the county clerk is 7500 dollars.

It can readily be seen that the salaries of the members of the county court are in most instances very low and would not be attractive to qualified men. This same situation exists in many of the states. Many states have not attempted to attract men of the same caliber as the trial judge to the office of probate judge. This is because most of the duties of the probate judge are nonlitigious in character and mostly administrative. Also, there is the general belief that a county cannot afford to support a probate judge with high qualifications. The answer, too often, has been lower qualifications and smaller salaries.34

It is only in rare situations that an attorney will serve as a member of the county court. The reasons are obvious because the office requires much time, the salaries are low, and most of the work is nonlegal in character. Usually the attorney who would serve would

31 W. VA. CONST. art. VIII, § 23.
32 W. VA. CODE ch. 7, art. 1, § 5 (Michie 1961).
33 Riley v. Board of Comm'rs of Ohio County, 125 W. Va. 545, 25 S.E.2d 497 (1943).
34 SIMES & BASYE, PROBLEMS IN PROBATE LAW 467 (1946).
be either retired from the practice of law or one who needs the additional income in order to live.

Political considerations are perhaps the greatest single factor in enticing one to run for the office of county commissioner. A highly respected member of the bar described the political factor as follows:

"If we take up, count by count, the indictment of the county court, we are confronted first with the fact that it is the political machine, par excellence. The reason is evident. It controls the collection and disbursement of county funds, the letting of contracts, the management of county institutions, the hiring of numerous employees. In a word it is the county plum tree. Consequently, the members of the county courts are of all local officials, the surest to be faithful henchmen of the local boss. It is unlikely that they will be qualified to exercise probate jurisdiction. If we must have probate judges who are not trained in the law, we might still do better than to choose for the purpose the heirarchy of the county political machine."\(^5\)

The inability of the county court to handle properly matters of a legal nature was recognized by the West Virginia Legislature when they passed a statute which permits the county court to refer any controversy in connection with the probate of any will, or with the appointment and qualification of personal representatives, or with the settlement of any account of fiduciaries to a commissioner of accounts. The commissioner of accounts must then hear proof on the matter, make a finding thereon, and advise the court on the law governing the decision of the matter.\(^6\) Therefore, the inability of the members of the county courts to handle probate matters of a litigious nature is generally recognized throughout the state. Several instances are known when the county court has had the prosecuting attorney advise it when a probate problem of a contentious nature is before it. This is not one of the duties of the prosecuting attorney and under normal circumstances the prosecutor would have had little experience with probate matters. This points out, however, that the members of the county courts recognize their own shortcomings in matters of probate.

In order to enable the people of a county to have access to a probate office at all times, the law gives the county clerk certain

\(^{35}\) Price, *supra* note 24, at 223.
powers. The county clerk may appoint appraisers of estates, admit wills to record, and appoint and qualify personal representatives in the same manner as the county court could do if in session. It may be argued that the county clerk would not be qualified to perform such duties. However, the duties of the clerk are primarily administrative and the clerk is not permitted to hear or determine any matters of contest. When there is a contest, the matter must stand continued until the next regular session of the county court. All actions by the county clerk concerning the probate of wills and the appointment of appraisers and personal representatives of the estate must be confirmed by the county court when it goes into session. If the action of the clerk is confirmed, it has the same effect as if the county court acted in the first instance. Thus, it can be seen that the criticisms of the qualifications of the county clerk are not usually justified.

Duties of Court Other Than Those over Probate Matters

The duties of the county court in relation to the administration of the county itself are numerous and the members of the court will naturally consider its jurisdiction over probate matters as very minor. A list of non-probate duties of the county court are summarized as follows:

1. Supervise and administer the internal police and fiscal affairs of the county, including the establishment and regulation of roads, bridges, and mills;
2. Judge the election, qualification and returns of all county and district officers;
3. Install, construct, maintain and operate waterworks, water mains, sewer lines and sewage disposal plants, provided the power does not extend into the territorial limits of a municipal corporation;
4. Improve streets, sidewalks and alleys;
5. Purchase, install and maintain radio mobile communication equipment for the use of the sheriff and his deputies;
6. Purchase, install and maintain photo copying equipment, appliances and supplies for the use of the county clerks;
7. Erect, maintain and operate fire stations and fire prevention units and equipment;

37 W. VA. Code ch. 44, art. 12, § 1 (Michie 1961).
38 W. VA. Code ch. 44, art. 12, § 3 (Michie 1961).
8. Operate and maintain public refuse dumps and sanitary land fills;
9. Operate and maintain garbage and refuse collection and dis-
posal service;
10. Operate and maintain sewage systems and sewage treatment
plants;
11. Visit and inspect institutions for housing and caring for the
poor;
12. Inspect the jails and arrange for the feeding and care of the
prisoners therein;
13. Investigate the conditions of the poor in the county;
14. Visit detention homes for children;
15. Visit and inspect bridges and bridge approaches under their
control;
16. Supervise the repair and maintenance of the county court
house, jails, houses for the poor and other county property;
17. Supervise and control the maintenance and operation of air-
ports owned or operated by the county;
18. Supervise and control the purchase of furniture, fixtures, and
equipment, and janitors' and other supplies for their county;
19. Review and equalize the assessments made by the county
assessor;
20. Inspect and review the lists of property, both real and per-
sonal, made up by the assessor for taxable purposes;
21. Cooperate with the county public assistance council;
22. Supervise, maintain and erect public parks, playgrounds, and
recreational facilities and obtain equipment therefor;
23. Construct or aid in constructing buildings for civilian de-
fense and equip them, and
24. Operate dog pounds.

Because of the many duties of the county court within the county,
the role of the county court sitting as a probate court is not given
the significance to which it is due. The duties as a probate court
are subordinate to the administrative duties of the county court.
When it is sitting as a probate court, the judicial atmosphere is lack-
ing and the judicial attitude is unnatural.

39 W. VA. CODE ch. 7, art. 1, § 3 (Michie 1961).
40 W. VA. CODE ch. 7, art. 1, § 5 (Michie 1961).
41 Price, supra note 24, at 225.
One of the most frequent criticisms heard among attorneys in the state is that either an ex parte procedure or a procedure in solemn form may be followed for the probate of a will.

An ex parte procedure in West Virginia means that any person may take a will before the county court, or the clerk thereof in the vacation of the court, and move the admission of the will to probate. The court or its clerk may immediately hear and determine the motion and either admit or refuse to admit it to probate without any notice being given to any party. The action by the clerk must be confirmed by the county court.

Solemn probate or formal probate in West Virginia means that when a persons offers a will for probate, he must file with the county court a petition, verified by affidavit, stating when and where the testator died, his last place of residence, the nature of the estate, the names and addresses of all the heirs at law and distributees of the decedent, and the names and addresses of each of the beneficiaries of the will. The court will then issue and serve process upon all persons interested in the probate of the will to appear and show cause why the will should not be admitted to probate. Process by order of publication is used for all non-residents and the unknown parties have at least one month from the date of the first publication to appear. The hearing on the admissibility of the will to probate must then be held before the county court, sitting in a regular or special session. At any time before the final order of the court admitting or refusing to admit a will to probate is entered, any person desiring to contest the will may appear and file a notice of contest in the proceedings.

The main difference between the two methods of probate is that of notice to interested parties. The giving and the non-giving of notice result in a difference in time and method, if one wishes to impeach the validity of the wills. Under the ex parte procedure if an interested party contests the probate of the will before it is confirmed by the county court, the county court will send out notices to all interested parties and it will in effect become a probate

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Under both methods of probate, interested parties have eight months from the date of the order of the county court to take an appeal to the circuit court. Under the ex parte procedure any interested party who was not a party to the proceeding may file a bill in circuit court to impeach the will any time within two years from the date of the order admitting the will to probate. If the order admitting the will to probate was entered by the circuit court on appeal from the county court, the party has two years from the date of the order of the circuit court to file the suit. Under the solemn form of probate, if all interested persons were parties to the probate proceedings, no suit can be brought in circuit court to establish or impeach the validity of the will; therefore, the only way to get to the circuit court would be by appealing the order of the county court within the eight-month period unless grounds existed which would authorize a court of equity to take jurisdiction to set aside or modify other judgments at law. However, under solemn form any person who resided out of the state or who was proceeded against by publication can bring a suit in circuit court within a two-year period to establish or impeach the will unless he appeared as a party or was personally summoned. Also, any interested party who was under a disability can bring such a suit within one year after the disability is removed.

Most of the complaints from attorneys are directed to the ex parte method of probate. The complaints are twofold. The complaint from a legal standpoint is that under the ex parte procedure, the will is not free from attack until the period of two years from the date of probate has elapsed. Where any real estate is involved in the estate, a cloud will remain on the title until the two-year period expires. The other complaint is that any person may move a will to probate in an ex parte proceeding, whereby under the solemn form a formal petition must be filed with the court which would require the services of an attorney.

The ex parte form of probate was used in England centuries ago.

"In the English ecclesiastical courts, the line between contentious and noncontentious business was pretty much the line between probate in common and in solemn form. . . . If a will was

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46 W. VA. CODE ch. 41, art. 5, § 10 (Michie 1961).
47 W. VA. CODE ch. 41, art. 5, § 11 (Michie 1961).
48 In re Winzenrith's Will, 133 W. Va. 267, 55 S.E.2d 897 (1949).
49 W. VA. CODE ch. 41, art. 5, § 12 (Michie 1961).
probated in common form there was no notice to interested parties; proof generally consisted merely in the executor taking oath that he believed the instrument presented was duly executed by a competent testator. If a caveat were filed by the next of kin, proof in solemn form then had to be made; interested parties were cited; and the attesting witnesses testified as to the execution of the will. The hearing was before the ordinary."

Over half of the states permit a probate without requiring notice to interested parties.\(^5\)

It must be remembered that in probating a will a person has the right to use either the ex parte or the solemn form method. It is only the rare exception that the validity of the will will be contested. Of those wills which are contested, in the majority of the cases, it is probable that the contest will be anticipated before the time of the probate. In such a case it will be only logical to follow the solemn form of probate. In West Virginia, if the solemn form of probate is used, it is conceivable that a period of almost four months could expire between the time the will is offered for probate and the time it is actually probated. If notice is by order of publication, the non-residents or unknown parties have at least one month to appear or they are to appear at the next term of the county court, whichever period is longer.\(^5\) The county courts are required to hold four regular sessions a year.\(^5\) If the first publication occurs twenty-nine days before the county court holds a session, it would be necessary to wait for the next session, three months later, before there would be a hearing and a formal order of probate. If ex parte probate is used, the will is probated immediately and the executor immediately assumes his duties. The action of the county clerk in probating a will is subject to confirmation by the county court; however, the confirmation by the court reverts to the time of the initial probate. This enables the executor to assume his duties with no delay and may contribute to a better over-all administration. It may be argued that a curator may be appointed before the actual probate, but his duty is that of receiving and conserving the personal estate and not of actual estate administration.\(^5\) This procedure will cause

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\(^5\) Sims & Basye, op. cit. supra note 34, at 439.
\(^5\) Id. at 444.
\(^5\) W. Va. Const. art. VIII, § 22.
an additional expense to the estate and requires a duplication of effort when the executor is finally appointed.

As to the argument that title to real estate is not clear until the expiration of the two-year period, if ex parte is used, there is a basis for criticism. However, as a practical matter, banks have been willing to lend money to purchasers, knowing that such a situation exists, after receiving adequate assurances that no contest as to the validity of the will is anticipated.

Many attorneys argue that since the ex parte procedure does not require the services of an attorney at the time of probate, the executor will not retain an attorney and this may cause an improper administration. This is true, and an increasing burden is put on the commissioners of accounts to see that the proper accountings are filed. However, this argument in itself is not sufficient to do away with an ex parte procedure. The bar associations can inform the public as to the complicated legal problems that may be involved in the administration of an estate. Many estates are very simply to administer and the services of an attorney are not actually needed. To do away with ex parte probate just to force the executor to hire an attorney would be wrong.

It must be concluded that the basic arguments against an ex parte probate are unsound; however, consideration should be given to reducing the time in which a person can contest the validity of a will under this method. Consideration should also be given to shortening the time required before a will is actually probated under the solemn form of probate.

COMMISSIONERS OF ACCOUNTS

The office of commissioner of accounts owes its origin to statute. The West Virginia Code of 1879 conferred upon all courts of record, expressly including county courts, power to appoint commissioners for executing their orders and decrees, and for settling accounts of fiduciaries. The Acts of the Legislature of 1882 expressly provided for the appointment of commissioners of accounts by the county court. The statute in effect today is as follows:

"The county court of each county shall appoint not more than four commissioners of accounts, except in counties where there

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55 Riley v. Board of Comm'rs of Ohio County, supra note 33.
exists a separate tribunal for police and fiscal purposes (Ohio County), such tribunal shall appoint such commissioners of accounts: Provided, that in Barbour County there shall be appointed as aforesaid four commissioners of accounts, not more than two of whom shall be from the same political party: Provided further, that in Kanawha County there shall be appointed as aforesaid eight commissioners of accounts, not more than four of whom shall be from the same political party."

The reason for establishing the office of commissioners of accounts is obvious. It was to relieve the county court of the burden of work that is involved in the settlement of estates. The county court, being primarily a fiscal body, did not have the time that is required to perform all of the duties of a court of probate. Since county courts are in most cases not composed of attorneys, they also did not have the specialized knowledge required in the settlement of estates. So, in effect, the office of commissioner of accounts was established as the right arm of the county court in settling matters of probate.

**Qualifications**

No specific qualifications are required for a person to serve as a commissioner of accounts. The only requirement would be that he be at least twenty-one years of age and a resident of the county in which he serves. In order to determine if higher standards should be required of a person to serve as a commissioner of accounts, it is necessary to examine the duties of the office. The commissioner of accounts, being the right arm of the county court, must restrict his duties to those conferred on the county court by the West Virginia Constitution. The constitution states that, "The county courts . . . shall have jurisdiction in all matters of probate. . . . Such courts may exercise such other duties not of a judicial nature, as may be prescribed by law." Much confusion has existed over the years as to the interpretation of this section of the constitution. By statute the county court is to refer estates to commissioners of accounts for proof and determination of debts and claims, establishment of their priority, determination of the amount of the respective shares of the legatees and distributees, and any other matters necessary and

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56 W. VA. CODE ch. 44, art. 3, § 1 (Michie 1961).
58 W. VA. CONST. art. VIII, § 24.
proper for the settlement of the estate. The confusion has existed in the conflict of the phrases in the constitution “jurisdiction in all matters of probate” and “not of a judicial nature.” The statute is necessarily governed by the constitution. The provision in the statute authorizing county courts, through commissioners of accounts, to hear and determine disputed claims against the estate has been held to be constitutional. Also, the provision in the statute authorizing the commissioner of accounts to determine the amount of the respective shares of the legatees and distributees has been held to be constitutional. Therefore, the commissioners of accounts do perform functions of a judicial nature where matters of probate are involved. When a creditor files a claim against an estate, any interested party may object to the claim, either in whole or in part, by filing a counter affidavit with the commissioner of accounts. The commissioner must fix a time and place for the hearing of evidence for and against the claim. Notices are served on all known interested parties. Witnesses are examined and the strict rules of evidence apply at the hearing. When the commissioner files his report of claims with the county court, he must include thereon the shares of the legatees and distributees. Therefore, it is necessary that the commissioneer have knowledge of the laws of descent and distribution in the state. It must be concluded that one of the minimum requirements of a commissioner of accounts should be that he be an attorney in good standing. That such a qualification does not exist has been one of the criticized segments of the West Virginia probate system. Judge Rose in a Supreme Court of Appeals opinion stated his feeling in this way: “That a county court, composed wholly of non-lawyers and a commissioner of accounts, who need not be a lawyer, should be vested with such high judicial authority, little comports with our conception of proper judicial procedure.” An analysis of all of the counties in West Virginia indicates that on September 1, 1961, there were 205 commissioners of accounts, 182 of whom were attorneys and twenty-three of whom were not attorneys. (See Appendix 1 for analysis by counties.) Of the commissioners of accounts who were not attorneys, fourteen came from counties which had six or

63 W. VA. Code ch. 44, art. 2, § 16 (Michie 1961).
fewer practicing attorneys residing therein. Since approximately eighty-nine per cent of the commissioners are attorneys and since over half of those who are not come from sparsely populated counties, it must be concluded that the situation is not as bad as may appear on the face. However, since the commissioners of accounts may be called upon to preside over hearings which may involve complex judicial and legal problems, the public should be protected. It is possible that a construction of a statute in West Virginia would permit the county court to appoint a special commissioner to hear and report on any disputed claims. If more than one commissioner is involved in the settlement of an estate, it would unnecessarily burden the administration of the estate with delay and additional expense. Therefore, if the commissioner of accounts system is to exist in West Virginia, a requirement should be that he be an attorney in good standing.

Political Factor

Politics is probably the largest single factor used by the members of the county court in appointing individuals to serve as commissioners of accounts. The county court in many counties is the most important political body within the county. Those in political control will naturally attempt to give their prime appointments to those who are faithful and of value to them. The office of commissioner of accounts will often generate sufficient income for an attorney to pay for his office expenses and secretary. Since the work of a commissioner consists mostly of administrative detail, his secretary will perform the bulk of the duties required. The attorney-commissioner will have much time for his legal practice and any fees derived will often be pure profit. Knowing this, attorneys will exert much pressure on the members of the county courts for appointments. Frequently the most qualified men for the office will not be chosen.

On September 1, 1961, of the fifty-five counties in West Virginia, twenty-five had all of their commissioners of the same political party affiliation as a majority of the members of their respective county courts. In fourteen counties the majority of the commissioners were of the same political party as the county court; in twelve of the counties the commissioners were equally divided in

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65 45 WEST VIRGINIA BLUE BOOK 479-614 (Myers 1961).
66 W. VA. CODE ch. 44, art. 3, § 7 (Michie 1961).
their party affiliations, this being required by statute in Kanawha and Barbour Counties; and in only four counties did the majority of the commissioners have party affiliations different from the majority of the members of their county courts. (See Appendix 2 for analysis by counties). Of those counties where the commissioners were equally divided in their politics, it can be safely assumed that this is by agreement with the county court, so that commissioners will not be in jeopardy of losing their positions, if the politics of the court are changed. Of the four counties having opposite party affiliations, two had only two commissioners of accounts and only two attorneys residing in the county, and in the other two counties the lone attorney residing therein of the same politics as the county court was serving as a commissioner of accounts. A prime example of the political factor can be found in Marshall County. The county court of Marshall County changed politics in 1963, and all of the commissioners of accounts were discharged and new commissioners were chosen, all of whom are of the same politics as the new county court.

Because the office of commissioner of accounts is under the great influence of politics, the most qualified people are not screened for the job. This acts as a handicap to the present probate system and does not give the office of the commissioner the dignity it should have.

Non-Performance of Duties

The West Virginia statutes set out in detail the duties to be performed by a commissioner of accounts during the administration and the settlement of an estate. However, many commissioners do not perform their statutory duties. "[I]n many instances, the mandatory requirements as to notices, reports of claims, proof of claims, etc. are not followed..." An attorney in Wheeling, West Virginia, stated that the reference to a commissioner of accounts has become perfunctory, and very few commissioners really perform the duties required of them by law and for which they are compensated. An attorney in Charleston, West Virginia, stated that it was his experience that the procedures contemplated by the present statutes are practically never followed.

67 Ibid.
The duties of the commissioners of accounts which are frequently not performed are:

1. Compelling the personal representative to file his inventory within two months of qualification.69
2. Mailing of notices to creditors, distributees and legatees of time for receiving claims against decedents' estates.70
3. Requiring claims to be proved by vouchers and affidavits.71
4. Preparing a report of claims and returning it to the county court.72
5. Proceeding against fiduciaries who do not file annual accounts with the commissioner.73

The intent of the statutes defining the duties of commissioners of accounts is:

"to relieve personal representatives of the great responsibility and liability that former laws imposed on them; to relieve distributees of the hardship of giving refunding bonds; and to furnish an expeditious and more modern means, under judicial guidance of closing up estates."74

The fact that many commissioners do not perform their statutory duties means that they are either lax in their duties or that the statutory requirements are unnecessary.

If each of the duties often not performed is examined separately, it must be found that each has a purpose. If the filing of inventories would not be subject to a time limit, months or even years might expire before actual administration would be effected and the estate would be subject to loss and waste. If notices are not mailed to interested parties and creditors, their rights may be jeopardized. If vouchers and affidavits are not required to prove claims, the personal representative and interested parties may not know the nature of the claim and whether it is valid and liquidated. Reports of claims instruct the fiduciary as to what claims should be paid and in what proportions, and how distribution should be made. If the fiduciary has no report of claims to follow and he paid improper

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claims or if the estate assets are insufficient to pay all debts and he paid them in incorrect proportions, or not in the order of their priority, he could be subject to liability. If accounts are not filed annually before the commissioner of accounts, the rights of interested parties would be in jeopardy. The accountings inform the commissioner and interested parties of the transactions which occurred in the estate or trust during the year, and afford an opportunity to object to the actions of the fiduciary. This requirement also relieves the fiduciary, for he receives annual clearances when his settlements are approved by the commissioner and confirmed by the county court.

It must be concluded that since the duties of the commissioners of accounts are determined by statute, each of which has a purpose to protect either the estate, the fiduciary, the creditor, or the beneficiary, some commissioners are lax and negligent in the non-performance of their duties. If the commissioner of accounts system is to remain in effect in West Virginia, adequate penalizing laws should be enacted to force the commissioners to perform all of their statutory functions.

**Fees**

There is no set fee schedule which a commissioner of accounts must follow in settling an estate. By statute it is provided that

"A commissioner of accounts . . . shall be allowed for any service such compensation as the court for which he is such commissioner shall from time to time prescribe.

"The commissioner shall indicate to the court, in writing, the compensation he believes he is entitled to receive for services performed."

The commissioner should therefore submit his fee in writing to the county court, and the county court should either approve or disapprove it. As a practical matter this procedure is not followed. Inasmuch as the amount of the commissioner's fee is included in his report of claims and in the settlement by the fiduciary, the county court approves the fee when the report or the settlement is confirmed by the court. The county courts do not review and discuss the fees of commissioners unless it is objected to by an interested party.

A West Virginia Supreme Court of Appeals decision held that the fee should be made on the basis of a reasonable compensation to the commissioner for the time employed by him in the various activities necessary to making a complete report, and without giving undue importance to the value of the estate. The court further held that citizens are entitled to have the services of public servants at a reasonable cost considering the time and effort in performing the services.\textsuperscript{76}

Fees charged by commissioners of accounts vary from county to county. Different methods are used for computing fees. Most commissioners base their fees on a percentage of the property held in an estate. They feel this is the most equitable method and the method gives them something tangible upon which to compute their fees. Other commissioners follow the intent of the statute and base their fees on the amount of work performed. However, many commissioners feel this is inequitable because the small estate will often consist of the most work for the commissioner and, if fees were charged accordingly, the beneficiaries who most need their devises and bequests would be seriously harmed. A writer for one of the state's leading newspapers reported the following:

"A fee schedule based on ability to pay, sometimes referred to as the 'Robin Hood Plan', is widely used by commissioners of accounts in charging for their services under estate laws that date back to ante-bellum Virginia.

"Commissioners readily say the rich pay for the poor when estates are settled. This is an age-old practice used throughout the professions, and it reportedly is suitable in the absence of laws fixing fees for commissioner of account work."\textsuperscript{77}

Attorneys throughout the state are aware of the fee problem with commissioner of accounts. The West Virginia State Bar Association has noted that "[T]here are many inequalities in fees charged by commissioners of accounts, leading in some instances to public criticism and confusion."\textsuperscript{78} One lawyer was quoted as stating that commissioners of accounts are parasites. He stated that the attorneys do all of the work and the commissioners charge a big fee for

\textsuperscript{76} In re Hauer's Estate, 135 W. Va. 488, 63 S.E.2d 853 (1951).
\textsuperscript{78} Report, supra note 68.
Many attorneys are of the opinion that commissioners are overpaid for the amount of work they perform. However, lawyers admit that when there is a conflict over a claim filed and the commissioner must hold hearings, he usually earns his fee. "Such cases are rare and the commissioners' fee comes largely from such routine work as publishing legal notices, approving appraisements, examining and approving tax reports, and preparing final settlement papers."  

As to the amount of fees charged most commissioners have a minimum fee. The minimum fee will usually vary from fifteen to fifty dollars, and a graduated scale is then often used, which will vary with the size of the estate. In Kanawha County the fee will vary from one per cent of the gross estate of medium or large estates to three-fourths of one per cent on extra large estates.

Fees charged by commissioners will vary from county to county. In Marion County a strict fee schedule is followed for smaller estates. The fee is based on the gross estate and is charged as follows:

<table>
<thead>
<tr>
<th>Estate</th>
<th>Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>$1,000-$2,000</td>
<td>$45</td>
</tr>
<tr>
<td>2,000-5,000</td>
<td>60</td>
</tr>
<tr>
<td>5,000-10,000</td>
<td>70</td>
</tr>
<tr>
<td>10,000-20,000</td>
<td>100</td>
</tr>
</tbody>
</table>

Fees charged on larger estates are at the discretion of the commissioner, but usually he will discuss them with the interested parties and the attorney for the estate before making a determination. One commissioner will charge a maximum of 500 dollars unless exceptions are filed during administration and he must hold hearings; then his fee may be higher based on the additional amount of work required.

A comparison of fees charged in estates chosen at random in Kanawha and Ohio Counties reveals a marked difference in the two counties:

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80 Ibid.
81 Ibid.
The fees charged in Kanawha County are larger than those charged in Ohio County. Inasmuch as the commissioners have the same statutory duties to perform in both counties, there should be no large variance in the fees charged.

If the commissioner of accounts system is to continue in West Virginia, an attempt should be made to determine what is an equitable fee and the fee should be standardized in all of the counties of the state.

**Circuit Courts**

West Virginia is divided into judicial circuits, each of which consists of several counties. At least one judge presides over each circuit. The circuit courts (except where otherwise provided) "have original and general jurisdiction of all matters at law where the amount in controversy . . . exceeds fifty dollars; of all cases of habeas corpus mandamus, quo warranto, and of all crimes and misdemeanors."84

The criticisms of the West Virginia probate system with reference to the circuit courts are not directed to the courts themselves, but

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82 Stafford, *supra* note 77.
83 Settlement Book 153, Office of County Clerk, Ohio County, West Virginia, 1962.
84 W. VA. CONST. art. VIII, § 5.
to the jurisdiction exercised over probate matters. The circuit courts have concurrent jurisdiction with the county courts over certain probate matters. In other probate matters they have sole jurisdiction. Some confusion exists among attorneys as to whether to use the county court or the circuit court in bringing certain types of suits. The problem lies in the constitution because it conferred probate jurisdiction upon the county court, but then added that the court could perform duties not of a judicial nature. The problem was confused further when a statute was enacted which stated that when an estate was referred to a commissioner of accounts, his authority extended over any . . . matters necessary and proper for the settlement of the estate.

Will Contests

A will can be contested in the county court at any time after the petition is filed offering it for probate and before final order is entered admitting or refusing to admit it to probate. This is accomplished by filing a notice of contest with the county court. The county court will then hear and determine the question of probate and enter such judgment thereon as the law and the evidence require. If the solemn form of probate is used and all interested parties are parties to the proceeding, no further rights of contest exist. However, if the ex parte procedure for probate is used, any interested party can bring suit in circuit court "to impeach or establish the will, on which bill, if required by any party, a trial by jury shall be ordered, to ascertain whether any, and if any, how much, of what was so offered for probate, be the will of the decedent." This right of contest also applies to any interested person who was not a party to a proceeding in solemn form. The time for filing the suit is within two years from the date of the order admitting it to probate. A person under a legal disability can bring the suit within one year after the disability is removed. The issue in the suit is that of \textit{devisavit vel non} and amounts to a trial de novo on the validity of the will; so it is therefore possible to have two trials on the validity of the will. If the will is probated in solemn form, a party properly served can contest the will before the county court. Any party out

\begin{itemize}
  \item [85] W. VA. CONST. art. VIII, § 24.
  \item [86] W. VA. CODE ch. 44, art. 2, § 1 (Michie 1981).
  \item [87] W. VA. CODE ch. 41, art. 5, § 5 (Michie 1981).
  \item [88] W. VA. CODE ch. 41, art. 5, § 6 (Michie 1981).
  \item [89] W. VA. CODE ch. 41, art. 5, § 11 (Michie 1981).
\end{itemize}
of state or under a legal disability and not a party to the proceedings can contest the will anew in circuit court.

Another method of contesting a will is by appealing the order of the county court to the circuit court. Under either the ex parte or the solemn form of probate any interested party may appeal the order of the county court, admitting or refusing to admit the will to probate, to the circuit court within eight months after the order is entered. Any person under a legal disability may appeal within eight months after the disability ceases.

"[T]he case shall be proceeded in, tried and determined in such courts, regardless of the proceedings before the county court, and in the same manner and in all respects as if the application for such probate had been originally made to the circuit court."\(^9\)

The circuit court must order a jury trial, if demanded by any interested party.\(^9\) The appeal to the circuit court is in fact a trial de novo; thus this is another method of having two trials as to the validity of the will. The first trial would be in the original contest in the county court and the second trial of the same issue would be held in the appeal to the circuit court.

The reason for permitting a trial de novo in circuit court either by bringing suit on the issue of *devisavit vel non* or by appeal is because of the lack of confidence in the ability of the county court. This explanation applies to other states which permit a similar procedure.

"Doubtless the reason for the appeal with trial de novo in the trial court of general jurisdiction is the same as that for the typical provision for appeal from the judgment of a justice court. The legislature has very little confidence in the competency of the judge; he might be a layman, and rules of law might be disregarded; if anybody objects, his case can be tried before a judge who is learned in the law. The same explanation could be given for the jurisdictions which permit a proceeding called a contest in a higher tribunal. In either type of contest, it would seem that the retrial of the issue in the higher court is unjustified, if it can also be tried in the probate court. This is to say, if the probate judge is not competent to preside over a contested probate, he

\(^9\) W. VA. Code ch. 41, art. 5, § 7 (Michie 1961).
\(^9\) W. VA. Code ch. 41, art. 5, § 8 (Michie 1961).
ought not to be allowed to do so at all. If he is competent, then the case does not need to be tried anew in another court.\textsuperscript{92}

The legislature of West Virginia, fully cognizant of the incompetency of the county courts to properly handle controversial legal matters, passed a law which enables the county court to refer matters of probate to a commissioner of accounts. The commissioner can hear proof of the matter and make a finding thereon. He is then to report his findings to the county court and the court will hear the case on the commissioner's report and the exceptions thereto without hearing any additional evidence.\textsuperscript{93} Therefore, there is a method for hearing a will contest before a person trained in the law in the first instance. However, it cannot be assumed that all of the county courts will utilize this statute, and it is possible that will contests in solemn probate will continue to be heard before county courts whose members are seldom trained in the law.

The procedures for will contests in West Virginia are justly criticized. Not only is the system complicated, but there exists much duplication of effort in the county court and the circuit court. Permitting a trial de novo in the circuit court is pure duplication and can result in much expense to the estate and the parties involved. The time limit of two years for contesting a will under the ex parte procedure is unnecessarily long. The fact that one under a legal disability can contest a will after the disability ceases is unwarranted.

Assuming that jurisdiction over probate matters is to continue to exist in the county courts, the procedures could be simplified merely by making statutory changes in the law. Inasmuch as the county courts are not qualified to determine matters of law in will contests, under no circumstances should a contest of a will be permitted before that court. The procedure should be that all will probates be uncontested. If a will is probated ex parte, notices should be sent out to all interested parties immediately after probate. A short period from six to eight months should be allowed for any interested party to contest the will in circuit court, and the proceeding in circuit court should be by trial de novo. No appeal should be permitted to the circuit court on the order of the county court admitting a will to probate since there is no right of contest.

\textsuperscript{92} Simes & Basye, op. cit. supra note 34, at 730.

\textsuperscript{93} W. Va. Code ch. 44, art. 3, § 7 (Michie 1961).
in the original proceeding and an interested party would be protected with the privilege to contest in circuit court. A right of appeal with trial de novo should be permitted only from an order of the county court denying probate. The time for such an appeal should be limited to the same period as the time permitted for contest. A similar system has been used in Ohio and has been satisfactory. In Ohio the basis for such a system was the recognition that the court of general jurisdiction is competent to try a will contest but that the probate court is not. Under such a system a competent judge would try the proceeding in the first instance and there would not be two trials of the same issue.

The two-year period for contest allowed in ex parte probate is too long. Any person should know immediately whether he desires to contest a will. Such a long period puts a burden on the distributees and devisees. They actually do not have free use of their inherited property until the time for the period of contest expires. The time limit should not extend beyond the time of final distribution and settlement of the estate.

Extending the time limit for contesting wills is not warranted for persons under a legal disability. They can act through guardians ad litem and are amply protected.

**Will Construction**

By statute the circuit courts are vested with authority to construe a will:

"Notwithstanding any other provision of law, and notwithstanding there is no other ground of equity jurisdiction, courts possessing general equity powers shall have and take jurisdiction of a suit to construe an ambiguous will at the suit of the executor, or administrator with the will annexed, or of any beneficiary thereunder whose interests are affected by a construction of the ambiguous provisions."

The supreme court has held that equitable jurisdiction to construe a will under this section does not withdraw from county courts powers vested in them under the constitution.

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94 Id. at 726.
95 Id. at 731.
96 W. VA. CODE ch. 41, art. 3, § 7 (Michie 1961).
97 Dawson v. Dawson, 123 W. Va. 380, 15 S.E.2d. 156 (1941).
There are some who feel that the county courts should have jurisdiction over the construction of wills. However, the supreme court has held that the county court has no jurisdiction to construe a will. In a strong dissent to this decision, Judge Kenna maintained that the majority opinion throws too great a burden on the circuit courts, which he feels the framers of the constitution did not intend when they established the county court and vested it with probate jurisdiction.9

When the probate court is fully competent to handle probate matters, there is no question but that the court should have included in its jurisdiction the authority to construe wills. Any judge presiding over such a suit should be trained in the law. Inasmuch as the county courts do not consist of attorneys, the fact that jurisdiction is only in the circuit courts and not in the county courts is justified.

Real Estate

It is the duty of the personal representative to administer only the personal estate of the decedent.99 The personal representative is not a mere stakeholder of the personal property but is vested with the exclusive title thereto until the estate is closed.100

Real estate does not become the title of the personal representative unless it is devised to him by the terms of the will. If the will devises the real estate to the executor to be sold, the executor is given the title and power to do so.101 Therefore, if there is nothing in the will conveying the property to the executor, the real estate immediately becomes the property of the devisee. However, when the personal estate of the decedent is insufficient for the payment of his debts, the personal representative may bring a suit in the circuit court to subject the real estate to the payment of the remaining debts. The right of the executor to bring the suit is exclusive for six months after qualification, and after the expiration of that period any creditor may institute the suit in his behalf and in the behalf of other creditors.102 The circuit court has authority to sell the encumbered real estate for the purpose of paying the decedent’s debts.

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100 Elder v. Gibson, 109 W. Va. 582, 155 S.E. 662 (1930).
101 W. VA. CODE ch. 44, art. 8, § 1 (Michie 1961).
102 W. VA. CODE ch. 44, art. 8, § 7 (Michie 1961).
and to satisfy the encumbrances out of the proceeds of the sale.\textsuperscript{103} The county court has no jurisdiction to sell land to pay debts.

Some argue that title to real estate should vest in the personal representative during administration. However, many estates are not administered at all, and the methods of clearing cloud on title could become very confusing and burdensome. In England, by statute interests in real estate pass to the personal representative just as personal property. In the United States, the vast majority of states provide that title to real estate passes to the heir or devisee.\textsuperscript{104} No strong argument can be found for vesting the title to real estate in the personal representative. The statute gives the means that can be used if the personal representative needs to sell in order to pay debts. More often than not is it unnecessary to resort to a suit in the circuit court because the devisees will ordinarily advance the necessary cash to the personal representative, either from their own funds or from the proceeds realized from the sale of the real estate by them as grantors.

It can be argued that the county court should handle the sale of real estate for the payment of debts. Kentucky, Nebraska, New Mexico and West Virginia are the only states in which the probate court does not handle such sales.\textsuperscript{105} The fact that members of the county courts are not attorneys precludes any argument for giving the county court jurisdiction over the sale of real estate. Complicated legal questions as to title may arise and also at the hearing the strict rules of evidence are followed, which must be known to the judge. The judges of the circuit courts have the necessary qualifications.

\textit{Determination of Heirs}

When there is any question as to in whom title to real estate vests upon the death of a decedent, any interested party may bring suit in the circuit court for a determination of heirs.\textsuperscript{106} This is part of the general equity jurisdiction of the circuit court, and is similar to the court's jurisdiction to remove cloud on title. Because of the complex legal problems that may be involved in such a determination of

\textsuperscript{103} Shahan v. Shahan, 48 W. Va. 477, 37 S.E. 552 (1900).
\textsuperscript{104}\textit{Smihes & Basye, op. cit. supra} note 34, at 450.
\textsuperscript{105}\textit{Smihes & Basye, op. cit. supra} note 34, at 455.
\textsuperscript{106} W. VA. Code ch. 42, art. 1, § 9 (Michie 1961); W. VA. Code ch. 51, art. 2, § 2 (Michie 1961).
title, this type of suit has rightly been withheld from the jurisdiction of the county court as it exists today.

A more complex problem is presented when it is necessary to have a determination as to who is to participate in the personal estate of the decedent. As a precautionary measure, when there has been a question as to who is to participate in the personal estate, attorneys have petitioned the circuit court for a determination. However, a commissioner of accounts must include in his final report to the county court on the settlement of an estate the names of the persons who “are entitled to share in the estate as legatees, and as such in what property or amounts; or as distributees, and as such in what proportions.”\textsuperscript{107} The West Virginia Supreme Court of Appeals held in a not too recent decision that the commissioner of accounts has no jurisdiction to decide descent and distribution, and that the West Virginia Code is granting powers to commissioners of accounts meant them primarily to handle debts against the estates of deceased persons.\textsuperscript{108} “Though not in so many words, the court by implication said that descent and distribution is a judicial matter over which the commissioner of accounts has no jurisdiction.”\textsuperscript{109} In a later decision the supreme court held that,

“Jurisdiction as to the settlement of the accounts of personal representatives is specifically placed in the county courts by the . . . provisions of the Constitution. We think of no method whereby there could be a settlement of the accounts of an administrator without first a determination of the parties entitled to participate therein. This would necessarily require an adjudication as to who are the distributees of an estate, except possibly as to an insolvent estate. Without such determination there could be no settlement of an estate. We believe that the power to determine that question is necessarily placed in the county court by the grant of the power to make ‘settlement’ of estates.”\textsuperscript{110}

It appears from this decision that the commissioners of accounts can determine who are distributees, and that it is no longer necessary to resort to a suit in the circuit court. However, the supreme court could reverse itself at any time and decide that such a question is of a judicial nature and not within the jurisdiction of the county court.

\textsuperscript{107} W. Va. Code ch. 44, art. 2, § 16(a) (Michie 1981).
\textsuperscript{108} Hansbarger v. Spangler, 117 W. Va. 373, 185 S.E. 550 (1936).
\textsuperscript{109} 60 W. Va. L. Rev. 264, 265 (1958).
court. Therefore, the cautious attorney will continue to have such a question resolved by the court of general jurisdiction. Such a determination is necessary for the settlement of an estate and the county court should have the authority to accomplish the end. However, because the strict rules of evidence would have to be followed at any contentious hearing and a thorough knowledge of the laws of descent and distribution would be required by the official presiding at the hearing, it is necessary that the person presiding be trained in the law. Because neither commissioners nor members of the county courts need be attorneys, the circuit courts should continue to have concurrent jurisdiction with the county court in such matters.

Assuming that no major changes are to be made in the present probate system, the legislature should better define the scope and authority of the county courts and their commissioners of accounts over such probate matters.

**Appeals**

"An appeal shall lie to the circuit court of the county from the final order of the county court in the . . . probate of a will; the appointment and qualification of a personal representative . . . and the settlement of their accounts . . ." The petition for an appeal must be presented within four months after the judgment or order was rendered and it shall assign errors. The appeal shall be decided upon the original record of the proceedings in the county court. The procedure is in fact by writ of error, but is it referred to as an appeal in the statutes. An attorney has the alternative of appealing an order of the county court, admitting or refusing to admit a will to probate within eight months after the order is entered, or by applying to the circuit court by writ of error within four months after the order is entered. If the writ of error is refused by the circuit court, it may then be presented to the West Virginia Supreme Court of Appeals, together with the record of the original proceedings. If the writ of error then is allowed by the supreme court, the allowance is certified to the circuit court and proceedings shall be had in the circuit court as if the allowance were by the circuit court or judge. After the decision of the ap-

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111 W. VA. CODE ch. 58, art. 3, § 1 (Michie 1961).
113 W. VA. CODE ch. 58, art. 3, § 5 (Michie 1961).
115 W. VA. CODE ch. 59, art. 3, § 6 (Michie 1961).
peal by the circuit court, the matter shall either be remanded to the county court or retained in the circuit court and there proceeded with as the circuit court may order. A decision by the circuit court can then be appealed to the West Virginia Supreme Court of Appeals within eight months after the decision is rendered.

The only criticism to be made concerning appeals is the number of times that findings can be reviewed by different bodies. A finding by a commissioner of accounts as to a settlement by a fiduciary or a claim by a creditor can be excepted to by any interested party. The county court can then review the proceedings and make any changes thereto it deems proper either from the face of the report or from the exceptions filed. The findings by the county court can then be appealed to the circuit court and ultimately to the supreme court.

The status of the commissioner of accounts is degraded by permitting his findings to be reviewed by the county court. The competency of commissioners of accounts in matters of claims and settlements will almost always exceed the competency of members of county courts. There is no sound reason why the findings by commissioners should be subject to change by the county courts, particularly because the commissioners actually conduct the hearings from which the findings are made. There is a useless duplication of effort involved, and the county courts should be required to confirm the reports of the commissioners without holding any hearings thereon. The interested parties would be protected with their right of appeal to the circuit court.

It may be argued that giving the parties the right to appeal orders of the county court to the circuit court places the probate court in the class of an inferior tribunal and does not give it the dignity and status it should have. Again pointing out the qualifications of the members of the county courts, the right of appeal to the circuit courts gives all parties the opportunity to have the matters reviewed by a competent judge before the right of appeal to the supreme court accrues. If probate jurisdiction is to remain in the county courts, the probate courts must continue to be inferior tribunals in West Virginia.

Jurisdiction Over Other Probate Matters

A creditor of a decedent can, instead of filing his claim before the commissioner of accounts, bring a suit in circuit court against the personal representative of the decedent's estate for the amount due him by virtue of any contract with the decedent. Also, a commissioner of accounts has authority to receive disputed claims against the estate of a decedent and to hear evidence on such disputed claims, but the commissioner of accounts does not have jurisdiction to hear and determine contingent or unliquidated claims. To enforce a contingent or unliquidated claim a creditor must bring suit in the circuit court. In effect the circuit court has concurrent jurisdiction over the proof of other types of claims. Such is confusing, but it entitles the creditors of an estate to have his claim heard by a competent judge in the first instance and also entitles him to a jury trial on the issue, if he desires. On the basis of this and on the basis of the qualifications of the commissioners of accounts and the members of the county courts, conferring such jurisdiction on the circuit courts is warranted.

Circuit courts also have jurisdiction over other probate matters, several of which are as follows:

1. Suits to establish lost or destroyed wills;
2. Suits for transfer of estate property to nonresident guardians and committees or to nonresident trustees, administrators and executors;
3. Suits against personal representatives for waste;
4. Suits against personal representatives after final settlement to compel disbursements of the balance due legatees and distributees;
5. Other special cases based on some distinctive and independent ground of equitable cognizance.

Though probate jurisdiction is in the county courts, the circuit courts have exclusive jurisdiction over many probate matters. This is necessary because of the make-up of the county courts and the

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118 W. VA. CODE ch. 44, art. 1, § 22 (Michie 1961).
120 Dower v. Seeds, 28 W. Va. 113 (1886).
121 W. VA. CODE ch. 44, art. 11, § 3 (Michie 1961); W. VA. CODE ch. 44, art. 11, § 6 (Michie 1961).
122 W. VA. CODE ch. 44, art. 1, § 24 (Michie 1961).
123 W. VA. CODE ch. 44, art. 4, § 22 (Michie 1961).
equity jurisdiction of the circuit courts, but it is the basis for much confusion in the West Virginia probate system.

**Small Estates**

West Virginia has a special, inexpensive procedure which may be followed for settling small estates:

"[I]f and when, the personal representative shall file with the county court an appraisement of the estate, showing its value to be one thousand dollars or less, then proceedings before the commissioner of accounts shall not be necessary, but the personal representative shall, within two months from his appointment, file with the county clerk his report of receipts and disbursements, and, unless some creditor or heir shall within thirty days thereafter show good cause why the report is not correct, the personal representative and his bondsman shall be discharged."

The method for settling estates of 1000 dollars or less in West Virginia is very simple and fast. No notices are required and it usually follows an informal proceeding before the county clerk. It is a justified procedure for it saves time and money for the beneficiaries of small estates who may be in dire need of all the money and property that can be saved.

West Virginia does not have statutes which provide for either a family allowance during administration or a widow's allowance. Some allowance is permitted by most states, and it is usually not subject to the claim of creditors. Also, some states have a widow's allowance which is not considered part of the estate and which would give her a sum of money or other property on which to survive for a short period of time. Such legislation is outside the realm of this study but should be considered by the legislators of West Virginia.

Consideration could be given to raising the maximum amount where certain classes of beneficiaries are involved and they are residents of West Virginia. Where the estate is subject to a state inheritance tax, the tax commissioner should be protected, and the estate should be referred to a commissioner of accounts. Property transferred to a surviving spouse is exempt from state inheritance

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125 Simes & Basye, op. cit. supra note 34, at 566.
taxes up to 15,000 dollars; there is a 5000 dollar exemption for property transferred to each surviving child and a 2500 dollar exemption for each surviving grandchild. The amount could be set at the least amount of the inheritance tax exemption applicable in a given estate of 1000 dollars, whichever is higher. Creditors of the decedent would be amply protected because they have the right to sue the distributees and legatees at any time within two years after distribution. The costs of such a suit, however, should be borne by the distributees and legatees and not the creditors, if the claim is allowed. The state would be protected for their would be no tax due. What constitutes a "small estate" should be redefined in a more substantial amount than the 1000 dollar limitation now applicable, and also, the estate should be referred to a commissioner of accounts when the personal representative or the court deems such action desirable.

This article will be concluded in the February issue.

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126 W. VA. CODE ch. 11, art. 11, § 4 (Michie 1961).
127 W. VA. CODE ch. 44, art. 2, § 27 (Michie 1961).