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PERSPECTIVE

Thoughts on Court Consolidation: The Surrogate's Court

BY RAYMOND RADIGAN

Judge Janet DiFiore, the Chief Judge of the New York Court of Appeals, has joined her predecessors, among them Judges Sol Wachtler, Judith Kaye and Jonathan Lippman, who, in the past, have proposed court consolidation for the purposes of streamlining New York's court structure and hopefully providing greater efficiency in administrating matters that come before the various courts. She encourages comments regarding the proposal. This article will deal only with the Surrogate's Court and my views.

The history of the Surrogate's Court is recorded within the two volume reports, recommendations, and studies of the Bennett Commission, which covered the period 1962 to 1967 and the six reports of the Advisory Committee to the legislature on EPTL and SCPA of which I was chair, and recites the development of the Surrogate's Court in great detail and efforts made to either abolish or strengthen

By
Raymond Radigan

the court that dealt with trusts and estates.

Basically, under early English law, the Crown made determinations concerning the distribution of property, both during life and upon death and ultimately assigned that to Surrogates, who were primarily within the ecclesiastical courts, to implement the laws as it dealt with inheritance.

New York, although it was at first a Dutch colony and we see some remnants of the continental law even today, ultimately adopted the English law when it became a British colony. When it became a state, it developed its own court system to deal with inheritance and related matters thereto.

On page 12 of the Bennett Commission's first report is a recitation of the history of the Surrogate's Court, where one will find references to probate court, chancery court, and the like. The court dealing with trusts and estates basically, in the beginning, was an administration court, like we now have in such states as New Jersey. Ultimately, more and more jurisdiction was given to the Surrogate's Court. It was then made a court of record. It was given both equity and law powers. Jury trials used to be transferred to a trial court and then the Surrogates were given jurisdiction to conduct such trials. Ultimately, the Surrogate's Court was created and in 1962, the people of the state of New York created a Constitutional Surrogate's Court and basically that court handled any and all matters dealing with the affairs of the decedent plus other matters the legislators thought appropriate, with some limitations.

Through the enactment of the EPTL and SCPA and amendments thereto, the legislature gave more jurisdiction to the Surrogate's Court concerning guardianship of the persons and infants. They created Article 17-A dealing with guardianship of individuals with disabilities. This was important for wards that needed

C. RAYMOND RADIGAN *is a former Surrogate of Nassau County and of counsel to Ruskin Moscou Faltischek, P.C. He also chaired the Advisory Committee to the Legislature on Estates, Powers and Trusts Law and the Surrogate's Court Procedure Act.*

guardians after reaching majority. Surrogates were also given jurisdiction in certain instances regarding Article 81 proceedings. They were included regarding jurisdiction concerning common trust funds, adoptions, and certain disputes between living persons as set forth under SCPA 2103, 4 and 5, and inter vivos trusts, to name just a few.

Today, the Surrogate's Court is a Constitutional Court and is not a creature of the legislature. It was created by the people and, therefore, it would require a constitutional amendment to change that court. It would appear that there would be serious issues in making certain provisions retroactive as there would be a constitutional question about those who were duly elected to be Surrogates not being able to complete their terms of office as Surrogates.

Under the present constitution, the legislature can give additional jurisdiction, but cannot take away what already is prescribed by the constitution, namely jurisdiction over any and all matters dealing with the affairs of a decedent.

Any change will require, among other things, the passage by two separate sessions of the legislature and any amendment would then have to be voted upon by the electorate to change the Surrogate's Court. Therefore, the Chief Judge's proposal is one that must be reviewed, discussed, and put forth before two sessions of the legislature and then the electorate. This will involve a process where hearings will be held, views of many being analyzed, and a determination made concerning whether there should be consolidation and, if so, to what extent.

Presently, there is a Surrogate in each county who is elected for a term of 14 years in the City and 10 outside the City. The Surrogates of the City of New York, Nassau, Suffolk and Westchester receive the same salaries as Supreme Court judges. The Surrogates outside the City, other than the three counties mentioned, receive lesser salaries. They may receive additional compensation if they are acting Supreme Court judges. In some counties, the total population is almost less than the number of individuals dying in the larger counties and therefore there is a limited amount of Surrogates work within those counties. Therefore, those Surrogates are what we call "triple hatters" where they may be assigned to do Family, County or even Supreme Court matters.

Under the present system, the courts have been efficient in expediting matters dealing with wills, intestacy, accountings, guardianships, and adoptions, as well as trusts. As to certain matters, the courts had to decline jurisdiction because a particular dispute involved living individuals for which the legislature did not extend jurisdiction to the Surrogates to handle. The practice regarding adoptions was different throughout the state. Some Surrogate's handle all adoptions, some do just agency, others private placement. There are other various practices regarding assignment of those proceedings.

Recommendations

As far as the Surrogate's Court is concerned, the proposal, to effectuate an improvement in all respects, should provide that there be a permanent part dealing with all trusts and estates matters, guardianship and adoptions, with clerks permanently assigned to handle such matters.

Some thought should be given to the name of the Surrogate part. The present proposal calls for the word "probate." At one time New York did have a probate court, but ultimately it was changed to Surrogate. Probate literally means to prove. So a part that would prove wills, intestacy and trusts may be called such, but may not be indicative of all that the part would be assigned. Some consideration should be given to a proper name for the part if a change were to be made.

However, whatever the name, it should be assigned all matters dealing with wills, intestacy, revocable and irrevocable trusts, guardianship of minors and in limited circumstances Article 81 proceedings and maybe even all such proceedings, dealing with guardianship of those under disability and adoptions. The judge should be elected to the Surrogate part and do all of the Surrogate work in their county. Presently, the Surrogate's Court has demonstrated that, through elections, the additional benefit of diversification can be accomplished. This is evident by the fact that we have minority Surrogates, for example, in Kings, New York and Bronx counties. This will be a serious issue of concern for representatives of the minority communities.

The Chief Administrator may be authorized in the event that there is not sufficient work for the Surrogate to assign that Surrogate to other court matters. However, the Surrogate should not be moved and have others do his or her work as Surrogate unless there is cause, such as a need for recusal. In that case, another Surrogate should be assigned. This will ensure that knowledgeable individuals

will permanently preside over Surrogates matters and the part not be subject to rotation. Therefore, the proposal should be adjusted to clarify when Surrogates could be assigned to other matters and on a limited basis consideration should be given for Surrogates to play a part in their budgets as is the present practice.

Surrogates are presently their own county clerks and collect substantial fees that are used by the state and not the court. Loss of such fees would affect the state fiscal condition and that must be considered as a budget issue.

It is very important that documents such as wills and adoption records not be co-mingled with what is now handled in the county clerk's office. The proposal should ensure some continuation of the Surrogate's Courts being their own county clerks.

There should be some clarification regarding the permanent assignment of the clerks to the Surrogate's Court. Under the present system, there are knowledgeable individuals heading various departments and in order to be effective, the proposal should address this issue to ensure that there be a user-friendly court for the public.

If the proposal for consolidation were properly implemented, as far as the Surrogate's Court is concerned, there could be many advantages. Many of such advantages could be accomplished by the legislature and not need any constitutional changes. Jurisdiction of the Surrogate's Court could be clarified so the Surrogates would be handle any and all matters dealing with trusts and estates, guardianship and adoptions, rather than splitting jurisdiction concerning guardianship of any kind, adoption and revocable and irrevocable trusts as all of that could be handled by the Surrogate's part, rather than being spread among the various courts as is the present practice.

Since Surrogates will be the equivalent of Supreme Court judges, one of the advantages of consolidation or change would be that the Judge would have full jurisdiction, even if a matter involves living persons. The court will not have to decline jurisdiction in some cases as is the present practice. Under the present practice, there are instances where the Surrogate, in spite of the fact that the dispute it between living persons, can continue to handle a matter and make an ultimate determination as is done in SCPA 2103, 4 and 5 proceedings. That concept can be expanded.

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The Estates, Powers & Trust Law and the Surrogate's Court Procedure Act came about as a result of two commissions and works effectively, but it calls for knowledgeable judges to preside in order to implement, as well as professional staff. This must be taken into consideration concerning the need for who is to run the probate part or whatever it is ultimately called.

Consideration should be given to expand the term of office to a full 14 years for all Surrogates and provide for extensions as is the present practice for Supreme Court judges who reach the age of 70. However, that is not critical. Your typical Surrogates specifically chose to be Surrogates and specialize their expertise in trusts and estates. They are not interested in salary amount, terms of office, or being appointed to the Appellate Division. They ran and were elected to be Surrogates because they are devoted to that practice and not other areas of the judiciary. That should be considered in any proposed changes. They are not interested in preserving the position for themselves, but for the position itself and to serve the public.

The Surrogate's Association will no doubt give careful constructive consideration to the proposals and if there is cooperation by all parties concerned, one can envision an even better Surrogate's Court then what we have today. The federal courts have special courts such as bankruptcy. The state should have specialty courts or parts. This could be done with proper changes. Much of what I have suggested could be accomplished through legislation without the need of a constitutional amendment.