

A Brief History Of The Pennsylvania Orphans' Court

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ABSTRACT

Orphans' Courts have been integral to Pennsylvania's judicial system since the earliest colonial days. However, there are no comprehensive histories of this institution that treat the whole arc of its existence from its English roots and earliest colonial days through to the present. This article strives to remedy that, if briefly.

I. INTRODUCTION AND ANTECEDENTS

An early colonial statute memorably expressed the purpose of the Orphans' Court "That Care maybe taken for those, that are not able to take Care for themselves."² It would be difficult to state better or more concisely the overriding principle of the Orphans' Court through the centuries. The court's scope has evolved significantly from its original mandate "to inspect and take Care of the Estates, Usage, and Employment of Orphans" to encompass wills, trusts, guardianships and various fiduciaries in ways that would no doubt puzzle the scribes of that statute, but it still cleaves to the same principle.³ And it will continue to evolve. But since "what's past is prologue,"⁴ it behooves us to revisit the earliest days of the Orphans' Court and trace its development through to the present.

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2. Act of March 10, 1683 (1 St.L. 66, Ch. 77) ("Law about Orphans' Court"); see also *In re Brereton's Estate*, 355 Pa. 45, 61 (1946) (reaffirming this sentiment as "the primary purpose for which the orphans' courts were created and continued by our several constitutions").

3. *Brereton*, 355 Pa. at 61. See 20 Pa.C.S.A. §711-713 for the jurisdiction of the modern Orphans' Court.

4. WILLIAM SHAKESPEARE, *THE TEMPEST* act 2, sc. 2.

The roots of the Pennsylvania Orphans' Court are in England, more specifically in London. That the Orphans' Court sprang from English soil should come as no surprise, since Pennsylvania inherited its Common Law from England, but the Orphan's Court "had no place in the common law."⁵ Rather, the Orphans' Court finds its inspiration in the London Court of Orphans.⁶ This court's origins are murky, but apparently extend back as far as January 14, 1276, when "Gregory de Rokesle, the mayor, and 'other reputable men' granted wardships of John, William, and Matilda, the orphans of Alan Godard, to Sarah, his widow. She was to hold the houses, buildings, possessions, rents, chattels, and all goods belonging to the said orphans till they come of age."⁷

Eventually, this court came to have broad powers over guardians and the persons and property of orphans until the age of majority. In addition to appointing

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guardians, the court also took recognizances from executors and administrators of deceased parents with minor children, which served as a mechanism to ensure that the property owed to minor children of deceased fathers would be preserved for their benefit and actually paid out to them when they reached majority.⁸ In lieu of the payment of an orphan's inheritance to a guardian, the court could also accept the inheritance and hold it in its coffers, *in custodia legis*, until the orphan reached majority.⁹

The privilege of access to the London Court of Orphans has long been considered one of the customary liberties afforded to residents of the free city of London.¹⁰ While prosaic enough by today's standards, the value of the Court of Orphans to the London citizenry is easy to appreciate when contrasted with the thoroughly feudal system that prevailed elsewhere.

Outside of London and the other cities where similar courts were available, the personal estates of decedents were administered by ecclesiastical courts according to Canon Law.¹¹ Historically, different systems prevailed depending on whether the

5. W. G. Hawkins, Jr., *Orphans' Courts in Pennsylvania*, 35 Am. L. Reg. and Rev. 438, 438 (1896).

6. *Id.*

7. CHARLES CARLTON, *THE COURT OF ORPHANS* 13 (1974).

8. *Id.* at 14. A recognizance is "an obligation of record," which "resembles a bond, but differs from it in being an acknowledgement of a former debt upon record." BLACK'S LAW DICTIONARY 1436 (4th ed. 1968). See also 2 WILLIAM BLACKSTONE, *COMMENTARIES* *341.

9. CARLTON, *supra* note 7, at 50. The accumulated funds held this way by the court could be lent to third parties, generating income for the orphans and providing a source of capital. *Id.* at 50-51.

10. Hawkins, *supra* note 5, at 438; Horner v. Hasbrouck, 41 Pa. 169 (1862). The "Liberties of London" were of ancient origin, and important enough to have been confirmed in the Magna Carta itself: "And let the City of London keep all its ancient liberties and free customs, on land and on the water." Magna Carta ¶ 13 (The 1215 edition reads: "*Et civitas London. habeat omnes antiquas libertates et liberas consuetudines suas, tam per terras, quam per aquas.*"). Other English cities established Courts of Orphans in time, either by custom or fiat, but London's was the archetype. CARLTON, *supra* note 7, at 23.

11. THEODORE F. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 725-27 (5th Ed. 1956). Of course, decedents who died seized of rural real property were subject to the complex rules governing feudal estates in land restricting their heritability, which engendered their own guardianships as the feudal incident of wardship. 2 WILLIAM BLACKSTONE, *COMMENTARIES* *87-88. Londoners and the other burghers who were the main constituents of Orphans' Courts were unlikely to have large rural landholdings, and real property within most boroughs was held by burgage tenure, and was often administered like chattel. See, e.g., 2 POLLOCK & MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I.* 330-21 (1898); 1 COKE'S *INSTITUTES* §167 (Co. Litt. 167) ("And in some cities and burroughes, lands may passe as chattels by will nuncupative or paroll without writing."). Therefore, a discussion of the administration of personal property will suffice for our purposes.

decedent died testate or intestate, but both eventually came under the jurisdiction of the ecclesiastical courts.¹² In either case, an official known as an “ordinary,” often the bishop of the decedent’s diocese or appointed by him, would appoint an administrator or decide the validity of the will.¹³ Where the decedent owned significant property in more than one diocese, probate jurisdiction was reserved for the archbishop, “by way of special prerogative,” who would appoint a “judge of the prerogative court” to hear such cases.¹⁴

This arrangement, which stood until 1857,¹⁵ was fraught with complexity and ripe for abuse. The ecclesiastical courts proceeded according to Canon Law, which was largely derived from Civil, or Roman law, so practice there was very different from practice in the courts of law and equity—i.e., most other courts in England.¹⁶ This tended to isolate estate practice from other legal disciplines, and produced its own set of professionals at Doctors’ Commons in London.¹⁷ Worse, the only means of compulsion directly available to the ecclesiastical courts was excommunication.¹⁸ While this must once have been a fearsome penalty, its efficacy waned over time, which led parties to other courts—especially chancery—in search of remedies binding on persons and property, not just the conscience.¹⁹ Worse still than the distinct and tortuous procedure of the ecclesiastical court, was the risk of abuse. For example, until 1670, while creditors of intestate estates were protected by the fact that the ordinary was personally liable for unpaid debts of the estate, heirs enjoyed no such protection.²⁰ Unscrupulous ordinaries and administrators could, and did, simply pocket the balance of the personalty once any debts were paid instead of turning it over to the heirs.²¹

All of these factors were surely on the mind of Penn and his government in 1683 when they created the Orphans’ Court—especially the last issue, which had by then been remedied but existed within their living memory. Pennsylvania needed a court to handle guardianship and orphans’ estates, and eventually probate and administration, that was more functional than the ecclesiastical system, and broader in its scope than the London Court of Orphans. It had to be sufficient unto itself, because the main recourse for enforcing the otherwise unenforceable on general principles

12. PLUCKNETT, *supra* note 11, at 730, 740.

13. *Id.* at 279, 740–41.

14. 3 WILLIAM BLACKSTONE, COMMENTARIES *65–66.

15. 20 & 21 Victoria, c. 77 (1857) (creating a Court of Probate administered as part of the English judiciary, supplanting the ecclesiastical court in this role).

16. 3 WILLIAM BLACKSTONE, COMMENTARIES *99. Blackstone offered some choice observations about the clergy and the purity of their motives for claiming this jurisdiction for themselves, but that is far beyond the scope of this article! Ecclesiastical jurisdiction left a permanent mark on the areas of law that it encompassed, which is still visible in our Orphans’ Court. For example, initial process in the ecclesiastical courts was by citation, a procedure that continues in use to this day. *Id.* at *100. 20 Pa.C.S.A. §764 (“Jurisdiction of the person shall be obtained by citation to be awarded by the orphans’ court division upon application of any party in interest.”). Similarly, the *exceptio* (pl. *exceptiones*) procedure of Roman law became, likely through the ecclesiastical intermediary, the “exception” of Orphans’ Court practice, which was only abolished in 2016. See WILLIAM L. BURDICK, THE PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW 643, J. Inst. 4.13.1, and prior O.C. Rule 7 (effective until September 1, 2016).

17. GEORGE D. SQUIBB, DOCTORS’ COMMONS, A HISTORY OF THE COLLEGE OF ADVOCATES AND DOCTORS OF LAW 25 (1977).

18. 3 WILLIAM BLACKSTONE, COMMENTARIES *99.

19. See, e.g., PLUCKNETT *supra* note 11, at 742 (“Particularly in the sixteenth and seventeenth centuries, the inadequacy for all practical purposes of the ecclesiastical courts drove litigants into chancery.”).

20. *Id.* at 730. The situation was remedied by the 1670 Statute of Distributions which empowered ordinaries to take bonds which would be recognized in secular courts, providing a temporal as well as spiritual remedy. 22 & 23 Charles II (1670).

21. *Id.* at 730.

of fairness—a separate chancery—has never effectively existed in Pennsylvania.²² Finally, considering the religious oppression suffered by the Quakers in England at the hands of the courts,²³ and in keeping with the spirit of the new colony,²⁴ it had to be secular and free from invidious religious influence.

II. THE FIRST ORPHANS' COURTS IN PENNSYLVANIA THROUGH 1832

It would take centuries for the Pennsylvania Orphans' Court to achieve all of those goals, but its beginnings, however humble, were a huge step forward. The Pennsylvania Orphans' Court was first constituted by an act of the Provincial Assembly on March 10, 1683, which read in its entirety:

Be it enacted &c: That the Justices of each respective County-Court Shall Sitt twice every year, to inspect and take Care of the Estates, Usage, and Employment of Orphans, which Shall be called The Orphans-Courts, and Sitt the first third [sic] day of the week in the first & eighth month yearly; That Care may be taken for those, that are not able to take Care for themselves.²⁵

Of these sixty-odd words, about half concern the court's schedule and staff, leaving scant room for details about its procedure and jurisdiction, beyond the ringing, but vague, injunction "that care may be taken." It appears that the earliest Pennsylvania Orphans' Courts were of limited scope and closely followed the mandate of the London archetype to supervise orphans' estates, only reaching decedents' estate and other matters incidentally when they affected guardians and their wards. Any discussion of the business of the Orphans' Court from the statutes empowering it in early colonial days should be taken with a grain of salt, however, because these statutes were very vague and the operation of the courts notoriously informal.²⁶

Within a few years, the Provincial Assembly would begin to broaden the scope of the court. For example, an Act of Assembly dated May 3, 1688 empowered the court to allow the sale of land from estates towards "defraying such Just Debts, the Education of such Child or Children, Support of the Widdow, and the better improving the remainder of the estate to their Advantage."²⁷

As the colony's corpus of legislation grew and developed, the powers and mandate of the Orphans' Court would become clearer and more concrete. Compared to prior legislative offerings, the Act of October 28, 1701, for example, provided an extensive treatment of jurisdiction and procedure in the Orphans' Court.²⁸ In addition

22. WILLIAM H. LOYD, *THE EARLY COURTS OF PENNSYLVANIA* 160 (1910). A combination of a populist abhorrence of unilateral power concentrated in one place and the want of trained lawyers prevented chancery from taking hold in Pennsylvania as a separate institution, but courts of common pleas have obviously exercised equitable powers all along. See also, Lawrence Lewis Jr., *The Courts of Pennsylvania in the Seventeenth Century*, *THE PENNSYLVANIA MAGAZINE OF HISTORY AND BIOGRAPHY*, Vol. 5, No. 2 (1881), at 147.

23. CRAIG W. HORLE, *THE QUAKERS AND THE ENGLISH LEGAL SYSTEM, 1660-1688* 45-46, 238-42 (1988) (discussing the formal and procedural disenfranchisement of Quakers by the English courts of the period).

24. See, e.g., Article XXXV of Penn's Frame of Government of Pennsylvania of 1682—Laws Agreed upon in England (providing that no believer in the "one Almighty" be "molested or prejudiced for their religious persuasion").

25. Act of March 10, 1683 (1 St.L. 66, Ch. 77).

26. Lewis, *supra* note 22, at 155.

27. Act of May 3, 1688 (1 St.L. 132, Ch. 188) ("Law about sale of intestates' land by the widow or administrator."). It is worth recalling that real property was not always freely alienable from decedents' estates. Personal representatives only gained the power to sell real property not specifically devised with the Act of April 18, 1649. This power is now codified at 20 Pa.C.S.A. §3351.

28. Act of October 28, 1701 (2 St.L. 148, Ch. 106) ("An Act for Establishing Court of Judicature in this Province and Counties Annexed"). This act also governs jurisdiction and procedure in other county courts. It was disapproved and repealed by Queen Anne and her privy council in 1706, but its provisions would be largely reenacted in future statutes, such as the Act of March 27, 1713. See LOYD, *supra* note 22, at 229.

to details concerning the court's composition and schedule, this act explicitly granted powers of compulsion to the Orphans' Court, including powers to issue process and arrest warrants for noncompliance, and set the scope of the Court's jurisdiction to include anyone "intrusted [sic] with or anyways accountable for" property of orphans or minors, whether as guardian, trustee, personal representative, or in other capacities.²⁹ While such a detailed discussion of the court and its powers was new, the subject matter of the court that it describes was largely the same as the original London archetype concerning the estates of widows and orphans.³⁰

The Act of January 12, 1705 marked the first major departure from the London model. This "Act for the Better Settling of Intestates' Estates," among other reforms, included the following provisions:

The said Orphans' court in the respective counties shall and may, and are hereby enabled to proceed and call such administrators to account for and touching the goods of *any person* dying intestate; and upon hearing and due consideration thereof, to order and make just and equal distribution of what remaineth clear (after all debts, funeral and just expenses of every sort first allowed and deducted) among the wife and children or children's children (if any such be) or otherwise to the next of kindred to the dead person.³¹

No longer was the Orphans' Court's jurisdiction limited to decedent's estates involving widows and orphans—now any administrator (though not yet any executor) could be called to account before this court, which could ensure that the estate was administered in an orderly fashion and that he or she distributed the net estate according to the laws of intestate succession.

The next major developments in the Orphans' Court came with the Act of March 27, 1713, which would remain in force, with occasional amendment, until 1833.³² The court retained the powers conferred by the Acts of October 28, 1701, and January 12, 1705 (which was explicitly incorporated³³) with a few modifications, especially to the relationship and division of jurisdiction between the court and Register General,³⁴ the precursor to the Register of Wills. The status of the Orphans' Court as a court of record was confirmed.³⁵ New powers were granted or explicitly enumerated for the first time, too, such as the ability to revoke letters of administration for cause shown.³⁶ The Act also empowered the court to allow the loan of estate funds at interest, reminiscent of the London Court of Orphans.³⁷ This Act also, for the first time, explicitly granted an appeal of actions by the Orphans' Court directly to the Supreme Court, a right which would persist for over 250 years.³⁸

The Act of March 27, 1713, as amended, would hold sway over Orphans' Court practice and procedure for a hundred and twenty years. During those years, British colonial rule would give way to independence, and Pennsylvania would become a

29. Act of October 28, 1701 (2 St.L. 148, Ch. 106), at Section VIII.

30. See LOYD, *supra* note 22, at 229–230.

31. Act of January 12, 1705 (2 St.L. 199, Ch. 135), at Section I (emphasis added).

32. Act of March 27, 1713 (3 St.L. 14, Ch. 197). LOYD, *supra* note 22, at 230–231.

33. Act of March 27, 1713 (3 St.L. 14, Ch. 197), at Section IV.

34. On this office, and the Register's Court, see *infra* note 63.

35. Act of March 27, 1713 (3 St.L. 14, Ch. 197), at Section I. Courts of record are those "whose acts and judicial proceedings are enrolled, or recorded, for a perpetual memory and testimony, and which have power to fine or imprison for contempt," which possess a seal, and the functions of which are independent of the officer presiding. BLACK'S LAW DICTIONARY 425–26 (4th ed. 1951).

36. Act of March 27, 1713 (3 St.L. 14, Ch. 197), at Section I.

37. *Id.* at Section III.

38. *Id.* at Section IV. See *infra*, text accompanying note 82, regarding the abolition of the direct appeal to the Supreme Court in 1980.

state. The first state constitution, passed in convention on September 28, 1776, confirmed the place of the Orphans' Court among the other courts of the commonwealth.³⁹

Despite the long period of relative stasis, or perhaps because of it, the Pennsylvania Orphans' Court of the early nineteenth century was increasingly ill-equipped to handle the growing demands placed upon it. While nominally a court of record since 1713,⁴⁰ "it was not, at first, accorded that dignity," and its decrees and adjudications suffered collateral attack in other courts.⁴¹ Justice Duncan, writing for the Pennsylvania Supreme Court in the 1824 opinion *McPherson v. Cunliffe*, presented a grim picture of the decay of the court:

Nothing has been more irregular than the practice of these courts generally; there may be exceptions, but they are very rare. These orders depend on loose scraps of paper deposited in untitled pigeon-holes, or packed up as useless lumber in old trunks; and when to this, is added, and it is a sore evil, their transmission from hand to hand, as the clerks of these courts are moved off the stage in rapid succession. . . . Nothing so much requires legislative attention as the proceedings in the orphans' courts, for as sure as we descend into our graves, so sure into this court we must come; and the man would be a real public benefactor who would devise set forms, and furnish directions in conducting the vast business in these courts, where we every day find so deplorable a system of confusion.⁴²

The Court in *McPherson v. Cunliffe* held that Orphans' Court decrees were no longer subject to collateral attack, but much remained to be done to rehabilitate the Orphans' Court.⁴³ Fortunately, the pleas of Justice Duncan for legislative action did not go unanswered.

III. THE REFORMS OF THE ACT OF MARCH 29, 1832, THE COURT THROUGH THE CONSTITUTION OF 1874 AND UNTIL 1968

On March 23, 1830, the General Assembly adopted a joint resolution that a commission "revise the several statutes relative to the settlement of accounts before Registers, and proceedings in the Orphans' Court."⁴⁴ The three appointed commissioners, William Rawle, Thomas I. Wharton, and Joel Jones, presented their findings and draft codes to the General Assembly on January 31, 1831, less than a year later.⁴⁵

In their preliminary remarks, the commissioners quoted from Justice Duncan's rebuke in *McPherson v. Cunliffe* that "nothing so much requires legislative attention as the proceedings in the orphans' courts," and reflect that but for the injunction of the legislature to address it first, they "should probably have reserved this subject to the last, and given it the utmost deliberation that our limits allowed," so difficult did they esteem the task.⁴⁶ Despite that, and the fact that they completed their revision in a matter of months, the fruit of the Commission's labors was well received.⁴⁷ The Commissioners who produced the next revision of Orphans' Court laws were effusive in their praise, writing in 1917 that the prior acts "were drafted with great care and consummate skill."⁴⁸

39. PA. CONST. of 1776, Ch. II, Section 26.

40. *See supra*, note 35.

41. LOYD, *supra* note 22, at 235.

42. *McPherson v. Cunliffe*, 11 Serg. & Rawle 422, 14 Am. Dec. 642 (Pa. 1824).

43. *Id.*

44. PRELIMINARY REMARKS OF THE COMMISSIONERS OF THE REVISED CODE OF PENNSYLVANIA (January 31, 1831).

45. *Id.*

46. *Id.*

47. *See, e.g.*, *Horner v. Hasbrouck*, 41 Pa. 169, 178 (1862).

48. JOHN MARSHALL GEST, GEORGE E. ALTER, & THOMAS J. BALDRIGE, REPORT OF THE COMMISSION TO CODIFY AND REVISE THE LAW OF DECEDENTS' ESTATES 1 (1917).

In March of 1832, the General Assembly passed slightly modified forms of the acts proposed by the Commission (one pertaining to the Register of Wills⁴⁹ and one to the Orphans' Court⁵⁰) which Governor George Wolf signed into law, effective the next August. These foundational pieces of legislation, bolstered by additional legislation over the next few years,⁵¹ would govern the substance and procedure of the Orphans' Court into the twentieth century.

The differences between these laws and the ones they supplanted are stark. Prior legislation was a patchwork affair and even the major statutes like the Acts of 1701 and 1713 were only a few pages long, and established broad, general principles with few particulars. These major acts were then modified over time by a multitude of subject-specific acts. The result was an "ill-digested" body of confusing law.⁵² In contrast, the Orphans' Court Act of 1832 alone covered thirty or so printed pages in sixty-one sections. The substance, too, was much more specific, providing granular detail about procedure and substance. This change represented the first effort to systematically group all legislation related to the Orphans' Court in one place, and the Act explicitly repealed any law that contradicted it.⁵³ The result was the first group of laws on the subject that could be called a "code,"⁵⁴ and which begins to resemble our modern Probate, Estates, and Fiduciaries Code ("PEF Code").⁵⁵

The new code brought to the practice and jurisdiction of the Orphans' Court more internal consistency than it had previously enjoyed. For example, the powers of the court over administrators (such as removal for cause, auditing and adjudicating accounts, and fixing security) now extended to executors, as well.⁵⁶ Actions in partition were discussed extensively,⁵⁷ and the court began to assert jurisdiction over trustees.⁵⁸

The court that was taking shape would by now have been unrecognizable by William Penn or anyone experienced in the London Court of Orphans. Its jurisdiction had expanded significantly, and its practice and procedure had become a unique blend of the major legal traditions of England and the United States. In the words of one nineteenth-century commentator:

In the orphans' court practice, are found the *motion*, *rule*, *fieri facias*, and *subpoena* of the common law courts, the *petition* of chancery, and the *citation* of the doctors commons; and mingled with them, the *order*, *decree*, and *sequestration* derived through these equity and ecclesiastical tribunals, from the civil and canon laws.⁵⁹

A notable addition to the jurisdiction of the court outside of the framework of the 1832 act came with the Price Act of 1853.⁶⁰ This act granted courts, including the Orphans' Court when title derived by descent, the power to "decree the sale, mortgage, leasing, or conveyance upon ground rent" of real property where the titled

49. Act of March 15, 1832 (P.L. 135) ("Relating to Registers and Register's Courts").

50. Act of March 29, 1832 (P.L. 190) ("Relating to Orphans' Courts, their Organization, Powers, and Scope of Jurisdiction").

51. See Act of April 8, 1833 (P.L. 315) ("Relating to the Descent and Distribution of the Estates of Intestates"); Act of April 8, 1833 (P.L. 249) ("Relating to Testamentary Writings"); and Act of February 24, 1834 (P.L. 70) ("Relating to Executors and Administrators—their Duties, Powers and Liabilities").

52. *Horner*, 41 Pa. at 178.

53. Act of March 29, 1832 (P.L. 190), at Section LXI.

54. In the sense of a "complete system of positive law, scientifically arranged and promulgated by legislative authority." BLACK'S LAW DICTIONARY 323 (fourth edition).

55. 20 Pa.C.S.A.

56. Act of March 29, 1832 (P.L. 190), at Sections XIV–XXXI.

57. *Id.* at Sections XXXVI–XLIX.

58. *Id.* at Sections XIV.

59. LOYD, *supra* note 22, at 238 (1910) (quoting HOOD, ON EXECUTORS 103).

60. Act of April 18, 1853 (P. L. 503).

owner was under a legal disability.⁶¹ Prior to this legislation, to resolve such issues of title, it was necessary to secure a special act of the general assembly.⁶² This power would stay an important part of the Orphans' Court's purview well into the twentieth century.

A significant consolidation of jurisdiction in favor of the Orphans' Court occurred with the ratification of the Constitution of 1874, which abolished the Register's Court⁶³ and vested its jurisdiction in the Orphans' Court.⁶⁴ The result was one court with full powers to audit and settle the accounts of decedents' estates, where previously there were two with similar and overlapping powers, improving judicial economy and ensuring more certain outcomes for fiduciaries and litigants.

Major legislative change came again to the Orphans' Court in 1917 with a group of seven acts known "familiarly, if not jocularly, among the legal fraternity as the 'Seven Sisters Acts,'" drafted by a commission that included John Marshall Gest, a noted legal scholar and sitting Philadelphia Orphans' Court judge.⁶⁵ These acts mostly codified the changes to the law that had accumulated since 1832, but also brought a few notable changes to the practice and substance of the Orphans' Court. For example, the Intestate Act for the first time eliminated the distinction between a decedent's real and personal estate, a distinction which, though of ancient origin, had by then become purely arbitrary.⁶⁶ It also evened the scales by giving widows and widowers the same rights in their deceased spouse's intestate estates.⁶⁷

The pace of change to Orphans' Court law accelerated during the twentieth century—the court no doubt drawn by the major tides of social change of the same period. The next recodification began in 1947, just thirty years since the last effort, compared to the 85 years that the 1832 statutes stayed in force. This time there were a series of acts over several years⁶⁸ maintaining some of the basic divisions of the

61. *Id.* at Section 1.

62. ROLAND R. FOULKE, A TREATISE ON THE PRICE ACT RELATING TO REAL ESTATE IN PENNSYLVANIA §10 (1914).

63. A parenthetical discussion of the Register General, the Register's Court, and the Register of Wills will provide helpful context here. Colonial law provided for a "Register for Birth, Marriages, Burials, Wills and Letters of Administration." Act of 1682 (1 St.L. 47, Ch. 47). This gave rise to the Register General (or sometimes, Register-General), with an office in Philadelphia and deputies in the counties, whose responsibilities included the proving of wills and the issuance of letters of administration. LOYD, *supra* note 22, at 217–218. The duties of this office were set forth in detail by statute in 1705. Act of January 12, 1705 (2 St.L. 194, Ch. 133), Section VI. The Register's Court was created (though not by name) by a 1713 statute ("An Act Concerning the Register-General's Office"), which provided that it would be composed of the Register General and two common pleas judges, who would hear caveats and audit accounts. The office of Register General was abolished in 1777 by the same statute which created the office of the Register of Wills. Act of March 14, 1777 (9 St.L. 68, Ch. 748). An Act "Relating to Registers and Register's Courts" appeared in 1832 in tandem with the Orphans' Court legislation of that year, explicating the jurisdiction and procedure of the Register and Register's Court at great length, giving the Register of Wills basic probate jurisdiction, while the Register's Court decided caveats and other contested matters, and could hear appeals of the acts of the Register of Wills. Act of March 15, 1832 (P.L. 135); LOYD, *supra* note 22, at 236–237. The separate Register's Court persisted until its abolition in 1874, while the office of the Register of Wills, of course, is still alive and well.

64. Constitution of 1874, Article V, Section 22.

65. 6 PARTRIDGE-REMICK PRACTICE AND PROCEDURE IN THE ORPHANS' COURT DIVISION §44.01(2). The seven acts were: The Intestate Act of 1917 (June 7, 1917, P.L. 429), the Wills Act of 1917 (June 7, 1917, P.L. 403), the Fiduciaries Act of 1917 (June 7, 1917, P.L. 447), the Orphans' Court Partition Act (June 7, 1917, P.L. 337), the Orphans' Court Act of 1917 (June 7, 1917, P.L. 363), the Revised Price Act of 1917 (June 7, 1917, P.L. 388), and the Register of Wills Act of 1917 (June 7, 1917, P.L. 415). For a warm appraisal of Judge Gest's scholarship, see John H. Wigmore, *Introduction to JOHN MARSHALL GEST, THE LAWYER IN LITERATURE* v-xii (1913).

66. JOHN MARSHALL GEST, GEORGE E. ALTER, & THOMAS J. BALDRIGE, REPORT OF THE COMMISSION TO CODIFY AND REVISE THE LAW OF DECEDENTS' ESTATES 5 (1917).

67. *Id.* at 6.

68. The Intestate Act of 1947 (P.L. 80); The Wills Act of 1947 (P.L. 89); The Estates Act of 1947 (P.L. 100); the Principal and Income Act of 1947 (P.L. 1283); the Fiduciaries Act of 1949 (P.L. 512); the Fiduciaries Investment Act of 1949 (P.L. 1828); the Register of Wills Act of 1951 (P.L. 638); and the Estate Tax Apportionment Act of 1951 (P.L. 1405).

Seven Sisters Acts, while expanding the framework to add new acts, including a separate Principal and Income Act and an Estate Tax Apportionment Act.

Interestingly, it was only in this period that the Orphans' Court acquired one of its most important and familiar areas of jurisdiction today: the persons and estates of incapacitated adults. That this area should fall under the purview of the Orphans' Court was not a new idea. As early as 1914, Judge Hawkins of the Allegheny County Orphans' Court observed:

It has been frequently suggested that the jurisdiction of separate Orphans' Courts should be enlarged so as to embrace the care of lunatics and their estates; and these are certainly within the declared purpose of the organization of the Orphans' Court—"that care may be taken for those that are not able to take care for themselves." The machinery of that Court is admirably adapted to such care.⁶⁹

However, it would not be until amendments to the Orphans Court Act of 1951⁷⁰ which became effective on July 28, 1953, that the Orphans' Court acquired concurrent jurisdiction over the appointment of guardians of the estates of "incompetents" and the administration of their estates. Interestingly, this act applied to all counties except Philadelphia, whose courts of common pleas retained exclusive jurisdiction over incapacitated persons and their estates. Further amendment made Orphans' Court jurisdiction exclusive over administration of guardianship estates effective February 10, 1956,⁷¹ and over appointment of guardians effective April 1, 1956⁷² (both still excepting Philadelphia). The Philadelphia Orphans' Court finally acquired the same jurisdiction, effective September 1, 1957.⁷³

IV. THE 1968 CONSTITUTION AND THE MODERN ORPHANS' COURT

Such was the state of the Orphans' Court, which had subsisted as an independent entity in Pennsylvania since 1683, on the eve of its abolition. Of course, the work of the court would continue—there has never been a shortage of orphans, literal or figurative—but as part of Pennsylvania's unified judicial system created by the constitution of 1968 rather than under its own banner.

The abolition of the separate Orphans' Court was discussed in Pennsylvania's 1968 constitutional convention, but was not unanimously favored by the delegates. The arguments for abolition shared the theme of promoting good governance and efficient administration. There was concern that the Orphans' Courts in some counties had become "fiefdoms" of influential judges.⁷⁴ It was submitted that unification of the courts could ease the perennial question of jurisdiction between Orphans' Courts and Common Pleas Courts on certain matters like creditor claims against decedents.⁷⁵ The basic advantage of being able to move and share resources and personnel between the Orphans' Court and other divisions was clear.⁷⁶ There were also arguments presented against the plan. In addition to appeals to tradition, there

69. WILLIAM G. HAWKINS, JR., *ORPHANS' COURT PRINCIPLES AND PRACTICE IN PENNSYLVANIA* 7 (1914).

70. Act of August 10, 1951 (P.L. 1163), amended by the act of July 28, 1953 (P.L. 690) and the act of July 28, 1953 (P.L. 689).

71. See 5 PARTRIDGE-REMICK *PRACTICE AND PROCEDURE IN THE ORPHANS' COURT DIVISION* §37.01(a).

72. Act 359 of 1956 (P.L. 1154).

73. Act 379 of 1957 (P.L. 794).

74. 2 JOURNAL OF THE CONSTITUTIONAL CONVENTION 852 (February 15, 1968) (statement of Delegate Scranton).

75. *Id.* at 852–853 (February 15, 1968) (statements of Delegates Silverman and Braham).

76. *Id.* at 851–852 (February 15, 1968) (statement of Delegate Scranton).

was concern that the valuable expertise of Orphans' Court judges and staff in a specialized and rather technical field would be squandered or diluted if shuffled between divisions.⁷⁷ A synthesis was reached by the retention of Orphans' Courts as separate division of the court of common pleas in those counties populous enough to support a separate court, allowing specialist judges and staff mostly to continue their work while allowing for centralized management and pooling of resources, and easing jurisdictional tensions.⁷⁸

However, one final indignity remained for the Orphans' Court: a proposal that it be stripped of its name and christened the "Estate Court Division," in an effort to "call a spade a spade!"⁷⁹ Happily, this proposal was defeated by the healthy margin of 22 delegates for to 105 against, preserving the Orphans' Court's ancient name that so well conceptualizes its continuing role.

There have only been a few significant changes to Orphans' Court law and procedure since the Constitution of 1968. One of these was the promulgation the PEF Code as Title 20 of the Pennsylvania Consolidated Statutes by the passage of Act 164 in 1972.⁸⁰ This act supplanted the prior, informal (though ubiquitous) arrangement in Purdon's Pennsylvania Statutes, and gave us the thoughtful arrangement of virtually the entire body of law practiced in Orphans' Court that continues in use to this day, updated and amended as necessary.⁸¹ In 1980, aggrieved Orphans' Court parties also lost their direct appeal to the Pennsylvania Supreme Court, a right mentioned at least as far back as the Act of March 27, 1713, bringing their rights into accord with the rights of other parties in the courts of Common Pleas whose appeals lie to Superior or Commonwealth Court.⁸²

V. CONCLUSION: LOOKING TO THE FUTURE

Our present Orphans' Court is a product of three centuries of change. If the Orphans' Court of 1832 would have been unrecognizable beside the London Court of Orphans, how much more so the modern Orphans' Court? Its jurisdiction, though still strictly limited by its statutory mandate,⁸³ is vastly wider than the London or early colonial Orphans' Courts, encompassing all decedents' estates, trusts, guardianships of adults, powers of attorney, and certain charities, to name but a few.⁸⁴ The court has been conservative in nature, adhering to the basic principle of supervising those who hold property and exercise rights on behalf of others, while at the same time constantly growing to meet the changing needs of society.

What demands will the Orphans' Court face in the future? How might it grow to meet them? A crystal ball notwithstanding, the best way to predict the future is probably by considering current trends. Reviewing statistical data about Orphans' Court caseloads reveals some significant patterns.⁸⁵

77. *Id.* at 851, 853 (February 15, 1968) (statements of Delegates Welsh and Shoemaker).

78. *Id.* at 854 (February 15, 1968) (statements of Delegate O'Donnell).

79. *Id.* at 1114 (February 21, 1968).

80. Act 164 of 1972 (P.L. 508), effective July 1, 1972.

81. See *Fiduciary Review*, August 1972, pp. 1-2.

82. Act 137 of 1980 (amending 42 Pa.C.S.A. §722).

83. The complete jurisdiction of the modern Orphans' Court is set by 20 Pa.C.S.A. §711-713.

84. 20 Pa.C.S.A. §711-713.

85. The data below was drawn from the publically available annual reports published by the Philadelphia County and Allegheny County Courts of Common Pleas. Of course, the experience of other counties may not be identical, but a complete survey of all 67 Pennsylvania counties is outside the scope of this Article. Special thanks the Honorable Matthew D. Carrafiello, administrative judge of the Court of Common Pleas of Philadelphia County, Orphans' Court Division, for his thoughtful presentation of the Philadelphia material to the author.

First, guardianship, and especially guardianship monitoring, is ascendant. For example, Philadelphia County has shown a steady increase in the volume of guardianship petitions since 1997 (the earliest year that such data is publically available), increasing from 105 petitions filed that year to 452 petitions filed in 2017.⁸⁶ Meanwhile, the volume of guardianship reports filed between 2010 (the earliest year such data is available) and 2017 has nearly tripled from 794 to 2,070.⁸⁷ More resources are being spent monitoring the reports that are filed, with many counties hiring court staff to investigate discrepancies in reports, and the implementation of the new, state Guardianship Tracking System.⁸⁸ Guardianship matters, including petitions for adjudication of incapacity, subsequent petitions, and reports, accounted for 63% of matters disposed of by the Philadelphia Orphans' Court in 2017.⁸⁹

Other matters that traditionally composed the bulk of Orphans' Court caseloads have ceded docket space to guardianships. Shrinking audit lists are symptomatic of this trend. The number of accounts filed in Allegheny County, for example, fell by over half between 2006 and 2016, from 828 to 404.⁹⁰

Just as it always has, the Pennsylvania Orphans' Court will continue to grow and change in response to the demands of the modern world while operating under its ancient name. In this way, we can expect that it will see to it "that Care maybe taken for those, that are not able to take Care for themselves"⁹¹ for centuries to come.

86. 1997 ANNUAL REPORT OF THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, at 96; 2017 ANNUAL REPORT OF THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, at 101.

87. 2010 ANNUAL REPORT OF THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, at 128; 2017 ANNUAL REPORT OF THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, at 105. This includes inventories and final reports.

88. 2017 ANNUAL REPORT OF THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, at 105; *See* Pa.R.J.A. No. 510 (implementing the guardianship tracking system).

89. 2017 ANNUAL REPORT OF THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, at 104.

90. 2006 ANNUAL REPORT, ALLEGHENY COUNTY COURT OF COMMON PLEAS, at 55; 2016 ANNUAL REPORT, ALLEGHENY COUNTY COURT OF COMMON PLEAS, at 33.

91. Act of March 10, 1683 (1 St.L. 66, Ch. 77) ("Law about Orphans' Court").