Opinion No. 15-1646

October 2, 1915

BY: FRANK W. CLANCY, Attorney General

TO: Mr. Leo L. Heisel, Tularosa, New Mexico.

Probate court procedure.

OPINION

*{*218}* Your letter of the 28th ult. reached this office late yesterday, but I had not time to answer until today.

You ask whether under the New Mexican statutes, there is an appeal from the decision of a probate judge with reference to the granting of letters of administration. Referring to the new codification, *{*219}* we find that by Section 1440, "any person aggrieved by any decision of any probate court of any county in this state may appeal to the district court" in the manner thereafter prescribed in said section. There might be some room to contend that this would extend to a decision of the probate court upon a disputed question as to the granting of letters of administration, although it is possible that there may be another remedy by virtue of the constitutional provision to be found in Section 13 of Article VI of the Constitution. By that section the district courts are given "appellate jurisdiction of all cases originating in inferior courts or tribunals in their respective districts and supervisory control over the same." The section goes on specifically to give the district courts power to issue writs of certiorari and prohibition in the exercise of this jurisdiction. If an appeal does not lie from such a decision as the one about which you write, then by a writ of certiorari, in the exercise of the supervisory control over the probate court, the district court can bring up the record for the purpose of supervising and controlling and especially for the purpose of ascertaining whether the probate court has exceeded its jurisdiction. If the right of appeal does extend to such a decision, then resort to certiorari or prohibition would be improper. Under these circumstances, the safe course for the aggrieved party would be to take an appeal under Section 1440 and to apply for a writ of certiorari if the probate court has already acted in making what is believed to be an improper appointment of an administrator, or for a writ of prohibition if the court has not actually acted but is about to do so.

You further say in your letter that the point in question is that a probate judge refuses to grant letters of administration to one who has filed in accordance with law and states that he will grant letters to another party and that "for his grounds he misinterprets the law making a distinction between a testator executing a will without appointing executors and one dying intestate." I cannot from this language tell just what the interpretation is. By Section 2218 a testator is directed to appoint administrators and executors of his will, but in case he fails so to do "the heirs shall, with the approval of the judge, appoint one or more persons as administrator or executor of the estate." This

action is subject to the approval of the probate judge. In the case of an intestate, Section 2224 specifies who shall administer the estate and only if there be no such persons in existence or if such persons do not take out letters of administration, then the probate judge may appoint, if he sees fit, a person to administer the estate.