No. 6

Form SA 1

SB-1

MEMORANDUM State of Alaska

TO: The Honorable William J. Moran
State House of Representatives

DATE : April 26, 1971

FROM: Robert P. Isaac RPI
Assistant to the Commissioner
Department of Education

SUBJECT: Re CSSB 1

In regard to CSSB 1, it would appear that paragraph 3, Sec. 18.65.220 pertaining to curriculum development would be in conflict with 14.40.170 (b) (2) relating to the course of instruction for the university.

Perhaps a better approach would be: "The Board of Regents, in cooperation with the Police Standards Council, shall establish minimum curriculum standards . . ." This would avoid the conflict and yet permit the Council to have considerable input.

Michigan State University has one of the most widely acclaimed police education programs. Perhaps the Legislative Council could determine who establishes their curriculum, etc.

In our opinion there is no question that various agencies and organizations have a lot to offer in curriculum development; and, generally, those involved in curriculum development will seek their assistance. However, it is a well accepted principle that responsibility for curriculum development should be with the educational agency.

RPI:mg

File: 023.1

SB-28

Table 4.—*Index of Crime by State, 1970*

Area	Population	Total Crime Index	Violent crime	Property crime	Murder and nonnegligent manslaughter	Forcible rape	Robbery	Aggravated assault	Burglary	Larceny $50 and over	Auto theft
ALABAMA											
Standard Metropolitan Statistical Area	1,901,095										
Area actually reporting	90.8%	44,314	5,130	39,184	190	323	1,278	3,339	18,906	14,016	6,262
Estimated total	100.0%	47,455	5,511	41,944	210	356	1,347	3,601	20,291	15,114	6,566
Other cities	544,894										
Area actually reporting	59.7%	5,861	985	4,879	26	26	100	833	2,395	2,012	472
Estimated total	100.0%	9,820	1,652	8,167	44	44	168	1,396	4,014	3,372	781
Rural	1,008,170										
Area actually reporting	33.5%	2,308	1,005	1,303	50	20	72	894	658	533	120
Estimated total	100.0%	6,935	3,019	3,916	150	237	216	2,436	1,978	1,570	360
State total	3,454,165	61,219	10,435	50,784	404	637	1,731	7,413	28,264	20,055	7,607
Rate per 100,000 inhabitants		1,885.4	305.7	1,579.7	11.7	18.5	50.3	215.2	703.1	580.2	220.5
ALASKA											
Standard Metropolitan Statistical Area	None										
Other cities	94,659										
Area actually reporting	100.0%	1,251	584	667	18	51	181	336	1,119	1,309	697
Estimated total	216,744										
Rural	100.0%	3,576	254	3,322	19	28	36	171	1,703	1,178	736
Area actually reporting	302,173	8,130	840	7,290	37	79	217	507	2,887	3,187	1,916
State total		2,690.5	278.0	2,412.5	12.2	26.1	71.8	167.8	955.0	1,054.2	634.3
Rate per 100,000 inhabitants											
ARIZONA											
Standard Metropolitan Statistical Area	1,320,153										
Area actually reporting	99.8%	51,654	5,558	46,096	141	462	1,967	3,052	15,701	18,013	8,083
Estimated total	100.0%	51,804	5,569	46,235	141	463	1,970	3,050	15,715	18,058	8,058
Other cities	171,705										
Area actually reporting	97.0%	5,167	611	4,556	0	36	158	417	1,584	2,102	455
Estimated total	101.0%	5,329	630	4,699	0	37	162	431	1,627	2,230	467
Rural	277,620										
Area actually reporting	45.9%	2,182	205	1,977	10	21	16	158	544	853	380
Estimated total	100.0%	3,937	363	3,574	18	37	29	279	1,000	1,560	685
State total	1,769,478	61,070	6,562	54,508	159	537	2,161	3,760	18,342	21,848	9,208
Rate per 100,000 inhabitants		3,451.2	370.8	3,080.4	9.0	30.4	122.2	212.5	1,036.7	1,234.8	520.4
ARKANSAS											
Standard Metropolitan Statistical Area	555,100										
Area actually reporting	99.1%	16,870	2,151	14,719	61	120	443	1,527	7,254	5,256	2,209
Estimated total	100.0%	17,020	2,172	14,848	62	121	447	1,542	7,327	5,309	2,212
Other cities	171,000										
Area actually reporting	14.0%	1,026	227	799	22	31	44	127	374	341	84
Estimated total	100.0%	8,432	1,621	6,811	22	32	110	733	3,107	2,677	1,027
Rural	576,253										
Area actually reporting	37.4%	2,181	276	1,905	28	31	31	186	841	827	237
Estimated total	100.0%	5,834	771	5,063	74	83	83	531	2,248	2,138	599
State total	1,323,295	39,845	4,564	35,281	194	336	640	2,676	13,182	11,097	3,811
Rate per 100,000 inhabitants		1,011.4	115.8	895.6	10.1	17.1	48.6	136.5	670.1	564.1	193.7
CALIFORNIA											
Standard Metropolitan Statistical Area	18,560,696										
Area actually reporting	100.0%	816,443	92,111	724,332	1,301	6,259	40,810	43,742	353,055	260,055	111,222
Other cities	951,804										
Area actually reporting	100.0%	70,852	3,[illegible]	[illegible]	25	97	994	2,817	[illegible]	[illegible]	[illegible]
Rural	861,307										
Area actually reporting	100.0%	21,[illegible]	1,[illegible]	[illegible]	50	139	782	1,[illegible]	10,[illegible]	8,102	[illegible]
State total	19,354,131	8,9[illegible]	94,[illegible]	[illegible]	1,376	7,[illegible]	[illegible]	48,[illegible]	[illegible]	277,[illegible]	[illegible]
Rate per 100,000 inhabitants		4,[illegible]	4[illegible]	[illegible]	6.9	35.1	[illegible]	225.3	[illegible]	1,[illegible]	[illegible]

See footnote at end of table.

SB-28

STATE OF ALASKA

WILLIAM A. EGAN, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL / POUCH K — STATE CAPITOL
JUNEAU 99801

February 8, 1972

Alaska State Legislature
House
Judiciary Committee
Pouch V
Juneau, Alaska

Re: Senate Bill No. 28 (Violent Crimes Compensation Board)

Dear Chairman Moran:

In response to your request of January 24, 1972, I will submit the information available from our records on this subject.

During the last nine months of 1971, the District Attorneys within the Department of Law processed the files of 444 defendants who were charged with crimes listed in Senate Bill No. 28.

Since our records only reflect those cases where an arrest was made it may not be a very meaningful statistic in the overall picture. I have spoken with the Commissioner of Public Safety and I believe that their report will be much more informative to the Committee because it will contain information on cases where no arrest was made.

If I may be of further service in this matter please advise.

Sincerely,

Norman C. Gorsuch
Deputy Attorney General

NCG:ss

SB-28

STATE OF ALASKA

WILLIAM A. EGAN, GOVERNOR

DEPARTMENT OF PUBLIC SAFETY

OFFICE OF THE COMMISSIONER

POUCH N — STATE CAPITOL
JUNEAU 99801

February 4, 1972

Representative William J. Moran
Chairman, Judiciary Committee
Alaska State Legislature
Pouch V - State Capitol
Juneau, Alaska 99801

Reference: Senate Bill 28

Dear Representative Moran:

We have compiled such information as is available concerning victims of violent crimes during 1971, 1970 and 1969. Because precise data that we need was not available we have made interpolations based upon the best information we could draw from.

Assignment of cost figures to these interpolations is even more difficult because there are absolutely no reported data of that nature. To arrive at possible costs we allowed the maximum $10,000 for a death and projected injuries at $2,200, which is a figure used for injury cost by the National Safety Council in accident loss computations.

We find by these imprecise means that the cost of compensation during calendar 1971 might have been $390,800.

Our 1970 figures were based upon the FBI Uniform Crime Report for 1970. These statistics indicated a possible cost of $317,600.

The 1969 Uniform Crime Report statistics would indicate a possible cost of $231,400.

I have enclosed the base data from which we arrived at these costs and hope that this may be of some use to you.

Very truly yours,

Emery W. Chapple, Jr.
Commissioner

Enclosures

FOLLOWING DATA PREPARED FOR USE IN CONSIDERATION OF SENATE BILL 28, COMPENSATION FOR VICTIMS OF VIOLENT CRIMES

ALASKA STATE TROOPER CASES ONLY - 1971

11	20 HOMICIDES: (50% of total)	9 fall within the four items listed under Section 44.58.110 (b).
2	20 MANSLAUGHTER: (10% of total)	18 fall within the four items listed under Section 44.58.110 (b).
	54 RAPES (Reported): (6% of total)	12 of which were unfounded. It is unknown how many of remaining 22 fall within the four items listed under Section 44.58.110 (b), however, it is felt very few if any. Depending upon interpretation of "personal injury" it is unlikely more than two would be compensational under SB 28.
	12 ATTEMPTED RAPES — 0 —	1 of which was unfounded. Remaining 11 as above.
	193 ASSAULTS WITH DEADLY WEAPON 10% of total	Which includes assault with intent to kill, maim, etc. Appears only ten to fifteen percent would be eligible for compensation. In most instances there either was no "personal injury"; relative involved; or person assaulted involved in criminal offense.
	142 SEX OFFENSES (Reported): - 0 -	This includes indecent acts with children; statutory rape; incest; lewd, indecent or obscene acts; crime against nature, etc. Again depending on interpretation of "personal injury", few (if any) would fall within category eligible for compensation.

CITY POLICE - 1971 (9 MAJOR POLICE DEPARTMENTS)

22	HOMICIDES	
4	MANSLAUGHTER	
71	RAPES	Breakdown as given above on AST cases not available from any of the city police departments.
10	ATTEMPTED RAPES	
385	ASSAULTS WITH DEADLY WEAPON	
255	SEX OFFENSES	

FOLLOWING DATA PREPARED FOR USE IN CONSIDERATION OF SENATE BILL 28,
COMPENSATION FOR VICTIMS OF VIOLENT CRIMES

ALASKA STATE TROOPER CASES ONLY - 1971

20	HOMICIDES:	9 fall within the four items listed under Section 44.58.110 (b).
20	MANSLAUGHTER:	18 fall within the four items listed under Section 44.58.110 (b).
34	RAPES (Reported):	12 of which were unfounded. It is unknown how many of remaining 22 fall within the four items listed under Section 44.58.110 (b), however, it is felt very few if any. Depending upon interpretation of "personal injury" it is unlikely more than two would be compensational under SB 28.
12	ATTEMPTED RAPES	1 of which was unfounded. Remaining 11 as above.
193	ASSAULTS WITH DEADLY WEAPON	Which includes assault with intent to kill, maim, etc. Appears only ten to fifteen percent would be eligible for compensation. In most instances there either was no "personal injury"; relative involved; or person assaulted involved in criminal offense.
142	SEX OFFENSES (Reported):	This includes indecent acts with children; statutory rape; incest; lewd, indecent or obscene acts; crime against nature, etc. Again depending on interpretation of "personal injury", few (if any) would fall within category eligible for compensation.

CITY POLICE - 1971 (9 MAJOR POLICE DEPARTMENTS)

22	HOMICIDES	
4	MANSLAUGHTER	
71	RAPES	Breakdown as given above on AST cases not
10	ATTEMPTED RAPES	available from any of the city police
385	ASSAULTS WITH DEADLY WEAPON	departments.
235	SEX OFFENSES	

ALASKA STATE TROOPERS CASES ONLY - 1969

14 HOMICIDES: 9 fall within the four items listed under Section 44.58.110 (b)

8 MANSLAUGHTER: All fall within the four items listed under Section 44.58.110 (b)

1 KIDNAPPING

50 RAPES Reported: 17 of which were unfounded. It is unknown how many of remaining 33 fall within the four items listed under Section 44.58.110 (b), however, it is felt very few if any.

10 ATTEMPTED RAPES: 3 of which were unfounded. Remaining 7 same as above.

116 ASSAULTS WITH A DEADLY WEAPON: Statistics not available to indicate how many would fall within items listed under Section 44.58.110 (b).

189 SEX OFFENSES reported: This includes indecent acts with children, statutory rape, incest, lewd, Indecent or obscene acts, crime against nature, etc. Appears only 26 victims may possibly be eligible for compensation under requirements set forth in SB

JUNEAU CITY POLICE DEPARTMENT

None of the requested statistics available.

FAIRBANKS POLICE DEPARTMENT - 1969

4 HOMICIDES
0 MANSLAUGHTER
0 KIDNAPPING
5 RAPES
21 ASSAULTS WITH DEADLY WEAPON
39 SEX OFFENSES

No breakdown available as given in AST cases

ANCHORAGE POLICE DEPARTMENT - 1968 (Latest year available)

7 HOMICIDES
2 MANSLAUGHTER
20 RAPES
2 ATTEMPTED RAPES
26 ASSAULTS WITH DEADLY WEAPON
117 SEX OFFENSES

No breakdown available as given in AST cases

1970 Unif. Crime Rpts.

Anchorage Pop. - 32,600 79 Assaults 567

1969 30-83-321

Table 4.—*Index of Crime by State, 1969*

[See footnotes at end of table]

Area	Population	Total Crime Index	Violent crime	Property crime	Murder and non-negligent manslaughter	Forcible rape	Robbery	Aggravated assault	Burglary	Larceny $50 and over	Auto theft
ALABAMA											
Standard Metropolitan Statistical Area	1,931,000										
Area actually reporting	91.3%	39,405	5,142	34,263	247	279	1,115	3,501	16,939	12,465	4,869
Estimated total	100.0%	41,316	5,452	35,914	271	305	1,168	3,708	17,820	13,050	5,044
Other cities	615,000										
Area actually reporting	61.5%	5,040	709	4,331	31	34	79	565	2,038	1,615	458
Estimated total	100.0%	8,197	1,153	7,044	50	55	129	919	3,317	2,952	745
Rural	965,000										
Area actually reporting	37.9%	2,312	855	1,457	62	31	57	685	751	609	97
Estimated total	100.0%	6,104	2,257	3,847	164	131	151	1,808	1,981	1,600	256
State total	3,531,000	55,617	8,542	46,805	485	491	1,448	6,415	23,158	17,602	6,045
Rate per 100,000 inhabitants		1,576.0	220.4	1,325.5	13.7	14.0	41.0	181.7	655.8	498.5	171.2
ALASKA											
Standard Metropolitan Statistical Area	None										
Other cities	98,000										
Area actually reporting	92.6%	3,862	384	3,478	15	40	143	190	1,101	1,515	819
Estimated total	100.0%	4,173	426	3,747	16	50	155	205	1,193	1,637	917
Rural	184,000										
Area actually reporting	100.0%	3,279	198	3,081	11	33	35	116	1,202	1,093	751
State total	282,000	7,452	624	6,828	27	83	190	321	2,455	2,795	1,668
Rate per 100,000 inhabitants		2,642.6	221.3	2,421.3	10.0	29.4	67.4	114.8	870.6	990.2	591.5
ARIZONA											
Standard Metropolitan Statistical Area	1,233,000										
Area actually reporting	99.7%	45,551	4,959	39,615	82	321	1,551	2,979	19,149	13,781	6,685
Estimated total	100.0%	46,063	4,965	39,738	82	321	1,555	2,984	19,180	13,835	6,697
Other cities	194,000										
Area actually reporting	97.1%	4,804	517	4,287	10	31	107	369	1,754	2,112	421
Estimated total	100.0%	4,947	532	4,415	10	32	110	380	1,806	2,175	434
Rural	207,000										
Area actually reporting	96.4%	2,529	226	2,303	10	33	56	127	1,023	986	294
Estimated total	100.0%	2,623	235	2,388	10	34	58	133	1,061	1,022	305
State total	1,634,000	53,633	5,732	46,541	102	389	1,692	3,513	22,053	17,032	7,436
Rate per 100,000 inhabitants		3,283.2	350.8	2,848.1	6.0	23.0	99.9	210.3	1,302.6	1,004.8	438.6
ARKANSAS											
Standard Metropolitan Statistical Area	618,000										
Area actually reporting	100.0%	16,536	2,701	14,045	100	100	631	1,870	6,631	6,669	1,351
Other cities	455,000										
Area actually reporting	6%	1,155	389	3,766	21	19	74	475	1,785	1,588	393
Estimated total	100.0%	6,285	951	5,484	32	29	109	781	2,709	2,352	402
Rural	872,000										
Area actually reporting	11.7%	2,376	412	1,824	27	54	59	272	982	732	110
Estimated total	100.0%	3,311	574	2,537	65	129	142	638	2,536	1,756	264
State total	1,935,000	28,295	4,550	23,735	197	347	883	3,089	11,717	10,178	2,020
Rate per 100,000 inhabitants		1,418.3	230.1	1,188.2	9.9	17.4	44.4	148.4	587.3	509.7	101.3
CALIFORNIA											
Standard Metropolitan Statistical Area	17,302,000										
Area actually reporting	99.9%	750,600	86,894	663,706	1,303	6,735	38,497	40,319	305,237	231,708	127,711
Estimated total	100.0%	751,250	86,947	664,303	1,304	6,739	38,511	40,373	304,492	232,012	127,799
Other cities	515,000										
Area actually reporting	99.2%	23,500	1,468	22,032	31	89	431	914	9,113	10,419	2,480
Estimated total	100.0%	23,676	1,475	22,201	31	89	433	919	9,158	10,491	2,427
Rural	1,656,000										
Area actually reporting	100.0%	24,320	1,476	22,850	48	295	296	837	12,241	8,087	1,647
State total	19,473,000	799,246	89,898	709,354	1,383	7,053	39,240	42,129	325,891	251,109	131,973
Rate per 100,000 inhabitants		4,104.5	461.7	3,642.8	7.1	36.2	201.5	216.4	1,673.6	1,289.5	677.8

Table 4.—*Index of Crime by State, 1970*

Area	Population	Total Crime Index	Violent crime	Property crime	Murder and nonnegligent manslaughter	Forcible rape	Robbery	Aggravated assault	Burglary	Larceny $50 and over	Auto theft
ALABAMA											
Standard Metropolitan Statistical Area	1,801,095										
Area actually reporting	84.8%	44,311	5,130	39,181	190	323	1,278	3,339	18,906	14,016	6,262
Estimated total	100.0%	47,455	5,511	41,971	210	356	1,317	3,601	20,291	15,114	6,566
Other cities	541,801										
Area actually reporting	58.7%	5,804	935	4,869	20	26	100	883	2,307	2,012	552
Estimated total	100.0%	9,889	1,652	8,177	41	41	168	1,396	1,014	3,372	791
Rural	1,065,176										
Area actually reporting	33.3%	2,368	1,005	1,363	50	79	72	804	656	632	113
Estimated total	100.0%	6,935	3,019	3,916	150	237	216	2,416	1,978	1,599	339
State total	3,441,165	61,219	10,183	51,036	401	637	1,731	7,413	26,263	20,085	7,696
Rate per 100,000 inhabitants		1,565.1	295.7	1,550.7	11.7	18.5	50.3	215.2	763.1	583.2	223.5
ALASKA											
Standard Metropolitan Statistical Area	None										
Other cities	80,030										
Area actually reporting	100.0%	1,551	586	3,065	18	51	181	336	1,119	1,509	949
Rural	216,141										
Area actually reporting	100.0%	3,576	251	3,325	19	28	36	171	1,068	1,328	729
State total	302,173	8,150	840	7,310	37	79	217	507	2,557	3,237	1,676
Rate per 100,000 inhabitants		2,696.5	278.0	2,418.5	12.2	26.1	71.8	167.8	750.9	1,071.2	554.3
ARIZONA											
Standard Metropolitan Statistical Area	1,320,151										
Area actually reporting	98.8%	51,603	5,555	46,138	111	462	1,947	3,035	22,826	15,291	8,013
Estimated total	100.0%	51,801	5,595	46,228	111	463	1,969	3,050	22,867	15,315	8,035
Other cities	171,765										
Area actually reporting	97.0%	5,167	611	4,556	6	36	128	441	1,935	2,162	459
Estimated total	100.0%	5,329	630	4,699	6	37	132	455	1,997	2,230	472
Rural	277,603										
Area actually reporting	55.9%	2,197	265	1,932	10	21	16	158	814	883	215
Estimated total	100.0%	3,932	398	3,534	18	34	29	283	1,456	1,580	386
State total	1,772,482	61,062	6,623	54,461	135	534	2,130	3,788	26,319	19,125	8,893
Rate per 100,000 inhabitants		3,445.2	373.6	3,071.6	7.6	30.1	120.2	213.7	1,485.0	1,079.2	501.8
ARKANSAS											
Standard Metropolitan Statistical Area	545,909										
Area actually reporting	93.9%	16,529	2,134	14,395	81	179	625	1,249	7,013	6,276	1,106
Estimated total	100.0%	17,610	2,275	15,335	88	191	671	1,325	7,474	6,687	1,174
Other cities	171,642										
Area actually reporting	66.6%	4,908	623	4,285	22	31	95	477	3,283	1,731	331
Estimated total	100.0%	7,312	917	6,395	33	47	141	723	3,450	2,627	318
Rural	805,753										
Area actually reporting	37.0%	2,181	242	1,939	28	31	31	199	927	833	179
Estimated total	100.0%	5,703	771	5,010	71	90	82	528	2,903	2,213	394
State total	1,523,304	30,625	3,963	26,740	192	328	894	2,576	13,827	11,527	2,386
Rate per 100,000 inhabitants		1,003.8	260.2	1,755.6	12.6	21.5	58.7	169.1	907.6	756.7	156.6
CALIFORNIA											
Standard Metropolitan Statistical Area	18,260,009										
Area actually reporting	100.0%	810,642	92,111	718,531	1,361	6,752	40,616	43,442	350,867	260,055	107,309
Other cities	561,801										
Area actually reporting	100.0%	20,852	1,343	19,509	25	97	419	802	8,616	8,565	2,328
Rural	801,527										
Area actually reporting	100.0%	21,879	1,277	20,602	10	136	242	889	10,205	8,407	1,960
State total	19,953,154	853,373	94,731	758,642	1,376	7,005	41,277	45,093	369,688	277,330	111,577
Rate per 100,000 inhabitants		4,307.0	478.8	3,832.1	6.9	35.4	208.9	225.9	1,773.0	1,384.9	564.2

See footnotes at end of table.

SB-28

Some States Aid Victims of Crime

EDITOR'S NOTE—There has long been a clamor for society to compensate victims of crime. Seven states now have laws providing compensation to victims of crime or persons injured in aiding victims of crime, and with federal government backing, there may be more on the books soon. A report on the situation:

By LOUISE COOK
Associated Press Writer

Donna M. Morrissey, a young registered nurse, was shot in the left shoulder by an unknown assailant as she got out of a car at a Boston skating rink Dec. 23, 1970.

While Donna was recovering, her father told her about a Massachusetts law which, under certain conditions, provides monetary compensation for victims of a criminal act.

On March 22, 1971, Donna filed a claim for compensation and after a June 14 hearing, the 25-year-old nurse was awarded $765.20. Three months later, Donna received her money.

Massachusetts is one of six states in the nation with laws compensating victims of crime. A seventh, Nevada, compensates persons injured in aiding the victims of crime.

A bipartisan group of legislators hopes to encourage other states to enact similar laws and, as a stimulus, is preparing a bill for Senate action under which the federal government would pay 75 per cent of the costs of compensation programs established by the states in accordance with federal standards.

Arguments in favor of such legislation include:

William Brown, attorney general of Ohio: "We do everything we can to rehabilitate the criminal, so it's only fair that we help the victim."

Robert Morris, University of Chicago Law School professor, who helped draft a crime compensation bill pending in Illinois:

"It's an extraordinary community which says help your neighbor, but the hell with it if you get hurt."

In addition to Massachusetts, the states already with such victims-of-crime compensation laws are New York, New Jersey, California, Hawaii and Maryland.

The Massachusetts law is fairly typical of the compensation statutes, although the different states have different maximum awards.

It allows the filing of claims for compensation by victims injured in a crime or by certain dependents of victims killed in a crime.

The law provides for compensation of up to $10,000 to victims who have lost more than $100 or two continuous weeks of earnings or support, provided the sum is not covered by public or private insurance. All expenses—including medical costs—are included in the $100 figure which is automatically deducted from any compensation payment. Donna Morrissey, therefore, actually received $665.20 of her $765.20 award.

Claims are filed in District Court and payments are determined by the court which must decide whether a crime was committed, whether the crime directly resulted in personal injury or death and whether police records show the crime was reported promptly.

The law took effect July 1, 1968 and the state attorney general, Robert F. Quinn, says most of the claims filed since then have resulted from assault and battery cases. The state paid $4,498.58 in fiscal 1968-69, $60,885.76 in 1970 and $27,162.33 for the first four months of 1971—the last period for which figures were available.

The number of claims has been lower than expected, according to a spokesman in the attorney general's office. "Most people don't know about this program," he said. "I've even met lawyers who don't know what it is."

The proposal before Congress, in addition to picking up part of the tab for state compensation programs, also would provide compensation up to $50,000 for victims of violent crimes committed in the District of Columbia, in national parks and forests, on Indian reservations and aboard airplanes and ships.

Even without the hope of federal money, many states and officials have been considering some sort of compensation law.

An Associated Press sampling showed proposals for such a law pending in a group of states that includes Pennsylvania, Georgia, Illinois, Milwaukee, Michigan, Florida, Missouri and Ohio. Washington, Delaware, Kansas and Arkansas legislators considered such measures in the past and defeated them and there are moves to introduce compensation bills in Colorado and Rhode Island.

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09.40.220, but the undertaking shall not be for an amount exceeding the judgment. (§ 15.04 ch 101 SLA 1962)

Cross reference.—See Civ. R. 69.

Am. Jur., 41 [illegible] and C.J.S. references: [illegible] Arrest, [illegible] to 115; [illegible] Attachment [illegible] 7 [illegible].

[illegible] to [illegible], 21 ALR 125, [illegible] ALR 1118.

Construction and application [illegible] 613.

Constitutionality of statutes [illegible] in [illegible] ALR 81.

33 C.J.S. [illegible] tions § 107 et seq.

Sec. 09.35.050. Imprisonment on execution. A person arrested on execution shall be imprisoned in jail and kept at his own expense until satisfaction of the execution or his legal discharge. (§ 15.05 ch 101 SLA 1962)

Cross reference.—See Civ. R. 69.

ALR reference.—Construction and applicability of statute authorizing arrest and civil action for personal injury, 33 ALR 618.

Sec. 09.35.060. Execution after death of judgment debtor. If the judgment debtor dies after judgment, execution may be issued on the judgment in the manner and with the effect as if he were still living, except that no action may be taken within six months from the granting of letters testamentary or of administration upon the estate of the deceased without leave of the court having jurisdiction over the probate of the estate. (§ 15.06 ch 101 SLA 1962)

Cross reference.—See Civ. R. 69-(d)(2).

Sec. 09.35.070. Property liable. All goods, chattels, money, or other property, both real and personal, or an interest in the property of the judgment debtor not exempt by law, and all property and rights of property seized and held under attachment in the action are liable to execution. (§ 15.07 ch 101 SLA 1962)

Cross [illegible]. See Civ. R. 69-(b)(1).

Levy and [illegible] of railroad line and franchises [illegible] include general corporate franchises. [illegible] v. Lathrop, 1 Alaska 107.

The [illegible] franchise of a corporation is not real [illegible]; particular franchises, the right to control [illegible] in line and collect tolls therefor, may partake of the nature of real property. [illegible], 1 Alaska 107.

Am. Jur. and ALR references.—21 Am. Jur., Executions, §§ 16 to 502; 30A Am. Jur., Judgments, §§ 479 to 567.

Levy on property of public utility under federal control, 4 ALR 1650; 8 ALR 969; 10 ALR 956; 11 ALR 1453; 19 ALR 698.

Money or other property taken from prisoner as subject of seizure under execution, 16 ALR 378; 45 ALR 574; 48 ALR 583; 151 ALR 758.

Municipal funds and credits as subject to levy under execution against municipality, 89 ALR 863.

Growing crops as subject to levy and seizure, 103 ALR 464.

Interest of spouse in estate by the entirety as subject to execution for individual debt, 166 ALR 969.

re SB 28

selected and reserved by the judgment debtor or his agent at the time of the levy, or as soon after levy and before sale as the [illegible] becomes known to him:

[illegible] judgment debtor received for his per[illegible] earned at any time within 30 [illegible] immediately [illegible], but not exceeding $350 if he [illegible] of a [illegible] $200 if he is a single [illegible] affidavit or otherwise [illegible] are necessary for his use or for the use of his family which is supported in whole or in part by his labor;

(2) books, pictures, and musical instruments belonging to the judgment debtor not to exceed $300 in value;

(3) necessary wearing apparel belonging to the judgment debtor for the use of himself or his family; watches or jewelry not to exceed $200 in value;

(4) the tools, implements, apparatus, motor vehicles, books, office furniture, business files, animals, laboratory, and any other article necessary to enable any person to carry on the trade, occupation, or profession by which that person habitually earns his living to the value of $1,800, including sufficient quantity of food to support the animals, if any, for six months;

(5) the following property belonging to the judgment debtor and in actual use or kept for use by and for his family: animals, household goods, furniture, and utensils to the value of $1,200, including food sufficient to support the animals, if any, for six months, and provisions actually provided for family use and necessary for the support of that person and family for six months;

(6) all property of a public or municipal corporation;

(7) no article of property mentioned in this section is exempt from execution issued on a judgment recovered for its price, and, in the event the article of property has been sold or exchanged for other property, the proceeds of the sale or the article for which it was exchanged is not exempt from execution. (§ 15.08 ch 101 SLA 1962)

Cross reference. See Civ. R. 69-(b)(1).

Sec. 09.35.090. Homestead exemption. The homestead of the family is, or the proceeds of the homestead are exempt from [illegible] judicial sale for the satisfaction of any liability contracted or judgment on debt except as provided in this section. The homestead consists of the actual abode of and owned by the family or some member of the family. It shall not exceed $8,000 in value, and not exceed 160 acres in extent if located outside a town or city

laid off into blocks or lots, or not exceed one-fourth of one acre if located in a town or city. This section does not apply to decrees for the foreclosure of a mortgage or deed of trust properly executed. If the owners of a homestead are married, it shall be executed by husband and wife. When an officer levies upon a homestead, the owner or the wife, husband, agent, or attorney of the owner may notify the officer that he claims the premises as his homestead, describing it by metes and bounds, lot or block, or legal subdivision. The officer shall notify the creditor of the claim, and, if the homestead exceeds the maximum in this section and he deems it of greater value than $8,000, then he may apply to the court for the appointment of three disinterested persons to appraise the homestead, commencing with the 20 acres of the lot upon which the dwelling is located, appraising each lot or 20 acres separately; and, if the homestead exceeds $8,000, then the officer shall proceed to sell all in excess of $8,000 by lots or smallest legal subdivisions, offering them in the order directed by the judgment debtor if he chooses to direct; otherwise, he shall sell them so as to leave the homestead as compact as possible. The homestead is exempt from sale or legal process after the death of the person entitled to the homestead for the collection of a debt for which it could not have been sold during his lifetime. (§ 15.09 ch 10[illegible] SLA 1962)

Cross reference.—See Civ. R. 69-(b)(3).

The [illegible] of homestead exemption is a [illegible] right and can be exercised [illegible] time after levy and before sale. Wendler v. Brenneman, 7 Alaska [illegible].

Order of confirmation may preserve right to raise question of homestead. Where the confirmation of sale is allowed without prejudice to defendant's right thereafter to make claim of her homestead exemption in proceeding within the jurisdiction of the court, defendant may raise question of her homestead right by an action of ejectment or to quit title, if the purchaser takes possession, or she may [illegible] obtain a perpetual injunction to prevent the issuance of a deed to the purchaser after the expiration of the time for redemption. Williams v. Thompson, 7 Alaska 601.

It was the legislative intent to make the assertion of a homestead exclusive, either on the parties or court. Williams v. Thompson, 7 Alaska 601.

Jurisdiction of court to determine claim of homestead.—See Williams v. Thompson, 7 Alaska 601.

Only one tract can be claimed as homestead.—One may have several tracts of land, houses, or homes; but only the one which he actually designates, points out, and selects as provided by law, can be claimed as the homestead. Seagreen v. Wendler, 5 Alaska 715.

It is not necessary for a person to live continuously on his homestead; but the fact of absence suggests, at least, the possibility that property claimed as a homestead was not a homestead. Williams v. Thompson, 7 Alaska 601.

Homestead character is not lost by use for business as well as residence purposes.—The homestead character of property is not destroyed by its use for business purposes while at the same time being occupied mainly as a residence. Wendler v. Brenneman, 7 Alaska 13.

Tenants in common are each entitled to a homestead exemption in the same property. Wendler v. Brenneman, 7 Alaska 13.

And right can only be waived intentionally.—Before it could be said that tenants in common, or either of them, waived their legal right of homestead exemption, there must be both knowledge of the right and the intention to relinquish it. Wendler v. Brenneman, 7 Alaska 13.

Statements to creditors do not estop claim.—One claiming a homestead exemption cannot be estopped by virtue of statements made to creditors. Wendler v. Brenneman, 7 Alaska 13.

Homestead may be purchased with nonexempt property.—A debtor may acquire a homestead and hold it exempt from execution for pre-existing debts not then reduced to judgment, although the homestead is purchased with, or obtained by exchange for, nonexempt property, and fraud cannot be imputed to such an act. In re Bocash, 10 Alaska 206.

Even by insolvent debtor.—An insolvent debtor, knowing himself to be insolvent, may acquire a homestead for himself and family, and hold the same exempt from his creditors, although purchased with nonexempt assets, and fraud cannot be imputed to such fact. In re Bocash, 10 Alaska 206.

The homestead exemption may be asserted even as to property purchased by an insolvent debtor with the proceeds of nonexempt property, in the absence of any specific equity existing in favor of a creditor, and the fact that the purchase is made for the very purpose of acquiring a homestead exempt from execution does not alter the rule. In re Bocash, 10 Alaska 206.

And service of notice of proceedings supplementary to execution does not prevent purchase.—The service on a judgment debtor of a notice requiring him to appear and answer regarding his assets, in a proceeding supplementary to and in aid of execution, without any order being made forbidding the transfer or other disposition of his property by him, does not give the judgment creditor any lien on his funds, nor prevent him from purchasing and paying for a homestead with them, which cannot be sold for the satisfaction of the judgment. In re Bocash, 10 Alaska 206.

As a general rule fraud cannot be predicated upon a disposition of the homestead; the same being exempt, the creditor could not subject the same to the satisfaction of his claim, and is therefore not injured or prejudiced by a conveyance or transfer thereof. Seagreen v. Wendler, 5 Alaska 715.

But transfer to put homestead beyond reach in event of moving may be fraudulent.—The transfer of the homestead from the husband to the wife is a fraud upon creditors, where it is not the bona fide intent to invest the wife with the real ownership, but to put it beyond the reach of the husband's creditors, in the event of their removal from said homestead. Seagreen v. Wendler, 5 Alaska 715.

Failure to introduce evidence waives allegation as to value.—Where no evidence was introduced upon either side as to the value of property in which a homestead exemption was claimed, defendant's allegation as to the value of the property was deemed abandoned. Wendler v. Brenneman, 7 Alaska 13.

Sec. 09.35.100. Execution against property. The person to whom the writ is directed shall execute the writ against property of the judgment debtor until the judgment is satisfied. (§ 15.10 ch 101 SLA 1962)

Cross reference.—See Civ. R. 69.

ALR and C.J.S. references.—Injunction against waste to protect judgment lien, 103 ALR 387.

33 C.J.S. Executions § 124.

Sec. 09.35.110. Execution procedure. All property shall be levied upon or released from levy in the manner that similar property is attached or released from attachment, and the proceed-

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arrangements for disposition of the matter as are just under the circumstances.

(5) If the judgment creditor cannot, after due diligence, locate the judgment debtor, he may file an affidavit of that fact with the court, and upon application, the court may authorize him to serve the notice required under this section by mailing the notice by certified mail to the last known address of the judgment debtor.

(6) Each court which issues writs of execution shall, by order, designate a trustee or other individual as the officer for administration of this section. This individual shall receive funds paid into the court, and is the appropriate person for service of claims for exemption by the judgment debtor and for performance of other duties that the court may direct. (§ 1 ch 175 SLA 1970)

Legislative committee report.—For report on ch. 175, SLA 1970 (HB 363 am S), see 1970 House Journal Supplement No. 3.

Sec. 09.35.070. Property liable.

Liquor license is not subject to attachment or execution.—A liquor license issued by the State of Alaska is not a property right but merely a personal privilege and, as such is, not subject to attachment or execution. 1967 Ops. Att'y Gen., No. 4.

Action against insurer. — A judgment creditor is entitled to an assignment of any claim its judgment debtor may have against the debtor's insurance carrier, without regard to whether or not such a claim in fact exists. Pennington v. Rimmer, 8 Alas. L.J. No. 5, p. 92 (May, 1970).

In Theodore v. Zurich Gen. Accident & Liab. Ins. Co., Sup. Ct. Op. No. (File No. 43), 364 P.2d 51 (1961), the Alaska supreme court held that a judgment creditor of the assured could maintain an action against the insurer (no assignment by the assured was stated in the decision to have been given). Pennington v. Rimmer, 8 Alas. L.J. No. 5, p. 92 (May, 1970).

Sec. 09.35.080. Exemptions. The following property is exempt from execution, except as otherwise specifically provided when selected and reserved by the judgment debtor or his agent at the time of the levy, or as soon after levy and before sale as the existence of the levy becomes known to him:

(1) the income of the judgment debtor, regardless of when it became payable, for work performed during the preceding 30 days, or otherwise earned or inured to his benefit within the 30-day period; the 30-day period shall be reckoned back from the date of the levy, but the exemption may not exceed $350 if he is the head of a family, and the amount of $200 if he is not the head of a family; the amount of the exemption shall be computed after deductions and payments, required by law or court order, so as to assure the judgment debtor the receipt of the first $350 per month if he is the head of a family or $200 if he is not the head of a family, when it appears by the debtor's affidavit or otherwise that the income is necessary for his use or for the use of his family which is supported in whole or in part by his income;

(2) books, pictures, and musical instruments belonging to the judgment debtor not to exceed $300 in value;

(3) necessary wearing apparel belonging to the judgment debtor for the use of himself or his family; watches or jewelry not to exceed $200 in value;

(4) the tools, implements, apparatus, motor vehicles, books, office furniture, business files, animals, laboratory, and any other article necessary to enable any person to carry on the trade, occupation, or profession by which that person habitually earns his living to the value of $1,800, include sufficient quantity of food to support the animals, if any, for six months;

(5) the following property belonging to the judgment debtor and in actual use or kept for use by and for his family: animals, household goods, furniture, and utensils to the value of $1,200, including food sufficient to support the animals, if any, for six months, and provisions actually provided for family use and necessary for the support of that person and family for six months;

(6) all property of a public or municipal corporation;

(7) no article of property mentioned in this section is exempt from execution issued on a judgment recovered for its price, and, in the event the article of property has been sold or exchanged for other property, the proceeds of the sale or the article for which it was exchanged is not exempt from execution. (§ 15.08 ch 101 SLA 1962; am § 1 ch 31 SLA 1966; am § 1 ch 96 SLA 1969)

Cross reference.

As to exemption of teachers' retirement salaries from taxation and process, see AS 14.25.200.

Effect of amendments.—The 1969 amendment rewrote paragraph (1) as amended in 1966.

Legislative committee reports.—For legislative committee report on ch. 31, SLA 1966, see House Journal (1966), p. 591. For report on ch. 96, SLA 1969 (CSSB 191 am H), see 1969 House Journal, p. 718.

Sec. 09.35.085. Exemption for child support payments. In addition to the exemptions set out in § 80 of this chapter, the amount which the judgment debtor has been ordered to pay to a court trustee as child support payments under Rule 67 of the Rules of Civil Procedure is exempt from execution. (§ 2 ch 31 SLA 1966)

Legislative committee report.—For legislative committee report on ch. 31, SLA 1966, see House Journal (1966), p. 591.

Sec. 09.35.087. Exemption for liquor licenses. In addition to the exemptions set out in §§ 80 and 85 of this chapter, the liquor license of a judgment debtor is exempt from execution. (§ 1 ch 18 SLA 1968)

Revisor's note (1968).—In ch 18 SLA 1967 the first portion of AS 09.35.087 provided that "since a liquor license is a privilege granted by the state . . . this privilege should be revocable only by the state."

Sec. 09.35.230. Redemption by lien creditor from purchaser. A lien creditor may redeem the property at any time within 60 days after the date of the order confirming the sale on paying the amount of the purchase money, with interest at the rate of eight

adequate comparison of credit costs as between different types of open end credit plans.

(Pub. L. 90–321, title I, § 143, May 29, 1968, 82 Stat. 158.)

EFFECTIVE DATE

Section effective July 1, 1969, see section 504(b) of Pub. L. 90–321, set out as a note under section 1631 of this title.

§ 1664. Advertising of credit other than open end plans.

(a) Exclusion of open end credit plans.

Except as provided in subsection (b) of this section, this section applies to any advertisement to aid, promote, or assist directly or indirectly any consumer credit sale, loan, or other extension of credit subject to the provisions of this subchapter, other than an open end credit plan.

(b) Advertisements of residential real estate.

The provisions of this section do not apply to advertisements of residential real estate except to the extent that the Board may by regulation require.

(c) Rate of finance charge expressed as annual percentage rate.

If any advertisement to which this section applies states the rate of a finance charge, the advertisement shall state the rate of that charge expressed as an annual percentage rate.

(d) Requisite disclosures in advertisement.

If any advertisement to which this section applies states the amount of the downpayment, if any, the amount of any installment payment, the dollar amount of any finance charge, or the number of installments or the period of repayment, then the advertisement shall state all of the following items:

(1) The cash price or the amount of the loan as applicable.

(2) The downpayment, if any.

(3) The number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended.

(4) The rate of the finance charge expressed as an annual percentage rate.

(Pub. L. 90–321, title I, § 144, May 29, 1968, 82 Stat. 158.)

EFFECTIVE DATE

Section effective July 1, 1969, see section 504(b) of Pub. L. 90–321, set out as a note under section 1631 of this title.

§ 1665. Nonliability of advertising media.

There is no liability under this part on the part of any owner or personnel, as such, of any medium in which an advertisement appears or through which it is disseminated. (Pub. L. 90–321, title I, § 145, May 29, 1968, 82 Stat. 159.)

EFFECTIVE DATE

Section effective July 1, 1969, see section 504(b) of Pub. L. 90–321, set out as a note under section 1631 of this title.

SUBCHAPTER II.—RESTRICTIONS ON GARNISHMENT

§ 1671. Congressional findings and declaration of purpose.

(a) The Congress finds:

(1) The unrestricted garnishment of compensation due for personal services encourages the making of predatory extensions of credit. Such extensions of credit divert money into excessive credit payments and thereby hinder the production and flow of goods in interstate commerce.

(2) The application of garnishment as a creditors' remedy frequently results in loss of employment by the debtor, and the resulting disruption of employment, production, and consumption constitutes a substantial burden on interstate commerce.

(3) The great disparities among the laws of the several States relating to garnishment have, in effect, destroyed the uniformity of the bankruptcy laws and frustrated the purposes thereof in many areas of the country.

(b) On the basis of the findings stated in subsection (a) of this section, the Congress determines that the provisions of this subchapter are necessary and proper for the purpose of carrying into execution the powers of the Congress to regulate commerce and to establish uniform bankruptcy laws. (Pub. L. 90–321, title III, § 301, May 29, 1968, 82 Stat. 163.)

EFFECTIVE DATE

Section 504(c) of Pub. L. 90–321 provided that: "Title III [which enacted this section and sections 1672—1677 of this title] takes effect on July 1, 1970."

§ 1672. Definitions.

For the purposes of this subchapter:

(a) The term "earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program.

(b) The term "disposable earnings" means that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld.

(c) The term "garnishment" means any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt. (Pub. L. 90–321, title III, § 302, May 29, 1968, 82 Stat. 163.)

EFFECTIVE DATE

Section effective July 1, 1970, see section 504(c) of Pub. L. 90–321, set out as a note under section 1671 of this title.

§ 1673. Restriction on garnishment.

(a) Maximum allowable garnishment.

Except as provided in subsection (b) of this section and in section 1675 of this title, the maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment may not exceed

(1) 25 per centum of his disposable earnings for that week, or

(2) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage prescribed by section 206 (a)(1) of Title 29 in effect at the time the earnings are payable,

whichever is less. In the case of earnings for any pay period other than a week, the Secretary of Labor shall by regulation prescribe a multiple of the Federal minimum hourly wage equivalent in effect to that set forth in paragraph (2).

(b) Exceptions.

The restrictions of subsection (a) of this section do not apply in the case of

(1) any order of any court for the support of any person.

(2) any order of any court of bankruptcy under chapter XIII of the Bankruptcy Act.

(3) any debt due for any State or Federal tax.

(c) Execution or enforcement of garnishment order or process prohibited.

No court of the United States or any State may make, execute, or enforce any order or process in violation of this section. (Pub. L. 90–321, title III, § 303, May 29, 1968, 82 Stat. 163.)

REFERENCES IN TEXT

Chapter XIII of the Bankruptcy Act, referred to in subsec. (b)(2), is classified to section 1001 et seq. of Title 11, Bankruptcy.

EFFECTIVE DATE

Section effective July 1, 1970, see section 504(c) of Pub. L. 90–321, set out as a note under section 1671 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1675 of this title.

§ 1674. Restriction on discharge from employment by reason of garnishment.

(a) No employer may discharge any employee by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness.

(b) Whoever wilfully violates subsection (a) of this section shall be fined not more than $1,000, or imprisoned not more than one year, or both. (Pub. L. 90–321, title III, § 304, May 29, 1968, 82 Stat. 163.)

EFFECTIVE DATE

Section effective July 1, 1970, see section 504(c) of Pub. L. 90–321, set out as a note under section 1671 of this title.

§ 1675. Exemption for State-regulated garnishments.

The Secretary of Labor may by regulation exempt from the provisions of section 1673(a) of this title garnishments issued under the laws of any State if he determines that the laws of that State provide restrictions on garnishment which are substantially similar to those provided in section 1673(a) of this title. (Pub. L. 90–321, title III, § 305, May 29, 1968, 82 Stat. 164.)

EFFECTIVE DATE

Section effective July 1, 1970, see section 504(c) of Pub. L. 90–321, set out as a note under section 1671 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 1673 of this title.

§ 1676. Enforcement by Secretary of Labor.

The Secretary of Labor, acting through the Wage and Hour Division of the Department of Labor, shall enforce the provisions of this subchapter. (Pub. L. 90–321, title III, § 306, May 29, 1968, 82 Stat. 164.)

EFFECTIVE DATE

Section effective July 1, 1970, see section 504(c) of Pub. L. 90–321, set out as a note under section 1671 of this title.

§ 1677. Effect on State laws.

This subchapter does not annul, alter, or affect, or exempt any person from complying with, the laws of any State

(1) prohibiting garnishments or providing for more limited garnishment than are allowed under this subchapter, or

(2) prohibiting the discharge of any employee by reason of the fact that his earnings have been subjected to garnishment for more than one indebtedness.

(Pub. L. 90–321, title III, § 307, May 29, 1968, 82 Stat. 164.)

EFFECTIVE DATE

Section effective July 1, 1970, see section 504(c) of Pub. L. 90–321, set out as a note under section 1671 of this title.

Chapter 42.—INTERSTATE LAND SALES [NEW]

Sec.
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1705. Information required in statement of record.
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(a) Permanent or temporary injunction or restraining order; jurisdiction.
(b) Investigations; publication of information concerning violations.
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(e) Self-incrimination.
1715. Administration; delegation of functions, duties and powers; hearing officers; appeals from decisions; public hearings; record of hearings.

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Mass. Closing Juvenile Jails

BY BILL KOVACH
The New York Times

AMHERST, Mass. — The State of Massachussetts is moving ahead rapidly with a program to abolish institutions for juvenile offenders and to replace them with community-based work and educational programs.

Tho program, in the formative stages for nearly two years, is designed to, within the next six months, make this the first state to abolish all juvenile prisons.

The experiment has received federal grants to aid its implementation.

In the past two months, three juvenile institutions — including the nation's oldest jails for boys and girls — have been closed and more than 200 of the state's 800 young offenders are in community-based facilities.

According to Dr. Jerome G. Miller, head of the Youth Services Department, directing the effort, the only way to reform the penal system is to dismantle its institutions.

"We made a basic decision after I took this job two years ago that it would do no good to pump more money and more programs into the existing system because the system can chew up reforms faster than you can dream up new ones," said Miller. "It is a sick system that destroys the best efforts of everyone in it and we decided to look for alternatives."

The per capita cost of jailing a juvenile for a year was about $10,000, or, as Miller pointed out, "enough to send a child to Harvard University with a $100 a week allowance, a summer vacation in Europe, and once a week psychotherapy."

Most of that money was required to maintain the institutions and, he said he decided it could be better spent for more personal work with the youthful offender in a program designed to integrate him back into the community rather than to segregate him.

One of the alternatives to buildings and bars is a program at the University of Massachussetts campus here called Juvenile Opportunities Extension, or, JOE.

Directed by Larry L. Dye, JOE is a recognized student activity (funded and run by the students) and is part of a major effort by the university's students to involve themselves in community affairs. Through JOE, 100 former inmates of the now-closed juvenile prisons are paired with student volunteers from their home community.

The juvenile and the student (called an advocate) live together in dormitories or apartments and jointly work together to find a way to bring the juvenile back into his local community. Designed as a month-long program, the two are expected to develop a living arrangement, at home if possible, and an educational or employment schedule.

Other alternatives serve 130 former juvenile inmates. Most of these are in group homes where the youngsters are directed and supervised by foster parents. Some of the larger group homes have staffs enlarged by the addition of state employes who formerly worked at the institutions that have been shut down.

"Whatever the arrangement," Miller said, "the thrust is the same — to get the kid out of an impersonal institution and into a more personal situation where he or she can be worked with more intensively."

By Lester Velie



The Child Trappers

The game is called "trap the child." It is played by judges, social workers and corrections officials in courtrooms, in bureaucratic mazes and in prison cells. It is known officially as the juvenile-court system, and yearly it mangles the lives of thousands of our children

For an outsider, the first glimpse of a fellow human being caged in solitary confinement in a six-by-ten-foot cell—prisoners call it "the hole"—is a harrowing one. But when the caged one is a child, the sight will trouble sleep that night, and for many nights thereafter.

Last August, at the Illinois Industrial School for Boys at Sheridan, I counted 26 boys, some as young as 15, who had been locked in the hole from five days to two months. One was Carman Tate, a slim, fine-featured boy of 17 whose dark-tan coloring reflected his black-Latin origins. Some deep, inner cry of protest so filled the boy's eyes with pain that one winced to look at him.

Carman had already spent three of his adolescent years locked away from mother, friends and school when I first saw him. What crime had he committed while outside? None known to the criminal code. The charge that set him on the path to this maximum-security prison was "running away from home for two days." His story reveals how the juvenile-court system traps and mangles children in the name of saving them.

The "saving" of Carman Tate began when he was 13. In the ghetto rioting that followed the assassination of Martin Luther King, Jr.,

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some drapes were set afire in a school in Carman's neighborhood. Carman, who, with thousands of others, was milling around the streets that night, was picked up and charged with the arson. Since children get no bail, the boy spent 28 days behind bars in the local detention center awaiting disposition of his case. Then, as it turned out, the case was dismissed for lack of evidence. But Carman faced a still more difficult charge: his parents' word that he stayed out late, was "beyond their control."*

Actually, as a court investigator and a psychiatrist reported, it was Carman's parents who were beyond control. When Carman was nine, a stepfather had entered his life—a Chicago policeman, giant in size and quick with his fists. To make a man of young Carman, he would send him to a dark cellar, scare him out of his wits, then yell "sissy!" at the youngster's terror. The stepfather also had a store and made Carman work long, after-school hours, without pay or allowance. When the boy rebelled, the stepfather beat him. When Carman's mother interceded, he beat her, too.

At the time of the stepfather's arrival, Carman was an average student, attending school regularly. Soon, however, he became listless in class and, because of the long hours in the store, sometimes fell asleep. He had to repeat the fifth grade. Once, when Carman was 13, he stayed away from school for 25 days. The reason, his mother told a social worker, was that Carman had to baby-sit for his sisters while his mother worked. But to the school, he was a habitual truant.

All this was spread before the juvenile-court judge after the arson charge had been dismissed, plus the psychiatrist's advice that Carman's parents, as well as Carman, get counseling. But juvenile courts are not in business to save adults. Only Carman got the treatment—a year on probation. Having become a ward of the court, he was ordered to obey his parents, observe a curfew and attend school regularly—or else. Since Carman's probation did nothing about his difficulty with his stepfather, the "or else" descended within four months. Carman was adjudged a delinquent for violating probation and turned over to the Illinois Youth Commission.

Prior to assigning Carman to one of the state's 18 juvenile detention centers, the commission tested him at a "diagnostic center." Here a social worker strongly recommended "family counseling." Carman's place, obviously, was in his home.

But Carman didn't go home. Somewhere out there in the corrections bureaucracy, some paper-shuffler had pinned crimes on the boy that he had never committed: unlawful possession of narcotics, and setting fire to a school. Carman had

*In some states, including Illinois, any minor under 18, after a second complaint of his being "beyond the control of his parents" or a "habitual truant," can be locked up until he is paroled or until he reaches 21.

never been accused of a narcotics charge; the arson complaint had been dismissed. Yet the final diagnostic-staff decision concluded: "Because of his possible arsonist tendencies," the boy had to be put away in a secure setting. He was bundled off in a prison van to the state training school for boys at St. Charles, the second most secure juvenile-detention facility in Illinois.

It took eight leisurely months for the child-savers at St. Charles to discover that Carman merited parole. But less than two weeks after his release, Carman was back on a parole-violation charge. He was defiant, his parents had told the parole officer. True. Ordered out of the house by his stepfather, Carman had cried out to his mother: "If I can't be with you, I might as well be locked up!"

Sent again to the diagnostic center at Joliet, Carman learned that his stepfather had died. Since a happy home now awaited him, reason screamed: *Send this boy home!* Instead, he was taken to the training school for boys at Sheridan, the maximum-security institution where I met him. It was a routine department matter; no judge, lawyer or parent was advised.

During his first year at Sheridan, Carman spent a total of 82 days—1968 hours—in solitary. Once (eight days) was for threats (by the slightly built 15-year-old) to hit a guard; another time (14 days) for disrespect to a counselor and refusing an order. When he was not in solitary, he lived with some of the most desperate young felons in the state.

As the months passed, with no word about parole, Carman descended into bitterness. He came to feel that only a black revolution against an oppressive white establishment could free him. So, in the spring of 1971, Carman joined other inmates in a "black revolution" riot aimed at calling attention to their plight.

The spark was the authorities' use of a powerful tranquilizer, Thorazine, injected to immobilize misbehavers. A psychiatrist later testified at an inquiry into Sheridan that "Thorazine is a dangerous drug which should be used only as part of a program of psychiatric therapy." Yet Sheridan's part-time psychiatrist was not consulted about the drug's use. Nor did the prison's part-time doctor always examine the injected boy. The result was that one asthmatic inmate, 19-year-old Anthony Jones, subjected to a heavy daily dose for four consecutive days, died by strangulation.

Because Jones was a leader of the Black Power organization inside Sheridan, inmates looked on his death as calculated murder. During the riot that subsequently broke out, inmates knifed one guard to death. Later another guard was seriously beaten, and Carman was accused in this incident. Since this was a serious charge, Carman, now 16, was taken before an adult criminal court and indicted for aggravated battery—which carries a one-to-ten-year sentence in Illinois.

Last October, Carman's lawyers were planning to plead the boy guilty to the charge, in return for a specific sentence in an adult penitentiary which—with time off for good behavior—could free Carman within a year. In the mad world of juvenile correction, then, Carman could extricate himself from the juvenile-court trap by "committing" a crime, his first.

The Crime of Childhood. Carman's case is not an isolated one. Each year, more than 440,000 other non-criminal minors under 18 are trapped by our juvenile-court system.

Item: Over her parents' tearful pleas to let 15-year-old Sharon R. go home, a juvenile-court judge sent the girl to an Indiana reformatory. Police said the girl had stayed out beyond the nine o'clock minors' curfew and had sassed a policeman.

Item: Fifteen-year-old Pamela W., an intelligent child, has spent almost three years locked up. Her mother appealed to a Chicago juvenile court when Pamela, at ten, developed emotional problems. Pamela then spent months alternating between foster homes and detention centers—until 1969 when, without court order, she was dumped into a state insane asylum, although she was sane. Here, for "treatment," Pamela was spread-eagled on a bed, her ankles and hands bound with ropes, once for 28 days, another time for 30 days. When the girl struck one of her tormentors, she was charged with assault and committed by a juvenile court to a state training school where, at age 13, she endured 792 hours of solitary confinement. When I saw her last fall, she was still awaiting parole.

How did crimes against children like these begin? The juvenile court and the concept of juvenile delinquency are American inventions, mothered by welfare workers of the 1880s, to save children from lives of crime. The way to do it, they theorized, was to catch the youngster in "pre-delinquent" misbehavior, remove him from his family and put him into "protective custody," where he would get the care and discipline to prepare him for solid citizenhood.

However, this well-intentioned theory was codified in vague laws that gave the state awesome power to intervene in the lives of non-criminal children. Indeed, some statutes seem to make childhood itself a crime. California's law, for example, says: "Any person under 21 who persistently refuses to obey his parents, guardian, custodian or school authorities or who from any cause is in danger of leading an idle, dissolute or immoral life is within the jurisdiction of the juvenile court."*

Because those caught up in such broad legal nets were to become "wards of the court," and the state was to become their parent, a new kind of court was created to deal only with juveniles. (In many states,

*As this article was written, the constitutionality of part of this law was under consideration by the U.S. Supreme Court.

however, adult criminal courts continue to handle serious offenders over 15, and in some states over 12.) The new court would be run by a new kind of judge—a wise and benign counselor who would prescribe treatment for the child, instead of passing sentence. And presumably, this judge would have the tools for therapy: psychiatric care, counseling and foster homes.

But neither judges nor tools matched the lofty aims of the child-savers. Today the National Council on Crime and Delinquency (NCCD), which has studied juvenile courts and detention in almost every state, says: *"The quickest route to a criminal career is via the juvenile court."* One study has found that one fifth of all juvenile-court judges were not members of the bar; one half hadn't even graduated from college.

In El Paso, Texas, one judge bundled children off to detention without ever seeing them. He simply initialed a mimeographed form, filled out by a parent, declaring the child to be a delinquent. One such "delinquent" was a 16-year-old girl whose mother went off on a two-week spree with a lover and signed away the child as an "incorrigible"—so using the detention home as a baby-sitter.

The Trap Is Set. For a close-up view of a juvenile court at work, let's visit Illinois' Cook County (Chicago). Here, to enter a juvenile courtroom, you need the written permission of the chief judge. This, you are told, is to protect the anonymity of the juvenile. But the secrecy protects the system more than it does the child.

The court I entered is where the first step in the juvenile judicial process takes place—an arraignment that leads to the dismissal of a case or to more court appearances. A black 11-year-old stands mute, as adults take three minutes flat to agree on a decision that may damage him for the rest of his life.

An assistant state's attorney reads the accusation which charges the boy with "illegal trespass to a vehicle," *i.e.*, joyriding in a stolen car, driven by another. The young public defender, who had not seen the boy before, does not speak to his client or challenge the state's attorney. He pleads the boy guilty.

The judge questions the boy to determine whether he understands what has been said. Then, as the boy stands silent, he tells him that he will be placed under court supervision for six months. At the end of that time, if the boy has behaved, the charge will be dismissed and the case record destroyed.

The trap has been set. Truancy from school, disobeying his parents or a probation officer's complaint will bring the boy back to court. Then he may go to jail for disobeying the judge's orders—although, because of the guilty plea, the original charge was never tried and proved.

Strangely, as other children face the judge, the public defender pleads

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virtually all his clients guilty. Why? In the Cook County juvenile court, parents and children are first questioned by law students and recent law graduates who—as "investigators" for the public defender—spend about ten minutes on each case. They note the child's name, his school record, past difficulties, if any, and then advise the parents.

"We kind of push for admissions (guilty pleas) on arraignment *if the kid has anything at all to do with the charge*," a law student told me. How the investigator determines this is not clear, for he does no investigating. The parent, not knowing what he or she is getting the child into, usually agrees to the guilty plea and supervision.

Even where court-appointed lawyers fight to send the child home, heavy case loads make the job difficult. In some cities public defenders each handle as many as 50 juvenile cases a day. And in small towns, many juvenile-court judges waive legal niceties altogether. When OEO lawyers sued every juvenile court in Texas last summer, charging failure to protect children's rights, the U.S. District Court for Eastern Texas sent a questionnaire to some 2400 jailed children all over the state. Half of them had not had a lawyer.

To all this, add the common practice of "dumping" non-criminal children, who languish in detention centers while judge and social workers seek a foster home, a shelter or psychiatric care. Such facilities are extremely hard to come by. The President's Crime Commission has pointed out that more than 80 percent of juvenile-court judges "had no psychologist or psychiatrist available on a regular basis." In short, the juvenile-court system simply can't keep the promise—made by its inventors—to use the behavioral and medical sciences to prevent or cure delinquent behavior.

Let's return to the Cook County Juvenile Court to watch judge, public defender and social worker make a promise that, unkept, dumps a 15-year-old who has done no one any harm. The courtroom we now enter is where the judge decides what to do with a child who has been held over after arraignment. It takes him an average of 12 minutes.

A sturdy boy, Gregory C., faces the judge. At an earlier hearing, Gregory had been adjudged a "minor in need of supervision," a term by which Illinois differentiates non-criminal children from delinquents. That was two months ago, when Gregory's mother had complained that he stayed away from home overnight. Since then, he has been behind bars in the Audy Home, a high-security detention center, while a social worker looked for a foster home. The social worker tells the judge that he still hasn't found one. Gregory's mother refuses to take him home.

A public defender has an idea. He takes the mother aside, and in an off-the-record huddle, urges her to agree to a finding of neglect against

her. This will turn Gregory into a "neglected child" and it will be easier to find a place for him. The mother demurs, then agrees, and the judge orders Gregory back to the lockup—pending further search for a foster home.

Tragic Odds. Is such dumping unusual? No. The Chicago Citizens Committee on the Juvenile Court found that 331 children *under six* had been dumped into the Audy Home in a recent year. Another 447 were six to 12 years old. Sometimes the bureaucracy, having dumped a child, loses or forgets him. Billy N., left temporarily at Audy when he was six, remained there on and off until he was 16!

If Gregory had been adjudged a delinquent he would probably have been sent to a training school. Many of these places are massive maximum-security facilities—overcrowded, located far from the homes of the children, and, according to NCCD, control their inmates with physical repression.

For example, at the Gatesville State School for Boys in Texas, as U.S. Senate investigators heard: "Security is maintained by a 24-hour horse patrol, 24-hour jeep patrol, and an eager kennel of dogs who are trained to chase younger children. [In April 1969, 200 of the "school's" inmates were under 12.] . . . A day without a beating is the exception, and torment is the order of the day."

Says Massachusetts Youth Services Commissioner Jerome G. Miller: "Almost anything we could do is better than what we have been doing." He wants to shut down his state's ten juvenile-correction institutions by 1974.

What are the odds that a juvenile graduate from a training school or reformatory can go straight? Less than 50-50, says NCCD. When the FBI studied several thousand repeaters of all ages it found three of every four offenders under 20 were repeaters within the next four years. At the school at Sheridan, Ill., an official who used to inspect state prisons said: "Over the years, I saw hundreds of inmates at Pontiac (an adult prison) whom I had first met as Sheridan boys."

In Philadelphia, Family Court Administrative Judge Frank J. Montemuro, Jr., summed up the horror of our juvenile courts: "We're running a feeding system for the adult-criminal court."

The delinquency doctors are telling us that the treatment is part of the disease. Isn't it time we tried another treatment?

In Part II of this series, The Reader's Digest will examine some possible solutions to the problems of juvenile justice.

Half-truths are like half a brick—they can be thrown farther.
—Vice Admiral Hyman G. Rickover

SB-68

NIGHT LETTER Sent 5-5-71 5:00 p.m.

To: Rep. Genie Chance, Juneau, Alaska

From: Harold J. Butcher, Anchorage

Strongly urge House conferees accept Senate Bill 68 as introduced by Thomas, et.al., as originally proposed by the undersigned and attached to memorandum of justification.

My proposal, as reflected in Senate Bill 68 simply adds one paragraph to the statute and requires no alteration or changes in preceding statutes. The languege contained in the last line of Senate Bill 68 "on order of the court" simply reiterates the same language as presently contained in the last line of 47.10.080(b)(1), as adopted in 1970. That language "on order of the court" has never created any problems between the court and the Division of Corrections. That language "on order of the court" also reiterates the same language in the statute as it existed before the amendment of 1970 in the original statute as it has stood since its adoption in 1962. The House verdon, in my opinion, detracts from the clear purpose of the statute as it has stood since 1962.

Please do your best to get a bill passed as the amendment is badly needed now.

Lowell:
This telegram sent to Genie Chance, May 5.

H.J.B.

SB-68

to take advantage of the training grants provisions of the Social Security Act, as amended, the state, through the department, consents and agrees to all conditions required by federal statute and regulation necessary for the state to participate fully in the training grants or other programs. (§ 51-1-3(p) ACLA 1949; added by § 4 ch 133 SLA 1957)

Sec. 47.05.050. Policy. It is the public policy of the state to cooperate and coordinate with the United States government and its agencies in providing for and administering federal and state laws for old age assistance and the other assistance which is provided for or extended to the people of the state. (§ 51-1-4 ACLA 1949)

Chapter 10. Delinquents and Wards of the Court.

Article
1. Juvenile Courts (§§ 47.10.010—47.10.142)
2. Juvenile Institutions (§§ 47.10.150—47.10.220)
3. Care of Children (§§ 47.10.230—47.10.260)
4. General Provisions (§§ 47.10.270—47.10.290)

Article 1. Juvenile Courts.

Section
10. Jurisdiction
20. Investigation and petition
30. Summons and custody of minor
40. Release of minor
50. Appointment of guardian ad litem
60. Waiver of jurisdiction
70. Hearings
75. Young adult advisory panels
80. Judgments and orders
90. Records
100. Retention of jurisdiction over minor
110. Appointment of guardian or custodian
120. Support of minor
130. Detention
140. Temporary detention and detention hearing
142. Emergency custody and temporary placement hearing

Sec. 47.10.010. Jurisdiction. (a) Proceedings relating to a minor under 18 years of age residing or found in the state are governed by this chapter, except as otherwise provided in this chapter, when the minor

(1) violates a law of the state, or an ordinance or regulation of a political subdivision of the state;

(2) by reason of being wayward or habitually disobedient is uncontrolled by his parent, guardian or custodian;

(3) is habitually truant from school or home, or habitually so conducts himself as to injure or endanger the morals or health of himself or others;

(4) is abandoned by his parent, guardian or custodian;

(5) lacks proper parental care by reason of the faults, habit or neglect of his parent, guardian or custodian;

(6) associates with vagrant, vicious or immoral people, or engages in an occupation or is in a situation dangerous to life or limb or injurious to the health, morals, or welfare of himself or others;

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(7) is an orphan who has no relatives willing and able to assume custody and care;

(8) has been released by his parent or parents, or guardian, to the department for adoptive purposes; or

(9) is in need of special care or training not otherwise provided.

(b) When a minor is accused of violating a traffic statute or regulation, or a traffic ordinance or regulation of an incorporated municipality, excepting a statute the violation of which is a felony, the procedure prescribed in §§ 20—90 of this chapter may not be followed, except that a parent, guardian or legal custodian shall be present at all proceedings. The minor accused of a traffic offense shall be charged, prosecuted, and sentenced in the district court in the same manner as an adult.

(c) In a controversy concerning custody of a minor, the court may appoint a guardian of the person and property of a minor and may order support from either or both parents. Custody of a minor may be given to the Department of Health and Social Services, and payment of support money to the department may be ordered. (§ 4 art I ch 145 SLA 1957; am § 1 ch 76 SLA 1961; am §§ 1, 2 ch 110 SLA 1967; am § 1 ch 64 SLA 1969; am § 6 ch 104 SLA 1971)

Cross references. — See Rules of Children's Procedure, Alaska Rules of Court Procedure and Administration. As to prosecution of minor driving vehicle without owner's consent, see AS 28.35.010 (d).

Effect of amendments — The 1967 amendment rewrote the introductory language of subsection (a) and rewrote subsection (c).

The 1969 amendment, in the first sentence of subsection (b), deleted "AS 28.35.030, 28.35.040, or AS 28.35.050 —28.35.110, or" following "excepting," and substituted "may" for "need." In the second sentence of that subsection the amendment substituted "shall" for "may" and inserted "in the district court."

The 1971 amendment substituted "Department of Health and Social Services" for "Department of Health and Welfare" in the last sentence in subsection (c).

Editor's note. — Section 7, ch. 110, SLA 1967, as amended by § 80, ch. 69, SLA 1970, provides: "In exercising its jurisdiction under AS 47.10, the superior court may designate district judges and magistrates as masters under Civil Rule 53."

Legislative committee reports. — For report on amending bill, see 1961 House Journal, p. 140. For report on ch. 64, SLA 1969 (CSHB 10), see 1969 House Journal, p. 362.

Jurisdiction to regulate custody of infants does not depend upon domicile of parents. Clegg v. Abood 13 Alaska 187 (1951).

It has its origin in the protection that is due to the incompetent or helpless. Clegg v. Abood, 13 Alaska 187 (1951).

The court acts as parens patriae, protecting the child whose custody is in dispute and making its award solely according to the interests and welfare of the child. This is true, regardless of the settled or transient character of the parents' residence, or even of a child abandoned by its parents. Clegg v. Abood, 13 Alaska 187 (1951).

Hence, the residence of the child suffices, though the domicile of the parents be elsewhere. Clegg v. Abood, 13 Alaska 187 (1951).

Effect of decree of another court in custody cases. — That a parent brings the child into the jurisdiction of a court in violation of the decree of another court, will not deprive the court of the state where the child presently resides from determining matters of custody in cases of changed circumstances. Clegg v. Abood, 13 Alaska 187 (1951).

When person over or under certain age. — With respect to penal statutes, whether a person is over or under a certain age depends upon whether he has reached that particular anniversary of his birthday or not. State v. Linn, Sup. Ct. Op. No. 47 (File No. 122), 363 P.2d 361 (1961).

Requisites to determination of delinquency. — Before a juvenile can be determined delinquent in a proceeding which could result in commitment to an institution, thus curtailing his freedom, certain requisites must be met. First, written notice of the charges must be given to the juvenile and his parents sufficiently in advance of the proceedings to allow preparation to meet the charges. Second, the child and his parents must be apprised of the right to counsel, including appointed counsel in case of indigency. Third, the child may exercise his privilege against self-incrimination. Lastly, absent a valid confession, the determination of delinquency cannot be sustained in the absence of sworn testimony, which is subject to cross-examination. E.J. v. State, Sup. Ct. Op. No. 628 (File No. 1144), 471 P.2d 367 (1970).

The required standard of proof has been increased from "a preponderance of the evidence" to "beyond a reasonable doubt" in the adjudicatory stages of at least those delinquency proceedings in which a child is charged with an act that would be a crime if committed by an adult. E.J. v. State, Sup. Ct. Op. No. 628 (File No. 1144), 471 P.2d 367 (1970).

Violations of AS 04.15.060. — In cases involving violations of AS 04.15.060, offenders between the ages of 18 and 21 years may be punished as for a misdemeanor by fine or imprisonment; but offenders between the ages of 17 and 18 years must instead be proceeded against under the provisions of the juvenile laws. Purdy v. United States, 16 Alaska 173, 146 F. Supp. 762 (D. Alas. 1956)

Appeal after serving sentence. — If there remain collateral legal disabilities apart from the sentence, an appeal is not mooted even though the sentence has been served. E.J. v. State, Sup. Ct. Op. No. 628 (File No. 1144), 471 P.2d 367 (1970).

Am. Jur., ALR and C.J.S. references. — 27 Am. Jur., Infants, §§ 101 to 112; 31 Am. Jur., Juvenile Courts and Delinquents, Dependent and Neglected Children, §§ 13 to 50.

Another court's jurisdiction over a child as affected by assumption of jurisdiction by juvenile court, 11 ALR 147; 78 ALR 317; 146 ALR 1711.

Vagrancy of minors, 14 ALR 1507.

Constitutionality of statute which, for reformatory purposes, deprives parent of custody or control of child, 60 ALR 1342.

Power of juvenile court to exercise continuing jurisdiction over infant delinquent or offender, 76 ALR 657.

Age of child at time of alleged offense or delinquency, or at time legal proceedings are commenced, as criterion of jurisdiction of juvenile court, 123 ALR 446.

Marriage as affecting jurisdiction of juvenile court over delinquents or dependents, 14 ALR2d 336.

Homicide by juvenile as within jurisdiction of juvenile court, 48 ALR2d 662.

43 C.J.S. Infants §§ 6, 93 et seq.

Sec. 47.10.020. Investigation and petition. (a) Whenever a person informs the court of the facts which bring a minor within this chapter, the court shall appoint a competent person or agency to make a preliminary inquiry and report for the information of the court to determine whether the interests of the public or of the minor require that further action be taken. Upon the receipt of the report, the court may informally adjust or dispose of the matter without a hearing, or it may authorize the person having knowledge of the facts of the case to file with the court a petition setting out the facts. Where the court informally adjusts or disposes of the matter, the minor may not be detained or taken into the custody of the court, and the matter shall be closed by the court upon adjustment or disposition.

(b) The petition and all subsequent pleadings shall be styled as follows: "In the matter of ....., a minor under 18 years of age." The petition may be executed upon the petitioner's information and belief, and shall be verified. It shall include the following information:

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(1) the name, address and occupation of the petitioner, together with his relationship to the minor, and his interest in the matter;

(2) the name, age and address of the minor;

(3) a brief statement of the facts which bring the minor within this chapter;

(4) the names and addresses of the minor's parents;

(5) the name and address of the minor's guardian, or of the person having control or custody of the minor.

(c) If any of the facts required in this section are not known by the petitioner, he shall state in his petition that those facts are unknown to him. (§ 5 art I ch 145 SLA 1957)

Sec. 47.10.030. Summons and custody of minor. (a) After a petition is filed and after further investigation which the court directs, if the person having custody or control of the minor has not appeared voluntarily, the court shall issue a summons which (1) recites briefly the substance of the petition; (2) clearly states that at the hearing it is possible that parental rights and responsibilities may be terminated forever and that the minor may at the hearing be committed to the Department of Health and Social Services for possible adoption; and (3) directs the person having custody or control of the minor to appear personally in court with the minor at the place and at the time set forth in the summons.

(b) If the person summoned is not the parent or guardian of the minor, the court shall also give the parent or guardian notice of the place and time of the hearing. The court may also subpoena the parent of the minor, or any other person whose testimony may be necessary at the hearing. A summons, subpoena or other process may be served by a person authorized by law to make the service. Where personal service cannot be made, the court may direct that service of process be made by registered mail.

(c) If the minor is in such condition or surroundings that his welfare requires the immediate assumption of his custody by the court, the court may order, by endorsement upon the summons, that the officer serving the summons shall at once take the minor into custody and make the temporary placement of the minor which the court directs. (§ 6 art I ch 145 SLA 1957; am § 1 ch 110 SLA 1960; am § 6 ch 104 SLA 1971)

Effect of amendment. — The 1971 amendment substituted "Department of Health and Social Services" for "Department of Health and Welfare" in item (2) of subsection (a).

ALR references. — Notice to parent, and hearing, before commitment of delinquent, dependent, or neglected children, 76 ALR 247.

Right to and appointment of counsel in juvenile court proceedings, 60 ALR2d 691.

Sec. 47.10.040. Release of minor. A minor who is taken into custody may, in the discretion of the court and upon the written promise of the parent, guardian or custodian to bring the minor before the court at a

time specified by the court, be released to the care and custody of the parent, guardian or custodian. The minor, if not released, shall be detained as provided by § 140 of this chapter. The court may determine whether the father or mother or another person shall have the custody and control of the minor for the duration of the proceedings. If the minor is over 14 years of age, his desires in the matter shall be given consideration by the court. (§ 7 art I ch 145 SLA 1957)

Sec. 47.10.050. Appointment of guardian ad litem. Whenever in the course of proceedings instituted under this chapter it appears to the court that the welfare of a minor will be promoted by the appointment of a guardian ad litem, the court may make the appointment. (§ 8 art I ch 145 SLA 1957)

Sec. 47.10.060. Waiver of jurisdiction. (a) If the court finds at a hearing on a petition that there is probable cause for believing that a minor is delinquent and finds that the minor is not amenable to treatment under this chapter, it shall order the case closed. After a case is closed under this subsection, the minor may be prosecuted as if he were an adult.

(b) Repealed by § 8 ch 110 SLA 1967, effective January 1, 1968.

(c) Repealed by § 8 ch 110 SLA 1967, effective January 1, 1968.

(d) A minor is unamenable to treatment under this chapter if he probably cannot be rehabilitated by treatment under this chapter before he reaches 21 years of age. In determining whether a minor is unamenable to treatment, the court may consider the seriousness of the offense the minor is alleged to have committed, the minor's history of delinquency, the probable cause of the minor's delinquent behavior, and the facilities available to the division of youth and adult authority for treating the minor.

(e) If a person who has been tried as an adult under this section has completed his sentence and five years have elapsed, he may petition (or the Department of Health and Social Services may petition for him) the superior court to seal the records of all criminal proceedings against him and all punishments assessed against him, except for traffic offenses, while he was a minor. If the superior court finds that the punishment assessed against the person has had its intended rehabilitative effect, the superior court shall order the record of proceedings and the record of punishments sealed. Sealing the records restores civil rights removed because of a conviction. No person may ever use records so sealed for any purpose. (§ 9 art I ch 145 SLA 1957; am § 1 ch 118 SLA 1962; am §§ 3, 8 ch 110 SLA 1967; am § 6 ch 104 SLA 1971)

Effect of amendments. — The 1967 amendment rewrote subsection (a) and repealed subsections (b) and (c).

The 1971 amendment substituted "Department of Health and Social Services" for "Department of Health and Welfare" in the first sentence of subsection (e).

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Sec. 47.10.070. Hearings. The court may conduct the hearing in an informal manner in the courtroom or in chambers. All hearings under this chapter are without a jury and the usual rules of evidence do not apply. However, a hearing may be held before a young adult advisory panel in accordance with § 75 of this chapter. The court shall give notice of the hearing to the department and it may send a representative to the hearing. The court shall also transmit a copy of the petition to the department. The representative of the department may also be heard at the hearing. The public shall be excluded from the hearing, but the court, in its discretion, may permit individuals to attend a hearing, if their attendance is compatible with the best interests of the minor. (§ 10(1) art I ch 145 SLA 1957; am § 1 ch 49 SLA 1966)

Effect of amendment. — The 1966 amendment added the second sentence.

Legislative committee report. — For report on ch. 49, SLA 1966, see 1966 House Journal, p. 52.

Constitutionality. — See In re Gault, 387 U.S. 1, 87 Sup. Ct. 1428, 18 L. Ed. 2d 527 (1967), discussing due process requirements in juvenile delinquency proceedings.

ALR references. — Power of juvenile court to require testimony by children, 151 ALR 1229.

Applicability of rules of evidence in juvenile delinquency proceedings, 43 ALR2d 1128.

Degree of proof in juvenile delinquency proceedings, 43 ALR2d 1138.

Sec. 47.10.075. Young adult advisory panels. (a) Unless the minor objects, the court may select a young adult advisory panel to hear the case and advise the court of a recommended judgment and order. The court may consider any of the panel recommendations in making its judgment and order in the case.

(b) The principal of each high school shall submit annually to the court a list of the students enrolled in grades 10, 11 and 12. The court shall determine the method of selecting the members of each panel.

(c) A student shall be excused from attending school during the time he is serving as a panel member. No student may serve more than once each year on a panel.

(d) A student shall be excused from service as a panel member if he submits a written request to the court indicating the reason he does not wish to serve. (§ 2 ch 49 SLA 1966)

Legislative committee report. — For report on ch. 49, SLA 1966, see 1966 House Journal, p. 52.

Sec. 47.10.080. Judgments and orders. (a) The court, at the conclusion of the hearing, or thereafter as the circumstances of the case may require, shall find and enter a judgment that the minor is or is not a delinquent, or a child in need of supervision, or dependent minor.

(b) If the court finds that the minor is delinquent, it shall

(1) order the minor committed to the Department of Health and Social Services for an indeterminate period of time not to extend past a specified date or in any event past the day the minor becomes 19, except

that the department may petition the court for continued supervision for an additional one-year period for minors who have not responded to treatment, and may direct the minor's placement in a juvenile correctional school, detention home, or detention facility designated by the department; the minor may be released from placement or detention and placed on probation on order of the court; or

(2) order the minor placed on probation, to be supervised by the department, and release him to his parents, guardian, or a suitable person; if the court orders the minor placed on probation, it may specify the terms and conditions of probation; the probation may be for an indeterminate period of time, not to extend past a specified date and in no event past the day the minor becomes 19, except that the department may petition the court for continued supervision for an additional one-year period for minors who have not responded to treatment.

(c) If the court finds that the minor is dependent, it shall

(1) order the minor committed to the department for an indeterminate period of time not to exceed the date the minor becomes 19 years of age, except that the department may petition the court for continued supervision for an additional one-year period for minors who have not responded to treatment;

(2) order the minor released to his parents, guardian, or some other suitable person; if the court releases the minor, it shall direct the department to supervise the care and treatment given to the minor; the department's supervision may not extend past the date the minor becomes 19 years of age, except that the department may petition the court for continued supervision for an additional one-year period for minors who have not responded to treatment; or

(3) by order, terminate parental rights and responsibilities of one or both parents and commit the child to the department or to a legally appointed guardian of the person of the child, if one of the following conditions exists:

(A) Each parent, or the surviving parent, or one parent if the other has been deprived of custody and visitation rights wishes to relinquish the child to the department or to a legally appointed guardian of the person of the child for adoptive purposes, and the relinquishment is in writing, signed and acknowledged before the court or duly authorized representative of the department and filed with the court;

(B) the child has been abandoned for a period of not less than six months by

(i) both parents, or

(ii) the surviving parent, or

(iii) one parent if the other has been deprived of custody and visitation rights;

(C) each parent, the surviving parent, or one parent if the other has been deprived of custody and visitation rights has been judicially determined to be of unsound mind and the disability has not been

removed and the parent has been hospitalized for reasons of mental illness diagnosed as permanent or of long duration; or

(D) each parent, or the surviving parent, or one parent if the other has been judicially deprived of custody and visitation rights, has demonstrated by his conduct, proven by clear and convincing proof amounting to more than a preponderance of the evidence that he is unfit to continue to exercise his parental rights and responsibilities.

(d) An order issued under (c) (3) of this section authorizes the commissioner of health and social services or his designee or the guardi of the person of the child to consent to the adoption of the child.

(e) If the court finds that the minor is not delinquent, a child in need of supervision, or dependent, it shall immediately order his release from its custody and his return to his parents, guardian, or custodian, and close the case.

(f) A minor found to be delinquent, a child in need of supervision, or dependent is a ward of the court as long as he is committed to the department or the department has the power to supervise his actions. The court shall review an order made under (b) or (c) (1) or (2) or (j) of this section annually, and may review the order more frequently to determine if continued placement, probation, or supervision is in the best interest of the minor and the public, and to determine if the minor is being treated fairly. The department or the minor's parents or guardian is entitled to a review on application. The minor need not be present at the review.

(g) No adjudication under this chapter upon the status of a child may operate to impose any of the civil disabilities ordinarily imposed by conviction upon a criminal charge, nor may a minor afterward be considered a criminal by the adjudication, nor may the adjudication be afterward deemed a conviction, nor may a minor be charged with or convicted of a crime in a court, except as provided in this chapter. The commitment and placement of a child and evidence given in the court are not admissible as evidence against the minor in a subsequent case or proceedings in any other court, nor does the commitment and placement or evidence operate to disqualify a minor in a future civil service examination or appointment in the state.

(h) The department shall pay all court costs incurred in all proceedings in connection with the adjudication of delinquency under this chapter, including hearings which result in the release of the minor.

(i) A minor, his parents or guardian acting on his behalf, or the department may appeal a judgment or order, or the stay, modification, setting aside, revocation, or enlargement of a judgment or order issued by the court under this chapter.

(j) If the court finds the minor is a child in need of supervision it shall make any of the following orders of disposition for his supervision, care and rehabilitation.

(1) any order which is authorized under (c) of this section; or

(2) order the minor placed on probation under those conditions and limitations that the court may prescribe. (§ 10(2) art I ch 145 SLA 1957; am § 2 ch 110 SLA 1960; am § 2 ch 118 SLA 1962; am § 1 ch 40 SLA 1967; am §§ 1—4 ch 27 SLA 1970; am §§ 12—15 ch 245 SLA 1970; am § 6 ch 104 SLA 1971)

Effect of amendments. — The 1967 amendment rewrote subsection (c) (3) (B).

The first 1970 amendment added "or thereafter as the circumstances of the case may require" and "or a child in need of supervision" in subsection (a), inserted "a child in need of supervision" in subsection (e), inserted "a child in need of supervision" in the first sentence of subsection (f), and near the beginning of the second sentence of that subsection inserted "or (j)." The amendment also added subsection (j).

The second 1970 amendment substituted "19, except that the department may petition the court for continued supervision for an additional one-year period for minors who have not responded to treatment" for "21" in subsections (b) (1) and (b) (2), substituted "19" for "21" and added the exception in subsections (c) (1) and (c) (2).

The 1971 amendment substituted "Department of Health and Social Services" for "Department of Health and Welfare" in subsection (b) (1) and "commissioner of health and social services" for "commissioner of health and welfare" in subsection (d).

Legislative committee reports. — For report on amending bill, see 1960 House Journal, p. 494.

For report on ch. 40, SLA 1967 (HB 131), see 1967 House Journal, p. 339. Chapter 245, SLA 1970 (HCSSB 399 am H), was identical to CSHB 406 (Jud.). For report on CSHB 406 (Jud.), see 1970 House Journal Supplement No. 6.

A judge cannot consider a juvenile offense as a criminal conviction for the purpose of prescribing a mandatory sentence. Berfield v. State, Sup. Ct. Op. No. 581 (File No. 960), 458 P.2d 1008 (1969).

The judge's consideration of factors relating to accused's life, characteristics, background and behavior prior to reaching the age of 18 years did not mean that he considered accused a criminal or that he was using the juvenile offenses as criminal convictions in determining the sentence to impose. Berfield v. State, Sup. Ct. Op. No. 581 (File No. 960), 458 P.2d 1008 (1969).

Sec. 47.10.090. Records. (a) The court shall make and keep records of all cases brought before it. The court's official records may be inspected only with the court's permission and only by persons having a legitimate interest in them. All information and social records pertaining to a minor and prepared in the discharge of his official duty by an employee of the court or by a federal, state or city agency are privileged and shall not be disclosed directly or indirectly to anyone without the court's permission. However, a state or city law enforcement agency shall disclose information regarding the case which is needed by the person or agency charged with making a preliminary investigation for the information of the court.

(b) The name or picture of a minor under the jurisdiction of the court may not be made public by a newspaper radio, or television station in connection with the minor's status as a delinquent or dependent child, except as authorized by order of the court. A person who violates this provision is guilty of a misdemeanor, and upon conviction is punishable by a fine of not more than $500 or by imprisonment for not more than one year, or by both. (§ 10(3) (4) art I ch 145 SLA 1957)

Sec. 47.10.100. Retention of jurisdiction over minor. (a) The court

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(d) If the court finds that probable cause exists, it shall determine whether the minor should be detained pending the hearing on the petition or released. It may either order the minor held in detention or order him to be released to the custody of a suitable person pending the hearing on the petition. If the court finds no probable cause, it shall order the minor released and close the case.

(e) Except for temporary detention pending a detention hearing, no minor may be detained except by court order. (§ 15 art I ch 145 SLA 1957; am § 3 ch 118 SLA 1962; am § 2 ch 100 SLA 1971; am § 6 ch 104 SLA 1971)

Effect of amendments. — The first 1971 amendment deleted "or evading the person having legal custody of him" following "justice" in the first sentence of subsection (a).

The second 1971 amendment substituted "Department of Health and Social Services" for "Department of Health and Welfare" in the first sentence of subsection (b).

Sec. 47.10.142. Emergency custody and temporary placement hearing. (a) The Department of Health and Social Services may take emergency custody of a minor upon discovering any of the following circumstances:

(1) the minor has been abandoned;

(2) the minor has been grossly neglected by his parents or guardian, as "neglect" is defined in AS 47.17.070(5), so that immediate removal from his surroundings is, in the determination of the department, necessary to protect his life;

(3) the minor has been abused, as "abuse" is defined in AS 47.17.070(1), so that immediate medical attention is necessary, in the determination of the department.

(b) A minor who has left home and is evading the person having legal custody of him may obtain the services of the department. The department shall assess the situation and furnish the minor with the social services it considers appropriate to protect the well-being of the minor and to preserve his family life if preserving it is considered desirable under the circumstances. If, after assessing the situation, considering the wishes of the minor, and furnishing appropriate social services, the department considers it necessary, the department may take emergency custody of the minor.

(c) When a child is taken into custody under (a) or (b) of this section, the department shall immediately, and in no event more than 12 hours later unless prevented by lack of communication facilities, notify the parents or the person or persons having custody of the child and the court of the action and file with the court a petition alleging dependency.

(d) The court shall immediately, and in no event more than 48 hours after being notified unless prevented by lack of transportation, hold a hearing at which the minor, if his health permits, and his parents or guardian, if they can be found, shall be permitted to be present. The

court shall determine whether probable cause exists for believing the minor to be a dependent minor, as defined in § 290(3) of this chapter. The court shall inform the minor, and his parents or guardian if they can be found, of the reasons given as constituting probable cause and the reasons given as authorizing his temporary placement.

(e) If the court finds that probable cause exists it shall order the minor committed to the department for temporary placement, or order him returned to the custody of his parents or guardian subject to the department's supervision of his care and treatment. If the court finds no probable cause it shall order the minor returned to the custody of his parents or guardian. (§ 3 ch 100 SLA 1971; am § 6 ch 104 SLA 1971)

Effect of amendment. — The 1971 amendment substituted "Department of Health and Social Services" for "Department of Health and Welfare" at the beginning of subsection (a).

Article 2. Juvenile Institutions.

Section		Section	
150.	General powers of department over juvenile institutions	190.	Conditions governing detention
160.	Duties of department	200.	Releasing juveniles after commitment
170.	Power of cities to maintain and operate home or facility	210.	Youth counsellors
180.	Operation of homes and facilities	220.	Grants-in-aid

Sec. 47.10.150. General powers of department over juvenile institutions. The Department of Health and Social Services may

(1) purchase, lease or construct buildings or other facilities for the care, detention, rehabilitation and education of dependent or delinquent minors;

(2) adopt plans for construction of juvenile homes, juvenile detention facilities, and other juvenile institutions;

(3) adopt standards and regulations under this chapter for the design, construction, repair, maintenance and operation of all juvenile detention homes, facilities, and institutions;

(4) inspect periodically each juvenile detention home, facility, or other institution to insure that the standards and regulations adopted are being maintained;

(5) reimburse cities maintaining and operating juvenile detention homes and facilities;

(6) enter into contracts and arrangements with cities and state and federal agencies to carry out the purposes of this chapter;

(7) do all acts necessary to carry out the purposes of this chapter;

(8) adopt the regulations necessary to carry out this chapter;

(9) accept donations, gifts or bequests of money or other property for use in construction of juvenile homes, institutions or detention facilities;

(10) operate juvenile homes when municipalities are unable to do so;

(11) receive, care for, and place in a juvenile detention home, the minor's own home, a foster home, or correctional school or treatment institution all minors committed to its custody under this chapter. (§ 3 art II ch 145 SLA 1957; am § 1 ch 152 SLA 1959; am § 6 ch 104 SLA 1971)

Effect of amendment. — The 1971 amendment substituted "Department of Health and Social Services" for "Department of Health and Welfare" near the beginning of this section.

Am. Jur. reference. — 26 Am. Jur., Houses of Correction, Reformation and Refuge, § 1 et seq.

Sec. 47.10.160. Duties of department. The Department of Health and Social Services shall

(1) accept all minors committed to the custody of the department and all minors who are involved in a written agreement under § 230(c) of this chapter, and provide for the welfare, control, care, custody, and placement of these children in accordance with the provisions of this chapter;

(2) require and collect statistics on juvenile offenses and offenders in Alaska;

(3) conduct studies and prepare findings and recommendations on the need, number, type, construction, maintenance, and operating costs of juvenile homes, facilities and the other institutions, and adopt and submit a plan for construction of the homes, facilities, and institutions when needed, together with a plan for financing the construction programs;

(4) examine, where possible, all facilities, institutions, and places of juvenile detention in Alaska and inquire into their methods and the management of juveniles in them. (§ 5 art II ch 145 SLA 1957; am § 4 ch 110 SLA 1967; am § 4 ch 100 SLA 1971; am § 6 ch 104 SLA 1971)

Effect of amendments. — The 1967 amendment deleted "handled by all district magistrate courts" following "offenders" in paragraph (2).

The first 1971 amendment inserted "all minors who are involved in a written agreement under § 230(c) of this chapter, and" in paragraph (1).

The second 1971 amendment substituted "Department of Health and Social Services" for "Department of Health and Welfare" near the beginning of this section.

Sec. 47.10.170. Power of cities to maintain and operate home or facility. (a) A city having a population of 1700 or more, according to the latest decennial census, or found by the department to have a present population of 1700 or more may maintain and operate a juvenile detention home or facility.

(b) The city may receive grants-in-aid from the state for costs of operation of the homes or facilities. (§ 5 art II ch 145 SLA 1957)

Sec. 47.10.180. Operation of homes and facilities. (a) The Department of Health and Social Services shall adopt standards and

regulations for the operation of juvenile detention homes and juvenile detention facilities in the state.

(b) The department may enter into contracts with cities and other governmental agencies for the detention of juveniles before and after commitment by juvenile authorities. No contract may be made for longer than one year. (§ 8 art II ch 145 SLA 1957; am § 3 ch 97 SLA 1960; am § 6 ch 104 SLA 1971)

Effect of amendment. — The 1971 amendment substituted "Department of Health and Social Services" for "Department of Health and Welfare" in subsection (a).

Sec. 47.10.190. Conditions governing detention. When the court commits a minor to the custody of the department, the department shall arrange to place the juvenile in a detention home, facility or another suitable place which the department designates for that purpose. A juvenile detained in a jail or similar institution at the request of the department shall be held in custody in a room or other place apart and separate from adults. (§ 9 art II ch 145 SLA 1957)

Sec. 47.10.200. Releasing juveniles after commitment. A juvenile delinquent who by his conduct gives sufficient evidence that he has reformed may be released at any time under the conditions and regulations which the department considers proper, if it appears to the satisfaction of the department that there is a reasonable probability that the juvenile will remain at liberty without violating the law. (§ 10 art II ch 145 SLA 1957)

Sec. 47.10.210. Youth counsellors. The department may employ youth counsellors. Youth counsellors shall exercise the duties of probation officers and shall prepare preliminary investigations for the information of the court. They shall also carry out other duties in the care and treatment of minors which are consistent with the intent of this chapter. Youth counsellors have the powers of a peace officer with respect to the service of process, the making of arrests of minors who violate state or municipal law, and the execution of orders of the court relating to juveniles. The youth counsellors shall assist and advise the courts in the furtherance of the welfare and control of minors under the court's jurisdiction. (§ 11 art II ch 145 SLA 1957)

Sec. 47.10.220. Grants-in-aid. The Department of Health and Social Services may accept grants-in-aid from the federal government or private foundations and may accept other gifts consistent with the purposes of this chapter. (§ 13 art II ch 145 SLA 1957; am § 6 ch 104 SLA 1971)

Effect of amendment. — The 1971 amendment substituted "Department of Health and Social Services" for "Department of Health and Welfare."

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Article 3. Care of Children.

Section
230. Powers and duties of department over care of child
240. Adequacy of home or institution
250. Standards of care
260. Payment of costs

Sec. 47.10.230. Powers and duties of department over care of child. (a) The Department of Health and Social Services shall arrange for the care of every child committed to its custody by placing him in a foster home or in the care of an agency or institution providing care for children inside or outside the state. The department may place a child in a suitable family home, with or without compensation, and may place a child released to it, in writing verified by the parent, or guardian or other person having legal custody, for adoptive purposes, in a home for adoption in accordance with existing law.

(b) The department may pay the costs of maintenance which are necessary to assure adequate care of the child, and may accept funds from the federal government which are granted to assist in carrying out the purposes of this chapter, or which are paid under contract entered into with a federal department or agency. No child under the care of the department may be placed in a family home or institution that does not maintain adequate standards of care.

(c) The department may receive, care for, and make appropriate placement of minors accepted for care for a period of up to six months on the basis of an individual voluntary written agreement between the minor's parent, legal guardian, or other person having legal custody and the department. The agreement may include provisions for payment, in whole or in part, to the department for the minor's care and treatment. The agreement entered into shall not operate to prohibit a minor's parent, legal guardian, or other person who had legal custody from regaining care of the minor at any time. (§ 1 art III ch 145 SLA 1957; am § 5 ch 100 SLA 1971; am § 6 ch 104 SLA 1971)

Effect of amendments. — The first 1971 amendment added subsection (c).

The second 1971 amendment substituted "Department of Health and Social Services" for "Department of Health and Welfare" in the first sentence of subsection (a).

Sec. 47.10.240. Adequacy of home or institution. (a) A representative of the department shall visit, as often as is considered necessary, every foster home or institution in which a child is placed, and if not satisfied as to the care given, may remove the child from the foster home or institution and place him elsewhere.

(b) The person or institution receiving a child shall submit the reports the department requires as to the education, health and welfare of the child and the conditions under which he is living. (§ 2 art III ch 145 SLA 1957)

Sec. 47.10.250. Standards of care. The Department of Health and Social Services shall establish standards of care and regulations desirable for the welfare of every child under its care. (§ 3 art III ch 145 SLA 1957; am § 6 ch 104 SLA 1971)

Effect of amendment. — The 1971 amendment substituted "Department of Health and Social Services" for "Department of Health and Welfare."

Sec. 47.10.260. Payment of costs. The department shall pay the proper and necessary costs of the court and witnesses and other expenses necessarily incurred in the enforcement of §§ 230—260 of this chapter. (§ 4 art III ch 145 SLA 1957)

Article 4. General Provisions.

Section
270. Appropriation
280. Purpose of chapter
290. Definitions

Sec. 47.10.270. Appropriation. Funds to carry out this chapter shall be provided for in the general appropriation act of the legislature. (§ 1 art IV ch 145 SLA 1957)

Sec. 47.10.280. Purpose of chapter. The purpose of this chapter is to secure for each minor the care and guidance which is as nearly as possible equivalent to that which should be given him by his parents. The principle is recognized that minors under the jurisdiction of the court are wards of the state, subject to its discipline and entitled to its protection, and that the state may act to safeguard them from neglect or injury and to enforce the legal obligation due to them and from them. (§ 2 art I ch 145 SLA 1957)

Sec. 47.10.290. Definitions. In this chapter, unless the context otherwise requires,

(1) "court" means the superior court of the state;

(2) "delinquent minor" is a minor whom the court determines is within the provisions of § 10 (a) (1) of this chapter;

(3) "dependent minor" is a minor whom the court determines is within the provisions of § 10 (a) (4), (5), (6), (7), (8), or (9) of this chapter;

(4) "juvenile detention facility" means separate quarters within a city jail used for the detention of delinquent minors;

(5) "juvenile detention home" or "detention home" is a separate establishment, exclusively devoted to the detention of minors on a short-term basis and not a part of an adult jail;

(6) "minor" is a person under 18 years of age;

(7) "child in need of supervision" is a minor whom the court determines is within the provisions of § 10 (a) (2), (3) or (6). (§ 1 art I ch 145 SLA 1957; am § 5 ch 110 SLA 1967; am §§ 5, 6 ch 27 SLA 1970)

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Sec. 47.15.060. Enforcement. The courts, departments, agencies and officers of this state and its subdivisions shall enforce this compact and shall do all things appropriate to the effectuation of its purposes and intent which are within their respective jurisdiction. (§ 6 ch 88 SLA 1960)

Sec. 47.15.070. Additional procedures not precluded. In addition to the procedures provided in articles IV and VI of the compact for the return of a runaway juvenile, the particular states, the juvenile or his parents, the courts, or other legal custodian involved may agree upon and adopt any plan or procedure legally authorized under the laws of this state and the other respective party states for the return of the runaway juvenile. (§ 7 ch 88 SLA 1960)

Sec. 47.15.080. Short title. This chapter may be cited as the Uniform Interstate Compact on Juveniles. (§ 8 ch 88 SLA 1960)

Chapter 17. Child Protection.

Section
10. Purpose
20. Persons required to report
30. Action on reports; termination of parental rights
40. Central registry; confidentiality
50. Immunity
60. Evidence not privileged
70. Definitions

Sec. 47.17.010. Purpose. In order to protect children whose health and well-being may be adversely affected through the infliction, by other than accidental means, of harm through physical abuse or neglect requiring the attention of a practitioner of the healing arts, the legislature requires the reporting of these cases by practitioners and others to the appropriate public authorities. It is the intent of the legislature that, as a result of these reports, protective services will be made available in an effort to prevent further harm to the child, to safeguard and enhance the general well-being of the children in this state, and to preserve family life whenever possible. (§ 1 ch 100 SLA 1971)

Sec. 47.17.020. Persons required to report. (a) The following persons who, in the performance of their professional duties, have cause to believe that a child has suffered harm as a result of abuse or neglect shall immediately report the harm to the nearest office of the department:

(1) practitioners of the healing arts;
(2) school teachers;
(3) social workers;
(4) peace officers, and officers of the division of corrections;
(5) administrative officers of institutions.

(b) This section does not prohibit the named persons from reporting

cases which have come to their attention in their nonprofessional capacities nor does it prohibit any other person from reporting a child's harm which he has cause to believe is a result of abuse or neglect. These reports shall be made to the nearest office of the department.

(c) If the person making a report of harm under this section cannot reasonably contact the nearest office of the department, and immediate action is necessary for the well-being of the child, the person shall make the report to a peace officer. The peace officer shall take immediate action to protect the child and shall, at the earliest opportunity, notify the nearest office of the department. (§ 1 ch 100 SLA 1971)

Sec. 47.17.030. Action on reports; termination of parental rights. (a) If a child, concerning whom a report of harm is made, is believed to reside within the boundaries of a local government exercising health functions for the area in which the child is believed to reside, the department may, upon receipt of the report, refer the matter to the appropriate health or social services agency of that local government. For cases not referred to an agency of a local government, the department shall, for each report received, investigate and take action, in accordance with law, which may be necessary to prevent further harm to the child or to insure the proper care and protection of the child.

(b) A local government health or social services agency receiving a report of harm shall, for each report received, investigate and take action, in accordance with law, which may be necessary to prevent further harm to the child or to insure the proper care and protection of the child. In addition, the agency receiving a report of harm shall forward a copy of its report of the investigation, including information the department requires by regulation, to the department.

(c) Action shall be taken regardless of whether the identity of the person making the report of harm is known.

(d) Before the department or a local government health or social services agency may seek the termination of parental rights, under AS 47.10.080(c) (3), it shall offer protective social services and pursue all other reasonable means of protecting the child. (§ 1 ch 100 SLA 1971)

Sec. 47.17.040. Central registry; confidentiality. (a) The department shall maintain a central registry of all investigation reports but not of the reports of harm.

(b) Investigation reports and reports of harm filed under this chapter are considered confidential and are not subject to public inspection and copying under AS 09.25.110 and 09.25.120. However, in accordance with department regulations, investigation reports may be used by appropriate governmental agencies with child-protection functions, inside and outside Alaska, in connection with investigations or judicial proceedings involving child abuse, neglect, or custody. (§ 1 ch 100 SLA 1971)

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Sec. 47.17.050. Immunity. A person who, in good faith, makes a report under this chapter, or who participates in judicial proceedings related to the submission of reports under this chapter, is immune from any civil or criminal liability which might otherwise be incurred or imposed. (§ 1 ch 100 SLA 1971)

Sec. 47.17.060. Evidence not privileged. Neither the physician-patient nor the husband-wife privilege is a ground for excluding evidence regarding a child's harm, or its cause, in a judicial proceeding related to a report made under this chapter. (§ 1 ch 100 SLA 1971)

Sec. 47.17.070. Definitions. In this chapter

(1) "abuse" means the infliction, by other than accidental means, of physical harm upon the body of a child;

(2) "child" means a person under 16 years of age;

(3) "department" means the Department of Health and Social Services;

(4) "institution" means a private or public hospital or other facility providing medical diagnosis, treatment, or care;

(5) "neglect" means the failure to provide necessary food, care, clothing, shelter, or medical attention for a child;

(6) "practitioner of the healing arts" includes chiropractors, dentists, health aides, nurses, optometrists, osteopaths, physical therapists, physicians, psychiatrists, psychologists, religious healing practitioners, and surgeons. (§ 1 ch 100 SLA 1971; am § 6 ch 104 SLA 1971)

Effect of amendment. — The 1971 amendment substituted "Department of Health and Social Services" for "Department of Health and Welfare" in paragraph (3).

Chapter 20. Exceptional Children.

Section	Section
10. Assistance authorized	40. Purpose
20. Standards for assistance	50. Definitions
30. Appropriations	

Sec. 47.20.010. Assistance authorized. The Department of Health and Social Services may provide professional guidance and financial assistance to organized groups of parents according to standards and regulations devised by the department for providing special services, evaluation and special training required by exceptional children who are educable or trainable but physically or mentally retarded. (§ 2 ch 118 SLA 1961; am § 6 ch 104 SLA 1971)

Effect of amendment. — The 1971 amendment substituted "Department of Health and Social Services" for "Department of Health and Welfare."

Sec. 47.20.020. Standards for assistance. The department shall

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Sec. 47.10.070. Hearings. The court may conduct the hearing in an informal manner in the courtroom or in chambers. All hearings under this chapter are without a jury and the usual rules of evidence do not apply. However, a hearing may be held before a young adult advisory panel in accordance with § 75 of this chapter. The court shall give notice of the hearing to the department and it may send a representative to the hearing. The court shall also transmit a copy of the petition to the department. The representative of the department may also be heard at the hearing. The public shall be excluded from the hearing, but the court, in its discretion, may permit individuals to attend a hearing, if their attendance is compatible with the best interests of the minor. (§ 10(1) art I ch 145 SLA 1957; am § 1 ch 49 SLA 1966)

Effect of amendment.—The 1966 amendment added the second sentence.

Legislative committee report.—For legislative committee report on ch. 49, SLA 1966, see House Journal (1966), p. 52.

Constitutionality.—See In re Gault, 387 U.S. 1, 87 Sup. Ct. 1428, 18 L. Ed. 2d 527 (1967), discussing due process requirements in juvenile delinquency proceedings.

Sec. 47.10.075. Young adult advisory panels. (a) Unless the minor objects, the court may select a young adult advisory panel to hear the case and advise the court of a recommended judgment and order. The court may consider any of the panel recommendations in making its judgment and order in the case.

(b) The principal of each high school shall submit annually to the court a list of the students enrolled in grades 10, 11 and 12. The court shall determine the method of selecting the members of each panel.

(c) A student shall be excused from attending school during the time he is serving as a panel member. No student may serve more than once each year on a panel.

(d) A student shall be excused from service as a panel member if he submits a written request to the court indicating the reason he does not wish to serve. (§ 2 ch 49 SLA 1966)

Legislative committee report.—For legislative committee report on ch. 49, SLA 1966, see House Journal (1966), p. 52.

Sec. 47.10.080. Judgments and orders. (a) The court, at the conclusion of the hearing, or thereafter as the circumstances of the case may require, shall find and enter a judgment that the minor is or is not a delinquent, or a child in need of supervision, or dependent minor.

(b) If the court finds that the minor is delinquent, it shall

(1) order the minor committed to the Department of Health and Welfare for an indeterminate period of time not to extend past a specified date or in any event past the day the minor becomes

19, except that the department may petition the court for continued supervision for an additional one-year period for minors who have not responded to treatment; and may direct the minor's placement in a juvenile correctional school, detention home, or detention facility designated by the department; the minor may be released from placement or detention and placed on probation on order of the court; or

(2) order the minor placed on probation, to be supervised by the department, and release him to his parents, guardian, or a suitable person; if the court orders the minor placed on probation, it may specify the terms and conditions of probation; the probation is to be for an indeterminate period of time, not to extend past a specified date and in no event past the day the minor becomes 19, except that the department may petition the court for continued supervision for an additional one-year period for minors who have not responded to treatment.

(c) If the court finds that the minor is dependent, it shall

(1) order the minor committed to the department for an indeterminate period of time not to exceed the date the minor becomes 19 years of age, except that the department may petition the court for continued supervision for an additional one-year period for minors who have not responded to treatment;

(2) order the minor released to his parents, guardian, or some other suitable person; if the court releases the minor, it shall direct the department to supervise the care and treatment given to the minor; the department's supervision may not extend past the date the minor becomes 19 years of age, except that the department may petition the court for continued supervision for an additional one-year period for minors who have not responded to treatment; or

(3) by order, terminate parental rights and responsibilities of one or both parents and commit the child to the department or to a legally appointed guardian of the person of the child, if one of the following conditions exists:

(A) Each parent, or the surviving parent, or one parent if the other has been deprived of custody and visitation rights wishes to relinquish the child to the department or to a legally appointed guardian of the person of the child for adoptive purposes, and the relinquishment is in writing, signed and acknowledged before the court or duly authorized representative of the department and filed with the court;

(B) the child has been abandoned for a period of not less than six months by

(i) both parents, or

(ii) the surviving parent, or

(iii) one parent if the other has been deprived of custody and visitation rights;

(C) each parent, the surviving parent, or one parent if the other has been deprived of custody and visitation rights has been judicially determined to be of unsound mind and the disability has not been removed and the parent has been hospitalized for reasons of mental illness diagnosed as permanent or of long duration; or

(D) each parent, or the surviving parent, or one parent if the other has been judicially deprived of custody and visitation rights, has demonstrated by his conduct, proven by clear and convincing proof amounting to more than a preponderance of the evidence that he is unfit to continue to exercise his parental rights and responsibilities.

(e) If the court finds that the minor is not delinquent, a child in need of supervision, or dependent, it shall immediately order his release from its custody and his return to his parents, guardian, or custodian, and close the case.

(f) A minor found to be delinquent, a child in need of supervision, or dependent is a ward of the court as long as he is committed to the department or the department has the power to supervise his actions. The court shall review an order made under (b) or (c)(1) or (2) or (j) of this section annually, and may review the order more frequently to determine if continued placement, probation, or supervision is in the best interest of the minor and the public, and to determine if the minor is being treated fairly. The department or the minor's parents or guardian is entitled to a review on application. The minor need not be present at the review.

(j) If the court finds the minor is a child in need of supervision it shall make any of the following orders of disposition for his supervision, care and rehabilitation:

(1) any order which is authorized under (c) of this section; or

(2) order the minor placed on probation under those conditions and limitations that the court may prescribe.

(am § 1 ch 40 SLA 1967; am §§ 1—4 ch 27 SLA 1970; am §§ 12—15 ch 245 SLA 1970)

Effect of amendments. — The 1967 amendment rewrote subsection (c)(3)(B).

The first 1970 amendment added "or thereafter as the circumstances of the case may require" and "or a child in need of supervision" to subsection (a), inserted "a child in need of supervision" in subsection (e), inserted "a child in need of supervision" in the first sentence of subsection (f), and near the beginning of the second sentence of that subsection inserted "or [illegible]." The amendment also added subsection (j).

The second 1970 amendment substituted "19, except that the department may petition the court for continued supervision for an additional one-year period for minors who have not re-

sponded to treatment" for "21" in subsections (b)(1) and (b)(2), substituted "19" for "21" and added the exception in subsections (c)(1) and (c)(2).

As the rest of the section was not affected by the amendments, it is not set out.

Legislative committee reports.—For legislative committee report on ch. 40 SLA 1967 (HB 151), see House Journal (1967), p. 339. Chapter 215, SLA 1970 (HCSSB 339 am H), was identical to CSHB 406. For report on CSHB 406, see 1970 House Journal Supplement No. 6.

A judge cannot consider a juvenile offense as a criminal conviction for the purpose of prescribing a mandatory sentence. Berfield v. State, Sup. Ct. Op. No. 581 (File No. 960), 458 P.2d 1008 (1969).

The judge's consideration of factors relating to accused's life, characteristics, background and behavior prior to reaching the age of 18 years did not mean that he considered accused a criminal or that he was using the juvenile offenses as criminal convictions in determining the sentence to impose. Berfield v. State, Sup. Ct. Op. No. 581 (File No. 960), 458 P.2d 1008 (1969).

Sec. 47.10.100. Retention of jurisdiction over minor. (a) The court retains jurisdiction over the case and may at any time stay execution, modify, set aside, revoke, or enlarge a judgment or order, or grant a new hearing, in the exercise of its power of protection over the minor and for his best interest, until he becomes 19 years of age, unless sooner discharged by the court, except that the department may petition the court for continued supervision for an additional one-year period for minors who have not responded to treatment. An application for any of these purposes may be made by the parent, guardian, or custodian acting in behalf of the minor, or the court may, on its own motion, and after reasonable notice to interested parties and the appropriate department, take action which it considers appropriate.

(b) If the court determines at a rehearing that it is for the best interests of the minor that he be released to the care or custody of his parent, guardian, or custodian, it may enter an order to that effect and the minor is discharged from the control of the department.

(c) If a minor is adjudicated a delinquent, a child in need of supervision, or a dependent before his eighteenth birthday, the court may retain jurisdiction over him after his eighteenth birthday for the purpose of supervising his rehabilitation, but the court's jurisdiction over him under this chapter never extends beyond his nineteenth birthday, except that the department may petition the court for continued supervision for an additional one-year period for minors who have not responded to treatment. The department may retain jurisdiction over a child between his eighteenth and nineteenth birthdays for the purpose of supervising his rehabilitation, if he is committed to the custody of the department before his eighteenth birthday, except that the department may petition the court for continued supervision for an additional one-year period

Sec. 47.10.070. Hearings. The court may conduct the hearing in an informal manner in the courtroom or in chambers. All hearings under this chapter are without a jury and the usual rules of evidence do not apply. However, a hearing may be held before a young adult advisory panel in accordance with § 75 of this chapter. The court shall give notice of the hearing to the department and it may send a representative to the hearing. The court shall also transmit a copy of the petition to the department. The representative of the department may also be heard at the hearing. The public shall be excluded from the hearing, but the court, in its discretion, may permit individuals to attend a hearing, if their attendance is compatible with the best interests of the minor. (§ 10(1) art I ch 145 SLA 1957; am § 1 ch 49 SLA 1966)

Effect of amendment.—The 1966 amendment added the second sentence.

Legislative committee report.—For legislative committee report on ch. 49, SLA 1966, see House Journal (1966), p. 52.

Constitutionality.—See In re Gault, 387 U.S. 1, 87 Sup. Ct. 1428, 18 L. Ed. 2d 527 (1967), discussing due process requirements in juvenile delinquency proceedings.

Sec. 47.10.075. Young adult advisory panels. (a) Unless the minor objects, the court may select a young adult advisory panel to hear the case and advise the court of a recommended judgment and order. The court may consider any of the panel recommendations in making its judgment and order in the case.

(b) The principal of each high school shall submit annually to the court a list of the students enrolled in grades 10, 11 and 12. The court shall determine the method of selecting the members of each panel.

(c) A student shall be excused from attending school during the time he is serving as a panel member. No student may serve more than once each year on a panel.

(d) A student shall be excused from service as a panel member if he submits a written request to the court indicating the reason he does not wish to serve. (§ 2 ch 49 SLA 1966)

Legislative committee report.—For legislative committee report on ch. 49, SLA 1966, see House Journal (1966), p. 52.

Sec. 47.10.080. Judgments and orders. (a) The court, at the conclusion of the hearing, or thereafter as the circumstances of the case may require, shall find and enter a judgment that the minor is or is not a delinquent, or a child in need of supervision, or dependent minor.

(b) If the court finds that the minor is delinquent, it shall

(1) order the minor committed to the Department of Health and Welfare for an indeterminate period of time not to extend past a specified date or in any event past the day the minor becomes

19, except that the department may petition the court for continued supervision for an additional one-year period for minors who have not responded to treatment and may direct the minor's placement in a juvenile correctional school, detention home, or detention facility designated by the department; the minor may be released from placement or detention and placed on probation on order of the court; or

(2) order the minor placed on probation, to be supervised by the department, and release him to his parents, guardian, or a suitable person; if the court orders the minor placed on probation, it may specify the terms and conditions of probation; the probation may be for an indeterminate period of time, not to extend past a specified date and in no event past the day the minor becomes 19, except that the department may petition the court for continued supervision for an additional one-year period for minors who have not responded to treatment.

(c) If the court finds that the minor is dependent, it shall

(1) order the minor committed to the department for an indeterminate period of time not to exceed the date the minor becomes 19 years of age, except that the department may petition the court for continued supervision for an additional one-year period for minors who have not responded to treatment;

(2) order the minor released to his parents, guardian, or some other suitable person; if the court releases the minor, it shall direct the department to supervise the care and treatment given to the minor; the department's supervision may not extend past the date the minor becomes 19 years of age, except that the department may petition the court for continued supervision for an additional one-year period for minors who have not responded to treatment; or

(3) by order, terminate parental rights and responsibilities of one or both parents and commit the child to the department or to a legally appointed guardian of the person of the child, if one of the following conditions exists:

(A) Each parent, or the surviving parent, or one parent if the other has been deprived of custody and visitation rights wishes to relinquish the child to the department or to a legally appointed guardian of the person of the child for adoptive purposes, and the relinquishment is in writing, signed and acknowledged before the court or duly authorized representative of the department and filed with the court;

(B) the child has been abandoned for a period of not less than six months by

(i) both parents, or

(ii) the surviving parent, or

(iii) one parent if the other has been deprived of custody and visitation rights;

(C) each parent, the surviving parent, or one parent if the other has been deprived of custody and visitation rights has been judicially determined to be of unsound mind and the disability has not been removed and the parent has been hospitalized for reasons of mental illness diagnosed as permanent or of long duration; or

(D) each parent, or the surviving parent, or one parent if the other has been judicially deprived of custody and visitation rights, has demonstrated by his conduct, proven by clear and convincing proof amounting to more than a preponderance of the evidence that he is unfit to continue to exercise his parental rights and responsibilities.

(e) If the court finds that the minor is not delinquent, a child in need of supervision, or dependent, it shall immediately order his release from its custody and his return to his parents, guardian, or custodian, and close the case.

(f) A minor found to be delinquent, a child in need of supervision, or dependent is a ward of the court as long as he is committed to the department or the department has the power to supervise his actions. The court shall review an order made under (b) or (c) (1) or (2) or (j) of this section annually, and may review the order more frequently to determine if continued placement, probation, or supervision is in the best interest of the minor and the public, and to determine if the minor is being treated fairly. The department or the minor's parents or guardian is entitled to a review on application. The minor need not be present at the review.

(j) If the court finds the minor is a child in need of supervision it shall make any of the following orders of disposition for his supervision, care and rehabilitation:

(1) any order which is authorized under (c) of this section; or

(2) order the minor placed on probation under those conditions and limitations that the court may prescribe.

(am § 1 ch 40 SLA 1967; am §§ 1—4 ch 27 SLA 1970; am §§ 12—15 ch 245 SLA 1970)

Effect of amendments. — The 1967 amendment rewrote subsection (c)(3)(B).

The first 1970 amendment added "or thereafter as the circumstances of the case may require" and "or a child in need of supervision" [illegible] subsection (a), inserted "a child in need of supervision" in subsection (e), inserted "a child in need of supervision" in the first sentence of subsection (f), and near the beginning of the second sentence of that subsection inserted "or (j)." The amendment also added subsection (j).

The second 1970 amendment substituted "19, except that the department may petition the court for continued supervision for an additional one-year period for minors who have not re-

sponded to treatment" for "21" in subsections (b)(1) and (b)(2), substituted "19" for "21" and added the exception in subsections (c)(1) and (c)(2).

As the rest of the section was not affected by the amendments, it is not set out.

Legislative committee reports.—For legislative committee report on ch. 10, SLA 1967 (HB 131), see House Journal (1967), p. 330. Chapter 215, SLA 1970 (HCSSB 360 am H), was identical to CSHB 406. For report on CSHB 406, see 1970 House Journal Supplement No. 6.

A judge cannot consider a juvenile offense as a criminal conviction for the purpose of prescribing a mandatory sentence. Berfield v. State, Sup. Ct. Op. No. 561 (File No. 960), 458 P.2d 1005 (1969).

The judge's consideration of factors relating to accused's life, characteristics, background and behavior prior to reaching the age of 18 years did not mean that he considered accused a criminal or that he was using the juvenile offenses as criminal convictions in determining the sentence to impose. Berfield v. State, Sup. Ct. Op. No. 561 (File No. 960), 458 P.2d 1005 (1969).

Sec. 47.10.100. Retention of jurisdiction over minor. (a) The court retains jurisdiction over the case and may at any time stay execution, modify, set aside, revoke, or enlarge a judgment or order, or grant a new hearing, in the exercise of its power of protection over the minor and for his best interest, until he becomes 19 years of age, unless sooner discharged by the court, except that the department may petition the court for continued supervision for an additional one-year period for minors who have not responded to treatment. An application for any of these purposes may be made by the parent, guardian, or custodian acting in behalf of the minor, or the court may, on its own motion, and after reasonable notice to interested parties and the appropriate department, take action which it considers appropriate.

(b) If the court determines at a rehearing that it is for the best interests of the minor that he be released to the care or custody of his parent, guardian, or custodian, it may enter an order to that effect and the minor is discharged from the control of the department.

(c) If a minor is adjudicated a delinquent, a child in need of supervision, or a dependent before his eighteenth birthday, the court may retain jurisdiction over him after his eighteenth birthday for the purpose of supervising his rehabilitation, but the court's jurisdiction over him under this chapter never extends beyond his nineteenth birthday, except that the department may petition the court for continued supervision for an additional one-year period for minors who have not responded to treatment. The department may retain jurisdiction over a child between his eighteenth and nineteenth birthdays for the purpose of supervising his rehabilitation, if he is committed to the custody of the department before his eighteenth birthday, except that the department may petition the court for continued supervision for an additional one-year period



. . . while five spiffy new paint schemes achieve high promotional impact . . . and win some new riders, too

Cr[illegible] savings averaging 4c a mile — equivalent to de-pr[illegible]n — have been posted the first year by 15 new GM[illegible] diesel-powered 3301's purchased by Spokane Transit system.

[illegible] cents a mile is the difference in operating costs between this fleet and the average of all other coaches owned by the system.

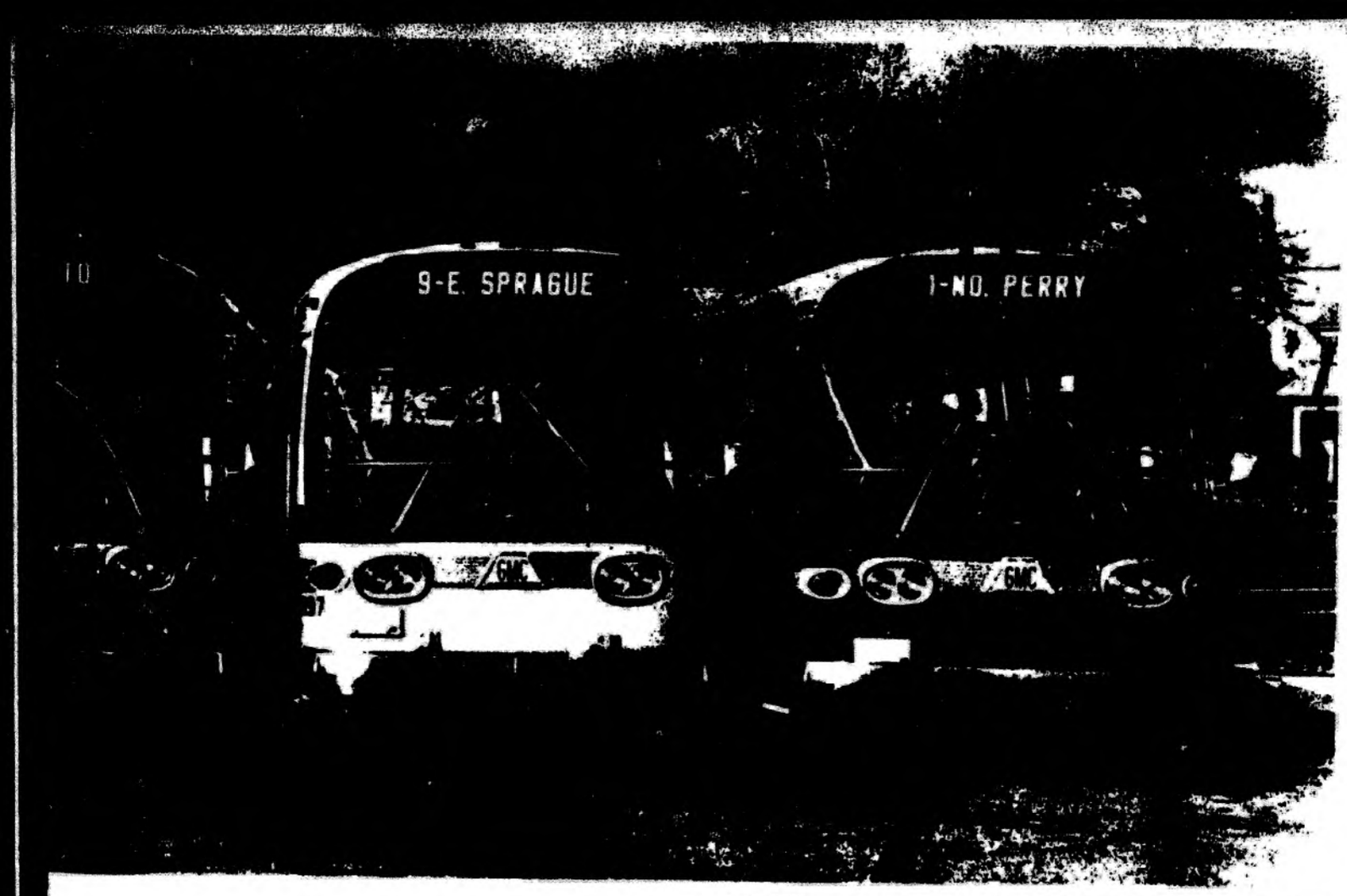
[illegible] of the saving is in fuel, since the new buses have been averaging 6.5 miles per gallon, nearly 2 miles per gallon better than the remaining fleet. All are GM[illegible] models ranging from a few 4507's up through Nov[illegible] 4517's. There are 66 coaches in the system.

In 740,958 miles, only 9 road calls

Operating 740,958 miles during their first 12 months, or 49,397 miles per vehicle, management reports only 9 road calls, 7 of which involved broken drive belts, for an average of 82,328 miles per call.

Engines have been trouble-free requiring only routine service. Likewise transmissions. Nor have there been any problems with air suspension.

"Considering our present requirements, the 33-passenger coach fits very well into our system," reports Robert V. Harder, General Manager. "We are planning a fleet of two-thirds small coaches and the other third, 45-passenger models. This means we will gradually phase out our older 45's and replace them with



additional 3301's as soon as funds become available.'

During the last year, while representing 22% of the fleet, the 3301's operated 37% of the mileage.

Reliability of the system's all-GMC fleet has resulted in excellent manpower-to-bus ratios. For example maintaining 66 coaches are 7 first class mechanics 2 second class mechanics, 5 utility men and 4 cleaners

Excitement in new colors

To focus city-wide attention on the new fleet, it was decided to use five different paint schemes, all of them bright and colorful — with interiors to match

"This multiple paint scheme created much favorable comment both locally and around the nation.' says Mr. Harder. "The maintenance cost is not any higher. However, it does affect our inventory of paint and repair materials." Subsequently, all older vehicles were repainted in one of the system's five new colors

More recently the system has been sustaining public interest with a Name-the-Bus contest.

Spokane Transit System serves a population of about 185,000 people with 117 one-way road miles. In 1969 the system operated 2,077,646 miles while carrying 4,123,685 people.

Estimates of passenger volume for 1970 have been projected in excess of 4,500,000.



Overseeing transit operations on behalf of the city are Mayor of Spokane David Rodgers, right; William Parker, Transit Commission Chairman, left; and Robert Wilkinson, Assistant Chairman, center.

While the system remains privately owned, it operates under a unique lease-management arrangement with the city, providing everything necessary for the operation on a cost-of-service basis. Recent legislation provides a subsidy of about $500,000 annually through a household transit tax of 73¢ per month per residence dwelling. As a result, 15 new buses have been purchased, headways increased and fares reduced. Responding to better service, passenger volume has been running higher throughout 1970.

SB-88

SENATE BILL 88 (Bar Association)

1. The present Board of Governors, as of 1955, includes 3 members from Southeastern, and 3 from the Second and Fourth Judicial Districts combined.

2. Half of the lawyers, or more, in the state are in the Anchorage area, and under the one-man--one-vote concept, Anchorage has felt that they should have greater representation on the 9-man board.

3. Obviously, the Ketchikan, Juneau and Tanana Valley Bar Associations don't approve, but the situation had almost reached the stage of throat-cutting.

4. Some of the members were even threatening to bolt the organization.

   At the May, 1970 Alaska Bar Association convention, a compromise resolution was approved. That compromise is reflected in this bill, which merely reconstitutes the board as follows:

   a. The Anchorage representation increases from 3 to 4.

   b. One of the 3 members is taken away from the Southeastern representation and one is taken from the 2nd and 4th District, making the apportionment 4--2--2.

   c. The 9th member will be elected on a state-wide basis.

5. All local bar associations and the State Bar, the Board of Governors, have approved the bill.

6. The second half of the bill merely provides that those members currently serving on the board will serve out their allocated terms. Only as each goes off the board will the new plan go into effect.

Offered: 2/2/71
Referred: Judiciary

IN THE SENATE BY THE JUDICIARY COMMITTEE

SENATE BILL NO. 88

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the Alaska Bar Association; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 08.08.050(a) is amended to read:

(a) Two [THREE] members of the board shall be elected by and from among the members of the association resident in the first judicial district; four [, THREE] members of the board shall be elected by and from among the members of the association resident in the third judicial district; two [, AND THREE] members by and from among the members of the association resident in the combined area of the second and fourth judicial districts; and one member at large from the entire state. [NO MORE THAN TWO MEMBERS MAY BE RESIDENT PRACTICING ATTORNEYS IN THE FOURTH JUDICIAL DISTRICT WHEN THERE ARE FOUR OR MORE RESIDENT PRACTICING ATTORNEYS IN THE SECOND DISTRICT.]

* Sec. 2. AS 08.08.050(c) is amended to read:

(c) Three board members shall be elected annually (on the following triennial rotation:) by the following

(1) in the first year, one member at large and two members from the third judicial district;

(2) in the second year, one member from the combined area of the second and fourth judicial districts, one member from the third judicial district, and one member from the first judicial district; and

(3) in the third year, one member from the first judicial district, one member from the combined area of the second and fourth

SB-99

Box 4 - W
Spenard, Alaska 99503

10 February 1971

State Representative
William Moran
Pouch V
Juneau, Alaska 99801

Dear Mr. Moran:

The bill introduced by Senators Groh, Rader, Ziegler and Ray to rescind certification of the Constitutional Referendum is a direct threat to all elective processes, past, present and future. It also amounts to an outright and outspoken accusation that we who voted for the Convention are dolts who did not know what we were voting for. I resent the implication involved and state categorically that I consider myself an interested and intelligent voter and that I knowingly and willfully voted in favor of the Constitutional Convention. Further, I have made many inquiries among friends and acquaintances and found that each who did vote in favor of the Referendum did so in the same willful and intelligent manner.

It is alarming to realize that a possibility exists within the Legislature to overturn the mass will of the voters at the ballot box. I feel that the Senators who introduced this measure have performed an obvious disservice to the people of the State of Alaska, and on that basis should seriously consider resigning from their present elective seats.

There is a group of us here in the Anchorage area, as well as another group in the Fairbanks area, who are organized to fight the legal action now pending in the courts in Juneau in the same issue. If the courts rule favorably for the plaintiffs and void the Referendum, we are poised to immediately bring the matter back into the courts and will challenge the outcome of all other elections held at the same time (3 November 1970).

There are many valid and serious reasons as to why the Convention must be held and a majority of us are convinced that the changes cannot be accomplished by the Legislature due to the very nature of them.

I thank you for your very kind attention and urge you to defeat the dangerous measure introduced by Senators Groh, Rader, Ziegler and Ray.

Very truly yours,

Jack A. Pearson

SB 113

March 5, 1971

MEMORANDUM

TO: The Honorable John Rader, Chairman
Senate Local Affairs Committee

The Honorable Mike Miller, Chairman
House Local Affairs Committee

FROM: Robert P. Isaac
Assistant to the Commissioner
Department of Education

SUBJECT: Review of Senate Bill 113, Municipal Code

I am herewith transmitting a review of the education provisions in Senate Bill 113. In our opinion the proposed code, if modified as suggested, would meet most of the objections which have been raised.

A small committee of school administrators and school board members would like an opportunity to meet with the respective legislative local affairs committees when hearings are again scheduled to discuss Senate Bill 113 as redrafted.

R. P. I.

RPI:cjb

Attachment

March 5, 1971

MEMORANDUM

TO: The Honorable John Rader, Chairman
Senate Local Affairs Committee

The Honorable Mike Miller, Chairman
House Local Affairs Committee

FROM: Cliff R. Hartman
Commissioner of Education

By: Robert P. Isaac, Assistant to the Commissioner

SUBJECT: Senate Bill 133, Revised Municipal Code in Respect to its Educational Provisions

We have reviewed the revised municipal code in respect to its education provisions, and we are especially concerned over the apparent omission of a specific education provision for school districts co-terminus with home rule municipalities.

A number of district superintendents, school board members, and other persons involved in education have also expressed a similar concern.

Section 29.33.050 pertaining to education is almost identical to a similar provision in the present borough law Title 7, (7.15.030). This section in the proposed revision applies only to the operation of schools in general law cities and boroughs.

Section 29.13.100 specifies the limitations on home rule powers and indicates the sections of the general code which may not be modified by a charter. Significantly, Section 29.13.100 does not include Section 29.33.050, Education, thereby giving a home rule municipality considerable latitude in legislating educational matters. It is our contention that education is a State function and delegated to the municipalities for administration and operation. We do not believe this delegation of the administrative-operational responsibility of schools also implies a delegation of the Legislature's legislative prerogatives.

As you may know, there is a local court case which revolves around this very matter; and while a decision has not yet been reached by the court, case law strongly supports State law as being superior to charter provisions if there is a conflict between the two.

Proponents of the concept that a charter may supercede State law argue that home rule municipalities may legislate on matters of local concern, including education, even though it might mean that charter provisions take an opposite view in respect to the law. They further argue that the Legislature, by placing the municipal education provision in the municipal code, have made education a matter of local concern.

We do not agree with this supposition. We believe that the specific provision in the existing borough code, Section 7.15.030 and its proposed successor, Section 29.13.100 in the revised code, are adopted by reference in Title 14 by Section 14.14.065, thereby defining this section as a general education law.

We do not argue that a municipality does not have a local concern or interest in education; however, we do believe that all municipal districts should be governed by the same basic laws and that a home rule municipality charter should not be in conflict with law.

The Department of Education is charged with the general management and supervision of the public school system and must do so in accordance with State law.

If a municipality also has legislative authority in respect to education, it would mean requiring the Department to adjudicate district education matters not only under State law, but under the provisions of home rule charters. As has happened already, we would foresee school boards requesting clarification and interpretation of law when conflicts arise. In this connection, it is likely a request of this nature would be referred to the Department of Law for an opinion. Whatever direction the opinion might give, the Department of Education is required to follow that direction (unless subsequently changed by court or legislative action). In order to write an opinion, the Department of Law would also have to read the charter and law together to arrive at a conclusion. In our opinion, such a procedure would be chaotic and unworkable and would only lead, ultimately, to greater devisiveness between local municipal governing bodies and school boards.

The Legislature, in accordance with the Constitution, has delineated quite clearly its intent in providing for public education. The following sequence of constitutional and State law provisions indicates how this was accomplished and the application of these provisions to the foregoing discussion:

Constitution: Article VII, Health, Education, and Welfare

> Section 1. Public Education. The Legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions. Schools and institutions so established shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.

Title 14:

> Section 14.03.010. Establishment of a School System. There is established in the State a system of public schools to be administered and maintained as provided in this title. (Sec. 1, Ch. 98, SLA 1966)
>
> Section 14.14.065. Relationship Between City School District and City. The relationships between the school board of a city school district and the city council and executive are governed in the same manner as provided in AS 07.15.330 for the school board of a borough school district and the borough assembly and executive. (Sec. 1, Ch. 98, SLA 1966)

By reference, Section 14.14.065 adopts 07.15.330 (29.33.050) and establishes it as general law to be observed by city and borough school districts, whether home rule or not.

Although there might be a number of alternatives, it would appear the most feasible recommendation we could make is to include Section 29.33.050 in the home rule limitations, Section 29.13.100. Such a revision would at least maintain the status quo.

If it is believed Section 29.33.050 is not adequate for both general law and home rule municipalities, we would then recommend the Legislature make such revisions as might be necessary. Our only case in point is that the education provisions should be in law and not in the charter, unless the law is repeated in the charter for convenience.

We would be glad to meet with the committees on this matter at their convenience.

RPI:cjb

Attachment

File: 023.1
023.2
022

SB 123

State Shoplifting Laws — A Chains Best Friend

Shoplifting laws have been enacted in forty-nine states. The District of Columbia has no laws which deal with the specific crime of shoplifting. California, while it has no shoplifting law, as such, the law of arrest allows a police officer to make an arrest when he has reasonable cause to believe a felony has been committed by the person arrested without incurring liability for false arrest. Decisions of the State Supreme Court and other appellate courts have held that a merchant or his employee may detain a suspected shoplifter for a reasonable time if he has probable cause to believe goods have been stolen (Collyer v. Kress; 5 California 2d, 175).

The first decision by the high court of any of the 49 states which have shoplifting laws was handed down by the Supreme Court of North Carolina on December 13, 1961. The Decision ruled the law was valid and sustained the conviction of shoplifter. (State v. Hales). The following chart indicates by a dot each state's inclusion in shoplifting laws of the United States.

	1	2	3	4	5		1	2	3	4	5
Alabama	●	●	●			Montana	●	●	●		
Alaska	●			●	●	Nebraska	●	●	●		
Arizona	●	●	●		●	Nevada	●	●	●		
Arkansas	●	●	●	●	●	New Hampshire	●			●	●
California (See Above)						New Jersey	●	●	●	●	
Colorado	●	●	●	●	[A]	New Mexico *	●	●	●	●	[A]
Connecticut	●			●	●	New York	●	●	●		
Delaware	●	●	●	●	●	North Carolina	●			●	●
Florida	●	●	●			North Dakota	●	●	●		
Georgia	●	●	●		[A]	Ohio *5	●	●			●
Hawaii	●	●	●			Oklahoma	●	●	●	●	●
Idaho	●			●	●	Oregon	●	●	●		●
Illinois	●	●	●			Pennsylvania	●	●	●	●	●
Indiana	●	●	●	●	●	Rhode Island	●	●			●
Iowa	●	●	●	●	●	South Carolina	●	●	●	●	●
Kansas *	●		●		[A]	South Dakota	●	●	●	●	●
Kentucky	●	●		●	●	Tennessee	●	●	●	●	●
Louisiana	●	●	●	●		Texas	●	●	●		[A]
Maine	●			●	●	Utah	●	●	●		
Maryland	●		●		[A]	Vermont	●	●			
Massachusetts	●		●	●		Virginia	●		●		●
Michigan	●		●			Washington	●		●		●
Minnesota	●	●	●			West Virginia	●	●	●		[A]
Mississippi	●	●	●	●	[A]	Wisconsin *	●	●	●	●	[A]
Missouri	●	●	●	●		Wyoming	●	●	●		●

Chart based on information supplied by the Association of General Merchandise Chains and the Institute of Distribution

*As last amended 1969. *8 Amendment of 1969. *1959, Wisconsin enacted additional law permitting a person to threaten or use force against another for the purpose of preventing or terminating what he believes to be an unlawful interference with his property. Third persons may use similar means to defend another's property provided property belongs to a merchant and third party is his employee or agent of property.

Provisions of Shoplifting Laws

1) Definition of shoplifting or theft of merchandise. This includes any or all of the following: removing unpurchased goods from within the store with intent to steal; concealment of unpurchased goods with intent not to pay for same; alteration of price tag or other markings; transfer of goods to another person or another container with intent to steal. One who assists or abets is also guilty.

2) Right of detention. This includes giving the right to a merchant, his employee or a peace officer to detain a suspected shoplifter for a number of reasons. These vary in different states and can include questioning with regard to ownership of the goods and questioning witnesses to the alleged act. This right is limited to a reasonable time—sometimes defined in the law—with the manner of detention also a reasonable one. Probable cause must exist for believing a crime was committed and the suspect committed the act. Few laws define probable cause and reasonable grounds with the judicial criteria usually being what the careful and prudent man would do under the circumstances.

3) Immunity from suit. This includes immunity from various civil and criminal actions if the merchant, his employee or peace officer takes the suspect into custody to detain him in a reasonable manner and for a reasonable length of time. Such custody and detention does not make merchant, his employee or officer liable for slander, false arrest, false imprisonment or unlawful detention.

4) Presumption of guilt. This includes wilful concealment of goods as *prima facie evidence* that intent to shoplift the items existed with the suspect having the burden to prove that this intent did not exist. This presumption often includes the presumption that finding unpurchased goods indicated that the items were wilfully concealed with intent to steal.

5) Penalties. This includes graduated fines and imprisonment penalties as a deterrent with some states (indicated by [A] adding felony punishment by imprisonment for not less than one year nor more than 20 years.

SB 103

STATE OF WASHINGTON
JOHN J. O'CONNELL
ATTORNEY GENERAL
TEMPLE OF JUSTICE
OLYMPIA, WASHINGTON 98501

May 19, 1967

Honorable Harold E. Wolf
State Representative
Twenty-second District
Clark Road
Yelm, Washington

Dear Representative Wolf:

By letter previously acknowledged you have requested an official opinion of this office on several questions concerning the provisions of chapter 76, Laws of 1967.

For purposes of discussion, we shall set forth in full the language of § 3 of this act, which reads as follows:

> "In any civil action brought by reason of any person having been detained on or in the immediate vicinity of the premises of a mercantile establishment for the purpose of investigation or questioning as to the ownership of any merchandise, it shall be a defense of such action that the person was detained in a reasonable manner and for not more than a reasonable time to permit such investigation or questioning by a peace officer or by the owner of the mercantile establishment, his authorized employee or agent, and that such peace officer, owner, employee or agent had reasonable grounds to believe that the person so detained was committing or attempting to commit larceny or shoplifting on such premises of such merchandise. As used in this section, 'reasonable grounds' shall include, but not be limited to, knowledge that a person has concealed possession of unpurchased merchandise of a mercantile establishment, and a 'reasonable time' shall mean the time necessary to permit the person detained to make a statement or to refuse to make a statement, and the time necessary to examine employees

> and records of the mercantile establishment relative to the ownership of the merchandise."

Notably, § 2 of the act contains an identical provision with respect to ". . . any criminal action . . ."

Before turning to your questions, we should note and explain that the provisions of §§ 2 and 3 of chapter 76, Laws of 1967, supra, are merely phrased in terms of providing a merchant or a shopkeeper with a defense against civil or criminal liability with regard to matters involved in detaining a suspected shoplifter, where the merchant or shopkeeper has complied with the provisions of the new law. In other words, the new provisions do not purport to authorize any particular activity by a merchant or shopkeeper; rather, they simply provide a defense for him in the event he is sued or prosecuted, assuming that he can show that he acted within the terms of the sections.

The statute itself is patterned after a New York statute (New York Laws of 1960, chapter 1005, codified as General Business Law, § 218). There has been no reported experience under the New York act as of the date of this writing, and the source of the statute is mentioned here only because, knowing the source, it is evident that the new sections of chapter 76 were intended to have at least as broad, and perhaps broader application than the New York statute. The New York statute specified the types of action in which the defense would be available to a shopkeeper. Our statute makes the defense available in any criminal action, in the case of § 2, and in any civil action, in the case of § 3, ". . . brought by reason of any person having been detained on or in the immediate vicinity of the premises of a mercantile establishment for the purpose of investigation or questioning as to the ownership of any merchandise. . . ."

Preliminary to answering your questions some general observations concerning the common law right of a shopkeeper to detain a person who is reasonably suspected of having shoplifted an article of merchandise might be helpful to an understanding of our analysis of the questions presented. First, it should be noted that without statutory authority a shopkeeper could detain a customer or patron of his store who apparently had not paid for what he had received, for a reasonable length of time to investigate the circumstances. Rogers v. Sears, Roebuck & Company, 48 Wn. 2d 879, 297 P. 2d 250 (1956);

Restatement of Torts 2d, § 120 A; 22 Am. Jur. 368; 35 C.J.S. 640. Grounded as it was on the right to protect or recapture one's property, the right to detain a shoplifter necessarily ceased upon the return of the goods taken or the expiration of a reasonable time to investigate the taking. See, Teel v. May Department Stores Co., 348 Mo. 696, 155 S.W. 2d 74, 137 A.L.R. 495 (1941); Restatement of Torts, § 120 A, Comment "f". While it is a general rule that whether the detention was lawful must be determined as of the time of the detention (35 C.J.S. 640), some courts have made a distinction between the right to detain for purposes of recaption of property and a detention for the purpose of vindicating public justice, holding in the latter case that a subsequent acquittal or dismissal of criminal charges has a bearing on the lawfulness of the detention. See, Annos. 35 A.L.R. 645; 92 A.L.R. 2d 15; 35 C.J.S. 660.

In a case where the employee of a drug store was also a deputy police officer, and the act which gave rise to the detention was prosecuted, resulting ultimately in acquittal of the suspect, our court did not see fit to discuss the dual nature of the employee's right to detain the suspect. Instead it based its opinion upon the fact that the employee, a police officer, was entitled to assert a defense of reasonable cause. Sennett v. Zimmerman, 50 Wn. 2d 649, 314 P. 2d 414 (1957). Analysis of that case leaves one with the inference that had the employee not been a police officer the mere fact that he had reasonable grounds to believe that the person detained had taken property from the store in which he was employed would not have been a defense to him or the store in the subsequent suit by the suspect.

In any event, subsequent to that case the legislature passed chapter 229, Laws of 1959 making shoplifting a distinct crime, authorizing a peace officer to make an arrest without a warrant for that misdemeanor, even though it was not committed in his presence, and made "reasonable cause" a defense to certain civil actions brought against the peace officer by a person suspected of shoplifting. The loose language of the last-mentioned section was criticized by Professor Arvil A. Morris, 34 Washington Law Review 308. Repeal of that section and substitution therefor of chapter 70, Laws of 1967 brings us to your questions.

You ask for a legal interpretation of "reasonable grounds" as that term is used in the statute. The statute itself defines the term as follows:

> ". . . As used in this section, 'reasonable grounds' shall include, but not be limited to, knowledge that a person has concealed possession of unpurchased merchandise of a mercantile

establishment . . . "

Because the determination of what "reasonable grounds" might include is susceptible to so many variables, dependent upon the particular circumstances in the context of which the term is sought to be defined, it is impossible to define the term with any precision. Certainly, the fact-finder in a suit in which the new statute is involved will, in most circumstances, decide whether the merchant had reasonable grounds to detain the suspect. Some general observations may be made, however. Whether the detention contemplated by this section is an arrest, it does seem clear that it is something akin to arrest and that the general criteria for determining an officer's right to arrest for a felony provides guidelines. In State v. Massey, 68 Wn. 2d 88, 411 P. 2d 422 (1966) the Washington Supreme Court outlined these rules as follows:

> ". . . (1) An officer has cause for an arrest if he has reasonable grounds for suspicion, together with evidence of circumstances to warrant a cautious man in believing the accused to be guilty. State v. Hughlett, 124 Wash. 366, 214 Pac. 841 (1923). (2) An officer has probable cause to arrest without a warrant if he has knowledge which would convince a cautious but disinterested person that the accused is guilty of a felonious offense. State v. Darst, 65 Wn. 2d 808, 399 P. 2d 618 (1965); State v. Smith, 56 Wn. 2d 368, 353 P. 2d 155 (1960); Beck v. Ohio, 379 U.S. 89, 13 L. Ed. 2d 142, 85 Sup. Ct. 223 (1964); Wong Sun v. United States, 371 U.S. 471, 9 L. Ed. 2d 441, 83 Sup. Ct. 407 (1963). (3) An officer is not required to have knowledge of evidence sufficient to establish the guilt of the accused beyond a reasonable doubt. Draper v. United States, 358 U.S. 307, 3 L. Ed. 2d 327, 79 Sup. Ct. 329 (1959)."

By paraphrasing the above rules, substituting shopkeeper where officer appears, detention where arrest appears, and shoplifting where felonious offense appears, it is suggested that a fairly good set of guidelines are set out for a merchant wishing to stay within the terms of the statute being discussed, at least until more precise rules are defined by the courts in construing the term as used in this section.

Your next question—what is a reasonable time? — like the previous question, is not susceptible to precise definition. The definition within the statute is:

> ". . . 'reasonable time' shall mean the time necessary to permit the person detained to make a statement or to refuse to make a statement, and the time necessary to examine employees and records of the mercantile establishment relative to the ownership of the merchandise."

It is obvious that here the legislature has expanded the term "reasonable time" beyond the confines inherent in the term as it was understood at common law. Perhaps the most precise statement of what a reasonable time for detention is, absent statutory authority, is found in Comment "f" of the Restatement of Torts 2d, § 120 A, which reads:

(2)

> "The privilege is one of detention on the premises for only the time necessary for a reasonable investigation. Investigation does not mean discovery of all of the facts, but only such inquiry as may reasonably be made under the circumstances, promptly and without undue detention. What is a reasonable time will depend upon all of the circumstances, including the nature of the misconduct suspected, the amount involved, the explanation or denial offered by the other, his willingness to cooperate, and the time required to consult readily available sources of information. Normally, such a reasonable time will be short. Fifteen minutes may be too long where all that is necessary is to ask a clerk whether the other has paid. If the detention is continued beyond the time reasonably necessary for investigation, the actor is liable for the excessive detention."

(3)

The statute authorizes detention beyond that set forth in the underscored portion of the quote to the extent that it permits detention for "the time necessary to make a statement or refuse to make a statement." Detention for this purpose was clearly not authorized at common law. See, Teel v. May Department Store Co., supra.

Does "reasonable time" include the time necessary for an officer to arrive on the scene? Of course, if an officer arrives while the storekeeper is taking a statement or examining employees

and records relative to the ownership of the merchandise allegedly taken, clearly the merchant is within the terms of the statute, and the defense afforded by it is available to him. A more knotty problem arises when an officer has not arrived on the scene at the time the statutory purposes have been accomplished. Since the statutory definition is in derogation of the common law, and since a statute in derogation of common law is to be strictly construed, (Sutherland, Statutory Construction, 3d Ed. § 6201,) the cautious answer would be that a detention, after accomplishment of the questioning relative to the statement and investigation of the employees and records of the mercantile establishment, is unlawful; and, consequently, the defense afforded by the statute may be lost to a merchant seeking to avail himself of it. (A strong argument can be made, however, reaching the opposite result. The legislature is presumed to be aware of existing statutes relating to the same subject. Hatzenbuhler v. Harrison, 49 Wn. 2d 691, 306 P. 2d 745 (1957). It is thus presumed to be aware of the existence of chapter 229, Laws of 1959. That statute, by singling out shoplifting as a separate offense and authorizing a peace officer to arrest without a warrant when he had reasonable cause to believe a suspect had committed that crime was certainly a legislative attempt to ease the dilemna created by the common law rules regarding unlawful detention and to facilitate prosecution of shoplifters. Morris, 34 Washington Law Review 308. The repeal of section 3 of that act, permitting the defense of reasonable cause to be asserted by a peace officer sued as a result of such a detention, and a substitution therefor of the present section granting a defense not only to peace officers but to the owner of the store and his authorized employees in no way would indicate a recession by the legislature from that position.)

Because both terms, "reasonable grounds" and "reasonable time", are incapable of accurate abstract definition, it is strongly urged that shopkeepers who intend to vigorously avail themselves of their right to detain shoplifting suspects consult with their attorney regarding a standard practice to be followed by the store and its authorized employees relating to shoplifting. Certainly, what that practice might be will vary depending upon the type of business conducted and other circumstances.

Your final question has to do with the responsibility of a shopkeeper to advise a detained suspect of his constitutional rights. There is at present no obligation on the part of a private citizen, or for that matter, on police officers, to advise a detained person of such constitutional rights as the

right to remain silent, the right to an attorney, etc. Certainly, whether or not the suspect had been so advised would in no way be material to the question of whether the shopkeeper acted within his rights and within the terms of the statute under discussion. Whether a statement obtained from such a suspect without having first advised him of his constitutional rights would be admissible in a criminal prosecution is an issue we do not reach in this opinion.

We hope this has been of some assistance to you.

Very truly yours,

JOHN J. O'CONNELL
Attorney General

RICHARD A. MATTSEN
Assistant Attorney General

RAM:lm

SB-123

ALASKA RETAIL ASSOCIATION

POSITION PAPER ON SB 123
RELATING TO THE DETENTION OF SUSPECTED SHOPLIFTERS

Nearly everyone will agree that the crime of shoplifting is epidemic throughout the United States. The latest national figures indicate that shoplifting causes losses to the consuming public amount to 3 billion dollars annually. This, indeed, contributes heavily to our present high cost of living. It has been stated, moreover, that shoplifting, coupled with internal theft, is responsible for about 30% of all business failures in the United States.

Specific figures on shoplifting losses for Alaska are not available. However, the Anchorage Chief of Police estimates that retailers of all sizes throughout the State lose an average of $7,000 apiece each year. As there are approximately 2,000 retailers of all types in Alaska, this means that Alaskans are subject to a loss of $14,000,000 annually.

Existing statutes and municipal codes, if enforced, are adequate to help combat the shoplifting problem. The main problem encountered in Alaska, and all other areas, in enforcement is the understandable reluctance of merchants, and even professional store detectives, to apprehend suspected shoplifters for fear of being subjected to false arrest litigation.

SB 123, relating to the detention of suspected shoplifters, would, we feel, provide just the right degree of protection to merchants and their agents against frivolous false arrest suits. This protection would encourage merchants to make apprehensions when a crime is apparently in process, thus helping to combat this very serious crime wave.

SB 123 is designed to allow reasonable protection to the merchant or his agent without promoting undue harassment of customers and without violating the rights of those who may be accused. It requires that the merchant, or his agent, have reasonable grounds to suspect that a crime has been committed before being allowed to detain a suspect. The circumstances of the detention must be such that the merchant or his agent had specific cause to believe a theft was in process before he would have an effective defense under this law and that the detention was accomplished in a reasonable manner and only for a reasonable time.

In summary, the general lack of prosecution is probably the one single factor which has contributed to making the crime of shoplifting so widespread in our country. Professional shoplifters and, indeed, amateur thieves are encouraged in their activities as they feel secure in the knowledge that the merchant is reluctant to prosecute. As this reluctance is caused, in a large part, by the merchant's fear of false arrest suits, or criminal action for false arrest, we feel that the provisions of SB 123 would aid greatly in encouraging retailers to prosecute those who are stealing from all of us.

We respectfully urge your favorable consideration of SB 123 as we are convinced that its provisions will aid significantly in combating a serious and costly crime -- shoplifting.

Dean Ehrich
Executive Director

ANCHORAGE NATURAL GAS COMPANY

A Divison of Alaska Public Service Corp.

P. O. BOX 6288
ANCHORAGE, ALASKA 99502

3000 SPENARD ROAD
PHONE 277-5551

SB 136

March 16, 1971

Honorable William J. Moran, Chairman
Judiciary Committee
House of Representatives
Juneau, Alaska

Dear Chairman Bill Moran:

While we were writing our comments on SB 136 yesterday, it passed the Senate. Apparently there was little notice of any public hearing, if any. We believe this Bill deserves closer review, for reasons given in the enclosures. Perhaps none of these reasons came to the attention of the Senators during its brief stay in Committee. By telephone today we have requested the opportunity to be heard on this matter (probably before the House Commerce Committee).

In the past, the fuel oil dealers (and subdividers) have entered regulatory proceedings against us, before the Commission. Although they admitted in their testimony that the public should have a free choice among all forms of fuel service, by their practice, and by the proposed amendment (SB 136), they would perpetuate their monopolistic practices.

We believe that the purpose of "regulation" would be thwarted by trailer court operators and subdividers (and where applicable, by apartment house owners) being left free to extract the "kick-back" described by Mr. Hall (Executive Director of the Commission), while refusing to allow natural gas service to be offered to their tenants. Surely the Legislature would not permit these practices to continue unchecked by the authority of the Public Utility Act and Commission.

We would appreciate advance notice and opportunity to appear when hearings are scheduled on this proposed amendment.

Very truly yours,

ANCHORAGE NATURAL GAS COMPANY

By Dale

Dale Teel
President

DT:kl
Enclosures

Alaska Public Service Corporation

P. O. BOX 6288
ANCHORAGE. ALASKA 99502

3000 SPENARD ROAD
PHONE 277-5551

March 15, 1971

Honorable Joe Josephson
and Honorable Ron Rettig
Alaska Senate
Juneau, Alaska 99801

Gentlemen:

We have just received copies of SB136, which would revise the definition of a public utility for the purpose of avoiding "....unnecessary regulatory procedures over petroleum fuel dealers delivering to trailer courts and apartment buildings..." except "when the consumer has no alternative in his choice of supplier of a comparable product at an equal or lesser price."

We have obtained a copy of the comments made by Mr. Don Hall, Executive Director of the Alaska Public Utilities Commission, regarding regulation of fuel dealers in general and this Bill in particular; Mr. Hall's comments were made in response to an inquiry by Mr. Robert Butler, Deputy Commissioner of Commerce. Copy of Mr. Hall's memorandum is enclosed; we believe his enclosures, which are obtainable from Mr. Butler, may be quite helpful to you in following his comments.

We have submitted our own comments on the fuel dealers' formal requests for exemption from regulation (APUC Cause U-7-71 through Cause U-11-71) by letter to the Alaska Public Utilities Commission, and copy of these comments is also enclosed for your review.

We hope you will understand our position--that when the tenants of trailer parks and apartment houses are precluded from the opportunity to receive or have natural gas utility service, an effective monopoly may exist even though it may be shared by two or more fuel oil dealers, which would be allowable without regulation under the language of your Bill (SB136).

The "kickback" referred to in Mr. Hall's memorandum to Mr. Butler is of course a central issue in this matter. We believe that such "kickback," which is referred to in our letter as an "incentive payment," explains the unwillingness of owners and operators of trailer courts and apartment house projects to allow natural gas service to be installed on their properties. In some cases, notably in the trailer court called "Dimond Park Estates," the owners are themselves also owners of the fuel distribution system. This project involves 400 trailer spaces, and may at

present dominate the house trailer market of the Anchorage area. No "kickback" may be in effect on this project, but the restraint of competition through refusal to allow natural gas service to be installed still would produce an effective monopoly which is normally cause for regulation.

Anchorage Natural Gas has always welcomed competition and has never sought to impose burdensome regulations upon underground oil and propane utilities. We do seek to see elimination or control of practices which appear to be unfair to consumers as well as to us. We believe that the Certificate of Public Convenience and Necessity which was issued to us by the Alaska Public Utilities Commission is being seriously infringed by continuation of such practices and that the best interest of a large portion of the public in our service area is harmed as a result.

All we ask is the opportunity to compete. We do not favor "...unnecessary regulatory procedures," nor are we seeking any competitive privilege other than relief from "affiliated interest" agreement by our competitors which effectively excludes us from an opportunity to compete. We do not believe SB136 can be administered to achieve the intended purpose and still protect the public interest. We are opposed to this Bill because:

1. It would foster -- and legitimize -- the continuation of "kick-backs" by dealers of oil and propane to owners of trailer courts and apartment houses.

2. It would perpetuate the condition in which Anchorage Natural Gas is being excluded from competition to serve trailer courts and apartment houses.

3. It would allow -- and practically invite -- price fixing by dealers of oil and propane, and would thus be in restraint of competition.

4. It would foster the continuation of shoddy and unsafe installation of underground systems for oil and propane, with obvious hazard to residents of areas so served.

For the foregoing reasons, we would request that if hearings are scheduled on SB136, we and our attorneys (Law Firm of Robison, McCaskey, Strachan, and Hoge) be notified by collect telegram or telephone so that we may have the opportunity to appear and support our position as necessary.

Very truly yours,

Dale Teel
President

cc: Mr. Don Hall and
Each Commissioner
Alaska Public Utilities Commission

Alaska Public Service Corporation

P. O. BOX 6288
ANCHORAGE, ALASKA 99502

3000 SPENARD ROAD
PHONE 277-5551

March 11, 1971

Alaska Public Utilities Commission
700 MacKay Building
338 Denali Street
Anchorage, Alaska 99501

Cause Nos. U-71-7/U-71-11
Inclusive

Gentlemen:

This letter is in response to the various Notices received from the Commission regarding Certification (or Exemption) of the fuel oil and propane dealers (Applicants) listed in the attached summary.

Alaska Public Service Corporation has been certificated by the Commission to provide natural gas utility service in the greater Anchorage area and on the Kenai peninsula, and is thus in competition with these Applicants to serve the energy requirements of these areas. Our position is that such competition is in the public interest and that regulation should not serve to inhibit such competition. However the practices of various of these Applicants appear to us to warrant an in-depth investigation by the Commission before a decision is made to exempt any of the Applicants from regulation by the Commission.

Specifically, we believe that competition is now being inhibited in many instances, if not generally, through the mechanism of an "incentive" paid to developers or owners of land on which these Applicants' fuel delivery systems are installed. The developers or owners of land served by Applicants underground systems become "affiliated interests" and subject to jurisdiction of the Commission, by their agreements or contracts with the Applicants. We understand the "incentive" is as much as 2¢ per gallon of fuel oil sold to the end users served by these systems, and a lesser amount per gallon of propane. We further believe that as a result of such "incentive payments" the developers or owners are resisting or refusing to allow natural gas distribution systems to be installed in the Applicants' areas of operations, or are discouraging their tenants or customers from giving fair consideration of natural gas utility service where it has been made available, thereby creating an effective monopoly by the fuel dealer serving the area. We further believe that in several cases some of the Applicants or their affiliated interests are owners or otherwise in control of the land served by them and that in such cases natural gas has been placed in an unfair position.

KA PUBLIC SERVICE CORPORATION
O. BOX 6288
CHORAGE. ALASKA

We believe that the Commission can and should move to prohibit the payment of such "incentives" by Applicants to the developers or owners of land and to restrain both applicants and developers and owners of land from discouraging the acceptance of natural gas by the end users of fuel in their areas of operation on such land. We believe moreover that where Applicants are the developers or owners of such land (or affiliated interests thereof), such Applicants should be ordered not to preclude or resist the reasonable and lawful efforts of Alaska Public Service Corporation (or other fuel sources) to compete for, attract, and serve the end users of fuel in such areas, and should be ordered to cooperate with Alaska Public Service Corporation (and others) as to access to the land for the purpose of construction, operation, maintenance of natural gas distribution facilities and appliances on such land.

If the foregoing position were to be adopted by the Commission, then Alaska Public Service Corporation would not oppose Applicants' requests for exemption (more accurately, "partial exemption, under AS 42.05.711(d)") from the full effect of regulation, specifically in whatever of Applicants' areas of operation natural gas service has been made available to end users in such areas.

We recognize the benefits of having the Commission and its staff and resources available to the public for receiving complaints and resolving matters of dispute, and we believe the Commission should not suspend its jurisdiction in this respect, or in the respect of safety (e.g., enforcement of the Pipeline Safety Act of 1969), or in the respect of preventing collusion or conspiracies or practices which would inhibit competition both among the Applicants and by Alaska Public Service Corporation, as a certificated natural gas utility serving most of the subject areas. We believe the Commission is empowered to achieve these benefits without the need for the full extent of filings, hearings, fiscal and other reporting, and formal proceedings which would be costly and burdensome to both the Commission and the Applicants.

Appropriate legal briefs and additional comments will be supplied during the course of these proceedings.

Very truly yours,

Dale Teel
President

Enc.: Listing of APUC Notifications to which foregoing letter pertains

cc: Each Applicant
Each Commissioner

ALASKA PUBLIC SERVICE CORPORATION
P. O. BOX 6288
ANCHORAGE, ALASKA

Attachment to APSC Letter
to Alaska Public Utilities Commission
Regarding Application of Various Fuel Oil & Propane Dealers
For Exemption from Regulation as Public Utilities

Cause No.	Notice Date	Reply Date	Applicant
U-71-7	February 22	March 12	Standard Oil Company 1689 C Street Anchorage, Alaska 99502
U-71-8	February 23	March 15	Peters Creek Fuel & Service, Inc. Post Office Box 128 Eagle River, Alaska 99577
U-71-9	February 25	March 15	Day and Night Fuel Company, Inc. 608 East Fireweed Anchorage, Alaska 99503
U-71-10	February 25	March 15	Denali Fuel Company et al 1525 East Fourth Avenue Anchorage, Alaska 99501
U-71-11	February 25	March 15	Petrolane-Anchorage Gas Service, Inc. et al 1200 Whitney Road Anchorage, Alaska

(Alaska Public Service Corporation opposes Exemption of above from regulation except in the event, and to the extent, that natural gas service is made available to end users in each of the respective utility systems operated by the above Applicants. Refer to attached letter and Legal Brief for further details.)

Certificate of Service

We hereby confirm that we have served a copy of this letter on Applicant(s) listed above, by mail to the address(es) listed in the Notice(s) of Application; and to each Commissioner by separate mailings.

RECEIVED
MAR 11 '71

March 11, 1971

Alaska Public Service Corporation

EX DIR	
DEP DIR	
ATTY	
ANALYST II	
ENGR	
ANALYST I	
ACCT II	
FILE	

MEMORANDUM

State of Alaska
DEPARTMENT OF COMMERCE

John info to me return to me Paul.

TO: Mr. Robert E. Butler
Deputy Commissioner
Department of Commerce

DATE : March 3, 1971

FROM: Don Hall
Executive Director
Alaska Public Utilities Commission

SUBJECT: S. B. 136
Revision of
AS 42.05.701 (2) (E)

SUMMARY

Complying with your request for comments on S. B. 136 is far easier said than done as you can see by the length of this memorandum and the amount of back-up material that accompanies it. Therefore, I thought it might be helpful and time-saving to summarize, at the outset, some of the main points I have developed and documented. Here they are:

1. In my view, the question of whether fuel oil dealers, or any other person or firm, should or should not be regulated, or exempt from regulation, in whole or in part, is properly a matter of legislative policy concerning which administrators, such as I, should not comment. Therefore, I respectfully decline to make any recommendation other than suggest the facts be examined to see if they fully support a finding that regulation of the operations in question is "unnecessary" as indicated in the stated purpose of the Bill.

2. The question should not be resolved solely on the basis of alternative choices by the customer as to comparable products and service related to the price paid. Our research, and some of the enclosures, indicate that the following factors should also be considered:

   A. Public safety as evidenced by faulty construction, faulty maintenance or unsafe practices. At least two trailer homes were destroyed by fire in Anchorage last November, and another badly damaged, resulting in an estimated loss of $40,000. (See Exhibits A and B)

   B. Trailer court owners and housing developers sometimes incur no investment toward the installation of storage and/or pipeline distribution facilities; yet receive a kick-back of 1¢ per gallon on every gallon sold for "dedicating" their trailer court (or housing development) to oil.

C. Complaints have been filed by consumers who looked to the Commission for the redress of grievances stemming from allegations that fuel dealers have failed to restore service quickly during cold weather--even after repeated pleas for help. (See Exhibit B-1)

3. Fuel dealers, such as Petrolane, distribute propane to trailer courts and apartment houses in much the same fashion that fuel oil dealers distribute their product, but they are not exempt. This does not appear to be equal or fair treatment. Nor does it appear reasonable that trailer court and apartment house owners who operate their own oil pipeline distribution systems should be regulated while dealers who operate in other trailer courts and apartments are exempt under certain conditions.

4. The Bill would be even more difficult to administer than sec. 42.05.711 (e) of the present law because of numerous practical difficulties. To put it more bluntly, it would create an administrative nightmare.

5. The Bill is poorly drafted, first, because it amends the wrong section. In my view, it should amend AS 42.05.711 which deals with exemptions, rather than the section containing definitions. Second, it does not clearly state the legislative intent, despite the effort to do so--which, incidentally is one of the questions that seems to bother oil dealers about the present law. They expect us to tell them what the Legislature intended, and we simply don't know. For example, the stated purpose makes reference to trailer courts and apartments but does not mention dealers who distribute fuel oil, by pipeline, to office buildings and housing developments. In my opinion, it would be better to simply exempt fuel dealers from the law completely (and without any qualification), if that is what is desired, rather than attempt to regulate them only under the stated conditions which would invite disputes between dealers and their customers; yet leave the Commission virtually powerless to resolve complaints filed with the Commission.

6. There are approximately 73 fuel dealers in Alaska now subject to regulation that would be affected by S. B. 136. Several of them have filed applications with the Commission for total exemption from AS 42.05 pursuant to AS 42.05.711 (d) thereof, or in the alternative, for a certificate of public convenience and necessity. If S. B. 136 is enacted, these pending

applications would, of course, be dismissed as moot and all other dealers would be relieved from the necessity of even filing applications. Further, any that might be subject to regulation in the future could very easily avoid it by changing their price if the customer was in an area in which he had one of the alternative choices mentioned in the Bill.

7. By order of the Commission all fuel dealers are temporarily exempt from all provisions of AS 42.05 until April 1, 1971 to give them ample opportunity to file applications with the Commission. (See Exhibit D) It was for this reason we stated, on page 16 of our first annual report, that it "...would be no surprise to the Commission if they should seek legislation to specifically exclude their operations from regulation under the APUC Act."

DETAILS

Your request for comments on Senate Bill No. 136 brings up a rather delicate question of policy; namely, whether I, as an administrator of the APUC Act, should take a position as to whether or not petroleum fuel dealers should be exempt from the Act under certain conditons. In the past I have consistently refused to take a position either for or against the regulation (or exemption) of any operation. I see no reason why I should now. However, I owe it to you, and to the Legislature, to report some pertinent background facts that may be of some assistance in arriving at an appropriate decision. (See Exhibit G)

In the first place, the problem does not relate soley to the price the customer pays which seems to be the main thrust of the proposed amendment. There is also the matter of safety to be considered. This was first brought to our attention here in Anchorage on November 23, 1970 when a fire destroyed two mobile homes and bably damaged a third one--all reportedly due to a malfunction in the Shato Trailer Park's community fuel system. The damage was estimated at $40,000 (See Exhibit A, attached).

I am also enclosing photos indicating that sub-standard construction practices are employed in a number of mobile home courts in Anchorage that are served directly or indirectly by local fuel dealers. (See Exhibit B) I cannot honestly affirm that all of the pictures portray systems installed by fuel oil distribution firms as distinguished from those installed by propane distributors (which, I note, are not involved in S. B. 136). Some may be owned and operated by the owners of the trailer parks rather than by dealers. But I

understand they all are served via pipelines from central storage tanks and that tenants generally do not have a free choice of furnishing their own individual fuel tanks and of purchasing oil directly from any local fuel dealer they may select.

While on the subject of safety, I must report that the Federal Department of Transportation has entered into an agreement with the APUC whereby the Commission will endeavor to enforce the Federal safety standards which are applicable to all gas pipelines in the State (See Exhibit C). This agreement was made pursuant to Section 5 (b) of the Natural Gas Pipeline Safety Act of 1968, and the rules and regulations issued thereunder (See Exhibit E). If we had not entered into this agreement, the Federal Department of Transportation would have already preempted the entire field of gas utility safety regulation in Alaska. Thus, unless the State desires to lose jurisdiction over gas pipeline safety, by default, it really has no choice but to help the Department of Transportation enforce its regulations. I wrote you a memorandum on this subject dated February 6, 1971, a copy of which is attached hereto as Exhibit F.

The main point of what I have just said about safety is this: How can the State reasonably exempt distributors of oil by pipeline, as to safety, (or as to anything else for that matter) and at the same time subject distributors of propane to all the provisions of AS 42.05 including safety? It would seem that the public need for regulation, or the justification for exemption from regulation, should not rightfully depend upon whether the pipeline distributor sells oil or gas. After all, they both sell an essential fuel that heats trailers and they distribute it by pipeline as well as delivering their product to individual customers. I say this only to point out a basic inconsistency--not because I have taken a position for or against the regulation of either kind of a fuel distributor.

Another inconsistency of S. B. 136 is that it singles out, for special treatment, fuel dealers that distribute petroleum products to the public for compensation while ignoring the fact that many mobile home court owners, who also distribute petroleum products to their own tenants for compensation via pipelines, would still be subject to regulation. This does not appear to be fair or reasonable.

Your attention is invited to the fact that this entire matter is now before the Commission in Docket No. U-70-85 and two orders have been written. A copy of the entire file in this proceeding is attached as Exhibit D of this memorandum. We are now in the process of issuing public notices so that all persons and firms in the entire State that may be utilities under AS 42.05.701 (2) (D) or (E) will have an opportunity to comply with the Commission's order that they must apply for a

certificate covering their operation as a condition precedent to considering their applications for exemption. The 6 fuel dealers that have already filed the required applications seek complete exemption from AS 42.05 pursuant to AS 42.05.711 (d). Alternatively, they desire a certificate. They now have until April 1, 1971 to make application pursuant to our order dated February 2, 1971 in U-70-85. But if they can get the law amended to exempt them from regulation, obviously those that have not applied will be spared the trouble of making application and the Commission will simply dismiss the applications then pending.

I understand the fuel dealers are not at all happy with the Commission, mainly because it has not felt free to go along with their contention that the Legislature never intended to regulate them in the first place. This may be so. Maybe it was a legislative oversight that they appear to be utilities, but who are we to say it was? If that is all that is involved, then certainly this Legislature is in a position to correct the oversight.

I am not yet in a position to give you completely reliable figures on the full extent of the problem of regulating oil distributors (as defined by AS 42.05.701 (2) (E)) or of regulating natural or manufactured gas distributors (as defined by AS 42.05.701 (2) (D)), but I do have a pretty good idea from our own research (with the aid of Carl Sullivan representing the Oil Heat Institute) and from other sources including the State Revenue Department. With the above qualifications, this is approximately what it looks like now for the entire State:

Kind of Fuel Distributed by Pipeline to 10 or More Customers

	Oil	Gas
Number of Cities	7	6
Number of Locations	47	33
Number of Operators	73	2
Number of Customers	2,413	863

From the standpoint of administering AS 42.05 as applied to all utilities presently defined as such by AS 42.05.701 (2) (E), I shudder to think of it as though cold steel were being plunged into my warm quivering human flesh, particularly so if the APUC is going to have its budget cut for next year. Just think of it. We now have 125 regulated utilities. This would increase the total to 198, a 63% increase. How in the world could we reasonable be expected to do an adequate job of regulating that many more utilities, with no more personnel than we now have is incomprehensible. On the other hand, if the Legislature feels that these operations should be regulated we shall just have to do the best we can with the resources placed at our disposal--but, you can depend upon it, we shall be severely criticized. If we had any idea of how many utility

operations of this kind there may be, we would have requested a lot more personnel than we did ask for in our great ignorance.

I think the underlined part of S. B. 136 will create administrative problems that just won't quit--ever. For example:

1. Who will decide disputes between consumers and the dealers that serves them as to whether or not the consumer has "no alternative in his choice of supplier of a comparable product and service at an equal or lesser price,"--the dealer, the consumer, or the Commission? If there is a question as to whether the Commission has jurisdiction to entertain the customer complaint, how would it be decided?

2. What is a "comparable product"? Would it include natural or manufactured gas? Would the decision be based upon the BTU content of the fuel?

3. Would the words "and service", following the word "product" include electric service since it might be argued that electricity furnished for space heating is a "comparable" service because both would supply trailer homes and apartments with heat, for cooking and space-heating?

4. In determining whether a comparable product or service could be purchased at "an equal or lesser price", what would be the common denominator for the determination as between heavy (like PS 300) and light oil (like diesel 182), propane, natural gas, and electricity? Who would decide disputes in this regard?

Getting back to the stated purpose of S. B. 136, I note that the expression "unnecessary regulatory procedures" is used. This is precisely the main issue now before the Commission in U-70-85. (See Exhibit D) The law under which gas and propane distributors are now seeking exemption is AS 42.05. 711 (d) which provides that the Commission, "... on a finding that no legitimate public interest will be served, may exempt a utility from all or any portion of the chapter." It may develop that the Commission will find, after a public hearing, that they should be exempt from some, all, or no provisions of AS 42.05. S. B. 136, if enacted, would simply mean the Commission would dismiss all the applications then pending, and close the proceeding as the issue would be moot. This is precisely what was done in respect to a case involving the regulatory status of the Kenai Pipeline Company when the law was amended (in 1968) to specifically exclude it.

Another thing I notice about the stated purpose of S. B. 136 is the fact that it includes dealers delivering to trailer courts and apartment buildings, but excludes those that may possibly be delivering to other multi-tenant structures such as office buildings. Still another situation that I actually know of here in Anchorage is not covered by the stated purpose. In this regard, I refer to a dealer here who furnishes oil to an entire housing development via pipelines connected with a central storage tank. It does not seem reasonable that such an installation would be exempt if others of a similar nature, that are mentioned, are included.

In short, Mr. Butler, I think S. B. 136 is poorly drafted and would cause more administrative headaches than it could possible eliminate if it is passed. Further, I do not think it would be fair to exempt petroleum fuel dealers without, also, exempting dealers who distribute propane or manufactured gas.

I hope I have covered the subject adequately.

By Don Hall

DH:eb
Encl.

Colored Photos of Two Trailer Homes

Destroyed by Fire and Another Badly

Damaged

EXHIBIT A

Photos Indicating Sub-standard Construction Practices in Mobile Home Courts in Anchorage Served Directly or Indirectly by Fuel Dealers

EXHIBIT B

Copy of Complaint Filed Before the Alaska Public Utilities Commission by F. Joseph Tirapelli and Gloria Tirapelli vs. Denali Fuel Company, Inc., John Mlacker, Jack Linton, and Jack Wong, a Partnership under the Name of S.L.M. PARTNERSHIP D/B/A PLAZA 36

and

Newspaper Clipping Regarding Suit Filed in Court

EXHIBIT B-1

Agreement Between the Secretary of Transportation and APUC Under Section 5 (b) of Gas Pipeline Safety Act of 1968

EXHIBIT C

U-70-85

In the Matter of the Certification of:

Alaska Fuel and Transfer, Inc.,
AAA Fuel, Inc.,
Arctic North Star Fuel,
Ace Fuel Service,
Day & Night Fuel, Inc.,
Inlet Fuel Co.,
Spenard Fuel, Inc.,
Peters Creek Fuel,
Denali Fuel Co.,
Fairbanks Fuel,
Petroleum Sales,
Peters Express,
Northern Gas and Oil,
Sourdough Heating, Inc.,
Johnnie's Express

and Others Similarly Situated.

EXHIBIT D

Natural Gas Pipeline Safety Standards Prescribed by Department of Transportation Pursuant to Natural Gas Pipeline Safety Act of 1968

EXHIBIT I.

Memorandum to Mr. Robert E. Butler

dated February 6, 1971

"Gas Pipeline Safety"

EXHIBIT F

Copy of Your Memo to Me of February 24, 1971, and Copy of Senate Bill 136, Requesting My Comments

EXHIBIT G

Copy Corrected
February 24, 1971

NOTICE OF APPLICATION FOR

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

The ALASKA PUBLIC UTILITIES COMMISSION hereby gives notice that the STANDARD OIL COMPANY, an Alaska Corporation, has filed an application (Cause No. U-71-7) for an exemption from Sections 221 - 281 of the Alaska Public Utilities Commission Act (AS 42.05) or, in the alternative (under protest) for a certificate of public convenience and necessity to furnish fuel oil delivery products public utility service in the following areas: Trailer City, 4420 Emard St., South Mountain View, Alaska; Maggies Trailer Court, 4503 Spenard Road, Anchorage, Alaska. The applicant states that the rate charged to its cutomers is 24.4 cents per gallon of fuel oil. More detailed information may be obtained from the applicant through its Attorney in Fact, Mr. Victor S. Schutzky, whose address is 1649 C Street, Anchorage, Alaska. The complete filing is available for inspection at the offices of the Alaska Public Utilities Commission, 700 MacKay Building, 338 Denali Street. Anchorage, Alaska 99501.

Any interested party may file with the Commission by 4:30 P.M. on March 12, 1971, a statement of his views and specific reasons in favor of, or in opposition to, the granting either of the exemption as requested or else of authority to the applicant to operate as a fuel oil delivery products public utility, together with written confirmation that the same statement has also been served on the applicant.

DATED at Anchorage, Alaska this 22nd day of February, 1971.

J. Lowell Jensen
Deputy Director

NOTICE OF APPLICATION FOR

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

The ALASKA PUBLIC UTILITIES COMMISSION hereby gives notice that the PETERS CREEK FUEL & SERVICE, INC. has filed an application (Cause No. U-71-8) for an exemption from Sections 221-281 of the Alaska Public Utilities Commission Act (AS 42.05) or, in the alternative, (under protest) for a certificate of public convenience and necessity to furnish fuel oil delivery utility service in the following areas in the vicinity of Eagle River, Alaska: Lazy Mountain Trailer Court, Sunny Slopes Subdivision, Eagle River Trailer Court, Eagle River Heights North Subdivision. The applicant states that the rates charged at present to its central distribution system customers are 24.4¢/gal. for No. 1 heating oil and 23.2¢/gal. for No. 2 heating oil. More detailed information may be obtained from the applicant whose address is P. O. Box 128, Eagle River, Alaska 99577. The complete filing is available for inspection at the offices of the Alaska Public Utilities Commission, 700 MacKay Building, 338 Denali Street, Anchorage, Alaska 99501.

Any interested party may file with the Commission by 4:30 PM on March 15, 1971, a statement of his views and specific reasons in favor of, or in opposition to, the granting either of the exemption as requested or else of authority to the applicant to operate as a fuel oil delivery public utility, together with written confirmation that the same statement has also been served on the applicant.

DATED at Anchorage, Alaska this 23rd day of February, 1971.

J. Lowell Jensen
Deputy Director

NOTICE OF APPLICATION FOR

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

The ALASKA PUBLIC UTILITIES COMMISSION hereby gives notice that DAY AND NIGHT FUEL COMPANY, INC. has filed an application (Cause No. U-71-9) for an exemption from Sections 221-281 of the Alaska Public Utilities Commission Act (AS 42.05) or, in the alternative (under protest), for a certificate of public convenience and necessity to furnish fuel oil delivery public utility service (through central tank and pipeline distribution systems) within the following service areas: Top Hand Trailer Court, 2409 McRae Road, Spenard, Alaska; Grizzly Trailer Court, 4222 Spenard Road, Spenard, Alaska. The applicant's stated rate is 23.7¢ per gallon of fuel oil. Its tariff also provides for a $25.00 deposit and monthly customer billing. More detailed information may be obtained from the applicant whose address is 608 East Fireweed, Anchorage, Alaska 99503. The complete filing is available for inspection at the offices of the Alaska Public Utilities Commission, 700 MacKay Building, 338 Denali Street, Anchorage, Alaska 99501.

Any interested party may file with the Commission by 4:30 P.M. on March 15, 1971, a statement of his views and specific reasons in favor of, or in opposition to, the granting either of the exemption as requested or else of authority to the applicant to operate as a fuel oil delivery public utility, together with written confirmation that the same statement has also been served on the applicant.

DATED at Anchorage, Alaska this 25th day of February, 1971.

J. Lowell Jensen
Deputy Director

NOTICE OF APPLICATION FOR

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

The ALASKA PUBLIC UTILITIES COMMISSION hereby gives notice that DENALI FUEL COMPANY/DENALI DISTRIBUTORS, INC. has filed an application (Cause No. U-71-10) for an exemption from Sections 221-281 of the Alaska Public Utilities Commission Act (AS 42.05) or, in the alternative (under protest) for a certificate of public convenience and necessity to furnish fuel oil delivery public utility service (through central tank and pipeline distribution systems) in the following locations in the Greater Anchorage and Eagle River areas: Alaskan Village Mobile Home Court, Chateau Trailer Court, Clearwater Trailer Court, Cowdery Brothers Construction, Dimond Estates, East Anchorage Trailer Court, Forest Park, Four Seasons, Frank's Trailer Court, Glacier Terrace Courts, Green Acres, Johnson Trailer Court, Kathy C Estates, Kluane Terrace, La Honda Trailer Park, Mountain View Trailer Court, Muldoon Estates, Penguin Trailer Court, Piper Trailer Court, Plaza 36, Rangeview Trailer Park, Rebischke's Court, Riviera Terrace, Scenic View, South Park Estates, Spruce Park Trailer Court, Totem Trailer Court, Trails End Trailer Court, Vagabond Trailer Court, Waterbury Trailer Court, White Birch Trailer Court, Hamilton Park, Ocean View Subdivision and Palos Verdes Subdivision. The applicant has filed a tariff which includes its rates and regulations relating to security deposits, installation charges, connection fees, automatic refueling, service labor charges, billing period, and terms of payment. The stated rates are 23.7¢ per gallon for No. 1 fuel oil and 22.5¢ per gallon for No. 2 fuel oil. The security deposit is $25.00 and the connection fee is $15.00 per customer. More detailed information may be obtained from the applicant

whose address is 1525 East 5th Avenue, Anchorage, Alaska 99501. The complete filing is available for inspection at the offices of the Alaska Public Utilities Commission, 700 Ma-Kay Building, 338 Denali Street, Anchorage, Alaska 99501.

Any interested party may file with the Commission by 4:30 PM on March 15, 1971, a statement of his views and specific reasons in favor of, or in opposition to, the granting either of the exemption as requested or else of authority to the applicant to operate as a fuel oil delivery public utility, together with written confirmation that the same statement has also been served on the applicant.

DATED at Anchorage, Alaska this 25th day of February, 1971.

J. Lowell Jensen
Deputy Director

U. 71-10
12 p

DENALI DISTRIBUTORS, INC.

EXHIBIT C

Applicant does not desire to render a service to the public in general, does not wish to hold itself out or offer its service to the public at large and does not wish to dedicate its operations to public use.

The business in which applicant desires to engage itself consists of the delivery of fuel oil to mobile home occupants in trailer courts and the delivery of fuel oil to occupants of dwellings in subdivisions.

The facilities which applicant proposes to utilize consist of bulk storage tanks in excess of 300 gallon capacity located within the trailer courts, pipes extending from the storage tanks in the trailer courts to the trailer spaces in the trailer courts, and separate meters to measure the consumption of each customer in each trailer court. The same facilities are utilized in connection with a housing development, or subdivision.

The type of customers consist of mobile home and permanent home owners and occupants in specified trailer courts and subdivisions. The number and location of the trailer courts and subdivisions is presented in Exhibits I and E attached hereto. The approximate number of maximum potential individual customers in trailer courts ranges from twenty-four at Green Acres Trailer Court and Piper Trailer Court to four hundred at Dimond Estates. At the present time, applicant proposes to deliver fuel oil from pipes connected to a storage tank in each of six subdivisions; namely, Hamilton Park Subdivision, formerly State Manor Subdivision, Ocean View Subdivision, Kluane Terrance Trailer Estates Subdivision, Palos Verdes Subdivision, Muldoon Estates

Subdivision and Sunny Slopes Subdivision. The remainder of applicant's proposed operations will be in trailer courts.

As part of its overall business of fuel oil delivery. Denali Fuel Company presently engages in the delivery of fuel oil to mobile home occupants in trailer courts and to occupants of dwellings in Subdivisions utilizing the facilities outlined above, except Denali Fuel Company presently has no operating facilities at Muldoon Estates Subdivision, Sunny Slopes Subdivision or Palos Verdes Subdivision. Denali Fuel Company does not presently deliver fuel oil to all of the potential customers specified as potential users in Exhibit I, since many of the potential users presently obtain fuel oil, or a different product for heating, from a competitor (See Exhibit III) of Denali Fuel Company. Denali Fuel Company, therefore, requests that the Commission find no legitimate public interest in regulating any of its operations. See Exhibit D.

DENALI DISTRIBUTORS, INC.

EXHIBIT D

No legitimate public interest is served by regulating any of the business of Denali Fuel Company, or applicant herein, because its business is not the type intended to be regulated, does not have the characteristics of a business intended to be regulated, and is already regulated by competition and other governmental requirements. Furthermore, the Commission has no jurisdiction to regulate any of the business of Denali Fuel Company, as no portion of its business is a defined public utility under the Alaska Public Utilities Act, either literally or within the intent of the Legislature.

One of the marks of a public utility is the monopolistic characteristics of its operations. This factor of monopoly gives rise to a reason for public protection through control and regulation. Contrariwise, the fuel oil delivery business, in general, and with respect to centralized delivery systems in trailer courts and housing developments, is a highly competitive business.

The sale of fuel oil by means of tank wagon delivery to a common storage tank in a trailer court or housing subdivision for further delivery through pipes from the common tank to customers in the trailer court or subdivision is a merchandising operation: the sale of a commodity and not of a utility service. A metered sale to individual customers in the trailer court or subdivision does not change the essential nature of the transaction.

Another one of the distinguishing marks of a utility operation is that it is affected with a public interest. The distribution of fuel oil by the use of a centralized storage tank and pipes directing the fuel to customers in a trailer court or subdivision is not affected with a public interest. There is no holding out or offer to service the public at large. The mere

fact that it may be considered to be of the nature of one of the necessities of life should not affect an industry with a public interest. A consumer in a trailer court or housing subdivision is no more dependent upon obtaining fuel oil for heating from one supplier at a constant price than he is upon obtaining other fuels such as coal, wood, kerosene, liquefied petroleum gas, or, for that matter, the same type of fuel oil from a different dealer on an individual or pipeline basis. There are many necessities of life, including such prime necessities as food and clothing, whose distribution and sale are made from a centralized location, but are not considered a public utility subject to regulation.

The supply of fuel oil through a pipeline system in a trailer court or housing subdivision makes no demands on the public for privileges peculiar and characteristic of a public utility; such as, the right to use public property and the exercise of eminent domain over private property.

Because of the non-competitive nature of its operation, an ordinary gas company is usually characterized by certain features which are lacking in the case of a fuel oil supplier. The fuel oil supplier employs the technique of marketing his product through a pipeline system in a trailer court or housing development on private property by permission of the owner. The installation of gas utility mains, by which the gas is delivered to users, requires, generally, the use of easements along or across public highways or the exercise of eminent domain over private property.

Furthermore, the operation of a public utility requires a monopolistic form of business. In order to prevent the lack of competition from affecting the service rendered to the public, governmental regulation of such a business becomes a paramount

policy consideration. The delivery of fuel oil is a highly competitive business and therefore does not meet the requirements for public utility regulation.

For this Commission to determine under the provisions of the Alaska Public Utilities Commission Act that it is within the public interest to exercise jurisdiction over and regulate the sale of fuel oil, merely because the product is marketed from a central tank through a pipeline system to ten or more people, would also mean that the Commission could assume jurisdiction over and regulate the sale of gasoline through all gasoline service stations in the State of Alaska. Certainly the Legislature of the State of Alaska, in enacting the Public Utilities Commission Act, did not contemplate, and could not have contemplated, any such broad interpretation of the Act. The Legislature specifically included AS 42.05.711(d) in the Alaska Public Utilities Act, authorizing the Commission to exempt an operation from any or all portions of the Act when no legitimate public interest will be served by regulating the operation. There is a distinct difference between the operation of a public utility engaged in the sale and distribution of electricity, gas or water, or the rendition of telephone service and that of one engaged in the delivery and sale of fuel oil. The distributor of electricity, gas or water and the supplier of telephone service are generally the sole suppliers of their particular product or service in and affecting an entire community. The delivery of fuel oil is not so limited. In the Anchorage area alone, there are at least thirteen suppliers of fuel oil, each of whom compete with the others.

Attached hereto as Exhibit IV is a survey of prices posted by all fuel oil suppliers in the Anchorage area. It is obvious from an inspection of this exhibit that there is a variation in pricing and that competition exists. The prices listed

in the columns for No. 1 and No. 2 fuel with a storage tank capacity of greater than 300 gallons are, to the best information and belief of Applicant, the rates applied with respect to central delivery systems and are also the rates applied to customers who have a 300 gallon, or greater, tank and who are not connected to a central delivery system.

It is also an attribute of a public utility that it be affected with a public interest. A mere legislative declaration with regard to this is insufficient. This point the United States Supreme Court has made clear in Wolff (Charles) Packing Co. v. Court of Industrial Relations, 262 U.S. 522, 539. The United States Supreme Court has also said the following in Williams v. Standard Oil Company, 278 U.S. 235, 240:

> "A business or property, in order to be affected with a public interest, must be such or be so employed as to justify the conclusion that it has been devoted to a public use and its use thereby in effect granted to the public. . . . Negatively, it does not mean that a business is affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance."

In view of this statement, it would seem that the question of whether the business of delivering fuel oil from a central tank through pipes to consumers in a trailer court or subdivision has become clothed with a public interest would turn in some degree upon the question as to whether the public has become peculiarly dependent upon the business and whether the distributor-marketer has evidenced an intent to grant the use of the business to the public. The situation in the case of the centralized supply of fuel oil is very much like that expressed by the United States Supreme Court in the case of Michigan Public Utilities Commission v. Duke, 266 U.S. 570:

> "Plaintiff is a private carrier. His sole business is interstate commerce, and it is limited to the transportation covered by his three contracts. He has no power of eminent domain or franchise under the state, and no greater right to use the highways than any other member of the body public. He does not undertake to carry for the public, and does not devote his property to any public use. He has done nothing to give rise to a duty to carry for others. The public is not dependent on him or the use of his property for service, and has no right to call on him for transportation."

Each consumer in a trailer court or subdivision wherein a centralized supply system is located is perfectly free to obtain his needs from someone other than the system owner. The consumer can have an individual tank, barrel or container positioned at his door for his own individual use.

A private business, operated under private contracts and not devoted to a public use, should not by legislative fiat or order of a public service commission be declared a public utility, since there would be in a sense the taking of private property for public use without just compensation, inconsistent with the due process clause of the Fourteenth Amendment to the United States Constitution.

There is not a dedication to public use of the centralized supply systems for fuel oil in a privately owned trailer court or housing development. Fuel oil, marketed through a pipeline system in a trailer court or housing development, is not sold to the general public like the utility gases. There is no open offer of sale. The supplier is free to refuse to deliver to any individual consumer in the trailer court or housing development. Furthermore, the means of tank wagon transportation, necessary to bring the product to trailer courts and subdivisions, and other incidental matters in connection with the transportation, handling and storage of fuel oil, indicate that the product

is not adaptable to the sale, distribution and furnishing to the public at large in unlimited quantities from a single dealer. Necessarily, the service rendered by a public utility must be so dedicated to the public that it becomes affected with the public interest. There must be an offer to sell to and serve the public generally, the right of use of public property, and in most cases condemnation of private property. Such is not the case in the sale of fuel oil to consumers in a trailer court, housing development, or elsewhere. Each sale is an independent sale and transaction between the seller and an individual customer. The fuel oil supplier does not hold himself out, nor should he be expected, to sell to the public generally.

The nature of the business of fuel oil delivery and the methods employed for marketing its products, together with the fact that there exists competition among the various dealers, contradicts common dedication to the public use. It is the factor of monopoly, absent in the case of centralized supply systems herein under consideration, which gives rise to a reason for public protection through control and regulation. Since the supply of fuel oil in trailer courts and housing developments is a highly competitive industry, to regulate the owners of the centralized systems, designed to more effectively market their product in such locations, would effectively eliminate this competition. The effect of an elimination of competition in an already competitive industry was noted as follows by the Ohio Supreme Court in Paramount Gas Utilities Co. v. Public Utilities Commission (1932), 125 Ohio St. 211, 180 N.E. 897:

> "If any mercantile establishment, selling its goods to the public in general, could have its business adjudged as falling within the jurisdiction of the Commission, and thereby eliminate, or at least greatly diminish competitors from unfairly coming into a determined

field, evidently all distinction between mercantile operations, carried on by persons, partnerships, corporations, or associations, and public utilities, as now generally recognized by law, would promptly disappear, and the Commission would, quite, as promptly, be completely swamped in any effort the Commission might make to take care of the situation thus arising, and the general provisions of the public utilities law would become broadened far beyond anything that the legislature ever had in mind in the enactment of the public utilities statutes."

Denali Fuel Company, and Applicant under protest herein, further contend that none of its operations are subject to the Commission's jurisdiction because none of its operations fall within the definition of public utility stated in AS 42.05.701(2). The Commission contends that a central supply system for fuel oil in a trailer court and housing development falls within the definition of AS 42.05.701(2)(E). This Subsection requires the owning, operating, managing or controlling of a pipeline or system for distribution of petroleum products to the public for compensation. Denali Fuel Company does not charge its customers for the delivery of fuel oil through the centralized system located in trailer courts and housing developments; i.e., there is no charge to the customer for the use or maintenance of the centralized system. Therefore, Denali Fuel Company is not being compensated for the customer's use of a pipeline or system.

The Commission is also referred to Applicant's Exhibit B herein, for an illustration of other governmental means by which standards are set with respect to various aspects connected with central fuel oil delivery systems, thus illustrating that there are already regulations imposed in the interests of the consumer's health and safety.

EXHIBIT IV

COMPETITION SURVEY-FUEL OIL SUPPLIERS - ANCHORAGE

Name of Business	No. 1 Fuel (Stove Oil) Price per Gal. 300 gal. tank or greater	No. 2 Fuel (Furnace Oil) Price per Gal. 300 Gal. tank or greater	No. 1 Fuel (Stove Oil) Price per Gal. Less than 300 gal. tank	No. 2 Fuel (Furnace Oil) Price per gal. Less than 300 gal. tank	Burner Service Work Yes or No	Hourly Rate Burner Service a. Regular Time B. Overtime	Minimum Charge Per Delivery	Twenty-Four Hour Service Yes or No
Ace Fuel	24.7 ¢	23.5 ¢	25.7 ¢	24.5 ¢	No	---	$ 10.00	No
Arctic North Star	24.4 ¢	23.2 ¢	25.4 ¢	24.2 ¢	Yes	a. $ 12.00 b. $ 18.00	None	No
Burnie Heating	22.7 ¢	21.5 ¢	22.7 ¢	21.5 ¢	Yes	a. $ 12.00 b. $ 18.00	Under 100 gal.	Yes
Day and Night Fuel	23.7 ¢	22.5 ¢	24.75¢	23.5 ¢	Yes	a. $ 18.00 b. $ 27.00	20 gal.	Yes
Denali Fuel	23.7 ¢	22.5 ¢	24.7 ¢	23.5 ¢	Yes	a. $ 13.00 b. $ 19.50	$ 10.00	Yes
Inlet Fuel	24.7 ¢	23.5 ¢	25.7 ¢	24.5 ¢	Yes	a. $ 12.00 b. $ 14.00	None	Yes
Katmai Oil	22.7 ¢	21.5 ¢	24.7 ¢	23.5 ¢	No	---	$ 15.00	No
Union Oil	22.7 ¢	No Delivery	22.7 ¢	21.5 ¢	No	---	5 Gal. Minimum	No
Spenard Fuel	23.7 ¢	22.5 ¢	24.7 ¢	23.5 ¢	Yes	a. $ 12.00 b. $ 18.00	$ 10.00	Yes
Peters Creek Fuel	23.7 ¢	22.5 ¢	26.7 ¢	25.5 ¢	Yes	a. $ 12.00 b. $ 12.00	25 Gal. Minimum	Yes
Alaska Heat	23.7 ¢	22.5 ¢	25.7 ¢	24.5 ¢	Yes	a. $ 16.00 b. $ 24.00	$ 10.00	Yes
Norgas	21.0 ¢	20.5 ¢	24.0 ¢	23.0 ¢	No	---	Under 71 Gal.	No
Standard Oil	**21.1 ¢**	No Delivery	**23.1 ¢**	**21.9 ¢**	**No**	**---**	**None**	**No**

DENALI DISTRIBUTORS, INC.

EXHIBIT F

Applicant proposes to charge, for fuel oil delivered through individual metered units connected to applicant's system in a trailer court or subdivision, a price not to exceed the retail price of the least expensive oil of a class suitable to such customer's needs based on the delivered price appertaining to 300 gallon capacity tanks posted in the Greater Anchorage area.

RATES

Stove oil : $0.237 per gallon - No. 1 Fuel

Furnace oil : $0.225 per gallon - No. 2 Fuel

SECURITY DEPOSIT

Per Customer: $25.00

INSTALLATIONS

No charge to customer for installation of storage tank, pipeline from tank to location or meter setting.

CONNECTION FEE

Per Customer: $15.00
This charge is made only if necessary to install copper tubing from the meter to customer's furnace and for firing furnace.

REFUELING

Automatic checking and refilling of the storage tank provided without additional charge to customers.

SERVICE LABOR CHARGE

No charge to customers for repair to meters, storage tank or pipes between them.

Furnace Service (If requested): $13.00 per hour
$19.50 per hour overtime

CYCLE BILLING PERIOD

Monthly

TERMS

1% service charge if bills not paid within sixty (60) days.

Denali Fuel Company, as it presently operates, posts the above rates for customers in trailer courts and subdivisions connected to a common storage tank located at the court or subdivision. These rates are the same posted rates for all customers having a storage tank with a capacity greater than 300 gallons. These rates do not exceed the posted rates for customers having a storage tank with a capacity less than 300 gallons, who are not connected to a trailer court or subdivision system.

No charge is made to any customer for the use or maintenance of the centralized distribution system.

NOTICE OF APPLICATION FOR

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

The ALASKA PUBLIC UTILITIES COMMISSION hereby gives notice that PETROLANE-ALASKA GAS SERVICE, INC., PETROLANE-ANCHORAGE GAS SERVICE, INC., and PETROLANE-QUEEN GAS, INC. have filed a joint application (Cause No. U-71-11) for an exemption from Sections 221-281 of the Alaska Public Utilities Commission Act (AS 42.05) or, in the alternative, an application (under protest) of PETROLANE-ALASKA GAS UTILITIES, INC. for a certificate of public convenience and necessity to operate as an LP-Gas fuel delivery public utility in the following areas: Dimond Estates, Plaza 36, Kathy O' Estates, Frank's Trailer Court, Alaska Village, Trailer City, Top Hand, Maggie's and East Anchorage Mobile Home at Anchorage; Best View at Chugiak; Badger Mobile Homes, Wayne's Trailer Park, Lakeview Terrace, Birdview and Wildwood Trailer Court at Fairbanks; Ocean Crest, Mt. View Trailer Court, and M.B. Development at Ketchikan; Mobil Haven and Thunder Mt. at Juneau; Perron's Trailer Court at Valdez. The application contains tariffs which include rates and regulations relating to deposits, connection fees, installation, automatic refueling, service labor charges, credit policies, taxes, billings, terms of payment, and other provisions for service. Seperate rate schedules are included for Anchorage, Fairbanks, Juneau, Chugiak, Valdez and Ketchikan. More detailed information may be obtained from the applicant whose address is 1200 Whitney Road, Anchorage, Alaska 99501. The complete filing is available for inspection at the offices of the Alaska Public Utilities Commission, 700 MacKay Building, 338 Denali Street, Anchorage, Alaska 99501.

Any interested party may file with the Commission by 4:30 P.M. on March 15, 1971, a statement of his views and specific reasons in favor of,

or in opposition to, the granting either of the exemption as requested or else of authority to the applicant to operate as an LP-Gas fuel delivery public utility, together with written confirmation that the same statement has also been served on the applicant.

DATED at Anchorage, Alaska this 25th day of February, 1971.

J. Lowell Jensen
Deputy Director

SB-248

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99801

M E M O R A N D U M

January 25, 1972

TO: Members of the House Judiciary Committee

FROM: Russell E. Mulder

SUBJECT: Uniform Probate Code

At various times since the adjournment of the 1971 session, the Legislative Council has solicited the courts, the Alaska Bar Association, local bar associations and individual bar members to study the proposed Uniform Probate Code and submit their comments and suggestions. Attached are the replies received which you will probably wish to consider concerning SB 248.

It is encouraging to note that while both the Alaska Bar Association and Probate Master Gray have offered various suggested changes, they both are in agreement that the Uniform Probate Code is an acceptable approach for probate revision.

I am also attaching a series of correspondence between Professor Richard V. Wellman (chief drafter of the UPC), Frederick O. Eastaugh (one of Alaska's members of the National Conference of Commissioners on Uniform State Laws) and Charles Horowitz (also a member of the National Conference) relating to the need for the retention of certain provisions in the UPC which have been objected to by some. The sections in question are AS 13.16.040 and AS 13.16.455. I believe Professor Wellman's explanations should be helpful.

Att.

REM:ic

Superior Court
State of Alaska
THIRD JUDICIAL DISTRICT
941 FOURTH AVENUE, ROOM 224
ANCHORAGE, ALASKA
99501

KEIFER L. GRAY

STANDING MASTER
PROBATE MASTER

June 15, 1971

Honorable Edward V. Davis
Acting Presiding Judge
Superior Court
Anchorage, Alaska

Dear Judge Davis:

In response to your request that I furnish you suggestions in connection with the revision of the Probate Code to be presented at the City Council chambers in this City on June 25 and 26 since I will not personally be here at that time, you are informed that the following suggestions are made.

It is suggested that wherever the word "county" is used that we substitute instead "judicial district."

ESTATES

Section 1-401, regarding notices under paragraphs (1) and (2), it is suggested "10 days" rather than "14 days" as set forth in the proposed code.

Section 2-109, paragraph (1), add "provided the Native rights through blood of any person so adopted may be retained if provided for in the decree of adoption."

Section 2-401, the homestead allowance should be a minimum of "$8,000" instead of "$5,000" as listed in the proposed bill.

Section 2-502, add a paragraph (a) which states "Wills other than self-proving wills under Section 2-504 may be proven by

the affidavits of the two witnesses to the will or, where one witness is deceased or cannot be located, by the testimony of one subscribing witness and other proof satisfactory to the Court."

Add Section 2-903. [Procedure for Non-Intervention Wills.]
If the last will and testament of a decedent provides that the estate shall be settled without the intervention of any Court, title of the decedent passes to the devisee or heirs on death. It is necessary only that the executor, or person or corporation nominated in his place if he fails to serve, submit the will to the Court, prove it, secure letters testamentary, file an inventory, and submit proof of solvency. Thereafter, the estate shall be managed and settled without the intervention of any Court. However, notice to creditors requiring them to submit their claims within three months shall be published once each week for four weeks in a newspaper of general circulation in the judicial district where the will is probated. The party probating the will may file a final account with the Court if he desires and he shall make a report of any inheritance tax due the State or the United States and pay the same from estate funds. Nothing contained in this section shall be construed to prevent the Court from ordering the filing of a final account if a petition demanding a final account is filed by an heir, devisee, legatee, creditor, the State or Federal Government or a person showing he is adversely affected by the failure to file the account. Provided further that a full and complete report must be submitted to the Court within one year from the date of filing such will for probate and that proof of final distribution should be filed simultaneously. Extensions beyond this period of time may be granted only on a specific order by the Court for good cause shown and then not to exceed six months.

Section 3-203(f), paragraph (1), substitute the figures "19" for the figures "21."

Section 3-706, the last paragraph after the comma, instead of "he may file the original of the inventory with the court" it should read "he shall file the original of the inventory with the court," substituting the word "shall" for the word "may."

Section 3-1201(1), change the value from "$5,000" to "$6,000."

Section 3-1204, add paragraph (d), "The Superior Court may authorize the disposal in a manner it prescribes of personal property which has not been disposed of under this section by the end of six months if no heirs or claimants have been located."

Add Section 3-1205. [Settlement Directed by Court.]
When a judge receives information that a person has died in his judicial district leaving an estate of $6,000 or less and no qualified person has appeared to take charge of the assets, the judge may immediately appoint some person, corporation, or attorney to settle the estate in the manner provided for in Section 3-1201 through 3-1204 of this chapter or the appointee may administer the estate in the manner provided for in the administration of small estates.

GUARDIANSHIPS

Section 5-103, item (1), the age should be "19 years."

Section 5-104, the time should be "not exceeding one year unless sooner revoked."

Section 5-204, add "or has failed to properly exercise his duties as such."

Section 5-207(e), add this paragraph to read, "A bond in the amount to be fixed by the Court may be required of the guardian as the circumstances require."

Section 5-209(d), add "at least once every year unless ordered sooner."

Section 5-424, change the age from "18" to "19."

From my examination of the Uniform Probate Code the above suggestions for changes have been made. It is felt that the code itself embodies an excellent change and one which sets forth clearly the law in every case which would be a distinct

advantage to our present code since a great deal of our present code has been built up solely through practice and does not set forth the facts as it should. It is my belief that the adoption of this code will greatly strengthen and simplify the handling of probate matters in the State and it is recommended that it be adopted.

Very truly yours,

Keifer L. Gray
Probate Master

KLG:ljd

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700 H STREET, SUITE 2
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P. O. BOX 279
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OFFICE
944 WEST 5TH STREET
ANCHORAGE, ALASKA 99501
AREA CODE 907/272-7469
MARY F. LAFOLLETTE, EXECUTIVE DIRECTOR AND BAR COUNSEL

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November 29, 1971

Legislative Affairs Agency
The Legislature
State of Alaska
Pouch Y State Capitol
Juneau, Alaska 99801

Attention: Russell E. Mulder, Deputy Director

Subject: Proposed Probate Code

Gentlemen:

In response to your memorandum on this subject dated October 4, 1971 addressed to members of the Alaska Bar Association, and at the direction of the Board of Governors of the Alaska Bar Association I report herewith the comments of the Real Property, Probate and Trust Committee of the association as reported to the Board of Governors at Anchorage, 6 November 1971. These comments and suggestions set forth the views of the Board of Governors. They are not intended to be totally exhaustive, but do reflect the views of the Association as expressed by the said committee, as follows:

1. The committee, based upon comments of reviewers in other states, considered recommending elimination or revision of Part 3 of the UPC (Informal Probate and Appointment Proceedings), (Article 3 of the work draft copy of the Legislative Affairs Agency). Objections were voiced in the belief that insufficient controls to protect creditors and heirs was afforded. However, it is concluded that sufficient safeguards are provided in the uniform code and no objections are taken to Article 3 as set forth in the redraft.

2. On the whole the UPC is acceptable, to the committee with few exceptions which are listed below.

a. UPC Section 2-401, Article II, Exempt Property and Allowances (Article 4, Sec. 13.11.125 et seq. of work draft copy). The use of a description such as "Homestead Allowance" for the widow of decedent and for minor and

dependent children might well be confused with the "Homestead Exemption" provided under A.S. 09.35.090, and the exemptions provided in Sec. 13.11.130 of the work draft copy may be confused with the exemptions provided by A.S. Sec. 09.35.080. We read the probate allowances and exemptions to be in addition to the homestead exemption and other exemptions as now provided under A.S. 09.35.080 and 09.35.090. We recommend that the probate code eliminate the description "Homestead Allowance" and substitute "Widow's and Childrens' Allowance". Likewise, we recommend the description "Exempt Property" be changed to "Personal Property Allowance".

b. Section 13.16.450 of the work draft copy in conformance with the uniform code allows four months for presentation of claims by creditors. We recommend this be changed to ninety (90) days to conform to our present probate code. Ninety days is considered sufficient, and will shorten the length of the probate proceedings.

c. We disagree with the power given a foreign personal representative under Section 4-201 of the UPC, which requires only that the non-resident fiduciary may secure removal of assets of a non-resident decedent from Alaska upon furnishing a copy of his appointment and an affidavit as to death, Alaska administration, and entitlement to payment. Nothing is said or provided concerning Alaska debts of the non-resident decedent, except that should a creditor in Alaska know of the death and the whereabouts of assets in Alaska, that creditor may object. This is considered inadequate and likely to result in no recovery in most cases. Suit against the foreign representative in the foreign jurisdiction is not a good remedy. We recommend that Sec. 4-201 be expanded to require some notice to Alaska creditors prior to removal of the assets from Alaska. We would add the following additional requirement to Sec. 4-201.

> "In addition to the foregoing requirements the domiciliary foreign representative shall furnish to any person having possession or control of personal property, or other asset sought to be removed from Alaska, proof that notice has been published in a newspaper of general circulation in the Borough or City where such assets are

located, at least once a week for three (3) weeks, that such property or other asset will be removed unless objections are made. Such notice shall specify the personal property or asset and its location in Alaska."

d. Section 2-901 UPC (Sec. 13.11.315 of draft copy) provides for deposit of wills with any court. This should be restricted to the Superior Courts inasmuch as the inferior courts, particularly in sparsely settled areas will not have the personnel or facilities to administer this provision. Basically we feel that Sections 2-901 and 2-902 might well be eliminated since they will burden the courts with additional duties, although it is assumed that the rules of court would require a charge to be made? The commentary to the UPC suggests that a central filing system be established soon and a statute be enacted requiring the registrar of the will to notify the central bureau so that any inquiries could be directed to the central bureau. All this seems unnecessary, and will require no end of additional court rules, record keeping, etc.

Should any further comments be desired it is suggested that you direct any inquiries directly to Kenneth McCaskey, Chairman, Real Property, Probate and Trust Committee, Alaska Bar Association, 921 W. Sixth Avenue, Anchorage, Alaska 99501.

Respectfully Yours,

Peter LaBate

Peter LaBate, President
Alaska Bar Association

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November 24, 1971

RECEIVED
NOV 29 1971
ROBERTSON, MONAGLE
EASTAUGH & BRADLEY

F. O. Eastaugh, Esq.
Commissioner on Uniform State Laws
P. O. Box 1211
Juneau, Alaska 99801

Dear Commissioner:

Thank you very much for your letter of November 18, 1971 and the most welcome news contained therein that the Uniform Probate Code now stands a good chance of passage at the forthcoming session of the Alaska legislature.

I have examined with interest the proposed changes summarized in Mr. Mulder's memorandum addressed to the members of the Alaska Bar Association and your own comments.

Because of the pressures of my work, I will be unable to do much more than call attention to a matter which I hope will be reconsidered. It is your Item (4), which expresses a doubt concerning the wisdom of establishing an absolute three-year limit on commencing probate. I have talked to our chief reporter, Richard V. Wellman, and have asked him to write to you directly so that you may have the benefit of his views on the importance that the three-year limitation plays in the Code. Would it be possible at the same time for you to send him a copy of the material which you sent me so that if anything occurs to him that should be called to your attention he may be in a position to write you concerning the matter. Will you please send me a copy of your letter so that both he and I will be aware of what each is doing.

Again, my thanks to you and my personal regards to both yourself and Mrs. Eastaugh.

Sincerely,

CHARLES HOROWITZ

CH:vm

P.S. While talking to Professor Wellman I was informed that he had just received a letter from Professor Richard Effland of Arizona State University that Arizona will probably be introducing the Code at the next legislative session.

THE UNIVERSITY OF MICHIGAN
LAW SCHOOL
HUTCHINS HALL
ANN ARBOR, MICHIGAN 48104

November 29, 1971

Comm. Disc.
RECEIVED
DEC - 3 1971
ROBERTSON, MONAGLE
EASTAUGH & BRADLEY

Frederick O. Eastaugh, Esq.
Box 1211
Juneau, Alaska 99801

Dear Fred:

Charles Horowitz telephoned recently to tell me that an important Alaskan committee had decided to make affirmative recommendations to your Legislature regarding the Uniform Probate Code. This is very good news. It puts Alaska with Arizona which, as I learned only a day or so ago, now has a totally favorable recommendation from a Law Revision Commission committee that spent a year in study of U.P.C.

Charles also indicated that he understood from your account to him that the Alaskan committee's recommendation would delete §3-108 which puts a three year from death time limit on proceedings to probate wills or administer estates. He asked me what I thought of this deletion and I responded that it would make hash out of much that Article III is designed to accomplish. He urged me to get my views on to you. This letter is designed to do just that.

The Committees and Reporters who created U.P.C. were not certain that three years from death was the correct deadline for probate and administration proceedings, but they were unanimously of the view that some cut-off on the possibility of probate and administration was necessary.

In Model Probate Code, §83 proposes a 5 year from death time limit on probate and administration proceedings. The statutory notes to M.P.C. report variations in state statutes prescribing probate limitations ranging from one year to twenty.

We know that at common law, there was no fixed time limit barring probate of a will. But, it was also true at common law that a will of land was like a deed in that no probate was essential as a preliminary to use of a will in evidence as a muniment of title.

But quite apart from historic sources concerning limitations on probate, §3-108 serves so many purposes in the functioning of Article III of U.P.C. that its deletion will cause serious difficulties unless it is offset by some careful re-drafting.

Consider these points:

(1) 3-108's three year limitation on probate serves as the time limit for contest of an informally probated will.

(2) 3-108's limitation serves to end questions concerning late-discovered wills that turn up after an estate has been distributed as intestate.

(3) 3-108's limitation period settles an estate as intestate and as lien-free if no will is probated and no administration is commenced. The public has been demanding a way by which inheritances can be perfected without an official act. Section 3-108 teams up with 3-101 to provide such a way. Few heirs will be content with the fact that inheritances will be non-marketable for the period prescribed by 3-108, so it's unlikely that many will avail themselves of the possibility. Nevertheless, it's quite important for good will purposes, and to restore public confidence in probate, that the possibility be available. Even those who use it may find title examiners insisting on a court determination of heirship (not barred by 3-108), but then again, not all heirship patterns are disputable or difficult to prove.

(4) The bar of 3-108 on administration bars the elective share proceedings under Article II, Part 2.

(5) The limitations in §3-1006 will not make any sense if 3-108 is deleted.

(6) Deletion of 3-108 seriously undercuts the effort reflected in Article II, Part 1 to make intestacy a recommended estate plan for many persons of ordinary means. This objective, in turn, is integral to the effort to re-establish confidence in sole ownership until death, and in state laws governing inheritance.

(7) Leaving 3-108 in the Code will not reduce the incentive for many inheritors and fiduciaries to use protective adjudications. The time for the end of questions relating to inheritances can be accelerated very appreciably by use of the formal proceedings provided in Article III, Part 4 and in §3-1001 and 3-1002.

I hope you can get your committee to reconsider the proposal to abandon this important time limit. Please let me know if I can be of any assistance in clarifying the matter.

Sincerely,

Richard V. Wellman

RVW:cjk

cc: The Honorable Charles Horowitz

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December 3, 1971

Professor Richard V. Wellman
The University of Michigan Law School
Hutchins Hall
Ann Arbor, Michigan 48104

COPY

Re: Uniform Probate Code

Dear Dick:

Thank you for your letter of November 29 which contains exactly the information I was about to write you for.

I can accept all of the reasons you so aptly demonstrated for the questioned provision in the Code regarding the three year period of limitations for proceedings to probate wills or commence the administration of estates.

However, we have a problem in Alaska that might not be shared in the Lower 48. Most of us have at one time or another been faced with the necessity of probating estates some ten or more years after death in order to clear title to realty. We usually find it necessary to probate one or two estates in order to clear title and are sometimes able to do so for a nominal cost less than the cost of a quiet title action.

As you suggest 3-108 may be the perfect solution to such problems, and if the limitation period of this section will not satisfy the title companies it could well be that the suggested court determination of heirship could be handled at nominal cost to solve most problems.

Your comments or further suggestions would be helpful.

Our Legislative Council met this past Monday and it is my understanding this point was discussed but left for legislative committee action when the bill is introduced. I am accordingly taking the liberty of sending copies of this letter and of your letter, to Senator Robert Ziegler, who is Chairman of our Legislative Council and who will be most influential in determining the action to be taken in the forthcoming session, and also to John Elliott who as you know is Director of Legislative Affairs.

As Charles Horowitz suggested, I am enclosing a copy of the Code modified to conform to the Alaska Bill Drawing Manual with the accompanying memorandum from Russell E. Mulder, Deputy Director of Legislative Affairs.

I was in Anchorage last week to attend Bob Eastaugh's wedding. Jim Bradley came up for it. Avrum Gross is reviewing the Code for the Juneau Bar Association. Both Jim and Av wanted to be remembered to you.

Sincerely,

FOE:bh
Encs.
cc: The Honorable Charles Horowitz
Senator Robert Ziegler Sr.
John Elliott, Esq.

F. O. Eastaugh

RECEIVED
DEC 3 1971
LEGISLATIVE AFFAIRS
AGENC

UNIFORM PROBATE CODE—ILLEGITIMACY—Inheritance and the Illegitimate: A Model for Probate Reform

I. INTRODUCTION

On May 20, 1968, the United States Supreme Court handed down landmark decisions in *Levy v. Louisiana*[1] and *Glona v. American Guarantee & Liability Insurance Company*.[2] In *Levy*, five illegitimate children sued under article 2315 of the Louisiana Civil Code[3] for damages for the wrongful death of their mother. The suit was dismissed by the Louisiana district court, which held that illegitimate children had no cause of action under the Louisiana statute. In *Glona*, a Texas domiciliary brought a diversity action in federal district court in Texas for the wrongful death of her illegitimate son, caused by an automobile accident in Louisiana. The Texas district court dismissed the suit, holding that under Louisiana law the mother had no cause of action for the death of her illegitimate child. The Supreme Court granted the petition for certiorari in *Glona*[4] and noted probable jurisdiction in *Levy*.[5] With Justice Douglas writing for a majority of six in each case,[6] the Court reversed both decisions, holding that the Louisiana wrongful-death statute denied equal protection of the law both to illegitimate children and to their parents.

Levy and *Glona*, read narrowly, stand only for the proposition that a state wrongful-death statute cannot discriminate between beneficiaries solely on the basis of legitimacy. Read in their broadest sense, however, the opinions in the two cases condemn generally any classification based on legitimacy. A major problem with the opinions is that Justice Douglas did not specify the grounds on which he based his decision. Thus, the potential scope of the holdings is open to question. Several recent cases[7] have interpreted *Levy* to condemn all classifications based on legitimacy. Similarly,

1. 391 U.S. 68 (1968).

2. 391 U.S. 73 (1968).

3. LA. CIV. CODE ANN. art. 2315 (West Supp. 1969).

4. 389 U.S. 969 (1967).

5. 389 U.S. 925 (1967).

6. Justices Black and Stewart joined Justice Harlan, dissenting, in both cases. 391 U.S. at 76.

7. *See* King v. Smith, 392 U.S. 309 (1968), especially Justice Douglas, concurring, at 392 U.S. at 336 (AFDC payments); Munn v. Munn, 450 P.2d 68 (Colo. 1969) (support); R—— v. R——, 431 S.W.2d 152 (Mo. 1968) (support); *In re* Estate of Jensen, 162 N.W.2d 861 (N.D. 1968) (inheritance). *But see* Strahan v. Strahan, 304 F. Supp. 40 (W.D. La. 1969) (inheritance).

several commentators have argued persuasively that the *Levy* reasoning should be extended by a test of "close scrutiny" under the equal protection clause of the fourteenth amendment,[8] to areas of the law other than wrongful death and should be extended with equal force to the child-father relationship as well as the child-mother relationship.[9]

One area of the law in which there traditionally has been discrimination against the illegitimate is that of inheritance. While most states allow an illegitimate to inherit from his mother by intestate succession on an equal footing with legitimate offspring,[10] only three states[11] allow an illegitimate to inherit from the father equally with legitimate offspring. Rather, most states require the father formally to recognize or acknowledge his illegitimate offspring in order for the child to be able to inherit from the father by intestacy.[12] In a few other states a judgment in a paternity action gives the illegitimate child the right to inherit from his father.[13] Not all states allow illegitimates to inherit from the mother's family, and only a few allow them to inherit from the

---

8. The courts tend to apply a close-scrutiny test over classifications when the interests at stake are deemed fundamental (*see* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (voting) and Douglas v. California, 372 U.S. 353 (1963) (right of the criminally accused to a proper defense)), or when the classification involved is inherently suspect (*see* Brown v. Board of Educ., 347 U.S. 483 (1954) (race)).

9. The general consensus among the commentators seems to be that either a close-scrutiny test should be applied or, in any event, the traditional state interests in supporting discrimination against illegitimates—to encourage marriage, to discourage promiscuity, and so forth—should no longer be considered "rational." *See generally* Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477 (1967); Krause, *Legitimate and Illegitimate Offspring of Levy v. Louisiana—First Decisions on Equal Protection and Paternity*, 36 U. CHI. L. REV. 338 (1969); Gray & Rudovsky, *The Court Acknowledges the Illegitimate: Levy v. Louisiana and Glona v. American Guarantee & Liability Insurance Co.*, 118 U. PA. L. REV. 1 (1969); Comment, *The Expanding Rights of the Illegitimate*, 3 CREIGHTON L. REV. 135 (1970); Note, *Equal Protection and the Applicability of Levy v. Louisiana to Succession Law*, 44 TUL. L. REV. 640 (1970); Note, *Inheritance Rights of Illegitimate Children Under the Equal Protection Clause*, 54 MINN. L. REV. 1336 (1970); Recent Development, 21 CASE W. RES. L. REV. 292 (1970).

10. *See* Note, *Illegitimacy*, 26 BROOKLYN L. REV. 45, 76-79 (1959).

11. Arizona, North Dakota, and Oregon have abolished illegitimacy as a legal status. *See* ARIZ. REV. STAT. ANN. § 14-206 (1956) ("A. Every child is the legitimate child of its natural parents. . . . B. Every child shall inherit from its natural parents and from their kindred heir, lineal and collateral, in the same manner as children born in lawful wedlock. . . ."); N.D. CENT. CODE § 56-01-05 (Supp. 1969) ("Every child is hereby declared to be the legitimate child of his natural parents. . . . He shall inherit from his natural parents, and from their kindred heir, lineal and collateral. . . ."); ORE. REV. STAT. § 109.060 (1968) ("The legal status and legal relationships and the rights and obligations between a person and his descendants, and between a person and his parents, their descendants and kindred, are the same for all persons, whether or not the parents have been married.").

12. *See* Note, *Illegitimacy*, 26 BROOKLYN L. REV. 45, 76-79 (1959).

13. *Id.*

father's family.[14] Furthermore, when a testator makes a bequest to his "children" in a will, many states have construed that term to include only legitimate children.[15] Thus, most states discriminate against illegitimates in their inheritance laws, although there are local variations concerning the manner and extent of the discrimination.

In light of *Levy* and *Glona*, and their progeny, the state inheritance statutes that discriminate on the basis of legitimacy are of dubious constitutionality.[16] Moreover, there has been over the past decade a perceptible trend in state and federal laws to bring the illegitimate child into a position of parity with his legitimate counterpart with regard to various legal rights.[17] Furthermore, commentators such as Norman Dacey[18] have soundly criticized probate laws on various grounds, and have exerted discernible pressure for a reform of probate law into a system more responsive to present-day needs. In light of these developments, therefore, it is likely that many states will be revising their inheritance statutes to provide illegitimates with certain legal rights that compare favorably with those accorded legitimate offspring.

The Uniform Probate Code (Code),[19] which was approved by the American Bar Association in August 1969, deals with the prob-

14. *Id.*

15. *See* Annot., 34 A.L.R.2d 4 (1954) (Right of Illegitimate Child To Take Under Testamentary Gift to "Children").

16. The commentators have painstakingly explored the constitutional issues involved. *See* sources cited at note 9 *supra*. In general, the consensus seems to be that while the right to inherit by intestacy—being a matter of statutory grace—is probably not a basic civil right, any classification based on legitimacy is probably inherently suspect—just as is a classification based on race. Thus the strict test of close scrutiny under the equal protection clause should apply. *See* note 8 *supra*. Furthermore, myths of a "rational purpose" (for a statement of the rational-purpose or reasonable-basis test of equal protection under the fourteenth amendment, see Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911)) to support discrimination against illegitimates—discouraging promiscuity, preserving the family unit, promoting morality—have been largely exploded by the same commentators. On the other hand, a federal district court in Strahan v. Strahan, 301 F. Supp. 40 (W.D. La. 1969), recently held Louisiana's intestacy statute, which denies to unacknowledged illegitimates the rights of inheritance enjoyed by legitimate issue of an intestate decedent, to be reasonable under the rationality test of the equal protection clause—the test that the court felt was applicable. The court identified two rationales sufficient to justify the statutory discrimination: (1) encouraging marriage and discouraging promiscuity, and (2) Louisiana's interest in maintaining stability of land titles. 304 F. Supp. at 42. The *Strahan* decision is criticized in Comment, *The Expanding Rights of the Illegitimate*, 3 CREIGHTON L. REV. 135, 155 (1970); Note, *Equal Protection and the Applicability of Levy v. Louisiana to Succession Law*, 44 TUL. L. REV. 640, 642 (1970); Recent Development, 21 CASE W. RES. L. REV. 292, 293-94 (1970).

17. *E.g.*, WIS. STAT. ANN. § 852.05 (Supp. 1970), and official comment. *See* Note, *The Rights of Illegitimates Under Federal Statutes*, 76 HARV. L. REV. 337 (1962).

18. *See, e.g.*, N. DACEY, HOW TO AVOID PROBATE (1966).

19. The Uniform Probate Code [hereinafter UPC] was promulgated by the National Conference of Commissioners on Uniform State Laws, and approved by the House of Delegates of the American Bar Association in August 1969.

lem of inheritance by illegitimates both with regard to intestate succession—section 2-109—and also with regard to the construction of a bequest to "children" by will—section 2-611. This Note will examine the issue whether the Code, which presents a comprehensive model for probate reform, deals with the problem of inheritance by illegitimates in an appropriate, desirable, and constitutional manner. The Code provisions concerning illegitimacy relate to many other provisions of the Code in which childhood status is relevant;[20] therefore, it will be useful to analyze these other provisions in order to assess the over-all effect of section 2-109 and section 2-611 in an integrated probate system. On the other hand, the formulae set out in sections 2-109 and 2-611, if constitutional, could constitute a desirable model for probate reform—even apart from the entire reform package of the Code—for those states that wish to, or, indeed, who are forced to, reform their laws in this important area.

II. The Illegitimate and Intestate Succession Under the Uniform Probate Code

A. *Section 2-109*

1. *Meaning*

Article 2 of the Code deals with intestate succession and wills. Under that article, section 2-109 defines "child" for the purpose of intestate succession. Furthermore, since section 1-201, the general definitional section of the Code, adopts the section 2-109 definition of "child," that definition is established for all purposes throughout the Code.[21] Section 2-109 provides:

> If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person,
>
> (1) an adopted person is the child of an adopting parent and not of the natural parents except that adoption of a child by the spouse of a natural parent has no effect on the relationship between the child and that natural parent.
>
> (2) In cases not covered by (1), a person born out of wedlock is a child of the mother. That person is also a child of the father, if:
>
> (i) the natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void; or
>
> (ii) the paternity is established by an adjudication before the death of the father, or is established thereafter by clear and con-

20. *See* pt. II. B. *infra*.

21. UPC § 1-201(5) provides: "'Child' includes any individual entitled to take as a child under this Code by intestate succession from the parent whose relationship is involved and excludes any person who is only a stepchild, a foster child, a grandchild or any more remote descendant."

> vincing proof, except that the paternity established under this subparagraph (ii) is ineffective to qualify the father or his kindred to inherit from or through the child unless the father has openly treated the child as his, and has not refused to support the child.

The language of the statute seems to be clear for the most part, but there may be an ambiguity that could best be dealt with in a comment to the statutory language. Subsection (2) is intended to define the right of an illegitimate who is not subsequently adopted under subsection (1) to inherit by intestacy. Such a person is always the "child" of the mother, and is also the "child" of the father if he is legitimated by the marriage of his natural parents or if he or his mother can establish the identity of the natural father to the satisfaction of subparagraph (2)(ii) of the section. Although the language of subsection (2) seems to be clear on its face, it appears to contain a latent ambiguity in that subparagraph (2)(i) runs headlong into "one of the strongest presumptions" in this area of the law—the presumption of legitimacy.[22] This doctrine, which derives from English law[23] and which is very common in American jurisdictions,[24] raises a strong presumption, usually rebuttable only by proof of impotency or nonaccess, that any child born in wedlock is legitimate.[25] The presumption is an outgrowth of the time when bastardy was not only a source of reproach and ridicule, but also a source of grave material and legal disadvantage. Although the stigmas attached to bastardy, both personal and legal, have gradually dissipated somewhat over the years, the presumption has remained.[26] The source of the crucial ambiguity lies in the fact that the term "wedlock" is used in a more narrow sense in the Code than it is in the presumption of legitimacy.

It seems clear from a reading of section 2-109 that the policy of that section is to enable illegitimates to inherit from their natural parents—hence "wedlock" is intended to mean marriage between the natural parents of a child. The policy of the presumption of legitimacy, however, is to avoid bastardization of as many children as possible—hence "wedlock" simply means any marriage at all. Accordingly, the presumption has been held to override an acknowledgment by the true father from an adulterous relationship when there was no clear proof of nonaccess or impotence of the legal husband.[27] Therefore, since the policy of section 2-109

22. *See* Lanford v. Lanford, 151 Colo. 273, 377 P.2d 115 (1962).

23. Banbury Peerage Case, 1 Sim. & St. 153, 57 Eng. Rep. 62 (Ch. 1811).

24. *See, e.g.*, Lanford v. Lanford, 151 Colo. 273, 377 P.2d 115 (1962); Ellis v. Woods, 214 Ga. 105, 103 S.E.2d 297 (1958).

25. *See, e.g.*, Gravely v. Gravely, 353 S.W.2d 333 (Tex. 1961).

26. *See* V. Saario, Study of Discrimination Against Persons Born Out of Wedlock 143-47 (1967).

27. Reyes v. Flemming, 158 F. Supp. 566 (D.P.R. 1958); George v. Bertrand, 217

dictates that "wedlock" means marriage only between the natural parents, that interpretation should be made explicit either in the statute or in a comment to that section, and the presumption of legitimacy should be similarly limited in those jurisdictions that may adopt the Code formulation of section 2-109.

2. *Constitutionality*

Assuming that section 2-109 can be read literally, subject to the above qualifications, it must, of course, pass the test of the equal protection clause of the fourteenth amendment in order to be valid. While Justice Douglas did not clearly specify the equal protection test which he applied in *Levy and Glona*,[28] it appears that section 2-109 would be valid vis-à-vis inheritance by illegitimate children under either the rationality test[29]—the basic test of equal protection—or under the close-scrutiny test[30]—the test applied when a basic civil right or an inherently suspect classification is involved.[31] The provision would be valid for the simple reason that it makes no classification on the basis of illegitimacy. Section 2-109(1) makes no distinction whatever between legitimates and illegitimates, and section 2-109(2) merely establishes a burden of proof[32] of paternity in the child-father relationship which the illegitimate must meet before he can inherit from his natural father. Substantively, section 2-109(2) takes the position that all children have the right to inherit equally from their natural parents. The draftsmen of the provision recognized, however, that while there are few, if any, problems of proof in ascertaining the child-mother relationship, such problems may be substantial indeed in ascertaining the child-father relationship. Thus, section 2-109(2)(ii) sets out a standard of proof for the illegitimate or his next friend to meet in establishing paternity if it has not been established by adoption under subparagraph (1). By imposing a burden of proof, then, section 2-109(2) does not entail a classification that must pass muster before the appropriate equal protection test, but rather, it entails a standard that must be measured by due process considerations.

S.2d 47 (Ct. App. La. 1968), *writ of review denied*, 253 La. 647, 219 S.2d 177, *cert. denied*, 396 U.S. 974 (1969).

28. *See* text accompanying notes 7-9 *supra*.

29. *See* Morey v. Doud, 354 U.S. 457, 465-66 (1956). *See also* note 16 *supra*.

30. *See* McLaughlin v. Florida, 379 U.S. 184 (1964); Oyama v. California, 332 U.S. 633 (1948); Korematsu v. United States, 323 U.S. 214 (1944). *See also* note 8 *supra*.

31. Gray & Rudovsky, *supra* note 9, at 15, suggest that perhaps the Court in *Levy* and *Glona* has taken a middle ground between the rationality and strict-scrutiny tests.

32. In *Glona*, Justice Douglas suggested that the danger of fraudulent claims is properly handled by an appropriate burden of proof rather than by making a classification which amounts to a denial of equal protection. 391 U.S. at 75-76.

One of the prime purposes of imposing a burden-of-proof requirement is to prevent fraudulent claims.[33] So stated, such a requirement certainly serves a valid state purpose. However, if the burden imposed is too heavy—that is, if it is tantamount to a bar to recovery in a substantial number of cases—it may operate as a deprivation of property without due process of law on those unable to meet the unreasonable burden.[34] It does not appear, however, that the standard adopted in section 2-109(2)(ii) is so onerous as to be violative of due process. If the only means of establishing paternity were by an adjudication before the death of the father, the standard would be of doubtful validity since the illegitimate's legal rights would be determined by the volitional acts of other people—the father by acknowledgment, or the mother by prosecuting a paternity suit. By allowing clear and convincing proof of paternity after the father's death, however, the statute, unlike many of the present provisions requiring acknowledgment by the father while he is alive,[35] allows the child or his next friend to gather appropriate proof of paternity in cases in which the father has died without acknowledging the child. The "clear and convincing" standard of section 2-109 is consistent with other burdens of proof relating to legal relationships involving deceased persons.[36] Thus, it appears that the provisions of section 2-109 governing inheritance of the illegitimate child by, through, or from his natural father are constitutional.

On the other hand, there may be raised grave doubts concerning the constitutionality of that portion of section 2-109 relating to the right of a father or his kindred to inherit from or through his illegitimate child. The Code provides that even if paternity is established under section 2-109(2)(ii), the father and his kindred cannot inherit from or through the child "unless the father has openly treated the child as his, and has not refused to support the child."[37] The rationale behind that provision seems to be to encourage fathers at least informally to acknowledge and support their illegitimate children. While this purpose may be a rational one under traditional equal protection analysis, it cannot stand if the close-scrutiny test of equal protection is applied. The Supreme Court has held in *Skinner v. Oklahoma*[38] that a statute touching

33. 391 U.S. at 76.

34. *See, e.g.*, Manley v. Georgia, 279 U.S. 1 (1929).

35. *See* note 12 *supra* and accompanying text.

36. *Compare, e.g.*, N.M. STAT. ANN. § 20-5-2 (Supp. 1969) (interested party cannot obtain judgment against a deceased person on his own evidence unless such evidence is corroborated by other material evidence) *with* W. VA. CODE ANN. § 57-3-1 (1966) (interested party shall not be examined as a witness in regard to any personal transaction or communication between himself and a deceased except on his own behalf).

37. UPC § 2-109(2)(ii).

38. 316 U.S. 535 (1942).

on fundamental rights must not be underinclusive. Yet section 2-109(2)(ii) arguably is underinclusive since it does not cut off the rights of all fathers who desert or fail to support their children, but rather cuts off the rights of only those who happen to have illegitimate children. Thus the constitutionality of the last clause of section 2-109(2)(ii) may turn on how the right to inherit is characterized or on how the use of ancestry (in the sense of legitimacy) as a means of classification is viewed.[39] If the right to inherit is deemed a basic civil right, or if classification based on legitimacy is deemed suspect—as is classification based on race—then the strict test of equal protection will apply,[40] and the last clause of section 2-109(2)(ii) may not pass that test.

3. *Desirability*

If section 2-109 meets the tests of the equal protection and due process clauses of the fourteenth amendment, as it probably does, it still must accomplish a desirable distribution in order to be appropriate for adoption by the various states either with or without the rest of the Code package. The law of intestate succession has two principal aims: to achieve a distribution of property at death which society deems fair, and to distribute property according to the presumed intent of the deceased.[41] If a socially equitable distribution were the sole aim of intestacy statutes, the distribution plan based on the definition of "child" in section 2-109(2) could not be faulted. It seems only fair that the natural offspring of decedents should be the object of their bounty in the state's estate plan. Illegitimate offspring are no less deserving of their natural parents' bounty because of a mere accident of birth than are their legitimate brethren. In fact, given the extent of the stigma that still attaches to bastardy,[42] it could be argued that illegitimates may be more entitled to compensation in the form of inheritance than legitimate children, at least from the standpoint of social justice. At any rate, it seems clear that from the standpoint of equitable distribution the most desirable plan is to treat legitimates and illegitimates as nearly equally as possible, especially in light of the proof considerations that must be taken into account—and section 2-109(2) accomplishes this end.

However, achieving a socially equitable distribution is only one of the goals of intestacy statutes; reflecting the presumed intent of the ordinary testator in lieu of a valid will is the other primary goal. With regard to this latter goal it could readily be argued that most decedents, especially fathers, would not wish to have

39. *See* note 10 *supra*.

40. *See* notes 29 & 30 *supra* and accompanying text.

41. *See* Gray v. Rudovsky, *supra* note 9, at 24.

42. *See* V. SAARIO, *supra* note 26, at 143-47.

their illegitimate offspring included among their heirs. But if the statute is designed to reflect presumed intent, it must still do so within constitutional limits. If the normal testator's presumed intent is in fact frustrated by the provisions of section 2-109(2), it is clear that the fourteenth amendment requires that result. In *Shelley v. Kraemer*,[43] the Supreme Court held that the equal protection clause prohibits court enforcement of restrictive covenants based on race. The reasoning of *Shelley* can be applied by analogy to the instant situation—a state is not allowed by statute or other state action to attribute a discriminatory intent to those who may not in fact have had such an intent.[44] Given the additional fact that a testator who is so inclined can exclude illegitimate children from his estate by disinheriting them by will, there appears to be no reason whatever to inject a presumption of discriminatory intent into the intestacy laws. Rather, the burden of discrimination properly lies with the testator.[45] Thus, it appears that the legal-estate plan of the Code based on the definition of "child" in section 2-109(2) reaches a desirable result in light of both social values and presumed intent.

Section 2-109(1), which relates to inheritance by adopted persons, also seems to achieve a desirable disposition. That subsection is apparently designed to apply to three types of situations, only two of which deal directly with illegitimacy. The first situation involves the case in which the parents of a legitimate child are divorced, one of the parents subsequently remarries, and the new step-parent adopts the child. This situation, by its very nature, would not arise with regard to an illegitimate child. The second situation is the case in which one of the natural parents of a child, whether legitimate or illegitimate, dies, the surviving spouse remarries, and the new step-parent adopts the child. In such a case the child would only be the child of the surviving spouse and the step-parent, and not of the deceased natural parent. Thus, adoption would cause the child, whether legitimate or illegitimate, to lose his right to inherit through his deceased natural parent, to the extent that he has not already done so before the act of adoption takes place. The third situation involves the case in which an illegitimate child is born, one of the natural parents marries a spouse other than the other natural parent, and such new spouse adopts the child. In this case, the child would inherit by, from, and through only his married natural parent and step-parent, not from the other natural parent. Similarly, the other natural parent

43. 334 U.S. 1 (1948).

44. *Cf.*, Reitman v. Mulkey, 387 U.S. 369 (1967).

45. An individual is free to discriminate against anyone he pleases so long as no state action is involved. *See generally* Shelley v. Kraemer, 334 U.S. 1 (1948); Civil Rights Cases, 109 U.S. 3 (1883).

could not inherit by, from, and through the child, at least by intestacy.

Section 2-109(1), insofar as it relates to illegitimates in the second and third situations just mentioned, appears to be desirable both from the standpoint of social justice and that of the presumed intent of the deceased. Furthermore, section 2-109(1) is not inconsistent with the statutory provisions presently in force in many states with regard to adopted children.[46] At first glance, it might appear that section 2-109(1) fails to take adequate account of natural filial relationships in that adoption causes a child to lose his right to inherit by, through, or from his other natural parent.[47] On the other hand, there are persuasive reasons why an adopted child should not inherit by, through, or from his other natural parent. In the first place, any social-justice argument that could be made to the contrary is neutralized by the fact that the illegitimate will be taking by intestacy by, through, or from someone—namely the adopting parent as well as his or her natural-parent spouse. In addition, insofar as section 2-109(1) is designed to reflect the presumed intent of both the adopting parent and the other natural parent it seems to do so—surely the adopting parent would wish to make his adopted child the object of his bounty, and it is almost as likely that the other natural parent would not wish for his estate to be distributed to a child who has been adopted, and in many cases reared, by another person.[48] Finally, in many adoption cases, the other natural parent may not be known to the child —especially an illegitimate child—and it would seem to be a valid

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46. *See, e.g.*, MICH. COMP. LAW ANN. § 702.86 (1968); N.J. STAT. ANN. § 9:3-30 (1968).

47. In fact, the traditional rule in many states has been that an adopted child still retains his right to inherit by, from, and through his natural parents, and in some states this is still the rule. *See, e.g.*, ALA. CODE tit. 27, § 5 (Supp. 1969). The trend in recent years, however, has been to subordinate the interest of fostering natural filial relationships to that of fostering unity in the adopting family. The New York experience in this regard is instructive. Until 1963, New York law, in accordance with the traditional rule, provided that an adopted child inherited from his natural as well as his adopting parents. Ch. 147, § 1, [1961] N.Y. Laws 781-82. In 1963 the law was changed to provide that an adopted child retained the right to inherit from his natural parents only when a natural parent remarried and consented to the adoption of the child by his or her spouse. N.Y. DOM. REL. LAW § 117 (McKinney 1964). Finally, in 1966 the law was changed further to provide that "[w]hen a natural . . . parent . . . marries or remarries, and consents that the stepfather or stepmother may adopt such child, such consent shall not . . . affect the rights of such consenting spouse and such foster child to inherit from and through each other and the natural and adopted kindred of such consenting spouse." N.Y. DOM. REL. LAW § 117 (McKinney Supp. 1969). In addition to fostering family unity, the effect of the present New York provision, as well as that of UPC § 2-109, is to give the adopted child the same relative rights that a natural child of the same parents would have.

48. Adoption statutes and procedures generally produce a clean break between the natural parents and the child. Especially in the case of agency adoptions, the natural parents often do not know who the adopting parents are. *See, e.g.*, Katz, *Judicial and Statutory Trends in the Law of Adoption*, 51 GEO. L.J. 64, 66-69 (1962).

state interest to attempt to protect the new family unit by not creating an economic incentive for the child to investigate his natural parentage.[49] Thus, it is submitted that the Code's solution of treating an adopted child as the child of the adopting parent in place of the other natural parent is the best way of dealing with situations involving illegitimacy and adoption.

B. *The Impact of Section 2-109 on Other Provisions of the Uniform Probate Code Relating to Intestate Succession*

Section 2-109, which treats the illegitimate offspring as the child of the natural mother in all cases, and the child of the natural father if certain conditions of proof are met, cannot be viewed in a vacuum. Although that section could be severed from the rest of the Code, it forms an integral part of article 2 relating to intestate succession and wills. As mentioned above, the general definitional section of the Code in article 1 adopts the section 2-109 definition of "child" throughout the entire Code.[50] In article 2 itself, the new and broader definition of "child" affects no less than fifteen other sections.[51] It may be useful to survey some of those sections briefly to discern the over-all impact of section 2-109 on inheritance law and to point out certain areas where draftsmen may wish to adjust their planning to take the impact of section 2-109 into account.

The intestate share of the surviving spouse is determined by section 2-102.[52] Since the share of the surviving spouse varies depending on the existence of issue of the decedent, treating illegitimates as heirs of a deceased father would change the spouse's

49. Full integration of the adopted child into the adopting family is a major social objective of adoption. Lingering ties with one or both natural parents would seem to undermine that objective. *See* Katz, *supra* note 48.

50. *See* note 21 *supra* and accompanying text.

51. Naturally, since UPC § 2-109 defines "child" and since children are an essential beneficiary in any intestacy scheme, the substantive and procedural rules governing intestate succession which the UPC sets forth will be applicable to illegitimates as well as legitimate children. *See, e.g.*, UPC § 2-104 (children must survive the testator for 120 hours in order to take an intestate share); UPC § 2-107 (halfbloods take as if they were of the whole blood); UPC § 2-111 (debts owed to the decedent will only be charged against the debtor's share); UPC § 2-801 (renunciation). Treating illegitimates as children under these provisions, however, does not create any special problems for draftsmen.

52. UPC § 2-102 provides:

The intestate share of the surviving spouse is:

(1) if there is no surviving issue or parent of the decedent, the entire intestate estate;

(2) if there is no surviving issue but the decedent is survived by a parent or parents, the first [$50,000], plus one-half of the balance of the intestate estate;

(3) if there are surviving issue all of whom are issue of the surviving spouse also, the first [$50,000], plus one-half of the balance of the intestate estate;

(4) if there are surviving issue one or more of whom are not issue of the surviving spouse, one-half of the intestate estate.

The same analysis would apply to UPC § 2-102A for community property states.

share considerably, at least when the father has no legitimate issue. Rather than taking the whole intestate estate under section 2-102(1) or the first 50,000 dollars plus one half of the remaining estate under sections 2-102(2) or (3) if illegitimates were not treated as heirs of the father, the widow would now take one half of the intestate estate under section 2-102(4). Thus, because of the effect that section 2-109 has on section 2-102, the married father of illegitimate offspring who wants his wife to inherit his entire estate would be forced to draft a will to achieve that particular disposition.

Section 2-103[53] allocates that portion of the intestate estate which remains after the surviving spouse takes her share, or the entire estate if there is no surviving spouse. Under section 2-103(1), treating illegitimate children as heirs of the father will affect the size of the shares that pass to legitimate children. It is not difficult to imagine a case in which heirs who would otherwise take per capita would be relegated to taking by representation by virtue of the existence of an illegitimate child of a degree closer to the parent, since shares are determined pursuant to section 2-106, relating to representation, and the illegitimate simply would be added to the class of heirs at the appropriate level. Similarly, illegitimates can take by representation through their dead parents, thus creating another class of heirs in some cases, and reducing the per capita shares of the first degree accordingly. Perhaps even more important than its effect on section 2-103(1) is the possible effect of section 2-109 on sections 2-103(2), (3), and (4). Under those provisions, the share of the decedent's parents, his brothers and sisters, and his grandparents respectively are all contingent on the absence of surviving issue. Thus, if a man died leaving an illegitimate son and two aged parents, his entire estate would go to the

53. UPC § 2-103 provides:

The part of the intestate estate not passing to the surviving spouse under Section 2-102, or the entire intestate estate if there is no surviving spouse, passes as follows:

(1) to the issue of the decedent; if they are all of the same degree of kinship to the decedent they take equally, but if of unequal degree, then those of more remote degree take by representation;

(2) if there is no surviving issue, to his parent or parents equally;

(3) if there is no surviving issue or parent, to the brothers and sisters and the issue of each deceased brother or sister by representation; if there is no surviving brother or sister, the issue of brothers and sisters take equally if they are all of the same degree of kinship to the decedent, but if of unequal degree then those of more remote degree take by representation;

(4) if there is no surviving issue, parent or issue of a parent, but the decedent is survived by one or more grandparents or issue of grandparents, half of the estate passes to the paternal grandparents if both survive, or to the surviving paternal grandparent, or to the issue of the paternal grandparents if both are deceased, the issue taking equally if they are all of the same degree of kindship to the decedent, but if of unequal degree those of more remote degree take by representation; and the other half passes to the maternal relatives in the same manner; but if there be no surviving grandparent or issue of grandparent on either the paternal or the maternal side, the entire estate passes to the relatives on the other side in the same manner as the half.

illegitimate son. In much the same manner, treating an illegitimate as an heir may prevent escheat under section 2-105.[54] Draftsmen must be especially wary of section 2-103 since the existence of illegitimate heirs may cause distribution of the intestate estate contrary to the wishes or expectations of many decedents with illegitimate offspring. It is now necessary to advise such persons to write a will rather than rely on the intestacy laws.

Treating illegitimates as heirs of the father also has an important effect on section 2-108[55] relating to afterborn heirs. Under that provision, illegitimates who are conceived before a decedent's death but born thereafter will be heirs as if they were born during the lifetime of the decedent. Thus, the juxtaposition of sections 2-108 and 2-109 could give rise to a spate of fraudulent claims by pregnant "gold diggers." In such cases the "clear and convincing" proof requirement for establishing paternity under section 2-109 should prove its usefulness.

Section 2-109 also has an important impact on section 2-110[56] relating to advancements. Under section 2-110 an illegitimate, as an heir, is subject to having receipts treated as advancements in certain cases. The provision is sufficiently clear that support payments, for instance, would not be treated as advancements unless a writing to that effect can be produced. It should be noted, however, that an astute draftsman could make good use of section 2-110, since a father who is supporting illegitimate children in another household may wish to designate such support payments as advancements in order to make what he feels to be an equitable distribution of his estate. Section 2-110 would seem to allow him to make such a designation.

The effect of section 2-109 on section 2-112[57] dealing with alienage could also prove to be important and lead to some difficulties, since alien illegitimates would be entitled to take as heirs under that provision. In light of the number of American servicemen and travelers going abroad each year, it is not unlikely that

54. UPC § 2-105 provides: "If there is no taker under the provisions of this Article, the intestate estate passes to the [state]."

55. UPC § 2-108 provides: "Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent."

56. UPC § 2-110 provides:

> If a person dies intestate as to all his estate, property which he gave in his lifetime to an heir is treated as an advancement against the latter's share of the estate only if declared in a contemporaneous writing by the decedent or acknowledged in writing by the heir to be an advancement. For this purpose the property advanced is valued as of the time the heir came into possession or enjoyment of the property or as of the time of death of the decedent, whichever first occurs. If the recipient of the property fails to survive the decedent, the property is not taken into account in computing the intestate share to be received by the recipient's issue, unless the declaration or acknowledgment provides otherwise.

57. UPC § 2-112 provides: "No person is disqualified to take as an heir because he or a person through whom he claims is or has been an alien."

such servicemen and travelers father a number of alien illegitimate children.[58] However, it seems doubtful that many alien illegitimates will be able to sustain the "clear and convincing" proof burden of section 2-109(2)(ii). Moreover, international conflict-of-laws problems could arise in this area regarding choice of law, and could be especially troublesome if the child is born in a country that does not recognize paternity actions.

It should be noted that section 2-109 will also affect provisions of the Code other than those dealing strictly with intestate succession, since on the basis of that section, illegitimates may be able to take against a valid will in certain instances. For example, an illegitimate child could be a pretermitted heir under section 2-302[59] just as a legitimate child could be. Section 2-302 could present the draftsman with substantial problems since that section not only presumes the existence of a will but further presumes that the omission of an afterborn illegitimate child in that will was unintentional, except in enumerated circumstances. If an afterborn illegitimate child is deemed to be a pretermitted heir, he is entitled to take against the will the value which he would have received if the testator had died intestate. Furthermore, under section 2-302(b) an illegitimate child is entitled to a like share if the testator omitted him from his will in the belief that the child was dead. It may be that, in light of the relationship between sections 2-109 and 2-302, draftsmen will insert in many wills a provision to the effect that afterborn illegitimate children are purposely excluded from the testator's will, in order to make certain the circle of heirs in a given estate plan. This procedure would also provide a solution to the pregnant "gold digger" problem, alluded to earlier,[60] which might arise in this context as well.

Illegitimates may also be able to take the homestead allowance, exempt-property allowance, and family allowance against a will

58. *See, e.g.*, V. SAARIO, *supra* note 26, at 15.

59. UPC § 2-302 provides:

(a) If a testator fails to provide in his will for any of his children born or adopted after the execution of his will, the omitted child receives a share in the estate equal in value to that which he would have received if the testator had died intestate unless:

(1) it appears from the will that the omission was intentional;

(2) when the will was executed the testator had one or more children and devised substantially all his estate to the other parent of the omitted child; or

(3) the testator provided for the child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

(b) If at the time of execution of the will the testator fails to provide in his will for a living child solely because he believes the child to be dead, the child receives a share in the estate equal in value to that which he would have received if the testator had died intestate.

(c) In satisfying a share provided by this section, the devises made by the will abate as provided in Section 3-902.

60. *See text* following note 55 *supra*.

pursuant to sections 2-401 [61] 2-402,[62] and 2-403[63] respectively. Under section 2-401, if there is no surviving spouse, the minor or dependent illegitimate children have a right to share the homestead allowance of 5,000 dollars with other legitimate minor or dependent children. Thus, illegitimate children may be entitled to a homestead allowance when there otherwise would be none, as in the case in which a single man who was the father of a minor illegitimate child disposed of his entire estate by will. Similarly, under section 2-402 an illegitimate child is entitled to share in the exempt-property allowance for an estate up to a total of 3,500 dollars if there is no surviving spouse. In contrast to the homestead allowance, in order to be entitled to the exempt-property allowance illegitimates need not be minors or dependent on the decedent. Fur-

61. UPC § 2-401 provides:

A surviving spouse of a decedent who was domiciled in this state is entitled to a homestead allowance of [$5,000]. If there is no surviving spouse, each minor child and each dependent child of the decedent is entitled to a homestead allowance amounting to [$5,000] divided by the number of minor and dependent children of the decedent. The homestead allowance is exempt from and has priority over all claims against the estate. Homestead allowance is in addition to any share passing to the surviving spouse or minor or dependent child by the will of the decedent unless otherwise provided, by intestate succession or by way of elective share.

62. UPC § 2-402 provides:

In addition to the homestead allowance, the surviving spouse of a decedent who was domiciled in this state is entitled from the estate to value not exceeding $3,500 in excess of any security interests therein in household furniture, automobiles, furnishings, appliances and personal effects. If there is no surviving spouse, children of the decedent are entitled jointly to the same value. If encumbered chattels are selected and if the value in excess of security interests, plus that of other exempt property, is less than $3,500, or if there is not $3,500 worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the $3,500 value. Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate, except that the right to any assets to make up a deficiency of exempt property shall abate as necessary to permit prior payment of homestead allowance and family allowance. These rights are in addition to any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided, by intestate succession, or by way of elective share.

63. UPC § 2-403 provides:

In addition to the right to homestead allowance and exempt property, if the decedent was domiciled in this state, the surviving spouse and minor children whom the decedent was obligated to support and children who were in fact being supported by him are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration, which allowance may not continue for longer than one year if the estate is inadequate to discharge allowed claims. The allowance may be paid as a lump sum or in periodic installments. It is payable to the surviving spouse, if living, for the use of the surviving spouse and minor and dependent children; otherwise to the children, or persons having their care and custody; but in case any minor child or dependent child is not living with the surviving spouse, the allowance may be made partially to the child or his guardian or other person having his care and custody, and partially to the spouse, as their needs may appear. The family allowance is exempt from and has priority over all claims but not over the homestead allowance.

The family allowance is not chargeable against any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided, by intestate succession, or by way of elective share. The death of any person entitled to family allowance terminates his right to allowances not yet paid.

thermore, illegitimates would be able to take advantage of the family-allowance provision of section 2-403 up to a total of 6,000 dollars during the period of administration of the estate. If the spouse survives, the family allowance is paid to her (or him) for the care of herself and the children living with her. But if the minor or dependent illegitimate child is not living with the surviving spouse, the allowance is apportioned between such spouse and such child. This situation would be fairly common in cases in which the parents of the illegitimate child do not live together. If no spouse survives the family allowance is paid directly to children who qualify. It should be noted that the homestead, exempt-property, and family allowances all are created by statute and, as such, entitle qualified persons to take against the will regardless of a testator's contrary intent.

From this brief survey of other relevant Code sections to which section 2-109 relates, it is clear that the repercussions of treating illegitimates as heirs of the natural parents whenever possible can have a profound effect on the distribution of estates. Thus, estate planners must be alert to the implications of section 2-109 in order to develop secure estate plans. Section 2-109 assures that if a testator wishes to discriminate against his illegitimate offspring, the law will not accomplish that task for him.

III. The Illegitimate and the Class Gift to Children Under the Uniform Probate Code

Part 6 of article 2 of the Code deals with rules of construction for wills and contains the other crucial Code provision dealing with illegitimates—section 2-611. As the general comment to part 6 suggests, "all of the 'rules' set forth yield to a contrary intent expressed in the will and are therefore merely presumptions."[64] Nonetheless, rules of construction are an important aspect of inheritance law, for all too often testators fail to make clear their intentions in a will, and courts need some guidance in the form of legal presumptions in construing wills. Section 2-611 is that rule of construction which defines "child" in a class-gift terminology. That section provides that:

> Halfbloods, adopted persons, and persons born out of wedlock are included in class gift terminology and terms of relationship in accordance with rules for determining relationships for purposes of intestate succession, but a person born out of wedlock is not treated as the child of the father unless the person is openly and notoriously so treated by the father.[65]

64. UPC art. 2, pt. 6, general comment.

65. UPC § 2-611.

Thus, section 2-611[66] adopts the basic formula of section 2-109 and adds another condition that the illegitimate must fulfill before he can be presumed to take under a bequest to children. The import of the provision is clear: the illegitimate child will always be included in a bequest to "children" by the mother; on the other hand, the same illegitimate child will only be included in a bequest to "children" by the father if the illegitimate can first establish paternity under section 2-109 *and* if the father openly and notoriously treats the child as his own. Section 2-611 by its terms only requires that an illegitimate be treated openly and notoriously as the child of the father in order to be included under a class gift to children. But the definition of "child" as used in section 2-611 comes from section 1-201(3) which extends the section 2-109 definition of "child" throughout the Code.[67] Thus, it seems that an illegitimate must satisfy requirements of both sections 2-109 and 2-611 in order to be included in a class gift to children.

Since a statutory presumption such as that found in section 2-611 constitutes state action no less than judicial enforcement of a restrictive covenant,[68] such a presumption must stand up to constitutional scrutiny under the fourteenth amendment. Section 2-611 poses no due process problems since it creates only a rebuttable presumption.[69] It may, however, be constitutionally suspect under the equal protection clause. The rationale behind the presumption in section 2-611 seems to be the "family-unit" theory,[70] which assumes that a testator normally wishes his bounty to pass to those within his family unit. As a general rule, the family-unit theory may be factually supportable, and may form a good basis for attempting to discern the actual intent of most testators. But unfortunately the "open and notorious" requirement of section 2-611 represents an imprecise application of the family-unit doctrine in that it requires too heavy a burden of proof from too small a group of people. One problem with section 2-611 is that only illegitimates need show open and notorious treatment by the father. If the provision is meant to foster the family-unit theory, why should not such a showing be required from *all* of a testator's children, legitimate and illegitimate alike? If a testator deserts both legitimate and illegitimate children, it would not be reasonable to allow only the legitimate children to take under a bequest to "children" when neither group actually has been treated as children by the father. On the other hand, a showing that the testator deserted

66. *See also* UPC § 3-101 which provides that the UPC will apply to wills drafted before the UPC becomes effective.

67. *See* note 21 *supra* and accompanying text.

68. *See* text accompanying note 48 *supra*.

69. *See* note 34 *supra*.

70. *See* Gray & Rudovsky, *supra* note 9.

all his children may be sufficient to rebut the presumption in section 2-611 against the illegitimate children. Thus, in large measure, the constitutionality and desirability of section 2-611 turns on the type and quantum of evidence that is required by a court to rebut the presumption contained therein.

Assuming that section 2-611 is neither undesirable nor unconstitutional even though it discriminates on the basis of legitimacy, one further problem remains with the formulation of that section. The requirement that the father treat the illegitimate as his child "openly and notoriously" in order for the child to be deemed an heir under a bequest to children may be challenged from the standpoint of desirability, not on the basis of any discrimination, but rather on its face as too strict a standard. It is arguable that such a requirement may be unrealistic since the imposition of that requirement may assume that the social stigma attached to bastardy has disappeared to a greater extent than it actually has.[71] In today's world it does not seem unlikely that a father might love and willingly support an illegitimate child and still not treat him as his own "openly and notoriously." Social convention is still too potent a force for many people openly to admit paternity of a bastard. Thus, a lesser showing of family unity than "open and notorious" treatment as a child would probably be more desirable under section 2-611. Clearly some recognition by the father of the parent-child relationship should be required. However, since the facts of each case are likely to be quite varied, it would be preferable to treat this issue on a case-by-case basis in order to determine the actual intent of the father, rather than to impose a strict per se standard such as the "open and notorious" requirement. Moreover, it must be remembered that since section 2-611 raises only a rebuttable presumption, testators are free explicitly to define "children" in their wills to include or exclude illegitimates as they see fit.

Thus it appears that although section 2-611 does create a classification based on illegitimacy, the discrimination it fosters is probably not so unreasonable as to violate the equal protection clause. Insofar as the presumption of section 2-611 has a factual basis, allows a court to discern the testator's actual intent in each case, and is rebuttable, it should be upheld in the courts. On the other hand, the standard of the presumption could be improved by modifying the "open and notorious" requirement to one which recognizes that many fathers may be unwilling, for a variety of social reasons, openly to acknowledge illegitimate children. Alternatively, the "open and notorious" requirement or a modification thereof could be applied to legitimate children as well in order to extend the family-unit theory to its logical limit.

71. *See* V. SAARIO, *supra* note 26, at 145-47.

IV. Conclusion

Illegitimacy has always been a fact of life in civilized society. So, too, has bastardy carried with it a special social stigma. But modern society has been gradually eliminating its outworn taboos. At the same time, the number of illegitimate births continues to rise[72] as illegitimacy proves to be more socially acceptable. In light of the large number of illegitimate children born in the United States every year,[73] American law, including inheritance law, can no longer afford to treat the bastard as *filius nullius* solely on account of an accident of birth. The bastard must be welcomed into society on a level of parity with his legitimate brothers. The provisions of the Uniform Probate Code dealing with illegitimates make a solid attempt to achieve that level of parity in the field of inheritance law. With only minor modifications necessary to avoid possible constitutional problems, the provisions of the Code appear to establish an appropriate model for reform in this important area, whether they be adopted in conjunction with the rest of the Uniform Probate Code or grafted onto an existing state probate system.

UNIFORM COMMERCIAL CODE—SALES—Sections 2-508 and 2-608—Limitations on the Perfect-Tender Rule

Just as parties to marriage contracts do not always live happily ever after, it is a fact of commercial life that a buyer and seller do not always live happily ever after the consummation of a sales contract. Even when the seller is satisfied with the arrangement, the buyer may try to cancel the contract either because he believes the seller has not and will not live up to his promise, or because changed circumstances have caused the buyer to feel that his purchase was not a good deal.

Buyer attempts to avoid sales contracts can occur in two contexts —merchants dealing with each other at arm's length, and merchants dealing with consumers. Contracts casebooks are full of cases involving merchant-buyers who cornered the glue or bolt market only to watch the price subsequently plummet. It was early observed that such a buyer will "often try to escape from a performance within the

72. *See* Krause, *Equal Protection for the Illegitimate*, 65 Mich. L. Rev. 477 (1967).

73. In 1963 there were 259,400 illegitimate live births in the United States. U.S. Census Bureau, Statistical Abstract of the United States 47, 51 (1965).

Some Effects of the Uniform Probate Code on Estate Planning

Richard V. Wellman

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CHAPTER 70-19

Some Effects of the Uniform Probate Code on Estate Planning

RICHARD V. WELLMAN *

¶70.1900 Introduction

The Uniform Probate Code is the product of a joint project of the Real Property, Probate and Trust Law Section of the American Bar Association and the National Conference of Commissioners on Uniform State Laws. The work started in 1962 and culminated in August 1969 when the Code, then in its sixth preliminary draft, was approved and promulgated by the sponsoring organizations. Early in 1970, an official paperback edition of the Code and official comments were published by the West Publishing Company.

It is fair to predict that the Uniform Probate Code will be of considerable interest to bar committees and legislatures across the country. In many states, probate laws are obviously obsolete. Also, Dacey and other popular writers have "Naderized" probate to the point where there is very great interest in corrective legisla-

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tion. The Code represents the careful effort of several dozen lawyer-experts whose principal objective was to produce a balanced package with broad acceptability. Preliminary drafts were reviewed by hundreds of lawyers, trustmen, life underwriters and other representatives of special points of view. Study committees organized by local bar committees combed the preliminary drafts and contributed enormously to the refining process which continued for three full years after the first tentative draft was made available in 1966. This preparation process insures that the Code will provide a useful and persuasive format for probate law improvement throughout the United States. Surely it is time for estate planners to begin to assess the probable impact of the Code on their work.

¶70.1901 The Code and Estate Planning—An Overview

The Uniform Probate Code will affect estate planning in the enacting states in many ways. From a technical point of view, it modernizes many basic estate planning tools so that existing preferences regarding devices for achieving various objectives should be reconsidered by advisors who wish to achieve optimum benefits for their clients. Additionally, some new planning tools will have to be assessed. Further, if the Code is widely adopted by the states, it could have a marked impact on the planning of multi-state estates. Finally, the Code will enable planners to review and re-evaluate existing wills, trusts and contracts because the publicity generated by its enactment will stimulate many estate owners to move to their counselors for a checkup.

¶70.1902 The Code and Wills in General

The Uniform Probate Code advances the proposition that the will should be as much like the revocable trust as possible in terms of procedural advantages and disadvantages relating to transfers at death. The Code will not change the fact that wills are ambulatory and contestable after death; nor does it alter the concept that inter vivos trusts create present authority over trust assets which may be unaffected by the settlor's death. However, the Code offers the executor a quick and simple route to a position like that of a trustee of a well-drafted trust over all of the assets of a dece-

dent's estate. The Code also contains several features which should shrink the threat of will contests so that the mere possibility of contest should no longer deter the use of wills.

¶70.1902.1 Obtaining Letters Testamentary

Informal probate and appointment is the procedure by which the person who is named the executor of an apparently well-executed will can secure full authority over the estate assets very quickly after the testator's death.[1] The proponent must sign a sworn application containing detailed information about the decedent's survivors and circumstances relevant to the validity of the will.[2] The application is made to the registrar of the probate court who need not be a lawyer.[3] Unless and until inheritance tax laws change to meet the situation, or unless some interested person has filed a demand for notice, the registrar may respond to the application without delay or notice to anyone and without the necessity of receiving testimony of attesting witnesses.[4] Hence, in uncontested cases involving no apparent irregularity which might move the registrar to reject the application,[5] letters testamentary can be obtained by a single trip to the courthouse after the expiration of a mandatory waiting period of five days from the testator's death.

¶70.1902.2 Fiduciary Powers

Once he receives letters, an executor appointed under the Code may exercise statutory powers which are designed to relieve third persons with whom he deals of any concern regarding his authority.[6] Land, securities, interests in going businesses and other assets may be sold, liened or otherwise used in any way that would be possible with reference to trust assets being handled by a trustee under a well-drafted trust instrument.[7] The Code also protects executors from certain risks of personal liability arising from transactions occurring during administration, and for distributions made in good faith and before being impugned by a later contest.[8] Finally, administration may be "independent." This means that there is no statutory requirement that the personal representative

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[1] For annotations, see end of chapter.

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return to the appointing court for approval of his accounts, discharge or any other occasion.[9]

¶70.1902.3 Widow's Election

The Code's provisions protecting a surviving spouse are designed to give meaningful rights in infrequently encountered instances where a deceased spouse has dealt unfairly with the survivor, without impeding administration in ordinary cases.[10] A spouse who has not altered his or her position by a simple written agreement or release as permitted by the Code[11] is entitled to one-third of the probate estate augmented by certain nonprobate values which are added for computation purposes.[12] But, to get more than the decedent has given, the survivor must take credit for all benefits received from the decedent by any means, including benefits passing by life insurance and pension plan.[13] Also, neither the court nor the decedent's executor has any responsibility to see that the surviving spouse's best interests are protected. Rather, the aggrieved survivor has six months after letters are issued within which to file a lawsuit against the estate and other successors.[14] In summary, the elective share provisions should be of less concern to estates being settled under wills than the threat of litigation is today in many states insofar as it relates to the widow's rights against revocable trusts.[15]

¶70.1902.4 Will Contests Under the Code

Opportunities for will contests under existing laws which enable unhappy heirs to tie up estates and coerce settlements are greatly reduced by the Code. The named executor who secures probate and appointment promptly and informally receives full authority to administer.[16] Once appointed, he may precipitate litigation (formal probate) to test the validity of known claims against the will and to eliminate unknown claims.[16] This process minimizes the likelihood that a contest will restrict administration. If a contest occurs before appointment, the named executor has priority to serve as special administrator pending resolution of the contest.[17] A section is included which throws the initial burden of proof and the burden of persuasion on contestants with respect to the usual grounds of undue influence and lack of capacity.[18]

Finally, the Code offers the enacting state an option in regard to whether a right to trial by jury will apply to will contests.[19] Overall, these several provisions should reduce the possibility of will contests in ordinary situations from that which exists today in many states.

¶70.1902.5 Advantages of Wills Under the Code

In addition to the tax advantages presently associated with the use of probate rather than trust estates, a Code estate settlement under a will may be preferable to a settlement under a revocable trust for any of several reasons. The ability of a personal representative to protect purchasers, transfer agents and others with whom he deals from doubts concerning the validity or meaning of the will, or his authority to act for the estate, is made clear by explicit statutory language which applies to all kinds of assets.[20] The Code includes renunciation provisions which are applicable to transfers through probate, but not to inter vivos transfers.[21] An enacting state may see fit to extend these provisions to all donative transfers. Unless it does, however, devisees under wills will have significantly greater opportunity than beneficiaries of living trusts to reduce their income, gift and estate taxes by careful use of the statutory system for renunciation. Also, although the validity of a trust may be determined in litigation by or against known disputants, resolution of disputes concerning the validity of trusts is frequently clouded by jurisdictional questions.[22] By contrast, the Code permits the validity of a will to be established in post-mortem probate proceedings as against all known and unknown persons with contrary interests, and with reference to known and later discovered assets.[23] The probate court of the decedent's domicile has exclusive jurisdiction for this purpose, and interested persons can be tied into the judgment by mailed notice and publication.[24] Such proceedings are not required, however, and if they occur, are not entwined with full court control of the estate or the personal representative.[25]

¶70.1902.6 Limitations on Wills Under the Code

The probate court of the decedent's last domicile will continue to allow heirs to contest wills. Hence, it will continue to be true

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that wills may be challenged somewhat more easily than revocable trusts.[26] The Code contains a three-year statute of limitations for contest of wills probated without notice, and a much shorter period for contest of formally probated wills.[27] Still, if a fight is anticipated, the estate planner will likely continue to recommend use of a revocable trust rather than a will.

Furthermore, until the Code is widely adopted, revocable trusts will continue to offer the most efficient mechanism for handling testamentary transfers of land or assets located in several different states.

¶70.1903 Testamentary Trusts

In addition to the new efficiencies relating to probate administration, the Code eliminates other technical and procedural limitations which may have discouraged the use of purely testamentary (as distinguished from pour-over) trusts. Provisions in Article VII make it clear that a testamentary trust may be administered by any trustee selected by the testator and at a place which is convenient or indicated by the will.[28] Local residency requirements and restrictions relating to qualification to engage in business at the place of probate are avoided. Article III provisions protect the executor who delivers assets to a trustee designated by will.[29] The testamentary trustee is not required to be appointed or approved by the probate court; nor are accountings to the court of the testator's domicile or elsewhere required.[30] Trustees of all family trusts are covered by a common set of provisions which enable them to resort to the probate court for resolution of problems or to secure protection.

Finally, the Code permits life insurance contracts to be drawn so that death benefits may be paid to a trustee of a trust established by will without being deemed part of the decedent's probate estate.[31] This provision should enable planners to make even greater use of life insurance.

¶70.1904 Inter Vivos Trusts

Notwithstanding the foregoing provisions which encourage the use of wills, the Code is not antagonistic to inter vivos trusts. Indeed, by paving the way to the creation of trusts via the very

simple method of signing a will, the Code should serve more to popularize all forms of trusts than to detract in any serious way from the existing, nontechnical, reasons for recommending living trusts. Similarly, Article VII of the Code should encourage the use of trusts by allowing a probate court to acquire jurisdiction over all persons interested in a particular trust question. Mailed notice of trust litigation will be effective for inter vivos as well as testamentary trust beneficiaries, and minors and unascertained beneficiaries can be tied into the decree by forward-looking provisions dealing with representation of interests.[32] Guardians ad litem are not eliminated, but their use under the Code should be far less common than at present.

It should be emphasized that the probate court's relationship to trusts is passive and nonsupervisory. The court cannot make an order regarding a trust except in response to a petition by an interested person and after notice. The power to issue orders does not continue once the proceedings under a given petition have been resolved.[33] As noted earlier, there are no statutory requirements for orders regarding accounts, distribution or other details of administration. However, unlike the situation involving the personal representatives of decedents and conservators of estates of disabled persons, the Code does not contain statutory powers for trustees.[34] Careful drafting of trust powers, then, will still be important, unless the state concerned has adopted the Uniform Trustees' Powers Act or its equivalent.

¶70.1905 Intestate Succession

Intestacy under present law is invariably undesirable. Therefore, estate planners are more accustomed to avoiding intestate succession than to using it as part of a plan. Nevertheless, the Code's version of intestate succession improves substantive and procedural aspects of the so-called "law's estate plan" to the point where advice to allow property to pass intestate may be given without hesitation in many more situations than at present.[35]

On the substantive side of intestacy,[36] the spouse takes all when (a) the decedent leaves no issue or parent; or (b) the decedent leaves no issue by a prior marriage, or no issue but a parent, and the distributable estate is worth less than $50,000. The spouse takes one-half when there are issue by a prior marriage, and the

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first $50,000 plus one-half of the excess over this amount when issue or parents survive. Issue take one-half of the intestate estate if any issue are by a prior marriage and split the excess over $50,000 with the spouse in other cases where both issue and spouse survive. If there is no spouse, issue take all. If there are no issue, parents split the excess over $50,000 with the spouse. If no issue or spouse survives, parents or descendants of parents take, and if there is none, grandparents and descendants of grandparents take. More remote relatives are not heirs. No person is an heir unless he survives the decedent by five days.[37] Adopted children are fully transplanted into the adopting family, and persons born out of wedlock who prove parentage before death of the father, or by clear and convincing proof thereafter, are treated like legitimate children for purposes of receiving inheritances.[38]

On the procedural side, all of the advantages applicable to probate proceedings are available also in intestacy.[39] Included is an opportunity to secure a binding adjudication that the decedent died intestate and determining his heirs.[40]

It is unlikely that this "new look for intestacy" will have any significant impact on estate planning for persons whose estates fall within Federal estate tax brackets. Indeed, liberal new rules regarding illegitimate and adopted children may provide additional incentives for the wealthy to alter the law's plan. Perhaps the most likely consequence of the new look will be that lawyer-planners will be able to assist clients with modest estates far more efficiently than at present. For example, under the Code, the best advice in many more cases than can possibly be imagined under present law anywhere simply will be to execute a will designating an executor and his alternate.

¶70.1906 Other New Planning Tools

As suggested previously, the Code's new system for intestacy will be an important estate planning tool. Similarly, the new treatment in Article V of the ancient problems of guardians and conservators will bring new flexibility to the planner for use in various specialized situations. For example, careful study of the powers and duties of a court-appointed conservator for a minor may lead many planners to eliminate elaborate sub-trusts which are frequently inserted in complex plans simply to avoid guardianship.

¶70.1906.1 Durable Powers of Attorney

Article 5 of the Code authorizes a written power of attorney to include language indicating that the authority conferred remains in effect notwithstanding later incompetency of the principal.[41] A properly worded power remains effective in periods of known incompetency and periods of uncertainty as to whether the principal is dead or alive. Durable powers should prove to be useful supplements to—if not substitutes for—revocable trusts to protect an owner from risks of senility or incompetence.

¶70.1906.2 Facility of Payment Provisions

A section in Article V of the Code protects any person owing money to a minor in amounts up to $5,000 per year who makes payment to any person having the care or custody of the minor, or deposits the sum owed in a savings account in the minor's name.[42] This provision will add to the utility of insurance and annuity contracts which provide benefits in relatively small amounts for minors.

¶70.1906.3 Renunciation Provisions

The Code specifically allows the partial or total renunciation of interests passing by will or intestacy.[43] A renounced interest passes as if the person renouncing his interest predeceased the decedent. In many situations, renunciation will have the effect of passing the renounced interest to the issue of the person renouncing, either by operation of the section dealing with lapse or by operation of the rules of intestacy. Thus, inheritance can be redirected to the next generation when tax or other considerations dictate.

¶70.1906.4 Multiple-Party Bank Accounts

Several provisions in the Code strengthen accounts in financial institutions in the name of two or more persons.[44] The provisions dealing with joint accounts, trust accounts and pay-on-death accounts authorize a variety of will substitutes for the individual who wishes to retain full control of deposit rights until death, while

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providing another with the power to withdraw balances remaining at death free of probate procedures.

¶70.1906.5 Minors and Incompetents

A general provision in Article V of the Code authorizes a probate court to respond to petitions regarding the estate problems of minors or incompetents which do not require appointment of a guardian or conservator.[45] Using it, minors' contracts may be ratified; settlements of injury claims may be approved; and various arrangements made for elderly persons, as for example, the conversion of his assets into an annuity contract for his benefit.

¶70.1907 Multi-State Estate Planning

If the Code is widely adopted, a series of provisions should have the effect of eliminating the need for administrations in several states where planning is accomplished by will or intestacy. Courts of enacting states are directed to abide by adjudications as to the domicile of a decedent when made in formal probate proceedings in another state which were commenced prior to the local proceedings.[46] Courts of enacting states are also directed to accept determinations as to the validity and construction of a will made in a proceeding after notice at the decedent's domicile.[47] If local administration becomes necessary, a series of provisions serve to give the personal representative appointed in the state of domicile priority to administer assets in an enacting state.[48] Other provisions protect local debtors of a decedent making payment to the personal representative appointed in the state of domicile, provided payment is not made prior to 60 days from the date of death and that no protest blocking payment has been made by a resident creditor of the decedent.[49] Also, a personal representative appointed in the state of domicile may file copies of his appointment with a local office and thereby acquire all powers of a personal representative appointed locally.[50]

The Code strengthens the ability of a testator to choose the law applicable to his estate. Enacting states are directed to recognize a will as valid if the will would be valid under the rules of almost any state having some connection to the will.[51] Another provision

permits a testator to select the law of any state to control the meaning and effect of his will unless the result offends the public policy of the enacting state.[52]

Finally, multi-state planning using trusts is facilitated. Assets may be transferred by will or by deed to trustees located in other jurisdictions.[53] Trustees of other states may act as trustees of land located in an enacting state without being charged with "doing business" in that state. Each trust has a "home base," located at the "principal place of administration" of the trust, which place can be fixed by the trust instrument.[54]

¶70.1908 Existing Estate Plans Under the Code

As drafted, the "effective date" provision of the Code directs applicability to wills written before enactment, but becoming effective by testator's death thereafter.[55] One important provision in the Code establishes a rule of construction that various class gift terms—such as "heirs" and "issue"—include certain persons who would be deemed related to the designated ancestor for intestate succession purposes.[56] Thus, the Code's new provision regarding rights of adopted persons and children born out of wedlock may become applicable to existing wills.

Other sections of the Code which will affect existing wills include provisions that: (a) beneficiaries are required to survive the testator five days, unless the will contains some language on the point;[57] (b) anti-lapse directions apply to gifts to any descendant of a testator's grandparents who predeceases the testator leaving issue;[58] (c) specific gifts of encumbered assets, whether land or personal property, pass the described asset subject to encumbrances and without exoneration unless the will directs otherwise;[59] (d) the surviving spouse (or children if there is no spouse) has a right to $3,500 of chattels as exempt property,[60] a right which may nullify chattel bequests in estates where the value of the chattel property is low; and (e) the surviving spouse and dependent minors are entitled to $5,000 value exemption called "homestead exemption" plus amounts needed for support during administration.[61] These rights, which are terminable interests under the Code, have priority over creditors' claims and will directions.

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¶70.1909 Conclusion

Enactment of the Code probably will be accompanied by a good deal of publicity about new and expanded estate planning devices. Estate planners can anticipate an upturn in requests for analyses and advice as various popular publications begin to inform the public about new opportunities under the Code.

Overall, the impact of the Code on estate planning will depend largely on the planners. For those who prefer to stick close to familiar patterns, the principal impact of the Code will be the need to carefully review existing will and trust forms. Others will experiment in various ways with some of the new opportunities offered by the Code. In time, estate planning should be considerably affected by the Code, but changes will be gradual and responsive to the interests of planners in meeting the needs of clients.

ANNOTATIONS

References are to the official text of the Uniform Probate Code (West Publishing Co., 1970).

¶70.1902.1 Obtaining Letters Testamentary

[1] See UPC, Art III, Pt 3 (§§3-301–3-311).
[2] UPC §3-301.
[3] UPC §§1-307, 3-105.
[4] UPC §§3-302, 3-306, 3-307, 3-310.
[5] UPC §§3-304, 3-305, 3-309, 3-311.

¶70.1902.2 Fiduciary Powers

[6] UPC §§3-307(b), 3-701, 3-703, 3-711, 3-714.
[7] UPC §§1-201(11), 1-201(33), 3-715.
[8] UPC §3-703.
[9] UPC §§3-704; *Cf.* UPC, Art III, Pt 5 (§§3-501–3-505).

¶70.1902.3 Widow's Election

[10] UPC Art II, Pt 2.
[11] UPC §2-204.
[12] UPC §§2-201, 2-202.
[13] UPC §2-202(3).
[14] UPC §2-205.

¶70.1902.4 Will Contests Under the Code

[15] UPC §§3-307(b), 3-701, 3-703, 3-704.
[16] UPC §§1-201(20), 3-401.
[17] UPC §3-615(a).
[18] UPC §3-407.
[19] The brackets in §1-306 indicate the option.

¶70.1902.5 Advantages of Wills Under the Code

[20] UPC §3-714.
[21] UPC §2-801.
[22] Under §7-201 and related sections, litigation "concerning the internal affairs of trusts" is within the exclusive jurisdiction of the probate court. The provisions of §§7-103 and 1-401 relate to §7-201 and permit the proper court to acquire jurisdiction over interested persons by mailed notice like that available in will contest proceedings. However, inasmuch as a suit to establish a trust would not fall within §7-201, §7-204 applies, and the usual rules governing jurisdiction of persons would control.
[23] UPC §3-412.
[24] UPC §§3-105, 3-201, 3-403.
[25] UPC §3-107.

¶70.1902.6 Limitations on Wills Under the Code

[26] This proposition is the corollary of the point discussed at Note 22, *supra*, to the effect that it is substantially easier to initiate effective litigation to test the validity of a will than it is to test the validity of an inter vivos trust.
[27] UPC §§3-108, 3-412.

¶70.1903 Testamentary Trusts

[28] UPC §§3-913, 7-105.
[29] UPC §3-913.
[30] UPC §7-201.
[31] UPC §6-201.

¶70.1904 Inter Vivos Trusts

[32] See Note 22, *supra;* UPC §1-403.
[33] UPC §7-201.
[34] UPC note under Art VII, Pt 4.

¶70.1905 Intestate Succession

[35] UPC Art II, Pt 1, §§2-801, 2-802.
[36] UPC §§2-102, 2-103.
[37] UPC §2-104.
[38] UPC §2-109.

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[39] UPC Art III.
[40] UPC §3-401.

¶70.1906.1 Durable Powers of Attorney

[41] UPC §5-501.

¶70.1906.2 Facility of Payment Provisions

[42] UPC §5-103.

¶70.1906.3 Renunciation Provisions

[43] UPC §2-801.

¶70.1906.4 Multiple-Party Bank Accounts

[44] UPC Art VI, Pt 1.

¶70.1906.5 Minors and Incompetents

[45] UPC §5-409.

¶70.1907 Multi-State Estate Planning

[46] UPC §3-202.
[47] UPC §3-408.
[48] UPC §§3-203, 3-308, 3-309.
[49] UPC §§4-201–4-203.
[50] UPC §§4-204–4-206.
[51] UPC §2-506.
[52] UPC §2-602.
[53] UPC §7-105; see also Note 28, *supra*.
[54] UPC §7-102.

¶70.1908 Existing Estate Plans Under the Code

[55] UPC §8-101.
[56] UPC §2-611.
[57] UPC §2-601.
[58] UPC §2-605.
[59] UPC §2-609.
[60] UPC §2-402.
[61] UPC §§2-401, 2-403.

THE UNIFORM PROBATE CODE APPROVED: A BOLD AND PROGRESSIVE REFORM

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Historical Background

History in law reform was created at Dallas on August 7, 1969, when the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Probate Code. In the judgment of the writer, this was one of the boldest and one of the most progressive achievements of the National Conference, unsurpassed even by the Uniform Commercial Code. Whereas the Uniform Commercial Code had as a base the old Negotiable Instruments and Sales Acts supported by the commercial motivation of interstate uniformity, the Probate Code cuts into a field of new statutory policy in suggesting that law relating to the transfer of property by death which has heretofore been considered largely a matter of local concern, should be elevated to a platform of national importance with resulting uniformity and predictable simplicity.

In the week following the adoption of the Code by the National Conference of Commissioners, the Section of Real Property, Probate and Trust Law in its sessions held in conjunction with the American Bar Association meeting, approved the Code, and subsequently the House of Delegates of the American Bar Association likewise approved the Code and directed the Real Property, Probate and Trust Law Section to institute studies of the Code among the various local bar associations of the United States with the end in view that the Code would receive wide attention and adoption.

The first printed version of the Code is now available from Prentice-Hall, and this will be followed at a later date by a publication of the Code with final minor stylistic corrections by the West Publishing Company.

To the Pennsylvania lawyer there is very little in the Uniform Probate Code that will seem new or radical. Taken as a whole, the Code is perhaps the greatest compliment that could be produced for the draftsmen of the Pennsylvania statutory system of probate and estate administration as originally created in the Five Sisters Acts of 1917, and as more recently amended and restated in the series of legislative acts which comprise what is our present Pennsylvania code.

In these two articles we will give a brief summary of the history and contents of the Uniform Probate

Code, with comment on those Sections of the Code which might be adopted in Pennsylvania.

Origin of the Model Probate Code

The origins of the Uniform Probate Code go back to 1946 when the Section of Real Property, Probate and Trust Law of the American Bar Association brought out the Model Probate Code. That work had a definitive effect on the laws of a number of states which at that time and thereafter were reviewing and amending their probate and estate administrative procedures. The Advisory Committee of Pennsylvania Legislature had the Model Probate Code before it when the Pennsylvania statutes went through their extensive revisions beginning in 1945. Missouri adopted the Model Probate Code in great part and a number of other states used it as a guide in the revision of their laws.

In 1962 the Council of the ABA Section of Real Property, Probate and Trust Law concluded that the time had come to review and revise the 1946 Model Probate Code in the light of decisional law and development since its promulgation. A committee was formed and the support and interest of New York University Law School was obtained.

At the same time, a New York State Legislature Commission was in the process of extensive revision the New York probate and ate administrative law, and financial help was given to the Code project which produced certain basic studies that were useful to the New York Commission.

From the beginning, the Council of the Real Property, Probate and Trust Law Section interested the National Conference of Commissioners on Uniform State Laws in the project. It was then envisioned by some that if the National Conference adopted the proposal, the project would have far greater chances of success because of the prestige of the Conference and its greater financial backing.

By 1964 a distinguished committee of draftsmen was put together under the Chairmanship of Richard V. Wellman of the University of Michigan Law School. Money was collected from individual lawyers, a few banks and from a few foundations. The National Conference of Commissioners fully adopted the plan: the sights were set not merely upon a review of the Model Probate Code, but upon a complete revision of the law, extensive in scope. It was further concluded that this work should be channeled toward a uniform statute.

The objective of uniformity developed strength as increasing criticism was directed at lawyers and courts by many writers and by the public generally. Never before had there been so much popular attention directed to the probate laws as that which followed the attack made by Dacey and others on probate procedures.

This criticism had the result of spurring the action of the two committees, one of the National Conference of Commissioners on Uniform State Laws, and the other, the Special Committee of the Section of Real Property, Probate and Trust Law of the American Bar Association. Additional funds were obtained and the Uniform Probate Code became the major project of the National Conference of Commissioners, leading to its adoption at the Dallas meeting.

The Uniform Code Follows Pennsylvania Law

At the beginning of this article it was noted that a Pennsylvania lawyer thumbing through the Uniform Probate Code as finally promulgated would not be surprised or startled by anything he saw. Once he got over the unfamiliar stylistic approach of the new Code in which it differs from the draftsmanship of Pennsylvania statutes, he would find that what is set forth in the Uniform Probate Code is substantially Pennsylvania law.

We must realize that the laws relating to the transfer of property by death have had an ancient and diverse evolutionary growth, from practice in the Ecclesiastical courts, the English chancery courts, and the common law courts. The New England states adopted the system of probate known as probate in solemn form, where notice must be given to all parties in interest and hearing held before an appropriate administrative or judicial authority in order to effect probate. These states also followed a system of supervised administration in which virtually every step of the personal representative in paying creditors and making distribution in accordance with the will or the intestate laws had to be effected through a court hearing with notice, testimony, findings, and decree. This system was predominantly followed throughout the Middle Western States and finally penetrated to the West Coast in modified form. It has been said that in the nineteenth century there was a great suspicion of personal representatives, and allegedly a great deal of embezzlement of decedents' property. As a consequence, the majority of our states set up highly restrictive probate systems for administering decedent's estates, requiring the personal representative to submit his every act to court supervision.

Pennsylvania, New Jersey and Delaware and to some degree Maryland were unique in adopting the form of probate known as probate in common form without notice, and the procedure of distributing an estate on receipt and release without court supervision.

The Drafting Committee, with all of the evidence before it, decided initially that the approach of the Uniform Code should give a choice to the parties to elect probate in common form, or probate in solemn form with notice, and also should include the choice of unsupervised administration as well as avenues for supervised administration, that

is, a method whereby the personal representative could be brought before the court at any step of the administration to justify his acts, or whereby the entire administration from start to finish would be under direct supervision of the Court.

This approach of maximum flexibility is the cornerstone of the entire Code, and it is perhaps the Code's most notable achievement. It could therefore become the law of Pennsylvania without affecting in any substantial way what is now our practice.

The Uniform Probate Code is far more than an all inclusive statutory plan. It is all of that, but much more. It is a treatise, a compendium of the law, relating to the transfer of property by death, and the administration of decedent's estates, the estates of incompetents, and of trusts. It is the most comprehensive effort in this field ever produced in the common law, and it rewards review by any lawyer interested in this particular field of jurisprudence.

Contents of the Code

Article I is concerned with definitions and also a description of the jurisdiction of the Probate Court. The entire Code is based on the assumption that each jurisdiction will have or will create a probate court having the full power of a court of general jurisdiction similar to the Orphans' Court Division of the Common Pleas Court under the Pennsylvania Constitution with direct appeal to the state's highest appellate tribunal. This is a radical departure for many jurisdictions where probate and estate administrative matters are handled by laymen acting as "probate" or "surrogate" judges.

Article II logically refers to intestate succession and the execution of wills. A singular part of this Article is expansion of the share of the surviving spouse.

Part 2 of Article II sets forth the elective share of the surviving spouse, again a novel concept and different from what we have in Pennsylvania although the basic approach is somewhat similar. The Code creates what is called the "augmented estate," which Mr. Hauptfuhrer discusses in the following article.

Article II, Part 3 relates to the rights of the spouse and children unprovided for by the will, giving the spouse the same share he would have received if the decedent had left no will unless it appears that the omission was intentional, and the same basic principle applies to pretermitted children.

Article II, Part 4 sets forth certain property which is exempt from creditor's rights, and to which the surviving spouse and children have a claim, such as homestead allowances, not interesting to Pennsylvanians, and a $3,500 exemption, including household furniture, automobiles and similar tangible personal property.

The family allowance is not set forth as a specific figure as in Pennsylvania law, but the surviving spouse and minor children of the decedent are entitled to a "reasonable allowance" from the estate for their maintenance during the period of administration.

Article II, Part 5 sets forth the principles for the execution of wills.

Article II, Part 6 sets forth rules of will construction, and Article II, Part 7 states that a contract to make a will is enforceable.

Article II, Part 8 contains general provisions, the most interesting being that relating to renunciation. This section states that any heir or person succeeding to an interest by intestacy or under a testamentary provision can renounce his interest by filing his renunciation at a certain time and place.

Article III is the most arresting, and in some respects the most controversial, because it is the article that sets forth probate and estate administrative procedure. While it is not the purpose of this article to analyze the coverage in this article or its applicability to existing Pennsylvania law, it must be emphasized that probate in common form, is the preferred approach. Any interested party may nonetheless force the probate to be accomplished in solemn form, and the personal representative may elect to follow that course. The administration may proceed out of court as in Pennsylvania, and can be terminated after payment of creditors and taxes and distribution of the estate, by appropriate filing of a release with the court, which terminates after a given period of time the liability of the executors, a concept not in our present law. In the alternative, at any stage of the proceedings the personal representative on his own motion may petition the court in any matter, and he may be forced to do so by any interested party. At the termination of a supervised accounting he must file an account with the court with due notice and thereafter can be discharged. Thus there is in essence what we now have in Pennsylvania practice.

Article IV relates to ancillary administration and here again is something of a landmark effort. In this section, emphasis is placed on the domiciliary or principal administration, and if uniformly adopted, this act would permit the domiciliary or principal administrator to collect the debts of the decedent, no matter in what state they might have arisen, and to distribute the real and personal property of the decedent among creditors and beneficiaries no matter in what state or states the real or personal property might be located.

Article V relates to the protection of persons under disability and their property, providing separate systems of guardianship to protect the persons of minors and of mental incompetents. It also provides a system of protective proceedings, including conservatorship, for the management of the property of

persons who are under disability. It is unique in giving to the guardian the power of a trustee, and expanding that power to provide that the guardian can make inter vivos gifts on behalf of his ward, make willls for him, and even arrange for his divorce. It also contains a useful provision that a power of attorney will survive incompetency, and there is a method of quickly getting a guardian or conservator appointed ex parte to protect the property of an incompetent person where there is danger that it may be taken from him by fraud or accident before complete proceedings can be established. This again is a landmark article and it contains many innovations.

Article VI relates to non-probate transfers such as joint interests, tentative trusts, "P.O.D. accounts" and similar types of property interests which do not go through probate, but where death does affect the transfer of property.

Article VII relates exclusively to the administration of inter vivos and testamentary trusts. There is nothing in this section that would prove new to a Pennsylvania lawyer, except the requirement of trust registration. The Code puts upon the trustee the obligation to register the trust in the county of the principal place of administration, the purpose being to provide not only a jurisdictional forum for all court action, but also to provide a method of control or supervision of the trust, if needed.

The Need for Uniformity and the Future of the Code

Why should the law of probate and estate and trust administration, and the administration of incompetent's estate be made uniform? For centuries these fields of law have been considered of parochial concern, a concept which arose from the fact that in earlier times, when our patterns of law were established, the principal source of wealth was real estate. It is inherent in the common law that the law relating to real estate is to be determined by the jurisdiction in which the land lies.

However, one of the phenomena of the economy of the last hundred years has been the alteration in our forms of wealth. Today wealth in greater part is represented by choses in action, notes, bonds, checking accounts, savings accounts, and by stock certificates representing fractional percentages in corporate enterprises. At the same time, our population has grown to over 200 million, and while there is still too large a percentage of that population at the poverty level, there is also an enormously increased percentage of the population having substantial property in the form of intangibles. This is evident by the increase in the number of wills that are being probated and the number of intestate administrations being granted in every jurisdiction.

There is the further factor that the population as a whole has be-

come far more mobile. State boundaries no longer are of any concern to the citizen of the United States. In the course of his lifetime he may have a residence in two, three, four, half a dozen, or a dozen states, and he may have from time to time acquired property interests in all of them. He not infrequently maintains a residence in two states, and we include not only the affluent. He will have banking connections in two or more states, and indeed he may have established inter vivos trusts in states in which he does not reside because of favoring a particular corporate fiduciary of prominence in the field of trust administration. The complexity, prolixity, and diversity is increasing not decreasing. With the inevitable population growth we shall certainly face greater problems in estate and trust administrations.

The time has already arrived when it seems ridiculous that the accident of where a will is probated on the basis of domicile, should determine procedural and substantive rights of creditors who may be scattered in many states. It is palpably absurd that the accident of a man dying intestate on the eastern bank of the Delaware River should face a different pattern of distribution of his estate from what would result if he had died on the western bank of the River.

These are the long range considerations that led the National Conference of Commissioners, after extensive study and debate, to determine upon a *uniform* probate code. It was fully recognized that there are articles and sections of the Code that commend themselves more than others to the consideration of uniform adoption throughout the states. Such sections, for instance, are those relating to creditors rights, to the methods of probate of the will of the decedent, and to the basic concept of intestate succession, and the share of the surviving spouse.

It is recognized that not all of the states are going to adopt this Code in the exact form in which it was promulgated. Studies will be made by various state and local bar associations over the next few years and various state legislatures will adopt perhaps part but not all of the Code. The Drafting Committee of the National Conference of Commissioners will be kept in office for another two years, and the Special Committee of the Real Property Probate Trust Law Section of the ABA will continue its work of study and promulgation of the Code. It is hoped that local bar associations in Pennsylvania will follow the lead of the Philadelphia Bar Association, which created a special sub-committee of its Orphans' Court Committee to study the Uniform Probate Code and make recommendations for adoption in this jurisdiction. Similar studies should originate in the Allegheny County Bar, and in many other county bars throughout the state, and these should be consolidated, hopefully, in studies that will be directed by the Real Property Pro-

bate and Trust Law Section of the Pennsylvania Bar Association. Ultimately the results of these studies should be concrete recommendations to the Advisory Committee of the State Legislature, to the end that the Pennsylvania statutes in these fields can be implemented, and in some respects modified and amended, so as to bring Pennsylvania in substantial conformity with the Uniform Code.

One of the advantages of having the National Conference of Commissioners adopt a code as a Uniform Code is the practical one that the Commissioners, by virtue of such adoption, are obliged to bring to the legislatures of their respective states, the Uniform Probate Code as adopted in Dallas. This will be the first step that will set the ball rolling in each jurisdiction, and it will then be up to the lawyers in each state to address themselves to the Code and to test its adaptability to their particular jurisdictions.

Maryland has already revamped its entire system of probate and estate administrative procedure and has passed its new statute in substantially the form of the Probate Code, which becomes effective January 1, 1970. Connecticut and Wisconsin are both in the throes of reexamination of their statutes, and the Uniform Probate Code will be recommended to the legislative committees of these states for adoption. Other states may be provoked or inspired by the Uniform Probate Code to create legislative commissions for the revision of their respective laws.

It is a long road. It cannot be covered quickly, but the ultimate objective of securing, through the United States, essentially similar laws with respect to the distribution and devolution of property on death would be a boon to all our citizens. Much effort has been spent over the past years in creating uniformity in the laws of the several states relating to the inter vivos transfer of property interests. The Uniform Commercial Code is a landmark in this field. Yet every citizen of this country must face the fact of death, and the inevitable transfer of property interests at that time. Certainly an interstate legal system providing for simplicity and uniformity in the transfer of property at this final moment is a desirable objective of law reform.

THE UNIFORM PROBATE CODE—A MODERN APPROACH FOR PENNSYLVANIA

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Last winter, as the National Conference of Commissioners on Uniform State Laws was revising the Fourth Working Draft of the Uniform Probate Code, the Orphans' Court Committee of the Philadelphia Bar Association appointed a special subcommittee to review the latest drafts of that code and to advise the Orphans' Court Committee whether the substance and procedure proposed by the Uniform Probate Code would be desirable in Pennsylvania. During the period of the subcommittee's study, the Fifth Working Draft of the Code was published and the study was directed to that draft. It is substantially the Fifth Draft which was approved this August by the National Conference of Commissioners on Uniform State Laws in Dallas and which was subsequently approved by the House of Delegates of the American Bar Association.

The subcommittee was comprised of Philip Bregy (author of *Intestate, Wills and Estates Acts of 1947*), John Walsh (Register of Wills of Philadelphia County), J. Pennington Straus (former Chairman of the American Bar Association Section on Real Property, Probate and Trust Law), Joseph Coghlan (former Law Clerk to Orphans' Court Judge Robert Bolger), Henry Beerits (partner of Morgan, Lewis & Bockius) and the author as chairman. This is a personal and subjective reaction to the Code—growing out of the subcommittee's work.

The task of the subcommittee was great in view of the size of the project (the Fifth Draft contains 341 pages) and the time limits imposed upon it. Under the circumstances, it was necessary for the subcommittee to concentrate on the broad policy aspects of the Code. In like manner, this report can be only a brief and broad overview of the Code. Neither the subcommittee nor the author have compared, in any detail, the provisions of the Code with their statutory and case law counterparts under existing Pennsylvania law. The focus of the subcommittee's study was on the desirability and feasibility of the Code. While the subcommittee members all specialize in probate, estate and trust law, it should be recognized that some of the "off the cuff" comments with regard to Pennsylvania law might very well be in error. The subcommittee had in mind always that it should be more concerned with what the law of Pennsylvania should be than

what it may or may not be at the present time.

Title

The first observation should be that the title of the Uniform Probate Code is a misnomer. The Code covers a great deal more than probate matters. It concerns itself also with minors and other persons under disability and the administration of their property, with non-probate transfers such as jointly-owned property and tentative trusts, and with trust administration. In general it would be a broad codification of many laws which we find today in our Intestate Act, Wills Act, Estates Act, Incompetents' Estates Act, Orphans' Court Act, Register of Wills Act, Fiduciaries Act and in a great body of our case law.

The second observation is that the Uniform Probate Code—while having uniformity among the states as its principal objective—has as a secondary objective the simplification of probate procedures throughout the United States. Many states have probate rules which require a lawyer to go to court with a petition—after notice and followed by a hearing—in order to effect the simplest procedure in the administration of an estate. Many of these costly and time consuming procedures have been the focus of recent public criticism. The Uniform Probate Code's provisions would provide an answer for much of such criticism without sacrificing many of the procedural safeguards which have grown up through the years for good reason. To a large degree the Code places on interested parties (particularly creditors) the obligation to come forward to protect their own interest. If the Code is adopted in Pennsylvania such parties would probably pay closer attention to what is going on in the administration of an estate than they do today.

Article I—General Provisions

As stated in Mr. Straus's paper, Article I contains the general provisions, definitions and outline of the jurisdiction of the probate court as a court of general jurisdiction with appeals going directly to an appellate court for reconsideration on the record. The probate court may include a registrar (Register of Wills), who need not be a judge or lawyer, to whom the judge can delegate certain ministerial functions. This is not unlike much of the judicial operations currently in effect in Pennsylvania with the exception that the office of Register of Wills is somewhat downgraded.

While most of the definitions in this section are self-explanatory it should be noted that a "conservator" is one appointed by a court to manage the estate of a disabled person or a minor, whereas a "guardian" is one who is qualified as the guardian of the person pursuant to either testamentary or court appointment.

Article II—Intestate Succession and Wills

Article II is perhaps the most important article in the Code. It deals with both intestate succession

and wills and contains provisions which would change the substantive law of many states.

Intestacy

The Code deals with real and personal property without distinction. That should create no problem of significance for Pennsylvania practitioners but it would bring about noticeable changes in other jurisdictions. The commentators to the Code consider the principal features under the intestate succession part of Article II to be as follows:

"(1) A larger share is given to the surviving spouse, if there are issue, and the whole estate if there are no issue or parent.

(2) Inheritance by collateral relatives is limited to grandparents and those descended from grandparents. This simplifies proof of heirship and eliminates will contests by remote relatives.

(3) An heir must survive decedent for five days in order to take under the statute. This is an extension of the reasoning behind the Uniform Simultaneous Death Act and is similar to provisions found in many wills.

(4) Adopted children are treated as children of the adopting parents for all inheritance purposes and cease to be children of natural parents; this reflects modern policy of recent statutes and court decisions.

(5) In an era when inter vivos gifts are frequently made within the family, it is unrealistic to preserve concepts of advancement developed when such gifts were rare; the statute therefore provides that gifts during lifetime are not advancements unless declared or acknowledged in writing."

While some may consider the changes of questionable value, it must be remembered that the testator may always elect different rules for distribution of his estate by executing a will.

By way of illustration, the Code would give to the surviving spouse, where there is no surviving issue but where the decedent is survived by a parent, the first $50,000 and then ½ of the balance of the net intestate estate. If there are surviving issue, all of whom are issue of the surviving spouse also, the surviving spouse would again receive the first $50,000 plus ½ of the balance of the net intestate estate; but where there are surviving issue one or more of whom are not issue of the surviving spouse, then the $50,000 preference is removed and the surviving spouse receives only ½ of the net intestate estate.

The Code contains a requirement that an heir must survive the intestate decedent by five days in order to be entitled to his share. The five-day survival provision requires survivorship by 120 hours and is designed to avoid multiple administration and in some instances to prevent property from passing to persons not desired by the decedent. It is believed that the five-day period would be generally beneficial and it is doubted that it would create any hardships by holding up the administration of an estate unduly. Also, it would not put a cloud upon the marital deduction under section 2056(b)(3) of the Internal Revenue Code if the spouse survives for the five days (even though it would deprive the estate of the marital deduction if the surviving spouse died

within the five-day period). As the marital deduction is normally a problem for larger estates, the five-day period could be easily "drafted around" by any competent scrivener.

Under the intestate section not only are adopted children fully engrafted upon the inheritance tree of their adopting parents, but also under certain circumstances an illegitimate child is considered the child of the father. The circumstances under which such relationship would be deemed to exist could be a subject for considerable discussion but it is probably fair to say that the policy trend is in favor of the direction taken by the Code.

The Code would alter the common law relating to advancements in that only written evidence of the intent that an inter vivos gift be considered as an advancement on one's inheritance would be admissible. The Commissioners obviously concluded that if a donor wanted an inter vivos transfer to be treated as part of a beneficiary's inheritance he could easily make a will and adjust the respective interests of his beneficiaries accordingly.

Elective Share

Part II of Article II would provide substantive law changes for almost all jurisdictions. It deals with the elective share of a surviving spouse and injects an entirely new concept of the property to be considered in determining the amount to be allocated to an electing spouse. In essence the concept is an extension of Section 11 of the Pennsylvania Estates Act. The Code provides that a surviving spouse may take an elective share of an "augmented net estate." In brief, the augmented net estate includes transfers by the decedent during marriage (a) to persons other than the surviving spouse where the decedent has retained for himself a lifetime benefit or control, (b) to jointly-held property with right of survivorship, (c) within two years of death to the extent that the aggregate transferred to any one donee in either of the years exceeds $3,000, (d) to the surviving spouse and (e) by way of life insurance or similar benefits payable to the surviving spouse.

The commentators' notes to the section indicate that the purpose of augmenting the probate estate in computing the elective share is two-fold:

"1. To prevent the owner of wealth from making arrangements which transmit his property to others by means other than probate deliberately to defeat the right of the surviving spouse to a share, and

2. To prevent the surviving spouse from electing a share of the probate estate when the spouse has received a fair share of the total wealth of the decedent either during the lifetime of the decedent or at death by life insurance, joint tenancy assets and other non-probate arrangements."

The category of transfers by the decedent during his lifetime, includes only transfers during the marriage, and it would therefore be possible for a person to provide for

children by a prior marriage, as by a revocable living trust, without concern that such provisions could be upset by later marriage and an election by the surviving spouse.

The surviving spouse under the Code would have an elective share equal to ⅓ of the augmented net estate. If a married person is domiciled in another state and owns property which is located in Pennsylvania there would be no election under Pennsylvania law to the Pennsylvania property. The Uniform Probate Code would, of course, include in the domiciliary state all of the property located in Pennsylvania.

Obviously, the substantive law changes and the policy behind them can be widely debated; however, it appears that the Code has a great deal to be said in its favor.

Exempt Property

Another noteworthy provision concerns "exempt property." In short, the Code would give a surviving spouse (or minor children in the absence of a surviving spouse) a "homestead allowance" of $5,000. In addition the surviving spouse would be entitled to an "exempt property allowance" on household furniture, automobiles, furnishings, appliances and personal effects to an aggregate value not exceeding $3,500. Finally, in addition to the two previous exemptions, the surviving spouse (and dependent children) would be entitled to a reasonable allowance from the estate for their maintenance during the period of administration. The determination of the latter obviously could lead to court proceedings in many cases until working ground rules are developed and refined.

Execution of Wills

Part V of Article II deals with the formalities of execution and revocation of wills. For many states the provisions contained in this part will greatly liberalize their procedures, as the Code contains only minimum formalities. Insofar as Pennsylvania is concerned the Code would permit any person 18 years of age or older who is of sound mind to make a will. Such reduction of the mimimum age seems to be in keeping with the times. With the exception of holographic wills, every will must be in writing signed by the testator and witnessed by two witnesses, although there is no requirement that the witnesses observe the testator sign and they can sign the document at any time after execution and need not sign in each other's presence. The signing of the will by the witness would, of course, increase the execution formalities over those currently required under Pennsylvania law.

The Code contains an interesting provision for "self-proved" wills. Under the Code a will may—at the time of its execution or at any subsequent date—be made self-proved by the acknowledgment thereof by the testator and the affidavits of the attesting witnesses

made before an officer authorized to administer oaths and evidenced by the officer's certificate under official seal attached or annexed to the will. The advantage of a self-proved will is that it can be admitted to probate without the testimony of any subscribing witnesses. In all other respects, it is treated no differently than a will which is not self-proved.

Construction of Wills

The rules for construction of wills are not significantly dissimilar from existing Pennsylvania rules except that there is the carryover from the intestate provisions of the five-day survivorship provision. The Code provides that a beneficiary who fails to survive the testator by 120 hours is deemed to have predeceased the testator unless the will provides otherwise.

The Code provides that adjustments should be made in bequests because of stock dividends and stock splits and similar types of corporate reorganization. Such provision might be an improvement over our current case law, but the particular section of the Code is introduced by the phrase "if the testator intends that specific gift of certain securities . . ." and our courts could well end up exactly where they are today with the question being: what did the testator intend?

The section contains more liberal provisions with regard to engrafting adopted persons on the family tree of the adopting parents and denying them inheritance from their natural parents. Ademption by satisfaction is eliminated as was the principle of advancement under the intestate section. In such cases the testator must provide either in a contemporaneously written document or by will that an inter vivos gift is to be deducted from the gift in the will.

The Code contains provisions with regard to the effect of marriage or divorce after the execution of the will and also provisions that are comparable to our Slayers' Act.

Deposit of Wills

An interesting new concept for Pennsylvania is a provision for the lifetime deposit of a will by a testator. Under the Code the testator may lodge the will with the court for safekeeping. Some states already have statutes which permit the deposit of wills, and wills so deposited are supposed to be kept completely confidential. The Commissioners obviously believed that the experience in such states has been beneficial.

Article III—Probate of Wills and Administration

Article III of the Code deals with the actual probate of wills and the administration of estates and Pennsylvania practitioners may require some "adjusting time" to become familiar with the Code's rules.

Alternative Procedures

Under the Code there are alternative procedures that may be fol-

lowed in connection with the administration of the estate. One is deemed the formal procedure and involves court review of almost all of the steps required in the administration of an estate. The other is referred to as the informal procedure and corresponds in many respects to the current practice in Pennsylvania. An executor or personal representative can start down either procedure and the Code contains provisions whereby the administration of the estate can be switched from either the informal to the formal or from the formal to informal procedure during the course of administration. The existence of the formal procedures would probably not impose any great hardship on Pennsylvania practitioners, most of whom it is believed would follow the informal procedure route in the settlement of estates. Personal representatives acting under the informal procedure have full powers to deal with the various assets of the decedent's estate and purchasers from such personal representatives or from distributees of such personal representatives are fully protected. Non-adjudicated settlement of estates is feasible under the Code. In essence, the Code visualizes the court's role in the settlement of estates as a passive one. Unless asked to do so under the formal procedure route the court becomes involved only when some interested party asks it to become involved to secure resolution of a problem.

Will Contests

Practitioners in some counties will find comfort in the provisions of the Code which allow only one will contest rather than the two (Register of Wills first and then the Orphans' Court) which is the practice under some existing rules.

Appraisals

For those states where there have been political abuses in connection with the appointment of appraisers of estates' assets the Code greatly simplifies matters and brings them into line with the general practice in Pennsylvania. Under the Code it is the personal representative's obligation to prepare an inventory of the property owned by the decedent and to indicate the fair market value of each item as of the date of death. The personal representative may employ a qualified or disinterested appraiser to assist him in ascertaining such market value. If he chooses to use an appraiser, he is required to indicate the name of such appraiser on the inventory.

Powers

The Code gives a personal representative exceedingly broad powers to deal with the property and claims of the decedent. The Code does however require joint action by co-personal representatives unless the will provides otherwise. There are only certain limited exceptions to this general joint action rule and it may cause testators to

reflect more carefully when selecting personal representatives.

Compensation

A personal representative is entitled to reasonable compensation for his services under the Code even though the will may contain an express provision for such compensation. In that event he may renounce the provision in the will and elect the reasonable compensation provided by law.

Small Estates

The provisions of Part 12 of Article III deal with special situations in the settlement of estates and seem generally worthy of adoption. One such provision creates procedures for the settlement of a small estate on affidavit. That procedure should be an easier procedure than is currently provided by Section 202 of the Fiduciaries Act, and it is believed that there would be any number of small estates where such simplified procedure would be helpful. It is recognized, however, that the liberalization of rules in this area could provide opportunities for wrong-doers. The affidavit procedure would apply to estates up to $5,000 and would be available only thirty days after the death of the decedent. The Code also provides provisions similar to Section 202 of the Fiduciaries Act for closing small estates where the amount involved does not cover the various "allowances" and the costs of administration, funeral, etc.

ARTICLE IV—FOREIGN PERSONAL REPRESENTATIVES: ANCILLARY ADMINISTRATION

In brief, Article IV is designed to simplify the administration of multiple-state estates through unifying the administration and emphasizing the domiciliary administration insofar as possible. It is interesting to note that this article includes not only personal representatives appointed under the various states of the United States, but also includes certain common law foreign countries with laws quite similar to ours—such as England, Ireland and Canada (but not the Province of Quebec).

Collection by Affidavit

Article IV simplifies the procedures whereby the domiciliary representative may collect the property that belonged to the decedent which may be located in another state. Under the Code he would simply deliver to the person possessing the decedent's property, 60 days after the death of the decedent, an affidavit stating only the date of death of the decedent, that there is no local administration, and that the person delivering the affidavit is the domiciliary personal representative entitled to the property. It does not require any statement, such as contained in Section 1101 of our Fiduciaries Act, to the effect that all local creditors have been paid. Under the Code the burden is on creditors to protect themselves by either taking some action locally within 60 days after death or by

proceeding in the jurisdiction in which the decedent was domiciled at the time of his death. The Code, on the other hand, protects third parties who are indebted to the decedent or to whom the decedent had entrusted the safekeeping of certain property by completely exonerating them from any further liability if they surrender property to the domiciliary representative on the strength of the affidavit provided by the Code. The affidavit procedure does not require the domiciliary representative to file copies of his appointment in the state where the property or claim is located or to produce a short certificate.

Formal Procedures

The domiciliary representative, if he wishes, could follow Code procedures similar to those currently provided in Pennsylvania law. He could file a copy of his appointment in the foreign state and enjoy the full authority that would be available to a local representative under the informal probate procedure. The Code makes it perfectly clear that a domiciliary representative has first preference to ancillary letters in the foreign state if formal proceedings in that state are indicated. Other persons who might be resident in the jurisdiction where the decedent's property is located are not foreclosed from applying for letters to which they might otherwise be entitled but they cannot obtain such letters until notice has been given to the domiciliary personal representative to come into the jurisdiction and to obtain letters.

Article V—Protection of Persons Under Disability and Their Property

Insofar as Pennsylvanians are concerned perhaps some of the most useful provisions of the Code are contained in Article V which has to do with the protection of persons under disability and their property.

Facility of Payment

To begin with, there is a facility-of-payment provision which enables persons owing funds to minors to distribute those funds in a pragmatic fashion where there has been no conservator appointed for the minor's estate. In particular, up to $5,000 a year can be paid (a) to the minor directly if he or she is 18 or married, or (b) indirectly by payment to the parent or the grandparent with whom the minor resides, or (c) indirectly by payment to the minor's guardian, or (d) indirectly by deposit in a savings account in the minor's name.

Guardian and Conservator

The Code could be at variance with some existing Pennsylvania practice in that the guardian of a minor's person may also be the conservator of the minor's estate.

Estate Planning

One provision which will be most welcomed by estate planners in this day of increasing numbers of senile

senior citizens is the Code's provision which would permit a conservator of a disabled person's estate to engage in estate planning for that person subject to court approval. While there have been a few lower court cases in Pennsylvania which have approved this practice on a substitution-of-judgment theory in a few special situations for affluent persons, it would undoubtedly be helpful to have statutory provisions which clearly accept the principle.

Separate Counsel

A requirement which might cause Pennsylvanians to raise their eyebrows is a provision that an alleged disabled person must have his own separate counsel in a hearing to determine his disability. The current Pennsylvania practice seems to provide more than adequate safeguards for disabled persons in such proceedings, but the provision should not be an exceedingly difficult provision to live with, although it may increase the costs of such proceedings.

Title

Those lawyers who are particularly intrigued with the concepts of title and vesting of title will be pleased to see that the Code contains a provision that title to real estate vests in a disabled person's conservator upon the appointment of such conservator.

Powers

A conservator is given broad powers to act without court approval in such areas as continuing the disabled person's business or incorporating it, or in mortgaging his property or even in determining and distributing principal and income. Of course, the conservator does exercise his judgment at his own risk; and accordingly, if he wishes, he can obtain the approval of the court in any situation where he feels that he needs the protection of a court decree.

Surcharge

A conservator can be held liable or be surcharged for loss only when there is a causal relationship between his breach of trust and the loss. For example, if an investment banker who is a conservator obtains bonds from a firm in which he is a partner at time when the purchase was generally thought wise, and such bonds later "turn sour," the conservator would not be a guarantor as a result of his technical self-dealing breach of trust. He would be liable only if it could be shown that his breach of trust caused the loss. That would be a change from current Pennsylvania law.

Bar to Claims

Another interesting concept involves the barring of claims against the disabled person by advertising by his conservator. If a creditor does not come forward within four months after such advertising his claim could be completely barred. The Code's philosophy of putting the burden on creditors may be

thought to be harsh to Pennsylvania lawyers who regularly represent clients who are creditors. The Commissioners apparently felt, on the other hand, that the conservator ought to be in a position to ascertain the debts of his ward. If the conservator takes reasonable steps to notify creditors and the persons to whom the disabled person owed money do not come forward, their failure to do so would be at their own peril and not at the risk of the conservator who should be trying to administer the estate in an orderly fashion.

Power of Attorney

Finally, this article contains provisions which all practicing attorneys should find useful: the "block-buster" power of attorney provisions. Under the Code, a power of attorney could be drawn which would survive disability. If by its terms the power of attorney is to be effective even in the event the person granting the power of attorney is declared incompetent, such provisions are valid and effective. Certainly each of us at one time or another is called upon to determine the effect of a power of attorney of a person who is in that wide, questionable area between competency and incompetency. The "block-buster" power of attorney seems to be a pragmatic solution for that problem.

Article VI—Non-Probate Transfers

Article VI of the Code purports to deal with non-probate transfers. (Incidentally this entire article of the Code is currently embodied in House Bill 1045 which is pending before the Pennsylvania legislature.) The article really deals with just two particular problems: (a) multiple party bank accounts and (b) tentative trusts.

Joint Accounts

With regard to joint bank accounts there is a new concept injected into the law. That concept is that each depositor owns his own "net contribution" to the account during his lifetime. The net contribution of a party is the sum of all deposits made by or for him less all withdrawals made by or for him which have not been paid to or applied to the use of any other party, plus a pro rata share of any interest or dividends included in the balance. The net contribution also includes any deposit life insurance proceeds added to the account by reason of the death of the party whose net contribution is in question. Of course, evidence of what a person's net contribution is may be difficult to produce. In addition, each account is presumed to be a survivorship account in the absence of provisions to the contrary. Rebutting the presumption of survivorship may also be quite a challenge.

Tentative Trusts

The provisions with regard to tentative trust are even broader than those under the recently adopted Pennsylvania Banking Code. Under the Uniform Probate Code there may be any number of trustees to a tentative trust and any number of settlors and beneficiaries. The original case law with regard to such accounts was exceedingly restrictive and the Pennsylvania Banking Code liberalized those restrictions only modestly. The Probate Code would go even further.

Banks

In both the multiple party account and the tentative trust account the banks are protected in accordance with their deposit contracts just as they are under existing Pennsylvania law. The Code covers only the relationship among depositors and others named in the deposit contract. It does not purport to impose any liabilities on the banking institution which otherwise lives up to its contractual obligations. In view of the great variety of deposit contracts which exist in our state today, one cannot help but wonder whether the Uniform Probate Code would provide any easy answers to the problems in this area in the short run. Perhaps the question should be: Have we any better solutions?

ARTICLE VII—TRUST ADMINISTRATION

The final article of the Code is Article VII and it deals with trust administration. There would be a few changes brought about by the Code.

Trust Registration

Undoubtedly, the biggest change in the law insofar as Pennsylvanians are concerned centers upon the trustee's duty to register an inter vivos trust at the principal situs of administration. The penalty for not registering the trust is that failure to do so is automatic grounds for removal of the trustee and automatic grounds for denial of his compensation. It is difficult to visualize any professional trustee failing to register the trust when the Code contains such penalties and the additional provision that any clause in the trust instrument which purports to eliminate the requirement for registration shall be ineffective. The provision for registration of trusts applies equally to inter vivos and testamentary trusts and is available to foreign created trusts as well as those locally created. The place of registration is not necessarily related to the place where the trust was created, but is related to the place where the trust is primarily to be administered. The situs of administration in turn is supposed to be at a location appropriate to the purposes of the trusts and the interests of its beneficiaries.

Standard of Care

Another innovation written into Article VII has to do with the trustee's standard of care and per-

formance. Here present Pennsylvania law would be revised and corporate trustees or individual trustees with special skills (such as lawyers) would be held to higher standards of care when serving as trustees than would ordinary laymen when serving as trustees. Undoubtedly the trust companies will study such provisions carefully.

Powers

The article also contains the broad powers already recommended by the Uniform Trustees Powers Act. These powers are exceptionally broad and even include the power to delegate discretionary duties. Some questions will probably arise as to the effect of some of the broad powers on certain tax planning devices.

Conclusions

Overall the Uniform Probate Code would appear beneficial for Pennsylvania, even though it contains a number of provisions of debatable value for Pennsylvanians. Uniformity in itself is a desirable goal, but in addition the Code would provide some improvements in Pennsylvania law and procedure.

Pennsylvania at the present time is among the forerunners of states which have liberal, pragmatic and inexpensive probate procedures. Thus there is probably no imperative reason that Pennsylvania rush to adopt the Uniform Probate Code. Possibly it would be wise for the Pennsylvania legislature first to enact into law, by way of amendment to existing laws, those sections of the Code which are most desirable in order that our law, in both substance and procedure, be brought gradually into line with the provisions of the Code. Perhaps Pennsylvania should first wait to see what the experience of some other states is with regard to this particular uniform act. This is not to say that the Code is not a desirable, forward-reaching document. It is only to say that Pennsylvania today has very workable laws. They should not be replaced until we are reasonably certain that the replacements will be improvements.

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The 1969 Oregon Probate Code and Due Process

THE 1969 Oregon Probate Code[1] (hereinafter Code) takes effect on July 1, 1970.[2] The author believes that the dominant objective of the Code is to facilitate the prompt and economical transmission of wealth at death through the administration of decedents' estates. Moreover, it seems an almost self-evident truth that speed and economy are dependent on an efficient legal system.[3] The 1969 Code should facilitate efficient administration of decedents' estates for two basic reasons: codification and independent administration.

Codification. Throughout the Code, substantive and procedural law has been clarified. Old statutes and decades of case law have been integrated and restated in modern text.[4] This codification process necessi-

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[1] Or. Laws 1969, ch. 591, as amended by §§277-280, Or. Laws 1969, ch. 597.

[2] Or. Laws 1969, ch. 591, 306. Hereafter, as all references to Code sections will be to OREGON REVISED STATUTES (1969), the form "ORS §000.000" will be used in text and footnotes.

[3] Unfortunately, no caveat is required at this point. Even a more efficient legal system may not decrease costs during an inflationary period. But at least it should dampen the rising cost spiral.

[4] The following provisions are merely important examples of this process: ORS §111.085. Matters subject to probate court jurisdiction; ORS §§112.015-.115. Intestate succession; ORS §112.385. Nonademption of specific devises in certain cases; ORS §112.045. Pretermitted children; ORS §112.455-.555. Rights of slayer in property of a decedent; ORS §112.675. Renunciation of intestate succession or devise; ORS §114.105.-165. Elective share of surviving spouse; ORS §116.133. Abatement; ORS §116.303-.383. Apportionment of estate taxes; and ORS §117.005-.096. Estates of absentees.

tated statutory resolution of many policy issues. Those responsible for the Code, as draftsmen and legislators, believe experience will verify the wisdom of at least the majority of these policy decisions. At the minimum, the attorney will find a new certainty and completeness in the Code which will permit him to advise his clients of their rights with less costly and time-consuming resort to the courts. However, no matter how important these clarifying provisions will be, they do not reflect the Code's new theory of estate administration. The most significant increase in efficiency for most estates will come from independent administration.

Independent Administration. The Code adopts the theory of independent estate administration. This theory is not new. It has been in operation in England since 1925,[5] and, in modified form, has been utilized for many years in Texas[6] and Washington.[7] It constitutes the central administrative theme of the UNIFORM PROBATE CODE,[8] promulgated by the National Conference of Commissioners on Uniform State Laws in August 1969. Although the Oregon Probate Code does not adopt the UNIFORM PROBATE CODE, many of its sections are based on the UNIFORM PROBATE CODE.

Why has independent administration been selected as the method for achieving more efficient estate administration? For many years, probate reformers have focused attention on "Small Estates Acts" designed to extricate small estates from the probate morass. The 1969 Code reflects a policy determination that the vital issue is the potential controversy which may be involved in the administration of an estate, not the size of the estate. Hence, the goal of the Code is to free all noncontentious estates from mandatory court supervision, but to keep judicial protection available whenever reasonably demanded by interested persons.

SUMMARY OF ESTATE ADMINISTRATION UNDER THE CODE

Since the Code makes a radical departure from the traditional philosophy of estate administration in the United States, a knowledge of its general drift is essential to appreciate any analysis. A selection of the basic administrative provisions of the Code will be quoted, or briefly summarized, to furnish an overview of the new Oregon system. For purposes of due process analysis, special attention should be focused

[5] Fratcher, *Fiduciary Administration in England*, 40 N.Y.U. L. REV. 12 (1965).

[6] Winn, *Non-Judicial Administration of Estates in Texas*, 17 SW. L. J. 384 (1963).

[7] Fletcher, *Washington's Non-Intervention Executor—Starting Point for Probate Simplification*, 41 WASH. L. REV. 33 (1966).

[8] UNIFORM PROBATE CODE, intro., art. III; §3.704. The UNIFORM PROBATE CODE will be cited hereafter in the form "UPC §0-000."

on those provisions designed to give interested persons a reasonable opportunity to protect their rights.

> ORS §111.085. *Probate jurisdiction described.* The jurisdiction of the probate court includes, but is not limited to . . . (5) Administration, settlement, and distribution of estates of decedents . . . (8) Supervision and disciplining of personal representatives . . .

ORS §113.035. "*Petition for appointment of personal representative and probate of will.*"[9] Any interested person, or a named executor, may file the petition and seek estate administration. In addition to the facts prerequisite to the court's jurisdiction, the petition must include, so far as known, the names and addresses of heirs (whether or not a will is being offered) and devisees (if a will is being offered). A statement of the extent and nature of estate assets is required to enable the court to determine the amount of bond which may be required. No notice of the hearing on the petition is required; it is contemplated that ex parte appointment and probate will continue to be used in Oregon in most cases.

ORS §113.105. "*Necessity and amount of bond; bond notwithstanding will.*"[10] A bond is required of the personal representative unless he is the sole heir or devisee, or the will provides that no bond is required. Even in the latter situation, the court may require bond.

ORS §113.145. *Information to devisees and heirs.*[11]

(1) Upon his appointment a personal representative shall deliver or mail to the devisees and heirs named in the petition for appointment of a personal representative, at the addresses therein shown, information that shall include:

(a) The title of the court in which the estate proceeding is pending and the clerk's file number;

(b) The name of the decedent and the place and date of his death;

(c) Whether or not a will of the decedent has been admitted to probate;

(d) The name and address of the personal representative and his attorney; and

(e) The date of the appointment of the personal representative.

(2) The failure of the personal representative to give information under this section is a breach of his duty to the persons concerned, but does not affect the validity of his appointment, duties or powers or the exercise of his duties or powers.

. . .

ORS §113.155. *Publication of notice to interested persons.*[12]

(1) Upon his appointment a personal representative shall cause a notice to interested persons to be published once in each of three consecutive weeks in:

(a) A newspaper published in the county in which the estate proceeding is pending; or

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[9] *See* UPC §§3-301, 3-306, *and* 3-310.

[10] Compare UPC §§3-603, 3-604, 3-605, *and* 3-606. Under these provisions, a personal representative appointed in informal proceedings (ex parte) is not required to give bond unless expressly required by the will, or demanded by an interested person.

[11] Based on UPC §3-705.

[12] The UNIFORM PROBATE CODE does not require a published notice comparable to ORS §113.155. UPC §3-801 does require the conventional notice to creditors.

(b) If no newspaper is published in the county in which the estate proceeding is pending, a newspaper designated by the court.
(2) The notice shall include:
(a) The title of the court in which the estate proceeding is pending;
(b) The name of the decedent;
(c) The name of the personal representative and the address at which claims are to be presented;
(d) A statement requiring all persons having claims against the estate to present them, within four months after the date of the first publication of the notice, to the personal representative at the address designated in the notice for the presentation of claims; and
(e) The date of the first publication of the notice.
(3) The failure of the personal representative to cause a notice to be published under this section is a breach of his duty to the persons concerned, but does not affect the validity of his appointment, duties or powers or the exercise of his duties or powers.
. . .

It should be noted that subsection (2)(d) takes the place of a separate notice to creditors. ORS §111.005(19) defines interested persons as follows:

(19) "Interested person" includes heirs, devisees, children, spouses, creditors and any others having a property right or claim against the estate of a decedent that may be affected by the proceeding. It also includes fiduciaries representing interested persons.

. . .

ORS §113.195. *Removal of personal representative.*
(1) When a personal representative ceases to be qualified as provided in ORS §113.095, or becomes incapable of discharging his duties, the court shall remove him. (2) When a personal representative has been unfaithful to or neglectful of his trust, the court may remove him.
(3) When grounds for removal of a personal representative appear to exist, the court on its own motion or on the petition of any interested person, shall order the personal representative to appear and show cause why he should not be removed . . .

ORS §114.215. *Devolution of and title to property.*[13]
(1) Upon the death of a decedent, title to his property vests:
(a) In the absence of testamentary disposition, in his heirs, subject to . . . administration and sale by the personal representative; or
(b) In the persons to whom it is devised by his will, subject to . . . administration and sale by the personal representative.
(2) The power of a person to leave property by will, and the rights of creditors, devisees and heirs to his property, are subject to the restrictions and limitations expressed or implicit in . . . [this Act] to facilitate the prompt settlement of estates.

ORS §114.265. *General duties of personal representative.*[14] A personal representative is a fiduciary who is under a general duty to and shall collect the income from property of the estate in his possession and preserve, settle and distribute the estate in accordance with the terms of the will and . . . [of this Act], as expeditiously and with as little sacrifice of value as is reasonable under the circumstances.

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[13] Based on UPC §3-101.
[14] Based on UPC §3-703(a).

ORS §114.275. *Personal representative to proceed without court order; application for authority, approval or instructions.*[15] A personal representative shall proceed with the administration, settlement and distribution of the estate without adjudication, order or direction of the court, except as otherwise provided in [this Act]. However, a personal representative or any interested person may apply to the court for authority, approval or instructions on any matter concerning the administration, settlement or distribution of the estate, and the court, without hearing or upon such hearing as it may prescribe, shall instruct the personal repsentative or rule on the matter as may be appropriate.

Relative to its importance, this section may be unduly terse. Its basic thrust is that the personal representative *shall* proceed with administration without court order. He, or any interested person, *may* apply to the court for instructions. The fundamental alteration in the role of the court will be apparen. to any experienced probate attorney. Whereas in the past, the court had supervisory responsibility for business decisions involving the administration of estate assets, with the personal representative playing a more ministerial part, under the Code, judicial authority is passive until invoked by the personal represenative or an interested person. It is believed that the Code contemplates that the personal representative will make and execute business decisions within the scope of his authority over estate assets without seeking court instructions, unless he believes that there is genuine disagreement among persons interested in the estate as to the wisdom of those decisions.

The role of the court in response to petitions by interested persons concerned about the administration of the estate is more nebulous. They would hardly be seeking "authority" or "approval." Rather, they would probably want the personal representative instructed to act in a specified way, or to refrain from acting in a manner contemplated. Section 3-607 of the UNIFORM PROBATE CODE expressly authorizes the court to issue an order restraining the personal representative from performing specified acts, or exercising any of his powers. Also, the UNIFORM PROBATE CODE has express provisions, in sections 3-501 through 3-505, for a completely supervised administration, which may be requested by an interested person. However, the author believes that the jurisdiction and powers of the probate court as expressed in ORS §§111.085 and 111.095 are sufficiently broad to permit the court to issue orders restraining a personal representative from exercising any or all of his powers without further court order, thus requiring a partially or completely supervised administration. Although the word "instructions" in ORS §114.275 is perhaps ill-chosen, the basic theory of the Code would require that it be given an interpretation broad enough to permit

[15] ORS §114.275 is based on UPC §3-704. However, UPC §3-704 only applies to a personal representative. Petitions for orders from an interested person are authorized by UPC §3-105.

an interested person to invoke the full supervisory jurisdiction of the probate court in an appropriate case.

ORS §114.305. *Transactions authorized for personal representative.*[16] Except as restricted or otherwise provided by the will or by court order, a personal representative, acting reasonably for the benefit of interested persons, is authorized to:...

This section, then, includes 25 subsections granting the personal representative broad authority to administer estate assets without court approval or order. It should be emphasized that this section details transactions which are *authorized* for a personal representative, unless restricted by the will or by court order.

ORS §114.325. *Power to sell, mortgage, lease and deal with property.*[17]
(1) A personal representative has power to sell, mortgage, lease or otherwise deal with property of the estate without notice, hearing or court order.
(2) Exercise of the power of sale by the personal representative is improper, except after notice, hearing and order of the court, if:
(a) The sale is in contravention of the provisions of the will; or
(b) The property is specifically devised and the will does not authorize its sale; or
(c) A bond of the personal representative has been required and filed, the sale price of the property to be sold exceeds $5,000 and the bond of the personal representative has not been increased by the amount of cash to be realized on the sale, unless the court has directed otherwise.

Subsection (1) gives the personal representative a *power* over the title to estate property, which may be exercised without notice, hearing or court order. Because of this *power* over title, the personal representative may transfer a good title to a bona fide purchaser under ORS §114.385 even though exercise of the power may have been improper, *i.e.*, unauthorized, under subsection (2) above:

ORS §114.385. *Persons dealing with personal representative, protection.*[18] A person dealing with or assisting a personal representative without actual knowledge that the personal representative is improperly exercising his power is protected as if the personal representative properly exercised the power. The person is not bound to inquire whether the personal representative is properly exercising his power, and is not bound to inquire concerning the provisions of any will or any order of court that may affect the propriety of the acts of the personal representative. No provision in any will or order of court purporting to limit the power of a personal representative is effective except as to persons with actual knowledge thereof.

ORS §114.395. *Improper exercise of power; breach of fiduciary duty.*[19] If the exercise of power by a personal representative in the administration of an estate is improper, he is liable for breach of his fiduciary duty to interested persons for

[16] *Compare* UPC §3-715 *and* UNIFORM TRUSTEES' POWERS ACT §3.
[17] The concept of power over title is taken from UPC §3-711. Authority to sell, mortgage, or lease property of an estate is included in UPC §3-715(23), along with transactions generally authorized for a personal representative.
[18] Based on UPC §3-714.
[19] Based on UPC §3-712.

resulting damage or loss to the same extent as a trustee of an express trust. Exercise of power in violation of a court order is a breach of duty. Exercise of power contrary to the provisions of the will may be a breach of duty.

Under ORS §114.325(1), the personal representative has an unqualified power over the title to property of the estate. However, the circumstances under which he is authorized to use this power are covered by ORS §§114.305 and 114.325(2). An unauthorized exercise of this power is improper, and may be a breach of duty under this section.

ORS §116.083. "*Accounting by personal representative.*" The personal representative must file a verified account of his administration annually, at such other times as the court may order, and when the estate is ready for final settlement and distribution. Although the statute does not expressly so state, it is believed that an interested person could invoke a court-ordered accounting in an appropriate case by petitioning for "instructions" to the personal representative under ORS §114.275. The final account must also include a petition for distribution.

ORS §116.093. "*Notice for filing objections to final account and petition for distribution.*" The personal representative must mail a notice of the time for filing objections to his final account and petition for distribution to each heir at his last-known address if the decedent died intestate, to each devisee at his last-known address if the decedent died testate, and to any other person known to claim an interest in the estate. No published notice is required.

ORS §116.103. "*Objections to final account and petition.*" Any person entitled to notice may file objections, and if any are filed, the court must provide a hearing.

ORS §116.113. "*Decree of final distribution.*"[20] The decree must designate the persons in whom title to the estate property is vested. Subsection (4) provides:

The decree of final distribution is a conclusive determination of the persons who are the successors in interest to the estate and of the extent and character of their interest therein, subject only to the right of appeal and the power of the court to vacate the decree.

ORS §116.123. *Effect of approval of final account.*[21] To the extent that the final account is approved, the personal representative and his surety, subject to the right of appeal to the power of the court to vacate its final orders and to the provisions of ORS §116.213, are relieved from liability for the administration of his trust. The court may disapprove the account in whole or in part, surcharge the personal representative for any loss caused by any breach of duty and deny in whole or in part his right to receive compensation.

ORS §116.213. *Discharge of personal representative.*[22] Upon the filing of

[20] Based on MODEL PROBATE CODE §183.

[21] Based on MODEL PROBATE CODE §179.

[22] Based on MODEL PROBATE CODE §193; see FED. R. CIV. P. §60(b)(1), which provides: "[T]he court may relieve a party ... from a final judgment ... for ... (1) mistake, inadvertance, surprise, or excusable neglect."

receipts or other evidence satisfactory to the court that distribution has been made as ordered in the final decree, the court shall enter an order of discharge. The discharge so entered operates as a release of the personal representative from further duties and as a bar to any action against the personal representative and his surety. The court may, in its discretion and upon such terms as may be just, within one year after entry of the order of discharge, permit an action to be brought against the personal representative and his surety if the order of discharge was taken through fraud or misrepresentation of the personal representative or his surety or through the mistake, inadvertence, surprise or excusable neglect of the claimant.

THE PROBLEM OF DUE PROCESS

Section 1 of the fourteenth amendment to the Federal Constitution provides: "Section 1 . . . nor shall any State deprive any person of . . . property, without due process of law . . ."[23] The author believes that two aspects of the Code could raise problems under the due process clause. They will be characterized as the authority problem and the power problem. Two simple examples may be of assistance.

The Authority Example. The testator's will left all of his property to his son (S) and his daughter (D) in equal shares. S was named executor in the will, which expressly stated that no bond should be required. S was duly appointed personal representative, and no bond was required by the court.

D (age 22) left for Europe after an argument with her father (the testator) about one year before he died. Occasional postcards had arrived, from various countries. S diligently attempted to locate an address for D, through other relatives, and friends of D, without success. S was unable to mail D the information required by ORS §113.145, and as S and D were also the sole heirs of the testator, no other mailing was made. S published notice to interested persons as required by ORS §113.155.

The testator owned and lived in a modest home some 300 miles from S's residence. The house had not been well maintained during the testator's declining years, and S believed that it would not be prudent to invest estate funds in necessary repairs to prevent further deterioration, or to hire a management firm to secure tenants and handle routine upkeep problems. Although not required to raise funds to pay debts or administrative expenses, S felt that a sale from the estate was desirable. The will contained no provision concerning the sale of estate property.

Pursuant to his power of sale in ORS §114.325(1), his authority to sell in ORS §114.325(2), and the general mandate of ORS §114.275 to proceed with estate administration without court order, S sold the property. He accounted under ORS §116.083. He mailed no notice of

[23] U.S. CONST. amend. XIV, §1.

his accounting and petition for final distribution to D under ORS §116.093 as her "last known address" was the testator's home. After paying D's share of the estate to the Division of State Lands pursuant to court order secured under ORS §116.213, S obtained an order of discharge under ORS §116.213.

D subsequently returned and recovered her share of the estate from the Division of State Lands. More than one year after S had obtained his discharge, she filed suit against him. She contends:

(1) That S was negligent in making the sale in that he sold for a grossly inadequate price.

(2) That the court lacked jurisdiction to enter a discharge of S which would bar her suit because:

(a) She was given no actual notice of the administrative proceeding.

(b) Constructive notice by publication is inadequate under the due process clause where a statute authorizes a fiduciary to sell estate assets without judicial supervision.

The Power Example. Assume the same facts as in the authority example, except for the following variations. S knew D's address, but did not mail her information under ORS §113.145. S did not publish notice to interested persons as required by ORS §113.155. The will expressly directed that the homeplace not be sold. The purchaser (BFP) from S paid value, and had no actual knowledge that S was using his power of sale improperly under ORS §114.325(2).

D filed suit against BFP to recover her one-half interest in the property. She contends:

(1) That ORS §114.215(1)(b) vested a one-half interest in the property in her as a devisee at the death of the testator.

(2) That insofar as ORS §§114.215(1)(b), 114.325(1), and 114.385 purported to give S a power of sale over her property, in contravention of the express terms of the will, when she had neither actual (ORS §113.145[2]) nor constructive (ORS §113.155[3]) notice of the proceeding, they deprived her of her property without due process.

What Is Property? In both examples, the basic contention of the devisee is that the Code procedures deprive her of *property* without due process. In the authority example, it is a cause of action for damages against the personal representative. In the power example, it is land. But what "property" did the devisee "have" to lose?

ORS §114.215(2) is crucial to this question, for subsection (2) expresses a legislative determination that the rights of heirs and devisees to the decedent's property are subject to the restrictions and limitations of the Code to facilitate the prompt settlement of his estate. The property rights of the decedent may differ from those of his devisee. This article can hardly plumb the depths of the jurisprudential meaning

of property. But a noted economist provides the following frame of reference:

> Since therefore neither occupation, natural law nor labor gives an indefeasible title to private property, some philosophers were led to frame the so-called legal theory of private ownership which is in essence that whatever is recognized as such by the law is rightfully private property. Obviously, however, this is not an economic doctrine. Good law may be bad economics. The law generally follows at a respectful distance behind the economic conditions, and adjusts itself gradually to them. The legal theory tells us what property is, not why it is, nor what it should be. Thus we are finally driven to the social utility theory...In ancient as in modern communities, the individual is helpless as against society, however much under modern democracy society may see fit to extend the bounds of individual freedom. If we allow the individual to seize upon unoccupied wealth, if we recognize the existence of certain rights in what are deemed to be the products of labor, if we throw the mantle of the law around the elements of private property—in every case society is speaking in no uncertain voice and permits these things because it is dimly conscious of the fact that they redound to the social welfare. Private property is an unmistakable index of social progress. It originated because of social reasons, it has grown under continual subjection to the social sanction. It is a natural right only in the broad sense that all social growth is natural.[24]

A leading United States Supreme Court case, *Irving Trust Co. v. Day*,[25] demonstrates the application of these theories to the rights of succession to property of a decedent. In 1922, two days before his marriage, a man (hereafter referred to as decedent) obtained a written waiver of all rights in his estate at death from his prospective bride (hereafter referred to as widow). On August 21, 1930 decedent executed a will leaving only $2,000 to his widow. On September 1, 1930 (eleven days later) section 18 of the NEW YORK DECEDENT ESTATE LAW[26] became effective as to all wills executed after that date. It gave a surviving spouse a right to take an elective share against the will of the spouse who died first, and permitted waiver of this right by an instrument duly acknowledged. Although the waiver signed by the widow was not acknowledged, the rights of successors under the August 21 will were still immune from claims of the widow because created under a prior law. But the decedent wished to change his will, and whether he knew it or not, his effective testamentary rights after September 1, 1930 were sorely restrained, for any change would forfeit his testamentary control over the share of his estate subject to the widow's election. He made a codicil on July 6, 1934, thus republished his will, and subjected his estate to the widow's election. The widow claimed her elective share. The executor of the decedent's will contended that section 18 impaired the decedent's contract rights, and deprived his testamentary successors of property without due process.

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[24] E. SELIGMAN, PRINCIPLES OF ECONOMICS 133-134 (1905).
[25] Irving Trust Co. v. Day, 314 U.S. 556 (1942).
[26] N.Y. Laws of 1929, ch. 229, §4.

The Court's initial pronouncement on the constitutional issue appears to reflect the legal theory of private ownership of property:

> Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition or even abolish the power of testamentary disposition over property within its jurisdiction.[27]

Under this sweeping language, New York could have eliminated the decedent's right of testamentary disposition, and thus deprived his testamentary successors of all rights. Reduced to its bold form, the proposition is that a state could not possibly deprive a person of property by its laws governing succession to a decedent's property, for the only property one has by succession is created by and subject to those laws.

Interestingly, the Court did not terminate its analysis at this point. It referred to the effect of section 18 as continuing, as obligations of a decedent's estate, social responsibilities he had assumed during life, and said that to effectuate this policy of providing for a surviving widow, New York could have refused to recognize any waiver by a spouse, acknowledged or not.[28] To whatever extent it was constitutionally relevant, the Court was obviously sympathetic with the benign social utility of New York's creation of property rights in the decedent's spouse at the expense of his testamentary successors.

Returning to ORS §114.215, the Legislature appears to have relied on the proposition that if the State of Oregon could constitutionally eliminate all rights of succession to a decedent's property, it could certainly create rights in successors "subject to restrictions and limitations to facilitate the prompt settlement of estates."

The author suspects, however, that for two reasons the logic of this analysis proves too much. First, as long as the due process clause purports to protect property rights, the federal courts can hardly leave the determination of whether or not property ever existed solely to the states. In the *Irving Trust Co.* case, the Supreme Court said that "the existence of the contract and the nature and extent of its obligations become federal questions for the purposes of determining whether they are within the scope and meaning of the Federal Constitution . . . [29] And, with reference to section 18 and the elective share which it created, the Court said: "The condition clearly was such as New York might, without restraint from the Federal Constitution, annex to the privilege of making a will under its law."[30] Why was the

[27] Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942).
[28] 314 U.S. at 563-564.
[29] 314 U.S. at 561.
[30] 314 U.S. at 563.

condition (the elective share) clearly within New York's power? Whether viewed as "creating" property rights in the widow, or "shifting" property rights from persons who would otherwise be successors to the widow, section 18 was justified by the Court in terms of reasonable state social policy.

Second, even if Oregon could constitutionally deny any property rights in erstwhile successors of a decedent, the primary thrust of ORS §114.215 is quite the opposite, for subsection (1) provides that upon the death of a decedent, title to his property *vests* in his heirs and/or devisees. Until heirship is determined, or a will is established and immune from contest, we do not know who these persons are. But the statute vests property rights in them which until his death resided in the decedent. Although these rights are conferred subject to restrictions and limitations, they are expressed as vested.

Because succession to a decedent's wealth is so deeply rooted in our society, the *interests* of successors probably will continue to be characterized as property rights, and the statutory provisions governing establishment of rights of succession and administration of the wealth of the estate in which those rights exist, will have to withstand an attack under the due process clause.

The Authority Problem. The authority example involves a collateral attack on the finality of the judicial order discharging the personal representative. The contention is that the court lacked jurisdiction to issue an order barring suit by a devisee given notice of the proceeding only by publication when the personal representative was authorized, by statute, to sell estate assets without judicial supervision. The theory is that due process requires that interested persons be given a higher quality of notice in independent administration than in supervised administration. However, before this theory can be evaluated, the general notice requirements of due process in estate administration should be explored.

Professor Simes states:

> In jurisdictions where statutes provide for some sort of notice to initiate the administration, it is clear that publication is sufficient and that personal service on interested parties is not required.[81]

Moreover, it is well known that probate in common form, without any notice to interested persons, is the accepted practice in many states.[82] In these states, notice to interested persons is usually given after the appointment of a personal representative, by a published notice to creditors or a notice of appointment.[83]

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[81] Simes, *The Administration of a Decedent's Estate as a Proceeding in Rem*, 43 MICH. L. REV. 675, 695 and n. 73 (1945).

[82] *Id.* at 693-694 and n. 70.

[83] *Id.* at 694.

However valid these notice procedures were under due process in 1945, when Professor Simes wrote, they are currently subject to serious doubts. The foundation case for these doubts is *Mullane v. Central Hanover Bank and Trust Co.*[84] The *Mullane* case was not concerned with estate administration, but dealt with trust administration, and a New York statute[85] which permitted trust companies to pool small trust estates into common trust funds for investment management. The statute also provided that a trust company could obtain a judicial settlement of its accounts in a common fund as against all beneficiaries of participating trusts after notice of hearing published in a local newspaper, setting forth merely the name and address of the trust company, the name and date of establishment of the common trust fund, and a list of all participating estates, trusts or funds. A trust company sought a final judicial settlement of accounts after giving the minimum notice by publication required by the statute. The Supreme Court held that this notice was inadequate under the due process clause as a basis for an adjudication depriving known beneficiaries whose addresses were available of substantial property rights. The notice provisions were upheld, however, as to persons whose interests or addresses were not known to the trust company.

That the beneficiaries of the participating trusts and estates had property interests in the common trust fund was conceded by all. The trust company argued that because the New York courts had jurisdiction over the trustee and the fund, the proceeding was at least in the nature of a proceeding in rem, and constructive service by publication was consistent with due process as to all beneficiaries. The opposing contention was that the decree did not affect the relative interests of the beneficiaries in the fund which was subject to New York's jurisdiction, but terminated the personal rights of all beneficiaries to surcharge the trustee for breach of trust, and hence was a proceeding in personam which required personal service of process on nonresidents, and at least mailed notice to residents.

Perhaps the most significant aspect of the Court's holding was its extreme pragmatism. The Court emphatically rejected the in rem—in personam antithesis in the due process context. It recognized the duty of the state to provide procedures for the administration of trusts supervised by its courts which would efficiently serve the needs of fiduciaries and all beneficiaries. But the Court was equally cognizant of the individual interests to be protected, for it said that before individual beneficiaries could be deprived of property the adjudication must

[84] 339 U.S. 306 (1950)

[85] N.Y. Laws of 1937, ch. 687, §10-C, as amended by ch. 602 (1943) and ch. 158 (1944).

"be preceded by notice and opportunity for hearing appropriate to the nature of the case."[36] These are broad words, as the Court admits:

> The Court has not committed itself to any formula achieving a balance between these interests in a particular proceeding or determining when constructive notice may be utilized or what test it must meet.[37]

The Court did provide what it characterized as a few general principles. The temptation to quote these will be resisted. It is believed that they in turn, boil down to two fundamental principles, which will be stated; their application to the "particular proceeding" in the *Mullane* case will be summarized.

(1) If a reasonable means, which would be used by a person who actually desired to communicate information to another, is available, an interested person is entitled to notice by that or equivalent means.

Mullane holding. Notice by ordinary mail was required for all beneficiaries, resident and nonresident, whose addresses were known to the trust company in the normal course of business.

Mullane analysis.

(a) "[T]he mails today are recognized as an efficient and inexpensive means of communication."[38] Such a notice is reasonably certain to reach most of those interested in objecting to the accounting.

(b) In a common trust fund, the interests of individual beneficiaries are identical with those of the entire class. As long as most beneficiaries receive notice, necessary objections probably will be made, and will inure to the benefit of all. "Now and then an extraordinary case may turn up, but constitutional law like other mortal contrivances has to take some chances, and in the great majority of instances no doubt justice will be done."[39]

(c) Personal service of citation on beneficiaries with known addresses would, "... by reasons of delay if not expense, seriously interfere with the proper administration of the fund."[40]

(2) If no reasonable means are likely to be available to a person who actually desired to communicate information to another, an interested person is entitled to notice which is not less likely to succeed than other feasible and customary substitutes.

Mullane holding. Notice by publication was approved for all beneficiaries, resident and nonresident, whose interests or addresses were not known to the trust company in the normal course of business.

Mullane analysis.

(a) Although it is unlikely that such a notice will ever reach inter-

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[36] 339 U.S. at 313.
[37] *Id.* at 314.
[38] *Id.* at 319.
[39] *Id.*
[40] 339 U.S. at 318-319.

ested persons, it is not much more likely to fail than alternative choices open to the state.

(b) Diligence in investigation beyond the normal course of business would lead to the ascertainment of some previously uncertain future interests, and the discovery of some previously unknown addresses. But because of the large number of beneficiaries, the practical difficulties and costs of such a requirement would impose a severe burden on the common trust fund plan, and would likely dissipate its advantages.

A subsequent case, *Schroeder v. City of New York*,[41] is also considered quite important. The case arose from a condemnation proceeding under the New York City Water Supply Act[42] to divert a portion of the Neversink River twenty-five miles upstream from the owner's land. In compliance with the Act, the City published notices in newspapers in the City of New York and in the County in which the lands with water rights were located, and posted twenty-two notices (two more than required) along a seven-to-eight mile stretch of the river in the general vicinity of the land affected by the case. Neither the published nor posted notices named any affected land owners, explained the necessary procedures to recover damages for loss of water rights, or gave information that damage claims were barred three years after the City's action. No notice was posted on the land affected in the case, and no notice was mailed to the owner, although her name and address were, to quote the Court's value judgment, "readily ascertainable from both deed records and tax rolls . . . "[43] The owner did not file a claim for damages within the three-year period required by the Act, and the issue was whether the published and posted notices measured up to the quality of notice required by the due process clause. The Court held that they did not. But what would have been adequate? The Court said:

> The general rule that emerges from the *Mullane* case is that notice by publication is not enough with respect to a person whose name and address are known or very easy ascertainable and whose legally protected interests are directly affected by the proceedings in question.[44]

The Court said a single letter would have discharged the City's obligation.

Although the Court referred to *Mullane*, it does appear that a significant factual distinction produced a more stringent notice requirement. In *Schroeder*, the owner's property interests were directly affected, and the damage claims of other property owners would not protect her. In *Mullane*, mailing was required for beneficiaries whose addresses were known "in the normal course of business;" in *Schroeder*, the re-

[41] Schroeder v. City of New York, 371 U.S. 208 (1962).
[42] Administrative Code of City of New York, tit. K41.
[43] 371 U.S. at 210.
[44] 371 U.S. at 212-213.

quirement is addresses "known or very easily ascertainable." Applied to the facts, this means that the City had a duty to ascertain the owners of all lands with possible water rights on the Neversink River downstream of the diversion point, and to give them mailed notice. The message is clear. Where the circumstances are such that only the interested person can effectively protect his rights, a duty of due diligence exists to locate his address. And due diligence probably means a more extensive search than the searcher might be disposed to call "easy."

In the years since the *Mullane* decision the Supreme Court has not considered a case involving notice requirements in estate administration. The general guide remains " . . . notice and opportunity for hearing appropriate to the nature of the case."[45]

What is the nature of the case? "The proceeding to administer the estate of a decedent is properly described as strictly in rem."[46] The res is the property of the decedent located in the state in which the proceeding takes place; the purpose of the proceeding is to determine the rights of all persons in the world, whether they be the decedent's successors or creditors, in that property.[47]

In many states the administration of an estate is viewed as one continuous in rem proceeding, from the petition for appointment of a personal representative to the order discharging him.[48] If constitutional notice is given to interested persons at the beginning of such a proceeding, no further notice is required for subsequent judicial orders in that proceeding.[49] Professor Simes states that the trend is to adopt the one continuous proceeding theory.[50] This trend probably reflects the greater efficiency of such a procedure, for in a reasonably complex estate, a requirement of new notices to support court approval of even the relatively significant transactions would impose a considerable burden in delay and expense.

It seems reasonably clear that the 1969 Code is based on the one-continuous-in-rem proceeding concept. ORS §114-275 is most in point, for it provides that ". . . a personal representative or any interested person may apply to the court for authority, approval or instructions on any matter concerning the administration, settlement or distribution of the estate, and the court, without hearing or upon such hearing as it may prescribe, shall instruct the personal representative or rule on the matter as may be appropriate." The court could, of course, require a notice of hearing under ORS §111.215. But the foregoing provision also refers to orders without hearing. Of course, the personal

[45] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).
[46] Simes, *supra* note 31, at 704.
[47] *Id.* at 697-698; Riley v. New York Trust Co., 315 U.S. 343, 353-354 (1942).
[48] Simes, *supra* note 31, at 689.
[49] Michigan Trust Co. v. Ferry, 228 U.S. 346 (1912).
[50] Simes, *supra* note 31, at 691.

representative would want an order with some judicial effect, and an ex parte order could satisfy that need only if rendered within a continuous in rem proceeding preceded by constitutional notice to interested persons.

Certainly the state must provide for the orderly administration of decedents' estates. If an order of final distribution is to identify the successors to a decedent's property, and bind all other persons, constructive notice must obviously be adequate for some persons. During the period of administration a fiduciary must manage the estate assets, and, frequently, management will require sale. The fiduciary may seek protection by a court approval before he makes the sale, or by a judicial order of discharge after his final account has been approved. But unless he can be assured of effective protection at some point for necessary business decisions, he could hardly accept the fiduciary office. Although the *Mullane* case rejected the significance of state characterizations of proceedings as "in rem" or "in personam" for due process purposes, the judicial necessity of jurisdiction over a res, and an indefinite number of potentially interested persons, remains. Discarding the "in rem" label does not alter the nature of the case. If estates are to be administered, less notice must be required than in proceedings historically characterized as "in personam."

The author believes that, subject to one qualification which will be discussed subsequently, ORS §§113.145 and 113.155 satisfy the due process requirement of notice and opportunity for hearing appropriate to the nature of a continuous in rem proceeding for the administration of an estate.

ORS §113.145, it will be recalled, requires a personal representative, upon his appointment, to deliver or mail to the devisees and heirs, named in the petition for appointment of a personal representative, certain basic information. Notice by ordinary mail was approved in *Mullane* as an inexpensive and efficient means of communication with a relatively large group of interested persons. The number of heirs and devisees in an estate is frequently large. The substantive information required by section 113.145 seems fully adequate to permit the recipient to utilize the further provisions of the Code available to secure protection of his rights.

Moreover, information to devisees under a probated will and heirs (which would include a surviving spouse and issue under ORS §§112.025 and 112.045) would include, in the vast majority of cases, all potential successors. Two categories of potential devisees are not included; those under unknown instruments, and those under instruments known to the personal representative which have not been probated. Many decedents leave a series of revoked wills. Imposing a duty on the personal representative to search for such instruments, and to

give information to devisees named in any of them found or already known, would be burdensome, and would probably be either fruitless or unnecessarily disruptive. The Code adopts the view that it is better public policy to leave such interested persons with the notice afforded all persons by the death of an individual, and publication.[51]

However, ORS §113.145 only provides for information to devisees and heirs named in the petition for appointment under ORS §113.035, and names and addresses of heirs and devisees need be included in that petition only "so far as known." Granted, in *Mullane* the trust company was only required to mail notice to beneficiaries whose addresses were known in the regular course of business. But in the common trust fund the interests of all beneficiaries were identical; notice to most would probably secure protection for the rest. The sole heir disinherited by a will may well have to protect his own interests. In *Schroeder*, mailed notice was required for a landowner whose address was easily ascertainable, and who, under the circumstances, had to press her own damage claim.

How diligent a search for unknown persons, or known persons with unknown address, should be required of a personal representative? After all, the death of a person is likely to come to the attention of relatives who were at all close to him.

> They do not pretend that the facts of the fraud were shrouded in concealment, but their plea is that they lived in a remote and secluded region, far from means of information, and never heard of Broderick's death, or of the sale of his property, or of any events connected with the settlement of his estate, until many years after these events had transpired. Parties cannot thus, by their seclusion from the means of information, claim exemption from the laws that control human affairs, and set up a right to open up all the transactions of the past. The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition, and of the vicissitudes to which they are subject. This is the foundation of all judicial proceedings in rem.[52]

Nevertheless, the author would advise his client who wished to rely on subsequent ex parte court orders to bar suit by an interested person who did not receive mailed information to be prepared to prove he searched with reasonable diligence.

ORS §113.155, the other notice statute, requires publication of a notice to "interested persons" including the title of the court in which the proceeding is pending, the name of the decedent, the name and address of the personal representative, and the usual information contained in a notice to creditors.[53]

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[51] *See* UPC §3-403, Comment.

[52] Case of Broderick's Will, 21 Wall (88 U.S.) 503 at 519 (1874).

[53] At this point one might reasonably wonder why ORS §113.145 requires "information" to persons, while ORS §113.155 requires published "notice." The author has already expressed his opinion that both sections will be required to

Assuming, then, that the notice requirements of sections 113.145 (with a diligent search for the addresses of heirs and devisees) and 113.155 would be adequate for a judicially supervised estate administration, are they adequate for independent administration? Are the rights of interested persons subject to more hazards under independent administration?

Of course, if the interested person receives notice of the proceeding, by mail, publication, or otherwise, protective provisions are available under either system.

(1) *Removal of personal representative.* Any interested person may petition the court to have a personal representative who "has been unfaithful to or neglectful of his trust" removed under ORS §113.195. If the interested person can establish that the personal representative has already been disloyal (unfaithful) or imprudent (neglectful), removal would seem to be in order in most cases. However, what if the evidence merely establishes that there is strong animosity between the personal representative and the interested person (which might lead to disloyalty), or that the personal representative lacks even ordinary managerial competence (which probably would lead to imprudent acts)? The court could have found such a person unsuitable and never appointed him under ORS §113.085. But the original appointment is ex

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meet minimum due process notice requirements for the continuous in rem estate proceeding contemplated by the Code. If so, both are notice provisions, and the word "notice" should have been used in ORS §113.145, rather than "information." The misnomer should have no legal significance in the Code, as long as the cause of the error is known.

The error was caused by copying a provision of the UNIFORM PROBATE CODE which was designed to accommodate a theory of estate administration not adopted in the Oregon Code. The UNIFORM PROBATE CODE provides for two categories of proceedings, formal and informal.

Informal proceedings for probate of a will, appointment of a personal representative, or closing an estate, may generally be conducted without notice to any interested persons. UPC §§1-201(s), 3-301, 3-705, and 3-1003; but see UPC §§3-306 and 3-310. These proceedings do not involve court adjudications, and interested persons become bound by them only by various statutes of limitations, and related provisions. UPC §§3-108, 3-703, 3-909, 3-1005 and 3-1006. Thus UPC §3-705 requires the personal representative to give information to heirs and devisees. With information of the administration, they can institute formal proceeding to secure such protection as they desire. But "information" is not "notice," and under the UNIFORM PROBATE CODE is not intended to confer jurisdiction on the court to issue an order binding an informed person. Much of the language of ORS §113.145, and unfortunately the word "information," was taken from UPC §3-705.

Formal proceedings are those conducted with notice to interested persons before a judge, without limitation as to subject matter (UPC §1-201). Adjudicative proceedings to determine testacy or secure appointment of a personal representative (UPC §§3-402 and 3-403), resolve administrative matters (UPC §3-105) and close an estate (UPC §3-1001), must be preceded by notice given under UPC §1-401.

Substantively, ORS §§113.145 and 113.155 give virtually the same notice as UPC §§-403 and 1-401, and for the same purpose, to support the court's jurisdiction to grant subsequent orders binding interested persons.

parte, and hence it is unlikely that the court would have had evidence of unsuitability available at that time. It would seem that the court should consider evidence of general unsuitability in acting on a removal petition in an appropriate case.

(2) *Order limiting authority of personal representative.* Any interested person may petition the court for an order instructing the personal representative to act, or refrain from acting, in a specified manner, under ORS §114.275. Engaging in a transaction made unauthorized by court order would be a breach of fiduciary duty, with resultant liability for loss to any interested person under ORS §114.395. It could also subject the personal representative to punishment for contempt of court under ORS §§111.085 and 111.095.

However, what if the interested person has received no actual notice of the proceeding from the personal representative upon his appointment? An examination of the alternatives open to the personal representative in a typical managerial transaction, and their practical impact on the rights of the interested person, should be useful. In the authority example, the personal representative made a business decision that certain real property ought to be sold. He had authority to make the sale without court order under ORS §114.325. Moreover, ORS §114.275 urged him to use that authority and to proceed with estate administration without court direction. He made the sale. By so doing he assumed the risk of liability, under ORS §116.063, for any loss to the estate which might arise if his conduct were subsequently found to be negligent. His final account under ORS §116.083 included the facts of the transaction. Had the interested person made herself known to the personal representative, she would have received mailed notice of his final account under ORS §116.093. She could have then filed objections under ORS §116.103, and ORS §116.123, possibly subjecting the personal representative to surcharge for breach of trust, as well as loss of his compensation as a fiduciary. In short, where the personal representative uses his authority under independent administration, he remains fully accountable for negligence until his final discharge, and for one year thereafter under ORS §116.213 if the interested person can satisfy the court that she permitted his order of discharge through her "mistake, inadvertence, surprise, or excusable neglect."

Moreover, his potential liability is made more meaningful under the Code because of stricter bond requirements under ORS §113.105. Even if the will waives bond, the court may, in its discretion, require one. It seems clear that an interested person could petition the court to exercise this discretion under ORS §114.275.

On the other hand, although the personal representative had authority to make the sale, he could have petitioned the court under ORS

§114.275 for approval before he did so. As long as the personal representative made a full and honest disclosure of the facts relevant to his proposed sale, the court's ex parte order of approval would give him protection under the one-continuous-in-rem-proceeding concept. The interested person would not then have a cause of action for the personal representative's negligence, even if she acquired knowledge of the estate proceeding before his final discharge, but she would have gained judicial supervision of the sale.

How much judicial scrutiny would the transaction probably have received? How much substantive protection is it likely that the court would have given? The Code's conclusion reflects the following analysis. The American court system is designed to adjudicate controversies between litigants; within this system, court supervision of noncontentious fiduciary decisions exists as an anomaly. Fiduciary decisions relative to the need for, and terms of, sale of estate assets will probably be based on economic considerations. Whether or not a given sale is prudent will depend on the best judgment of business experts, real estate men or securities investment counselors. A judge can hardly be assumed to possess such skills or have the time to conduct an independent investigation of the wisdom of a proposed transaction. Perforce, he must usually approve the decision already made by the fiduciary and his advisers. The unrepresented interested person will seldom acquire additional protection, for he is not present to offer an alternative solution to the court. But the personal representative will have bought protection, and the cost of this protection, in terms of attorney fees, is an administrative expense of the estate. The ultimate conclusion is that the practice of routine ex parte approval of proposed fiduciary transactions involves delay and expense, and produces very little protection for the estate. Thus the Code authorizes and charges the personal representative to make and act on his management decisions; to be prepared to defend their prudence at the time of his final accounting; in a word, to earn his fiduciary compensation.[64]

Does independent administration subject the interested person without actual notice of an estate proceeding to greater risks than supervised administration? The argument that his rights against the personal representative are strengthened is, at the very least, reasonable. Imposition of a higher standard of notice for independently administered estates could seriously impair the objective of the Code, speedy and economical administration of estates in the interests of all potential successors. What notice beyond a diligent search for the identity and

[64] The Code authorizes courts to grant ex parte approvals for contemplated fiduciary transactions; it may be that courts should move in the direction of refusing to grant approvals for business decisions which should properly be the responsibility of the fiduciary.

addresses of heirs and devisees, and a mailed notice, could be required? Personal service might be suggested. But if an address cannot be located, this is no better than a letter insofar as actual notice is concerned. If it were required in the name of due process, the fiduciary would be forced to return to the old practice of seeking court approval for all transactions. The author sees no sensible reason for such a result.

The Power Problem. The power example mounts a direct attack on the Code provisions granting the personal representative power to transfer good title to a bona fide purchaser even when exercise of the power is unauthorized. Certainly the Code is not designed to encourage or condone this conduct. ORS §114.325(2) states that a sale in contravention of the provisions of a will *is* improper except after notice, hearing and order of the court, and ORS §114.395 provides that a personal representative *is* liable for loss or damage to an interested person resulting from a breach of duty in the improper exercise of power. The last sentence of ORS §114.395 provides that "Exercise of power contrary to the provisions of the will *may* be a breach of duty." An emergency might make it necessary for a personal representative to sell assets in contravention of the terms of the will without taking time to secure prior court approval. Such a sale would be improper, yet in exceptional cases might not be a breach of duty. But in the absence of a compelling emergency, the breach of duty would be clear, and the personal representative would be liable for any resulting loss, no matter how prudent the sale might have been when made.

However, damages may be quite inadequate to an interested person who has been deprived of property with unique or sentimental value. Fairness forces us to reconsider the notice problem, for if an interested person had notice of the proceeding, a method for blocking the personal representative's unauthorized exercise of power would surely have been available.

The UNIFORM PROBATE CODE provides for a completely supervised administration in certain situations.[55] Under this procedure, the court may order the personal representative not to exercise all or certain powers without court approval, and these restrictions must be endorsed on the personal representative's letters of appointment. As a person dealing with a personal representative must determine his fiduciary status by examining his letters of appointment, the person could not be a bona fide purchaser if restrictions on powers were noted on the letters.

No express provisions for endorsing letters with restrictions on powers are included in the Oregon Code. The author believes, however, that ORS §§111.085 and 111.095 grant the court ample power

[55] UPC §§3-501 through 3-505.

to make endorsements, and that an interested person could petition under ORS §114.275 to invoke the court's power. Where the will directed that certain property not be sold, or contained a specific devise of certain property without authorizing its sale, the statutory restrictions on the sale of that specific property without court approval under ORS §114.325 could be endorsed on the letters of appointment. Moreover, the court could restrain a personal representative from making any sales without prior court approval, and have the letters so endorsed. In the power example, no information was mailed to a devisee with a known address, and no notice was published. Hence this remedy was not available to the devisee.

Both ORS §113.145(2) and ORS §113.155(3) expressly state that failure of the personal representative to give information, or publish notice, as required, does not affect the validity of his appointment, or the exercise of his duties or powers. These provisions supply indispensable support for ORS §114.385, which permits a person, such as a purchaser, to deal with a personal representative on the strength of his letters of appointment. But balanced against the loss to an interested person of irreplaceable property, why is it not proper to impose a greater duty of inquiry on the purchaser? The purchaser (in reality his attorney) could:

(1) Check the court file to ascertain that notices required by ORS §§113.145 and 113.155 have been given.

(2) Examine the will to see if sale is authorized under ORS §114.325(2) without court order, and if not, if a court order has been properly obtained.

(3) In an intestate proceeding, check the court file to ascertain if bond has been required, and if so, if it has been increased as required by ORS §114.325(2)(c).

A practical answer to point (1) above is that if the power of a personal representative to engage in binding transactions, such as sales, were contingent on whether or not he used reasonable diligence in mailing notice to heirs and devisees, or published notice with technical accuracy, a person dealing with a personal representative could seldom rely on his power.

However, the three points above raise a far more fundamental issue. The Code was written to facilitate the prompt and economical administration of thousands of estates. In the power example, one personal representative failed to give required notices, and made an improper sale. But unless the purchaser in this obvious hardship case is protected; unless the personal representative's power of sale can exist independent of his authority, then every purchaser from every personal representative in every estate must make certain of the authority of the fiduciary to sell.

The philosophy of the Code reflects a policy judgment now uniformly accepted in the United States in connection with the transfer of securities by a fiduciary. Suppose that the power example concerned the sale of securities registered in the testator's name at his death, rather than real property. For this transaction the personal representative would need both a buyer and a transfer agent willing to rely on his statutory power of sale. The buyer must be certain that his title will be upheld, and the transfer agent must be certain that it will not be subjected to liability, even if the fiduciary exceeded his authority in making the sale. Neither can rely unless a protective statute is in force in the state of incorporation of the issuing corporation, and the state where the transfer and issuance of a new certificate will take place.

As of 1967, either the UNIFORM COMMERCIAL CODE, the UNIFORM ACT FOR SIMPLIFICATION OF FIDUCIARY SECURITY TRANSFERS, or the MODEL FIDUCIARIES' SECURITIES TRANSFER ACT was in force in all American legal jurisdictions, and for practical purposes no distinction need be made between these jurisdictions.[56] As the UNIFORM COMMERCIAL CODE[57] has now been adopted in all states except Louisiana, the following analysis will be based on that CODE.

A person such as a decedent's successor, against whom the transfer of a security is wrongful for any reason, except an unauthorized endorsement, cannot recover possession of the security or any new security evidencing all or part of the same rights, from a bona fide purchaser.[58] An executor or administrator of a decedent who is a registered owner of a security is authorized to endorse the security for transfer.[59] And, failure of a fiduciary to comply with a controlling instrument or with the law of the state having jurisdiction of the fiduciary relationship, including any law requiring the fiduciary to obtain court approval of the transfer, does not render his endorsement unathorized.[60] A bona fide purchaser is defined as a purchaser for value in good faith and without notice of any adverse claim.[61] Further, the fact that the purchaser has notice that the security is endorsed by a fiduciary does not create a duty of inquiry into the rightfulness of the transfer or constitute notice of adverse claims.[62]

But, protection for a would-be buyer would be fruitless if no trans-

[56] C. ISRAELS & E. GUTTMAN, MODERN SECURITIES TRANSFERS §12.01 (1967).

[57] The UNIFORM COMMERCIAL CODE will be cited hereafter in the form "UCC §0-000."

[58] UCC §8-315.

[59] UCC §8-308(3)(d).

[60] UCC §8-308(7).

[61] UCC §8-302.

[62] UCC §8-304. Section 7(a) of the UNIFORM ACT FOR SIMPLIFICATION OF FIDUCIARY SECURITY TRANSFERS (hereinafter cited as SIMPLIFICATION ACT) contains similar provisions, and is substantially comparable to ORS §114.385.

fer agent could risk making a transfer to him. Hence, neither an issuer[63] nor a transfer agent[64] is liable to a person suffering loss as a result of the transfer of a security if it has the necessary endorsements and had no duty to inquire into adverse claims. Where the endorsement is by a fiduciary appointed by a court, appropriate evidence of the appointment is specified to be an official court certificate, such as letters of appointment.[65] Although the issuer or transfer agent has a general duty to inquire into adverse claims upon proper notice, where the endorsement is by a fiduciary there is no duty to inquire whether the transfer is made in compliance with a controlling instrument or with the law of the state having jurisdiction of the fiduciary relationship, including any law requiring the fiduciary to obtain court approval of the transfer. Neither the issuer nor the transfer agent is charged with notice of the contents of any court record or file or other recorded or unrecorded document.[66]

The dominant purpose of article eight of the UNIFORM COMMERCIAL CODE is expressed by section 8-105: to make securities governed by that article negotiable instruments. But within the context of fiduciary transfers, the underlying reason for negotiability is stated in the Prefatory Note to the UNIFORM ACT FOR THE SIMPLIFICATION OF FIDUCIARY SECURITY TRANSFERS. "The main purpose of this Act is to render unnecessary the burdensome documentation which has been required by the transfer agent . . ." [67] If the corporation and transfer agent are liable for making a transfer which results from a fiduciary breach of duty, they must police the transfer. Documentation proving that the personal representative has been properly appointed, that he is complying with the will, and any law requiring court approval, must be required. This procedure would prevent some wrongful transfers. But the administrative expense in providing documentation it imposes on the overwhelming majority of proper transfers is enormous. In isolated transactions a market based on the premise of negotiability may deprive true owners of a margin of protection; but overall, the efficiency and reduced costs of negotiability redound to the benefit of sellers and purchasers.[68]

Should speed and economy only be provided in transfers of investment securities? At common law, the personal representative was considered the owner of all estate personal property, and consequently could sell personalty and transfer good title to a purchaser without the

[63] UCC §8-404(1).
[64] UCC §8-406.
[65] UCC §8-402. Section 4(a) of the SIMPLIFICATION ACT is comparable.
[66] UCC §8-403. Section 3 of the SIMPLIFICATION ACT is comparable.
[67] SIMPLIFICATION ACT, Commissioners' Prefatory Note.
[68] Folk, *Article Eight: A Premise and Three Problems*, 65 MICH. L. REV. 1379, 1386-1387 (1967).

necessity of a court order.[69] Where a different rule exists in the United States, it results from statutes which condition the personal representative's power of sale of personalty upon prior court authorization.[70] The historical origins of the rules governing sales of real property are well known. Real property descended directly to the heir. Were it available to the personal representative for the payment of debts, the performance of feudal military services might have been jeopardized.[71] Of course, land is now subject to sale for the payment of administrative expenses and the decedent's debts, but because the realty passed directly to heirs or devisees, statutes were required to authorize such sales.[72] And in the absence of a testamentary power of sale, these statutes require court approval as a prerequisite to a valid sale.[73]

The plight of the prospective purchaser from a fiduciary in the United States, whether he be a personal representative or a trustee, is much the same. One cannot be a bona fide purchaser from a trustee if he has knowledge that the trustee would be exceeding his authority in making the sale. If the purchaser knows that he is dealing with a trustee, he is charged with notice of the terms of the trust, and their correct legal interpretation, and hence of any lack of authority.[74] The draftsman can provide the trustee with the broadest of powers, or a modern statute such as the UNIFORM TRUSTEES' POWERS ACT may provide such powers.[75] The purchaser still has a duty of inquiry; he must examine the trust instrument to make certain that included powers are adequate, or that statutory powers have not been negated by the settlor. Professor Fratcher has aptly summarized the situation:

> The Uniform Fiduciaries Act and the Uniform Commercial Code have abolished the duty of inquiry in virtually all transactions concerning negotiable instruments and investment securities, but little has been done as to other types of transactions. One who purchases half a million dollars worth of corporate bonds from a trustee need not inquire into his powers to sell and to give a receipt for the price, but one who buys a pig or a rocking chair at a trustee's auction is bound to study the terms of the trust and determine at his peril their correct legal meaning. The duty of inquiry is especially onerous in land transactions because, if notice of a trust appears in the chain of title, not only the original purchaser from the trustee but every subsequent purchaser must diligently inquire into his powers. Might it not be better to eliminate the duty of inquiry in all transactions with trustees and make third parties who engage or assist in such transactions liable to the cestui que trust only when they have actual knowledge that the trustee is committing a breach of trust? The duty of inquiry is rarely of real value to the cestui,

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[69] T. ATKINSON, WILLS §122 (2d ed. 1953).
[70] *Id.*
[71] C. LANGDELL, BRIEF SURVEY OF EQUITY JURISDICTION 144 (2d ed. 1908).
[72] T. ATKINSON, *supra* note 69, at §213.
[73] *Id.*
[74] IV A. SCOTT, TRUSTS §§297, 297.1,-.5 (3d ed. 1967).
[75] UNIFORM TRUSTEES' POWERS ACT §3. This act has been adopted in Idaho, Kansas, Mississippi, and Wyoming.

yet it *impedes the effective administration of every trust by delaying necessary transactions and discouraging dealings with and assistance to trustees.* A trustee who is financially unable to respond in damages for his breaches of trust could be required to furnish a bond.[76]

The UNIFORM TRUSTEES' POWERS ACT adopts the thesis of Professor Fratcher, for it provides that:

[A] third person, without actual knowledge that the trustee is exceeding his powers or improperly exercising them, is fully protected in dealing with the trustee as if the trustee possessed and properly exercised the powers he purports to exercise.[77]

The primary purpose of this provision is to eliminate the delay and expense produced by the duty of inquiry in the vast majority of cases when the trustee is not committing a breach of trust. And this purpose cannot be achieved unless all purchasers, except those with actual knowledge of breach of trust, are protected.[78] No distinction is made between personal and real property transactions. Indeed, as Professor Fratcher points out, because title assurance in the United States is primarily based on recording systems and chain of title, merchantability of land is enhanced by statutory protection of bona fide purchasers from trustees.

Finally, the potential merits of this approach have led to its extension to transactions with personal representatives in the UNIFORM PROBATE CODE[79] and the Oregon Probate Code.[80]

As ORS §114.215 vests title to a decedent's property in his heirs or devisees, subject to sale by the personal representative, the ultimate result of the exercised power of sale is to *shift* the rights of interested persons from specific property to proceeds of sale, perhaps to be supplemented by the personal liability of the personal representative and his surety if a breach of fiduciary duty has resulted in loss. Neither the Oregon Probate Code, the UNIFORM PROBATE CODE, nor the UNIFORM COMMERCIAL CODE condition this shifting of rights on constitutional notice to interested persons. Could the UNIFORM COMMERCIAL CODE, adopted in all states except Louisiana, be constitutional, but not the Oregon Probate Code, or the UNIFORM PROBATE CODE when adopted? Returning to Professor Fratcher, if an interested person could be deprived of half a million dollars worth of stock in a corporation (per-

[76] Fratcher, *Trustees' Powers Legislation*, 37 N.Y.U. L. REV. 627, 662-663 (1962) (emphasis added).

[77] UNIFORM TRUSTEES' POWERS ACT §7. Charles Horowitz, who was chairman of the special committee which drafted the act, states that it adopts the approach proposed by Professor Fratcher. Horowitz, *Uniform Trustees' Powers Act*, 41 WASH. L. REV. 1, 7-8, 28-29 (1966).

[78] Horowitz, *supra* note 77, at 28-29.

[79] UPC §3-714.

[80] ORS §114.385.

haps including control of the corporation), it seems unlikely that loss of a pig (even as unique as Al Capp's Salome), should produce a contrary result. Will the relevant portions of the UNIFORM COMMERCIAL CODE be held unconstitutional? No case raising such a challenge has been discovered.

CONCLUSION

This article is developed around two hardship examples. In so doing, it demonstrates a syndrome commonly attributed to lawyers, an analytical approach oriented to the unusual case. Whether this is a virtue or a vice depends on the extent to which it leads to a focus on the trees to the exclusion of the forest.

The Code is designed to facilitate the transmission of wealth at death without unnecessary administrative delay and expense. The system developed must provide for the efficient succession to millions of dollars in thousands of estates. The primary focus of the Code is on the vast majority of estates. In order to achieve this goal the Code has adopted the theory of independent administration. The personal representative is given authority required for prudent management of estate assets without mandatory judicial supervision. He is given a power over the title to estate assets so that third parties can safely transact business with him. Perhaps the delay and expense inherent in the old system could be tolerated during the nineteenth century. But the twentieth century has already witnessed a remarkable increase in the relatively affluent percentage of the population. In a free enterprise economic system, it is highly desirable that the wealth of decedents be efficiently managed and kept freely alienable. This writer believes the Code meets the current needs of our society and is optimistic that it will meet economic requirements that will probably be characterized as imperative by the twenty-first century, only thirty years away.

THE UNIFORM PROBATE CODE: A POSSIBLE ANSWER TO PROBATE AVOIDANCE††

RICHARD V. WELLMAN†

Succession, or probate as it is more likely to be called, is currently quite controversial. This fact, though possibly useful to would-be speech makers, is unfortunate. There should not be any controversy about the rules protecting individual freedom in regard to personal savings. The fundamental principles, *e.g.*, the premise of private property that a decedent's unused savings should go as he indicates in his will or to his heirs if he leaves no will, are not disputed or disputable. Nor can the troubles of the area be attributed to contentiousness of survivors and other claimants. Wills are rarely challenged, and the occasional challenges are usually unsuccessful.[1] Creditors of decedents, protected in many situations by security or insurance, if not by survivors concerned about family credit ratings, are not a notable source of controversy.[2] Indeed, the controversy arises from the charge that we have more rules than we need.

Perhaps the presence of elaborate rules and procedures causes survivors to forego natural contentiousness. Perhaps we should accept the ponderousness of our system as the price for desirable tranquility. Still, there are other explanations for lack of disputes, which seem particularly applicable to small estates. Inheritance is a family matter. Any economic advantage one set of survivors might gain over another by stirring up trouble would be countered in most cases by displeasure and resentment by relatives or close acquaintances, rather than strangers. And, disappointment in regard to an expectancy is seldom as keen as other economic losses. We are quite accustomed to the idea that an estate owner is free to dispose of his savings as he pleases. Hence, losses of anticipated inheritances can be borne with equanimity and when there is something to inherit, it comes as a happy surprise! In sum, therefore, many of the

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†† This article is an adaptation of an address delivered at the Institute on Estate Planning and Administration in Indiana, Indiana State Bar Association, October 25, 1968.

1. Of 453 testate estates in a random sample studied in a recent survey of probate records in Cuyahoga County, Cleveland, Ohio, will contests occurred in only six, or 1.3 per cent of the cases. None were wholly successful. The survey was conducted by a sociology-law team at Case-Western Reserve University, Cleveland, Ohio. The results soon will be published. The manuscript from which the information was obtained is entitled *The Family and Inheritance*. Its authors are Marvin B. Sussman, Judith Cates and David Smith.

2. According to the manuscript of the Cleveland survey, ". . . we do not find that debts constitute a significant problem in the settlement of an estate."

usual components in succession tend to lead survivors to resolve any differences privately and amicably.

At some point, however, the size of the inheritance becomes large enough to induce would-be successors to disregard various environmental restraints in an effort to get something, or to get more. Whether this phenomenon exists in fact, or only in the minds of would-be decedents and their fiduciaries, is problematical. In either event, persons counselling owners of substantial estates are not likely to agree that survivors will not be contentious or that they will be able to resolve their differences without outside assistance. To them, a complex system for succession may tend to prevent problems before they become serious.[3]

Nonetheless, in estates of the size most frequently encountered,[4] the picture should be one of peace and harmony. Paradoxically, however, the factors in modest estates which should indicate legal tranquility appear to have contributed indirectly to the current hue and cry about probate. In any event, it is clear that we have a controversy about probate law. It is identified by the words *AVOID PROBATE*.[5] Mr. Dacey struck a raw nerve, as he learned to his delight, when his paperback of about fifty pages of text and 291 pages of duplicated forms ran first on the nonfiction best seller list in the late months of 1966. Total sales of this expensive packet of legal forms has passed 670,000.[6] Dacey's charges were quite specific and quite serious. He asserted that probate law and procedure are archaic, needlessly complex, and exist principally for the benefit of lawyers and probate judges. As a result, succession through probate is terribly time-consuming and costly. He also stated that lawyers cannot be trusted to give sound estate planning advice because of a conflict of interest; *i.e.*, the conflict between what is good for the client, and the lawyer's interest in probate fees.

His advice was explicit and alarming: Do not trust the law of succession. Opt out, and avoid probate by the use of self-declared trusts

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3. See *Probing the Source of Probate Pains*, The Wall Street Journal, May 14, 1968.

4. The Cleveland survey described in note 1 *supra* covered 659 estates which were identified in a five per cent simple random sample of all estates closed in Cuyahoga County between November 9, 1964 and August 8, 1965. Of the 659, forty-eight or 7.3 per cent involved assets of 60,000 dollars or over and eighty-five or 12.9 per cent involved assets of less than 2,000 dollars and so were released from administration. Four hundred fifty-three (68.7 per cent) were testate and 206 (31.3 per cent) were intestate. The mean testate estate grossed 41,218 dollars; the mean intestate estate grossed 8,599 dollars. The median testate estate size was 15,000 dollars gross; the median intestate estate was 6,000 dollars gross. The figures refer to the size of the probate estate. From these figures it can be said that half of the estates in probate involve well under 15,000 dollars gross.

5. N. Dacey, How to Avoid Probate (1965).

6. Dacey's full page ad in The New York Times, May 3, 1967, reported that more than 673,000 had been sold.

of various assets and by use of joint tenancy designations.

Unfortunately, from the view of those who dislike Dacey's charges, there is much in them that cannot be denied,[7] particularly if we focus on the estate of modest size and the relationships most commonly encountered in succession. Probate laws in almost all of our states, including some with recently adopted codes, are undeniably obsolescent. For example, intestacy laws nearly everywhere continue to divide estates between the spouse and children of a decedent, even through this pattern has not made sense since the family farm ceased to be the dominant feature of American family organization a couple of generations ago. Also, modern probate procedures are best explained by reference to colonial times when our rule assigning personal property of decedents to publicly appointed local officials at least served to protect local interests against unwanted claims from afar. This ancient starting point explains a heritage which haunts probate procedures in many states today. The assumption that administration of an estate requires a judicial proceeding is as doubtful as it is costly. The burden it imposes on succession has become more apparent as the Supreme Court has made lawyers realize that easy judicial notices via publication or posting cannot be considered due process if better notice is possible.[8] The absurdity of the assumption is nowhere more apparent than in our crowded cities where low paid probate clerks go through the motions of checking receipts against items of expenditure listed in accounts of personal representatives. One coming on such a scene from abroad might assume that outlays of public moneys rather than private family distributions were involved. However, he would soon learn that routine big-city probate audits are superficial affairs which serve best to remind us how futile it is to use public offices to check private family transactions.[9]

This is not to say that the probate situation is the product of a conspiracy by lawyers against the public, as Dacey suggests, or that probate laws do not work very well in many situations. Rather than a

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7. But we should be less than fair if we sought to excuse the abuses in the probating of wills that are inducements to avoiding probate. It is our belief that regardless of the merits of the revocable trust, it is the duty of a vigilant organized bar to take to heart the criticisms that have been aimed at lawyers and at the improper practices of the probate courts.
Editorial, *Avoiding Probate*, 52 A.B.A.J. 938, 939 (1966).

8. See Mullane v. Central Hanover Bank, 339 U.S. 306 (1950). There has been quite a bit of controversy concerning whether the *Mullane* case applies to probate proceedings. See Levy, *Probate in Common Form in the United States: The Problem of Notice in Probate Proceedings*, 1952 Wis. L. Rev. 420; Estate of Pierce, 245 Iowa 22, 60 N.W.2d 894 (1953).

9. As far as the writer knows, unless a question is raised by an interested person, the process is limited to determining whether receipts with which the accounting fiduciary charges himself have been properly expended and distributed.

conspiracy, what we have is the natural product of understandable conservatism in regard to changes of basic law. Coupled with this, we have a situation in which the basic law works well for persons of wealth who know that their affairs involve values which may invite trouble unless there is careful planning. These persons, whose affairs tend to be unusual, are rarely bothered by rules designed for the average person because they see to it that custom-made charters govern their estates.

But there is a vacuum of consumer interest in the laws which affect most directly the person whose estate is very modest and whose affairs are average. This vacuum has been principally responsible for the neglect of our estates codes. Legislatures respond to pressure. Decedents obviously pose no political problems, nor do the more thoughtful prospective decedents who can protect themselves by planning. Survivors tend to be happy with their windfall. Hence, probate laws have remained largely unchanged for generations, because the groups principally concerned with them, the lawyers and probate court officials, have found that they work very well for what they see to be the important cases; *e.g.*, the big estate where planning occurs, and the bitterly contested case. These professionals are paid to make rules work, rather than to question or to change them, and until recently at least, there has been almost no pressure for change. In a sense, the legal profession has demonstrated its technical proficiency by making the old laws work as long and as well as they have.

If, as I have suggested, probate laws which work unjustly for the average person are the product of history and historic indifference, one might expect that better legislation would appear rather quickly in this day of rising emphasis on estate planning. The combination of steadily rising levels of affluence, complex federal and state tax laws with burdensome rates and more and more public awareness of the advantages of planning which our burgeoning estate planning industry has generated, has made hundreds of thousands of persons newly conscious of their estates.

With the aid of paid and free advice, they are learning that succession via probate runs directly against such usually desired objectives as privacy in regard to family property matters, avoidance of delay in transmission at death and avoidance of periods of artificial non-liquidity following death. Joint estates, life insurance, living trusts and various extra-legal devices which avoid the shortcomings of probate are being utilized with steadily increasing frequency. Still, probate substitutes involve some personal and legal inconveniences when compared to the will. And, many people are sufficiently resentful about being pushed toward probate-avoiding devices by bad law that they would gladly

support legislative correction of the probate problems even though they also may move to protect themselves.

But, new statutes to correct probate problems are not going to be promoted or written by laymen. Lawyers must do the job and most other lawyers must support the results. The question is, how do lawyers view the probate problem?

My premise in regard to probate reform is that Dacey is simply wrong in suggesting that lawyers will not support probate law changes. There are too many reasons why lawyers should jump at the chance to get probate laws on a modern track. Let me elaborate.

Traditionally, the principal service of lawyers in relation to the succession process has involved the counselling of personal representatives and survivors. There are no better clients. But the importance of this role is shrinking in direct correlation to the extent to which individuals are using devices to avoid probate. Of course, an important new role for lawyers, garbed in the catchy words, "estate planning," has developed. These words used to mean will drafting. But, much modern estate planning is likely to center around non-probate devices. Indeed, if the sales of Dacey's book are an indicator, we should accept the fact that many laymen may shy away from use of a will. Surely, the layman is interested in substitutes. Seeing that the lawyer has no insurance, mutual investments, or joint accounts to sell, the layman is likely to believe that the lawyer can meet his estate planning needs only where the estate is large enough to warrant use of a trust.

Of course, if laymen also realized that lawyers might assist them with small trusts using family trustees, as well as with many other devices—that, indeed, a lawyer is an expert in probate avoidance—my concern about a shrinking role in estate matters for lawyers would not be so great. I am told that a good deal of new interest in estate planning by lawyers has been stimulated by the Dacey furor. But, lawyers also concede that much of this business probably would have come to them anyway. Any wide-spread discussion of estates, whether it is focused on the inadequacy of present rules, or on the advantages of a new code, would probably have some short-run effect in moving people to law offices.

I conclude, therefore, that the new "avoid probate" emphasis in estate planning works in several ways to discourage persons from using lawyers as estate planners. First, it is related to charges that the law is defective and that lawyers are in some degree responsible. Second, it has deprived lawyers of their best known stock-in-trade for estate planning, the will. Third, it has made lawyers appear to be useful only in regard to estates of unusual size and complexity.

Most estates are not of unusual size and complexity, at least so far

as estate owners are concerned. The practicing bar surely should be concerned with any trend suggesting that most estate owners understand they need some planning, but believe that lawyers have little to offer them. One disconcerting aspect is that a lawyer probably will not be the professional to whom the young family man turns first in his search for assistance in financial planning. By the time the typical person gets to the lawyer, his affairs have become complicated and much untangling becomes necessary. Worse, he may not get to the law office at all.

As a service industry, we cannot afford a posture that makes us appear useless to the average man. The other side of the coin is equally disconcerting. It is that present trends are shrinking the area of utility of estates lawyers to the point where their livelihoods may depend on continuance of a few relatively narrow provisions of our federal tax laws. When lawyers do participate in modern estate planning, the shift in the timing and character of their service means that they are working more for estate accumulators than for estate inheritors. There are significant differences between these groups in regard to their tolerance for legal fees. If put to a choice, would not lawyers prefer to be employed by inheritors? If so, there is additional reason for skepticism about the proposition that the lawyer's role in modern estate planning makes him uninterested in probate law reforms.

Probate law dilemmas are therefore lawyers' dilemmas. The probate controversy should not embarrass us—it should delight us. It has given us a great opportunity to solve some old problems. What remains to be seen, however, is whether lawyers will make the proper response to the probate controversy. In some instances to date, lawyer organizations have moved in precisely the wrong direction. Consider the action of the New York County Bar Association. That group sued to enjoin distribution of the Dacey book in New York on the ground that the author was engaged in the illegal practice of law. This action, which was in effect to say that the public should not read matters lawyers do not want them to read, simply tended to prove Dacey's charges that the bar would do whatever it could to keep the public from learning something about probate. Even if the suit in New York had resulted in a lawyer victory, which it did not,[10] the practicing bar in general stood to be seriously damaged by this emotional outburst.[11] As you can imagine, the litigation was publicized to the hilt by Mr. Dacey.[12]

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10. The decision of the New York Court of Appeals terminating the litigation is reported in The New York Times, Dec. 30, 1967, and TIME, Jan. 12, 1968.

11. In Florida, the content of a bar journal article criticizing Dacey seems now to be the subject of a libel action by Dacey against the lawyer group. See TIME, Jan. 12, 1968.

12. See the ad in The New York Times, May 3, 1967.

A somewhat more typical reaction by various lawyers has been to write and speak of the danger of following the Dacey form book approach to probate avoidance.[13] In the main, these pieces have done a good job of discrediting Mr. Dacey's advice concerning how probate is to be avoided.[14] But, the reasoned answer sometimes seems to interest a smaller circle than the emotional attack.

Moreover, many lawyer responses to Dacey's charges fail to offer the layman a practical solution to his estate problem. The usual message has been either that probate is not so bad after all, or that only lawyer-drawn trusts are safe. But, it is still obvious to most people that probate routines are expensive and senseless as applied to the ordinary estate, and the advice that everyone should see a lawyer, is increasingly impractical. Owners of ordinary estates are the ones who have been most frightened by the turmoil about probate, and many of these persons, being newly arrived in the status of having enough to worry about, do not know a lawyer. The suggestion that they find one is troublesome. It sounds expensive. Also, lawyers are busy and the general practitioner who serves the walk-in trade is becoming hard to find. Even if the layman with a modest estate can locate an estates lawyer, more likely than not he will encounter a product of recent law school emphasis on estate planning oriented around federal tax problems. If so, he may end up with a monstrous estate plan which will be worth its price only if all of his relatives suddenly die without plans and he is later wiped out in an airline accident causing gobs of double indemnity and travel insurance to fall into the pot.

These observations suggest the parameters of the probate problem. Obsolete laws and outmoded administrative institutions threaten to trap estates lawyers and to strip them of their traditional and principal function. Interest in estate planning for persons with complex affairs has diverted professional attention so that the loss of customary function does not appear to be as alarming as reflection suggests it may be. To correct the problem, major and meaningful steps must be taken to restore the confidence of the owner of small estates in the probate system. But, lawyers must offer the solutions. And, the general area of probate has been of such pervasive importance to lawyers for so long, that the process of persuading lawyers to concede that the present system is defective, and to apply their energies vigorously to its correction, stirs up professional doubts and emotions that threaten to render the bar

13. See Kinnaird, *Michigan Probate or How to Avoid Dacey*, MICH. ST. B.J., Mar. 1967, at 14; Strauss, Book Review, RES GESTAE Sept. 1966, at 5; Davis, Book Review, Chicago Tribune, Aug. 31, 1966.

14. See especially the review in CONSUMERS' REPORT, July, 1967, at 390-392.

impotent in the matter.[15]

Hopefully, the rapidly maturing Uniform Probate Code may provide some answers if it is approved by the Uniform Law Commissioners when they give it final consideration next July.[16] The project which is producing the Code is one for which every lawyer may claim credit. Originated by a sub-committee of the American Bar Association, financed almost entirely by lawyers' bar dues and gifts channeled through the American Bar Foundation, the project has been active since late 1962.[17] Because the project was well underway long before Mr. Dacey touched the public's sensitivity, it offers an explicit rejection of the charge that lawyers will never act on their own to sweep away probate dead wood. Moreover, the major features of the evolving Code will provide an affirmative, professional response to the major complaints about existing law.

Let me become more specific. The heart of the Code is its system of probate administration.[18] The basic scheme is not very original, but it may be both useful and acceptable. The idea is to offer the various major features of the different probate systems presently followed in our fifty states, as options, in a single system. Thus, under the draft Code, it will be possible for persons representing an estate to secure probate of a will very promptly after the testator's death by application to a non-judicial official of the probate court. Only a mandatory five day delay to permit family coordination and to discourage races is involved.[19] Probate with-

15. For further example, the American Bar Association has been criticized for sponsoring and producing the film "The Revocable Trust—An Essential Tool For the Practicing Lawyer." The film suggests that legal fees can be avoided by use of the revocable trust. See *Avoiding Probate*, note 7 *supra*.

16. Preliminary consideration was given to portions of early drafts at annual meetings of the National Conference in 1965 and 1966. A first tentative draft was introduced in 1966 and an expanded and improved second draft was introduced at the 1967 meeting. Three days of full Conference attention was given to a fourth working draft at the Philadelphia meeting of the Conference in 1968. Three meetings of the Special Committee of Commissioners have been scheduled for the winter 1968-69, during which it is contemplated that one or possibly two additional drafts will be prepared. Present plans are to present a final draft to the National Conference at its meeting in Dallas in 1969.

17. The project originated in 1962 when a subcommittee of the Real Property, Probate and Trust Law Section of the American Bar Association was formed to revise the Model Probate Code. Soon thereafter, the project was taken over by the National Conference of Commissioners on Uniform State Laws, which has assumed sole responsibility for the research and drafting effort. The ABA committee continues to serve in advisory capacity, however.

18. Article III of the 4th Working Draft of the Uniform Probate Code covers probate procedures. (The 4th Working Draft is hereinafter cited as Code).

19. Neither probate nor appointment can occur until at least five days after the decedent's death. Code §§ 3-210; 3-216. However, provision is included for emergency appointment of a special administrator, if needed before five days have elapsed. Code § 3-313. But, by use of the "relation-back" idea, and by giving the personal representative

out notice, which permits a will to be put into effect without being finally adjudicated, is an old and respected feature in many states which have long permitted what is usually called "common form probate."[20] However, if the parties desire a binding adjudication of the will's validity, the draft Code offers an appropriate, optional procedure.[21] Either no-notice or formal probate can occur without administration. But, if persons want to collect and transfer assets, administration will be a practical necessity because only an appointed representative can protect transfer agents and others.

An executor or an administrator in intestacy may be appointed with no more fuss than is required to probate a will, just as is true in many states today. After securing letters, a personal representative under the Code becomes in effect a statutory trustee with the necessary powers and protections to permit him to accomplish the entire job of collecting assets, paying debts, and selling land or intangibles as needed to raise necessary cash and distributing the estate to the successor.[22] If desired, all of these steps can be handled without further court orders. Again, however, isolated adjudications to answer particular questions or general orders settling accounts are available as desired.

The Code accepts the proposition that the probate court's proper role in regard to settlement of estates is to answer questions which parties want answered rather than to impose its authority when it is not requested to see that otherwise peaceful settlements are correct. This idea, though it would change the law in Indiana, is not novel in American probate law. Pennsylvania procedures and practice have long sanctioned settlement of estates without any activity by public offices or officials other than common form probate and routine issuance of letters. New Jersey procedures are similar. New York's surrogate courts have little to do with personal representatives after appointment. In Georgia, Texas and Washington, wills can effectively provide that the probate court shall not supervise the work of executors, and all well-drawn wills in these areas routinely so provide.

But, the draft Code offers the option of supervised administration which features, like your present Indiana Code, the necessity of a court ordered distribution of assets to close the judicial proceedings, which are deemed to have been initiated by probate, and issuance of letters.[23]

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power to ratify acts of others done before appointment, it is hoped that use of special administrators may be avoided. Code § 3-401.

20. Simes, *The Function of Will Contests*, 44 MICH. L. REV. 503 (1946), also published in L. SIMES & P. BASYE, MODEL PROBATE CODE 682 (1946).

21. Code § 3-222 et seq.

22. Article III, Part 4, Code. See also Code § 3-104.

23. Code § 3-105 et seq.

All that is required is that some interested person request supervision by the court and that a need for it exist.

What is new about the procedural package? In a sense, nothing is new because each procedure has its tested counterpart somewhere among the states now. But the extension of familiar, easy procedures to intestate estates and the presence in the Code of clear options to handle various steps in testate or intestate administration, with or without court orders, will offer new advantages in procedure for every state.

In two other respects, however, the draft code offers somewhat newer ideas for improvement of succession in the United States. The most important is a new basic pattern of succession to intestate estates left by married persons.[24] The old system, found almost everywhere in this country, divides estates equally between the spouse and children of intestate decedents. The Code alters this so that the first 50,000 dollars will pass to the spouse, and any excess over 50,000 dollars will be divided between the spouse and children. There is a variation from this pattern if all children are not the children of both the decedent and the surviving spouse. The new pattern is deemed to reflect what an overwhelming majority of married persons want.[25] An impressive amount of data shows quite clearly that married persons of ordinary means do not want their estates divided between their spouse and children. If the children are young, expensive guardianships result from a parent's death without a plan. If the children are grown, their heirship may well reduce the spouse's share below what should be provided for predictable needs. Moreover, reducing the surviving spouse's share in favor of children deprives the survivor of a degree of control over children's inheritances which may be useful to bolster natural ties when problems of old age might strain the relationship.

Thus, the draft code rejects the feature of existing law which tends to compel every married person to make a will or employ a will substitute.

This new pattern of heirship, coupled with efficient procedures for intestate estates, should tend to reduce pressures on persons of modest means to make wills *or* avoid probate. In a sense, the Code offers a statutory estate plan which should be wholly satisfactory for most persons. Thus, the drafts offer the legal profession an answer to the question of

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24. Code §§ 2-102, 2-103.

25. See Dunham, *The Method, Process and Frequency of Wealth Transmission*, 30 U. Chi. L. Rev. 241 (1963). The Cleveland study mentioned in note 1 *supra* reports that 89.2 per cent of testate decedents who were survived by spouse and issue willed everything to the spouse. The survey also includes responses to interviewer questions by survivors. In the survivor sample, 87.2 per cent of those with spouse and issue planned to leave their entire estates to their surviving spouse. Where the decedent was survived by a spouse and collateral heirs, 85.8 per cent willed everything to the spouse.

how to accommodate the large bulk of estate owners without diverting professional attention from the increasing demands of persons with complex affairs. It will be much easier to give advice about intestacy than to mass produce wills.

In addition, the new Code, if widely adopted, will go far to reduce the problems of planning via wills for persons who own property in several states. Estate planning by will and testamentary trust presently is handicapped in regard to persons who may change residences from one place to another, or who would invest in land in more than one state. Lawyers, who are so important to persons who prefer to manage their own affairs, should vigorously support uniformity of estate law because it will increase the range and value of the planning devices which lawyers are uniquely well equipped to handle. Also, lack of uniformity of estate law may be pushing persons who anticipate moving about the United States toward nationally managed investment pools, and the pre-packaged estate plans which go with them. I have no quarrel with these arrangements if they are preferred over owner-controlled investments *on the merits*. We should see, however, that individualized ownership is not unduly handicapped by legal anachronisms.

The Uniform Probate Code thus offers some positive answers to current probate dilemmas. Properly explained and properly used by lawyers assisting survivors, it will offer a much easier answer to worried owners than Mr. Dacey's. The message might be: "Relax; keep your property for yourself; inheritance is safe and, like any alternative, as cheap or expensive as your survivors and creditors make it." Shortened, the message might simply be, "Save your money. Probate works well."

The new Code would let lawyers carry out this kind of promise to the public. When survivors of a decedent who did not avoid probate seek legal counsel, the attorney will find it easier to give efficient service, for many of the old procedural drawbacks are gone. The Code makes it possible to avoid public disclosure of the assets of a decedent. Court-appointed appraisers are eliminated. Probate bonds, which every testator avoids when he can, will not be needed unless demanded by survivors, and awkward judicial sales of real estate should become a thing of the past.

The legal system will offer protection, but will not force it. As a corollary of less required paperwork and fewer adjudications, legal fees in individual cases may go down, but if general confidence in the probate system is restored the overall effect should be a marked increase in the number and size of estates in which lawyers may be involved.

Still, there are substantial risks that the Code will not become the answer to probate avoidance. The principal worry lies in the difficulty

of marshalling lawyer opinion behind the project. There are some who believe that the probate controversy is a tempest in a teapot and that it would be a mistake to undo settled law in response to the new found public interest in estates. I am convinced, however, that these views are wrong. In my five years of work on the Code, I have heard from dozens of laymen, and I have discussed these matters with lawyers from every part of the country. Most lawyers concede that the law needs to be improved. The public wants a change of law. If there is doubt on any point, it relates simply to whether lawyers will react affirmatively to the obvious demand for change. Until now much of the pressure for change has been tempered by publicity to the effect that the Uniform Code project would result in significant improvement. If the organized bar disappoints the public and follows the advice of the "stand-patters" on this occasion, it will be inviting a new and serious wave of anti-lawyer opinion which I, for one, do not believe it can afford. Moreover, it will be missing a golden opportunity to get public support for law changes that are badly needed in order to get the will, the lawyer's stock-in-trade, back into the circle of approved methods for handling many estate planning demands.

Some lawyers, particularly older practitioners who enjoy good probate practices, express apprehension about the Code's impact on probate fees. However, old assumptions concerning probate fees are likely to be unreliable guides for the future whether or not the Uniform Code gains much support. The increasingly popular revocable trust and publicity about probate fees already have brought new fee fixing criteria into the picture. Further, the Uniform Code does nothing about probate fees other than to make the lawyer's work load in particular estates somewhat less predictable, and to get the probate court out of the business of determining or approving fees in routine cases. Perhaps the biggest difference will be that lawyers will be able to handle small estates efficiently enough to begin to realize a decent return for time invested. Certainly they would prefer to be well paid for two or three hours of work, rather than nurse a file along for months to pick up a few hundred dollars from a small estate.

As far as large estates are concerned, I see little reason to predict great change in the actual work which lawyers will perform. Of course, if all that is involved is the transfer of securities and the routine determination of taxes, work and fees may be modest. But corporate fiduciaries will want the protection of adjudicated settlements; fees will continue to be borne in large part by the government in the form of deductible expenses; survivors receiving big inheritances should not be any more hard-nosed about fees than they are today. Indeed, with increased pros-

pects that fees will be carefully explained and irritating rituals in court minimized, there may well be less resistance to good fees in big estates than is present today.

Some lawyers and trustmen may worry about loss of inter vivos trust business under the Code but if any diminution occurs, it will be because probate business grows. Moreover, if there is no reason for a trust except to avoid probate, it is not certain that professional trustees will find participation profitable. There is an essential and expensive contradiction between the idea that the trust company owns and controls and the notion that the settlor is still the owner. Yet a settlor who has kept a power of revocation is likely to see it just this way, especially if the whole purpose was merely to avoid probate. But, there should be no loss of the desirable revocable trust business. The Probate Code does nothing to reduce the advantages of revocable trusts for persons who want the investment, tax counselling, bookkeeping, and "senility-insurance" features offered by present trusts for management.

Indeed, by its inclusion of an up-to-date set of optional legal proceedings for trustees and beneficiaries of all kinds of trusts, without distinction between those created by will and those created inter vivos, the Code should encourage greater use of trusts.

Many lawyers who tend to favor the Code fear the reaction of the probate judiciary to the new package. They fail to take into account that probate judges and their employees everywhere have been hit with the main force of the probate controversy. These people are caught between an interest in serving the public which led them to accept public office, on the one hand, and unpopular and useless law which they must enforce, on the other. The Uniform Code, though it may be adapted to a wide variety of court organizations, advocates that probate courts be thought of as fully equivalent in terms of power to courts of general jurisdiction. The Code also expands the subject matter jurisdiction of the probate court, giving it clear authority to resolve controversies relating to all kinds of will substitutes, and to handle questions and accounts by inter vivos and testamentary trustees. Overall, the Code is designed to relieve probate judges of the unpopular and difficult job of riding herd on all estates, and to open the way to the development of a powerful and specialized court which should offer real opportunity for valuable and dignified service by incumbent and future probate judges. Surely many will favor such a package.

There are many other less obvious perils ahead for the Code, but all of them will evaporate if lawyers support the project. Some elements of the newspaper industry are unhappy with what they deem to be inadequate provisions for publications of legal notices, and peddlers of probate

bonds dislike the Code's provisions on bonds. Another, perhaps more worrisome, obstacle to the Code is the tendency of local committees of lawyers examining the Code to prefer familiar local rules of heirship and wills to any national model. This tendency easily could wreck the objective of uniformity. Committee by committee, the realization must spread that lawyers, and the people legal rules should serve, have everything to gain and nothing to lose by relinquishing their hold on traditional provincial rules regarding inheritance. Only very minor adjustments in basic rules will be necessary for most states to align present rules to the Code. The goal of expanding every estate lawyer's useful counselling range so that interstate succession problems can be handled is important.

But, do not let talk of doubts blur your perspective about the Code. Keep in mind that the Code will represent a very thoroughly considered professional response to problems which were identified by lawyers long before Mr. Dacey got excited. Literally hundreds of lawyers representing all kinds of practice in all parts of the country have been continuously involved in its preparation over the last five years.[26] Their diversity and their awareness of the great public interest in the project have enabled them to evolve drafts which offer fair balance between public and professional interests. If these drafts become law, millions of owners of modest estates may find reason to stop worrying about estate planning and probate because the law's estate plan will be as good as they can find. Thus, the law may at least stop pushing these people toward non-lawyer estate specialists. At the same time, lawyers will gain important new legal equipment to enable them to meet the interest of persons who know they have enough property to make planning and protection worthwhile. This is a charter which should attract wide support.

In passing, I should note that the conditions in Indiana which bear on the Code's chances of success here strike me as especially favorable. Your present Code, like the Uniform Code, has borrowed much from the old Model Probate Code of 1946. Your court organization, which presently recognizes the probate court as a court of significant power and stature, is essentially compatible with the Uniform Code. The

26. The advisory committee of the Real Property, Probate and Trust Law Section, was mentioned in note 17. Primary responsibility for the drafts has rested in the Special Committee on the Uniform Probate Code of the National Conference (see note 16 *supra*) with whom the Reporters have met frequently since 1962. This committee, numbering over twenty, is composed of lawyers from different states. Other subcommittees of the Real Property, Probate and Trust Law Section of the American Bar Association have studied and reported on the Code. More than 150 lawyers are involved in these committees. The American College of Probate Counsel, The Trust Division of the American Bankers Association and many state and local bar groups have had committees studying the drafts for some time.

interest of the bar of Indiana in estate planning, as reflected by the focus of this important meeting, is a very good omen. Your people, situated near the crossroads of the nation, are more interstate than provincial. Surely, you need to keep your laws in tune with, if not ahead of, those in neighboring states. Finally, I am delighted to learn that your Commission on Interstate Cooperation has recommended to the Indiana legislature that the Probate Code Study Commission be reconstituted with a charge to study the Uniform Probate Code. This is a very good start.

It remains to be seen, however, whether we lawyers can agree on anything so pervasive and so important to the general practice of law as a uniform probate code. If we can, and *if* we use the resulting new law intelligently, we will have our answer and that of the public to the probate avoidance controversy. If we cannot, we will not block changes in probate law and practice. Present trends, if unchecked, dictate that *probate avoidance* will become the main road with wills and intestacy becoming infrequently encountered by-ways. Present trends also suggest that estates law and lawyers will become increasingly irrelevant to the ordinary person's estate problems. Our failure to agree on a useful new Code will not change these trends. It will prove only that lawyers as a group are so incapable of constructive reform that they cannot even agree on changes which seem necessary to the perpetuation of the profession as we have known it. I, for one, am not yet ready to believe that this will be the case.

CONSERVATORSHIP UNDER UNIFORM PROBATE CODE

BY ELMER L. FINGAR*
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I. INTRODUCTION

Article 5 of the Uniform Probate Code (hereinafter referred to as UPC) relates to minors and other persons under disability. I had contended most vehemently that the problems of minors and those of adult persons under disability were so dissimilar that it was not feasible to draft a statute which would adequately provide for both. I now state publicly that Professor Wellman and his able assistants who drafted the UPC have demonstrated that gasoline and water can indeed mix, provided the mixers have patience and adequate skill.

We have made great progress in protecting the rights of all citizens regardless of race, color or creed. Yet there is little in the press or elsewhere in regard to the rights of *adult* persons under disability. It is stated that about half of all the hospital beds in the United States are occupied by mentally ill persons.[1] Such persons are unable to organize to protect and preserve their property and to exercise freely their civil rights. Therefore, it is the duty of the bar associations, and particularly the American Bar Association, to act on behalf of this unfortunate segment of our society and to sponsor needed legislation. The person under a disability is not a second rate citizen.

As a boy I heard my seniors refer to patients in a state hospital for the mentally ill as lunatics, crazy and the like. The commitment to the hospital was a stigma, something that the family of the patient did not discuss. While there has been some change in the attitude of the public, a residue of such thinking remains with us. We know now, of course, that many of such patients are curable and that during their treatment they are capable of exercising many of their civil rights, such as voting.

In addition to the patient in a hospital for the mentally ill we have the elderly senile person, who makes his home with a son or daughter, and the unfortunate retarded person. In 1968 I probated the will of a retarded man who had the mentality of a boy of 14 and who died in his sixties. There were objections to the will but they were withdrawn.

There is no need here to discuss in detail guardianship of minors or guardians of the *person* of incapacitated adult persons. The provisions of Parts 2 and 3 of Article V of the UPC are clear in these two areas and do not present any particular problems. They are quite similar to existing statutes of most states. My experience is that guardians of the person, whether a minor or adult under disability, fill a rather limited role in any event. If, however, such appointment is needed, I direct your attention to

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[1] ALLEN, FORSTER & WEIHOFEN, MENTAL IMPAIRMENT AND LEGAL INCOMPETENCY (1968).

section 5-303. The draftsmen have fully protected the alleged incapacitated person to prevent an adjudication where one is not required. For example, he must be represented by counsel, a physician appointed by the court must examine him and he must be interviewed by a "visitor" designated by the court. Finally, he is entitled to be present at the hearing and to a trial by jury in open court. A hearing in chambers without a jury may be had if the ward or his counsel so requests and the physician and visitor approve the request.

II. Protective Proceedings

Part 4 of Article V of the UPC relates to the protection of the *property* of minors and adults under disability. The proceedings thereunder are called "protective proceedings," the person under disability a "protected person" and the fiduciary appointed by the court a "conservator."

A minor is stated to be a person under age 21. An adult person under disability is a person unable to manage his property and affairs effectively because of physical or mental disability, including mental retardation, senility, disease, habitual drunkenness, addiction to drugs, imprisonment, compulsory hospitalization, confinement, detention by a foreign power, disappearance or other reason or combination of reasons.

Section 5-401 provides that the court may appoint a conservator of a minor who has money or property that requires management or protection which he is unable adequately to provide or that funds are needed for his support and education and that protection is necessary or desirable to obtain or provide funds. Likewise, the court may appoint a conservator of an adult under disability if it determines that the person has property which will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care and welfare of the person or those entitled to be supported by him and that protection is necessary or desirable to obtain or provide funds.

If the court finds that sufficient grounds exist for the appointment of a conservator of an adult under disability, the statute provides that the court shall have the powers over his estate and affairs which he could exercise if present and not disabled, including the power 1) to make gifts; 2) to convey or release contingent and expectant interests in property, including inchoate dower, curtesy initiate and the right of survivorship incident to joint tenancy and tenancy by the entirety; 3) to exercise or release his powers as trustee or other fiduciary or donee of a power of appointment; 4) to enter into contracts; 5) to create revocable or irrevocable trusts of property of the estate which may last longer than his disability or life; 6) to sue for divorce or annulment of his marriage; 7) to exercise options to purchase securities or other property; 8) to elect options and change beneficiaries under insurance and annuity contracts and to surrender policies for their cash surrender value; 9) to exercise his right to an elective share in the estate of his deceased spouse and to renounce any interest by testate or intestate succession or by inter vivos transfer.

Provision is made for a hearing in respect to the exercise of certain of

the enumerated powers such as the exercise or release of powers and the making of gifts exceeding 20 per cent of any year's income of the disabled person. It will be noted that tax saving is the motivation for several of the powers. As for the power to sue for a divorce or annulment of marriage the comment states that the court should have the power to authorize the conservator to cut off the rights of the spouse of a disabled person who has abandoned or maltreated a minor or disabled person and thereby prevent a wrongdoer spouse from exercising his or her marital rights, such as support. I have recommended that the power of the court be extended to sue for a legal separation.

A questionnaire circulated to selected lawyers active in the American Bar Association shows that some of the enumerated powers are controversial, particularly the power to dissolve the marriage of a protected person. Such power cannot be exercised, however, without notice to the person, his spouse, his parents and children, his guardian, if any, and his conservator.

III. Appointment and Function

Assuming that the facts justify the appointment of a conservator, the court may appoint either a natural person or a corporation with general powers to serve as trustee. While the appointment of a conservator vests in him title to all property of the protected person, the statute states that the appointment is not a transfer or alienation within the meaning to the provisions of any federal or state statute or regulation, insurance policy, pension plan, contract or a will or trust agreement imposing restrictions upon or penalties for transfers or alienation by the protected person of his rights or interest.

Where the court finds that a basis exists for the appointment of a conservator of a disabled person it may authorize or direct any transaction necessary or desirable to achieve any security, service or care arrangement meeting the foreseeable needs of the protected person without the appointment of a conservator. For example, authority may be granted by court order to transfer real property and securities without an appointment. This provision effects savings in time and expenses otherwise incurred in a full conservatorship.

The alleged disabled person or minor or any person interested in his welfare may petition for the appointment of a conservator and nominate the conservator. The statute provides for priority of appointment of classes of persons, for the fixation of the bond (individuals), for filing of an inventory and accounting and like matters. As for the other statutory powers of a conservator I shall mention only that the prudent man rule governs investments.

In addition to providing for the necessary support of the disabled person the conservator under proper circumstances may with the approval of the court provide for the maintenance and support of other persons who had been maintained and supported in whole or in part by the protected person prior to the appointment of a conservator.

On the death of the protected person the conservator must deliver to

the court any will of such person in his possession and deliver the estate to the duly appointed personal representative of the decedent. Functionally, it would seem that if the protected person dies intestate, the conservator with court approval should be authorized to administer the estate and make ultimate distribution to the distributees.

While the statute imposes restrictions upon the right of the protected person to incur debts and to execute contracts, unless authorized by the court, the existence of a conservatorship has no bearing on the capacity of the protected person to marry, to vote or to exercise other civil rights.

Possibly one of the most important provisions of the UPC is that third persons dealing with or assisting a conservator are amply protected in that (1) the existence of all statutory powers conferred upon conservators and their proper exercise may be assumed without inquiry; and (2) a third party is not bound to assure the proper application of money or assets paid or delivered to a conservator. These provisions have particular significance when applied to land record and security transfers.

IV. Powers of Attorney

In most states the authority of an attorney-in-fact terminates with an adjudication of incompetency or the death of his principal. Part 5 of Article V of the UPC permits a principal who is *sui juris* to abrogate that rule by adding to the instrument, "This power of attorney shall not be affected by disability of the principal" or similar words. This authorizes the attorney-in-fact to act regardless of the later disability or incapacity of his principal or later uncertainty whether the principal is dead or alive. If a conservator is thereafter appointed for the principal, the attorney-in-fact must account to the conservator rather than to the principal. The conservator has the same power which the principal would have had but for his disability or incompetence to revoke, suspend or terminate all or any part of the power of attorney.

An attorney-in-fact acting in good faith may continue to exercise his authority as agent until he has actual knowledge of the death, disability or incompetence of his principal. An affidavit executed by the agent as to lack of actual knowledge of the revocation or termination of the power of attorney by death, disability or incompetence constitutes, in the absence of fraud, conclusive proof of the nonrevocation or nontermination of the power at such time.

V. Conclusion

I recommend the UPC for study to the end of sponsoring it in your state in whole or in part. While you may not agree with all of its provisions I am confident you will find that many provisions deserve your attention and that of your local bar association. I am pleased to note that Maryland has paved the way by enacting in 1969 a new Probate Code which with certain changes follows the patterns of the UPC.[2] That other states will follow is inevitable.

[2] *See* 4 REAL PROP., PROB. & TR. J. 253 (1969).

MULTIPLE-STATE ESTATES UNDER THE UNIFORM PROBATE CODE

ALLAN D. VESTAL*

1. THE UNIFORM PROBATE CODE

On August 7, 1969, the National Conference of Commissioners on Uniform State Laws adopted by a vote of the states the Uniform Probate Code. The following week the House of Delegates of the American Bar Association approved the Code.[1] In these actions a giant step forward was taken toward uniformity in probate law in the United States. Although no state has had the opportunity to consider and adopt the Uniform Code, there is reason to believe that a number of states will give serious consideration to the Code in the near future.

For some time in the post World War II period various segments of the legal profession and the lay public had been dissatisfied with the methods of passing property from one generation to another.[2] This had resulted in a number of probate revisions which have taken place or which have been urged.[3] In the decade of the sixties impetus for re-

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[1]The House of Delegates approved the UNIFORM PROBATE CODE with an amendment which provides:

> Resolved, that the Section of Real Property, Probate and Trust Law be authorized to present the views of the American Bar Association regarding the Uniform Probate Code with appropriate recommendations for implementation to state and local Bar Associations to make in-depth studies, including studies of the long-term advantages of uniformity on particular points of probate and related law, customs and practices; and that the National Conference of the Commissioners on Uniform State Laws be urged to continue its Special Drafting Committee.

After the adoption of the UNIFORM PROBATE CODE (hereinafter cited as UPC) by the National Conference and its approval by the House of Delegates of the American Bar Association, a version of the UPC was published by Prentice-Hall under the date of August 27, 1969. In a letter from the Executive Secretary to the Commissioners it was stated:

> This edition of the Code was printed by Prentice-Hall, Inc., and contains the changes made at Dallas.
>
> However, it does not contain style changes which will appear in the official draft of the Uniform Probate Code.

[2]*See* M. BLOOM, THE TROUBLE WITH LAWYERS, ch. 11 (1968); *Let's Rewrite the Probate Laws*, CHANGING TIMES, Jan. 1969, at 39.

[3]For example, the IOWA PROBATE CODE was revised by a committee of the Iowa Bar Association and submitted to the Iowa General Assembly in 1963. IOWA CODE ch. 633 (1966). This was adopted almost without change by the legislature and became effective on January 1, 1964. On the new IOWA PROBATE CODE, see *Symposium on the New Iowa Probate Code*, 49 IOWA L. REV. 633 (1964) with forward

form has come from Wisconsin, Michigan, Oregon, Alabama, Maryland and other states. In the early 1960's the National Conference of Commissioners on Uniform State Laws (hereinafter the National Conference) and the Real Property, Probate and Trust Section of the American Bar Association both became actively interested in the matter of probate reform.[4]

In August. 1963, a joint meeting was held of the Model Probate Code Special Committee of the National Conference and members of the Section on Real Property, Probate and Trust Law of the ABA.[5] At this meeting the preliminary efforts of these two groups were merged into a common project, a "joint venture," "the development of a Model Probate Code."[6] Following this meeting in 1963, a group of reporters started work on drafting a code dealing with probate and related matters. At the Hollywood, Florida, meeting of the National Conference in August of 1965, a draft of part of the Code was presented for the first time. Following this beginning the personnel working on the project has changed,[7] the title of the project has changed,[8]

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by Willard L. Boyd (early draftsman of the UPC), and articles by Shirley A. Webster, Jack W. Peters, Matthew J. Heartney, Jr. and N. William Hines.

For a discussion of 1965 changes in New York probate law see Note, *Recent Reforms in the Law of Estates, Wills and Trusts*, 40 ST. JOHN'S L. REV. 230 (1966).

[4]The Conference has been interested in estate administration for a number of years as indicated by the uniform acts passed in the area. The UNIFORM FOREIGN PROBATED WILLS ACT was approved in 1915 (withdrawn); the MODEL EXECUTION OF WILLS ACT was drafted in 1940; the UNIFORM POWERS OF FOREIGN REPRESENTATIVES ACT was approved in 1944; the UNIFORM ANCILLARY ADMINISTRATION OF ESTATES ACT was approved in 1949; the UNIFORM PROBATE OF FOREIGN WILLS ACT was approved in 1950; and the MODEL SMALL ESTATES ACT was approved in 1951.

[5]This meeting was held in the Hotel Knickerbocker, Chicago, Illinois, during the 72d Annual Conference of the National Commissioners. Representing the ABA were J. Pennington Straus, Edward B. Winn, Harrison Durand, Paul Basye and William Fratcher (the latter two later became reporters on the UPC). Representing the National Conference were Allison Dunham, Earl Sachse, Clarke Gravel, Harvey S. Reynolds, Clarence Swainson, William Pierce, Herbert H. McAdams and Sverre Roang.

[6]This language is taken from the notes of the meeting and is attributed to Clarke Gravel, Chairman of the 1962-63 Model Probate Committee of the National Conference.

[7]The original chairman of the National Conference Committee was Judge Sverre Roang, of Janesville, Wisconsin, who was not renamed a Commissioner in 1967. In the Hawaii meeting Tom Martin Davis of Houston, Texas, and Charles Horowitz, of Seattle, Washington, were named co-chairmen of the Committee. During the crucial year, 1968-69, the members of this Special Committee on the UNIFORM PROBATE CODE were Fred T. Hanson (Nebraska), James T. Harrison (Montana), Thomas L. Jones (Alabama), Robert A. Lucas (Indiana), Miller Manier (Tennessee), Bert McElroy (Oklahoma), Godfrey L. Munter (D.C.), J. William O'Brien (Vermont), Russell W. Smith (Indiana), Clarence A. Swainson (Wyoming), C. P. Von Herzen (California), Joe W. Worley (Tennessee), Robert R. Wright (Arkansas), and the author of this article.

[8]The initial discussion was in terms of a "Model" Code. Later the goal became

and the scope of the project has been modified,[9] but the principal thrust has remained the same—the creation of simplified methods of transferring property on death and protecting the interests of certain legally incompetent persons. A great impetus to the development of the Code was given by a meeting of the draftsmen in 1967 at Boulder, Colorado.[10] During a five week session the draftsmen put together the so-called "Boulder Draft" which was the first extensive, cohesive draft covering all of the articles then proposed. A session of three draftsmen was held in Berkeley the following year and Article VII on trusts was produced in this meeting.[11] This is the background of the adoption of the Uniform Probate Code (UPC) in Dallas in 1969.

The UPC is composed of seven articles dealing with various phases of the very broad topic of estates of both decedents and persons under disability in addition to coverage of some non-probate transfers and trusts. Article I, General Provisions, covers the application of the act, definitions, the probate court itself, a general notice provision, right to trial by jury, and a broad fraud provision. Article II provides for intestate succession and wills. This includes elective share of the surviving spouse, pretermitted heirs, exempt property and allowances, rules of construction for wills, and contractual arrangements concerning death. This article in a bracketed section also deals with the effects of homicide on succession to property.

Article III covers the probate of wills and the administration of estates, either through supervised or independent administration. Parts of Article III deal with appointment proceedings, the personal rep-

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a Uniform Act. To the National Conference the difference is very significant. For a discussion of the distinction between a "Model" Act and a "Uniform" Act see HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 328 (1968). Basically the "Uniform" Act has widespread support among the commissioners and is expected to have a good chance of enactment in a substantial number of jurisdictions.

[9]The addition of the Article on Trusts in 1968 was the most notable change.

[10]Attending the seminar in Boulder, Colorado, were draftsmen Paul E. Basye, Hastings College of the Law of the University of California, Richard Efland, now of the College of Law of Arizona State University, William F. Fratcher, School of Law, University of Missouri, James McDonald, Law School of University of Wisconsin, Eugene Scoles, now Dean of the School of Law, University of Oregon, Richard V. Wellman, Law School of the University of Michigan, Harold G. Wren, Law School of Boston College, and the author. Observers at the meeting were Thomas L. Jones of the Law School, University of Alabama (later named a Commissioner and a member of the Special Committee on the UNIFORM PROBATE CODE) and Thomas W. Mapp, School of Law, University of Oregon.

[11]The three men attending this meeting were Edward Halbach, Dean of the School of Law, University of California at Berkeley, Gene Scoles, now Dean of the School of Law, University of Oregon, and Richard Wellman, Law School of the University of Michigan.

resentative and his duties and powers, claims of creditors, distribution, and closing. The article also includes a provision for handling small estates.

Article IV covers the matters under consideration in this article, foreign personal representatives and ancillary administration.

Article V deals with the protection of persons under disability and their property. Article VI, on non-probate transfers, covers multiple-party accounts and provisions in contracts dealing with the effect of death. The final article, VII, deals with the administration of trusts. Although there is some interrelationship between articles, they generally can stand alone.[12]

The Uniform Probate Code was designed to remedy some of the deficiencies so readily apparent in the present scheme of property passage by probate administration. It may be true that the Code goes to extremes in attempting to solve some of the problems, but nonetheless radical steps seemed to be necessary. The National Conference has prepared a comprehensive document which deserves serious consideration by all members of the legal profession.

2. Foreign Personal Representatives; Ancillary Administration

Article IV deals with estates which involve more than a single state.[13] Generally, this involves the domiciliary jurisdiction[14] and a second state in which the decedent had property or in which a claim is asserted against the estate. Obviously more than two states can be involved. The multi-state contacts can arise in numerous ways. The retired Iowa farmer, who keeps his farm but moves to Florida and decides to reside there, may have property in both Iowa and Florida on death. The Illinois businessman, who decides to invest in a savings

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[12]In the latter stages of drafting there has been some pressure to separate some articles out for special treatment as model rather than uniform provisions. To the members of the N.C.C.U.S.L. this difference is very significant. The uniform laws have much more status or prestige. *See* note 8 *supra*.

[13]For a general discussion of the current state of the law on suits by and against foreign personal representatives see Currie, *The Multiple Personality of the Dead: Executors, Administrators, and the Conflict of Laws*, 33 U. Chi. L. Rev. 429 (1966).

[14]The UPC in section 3-402 provides for the situation where there is a conflict concerning the state of domicile. The final sentence states, "The determination of domicile in the proceeding first commenced must be accepted as determinative in the proceeding in this state." Since this is keyed to the action first commenced and not to the first judgment handed down, there may be some constitutional problem concerning full faith and credit. *See also* Riley v. New York Trust Co., 315 U.S. 343 (1942) (determination of domicile not entitled to full faith and credit as to those not parties to prior determination).

and loan association in California, on death will have a multi-state estate. If a Kansas motorist, killed in an automobile accident in Missouri, is at fault, his personal representative handling his estate in Kansas may find that he is involved in litigation in Missouri.[15] The Montana resident who invests in land in Arizona has a multi-state estate on death. All of these hypotheticals are commonplace; the American population is no longer tied to its place of birth. People are mobile; wealth is mobile.

Whenever more than one state is involved, administration at the present time is complex and difficult. Assembling assets from several states is not easy. While jurisdictions increase arithmetically, difficulties seem to increase geometrically. Just as troublesome is the possibility that the personal representative or the assets of the estate may be the subject of litigation in several states.

Article IV is designed to simplify and unify the estate administration. It may have some other collateral effects, but the main thrust is toward these goals.

3. Marshalling Assets of Estate; Collecting Debts or Property Owed to Decedent

One of the recurring problems in estate administration is collecting debts and property of a decedent outside the domiciliary jurisdiction. An example of this difficulty is found when the decedent has deposited money in a savings and loan association in a foreign state. The personal representative is forced to go to the foreign state to get this asset. Should the savings and loan association be willing to pay without court proceedings, this does not necessarily solve the difficulty completely. There remains the possibility that payment may not terminate liability.

The courts of a number of states have held that the personal representative appointed by the foreign, domiciliary court[16] may ac-

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[15]Brooks v. National Bank of Topeka, 251 F.2d 37 (8th Cir. 1958) (Kansas executor sued in federal court in Missouri by Florida residents). Note, *Should Iowa Again "Reach Out" for Estate Representatives of Non-resident Motorists?*, 44 Iowa L. Rev. 402 (1959); Note, *Amenability of Foreign Administrators to Suit Under Non-Resident Motorist Statutes*, 57 Yale L.J. 647 (1948).

[16]Although there may be some confusion about the terminology, it seems reasonable to separate probate courts in a given estate into a domiciliary court (in the state where the decedent was domiciled) and ancillary courts (all other states). *In re* Maxton's Estate, 335 Ill. App. 240, 81 N.E.2d 658 (1948); First Nat'l Bank v. Blessing, 231 Mo. App. 888, 98 S.W.2d 149 (1936); *In re* Smith's Estate, 126 Mont. 558, 255 P.2d 687 (1953); *In re* Smith's Estate, 55 Wyo. 181, 97 P.2d 677 (1940). A court may be ancillary although there has been no domiciliary administration. Payne v. Payne, 259 Ky. 99, 82 S.W.2d 805 (1931).

cept voluntary payment and give acquittance so long as no local creditors are prejudiced. For example, the Supreme Court of New Hampshire has stated,

> By comity, in the absence of the appointment of an ancillary administrator in this state, a foreign administrator may collect the assets of the estate located here when there is no prejudice to local interests . . . . If there is need, any creditors may petition for ancillary administration in this state.[17]

Minnesota,[18] California,[19] Connecticut,[20] New York[21] and Delaware[22] have reached similar conclusions. The Maryland court has stated, "[T]he general current of the decisions has held that such voluntary payment is valid, and a good discharge of the debt."[23]

Colorado and Florida have statutes covering this matter. Conditioned on "no prior written demand from a creditor" and a delay of six months, the Colorado statute protects a debtor of the estate by providing: "Upon such payment or delivery, such person is released to the same extent as if payment or delivery had been made to a personal representative appointed by a court of this state."[24] The Florida statute, along this same line, provides,

> All persons indebted to the estate of a decedent or having possession of personal property, either tangible or intangible, belonging to the estate of a decedent, who have received no written demand from a personal representative or curator appointed in this state, for payment of such indebtedness or the delivery of such property, are authorized to make payment of such indebtedness or to deliver such personal property to the foreign personal representative after the expiration of three months from the date of his appointment.[25]

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[17]Swann v. Bill, 95 N.H. 158, 161, 59 A.2d 346, 348 (1948). *See also* Wolfe v. Bank of Anderson, 123 S.C. 208, 212, 116 S.E. 451, 452 (1923).

[18]Dexter v. Berge, 76 Minn. 216, 220, 78 N.W. 1111, 1113 (1899) held that a foreign executor had the authority to receive a voluntary payment of indebtedness even without complying with a statute which preceded MINN. STAT. § 525.273 (1965) (providing that a foreign representative may collect debts after filing authenticated copy of his letter at office of local register of deeds).

[19]*See, e.g.*, Fishback v. J. C. Forkner Fig Gardens, Inc., 218 Cal. 401, 402, 23 P.2d 293 (1933); *In re* Rawitzer's Estate, 175 Cal. 585, 587, 166 P. 581, 582 (1917); Winbigler v. Shattuck, 50 Cal. App. 562, 563, 195 P. 707, 708 (Dist. Ct. App. 1920).

[20]*See* Selleck v. Rusco, 46 Conn. 370, 372 (1878).

[21]Mass v. German Sav. Bank, 176 N.Y. 377, 68 N.E. 658 (1903); Schluter v. Bowery Sav. Bank, 117 N.Y. 125, 22 N.E. 572 (1889); Parson v. Lyman, 20 N.Y. 103 (1859).

[22]*See* Bowles v. R. G. Dun-Bradstreet Corp., 25 Del. Ch. 32, 42, 12 A.2d 392, 396 (1940).

[23]Citizens Nat'l Bank v. Sharp, 53 Md. 521, 529 (1880).

[24]COLO. REV. STAT. ANN. § 153-6-9 (1963).

[25]FLA. STAT. ANN. § 734.30 (1963).

Florida also has a parallel statute dealing with bank accounts of nonresident decedents.[26]

Section 4-201 of the UPC is similar to the Colorado and Florida statutes in allowing voluntary payment. It provides that the personal representative from the domiciliary jurisdiction can, after the death of the decedent, contact

> any person indebted to the estate of a . . . decedent or having possession or control of personal property, or of an instrument evidencing a debt, obligation, stock or chose in action belonging to the estate of the . . . decedent . . . .

and ask for payment or delivery.[27] The personal representative is to present an affidavit stating:

(1) the date of the death of the nonresident decedent,
(2) that no local administration, or application or petition therefor, is pending in this state,
(3) that the domiciliary foreign personal representative is entitled to payment or delivery.[28]

Upon the presentation of this affidavit, the debtor or person in possession, if he acts in good faith, can pay or deliver to the domiciliary personal representative and will be discharged of his obligation.[29] This simplifies the handling of debts or assets in a non-domiciliary jurisdiction. At the present time in many states these can be handled with protection to the delivering party only through the opening of an ancillary administration.[30]

Under this section of the UPC the debtor of the estate is not required to make payment. If he wishes, he can refuse to pay and force the foreign personal representative to use other techniques available to him to collect the debt. This section does not cover the matter of transfer of securities since, it is felt, this "is adequately covered by section 3 of the Uniform Act for Simplification of Fiduciary Security Transfers."[31]

There is one apparent danger in the UPC provision. A resident creditor of the nonresident decedent may wish to look for satisfaction

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[26] FLA. STAT. ANN. § 654.04 (1966).
[27] UNIFORM PROBATE CODE § 4-201.
[28] *Id.*
[29] *Id.* § 4-202.
[30] *See, e.g.*, Robinson v. First Nat'l Bank, 45 F.2d 613, 614 (N.D. Tex. 1930), *aff'd*, 55 F.2d 209 (5th Cir. 1932); Noel v. St. Johnsbury Trucking Co., 147 F. Supp. 432, 433 (D. Conn. 1956); Jones v. Turner, 249 Mich. 403, 408-09, 228 N.W. 796, 798 (1930).
[31] UNIFORM PROBATE CODE § 4-201, Comment.

to the assets of the decedent located in the local state. He may not want the assets carried back to the domiciliary jurisdiction. Article IV provides that such a resident creditor may notify "the debtor . . . or the person having possession of the [decedent's] personal property" that the assets should not be delivered to a foreign personal representative. When such notice has been given, payment or delivery may not be made under section 4-201.[32] This provision is similar to the Colorado provision[33] and reflects the desire found in other states to protect local creditors of the decedent.[34]

4. Foreign Personal Representative Acting as Local Personal Representative With All Powers

Under the existing law of a number of states, the foreign personal representative has the power to maintain actions to recover debts owed to the decedent.[35] For example, the Kansas statute provides:

> A fiduciary duly appointed in any other state or country may sue or be sued in any court in this state, in his capacity of fiduciary, in like manner and under like restrictions as a nonresident may sue or be sued.[36]

Other states have similar provisions.[37] This power to sue may be given to the foreign personal representative only after he has met certain local requirements. In Indiana he is authorized to file a duly authenticated copy of his letters and give a bond "under the laws regulating the maintaining of suits by non-resident citizens."[38] In Arkansas he is required to file a bond.[39]

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[32] *See Id.* § 4-203.

[33] *See* Colo. Rev. Stat. Ann. § 153-6-9 (1963).

[34] *See, e.g.*, Ga. Code Ann. § 113-2404 (1959); Va. Code Ann. § 54.1-130 (Repl. Vol. 1968).

[35] *See* Note, *The Extraterritorial Authority of Executors and Administrators to Sue and Collect Assets*, 52 Iowa L. Rev. 890, 892-98 (1966) (analysis of state statutory authorization of foreign personal representatives to sue).

[36] Kan. Stat. Ann. § 59-1708 (1964).

[37] *See, e.g.*, Fla. Stat. Ann. § 734.30 (1963); Ga. Code Ann. § 113-2401 (1959); N.Y. Deced. Est. Law § 160 (McKinney Supp. 1966) *See also* Note, *supra* note 35, at 897-98.

[38] Ind. Ann. Stat. § 7-753 (Repl. Vol. 1953). A foreign personal representative may be allowed to sue in Indiana without producing a copy of his letters unless his capacity is challenged. Upton v. Adams' Executors, 27 Ind. 432 (1867). A foreign personal representative cannot sue on a note when ancillary administration has been granted. Hensley v. Rich, 191 Ind. 294, 132 N.E. 632 (1921).

[39] Ark. Stat. Ann. § 27-805 (Supp. 1965). For cases interpreting this and its progenitor see McGraw v. Simpson, 208 Ark. 471, 187 S.W.2d 536 (1945); St. Louis, I.M. & S. Ry. v. Cleere, 76 Ark. 377, 88 S.W. 995 (1905); Gibson v. Ponder, 40 Ark. 195 (1882).

The Conference chose to incorporate a provision in the UPC granting broad power to a domiciliary personal representative who files certain documents in the local state. Under section 4-204, if no local administration is pending, the foreign personal representative can file with the local court in a county in which the deceased had property (1) authenticated copies of his appointment, and (2) copies of his official bond if he has given one.[40] Upon filing these documents, the foreign personal representative may exercise "all powers of a local personal representative, and may maintain actions and proceedings in [the local state] subject to any conditions imposed upon nonresident suitors generally."[41]

The grant of "all powers of a local personal representative" to the foreign personal representative means that the foreign personal representative "has the same power over the title to property of the estate as an absolute owner would have . . . ." This power of the personal representative "may be exercised without notice, hearing, or order of court." The property, of course, is held in trust for the benefit of the creditors and other individuals having an interest in the estate.[42] Equating the foreign personal representative with the local personal representative also means that the former may have the power to "receive assets from fiduciaries, or other sources,"[43] and "prosecute or defend claims, or proceedings . . . for the protection of the estate . . . ."[44]

The Uniform Probate Code provides that the powers under sections 4-201 and 4-205 "shall be exercised only when there is no administration or application therefor pending in this state."[45] An application for ancillary administration terminates powers under the two sections to collect assets of the decedent and to exercise the powers of a local personal representative. However, "the local Court may allow the foreign personal representative to exercise limited powers to preserve the estate."[46] When a local personal representative is named, he then is "subject to all duties and obligations which have accrued by virtue of the exercise of the powers by the foreign personal representative and

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[40]For examples of similiar filing requirements see GA. CODE ANN. § 113-2405 (1959); KY. REV. STAT. § 395.170 (1969); MINN. STAT. § 525.275 (1961); MISS. CODE ANN. § 622 (1957); N.Y. DECED. EST. LAW § 160 (McKinney Supp. 1966); N.D. CENT. CODE § 35-01-25 (1960). For other examples of similar bond requirements see ALA. CODE tit. 61, § 151 (1958); KY. REV. STAT. § 395.170 (1969).

[41]UNIFORM PROBATE CODE § 4-205.

[42]*Id.* § 3-711.

[43]*Id.* § 3-715(2).

[44]*Id.* § 3-715(22).

[45]*Id.* § 4-205.

[46] *Id.*

may be substituted for him in any action or proceedings in this state."[47] This continuity in administration reflects the underlying policy of unifying estate administration which is found in the UPC.

Since there may be some confusion about the powers in this period of transition, the UPC protects a relying party by providing that:

> No person who before receiving actual notice of a pending local administration has changed his position by relying on the powers of a foreign personal representative shall be prejudiced by reason of the application or petition for, or grant of, local administration.[48]

5. Ancillary Administration

A. *Procedure*

Another method of dealing with the assets of a nonresident decedent, provided in the Uniform Probate Code, is ancillary administration.

Under the UPC the appointment of a personal representative can be sought first by persons given priority. These include:

(1) the person with priority as determined by a probated will including a person nominated by a power conferred in a will;
(2) the surviving spouse who is a devisee of the decedent;
(3) other devisees of the decedent;
(4) the surviving spouse of the decedent;
(5) other heirs of the decedent;
(6) 45 days after the death of the decedent, any creditor.[49]

It is clear that persons without priority may seek the appointment of a personal representative although only in a formal proceeding.[50] Should appointment be sought, then the local court must, if there are local assets of the decedent, appoint a personal representative and so open an ancillary administration of the estate. This ancillary administration will be instituted even though there is a domiciliary personal representative who has filed authenticated copies of his appointment and of his bond, if any.[51] This ancillary administration will probably be sought by someone other than the domiciliary personal representative since he can obtain all of the powers of a local personal representative

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[47] *Id.*
[48] *Id.*
[49] *Id.* § 3-203.
[50] *Id.* § 3-203(e). Formal proceedings are judicial and are covered by Article III, Part 4; Informal involve only the Registrar, § 1-401(11), and are covered by Article III, Part 3.
[51] *Id.* § 4-206.

without going through the procedures of informal or formal appointment.[52]

A non-domiciliary administration may be had where there is no administration in the place of domicile of the decedent. It is possible that a decedent might die with all of his assets outside his state of domicile or under circumstances so that there would be no administration at his place of domicile. This might happen, for example, in the case of an Iowa farmer who decided to retire to Florida. He might have a farm and equipment in Iowa—the bulk of his wealth—while his residence is in Florida. On death there might not be an administration in Florida, his place of residence, while there might be an administration in Iowa. This latter would be an ancillary, not domiciliary, administration.[53]

Ancillary administration under the UPC follows the general pattern of administration under Article III. There are, however, some points of difference. In an original administration there is a three year period of time within which the appointment of the personal representative must take place. This statute of limitation does not apply if there has been a prior appointment. If a personal representative has been appointed in one state, then additional appointments are possible under the UPC even though the three year period has run.[54]

The proper venue for the appointment of a personal representative is the place of domicile of the decedent. In the case of a non-resident there is no place of domicile in the state and the Code provides that the proper venue for an ancillary appointment is "any [county] where property of the decedent was located at the time of his death."[55] To solve some of the problems concerning the location of property, subsection (d) establishes some rules. It provides:

> A debt, other than one evidenced by investment or commercial paper or other instrument in favor of a non-domiciliary is located where the debtor resides or, if the debtor is a person other than an individual, at the place where it has its principal office. Commercial paper, investment paper and other instruments are located where the instrument is. An interest in property held in trust is located where the trustee may be sued.[56]

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[52] *Id.* § 4-205. A decedent in his will may provide for different personal representatives in the domiciliary jurisdiction and an ancillary jurisdiction. The UPC will not interfere with such a decision. *See* §§ 3-203(g), 3-611(b). This multiple appointment will destroy to some extent the unity sought under the UPC. A provision for different personal representatives can be implemented in the ancillary jurisdiction only by a formal appointment. *See* discussion Sections 5 B and C text *infra*.

[53] *See* cases cited note 16 *supra*.

[54] UNIFORM PROBATE CODE § 3-108.

[55] *Id.* § 3-201(a)(2).

[56] *Id.* § 3-201(d).

In the proceedings brought for the appointment of a personal representative in a non-domiciliary jurisdiction the procedures set out in Article III, Part 3 (informal appointment) or Part 4 (formal appointment) would be used. Those seeking the appointment of a personal representative could choose either of the tracks, formal or informal.[57]

B. *Informal Appointment*

The informal procedure, involving only the Registrar, is not available if a personal representative has been named in the domiciliary jurisdiction. Section 3-308 provides that an application for informal appointment must be denied if it is indicated that

> the decedent was not domiciled in this state and that a personal representative whose appointment has not been terminated has been appointed by a Court in the state of domicile . . . .

This indicates that an ancillary appointment, where there is a domiciliary personal representative, can be obtained only in a formal proceeding under Part 4 of the UPC.

The basic provision concerning the application for informal appointment is section 3-301 which includes a requirement of disclosure of, among other things, the place of domicile of the decedent and "a statement identifying and indicating the address of any personal representative of the decedent appointed in this state or elsewhere whose appointment has not been terminated."

Section 3-307, dealing with informal appointment, includes a proviso that

> if the decedent was a non-resident, the Registrar shall delay the order of appointment until 30 days have elapsed since death unless the personal representative appointed at the decedent's domicile is the applicant, or unless the decedent's will directs that his estate be subject to the laws of this state.

This provision, that a domiciliary personal representative can be appointed an ancillary personal representative through the informal procedure, seems inconsistent with section 3-308 which states that informal appointment is not available for a non-domiciliary decedent where a personal representative has been named in the state of domicile A state adopting the Uniform Probate Code would probably wish to resolve this apparent inconsistency by either (1) clearly allowing an informal appointment under section 3-308 if the domiciliary personal representative is the applicant, or (2) deleting the exception for the domiciliary personal representative in section 3-307. It would seem

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[57] *Id.* § 4-207.

that the first alternative is preferable. If a domiciliary personal representative is the applicant, there would seem to be little reason for requiring a formal proceeding.

The notice provided in the informal appointment of a personal representative includes notice to all persons having a prior or equal right to appoint. The priority concerning appointment is established by section 3-203 and this includes in (g) the following:

> A personal representative appointed by a court of the decedent's domicile has priority over all other persons except where the decedent's will nominates different persons to be personal representatives in this state and in the state of domicile. The domiciliary personal representative may nominate another, who shall have the same priority as the domiciliary personal representative.

Therefore, anyone seeking an ancillary appointment where there is a domiciliary personal representative would be required, by this section, to notify the latter of the applicant's intention to seek an informal appointment. As indicated above, this informal appointment would be proper only if there is no known domiciliary personal representative.

C. *Formal Appointment*

In the typical estate where there is a domiciliary personal representative recourse would (absent the change suggested above) be to the appointment of an ancillary personal representative through the formal proceeding involving a judge. Notice under section 3-403 must be given to

> executors named in any will that is being, or has been, probated, or offered for informal or formal probate in the [county], or that is known by the petitioner to have been probated, or offered for informal or formal probate elsewhere, and any personal representative of the decedent whose appointment has not been terminated.

So here, as in the case of informal appointment, notice must be given to the domiciliary personal representative if there is one.

The appointment in the formal proceeding is provided for in section 3-414. Reference in that section is made to the priority established by section 3-203 which gives preference to the domiciliary personal representative. Here, as in the informal ancillary appointment, preference is given to the domiciliary personal representative in an attempt to maintain the unity of the estate administration.

D. *Estate Administration*

Once the ancillary personal representative has been named, the provisions of Article III control and the administration follows the general pattern established by that article.[58] There are, however, some special provisions for ancillary administrations dealing with exceptional problems which may arise.

The UPC attempts to minimize conflicting adjudications where assets are located in more than one state. To this end, section 3-408 provides that an adjudication in the court of the state of domicile

> determining testacy, the validity or construction of a will, made in a proceeding involving notice to and an opportunity for contest by all interested persons must be accepted as determinative by the courts of this state . . . .

By so applying the concept of res judicata/preclusion the UPC again emphasizes the unity of the estate administration. Recognizing that some jurisdictions may not provide for the probating of a will, section 3-409 provides in part:

> A will from a place which does not provide for probate of a will after death, may be proved for probate in this state by a duly authenticated certificate of its legal custodian that the copy introduced is a true copy and that the will has become operative under the law of the other state.

This procedure, of course, does not rise to the level of the binding effect of section 3-408 where a will has been established. It does, however, provide a simple method of proving the document.

Where an ancillary personal representative has been named, other than the domiciliary personal representative, there may be a desire to unify the administration by having the domiciliary personal representative named in the ancillary jurisdiction. Section 3-611 (b) states in its last sentence:

> Unless the decedent's will directs otherwise a personal representative appointed at the decedent's domicile, incident to securing appointment of himself or his nominee as ancillary personal representative, may obtain removal of another who was appointed personal representative in this state to administer local assets.

Under this a domiciliary personal representative can oust any person serving as ancillary personal representative regardless of the sequence of appointment.

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[58] *Id.* § 4-205.

During the course of the administration of the estate in the ancillary jurisdiction, the personal representative is under an obligation to notify creditors of his appointment.[59] Under the UPC the non-claim period, that time during which creditors must present their claims or else be barred, is four months, which runs from the date of the notice.[60] In the case of ancillary administration a serious problem arises where notice to creditors is given at different times in different jurisdictions. The problem of different statutes of limitations and different non-claims periods gave the draftsmen of the UPC a gr at deal of trouble. The final draft provides that any claims against the decedent's estate arising prior to the decedent's death are barred unless presented within the four-months' period, with the proviso that "claims barred by the non-claim statute at the decedent's domicile before the first publication for claims in this state are also barred in this state . . . ."[61] So if the non-claims provision has run in the domiciliary jurisdiction before the first advertisement in the ancillary administration, claims will be barred in both jurisdictions. This may seem to be unfair to the local creditor who has relied on the assets of the decedent available in the local state. However, he does have the right to initiate administration[62] and should do so to protect himself if it is not started promptly by those with superior priority.

If the first advertisement in the ancillary state should occur before the running of the non-claim period in the domiciliary jurisdiction, then claims are not barred. Some interesting possibilities may occur under this section. Assuming that a domiciliary personal representative has been appointed, knowledgeable creditors will file in the domiciliary administration. Should there be, however, uncertainty about a group of creditors, an attempt might be made to extend the period for filing by starting an ancillary administration and thus taking advantage of secti on 3-803(1).

A creditor, with sixth priority forty-five days after the death of the decedent,[63] can seek an appointment as a personal representative. This would have to be in a formal proceeding.[64] The creditor could attempt to time his appointment to come close to the end of the four-months' non-claim period in the domiciliary jurisdiction. A vindictive creditor

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[59] *Id.* § 3-801.

[60] *Id.* § 3-803(1).

[61] This provides for three published notices at weekly intervals in a newspaper of general circulation in the county.

[62] UNIFORM PROBATE CODE § 3-203(a)(6).

[63] *Id.*

[64] Since a domiciliary personal representative has been named. See discussion at Section 5 C text *supra*.

could thus effectively extend the non-claim period for somewhat less than four months giving creditors who were unascertained or uncertain an additional period of time in which to file. This, of course, assumes the existence of assets of the decedent in the ancillary jurisdiction.

In the administration of the estate in the ancillary jurisdiction, the personal representative must recognize that "[a]ll assets of estates being administered in [the ancillary state] are subject to all claims, allowances and charges existing or established against the personal representative wherever appointed."[65] Should the assets in the domiciliary jurisdiction prove to be insufficient to pay homestead allowance, or family allowance, or exempt property allowance, then the assets in the ancillary jurisdiction would be used to make up the difference.

E. *Insolvent Estate*

The troublesome problem of the estate which is insolvent in a single state while solvent in other states has not been satisfactorily settled in the general provisions of the UPC. In the First Tentative Draft of the Model/Uniform Probate Code, dated July, 1966, in Part III, section 317, there was a provision dealing with an "insolvent estate transferred to federal bankruptcy court." This provision was included in section 3-112 of the Honolulu Draft, 1967, in the following language:

> Incident to a petition for supervised administration, if it appears that the estate is insolvent, the court may, upon petition of the principal creditor or creditors, order the proceedings transferred to the jurisdiction of the federal district court in bankruptcy, provided federal laws permit such court to administer an insolvent decedent's estate, and provided, further, that the rights of the surviving spouse and children of the decedent to homestead, family, and support allowances and to exempt property, are or can be protected in the process.

In the UPC there is no such provision concerning an insolvent estate. Section 3-815, however, does cover the payment of claims in case of insolvency. Under this section the family exemptions and allowances and prior charges are to be satisfied, and then all claimants whose claims have been allowed "either in this state or elsewhere in administrations of which the personal representative is aware" are to be paid equal proportions of his claim. The local jurisdiction in its distribution is authorized to balance out inequitable treatment given in another

[65] UNIFORM PROBATE CODE § 3-815(a).

state.[66] Section 3-815(c) sets forth a procedure to be used in a non-domiciliary jurisdiction when local assets available for the payment of claims are either greater than or smaller than necessary to pay the correct proportional share. If assets beyond the proper proportional share are available locally, these are to be transferred to the domiciliary personal representative.[67] Again, the unity theory which runs through this entire Code in its treatment of multi-state estates can be seen. The ancillary administraion does not stand apart from the domiciliary administration; rather the two are considered together.

F. *Final Distribution*

The provision concerning the final distribution of the estate in the ancillary jurisdiction also reflects the unity concept. This section, 3-816, provides:

> The estate of a non-resident decedent being administered by a personal representative appointed in this state shall, if there is a personal representative of the decedent's domicile willing to receive it, be distributed to the domiciliary personal representative for the benefit of the successors of the decedent . . . .

There are, however, exceptions to this general provision. First, if the decedent's will provides that his successors are to be identified "pursuant to the local law" of the forum state then the transfer of funds need not be made. Second, if according to the applicable choice of laws rules, the successors are to be determined "pursuant to the local law of [the forum state] without reference to the local law of the decedent's domicile."[67] One obvious application of this exception would be in the case of real property located in the forum state. Under the usual conflicts rule this property will pass according to the law of the state of situs—the forum state—and therefore the property would not be distributed to the domiciliary personal representative. The apparent reasoning is that if the law of the forum state is to be applied, the forum state should apply it.

A third exception to the transfer of funds to the domiciliary jurisdiction occurs when the local personal representative is unable to discover a domiciliary personal representative. If he cannot find a domiciliary personal representative through "reasonable inquiry," he has no duty to transfer funds. Finally, a court in a proceeding for

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[66] *Id.* § 3-815(b).

[67] *Id.* § 3-815(c). This section was derived from the UNIFORM ANCILLARY ADMINISTRATION OF ESTATES ACT as amended in 1955. 9 UNIFORM LAWS ANNOTATED 69-70 (1957).

closing under section 3-1001, or in a supervised administration, can order local distribution or make any other order regarding distribution which it feels appropriate.[68]

6. Jurisdiction Over Ancillary Personal Representative

Section 3-602 provides:

> By accepting appointment, a personal representative submits personally to the jurisdiction of the Court in any proceeding relating to the estate that may be instituted by any interested person.

This section also sets out the procedure to be used in serving notice on the personal representative. By using the procedure set forth, service can be made on any personal representative, domiciliary or ancillary, named by a court of the state. Since there is a substantial contact between the individual and the state there would seem to be no constitutional question about the validity of the provision for service.[69]

7. Jurisdiction Over Foreign Personal Representative

Section 4-301 is designed to deal with the foreign personal representative who has not been appointed a local representative by the local court. The foreign personal representative who (1) collects funds as authorized by section 4-201, (2) files his authenticated copies of his appointment thereby getting all the powers of a local personal representative, or (3) does any act as a personal representative which would give the state jurisdiction over him as an individual, submits to the jurisdiction of the courts of the local state.[70] In the case of collection of funds, jurisdiction is "limited to the money or value of personal property collected."[71]

In all of these situations there seems to be a sufficient minimum contact so that it is reasonable for the state to exercise jurisdiction over the foreign personal representative.[72]

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[68] Uniform Probate Code § 3-1001(a).

[69] McGee v. International Life Ins. Co., 355 U.S. 220 (1957); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[70] Uniform Probate Code § 4-301. Only a domiciliary personal representative can file authenticated copies of his appointment under section 4-204. Collecting funds under section 4-201 can be done only by a domiciliary personal representative; either a domiciliary or an ancillary personal representative could do acts in the state which might give the state jurisdiction over "him as an individual" thus giving the state jurisdiction over the personal representative.

[71] *Id.* § 4-301.

[72] *See* cases cited note 69 *supra*.

The UPC also provides in section 4-302, that "a foreign personal representative is subject to the jurisdiction of the courts of this state to the same extent that his decedent was subject to jurisdiction immediately prior to death." This provision covers the situation, for example, where the decedent, involved in an automobile accident outside the state of his residence, tortiously injured another person and died. Had the tortfeasor lived, the injured person would have been able to bring an action under the usual non-resident motorist provision.[73] Because of the death of the tortfeasor, a rather complex legal problem arises. Some states have held that they could not exercise jurisdiction over the person of the foreign personal representative even though he had been served in the forum state or had appeared in the proceeding. The theory seems to be that the person *qua* personal representative can be found only in the state of appointment and that only the courts of that state have any power over him.[74] The federal court sitting in Iowa, speaking to this point, stated:

> [A]n executor or administrator appointed in one state, cannot by voluntary appearance in an action in another state confer upon the court of such other state jurisdiction to render judgment against him in his representative capacity where there is no property belonging to the estate in the state where the action is brought.[75]

The court concluded that the Iowa provision for service on the foreign personal representative was invalid and that the court acquired no jurisdiction over the foreign administration.[76] Although there is some question about this judgment,[77] the Iowa General Assembly decided to use a different technique to reach assets of the non-resident motorist who is deceased.[78]

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[73]Joy, *Non-Resident Motorists Service of Process Acts*, 33 F.R.D. 151 (1964).

[74]Thorburn v. Gates, 225 F. 613 (S.D.N.Y. 1915); Burton v. Williams, 63 Neb. 431, 88 N.W. 765 (1902) (foreign personal representative could not be sued in Nebraska); State *ex rel.* Scott v. Zinn, 74 N.M. 224, 392 P.2d 417 (1964) (Texas personal representative not subject to suit in New Mexico). For a good discussion of the possibility of suing foreign personal representative see Note, *Amenability of Foreign Administrators to Suit Under Non-Resident Motorist Statutes*, 57 YALE L.J. 647 (1948).

[75]Knoop v. Anderson, 71 F. Supp. 832, 845 (N.D. Iowa 1947).

[76]*Id.* at 852.

[77]*See* Brooks v. National Bank of Topeka, 251 F.2d 37 (8th Cir. 1958) (contra to the *Knoop* case); *In re* Estate of Fagin, 246 Iowa 496, 504, 66 N.W.2d 920, 925 n.1 (1954) (Mulroney, J., dissenting). *See also* Note, *Amenability of Foreign Administrators to Suit Under Non-Resident Motorist Statutes*, 57 YALE L.J. 647, 653-54 (1948); Note, *Should Iowa Again "Reach Out" for Estate Representatives of Nonresident Motorists?*, 44 IOWA L. REV. 402 (1959); 36 IOWA L. REV. 128 (1950).

[78]*See* IOWA CODE § 321.512 (1966).

The more numerous group of states has decided that a state can exercise jurisdiction over the non-resident tortfeasor's personal representative named by another state. This is the path chosen by the UPC.[79]

The UPC, if adopted in the state of domicile of the deceased tortfeasor, would give the personal representative the right to defend when so served. Section 3-715 provides that a personal representative (here of the deceased tortfeasor) may "(22) prosecute or defend claims, or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the performance of his duties." Section 3-703(c) also provides:

> A personal representative of a decedent domiciled in this state at his death has the same standing to sue and be sued in the courts of this state and *the courts of any other jurisdiction as his decedent had immediately prior to death.* (Emphasis supplied.)

This provision, being tied to the status of the decedent prior to death, is the complementing provision to that dealing with service on the personal representative under conditions when the decedent could have been reached immediately prior to death.

> The mechanics of service are covered by section 4-303 which states:
> (a) Service may be made upon the foreign personal representative by registered or certified mail, addressed to his last known address, requesting a return receipt signed by addressee only. Notice by ordinary first class mail is sufficient if registered or certified mail service to the addressee is unavailable.
>
> Service may be made upon a foreign personal representative in the manner in which service could have been made under other laws of this state on either the foreign personal representative or his decedent immediately prior to death.

The foreign personal representative so served is to be given at least thirty days in which to move or appear.[80]

8. Effect of Adjudication; Unity of Administration

The final section of Article IV provides:

> A prior adjudication rendered in any jurisdiction for or against any personal representative of the estate is as conclusive as to the local personal representative as if he were a party to the adjudication.[81]

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[79] Uniform Probate Code § 4-308.
[80] *Id.* § 4-303(b).
[81] *Id.* § 4-401.

This general statement of res judicata/preclusion in connection with the administration of the estate is still another part of the general attempt to unify the estate administration. This not only provides that adjudications in the domiciliary jurisdiction will be preclusive: it also provides that an adjudication in any other ancillary administration will be binding. This binding effect includes both issue preclusion and claim preclusion.[82] Although there is no fraud exception specifically set out, it is obvious that an adjudication resulting from fraud or collusion would not be binding.[83]

9. Thrust of Provisions

An examination of the provisions of Article IV indicates that the draftsmen have hoped to achieve some very specific ends. First is simplicity in the handling of the assets of the estate outside the domiciliary jurisdiction. Second is the unifying of the administration to avoid conflicting fiduciaries or, more positively, to simplify and expedite administration. Third is the goal of centralizing all of the problems in the domiciliary administration by allowing suits against the domiciliary personal representative in a number of jurisdictions. The unifying of administration is promoted, finally, by the res judicata/preclusion effect to be given adjudications "in any jurisdiction for or against any personal representative of the estate."

All of these attempts of the draftsmen—to simplify, to unify the administration, to centralize the problems of the estate—if successful will make estate administration a much more attractive way of handling the passage of property from one generation to another.[84] In the multistate estate provisions of the UPC, the draftsmen have presented a document which deserves the careful consideration of the legal profession.

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[82] *See generally* Vestal, *Extent of Claim Preclusions*, 54 Iowa L. Rev. 1 (1968); Vestal, *Res Judicata/Claim Preclusion: Judgment for the Claimant*, 62 Nw. U.L. Rev. 317 (1967); Vestal, *Preclusion/Res Judicata Variables: Nature of the Controversy*, 1965 Wash. U.L.Q. 158; Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 Iowa L. Rev. 27 (1964).

[83] There is an overriding fraud provision in Uniform Probate Code § 1-106.

[84] Veilman, *The Uniform Probate Code: A Possible Answer to Probate Avoidance*, 44 Ind. L.J. 191 (1969).

UNIFORM PROBATE CODE

Some Current Comments

BY H. IRVIN LAWRANCE

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In August of this year, after several working drafts and seven years of study in cooperation with the Real Property, Probate and Trust Law Section of the American Bar Association, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Probate Code, and the House of Delegates of the American Bar Association approved it.

Some General Comments

The work of the Conference was conducted in cooperation with an American Bankers Association Trust Division Liaison Committee. The Conference work has also been followed with interest by several groups including the American College of Probate Counsel, which is interested for obvious reasons; the Veterans Administration, which is concerned over veteran guardianships; newspaper groups, which are concerned over the code's minimum requirements for published notice; and insurance groups, which are concerned over the code's minimum requirements for posting bond. These activities are evidence that the code has broad significance, and will be presented to various state legislatures in the very near future.

Professor Richard V. Wellman of the University of Michigan Law School addressed the Midwinter Trust Conference and the Mid-Continent Trust Conference on this subject in 1968. The text of these talks has been printed in *Trusts & Estates* [T&E, Mar. '68, p. 238 and Jan. '69, p. 29] and in *The Trust Bulletin*, thus offering trust men an excellent written overview of the code.

As Chief Reporter for the Uniform Probate Code Project, Professor Wellman speaks to our industry as an advocate—indeed a brilliant advocate—of the code. Today I intend to cover briefly the contents of the code, raise some questions and indicate some of the code provisions which may have an impact upon the corporate fiduciary. I should also like to speculate briefly upon the probability that the code will be accepted by the several states.

It is clear that legislation of this magnitude will generate controversy. For example, although it has many forward-looking features, it may not meet the required standards of all communities and although it is immensely well integrated, there is something in it to offend everyone.

The code consists of eight articles. Let me outline them briefly.

General Provisions And Definitions

Article I contains general provisions and definitions. It covers court jurisdiction and notice. Here the purposes and policies of the code are stated. The code expressly encourages simplicity, speed and efficiency in the administration of estates.

The probate court is given subject matter jurisdiction over all trusts, whether created by will or otherwise, as well as jurisdiction over estates of decedents and protected persons.

Article I provides a definite statute of limitations applicable wherever fraud is perpetrated in connection with matters covered in the code. These provisions are intended to replace various existing equitable remedies and limitations, such as the uncertain limitation embodied in the principle of laches. Action must be commenced against the perpetrator of a fraud within two years from discovery of the fraudulent act, and against non-perpetrators within five years from the time the fraud was committed.

For example, if a will known to be a forgery is probated informally—an option provided in the code, under which no notice is required—and the contest period runs, heirs may proceed against the perpetrator within two years from discovery of the fraud, but may proceed against innocent distributees only if action is commenced within five years from the time of the fraudulent act. The same limitations would apply where a will has been fraudulently concealed.

Treatment of Fraud

Let me pause here for a general comment. The code concept of fraud is new and reflects a basic approach, repeated in the code, to the effect that persons interested in a decedent's estate should be free to prove a will or not; commence legal proceedings or not; have a personal representative appointed or not—all in terms of whether or not they are willing to assume the risks involved.

The traditional legislative approach to probate administration, in contrast to this, has been one of more formality. And while this very formality has been criticized and even ridiculed, such formality was probably developed in an effort to insure that heirs and creditors, including taxing authorities, would always receive some kind of notice, and to make it clear that all interested persons were protected by the presence of a personal representative, responsible to the court as well as personally responsible in the administration and distribution of an estate.

In very general terms the code would now say: "Injured party, you have your remedy against those who take innocently and against those who perpetrate a fraud, but your rights as against an innocent personal representative will be strictly limited. We want personal representatives to act without delay and without fear."

In the same general terms I suggest that innocent distributees whose inheritance is later recovered by a superior claimant, and injured parties who attempt to collect personally either against perpetrators of fraud or in-

From address at 43rd Western Trust Conference, San Diego, Calif., Nov. 1, 1969.

nocent distributees, may well be expected to let go with a far more pertinent outcry against our legal system and how it operates than Norman Dacey ever considered. If property is improperly distributed, legal costs of recovery will certainly be high and the problem aggravated by the very real possibility that defendants may have disposed of their windfall by the time they are reached.

Moreover, I fear that the innocent personal representative may not be safe from attack as might be assumed. Faced with a difficult case, a court may well broaden its concepts of fraud in order to place responsibility for injury where the court, in retrospect, feels the responsibility should be placed.

As between an innocent personal representative and an innocent injured heir it is not beyond my imagination, for example, that a court might conclude that a personal representative should have known that formal rather than informal administration was called for because the latter is better designed to give notice; that some greater investigation was called for or that some other such thing tainted his acts sufficiently to constitute "fraud" so that he rather than the innocent heir should suffer.

Probate And Administration

Article II covers intestate succession, wills, rules of construction, the spouse's elective share and custody by and deposit of wills with the court. The code provides for deposit of an executed will with any court for safekeeping.

Article III covers probate of wills and administration. The code provides an option of informal or formal probate of a will. Administration is not mandatory, but a personal representative may be appointed, again either informally or formally. Regardless of how an administration is commenced problems may be referred to the court for hearing after notice.

Article III includes the Uniform Estate Tax Apportionment Act without change. Incidentally, there are other uniform acts embodied in the code. For example, Article II includes the Uniform Testamentary Additions to Trust Act. In this regard while California, for example, has adopted the Uniform Testamentary Additions To Trust Act, the tax apportionment act has met with strong resistance, primarily on the grounds that our existing apportionment statutes in California are workable and the ultimate test of any such legislation is its workability. Introducing a change in this respect has been and will probably continue to be troublesome.

Article IV covers foreign personal representatives and ancillary administration.

Disability—Power of Attorney

Article V deals with the protection of persons under disability and their property. This article introduces some new terminology. "Guardian" as here used is the term to define what we know as guardian of the person, except that there are certain specified instances in which the guardian may in fact handle the property of the disabled or incompetent person.

The word "conservator" is here used to define what we now know as conservator or guardian of the estate. That is, it is the conservator who is primarily responsible for managing the property of the disabled persons.

Article V covers powers of attorney. In this article the flexibility of a power of attorney is substantially increased in order to permit persons to do that which a number of them are already doing anyway. That is, the code would permit using a power of attorney beyond the time when the principal becomes disabled. Under the new provisions, if a power of attorney contains language to the effect that the power shall not be affected by disability of the principal, or that it shall become effective upon the disability of the principal, or similar words showing intent that the authority conferred shall be exercisable notwithstanding disability, then the authority of the attorney in fact or agent is exercisable by him as provided in the power.

Article V also contains express provisions protecting persons who deal with the holder of a power of attorney, which power might previously have been revoked or terminated, so long as they had no actual knowledge of revocation, death, disability or incompetency of the principal.

Non-Probate Transfers

Article VI covers non-probate transfers. Like Article V, it is designed so as to include within the probate code specific coverage of various will-substitutes which are being used. Article VI deals with bank accounts which are joint, payable on death to named persons, or bank trust accounts, such as *Totten Trusts*. Provisions are included in Article VI defining more clearly than any existing law the rights of the various persons named in such bank accounts. This article includes protective provisions for banks in dealing with survivors as well as creditors of the depositor.

Administration of Trusts

Article VII is entitled "Trust Administration." It is contemplated that the probate court, as defined in the



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code, would have subject matter jurisdiction over all trusts administered in the state. Article VII requires registration of a trust.

A trust is registered by the trustee in a court of the state in the county of the principal place of trust administration. This registration is not a registration of the trust instrument. That is to say, there is no need for filing a copy of the trust instrument with the court. What is required is a disclosure of the name of the settlor or testator, the date of the trust and, of course, the identity of the trustee. There are provisions in Article VII designed to coerce the registration of trusts and to smoke out a number of "Dacey Trusts" now in existence.

Under Article VII, resort to the court is possible for any number of reasons in order to resolve actual controversy and to end up with a binding order which will serve as some protection to all persons concerned. A trustee under this section may resort to the court for review and settlement of interim or final accounts.

It is clearly stated that neither registration of a trust nor proceedings under Article VII will result in continuing court supervision. It is also provided here that the management and distribution of a trust are intended to proceed expeditiously, consistent with the terms of the trust, free of judicial intervention and without order, approval or other action of any court.

Possible Shortcomings

I am not entirely satisfied with these portions of the code since a trustee who may submit accountings might well conclude for any number of reasons that he must submit accountings to the court for approval, if only to cut off contingent liabilities Moreover, I should think some attention would have been given to the possibility that an attorney might provide in a trust which he drafts that the trustee must submit periodic accountings to the court.

For the corporate fiduciary, I believe we generally agree that court accounting procedures are somewhat more costly than non-court accounting procedures. If we accept that fact, and then recognize that a number of inter vivos trusts contain express fee provisions, I can envision some profit squeeze here because of the code provisions.

Article VIII is the effective date and repealer section. As I said earlier the code itself is immensely well integrated. I might add here that it also overlaps a number of other statutes in California. I am sure the same is true in other states. It is also clear that one cannot automatically repeal an entire existing probate statute and expect the Uniform Probate Code to cover all subjects which were dealt with in the repealed law. For example, the existing California Probate Code contains clear provisions eliminating bond requirements for the corporate fiduciary. The Uniform Probate Code is silent on this subject.

Advantage of Flexibility

As mentioned, the code does embrace some forward-looking features. The flexible system of administration of decedent's estates, involving formal and informal probate, formal and informal administration, supervised administration and so on is the heart of the Uniform Probate Code, and is based on the premise that the court's role in connection with probate and administration, and the court's relationship to personal representatives, who derive their power from public appointment, is wholly passive until some interested person invokes the court's power in order to resolve a controversy. In other words, as stated in the code comments, the state, through the court, should provide remedies which are suitable and effective to protect any and all rights regarding succession, but should be restrained from intruding into family affairs unless requested to do so.

Role of the Corporate Fiduciary

I am not yet certain how the corporate fiduciary will fit into this flexible probate system. I anticipate, for example, that a certain amount of pressure may be brought to bear on the corporate fiduciary to proceed informally wherever possible on the assumption that this will reduce costs. The corporate fiduciary is of course also interested in protecting itself and never has a personal interest in the estate of its customers. The code, it seems to me, has been drafted on the assumption that the personal representative in many if not most instances *will* have a personal interest in the estate and for that reason be willing to choose his alternative courses with regard to what is best for him.

I am a little timorous here. Banks may be pressured into pursuing a course which would disregard the fact that some risk and exposure is involved, particularly in the no-notice, informal alternatives which are available and optional with the personal representative. I suspect, in other words, that banks would generally proceed with supervised administration, but I hesitate to offer this as a recommendation since it is contrary to the spirit in which the code has been drafted and offered to the public.

(Continued on page 1136)

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Code's Forward-Looking Features

Whatever may be said about the flexible system of administration of decedent's estates which is embodied in the code it is at least possible to say that this, since it is the heart of the code, is the basic forward-looking feature of it. What has been written in our industry journals already is sufficient to explain some of the other major features of the code. Following are some forward-looking features, selected at random for review, based on personal experience:

1. The code provides that no person is disqualified to take as an heir because he or a person through whom he claims is or has been an alien. Existing reciprocity statutes in the several states, including Oregon and California, have caused expensive legal controversy in an attempt to prove up the current law on this subject in some foreign country. We have evidence that this type of litigation is being conducted notwithstanding severe doubts as to the constitutionality of such legislation. The constitutional limitation is based on the assumption that such statutes force an excursion by a state into foreign affairs, which matters are basically entrusted to the President and Congress.

2. The code clearly covers matters of accession and ademption. The code provides that if properties specifically devised are sold by a conservator prior to a testator's death the devisee has the right to receive a general pecuniary devise equal to the net sale price.

Incidentally, the code defines the term "devisee" to mean any person designated in a will to receive a gift, whether the gift is of real or personal property, and thereby would wipe out a problem I have had, particularly with older trust men and lawyers, in selecting the proper words when referring to a bequest, a devise or a legacy. So far as accessions are concerned, the code is pretty good with respect to stock splits and other corporate distributions, including mutual fund reinvestments under a plan originated by the testator.

3. The code attempts to set forth a definition of what is meant by "surviving spouse" where there have been a number of marriages and divorces, some of which were invalid. These provisions are set out in the intestate succession and wills portion of Article II of the code and include, as an illustration, a statement to the effect that the term "surviving spouse" does not include a person who, following a decree or judgment of divorce which may not have become final, then participates in a marriage ceremony with a third person.

While I regard this as a forward-looking feature of the code, I am somewhat concerned over the fact that no effort was made to deal with this rather complicated subject in Article V, concerning the protection of persons under disability. In this connection we as conservator are faced with the problems of support which arise where a husband becomes incapacitated having left a trail of marriages and divorces in an unresolved state of bigamy and confusion.

4. The code expressly permits the conservator to examine the will of his conservatee when the same is in custody of a third person.

5. The nomination provisions are very broad. Even the conservator of the estate of a protected person may exercise rights of nomination. While I regard these provisions with optimism and hope I am sure that the various public administrators are already sharpening their ax on this subject.

Representative's Investment Powers

6. The investment powers conferred upon a personal representative of a decedent's estate are very broad. Again it is contemplated that these powers will be exercised in a fiduciary capacity and without submitting investment questions to the court.

Several months ago, one of my colleagues in the trust business who works in a state which permits unsupervised administration, severely chastised California trust men for not attempting to change the California law on this point. He stated his opinion very bluntly to the effect that complicated investment transactions should be resolved by qualified corporate fiduciaries and not be tendered to some judge.

7. The code contains separate provisions regarding personal representatives, conservators and trustees, to the effect that such fiduciaries are individually liable for obligations arising from ownership or control of property of the estate or for torts committed in the course of administration *only* if they are personally at fault. There has been a great deal of dispute on this subject which these code provisions would tend to resolve.

Conservator's Powers

8. I am particularly interested in the provisions of Article V regarding the powers of a conservator as well as powers of the court with respect to the affairs of protected persons. After hearing, and upon determining that grounds for an appointment or other

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protective order exist with respect to a person, the court has for the benefit of that person all the powers over his estate and affairs which that person could exercise if present and not under disability, except the power to make a will.

These powers are stated to include the power to make gifts, to exercise or release a protected person's powers as trustee or personal representative, to enter into contracts, to create revocable or irrevocable trusts, and so on. Here for the first time we have in this proposed legislation recognition of the fact that trusts and other will substitutes do exist. I feel that the one major defect with most existing conservatorship and guardianship statutes is that they simply fail to contemplate that property will descend upon death of the protected person in any way other than by will or by intestate succession. It is curious to me, however, that while the court may create revocable trusts for the protected person it may not make a will for him or her.

Provisions Affecting Banks

With regard to banks, several provisions of the code should be studied carefully, including the following:

1. The code provides that an executor or administrator is entitled to reasonable compensation. It is entirely silent on the subject of attorney's fees. Enactment of the code would probably be followed by the informal adoption of a number of fee schedules or fee guidelines both for attorneys and for executors or administrators. I hope that the banks will be able to deal tactfully with attorneys and cooperate with them on this rather delicate point.

2. Bond is required under the code only if the court determines that a bond is necessary. This is true even where a will expressly requires bond. So long as the corporate fiduciary can obtain a blanket statutory exemption from bonding requirements, this type of provision may work to our benefit. That is to say, since the testator has no control over bonding he would, if the code were adopted, look to the corporate fiduciary as the best source of protection for his heirs. I personally prefer the bonding requirement even though testators in most cases waive bond. The reason for this is that all of us in this business suffer whenever any estate is raided and heirs suffer for lack of bonded protection.

3. I have already mentioned concern over the pressure which would be applied to banks to elect the informal, no-notice options available under the code. This pressure would probably be applied with the objective of keeping the costs down. As I stated before, this is where the representative has a personal interest as heir or as a relative of an heir who enjoys benefits under an estate. Banks never enjoy benefits under decedent's estates which they administer. Accordingly, the pressure to select the informal no-notice options would, under the code, present us with what is essentially a fee controversy right from the beginning.

Foreign Fiduciaries—Family Allowance

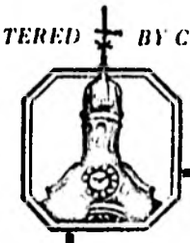
4. The provisions of the code regarding the conduct of trust business by foreign fiduciaries are of concern to me to the extent they permit foreign executors and administrators to act locally. The trust provisions of the code, however, expressly provide that a foreign corporate fiduciary may not administer trusts in a state unless it satisfies the laws of the state of administration relating to the qualification of a corporate fiduciary to conduct business there.

5. The family allowance provisions of the code authorize the personal representative of a decedent's estate to pay, as a lump sum or in periodic installments, a reasonable allowance for support of the surviving spouse of a decedent and his dependent children. This is a grant of discretionary powers, but the code does not specify what factors are to be taken into consideration in exercising such discretion.

The comment to this particular Code Section (2-403) does suggest the various factors to consider. I am nonetheless concerned since in the related provisions of Article V covering protected persons, and in particular Section 5-425, specific standards *are* set forth to guide the conservator in expending funds reasonably necessary for the support, education, care or benefit of the protected person. That is, he must pay due regard to the size of the estate, the duration of the conservatorship, a likelihood that the protected person may at some future time become able to manage his affairs, the accustomed standard of living of the protected person and members of his household as well as other funds or sources available for the support of that person. It is not clear to me why similar guidelines are not offered for the personal representative of a decedent's estate.

6. The code provides that any person may renounce an inheritance by a written instrument at any time within six months after the death of the decedent. This offers the heir an excellent opportunity to wipe out what may

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In addition, unless our tax laws were also revised, I question whether the various tax collectors would read this renunciation privilege literally. I suspect the heir would be taxed as if he received the inheritance, at least in those cases where this will produce a larger tax.

7. The code provides that a will may be deposited by the testator or his agent with any court for safekeeping, under such rules as the court may promulgate. This section should have been drafted after consultation with those who do accept wills for safekeeping. The expense to the public of this kind of safekeeping service may well turn out to be prohibitive. The draftsmen might have considered the court custodian in a large metropolitan area dealing with hundreds of thousands of wills, for any one of which an individual may be repeatedly asking the custodian to bring out her wills and all of her holographic codicils so that she can look them over for another change. I use the feminine reference arbitrarily.

Appraisal

8. The code provides that the personal representative will act as appraiser for his own estate. While payment of a percentage of the total value of an estate to an appraiser may be obnoxious to some persons, it is also true in some states that the appraiser not only determines values but also computes the tax, which computation in some instances is a highly complex and technical job for which percentage fees may or may not be adequate. Whatever the case may be, adoption of the Uniform Probate Code with this provision in it would probably necessitate revision of the tax laws of any state.

9. The code provides that where there are two or more co-representatives, any co-representative may receive and receipt for property due the estate. Problems can and often do arise where banks act with family members as co-representatives. These problems are sufficiently common so that I am completely unable to understand why receipt of both co-representatives is not required. In my opinion, this provision makes sense only if representatives are generally bonded, and since the bonding requirements have for all practical purposes been eliminated I fail to understand the logic behind this particular section of the code.

Reform—Two Sides of the Coin

Some of the facts of life which are suggested as a basis for reconsidering existing laws on the management and distribution of the property of deceased and incapacitated persons have frequently been discussed. These include increasing affluence in our society, the complexity of modern investment techniques, the frequency of second and third marriages, the diffusion of family members, which is a part of the population mobility which our society seems to encourage, and increased taxes.

Professor Wellman has admitted that a number of sections of the code do not necessarily have to be accepted in every state. This makes the Uniform Probate Code different from other uniform laws which have been offered. The historical distinction between the uniform laws and the model codes is that the uniform laws are offered with the idea that no local changes would be made, whereas model codes were simply offered as a sort of food for thought which could be borrowed in whole or in part as any legislature might see fit. Professor Wellman has described the Uniform Probate Code, however, as a form of uniform model act, or model uniform act, but in any case he concedes at the outset that some localization is to be expected.

So far as the opposing groups are concerned, I feel that the various newspapers might oppose the code because of its broad no-notice provisions, and the general elimination of required published notice in legal newspapers. I suppose the insurance industry will object to the reduction of bonding requirements. Corporate fiduciaries as well as lawyers, will probably fe[illegible] the code to some extent because it requires them to study and learn an entire new approach to what has been a bread-and-butter portion of their work. All of this would indicate that we may now be entering a period of public debate and controversy over the subject of estate administration and distribution, which has in the past been a very dull subject.

I feel that the code will attract some attention on the grounds that it aims to reduce the number of required contacts with the court, thus reducing public expense or at least freeing a judge so that he can handle other m ters. Today it seems that our appel courts are being forced to devote inordinate amount of time trying define and balance the rights of individual citizen as against those the citizenry as a whole. This ma it important that controversy rega ing property matters, including esta and trusts, be resolved at the low possible level.

While the code may be a step that direction, we should recogn that a skillful and responsible job administration also tends to red controversy. This is where our indus deserves recognition. We have don fine job, often notwithstanding the v ious probate laws, and I would ho that this new code will not be accep if it operates to minimize the sign cance of our work.

One burden that the commission have not borne in the code or in th comments, or even in the prior wo ing drafts of the code, is the burden proof to show why uniformity is n essary in all the areas covered by code. I can understand, for examp why a uniform law on the subject intestate succession is advisable. I c also understand the advisability of ha ing more or less uniform approach in the several states to the treatm of persons who are incapacitated. T is understandable from the fact th people do move and it seems absurd impose technical legal barriers up free interstate mobility.

I am unable to endorse the bli proposal that uniformity is a desiral end in itself. In connection with th uniform laws it is my strong feeli that one must first ask if the propos new law is really better than the exi ing law. In California a great deal h been done recently to up-date our pr bate laws. We now have some limit authority to invest estate funds if will so provides. The claim period h been shortened. We have a new pr vision covering powers of a testame tary trustee. These are just a few many changes which have been ma here. I consider the existing Californ probate system to be quite good a certainly not subject to the criticis which has been generally directed t ward probate law and practice.

If there are provisions in the co which would improve existing law th I suggest we consider those provisio only and accept Professor Wellma suggestion that this package be treat like a model code.

Uniform Probate Code:

Probate costs are high because of antiquated procedures lawyers must follow.



By Harrison K. Chauncey, Jr.

A certain Jarndyce, in an evil hour, made great fortune, and made a great Will. In the question how the trusts under that Will are to be administered, the fortune left by the Will is squandered away; the legatees under the Will are reduced to such a miserable condition that they would be sufficiently punished, if they had committed an enormous crime in having money left them; and the Will itself is made a dead letter.
CHARLES DICKENS — BLEAK HOUSE 1853

THE SAVAGE CRITICISM of probate practice that Dickens vented in *Bleak House* had little effect in Victorian England, but in our day the public is not so placid. Criticism of our probate courts is increasingly harsh.[1] Indeed, in some Florida counties our judges have warned us that we are killing the goose that lays the golden egg of probate practice.

There is no question that estate administration is costly. But it is arguable that one reason those costs are high is due to the antiquated, time-consuming probate procedures that lawyers must follow. If those procedures could be streamlined the estate would not be overburdened in costs and the attorney would not be forced to spend valuable time in unproductive paper-shuffling.

In 1963 (two years before Norman Dacey came upon the national scene) a group of lawyers in the American Bar Association who were deeply concerned with our probate practice urged and eventually obtained approval for a study of probate practice by the National Conference of Commissioners on Uniform State Laws and the ABA Section of Real Property, Probate and Trust Law. The object of the study was to suggest reforms to, and update the Model Probate Code which had been completed in 1947.[2] The result was the Uniform Probate Code, promulgated in 1969.[3]

The reporters of the National Conference first endeavored to pinpoint the manner in which our probate laws impeded the efficient administration of estates. They found that the problem was, in some respects, historical.[4] Our probate courts occupy a position uniquely American; that is they are administrative rather than judicial courts. In civil jurisdictions no public agency becomes involved in the administration of a decedent's estate unless disputes arise. The draftsmen also concluded that our 50 jurisdictions have developed a variation of procedures that have unduly complicated the administration of estates, especially in multistate administration.[5]

Also, it is clear that the laborious and expensive procedures adopted by the various states in the name of protecting the beneficiaries and creditors have overburdened the probate courts and unnecessarily postponed distribution to beneficiaries for a period of from two to four years.

The probate practitioner might retort that the procedures developed by the probate courts in America are important. There is need for the protection of creditors, heirs and beneficiaries and the laws that have been developed do these things. Laymen, however, do not agree. They simply say, "I want my wife to get my estate"—and they find a way to do it. For

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Attempted Reform

example, 55 percent of all the land in Iowa was, in 1964, held as joint tenancies. Thirty percent of all savings accounts in New York in 1964 was held as joint tenancies. In 1965, shares traded on the New York Stock Exchange and valued at 48 billion dollars were jointly held.[6] The life insurance field has found it possible to merchandise various wealth-passing devices that avoid probate. And now the *inter vivos* trust is a favorite way to pass on property without a will and without subjecting a decedent's estate to probate procedures.

Although it may be that many of these probate-avoidance vehicles would have been successful no matter how little a lawyer charged or how simple probate might be, most fairminded members of the Bar will agree that there is an urgent need for reform in probate procedure. The draftsmen of the Code in promulgating it have suggested that a probate law flexible enough to serve a changing society is at least useful as a guide to probate reform in the various jurisdictions.[7]

Because the Uniform Probate Code contains more than 400 pages of typewritten text and combines in one code areas of the law now covered in many separate statutes, it would be impossible to discuss the entire work here in detail. About all that can be attempted is to give a general outline of the Code and highlight some of its more unfamiliar aspects.

Article I of the Code contains general provisions including definitions and the scope of probate jurisdiction of courts. It also codifies the present rules respecting fraud in estate matters.[8] Article II concerns intestate succession and wills. Article III gives the rules for probate of wills and administration of estates. Article IV is involved with foreign personal representatives and ancillary administration. Article V provides rules for protection of persons under disability and their property. Article VI governs nonprobate transfers. Article VII respects trust administration and Article VIII contains the repealer and effective date.

Four Changes in Florida

At least four substantial changes in Florida practice and substantive law would occur if the Code were adopted—and they would be controversial changes. The first is the concept called Code estate planning; the second is reform of widow's rights and the theory of the augmented net estate; the third is the new procedure for administering estates by revolutionizing (for Florida, at least) the probate practice rules; and fourth is the Code approach to ancillary administration. These four areas engendered much of the controversy during the drafting stages and certainly will continue to do so. Lawyers have been particularly vociferous in attacking the portions of the Code relating to descent and distribution and the Code estate plan.

Although present statutes on descent and distribution vary widely from state to state, the widow's share is usually less than half of the estate.[9] This type of intestacy statute seems to be totally unacceptable to the average American today. For example, in a recent study by sociologists and lawyers at Case-Western Reserve University, a survey of lawyers, laymen and trust men asked the question, "How would you wish your property to be left in the event you died without a will?" By far the majority of people surveyed indicated that they wanted all their property left to their surviving spouses.[10] Contrary to most state laws on intestacy that do not reflect the desires of the average person, the Code takes a new tack.

Spouse Gets Entire Estate

The Code would give the surviving spouse the entire estate if there is no surviving issue or parent of the decedent. The widow would receive the first $50,000 if there is surviving issue or a parent plus one-half of the balance of the estate. If there is surviving issue of the decedent but not of the surviving spouse, then the surviving spouse takes only half of the estate and the surviving issue takes the balance.[11]

The result of the provision is that many estates may be "Code probated." That is, no will would be necessary if a man wishes his spouse to receive one-half of an estate of $100,000. The full marital deduction would thus be saved and the interests of issue would be protected. It is obvious that a large number of estates in Florida would fall within this provision and it would make unnecessary many wills drawn today. It is therefore easy to see why Rich-

ard Wellman, chief reporter for the Code, found lawyers objecting to this provision of the proposed Code.[12] As might be imagined the draftsmen are accused of attempting to legislate lawyers out of business by providing a basic estate plan within the Code. This view not only makes the spokesmen appear to be grasping will-hoarders, it is also shortsighted for several reasons.

First, the average layman is keenly interested in probate matters and wants the substance and procedure of the practice reformed. Two surveys have been cited to support this. One survey was held in the 18th Senatorial District of Michigan where a state senator sent questionnaires to his constituents asking them to rank, in order of priority, 13 topics of possible legislative activity. Of the 500 returns picked at random from 3,500 responses the percentage of respondents indicating an interest in probate reform was topped only by concern about unsolicited credit card charges and cancellation of automobile insurance.[13] Another survey of a 35,000 member consumer organization in Detroit placed estate law reform second only to assistance in garnishment procedures.[14]

Second, the Code estate plan might actually enable the lawyer to use his time more effectively. Consider the relatively large amount of time the lawyer takes to draw a will for the small estate; and for which he can charge only a small fee. If the practitioner were able to avoid drafting the simple will and spend more time on complex estate plans for which he could charge a reasonable fee, both he and his clients might be better served.

Widow's Elective Share

Those who find the intestate succession provisions surprising will be staggered by the provisions dealing with the widow's elective share; it involves a concept known as the augmented net estate. To really understand the idea it is first necessary to understand what the draftsmen were trying to cure.

Suppose *T* has $1,000,000; and suppose that before his death he gives $600,000 jointly to *S1*, *S2* and himself. Then he gives away $200,000 to the community chest. He dies and his will leaves his entire probate estate to his wife. It also directs the executors to pay estate taxes from residue. In this case *T* could ignore the needs of his wife in giving the bulk of his estate to his sons and to charity, because in Florida dower extends only to personalty owned by *T* at the time of his death.[15]

Now suppose a different case. *T* gives $600,000 outright to his wife. He pays a gift tax and dies four years later leaving the rest of his estate, say, approximately $300,000 equally to his three sons. *W* elects to take against the will in Florida and she receives $100,000 of the $300,000. Of course, the sons' shares are burdened with the payment of estate taxes, administration expenses and debts. In this case the wife has used her dower privilege to obtain an unfair advantage and in the process, to destroy her husband's estate plan.

What would the Code do? Very simply, it gives the widow one-third of the "augmented estate." That is computed by adding to the value of the estate (reduced by the amount of claims, expenses and allowances) the sum of the following: (1) all *inter vivos* transfers by the testator to someone other than his wife including those in which he retained any life interest, control, power of revocation, or consumption or right of survivorship; transfers of over $3,000 to any one person within two years of death; and (2) generally all property derived from the decedent by the surviving spouse during marriage and owned by the spouse at the decedent's death, plus all such property transferred by the spouse during marriage to one other than the decedent.[16] The Code then directs that the wife's share be funded by deducting from one-third of the augmented estate all property comprising the augmented estate which has been transferred to her during the marriage, by the will or by intestate succession.[17] The balance, if any, is charged to the probate estate and other transferees of the decedent.

Although the fairness of the provisions respecting the augmented net estate must be admitted, there will be many instances in which the complexity of the device will generate extensive litigation. Collection problems also could be very difficult. Although the Code provides for collection in cases where estate assets are insufficient to fund the share,[18] the Code leaves some blanks that will need to be filled. For example, is income on transferred assets collectable? If so, for what period of time? Any legislature contemplating the enactment of the Code should weigh the prospect of extensive litigation against the basic fairness of the Code's approach to the widow's share

Independent Administration

Somewhat less complex than the augmented net estate, the concept of simplified or of independent administration forms the heart of the Code. It has been said that the purpose of independent administration is to provide a flexible system with as much or as little probate procedure as circumstances may require.[19]

The basic idea of independent administration is simple. The draftsmen assumed first that estate matters are administrative matters and not judicial. They also assumed that if there are no disputes and the rights of all persons are protected then court supervision of the administration of an estate is unnecessary.[21] But they also make provision for supervision of an estate when necessary or desirable.

For example, assume *T* dies and leaves a wife and three sons. His probate estate is $250,000 and his wife is named executrix. The wife

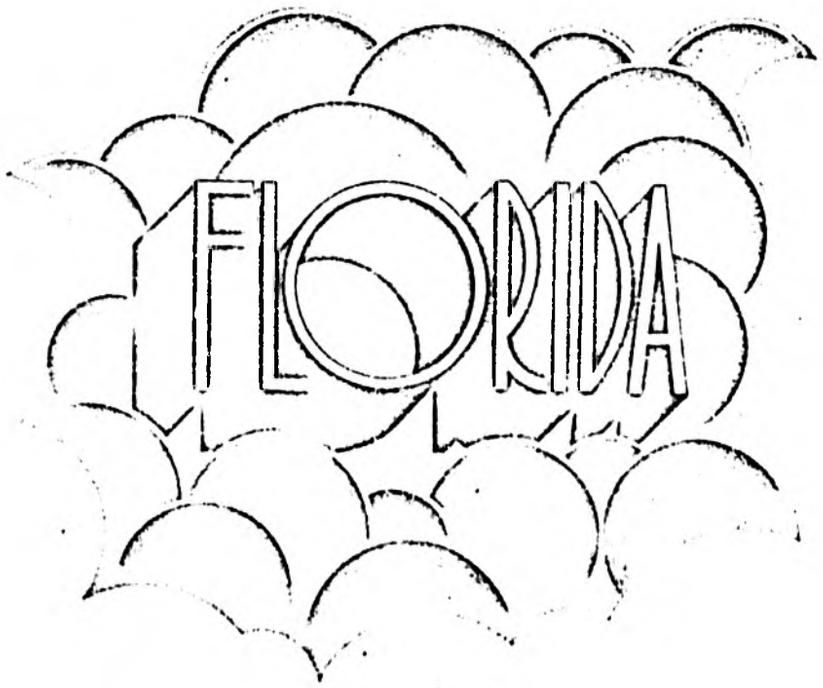
would proceed as follows: after five days from the decedent's death she may apply for informal probate before the registrar (the administrative official), which simply means that she files a short application with the registrar.[22] The will can accompany the application or be preproved or prefiled with the court. Upon the registrar's finding that the application is complete and verified and that the will appears validly executed, he will issue a statement of informal probate and appoint the widow executrix.[23] The executrix then administers the estate without the necessity of an appraiser by simply giving notice of her appointment and a copy of the inventory to the beneficiaries.[24] She publishes a notice to creditors and pays bills on the creditors' statements. No formal claims are necessary—although creditors may file such claims.[25] In general, the claims period expires four months from the issuance of letters.[26] At the end of the fifth month, the widow is free to distribute and file a sworn "closing statement" describing her administration.[27] After filing of the informal closing statement however, the widow is not discharged, but remains liable to creditors and interested parties for a period up to three years from the time of distribution.

This kind of simplified procedure would certainly eliminate much of the unnecessary and duplicative work incident to the administration of most moderate-sized estates, and that should be a welcome prospect. The problem, however, is whether the beneficiaries, contesting parties, creditors and even the fiduciary are adequately protected under the informal procedure.

Adequate Protection?

To illustrate, assume that *T* dies leaving his present wife, a former wife and a son by the former marriage who himself is a defendant in a divorce proceeding. (The example really is not that farfetched.) There is a probate estate of $500,000 and *T*'s widow and a bank are executors. The widow (and the bank) are worried that the son or the former wife or even the daughter-in-law might obstruct an informal proceeding, and perhaps contest the will.

Under the Code the executors may file a formal petition for probate asking that validity of the will be judicially determined and that the court (not the registrar) appoint the executors.[28] Upon the filing of this petition there must be notice to all heirs.[29] If the will is found to be valid, then (subject to a couple of exceptions) all right to contest it is terminated.[30] The executors, subject to the decision of the court, might then proceed in a variety of ways. On the one hand, the court might have found that the administration



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should be supervised by the court; or, it may have found that non-supervised informal administration would be preferable. The executors could perform some administrative steps informally and operate under supervised procedure for others; or they could administer the estate as did the widow in the former example and then formally petition for an order of settlement and discharge.[31]

If the court is persuaded to continue the estate in supervised administration, all important administrative matters may, upon motion, be approved by the court.[32] There could then be an order entered for the payment of claims, orders of distribution, orders for any compromises and the executors would file formal accountings. After an accounting proceeding and distribution and discharge, any rights any creditor or party might have had would be foreclosed except in the event of fraud.[33]

Finding Administrators

One seemingly troublesome question that might arise under the Code concerns the availability of supervised administration; that is, the supervisory proceeding is possible only when the court finds it to be necessary or when the will so directs.[34] Some contend this tends to put the burden on inexperienced and, perhaps, minor beneficiaries to come in and ask for supervised administration. The draftsmen answer that is exactly where the burden belongs because the beneficiaries are the best ones to protect their own rights.[35]

Perhaps some middle ground is preferable in Florida. An ombudsman or guardian or the registrar himself might be a proper person (in addition to the beneficiaries) to initiate a petition for supervised administration at any point. It may be unrealistic to hope that a beneficiary or a court, on its own motion, will find supervised administration necessary and some other policing official may be necessary.

The above examples give only the barest, oversimplified outlines of the procedure available under the Code. The important administrative concept is, of course, that any degree of either independent or supervised administration is possible. There can be no doubt of the flexibility of the proposed procedure.

Similarly, it is wasteful to go through the motions of obtaining court orders if none is really necessary. On the other hand, our Bar might argue that Florida now has a form of independent administration; orders are obtained only when the executor wants or needs them and partial distributions are often made without order for tax reasons. Even final distributions are sometimes made on simple receipt and release.

Statute Needs Reform

Although it is common knowledge that our courts and lawyers often wink at the statutory probate provisions and do not follow them, it is submitted that this is a sign that the statute needs reform.

Even assuming the Code does not survive its legislative trip in Florida, it and the critics of our current procedure will have accomplished much by focusing critical public attention on outmoded procedure.

The portion of the Code which could cause a mild panic in some parts of Florida is that respecting ancillary administration.[36] The Code sets the sweeping tone of Article IV by defining a foreign personal representative as any "personal representative of another jurisdiction."[37]

The first right that the foreign representative has in Florida (without any qualification here) is the right to demand a Florida debtor pay a debt to the foreign personal representative.[38] Although this flies in the teeth of the usual jurisdictional or territorial limitations on personal representatives, many states expressly permit this as an exception to that territorial limitation.[39]

Foreign Fiduciaries

The bombshell for Florida, however, is the provision allowing a foreign personal representative to file authenticated copies of his letters in the ancillary state and then act in all respects in that state as a domiciliary representative in a local, informal probate administration.[40] This provision would permit foreign corporate fiduciaries to act in Florida. It would be understandable if New York, Illinois, California and a few other states with powerful, national trust companies should approve this provision but it is difficult to see how it could pass through the Florida Legislature unscathed—no matter how socially beneficial it might be.

These highlights of the Code are by no means all the important provisions. The articles dealing with trusts, wills and guardianship are equally new to Florida and in most respects are convincing efforts to solve in a practical manner many difficult problems besetting the lawyer who advises fiduciaries.

Last summer at the American Bar Association meeting in Dallas, Texas, the Code was recommended for adoption to the states. If the history of the Uniform Commercial Code is pertinent—it was promulgated in 1952—it will be many years before Florida finally adopts the Code. □

FOOTNOTES

[1]See, generally, Bloom, *Time to Clean Up Our Probate Courts*, READER'S DIGEST, January 1970; reprinted from NATIONAL CIVIC REVIEW, September 1969.

[2]See Simes, *Improving Probate Procedure*, 38 T & E 277 (1948). Professor Simes details the efforts of the American Bar Association to reform the probate practice since 1879.

[3]The Uniform Probate Code, in its complete text, has been published as a service to the Bar, by Prentice-Hall, Inc. Copies are available at $3 per copy from the publisher at Englewood Cliffs, N.J. 07632. In Prentice-Hall, *Successful Estate Planning Ideas and Methods*, Harrison F. Durand has written a lucid *Introduction to the Uniform Probate Code*, ¶ 15,001 (Sept. 1969).

[4]See Prefatory Note, 5th Working Draft, Uniform Probate Code (1969).

[5]*Ibid.*

[6]See Report of Committee on Administration and Distribution of Decedents' Estates, 2 Real Prop., Prob. & Tr. J. 273 (1967) at 274.

[7]*Op. cit. supra* note 4.

[8]The Uniform Probate Code will be cited herein as UPC.

[9]In Florida the surviving spouse takes equally with the decedent's children unless she elects to take dower under § 731.34 Fla. Stat. 1969; so, if a decedent is survived by a wife and two children, the wife would receive only a third of the estate. § 731.23 Fla. Stat. 1969.

[10]Wellman, *Selected Aspects of Uniform Probate Code*, 3 Real Prop., Prob. & Tr. J. 199 (1968) at 204.

[11]UPC § 2-102. A detailed discussion of the intestate succession provisions appears in Professor Wellman's article cited at Note 10.

[12]Wellman, *op. cit. supra* note 10 at 205.

[13]*Id.* at 206.

[14]*Ibid.*

[15]§ 731.34 Fla. Stat. 1969.

[16]UPC § 2-201.

[17]UPC § 2-207.

[18]UPC § 2-207(b) and (c).

[19]See note 4 *supra*.

[20]*Ibid.*

[21]See the Introduction to Article II of the UPC.

[22]UPC §§ 3-301, 3-302.

[23]UPC § 3-303.

[24]Article III, Part 7, UPC; see also UPC §§ 3-703 and 3-704.

[25]See General Comment to Part 8 of Article III, UPC.

[26]UPC § 3-803.

[27]UPC § 3-1204; see also the more detailed discussion in Report of Committee on Administration and Distribution of Decedents' Estates, 3 Real Prop., Prob. & Tr. J. 143 (1968) at 152.

[28]UPC Part 4, §§ 3-401-414.

[29]UPC § 3-403 (a).

[30]UPC § 3-412. The exceptions referred to in the text are that such an order may be vacated if there is a later discovered will, an unknown heir is found or the alleged decedent is alive.

[31]UPC §§ 3-1101 and 3-1102.

[32]See the Comments to § 3-501 and 3-502 of the Code.

[33]Report of Committee on Administration and Distribution of Decedents' Estates, *op. cit. supra*, note 27 at 132.

[34]UPC § 3-502(2). See also Durand, *op. cit. supra* note 4 and the discussion beginning at page 395 in Wellman, *The Uniform Probate Code—Questions and Answers*, 3 Real Prop., Prob. & Tr. J. 388 (1968).

[35]See the *Report, op. cit. supra* note 6 at 279.

[36]UPC, Article IV.

[37]UPC § 1-201. This is one place where the draftsmen may have tried to do too much. In the introduction to the 5th Draft of the Code (page 211) the then proposed Article IV was available only to personal representatives in jurisdictions of the U.S. and others having a common law tradition. In the final draft this was omitted. Thus, if a state adopts the Code then *any* foreign personal representative (whether or not reciprocity exists) may exercise all Article IV powers.

[38]UPC § 4-201.

[39]Report of the Committee on Administration and Distribution of Decedents' Estates, 4 Real Prop., Prob. & Tr. J. 242 (1969) at 247.

[40]UPC §§ 4-204 and 4-205.

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The New Uniform Probate Code

by Richard V. Wellman

The product of a long study and gestation, the new Uniform Probate Code now has been approved by the American Bar Association and is available to the states for study and enactment. The new code modernizes one of the oldest and most creaky institutions of the law—an institution whose shortcomings have been a source of embarrassment for the legal profession.

LAST AUGUST the House of Delegates of the American Bar Association approved the Uniform Probate Code. This action came a few days after the code had been approved by the National Conference of Commissioners on Uniform State Laws, which sponsored the code in a co-operative project with the Real Property, Probate and Trust Law Section of the Association. The completion of the code and its approval mark an extraordinary achievement by the American Bar Association and the National Conference. The accomplishment indicates that lawyers serving these national organizations faced and resolved doubts about the desirability and feasibility of a significant reform of state probate laws. Similar doubts will be entertained by other lawyers as the code is considered for adoption in the several states.

To some lawyers, our tradition of nonuniform, local laws for the administration of decedents' estates, guardianships and trusts is a complete reason for opposing uniformity in probate laws. Others are traditionalists in the sense that the *status quo* will be favored until persuasive reasons for changes required to achieve uniformity become apparent. The negative or skeptical attitudes of many lawyers regarding the project pose a handicap.

The size of the code and the pervasive and complex nature of its concepts present additional difficulties. The printed code with official comments runs to 275 pages.[1] The subject of property rights at death is terribly complex. In many states it is intertwined with community property concepts that will continue to cause interstate diversities affecting succession, though all states adopt a common code of probate. Many of the old rules, although possibly not justified by the current attitudes of laymen, appear suitable to lawyers as points of departure for planning and drafting. Subjects like restrictions on testamentary power, the rights of dependents and creditors of a decedent and the role of formalities in preparing wills pose the trap of interminable debate for anyone advocating abandonment of provincial rules in favor of some national norm. The investment that counselors and estate planners have in an education that enables them to live with the existing complexities seems threatened by change.

Lawyers interested in probate law improvement soon realize that their work will not be much noticed by the public. The development of the new code received little financial or moral support from any but the sponsoring organizations and their members. The work, which forced participants to take a close look at the details as well as the over-all functioning of the nation's elaborate probate institution, attracted little outside attention. Representatives of the Trust Division, American Bankers Association, watched the formative process carefully but, except for a general memorandum of approval issued last summer in regard to the fifth working draft, avoided any assertion of control or influence. The American College of Probate Counsel was interested but provided little leadership or encouragement. Ultimately, hundreds of lawyers and other interested persons acquainted themselves with the major premises of the code, which remained fairly constant through six preliminary drafts. Their familiarity, of vital importance to final approval of the code,

1. See the official text of the code and appended comments prepared by West Publishing Company, which was published in March, 1970.

came about largely because of the hard work of the Section of Real Property, Probate and Trust Law, accomplished through committees that worked closely with the draftsmen from the inception of the project.

Why, in spite of these obstacles, did the project manage to produce an officially approved code? Several reasons can be identified. Many are relevant to the prospects for widespread adoption of the Uniform Probate Code.

The most important is the concern all members of the legal profession share for the recent and widespread public criticism of the American probate institution.[2] Much of the biting commentary has been directed most squarely at practicing lawyers. Some of it has suggested that a conspiracy exists among courts, legislatures and lawyers which works to rob survivors of their inheritances. The discussion weakened public confidence in an important American legal institution. Focusing on an area lawyers themselves have long recognized as needing reform, the criticism called for action rather than words. The profession answered in the form of the Uniform Probate Code.

History of the Project Goes Back to the 1940s

But the code is much more than a mere response to embarrassing criticism. Its roots go back to the early 1940s and the careful work which culminated in 1946 with the publication by the University of Michigan Law School of the Model Probate Code,[3] a project of a special committee of the Probate Law Division of the Real Property, Probate and Trust Law Section. Although not conceived as a uniform code or officially approved by more than a small advisory committee, the model code was a major effort to bring some rational order out of our chaotic probate laws. It had a significant influence on probate code changes adopted in several states after 1946.

The Uniform Probate Code project originated with a move in 1962 in the Real Property, Probate and Trust Law Section to revise the earlier work and to encourage wider recognition of its recommendations. The move reflected growing professional concern about a continued provincialism in probate and represented an effort to take advantage of more than a decade of experience with the earlier code. Viewed together, the two projects represent a long-standing, forceful effort by national committees of lawyers to improve probate law.

The long history of the project and the renewal of activity in 1962 allowed participants to release their accomplishments in time to take some advantage of the probate publicity. The first tentative draft of the code, rushed to completion by two reporters in the summer of 1966, reflected the benefit of nearly twenty years of experience with the earlier model code and four years of committee discussions about how that code might be improved and extended. The fact that the project was able to produce a comprehensive draft as quickly as it did following the wave of adverse probate publicity was a source of important support and momentum for the effort. Also the demonstration of progress served in some states to delay proposals for quick legislative reaction to adverse probate publicity. It is hoped that the code now will be received for local study by committees that will give some weight to the time-consuming care with which it was prepared.

Major Premises of the Code Are Based on Experience

The research and experience gained from the Model Probate Code project and the discussions from 1962 to 1966 enabled the evolution of some major premises that have proved popular. These good ideas, which served to offset much of the initial skepticism about the project, form the major characteristics of the new code. Framing a package that will enable the profession to meet the legitimate demands of the public, they provide some additional basis for believing that the code may be well received by state legislatures.

The area of probate procedure posed the toughest challenge for the code's architects. Intertwined with widely varying ideas across the country concerning the appropriate status, power and function of local probate offices, procedures relating to decedents' estates are characterized by local eccentricities that contribute significantly to the inefficiency of the succession process. Except for Louisiana, our states subscribe to the idea that wills must be probated after the testator's death and that a publicly appointed personal representative is the appropriate authority to marshal assets for the benefit of creditors and successors of decedents. Having said this, one has described the only common threads in the practice existing in the fifty states.

Sometimes postmortem proof of wills occurs in an adjudication after



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2. The principal probate critics are Norman F. Dacey, author of *How To Avoid Probate*, and Murray Teigh Bloom, author of two *Readers' Digest* articles on probate and of the book, *The Trouble With Lawyers*.

3. The book, PROBLEMS IN PROBATE LAW, INCLUDING A MODEL PROBATE CODE, 1946, is better known as MODEL PROBATE CODE. The volume includes a model code and comments (197 pages), an appendix of statutory notes comparing the code with statutes and cases in all states (110 pages), and four important law review articles by Lewis M. Simes and Paul E. Basye. Copies of a reprint in paperback form are available from Legal Publications, University of Michigan Law School.

notice. Usually, but not invariably, it is linked with the appointment of an executor. Sometimes the appointment of a personal representative in intestacy involves an adjudication after notice. Administrators in some states and executors under well-drawn wills in a few others assume the role of unsupervised fiduciaries who have no purely statutory obligation to account to their appointing authority or other tribunal. At the other extreme, probate administration is frequently a tightly controlled affair requiring several hearings to enable superintending courts to satisfy themselves of full compliance with all rules.

The code offers a flexible system for the administration of decedents' estates. The purpose is to offer alternatives that permit the details of procedure to be determined by the needs of each estate, rather than to be dictated by state statute. Another objective is to create substantial opportunities for some sets of survivors to avoid any contact with a public office if no will or need for administration appears within a set number of years after death.

Under the code, wills are ineffective unless probated after death.[4] Whether or not a will is probated, the appointment of a personal representative is optional,[5] but successors will find that appointment will be a practical necessity if they wish to protect transfer agents and purchasers during the first three years after a decedent's death.[6] After three years, unsecured claims against the decedent and any proceeding for probate or appointment in regard to his estate are barred.[7] This period of limitation co-ordinates with a provision passing title to all estate assets at death, subject to probate and administration, and aids survivors who want to avoid all probate or appointment steps.[8]

Timely proceedings for probate, appointment or both may be informal, nonadjudicative and handled by a probate registrar, or they may be formal, with a judge of a court having the power of a court of equity to enter a final order after notice and hearing on relevant questions.[9] After appointment, a personal representative may proceed without further court or registrar activity, using statutory duties and powers and periods of limitation to accomplish all objectives of administration.[10] Or a procedure called supervised administration is available on petition, so that persons who see some advantage to keeping an estate "in court" until distribution may obtain their goals under the code.[11] Unless supervised administration is ordered, the appointing court or registrar has no responsibility to check or answer for the acts of the appointee.[12]

A galaxy of remedies is provided for individuals having interests in estates, however, so that there is little prospect that any personal representative will get away with illegal conduct offensive to others.[13] The unsupervised personal representative has full optional access to an appropriate court for resolution of any problem or for judicial review of his administration and discharge.[14] The code includes a jurisdictional system for making interested persons parties to any proceeding by mailed notice, so that the option of obtaining judicial review of any question involving an estate may be pursued without undue procedural difficulty.[15]

Flexibility of the System Is Attractive to Lawyers

Several aspects of this flexible system of administration make it attractive to lawyers. First, each of its features is based on a tested characteristic of some state's existing probate law. Only the combination is different, and even it is similar to procedures now available in Pennsylvania.[16] Second, the system will enable lawyers in a particular state or part of a state to handle estates as they are accustomed to handling them or to innovate with new combinations designed to lower costs or improve client relations. No one will be pushed into strange new practices. If changes in practice occur, it will be because estate counselors and their clients desire change. Third, the system will enable an efficient handling of estates that, in view of the successors' circumstances, are small enough to be free of serious risks for the personal representative. Once a mandatory waiting period of five days from death has passed, a probate and appointment can be obtained through informal proceedings that can be completed in a single trip to the courthouse and without the necessity of notices or citations to witnesses or heirs.[17] Only an affidavit procedure is involved, and full control of estate assets can be gained by one willing to assume a trustee's responsibility, and administration can be completed without any return trip to the courthouse once the registrar makes the appointment. The idea of having efficient procedures available for use in any estate that appears risk free to the personal representative and other interested persons has more appeal for lawyers than dramatic proposals to exempt all estates under $60,000 or some other arbitrary figure from all probate requirements.[18] A full array of effective procedures may be more important to some persons who have interests in a $25,000 estate than to others who share an estate worth hundreds of thousands of dollars.

Finally, the code offers viable alternatives to the tight control over estate procedures assumed by probate magistrates over the generations. It is frequently difficult at the state level to find officials accustomed to control who are willing to relinquish any authority. These officials have tended to dominate local probate law revision efforts to the point that many probate code reforms entail the addition, rather than relaxation, of expensive and mandatory requirements. The national

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4. Section 3-102.
5. Sections 3-107, 3-301 and 3-401.
6. Sections 3-103, 3-307, 3-414, 3-601, 3-703 and 3-714.
7. Sections 3-108 and 3-803.
8. Section 3-101.
9. Sections 3-102, 3-103 and Parts 3 and 4 of Article III.
10. Sections 3-107, 3-701 and Parts 7 through 12 of Article III.
11. Part 5, Article III.
12. Section 3-107.
13. See, for example, sections 3-204, 3-602, 3-605, 3-607, 3-611 and 3-105.
14. Sections 3-105, 3-704, 3-1001 and 3-1002.
15. Part 4, Article I and Section 3-106.
16. See HASKINS, SMITH & GROSSMAN, PENNSYLVANIA FIDUCIARY GUIDE (1962).
17. See Part 3, Article III.
18. See Bloom, *Our Probate Mess*, 58 NAT'L CIVIC REV. 361 (1969), reprinted in the January, 1970, issue of READERS' DIGEST.

package, with a rational answer for every apprehension and the blessing of the American Bar Association, should help legislatures see that much of the probate bog is the result of the long-standing propensities of publicly elected probate officials to overemphasize the risks in estates administration to magnify their own role as public protectors. It remains to be seen, of course, whether legislatures will perceive the public interest in changes that reorder accumulated political power.

Should the Law of Intestate Succession Be Uniform?

Another sticky portion of the job of probate reform relates to the substantive law of intestate succession. What objectives justify a uniformity we have been able to do without? Why change the rules without good reason? The answers evolved by the project participants have favorable public relations implications for the Bar and wide practical appeal for lawyers whose clients, like most people of substance today, have business and personal connections with more than one state.

The code offers a respectable statutory estate plan for married persons of modest means. The principal feature of the code's scheme of exemptions is that approximately the first $15,000 of gross probate estate of a married decedent will pass to the surviving spouse ahead of creditors and the provisions of any will.[19] Intestate estate in excess of exemptions will pass entirely to the spouse unless it exceeds $50,000, or unless the decedent left issue by a prior marriage.[20] Common accident problems are avoided by a five-day survival requirement for heirs.[21] Modern considerations control the definitions of spouse and other takers by descent.[22] These features combine with the administrative system of the code, which treats administrators in intestacy exactly like executors and gives both offices the statutory power and protection necessary to permit efficiency in collection, management and distribution of estates.

The code reduces the pressure on married persons with modest estates to make wills in order to insure that the survivor will have full control of family resources. The many lawyers on committees controlling the project and others who reacted to the drafts were quickly in favor of this approach. Possibly they felt that the purpose of restoring confidence in a basic system for transmitting savings at death outweighed any possible advantage of a system that tends to force persons of average circumstances into law offices for wills. They felt that persons with estates falling within federal estate tax brackets would be moved by tax considerations to continue to support a high volume of personalized estate planning service.

The idea that the code offers persons of modest means a statutory plan having a potential for efficiency well beyond that of all highly touted will substitutes struck many as guaranteeing that the code would be popular from a political point of view. Without this broad appeal, the odds against getting the code's administrative system enacted over the protests of local politicians, who have vested interests in present systems, were heavy.

Standing alone, the idea of uniformity in the law of wills seems to many to be a good idea, but hardly worth fighting for. On the other hand, lawyers from metropolitan areas embracing two or more states tend to put the code's objectives of substantive uniformity and of unification of probate administration at domicile high on the list of reasons why the code should be vigorously supported.

Substantive uniformity in succession matters will depend on the general adoption of the code. In contrast, many of the code's ideas to enable unified administration of probate estates located in two or more states may be picked up by states that do not accept the entire code. One key procedure enables personal representatives appointed at the domicile of their decedents to secure authority to collect, sell and distribute local assets by local filing of their domiciliary letters.[23] Another involves submission to the jurisdiction of local courts by any nonresident who obtains local appointment as a personal representative.[24] The latter provision permits abandonment of residency requirements for executors and administrators, which have tended to complicate administration of multistate estates. Another section would require courts of enacting states to accept prior adjudications regarding validity and meaning of wills entered at decedents' domiciles.[25] Ancillary administrations remain possible under the code, but these and other provisions serve to reduce significantly the practical likelihood of multiple administrations.

A moment's reflection suggests that lawyers everywhere should applaud steps tending to make the will more suitable as an estate planning tool for the 1970s and beyond. If the will can be freed of procedural and stateline limitations, the advantages of its characteristics as a unilateral and ambulatory device tend, over time, to assure that it may again become the principal instrument for sophisticated estate planning. Lawyers are still much more closely associated in the public mind with the will than they are with other estate planning devices. Steps that tend to popularize the will tend to assure estate specialists of plenty of interesting work for the decades ahead.

Code Goes Beyond Subject of Decedents' Estates

The code ranges well beyond the subject of decedents' estates. It encourages, but does not demand, realignment of administrative and judicial responsibilities among public offices so that the judge who handles true adjudications relating to estates and other proceedings under the code will be indistinguishable from and ideally a part of the trial court of general jurisdiction.[26] Routine contacts required for every estate would be with local probate offices having the authority of the registrar described by the code. Other ways of allocating the public authority

19. Part 4, Article II.
20. Section 2-102.
21. Section 2-104.
22. Sections 2-109, 2-802.
23. Sections 4-204, 4-205.
24. Sections 3-602, 4-301 and 4-302.
25. Section 3-408.
26. Sections 1-302, 3-105 and 3-106.

contemplated are illustrated by the code and comments, however.[27] In short, it should be easy to fit the code's important features into almost every combination of probate office arrangement as now recognized.

In its coverage of guardianships and conservatorships, the code is best described as a collection of new, good ideas. There is virtually no dissent from the proposition that this badly neglected area of our state codes critically needs improvement, and the goal of uniformity supplies a needed catalyst to consideration of new ideas.

The code uses the term "guardian" to refer to what has been commonly known as a guardian of the person and "conservator" to refer to one who is concerned primarily with estate management.[28] Subject to veto power in the prospective ward, a guardian of a minor or an incompetent adult may attain official status by filing a written acceptance of appointment as expressed by the will of a parent or spouse.[29] When no one has the parental rights of a parent or guardian, or after removal of a testamentary guardian, the court may appoint a guardian for a minor or incapacitated person after notice and hearing. A conservator, who occupies a position much like that of trustee of all assets of a disabled person as it might be described in a well-drawn trust instrument, may be created only by court order in what are called "protective proceedings".

In protective proceedings, the court may solve an estate management problem without appointment of a conservator as, for example, by ratifying a minor's contract or ordering renewal of a lease or mortgage for a disabled adult, or it may determine that continuing management is necessary and appoint a conservator.[30] The proceedings are designed to handle cases in which a person disappears leaving dependents who should be assisted by use of his estate.[31] If a conservator is appointed, he may use statutory powers to manage and distribute the estate, and so avoid further contact with the court that neither he nor any person interested in the affairs of the disabled person desires or seeks.[32]

The code article dealing with the affairs of minors and disabled persons also includes various devices designed to eliminate many recurring reasons for guardians or conservators. One is a facility of payment provision which gives statutory protection to debtors of minors who make payment to parents and others as prescribed by the code.[33] Other provisions permit powers of attorney to be used as reliable sources of authority to manage the affairs of persons who may become incompetent after execution of powers.[34]

In general, the code avoids the temptation to straighten out the world of nontestamentary transfers at death and to co-ordinate it with that of transfers through probate. However, joint accounts, Totten trust accounts and related arrangements are the subject of a rather ambitious effort to strengthen these much-used arrangements and eliminate stateline booby traps. The general subject of joint tenancy is not touched by the code except indirectly through the position that a joint and survivor account should not be considered a joint tenancy at all, but merely a contract enforceable according to its terms, as far as the bank is concerned, and a valid mutual will which is good without probate between persons named as depositors.

The final article of the code deals with court procedures for testamentary and *inter vivos* trusts. Proceeding from the assumptions that many existing state laws require unnecessary and expensive qualification and accounting requirements for testamentary trustees and that frequently there is an absence of effective procedures for handling problems relating to *inter vivos* trusts, the article offers a common procedural system for both forms of trust. Under it, no trustee is under statutory compulsion to qualify or account in court for the affairs of the trust. However, there are provisions designed to establish a relationship between each trust and a court that is convenient to the trust's place of administration.[35] Either trustee or beneficiary may use that court as a forum for resolving issues which may require resolution. Orders are binding on the trust interests of all who are notified by mail of pending procedures.[36] The easy availability of optional court procedures will not embarrass the ability of trustees and beneficiaries who face no controversy to handle their business without making any court record indicating the assets, beneficiaries or terms of their arrangement.

Code Deserves Support

Lawyers will react with varying degrees of enthusiasm or dismay to the Uniform Probate Code. But the solid reasons that impelled hundreds of well-informed lawyers to urge and obtain overwhelming support from the House of Delegates for this most ambitious package of proposals should apply with more rather than less force to the question of local enactment.

The code offers an affirmative, balanced and long-range solution to the dilemma posed by our old and over-protective probate law. Its enactment should be accompanied and followed by a period of public education that should go far toward restoring public confidence in the basic institution of succession and in the lawyers who are so closely related to it. Many more lawyers than are involved in estate planning and probate work have been embarrassed by the controversy about our defective probate institution. The code gives them an answer to some serious problems that have proved to be practically beyond the power of individual state law reform efforts.

It remains to be seen whether most members of the legal profession have the ability to receive as well as give good counsel. If they have, the Uniform Probate Code may have a very significant impact on our state laws and the probate institution. If they have not, a tragedy of some dimension will occur if events prove that Norman F. Dacey was right when he said that lawyers would see that legislatures do nothing to correct probate law deficiencies.

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27. See comments following Sections 3-105 and 3-106.
28. Sections 5-209, 5-312 and 5-410 to 5-426.
29. Sections 5-201, 5-202, 5-203 and 5-301.
30. Sections 5-401, 5-409.
31. Section 5-401(b).
32. Sections 5-419 to 5-425.
33. Section 5-103.
34. See Part 5, Article V.
35. See Part 1, Article VI.
36. See Part 2, Article VII.

THE UNIFORM PROBATE CODE: BLUEPRINT FOR REFORM IN THE 70's

*Richard V. Wellman**

INTRODUCTION

PROBATE law changes slowly. On August 13, 1969, the House of Delegates of the American Bar Association promulgated the Uniform Probate Code, completing a project which began in 1962.[1] The UPC project has been described as a continuation of an earlier effort by elements of the ABA to modernize and unify American probate laws which resulted in preparation of the Model Probate Code.[2] Viewing the two projects as one, the 30 plus years of effort to improve probate law may appear as an exercise in killing an unwanted idea by perpetual debate.[3] The Connecticut story, as told by other contributors to this symposium, is representative of the experience in other states where efforts to improve probate law have been frustrated by foot-dragging tendencies of local elements who derive power or profit from the old rules. An observer might well conclude that national efforts at probate reform would be more of the same.

But there is more to the new Code. Though it may not have been conceived for purpose of reform, the recent project matured in a period of unparalleled public criticism of the existing probate institution.[4] Also, the project was supported by both ABA committees

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1. For a brief discussion of the action by the House of Delegates, *see* 55 A.B.A.J. 976 (1969).

2. *See* 4 REAL PROPERTY, PROBATE & TRUST L. J. 206 (1969).

3. The recent motion for final approval also chartered the Real Property, Probate and Trust Law Section of the American Bar Association to engage in continuing "in-depth" studies of the relative merits of uniformity and provincialism in regard to probate laws. The resolution of the House of Delegates authorizing the Section of Real Property, Probate & Trust Law to present the views of the Association followed a resolution of Section Council published in 4 REAL PROPERTY, PROBATE & TRUST L. J. 206 (1969).

4. N. DACEY, HOW TO AVOID PROBATE (1965); Bloom, *The Mess in Our Probate Courts*, READERS DIGEST, Oct., 1966; *Needed: Better Probate Laws*, CHANGING TIMES, Jan., 1969; *Personal Finance: How to Avoid a Costly Probate*, N. Y. Times, Nov. 14, 1966; *Probing the Source of Probate Pains*, Wall St. Journal, May 14, 1968; *The Probate Fuss*, LOOK MAGAZINE, Nov. 29, 1966; *Editorial*, Columbus ,Ohio Citizen-Journal, Jan. 18, 1967.

and the National Conference of Commissioners on Uniform State Laws. Bolstered by broad support, and challenged by the goal of framing rules meeting the diverse and idealistic demands of the Commissioners, the draftsmen sought to produce a truly useful guide to significant probate reform in the seventies.

And there are many reasons for believing that a forward-looking Code will be welcome on the state level. Widespread public discussion of probate law problems has resulted in the formation in many states of study committees charged with responsibility to recommend changes meeting on public concerns. UPC will provide conscientious committee members with a strongly recommended alternative to proposals from local probate officials whose control of probate rules has caused many of the current problems.[5] Practicing lawyers also are ready for a turnabout in probate law. The tendency for local probate officials to extend their responsibility through generation of more red tape for estates has been dominant too long. Consequently, existing legal requirements in many areas not only irritate the public but complicate settlement of quite modest estates to the point where someone, usually a lawyer, must work for very little or nothing if titles are to be cleared.[6] Also, the new Code probably would not have been promulgated were it not for a growing realization by the legal profession that its traditional monopoly in regard to estate services has been broken by the ever increasing array of popular devices for avoiding probate.[7] Streamlined probate procedure has become an important objective of law-oriented estate planners who must innovate constantly to keep abreast of client demands. Perhaps, there-

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5. UPC's procedural package, though designed to reduce the traditional control by probate officials of decedents' estates, can be described as conventional for it merely offers, as options for use in every state, various procedures which exist today in the various states. *See* "Introduction to Article III", *Uniform Probate Code*, 34, (Prentice-Hall, 1969). [Hereinafter cited as UPC.]

6. Informal surveys conducted by members of the Committee on Professional Economics, Michigan State Bar Association, resulted in unpublished estimates that between 35 and 45 hours of professional time is required to handle the usual responsibilities of counsel for a personal representative in Michigan. It might be noted, however, that Michigan's probate code requires a minimum of three court appearances for the simplest estate.

7. *See* Wellman, *The Lawyer's Stake in Probate Reform*, 47 MICH. ST. B .J. 10 (1968), reprinted in 9 LAW OFFICE ECONOMICS & MANAGEMENT 415 (1969); Wellman, *The Uniform Probate Code: A Possible Answer to Probate Avoidance*, 44 IND. L.J. 191 (1969).

fore, three decades of talk about probate law improvement will produce results the public will find beneficial.

I. From Court to Complexity: The American Probate Problem

One confronted with the task of describing today's American probate institution is best advised to seek another approach or other employment. Happily, there is a way out. The legal situation has been so lightly touched by change in the twenty-three years since Simes and Basye prepared their careful analyses of probate laws, that their articles continue to provide an accurate picture.[8] It is one of disarray. There is general agreement that wills must be validated by probate after death to be effective to prove a bequest or devise,[9] and that creditors of decedents should seek their remedies against publicly appointed personal representatives.[10] But local procedures for probate of wills range from procedures involving little more than public deposit of a will, with appropriate, accompanying affidavits,[11] through various intermediates,[12] to formal litigation against every-

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8. Simes and Basye, *The Organization of the Probate Court in America*, 42 Mich. L. Rev. 965 and 43 Mich. L. Rev. 113 (1944); *The Function of Will Contests*, 44 Mich. L. Rev. 503 (1946). The same articles appear in Problems of Probate Law — Model Probate Code (1946) at 385, 683. The latter volume is better known as Model Probate Code and this shorter reference will be used hereinafter.

9. *See* comment to § 85, Model Probate Code; T. Atkinson, Wills 503 (2d ed. 1953).

10. Louisiana adheres to the civil law view that acceptance of a succession by an adult heir makes the acceptor personally liable for the decedent's debts. LSA Civ. Code (Rev. 1950) Art. 1013. *See* Rheinstein, *European Methods for Liquidation of the Debts of Deceased Persons*, 20 Iowa L. Rev. 431 (1935).

11. In Texas, common form probate may occur on the strength of a petition accompanied by a deposit of a "pre-proved" will. A will may be pre-proved in the Texas Probate Code which became effective January 1, 1956, by attachment of an acknowledgement of the testator and affidavits of attesting witnesses in the form prescribed by § 59, Chapter 4, Vernon's Ann. Civ. St.. However, it appears that a probate magistrate in Texas may, in the exercise of discretion, decline to probate a will which has been presented to him.

12. Connecticut procedures involve probate after notice before one called a judge. However, any elector of a probate district, whether or not trained in law or licensed to practice, can be elected probate judge. Also, the notice may be "public" or "private". "Public notice" consists merely of publication. Gill v. Bromley, 107 Conn. 281, 140 A. 721 (1928). Indiana statutes patterned after the Model Probate Code direct that a petition for probate of a will shall be "heard forthwith" by the court or by the clerk if filed when the court is in vacation. Notice to interested persons occurs after probate and appointment of a personal representative. The new Iowa code gives the district attorney authority (which

one in the world.[13] Administration may be a dispensable procedure which affects testate and intestate estates only when unpaid creditors or title clearance considerations compel it;[14] or it may be inseparable from probate of a will in testate cases,[15] and it may be required in intestate estates to prevent opportunities for public administrators to take over.[16] Once commenced by appointment of an executor or administrator, administration may resemble a form of non-court trust in that the appointee is expected to proceed on his own to settle the estate in accordance with legal duties, with no more being required by or of the appointing or other authority unless some interested person petitions for relief.[17] More commonly the appointee is obliged to return for authority to take various steps required for estate settle-

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may be exercised by the clerk) to order probate immediately upon receipt of a will and petition for probate. Testimony of one of the attesting witnesses is sufficient, and may be supplied by affidavit executed after the testator's death. Notice follows probate.

13. Illinois Probate Act, 1955 ILL. REV. STAT., Chapter 3, Par. 63, *et seq.*; LAWS ANN., § 702.21 *et seq.*

14. Careful analysis of the perils of attempting to settle estates by family agreement appear in Basye, *Dispensing with Administration*, 44 MICH. L. REV. 329 (1945). *See also* HASKINS, SMITH & GROSSMAN, PENNSYLVANIA FIDUCIARY GUIDE ch. 1 (1962).

15. ABA members from twenty-three states responded to a questionnaire prepared by the Committee on Administration and Distribution of Decedents' Estates which included a question about probate without administration. The respondents from twelve states (Col., Fla., Iowa, Md., Mo., N.Y., N.C., N.D., Ohio, Penn., Tex., Vt.) indicated that a will could be probated without appointment of an executor, while answers from eleven states (Ill., Kan., Me., Mich., Minn., N.H., Okla., Ore., R.I., Wash., Wisc.) indicated the contrary.

16. For example, Michigan statutes authorize the public administrator to petition for administration whenever it appears that the surviving spouse or kin have neglected to petition within 30 days after death. In practice, the power conferred appears not to be exercised frequently except where the decedent resided in a large metropolitan area and left no resident kin.

17. The text describes administration under a non-intervention will in Texas. *See* Marschall, *Independent Administration of Decedents' Estates*, 33 TEXAS L. REV. 95 (1954); Woodward, *Independent Administration Under the New Texas Probate Code*, 34 TEXAS L. REV. 687 (1956). "While he takes charge of and administers the estate of his testator without action of the county court in relation to the settlement of the estate, and may do, without an order, every act which an executor administering an estate under the control of the court may do with such order, he is uncontrolled, uninformed, unchecked and untrammeled by orders of the court, directing, informing or commanding what he shall do in the management and administration of the estate. He is an executor at large, exercising his own judgment and discretion, acting and doing what he pleases, unless brought to account for his actions by someone interested in the estate . . ." Altgelt v. Mernitz, 37 Civ. 397, 83 S.W. 891, 894 (Tex.Civ.App. 1904).

ment and the appointing authority is expected to review and approve accounts and make other orders deemed necessary to assure proper performance of the appointee's duties.[18]

Also, the public office controlling inheritances varies markedly from state to state in name and stature. For example, both New York and New Jersey confer original jurisdiction for probate of wills and issuance of letters on officials called surrogates.[19] However, the surrogate's office in New York has grown to become a powerful court with complete, original jurisdiction over matters involving probate and appointment,[20] while the New Jersey surrogate who is also clerk of the probate division of the county court, may handle only uncontested probates and appointments.[21] The New Jersey officer resembles Pennsylvania's "register of wills" in that both appear to perform approximately the same function once performed by the English "ordinary", who had little effective power other than to probate wills and issue letters.[22] Thus, neither New Jersey's surrogate nor Pennsylvania's register may entertain proceedings for approval of accounts. But, one must not conclude that the title of "ordinary" always signifies similar limitations on authority. Thus, Georgia uses this term for its probate official to whom it gives jurisdiction to handle common form and solemn form probates, proceedings for orders of sale and proceedings for review of accounts.[23] However, orders of the Georgia "ordinary" in contested matters are reviewable by trial de novo in the superior court.[24] Nor does the term "probate court" con-

18. In fifteen of twenty-three states covered by returned questionnaires, ABA members reported that personal assets cannot be sold by a personal representative without court order or express will-power. The same survey reports that a personal representative's final account must be approved before he can make final distribution. *Estate Administration: Current Practices and Proposed Uniform Probate Code*, 3 Real Property, Probate & Trust L. J. 143 (1968).

19. McKINNEY'S CONSOL. L. CONST. ART. VI, § 12(d), 3-A . . . STAT. ANNO., § 3-17. The term "surrogate" reflects the circumstance that the governor of the New York province held the probate authority exercised in England by the ordinary, which was exercised through delegates. A Dr. Bridges, appointed probate deputy by Lord Cornbury in 1702, seems to have been the first to use the title "surrogate". REPPY and TOMKINS, HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS 165. (1928).

20. *See* McKINNEY'S CONSOL. L., CONST., ART. VI, §§ 11, 12, 25.

21. N. J. STAT. ANN., §§ 2A—3-2, 3A—2-3.

22. PURDON'S PENNA. STAT. ANN., Title 20, §§ 1840.201, 1840.205, 1840.207; T. ATKINSON, WILLS 15-19 (2d ed. 1953).

23. GA. CODE ANN. (Rev. 1959) § 24.1901.

24. GA. CODE ANN. (Rev. 1959) § 6-201.

vey any meaning which can be safely exported from one state to another. For example, differences outweigh similarities when one tries to compare the Massachusetts' version with the organization carrying the same name in Connecticut. The former is a lawyer-manned court of considerable stature,[25] while the latter connotes a job for which any qualified elector in a probate district is qualified.[26] It goes without saying that activities of the two kinds of organization have quite different legal significance.

How can this jungle of procedures and organizations be explained? Obviously, the shape of probate rules in each state is rooted more in local history than in the English traditions regarding the subject which all states save Louisiana[27] have accepted. The old assumptions that wills should be publicly established after death, and that personal representatives should be publicly appointed or identified, have survived, to be sure. But the differences in these requirements as they exist today in the several states are so great as to suggest that the old ideas have served principally as a cover for more important considerations. The variety demonstrates that the dominant factor in growth of our probate institution has been the preoccupation of our legislative and legal community with the power represented by assets of decedents. The story of probate is a story of expansion and dispersal of this power among local politicians and the legal profession.

The variety of the country's probate offices and procedures also provides legislators who become serious about probate reform with a wide assortment of working models for comparison with local assumptions. Hopefully, comparative study will lead to reconsideration of a series of incremental judgments which the political and legal communities in some key states seem to have made with inadequate attention for any but their own concerns.

The complexity of the probate institution is, of course, a major reason for its perpetuation. Relatively few lawyers, including many who regularly handle simple estates, seem to be well founded in regard to the rationale and weaknesses of their own state's probate rules. Even fewer have had the necessity or opportunity to learn

25. Atkinson, *The Development of the Massachusetts Probate System*, 42 MICH. L. REV. 425 (1943).

26. CONN. GEN. STAT. (Rev. 1958) § 45-6.

27. Under the Civil Law concept of universal succession which is accepted in Louisiana, unqualified acceptance of an ancestor's estate by an adult heir makes the inheritor personally liable for the decedent's debts. *See supra* note 10.

about the laws of several states. There will be few improvements in the law in this area if the process of change requires many to grasp most of the procedural niceties of several states. The discussion must focus on some fairly simple propositions.

With full recognition of the risks of generalization, it is suggested that legislative discussion about probate reform should center around three major questions: (a) Is a "court" the appropriate agency to handle routine applications for probate and appointment? (b) Are routine probate and appointment orders properly viewed as adjudications which must conform to all requirements of procedural due process of law which might apply to a condemnation proceeding, for example? (c) Should responsibility for accurate and complete administration of decedents' estates be assumed by any state agency?

In areas where probate procedures and bureaucracies have ballooned to maximum proportion, each of these questions has been answered affirmatively.[28] Understandably, local experts in these areas are convinced about the propriety,[29] if not the necessity, of their complex systems. Nevertheless, examples from other states are available to show that different answers produce wholly satisfactory and vastly simpler results.

A. Courts as the Proper Agencies to Administer State Authority Over Estates.

It is unclear whether English ordinaries exercised much effective control over decedents' estates. Summaries of English probate history suggest a declining role which, at the time of formation of American colonies, probably was reduced to the point where it served to assure that authority over personal assets of a decedent passed to one who solemnly undertook to collect and distribute with full regard for rights of the decedent's creditors and family.[30] In recognizing and appointing personal representatives, ordinaries doubtless performed

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28. States such as California and Illinois which confer probate jurisdiction on the court having general civil jurisdiction and whose probate procedures involve required, fully supervised administration for all but small estates, provide the best examples.

29. *See* Marshall, *Probate Code — The New Look*, 47 TAXES 139 (1969). *See also* 47 TAXES 244 (1969) for a reply to Judge Marshall's article.

30. *See* Bordwell, *An Introduction to Wills and Administration*, 14 MINN. L. REV. 1 (1929); Simes and Bayse, *The Organization of the Probate Court in America*, 42 MICH. L. REV. 965, 967-970. (1940).

a magistrate's role, but it seems inaccurate to bracket them with courts in the present sense of the term. In any event, judicial authority over estates and personal representatives seems to have been sufficiently diffused between the ordinaries, the law courts and chancery to provide fair assurance in most cases that no judge with significant authority could exert much unwanted control over an estate after the business of identifying the personal representative had occurred.[31]

In England, the awkward rule which attributed the title of a decedent's goods to his personal representative after appointment, probably worked well because of the role of the ecclesiastical authorities. The same rule created a troublesome gap in control of family assets when applied in colonies which sought to avoid a state church. Representatives of the civic authority appeared on the scene to remedy the problem.

In some American colonies whose probate history has been carefully reconstructed, early patterns indicate that although local delegates or magistrates had little to do with testate estates other than to receive proof of wills and inventories, they exercised virtually unlimited power over goods of intestates.[32] Understandably, law and organizations to enforce it grew to control this power which, in a

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31. Simes, *op. cit.*, note 30, pp. 391-395.

32. Atkinson, *The Development of the Massachusetts Probate System*, 42 MICH. L. REV. 425 (1943). At page 436, the author reports as follows regarding the contents of an unpublished judicial notebook of a magistrate who served in what later became Springfield: "Pynchon's notebook confirms what may be found in the regularly organized courts. Proof of wills, grants of administration and exhibition of inventories were apparently necessary in all cases. Generally, further matters were settled by agreement without coming again into court, but if there were doubt, dispute or special circumstances the court would determine the matter. In an early case the court appointed commissioners to settle the executor's account; after confirmation of the report, the executor was discharged. Particularly in the division of small intestate estates there was the utmost judicial discretion and paternalism both as to the shares which each member of the family should receive and the time, form and manner of payment. The magistrates' notions of the welfare of the particular family seem to have been the sole criterion in many cases." *See also*, the account of the development of the law of probate and administration in New York by Surrogate Charles P. Daly (later Chief Justice), in Matter of Brick's Estate, 15 Abb. Prac. Rep. 12, 17-31. Concerning the power of local delegates of the governor to supervise the estate of intestates, Surrogate Daly notes, at p. 24,: "This power of supervising the estate of intestates was in consequence of a clause in the act of 1692, which provided, that where any any person died intestate, two freeholders of the town, to be annually elected, should inquire into the real and personal estate of the deceased, and make an inventory of it, and return it, under oath, to the person in the county delegated

community where wills probably were unusual,[33] must have been very obvious. Also, the circumstances were lacking which served in England to prevent the ordinary's jurisdiction over testamentary causes from becoming a self-expanding legal complex.[34] The local probate officials exercised the same state-delegated power as that of local magistrates exercising general civil and criminal jurisdiction. Only the reason for and the technique of exercise distinguished the probate official. The importance of their power increased as they asserted authority over wills and real estate like that formerly exercised by various tribunals in England. Imperceptibly, the assumption

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by the governor to supervise the estate of intestates; that the persons delegated should cause the goods and chattels to be sold, retaining the proceeds for those who should appear and have a right to claim them . . ."

33. Some guess work about will-making habits in the seventeenth century can be based on data from this century. Various studies suggest that the tendency for persons to make and leave wills has increased markedly during the 20th century. Powell and Looker, examining the period from 1915 to 1929 found a steady increase. Among the jurisdictions studied, the range was from 25 percent testate in Cook County, Illinois, to 64 percent testate in Chelain County, Washington. Powell and Looker, *Decedents' Estates*, 30 COLUM. L. REV. 930 (1930). Studies relating to Dane County, Wisconsin, found testate cases accounting for 61.9% of estates in 1929, 45.9% in 1934, and 39.1% in 1944. A study of Cook County, Illinois records in the years 1953 and 1957 indicates that 58% of estates involve wills. Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 250 (1962). A careful study, as yet unpublished, of Cuyahoga County, Ohio, probate records shows 69% of the estates to involve wills. Sussmah, Cates and Smith, "The Family and Inheritance" (1963 manuscript). It suggests also that testacy is positively associated with age (75% and up of all persons over 70 leave wills), marital status (single persons are least likely to have wills; married and widowed persons are most likely), and size of estate (median testate estate is $15,000 gross, compared with $6,000 for intestate; average testate estate is $41,218, compared with $8,599 for intestate.) Overall, this data suggests that except for the wealthy, will-making habits turn importantly on the amount of information persons have about probate laws.

34. The principal circumstance, of course, was that testamentary causes were under the jurisdiction of ecclesiastical courts which, from a relatively early date, declined in importance as the temporal courts grew in power. As explained in Bordwell, *Introduction to Wills*, 14 MINN. L. REV. 1 (1929), this eventually resulted in a situation where the tribunal which touched every estate served effectively only to accept proof of due execution of wills and to issue letters of authority to personal representatives. The Law Court's writ of prohibition prevented the ecclesiastical court from exercising authority over executors and administrators. Eventually, the court of Chancery developed effective procedures to handle problems involving administration and distribution of estate, but it asserted jurisdiction only in those cases brought before them by proper pleading of an interested person. *See also* SIMES AND FRATCHER, CASES AND MATERIALS ON FIDUCIARY ADMINISTRATION (2d ed. 1956) at 12-18 and authorities cited.

grew that agencies handling routine probate matters should be thought of as specialty courts, having within the range of the subject matters assigned to them approximately the power of any court of general jurisdiction.[35]

The notion that routine probates and grants of administration are properly the business of an office which is, or aspires to be, a court in the usual sense of the word is at the root of most of today's probate complications. Of course, lawyers have not questioned the connection, for the presence of a court creates a service monopoly protecting lawyers, not only from other specialists, but from survivors themselves.[36] Even though required estate procedures in a given state have remained or become minimal, the routing of every estate to an office resembling a court leaves the legal profession pretty much in control of the situation. The arrangement would be acceptable were it not for the historic tendency of judges and lawyers to serve each other's need for function and status, a tendency which has been particularly obvious in probate matters. Here, public ignorance and dispersal, distaste for death planning and lack of concern by survivors about pre-receipt erosion of inherited assets have left an open field for those who would emphasize, rather than minimize, the need for expensive safeguards. The assumption that a court is the proper agency to handle essential services to decedents' estates undoubtedly contributes to pyramiding legal requirements.

What is the alternative? In England, the modern system enables persons interested in estates to apply in person for letters to any of 26 District Probate Registries, or in cases of estates of small value, to any of 374 customs and excise offices.[37] If a solicitor is involved, a mailed application suffices.[38] Two-thirds of approximately 300,000 grants of probate per year are made in District Probate Registries which, as of the time of Professor Fratcher's careful report, were manned by a total of seventeen District Registrars receiving annual salaries in the £3,550 to £4,100 range.[39] The systems in Pennsylvania and New Jersey bear some resemblance to the English system in that

35. *See* Atkinson, *supra* note 25; Reppy & Tomkins, *supra* note 19.

36. *See* State ex rel. Baker v. County Court of Rock County, 29 Wisc.2d 1, 138 N.W.2d 162 (1965).

37. Fratcher, *Fiduciary Administration in England*, 40 N.Y.U. L. Rev. 12, 49 (1965).

38. *Id.* at 49.

39. *Id.* at nn, 241 and 258.

the fundamental steps of probate and appointment are handled by a statutory official who, though connected to a court having jurisdiction over estates, acts on his own in routine cases.[40] In both states, the power of the magistrate is sharply limited so that he has a relatively minor role in contested cases, and no responsibility to review acts and accounts of his appointees. The probate offices in these states constitute a standing contradiction to any assumption that a modern state must interpose a powerful court between survivors and the estates they would claim.

B. Probate and Appointment As Adjudications Requiring Notice

The initial step in administration of a testate estate is to secure probate of the will. If there is no will, the appointment of an administrator starts things. The English procedures first followed in the early colonies included common form probate,[41] which is generally understood to permit wills to be proved and appointments to be made without notice to interested persons, delay or elaborate proofs.

Traditionally, orders so obtained have not been accorded the respect or finality accorded orders entered in ordinary judicial proceedings, but they have served an obvious purpose in situations in which there was no contention.

Early intestate administrations differed somewhat in that the probate magistrate through his appointees seems simply to have taken charge of intestate estates coming to his attention. The notion that appointment of an administrator in intestacy involves a finding that there is no will was a much later development which is still incomplete.[42]

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40. PENN. CONST., ART. 5 § 22. For Pennsylvania, *see* 20 PURDON'S PENN. STAT. ANN. §§ 1840.201, 1840.207. *See also,* HASKINS, SMITH & GROSSMAN, PENNSYLVANIA FIDUCIARY GUIDE (1962) §§ 3.4, 3.14, 3.15; Straus, *The Uniform Probate Code Approved: A Bold and Progressive Reform,* 41 PENN. B. ASS'N. Q. 71 (1969); Hauptfuhrer, *The Uniform Probate Code — A Modern Approach for Pennsylvania,* 41 PENN. B. ASS'N. Q. 79 (1969).

41. Simes, *The Function of Will Contests,* 44 MICH. L. REV. 503 (1946).

42. In Michigan, for example, a later discovered will cannot be probated after an estate has been settled and closed under a prior will and normal periods for vacation and delayed appeal have passed. But, if the estate was distributed as intestate after a finding that there was no will, there appears to be no time limit on proceedings to probate a later discovered will. This curious situation is attributable, in part, to a statute which provides for revocation of letters of administration incident to probate of a later discovered will. *See* In re Broffee's Estate, 206 Mich. 107, 172 N.W. 541 (1919); Young v. Young, 200 Mich. 236, 167 N.W. 23 (1918). *Cf.* In re Butts' Estate, 173 Mich 504, 139 N.W. 244 (1913).

In both New York and Massachusetts, common form probate simply disappeared as the estates court grew in power and stature.[43] Presumably, the office holders aided their evolution toward the status of powerful judges by adopting procedures like those followed in regular courts.

Common form probate still exists in some states as an optional method of establishing a will or initiating an administration.[44] In many, the choice between notice and no-notice procedures gives successors some control over the time when the probate order becomes conclusive.[45]

Following the lead of the Model Probate Code, several states have accepted the idea that probate of a will initiates a continuous court proceeding which is not concluded until entry of an order approving final distribution and discharging the personal representative.[46] The logic of this approach permits notice of probate to be given after administration has been commenced, for until the closing order, the position of those who would take in the absence of a will is not finally determined.[47] The system offers significant advantages over that of

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43. *See* Surrogate Fowler's account of New York history involving common form probate in In re Hock, 74 Misc. 15, 129 N.Y.S. 196 (Sur.Ct. 1911). Atkinson notes that early probate laws in Massachusetts provided very little guidance concerning the necessity and manner of notice of proceedings before probate magistrates and lists the present notice requirements under the heading "Modern Developments". Atkinson, *supra* note 25, at 442 and 449. In *The Function of Will Contests, supra* note 41, Simes suggests that the abandonment of the English system of ex parte probate by many jurisdictions may have been due to extension of probate court jurisdiction to land as well as to a tacit assumption that due process requires that interested persons be given advance notice of orders affecting them.

44. Simes, *supra,* note 41. The Codes of New Hampshire, Indiana, Missouri and Arkansas have been changed in regard to notice since publication of the Simes article.

45. The Florida procedures described by Simes provide an example. Simes, *supra* note 41. *See also* GA. CODE ANN. (Rev. 1959, Supp. 1969) §§ 113-601, 113-605; 12 DEL. CODE § 1310.

46. The Codes of Arkansas, Indiana, Iowa and Missouri provide examples.

47. MODEL PROBATE CODE §§ 64-81. The Code enables will proponents to use a prior notice probate proceeding to shorten the time available for contestants to raise all objections except revocation by subsequently discovered will. Under § 81, the order of probate or grant of administration remains vulnerable to proof of another will "not theretofore presented to the court" which is offered "prior to the decree of final distribution." If the estate was opened on an assumption of intestacy, the order may be vacated for good cause under section 19 at any time prior to the expiration of the time for appeal from the closing order. The effect of these provisions is to require full administration and closing of an estate as a

states which require notice to all interested persons to proceed entry of an order of probate or determining intestacy. The tactical position of trouble-making heirs is enhanced very considerably when, as is true in many prior notice states, only special administrators with quite limited powers can be appointed to manage the estate pending entry of the order of probate.[48]

Nevertheless, the cost of probate or appointment without prior notice to interested persons is too high when the package includes a

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condition to complete finality of an order of probate which was entered after full notice and hearing. The authors offer the following observations which tend to justify the Model Probate system:

> As to noncontentious matters, the situation may be different. Here it is conceivable that the estate could be distributed without any judicial intervention at all. Indeed, the Roman law system, with its conception of universal succession, accomplished just that. And the modern tendency of legislation in the United States to dispense entirely with administration in the case of small estates is to the same effect. Nevertheless, there are many cases where some judicial action is desirable even though there are no controversies among the interested parties. This becomes particularly important in view of the current trend, elsewhere noted, to provide that the probate court distribute land by its decree. In spite of the lack of disagreement among persons interested in the estate, they may well need the aid of the court to determine what is a just basis of distribution; they may wish to distribute in such a way as to avoid disputes in the future; and, to further that end, they may desire to have an official record of the distribution which has been made. Thus, the noncontentious business of the court is an important function of the judicial organization. No statistics are required to justify the observation that the vast majority of smaller estates is handled by American probate courts without any controversies whatsoever. Administration in court is then desired solely for the purpose of having the property of the decedent disposed of in an orderly way.

48. Prior notice of probate is required in Massachusetts and New York, as well as in many other states. The following appears in Report No. 3.3A, N.Y. Commission on Estates 2d Report (March 31, 1968) at 60:

> In a large number of cases on the probate trial calendar, the person who files objections to the probate of the will has no reasonable basis to expect any measure of success in the contest except that which may inure to him because of his ability to delay the administration of the estate. Estate representatives and beneficiaries are frequently willing to pay the nuisance value of a contest in order to avoid delay and even greater expense. We believe that a grant to an estate fiduciary of an authority somewhat greater than that possessed by an executor will speed the administration and reduce the number of feigned objections. One of the advantages of probate in the common form is said to be its discouragement of groundless probate contests. That is an objective which would save much time and money for the people of the State.

The new provisions governing the appointment of temporary administrators in New York appear at § 901 *et seq.*, SCPA (McKinney, 1967).

requirement of court supervision and closing of every estate. A more flexible concept works quite satisfactorily today in Pennsylvania and New Jersey where probate and appointment by limited power magistrates may initiate administrations which need not be closed by court order.[49]

It may be contended that an order determining the validity, invalidity or absence of a will denies procedural due process if it is entered without prior notice to interested persons.[50] The concern is valid if it is also conceded that a probate settlement necessarily involves an adjudicative process resolving recognized private rights. The steady self-induced growth of local probate magistrates toward the position of powerful judges has gone hand in hand with development of probate as a court proceeding.

The Model Probate Code, reflecting the drive of three decades ago to organize and rationalize the existing situation rather than the current concern about probate simplification, added impetus to this view.[51] Serious efforts to simplify probate must involve review of these developments, for the cost of the courts and lawyers necessarily involved under an adjudicative approach is simply more than the public should or will tolerate. The English system[52] as well as those presently working in Pennsylvania and New Jersey point to a better

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49. *See* HASKINS, SMITH & GROSSMAN, PENNSYLVANIA FIDUCIARY GUIDE (1962), for a discussion of Pennsylvania procedures. *See especially* §§ 4.8 and 15.2. For New Jersey, *see* the authority referred to in note 40.

50. *See, Informal Proceedings Under the Uniform Probate Code: Notice and Due Process*, 3 PROSPECTUS 39 (1969); Comment, 53 IOWA L. REV. 508 (1967).

51. The Model Probate Code originated in the Probate Division, the Real Property, Probate and Trust Law Section, American Bar Association. Professor Simes used research resources of the University of Michigan Law School to secure assistance for the project and the same resources made publication of the volume possible. In conversations with the principal participants, the author has formed the impression that the earlier project had to be cut along very conservative lines in order to achieve any degree of success. These observations are not offered as criticisms. Surely, the Uniform Probate Code project could not have succeeded without the earlier effort. UPC originated with a proposal to update the MODEL PROBATE CODE and the careful statutory research and analysis of the '40's relieved the participants in UPC from the awesome obligation of combing the current codes of fifty states to achieve legitimacy. In this connection, it should be noted that Professor Simes has served on the ABA committee which has guided the current project. Also, during the summer of 1966, as a special consultant to the project, he reviewed the first tentative draft. Professor Basye, a major participant in the earlier project, had much to do with origination of the UPC project, and served as a Reporter.

52. *See* Fratcher, *supra* note 37.

way. The failure of the New York Commission on Estates to recommend common form probate as a part of its sweeping revision of New York laws and procedures was disappointing, evidently even to some of those involved.[53] In the absence of better explanation, it must be attributed to the fact that surrogates and former surrogates controlled the effort.[54]

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53. The following paragraph opens a report entitled, "Simplification of New York Probate", prepared by staff assistants of the New York Commission on Estates which is published in the Second Report of the Commission (1963) at 60: "Many of the advisory committees suggested to the Commission that it recommend to the Legislature the adoption in New York of one of the variants of probate in the common form. The Commission studied the proposal, heard extensive argument, and voted not to approve probate in the common form. Undoubtedly those advisory committees and individual lawyers who recommended the adoption in this State of the so-called simple probate, were motivated by a desire to simplify our probate procedure and to reduce delay and expense. Many other lawyers and legal groups that were unwilling to go so far as probate in the common form, have also suggested that present procedures be simplified, made less expensive and more expeditious. They have also suggested that provision be made to reduce the large number of probate contests that have no real merit and are prosecuted solely for their nuisance value. At the request of Chairman Bennett, your Committee on Simplification of New York Probate was organized. We accept the decision of the Commission which disapproved probate in the common form (although some members of your Committee favor it), and we take that decision as our starting point."

54. Eight of fourteen of the original Commission were surrogates or former surrogates. (First Report (1962), at 9). The more than 3,700 pages of printed reports of the Special Commission contain rather extended reports about various matters of narrow importance, such as the 35 page report about nuncupative and holographic wills. The subject of common form probate was not overlooked. Indeed, it was identified by a paragraph in the first Report which concluded: "The study of simple probate, or probate in common form, is therefore of high priority". (First Report, (1962) at 25). Other notations in the voluminous reports indicate only that the matter was "tabled" at a Commission meeting on June 22, 1962, after a single meeting on May 31, 1962, between a former surrogate who represented the Commission and members of the New Jersey and Connecticut bars who were invited to explain their state's version of simplified probate (Second Report (1963) at 3). Surely, in view of the extensive staff reports on other rather esoteric matters, the Commission did *not* accord the topic "high priority" in any sense other than the speed with which it was dropped as a study topic.

The disappointing performance of the Special Commission in the area of probate simplification surely reflects the fact that surrogates dominated the Commission. Indeed, it may be more than coincidental that the legislation authorizing the special commission was enacted by the same 1961 session which produced two bills permitting proof of wills by affidavit. The bills passed both houses but were vetoed by Governor Rockerfeller who appears to have accepted arguments by the Surrogates Association which urged that proposals for probate procedure changes be deferred for study by the Special Commission then being recommended. *See* N.Y. Legislative Annual, 1961, at 589; Report 3.3A, Second Report (1963); Com-

C. Public Office Responsibility for Acts of Personal Representatives

Perhaps the most awkward heritage of the American tradition of permitting probate courts to grow just as probate judges and compliant lawyers have thought best is the concept of supervised administration. The notion is accepted in most states that the personal representative handles the business of administration as if he were a receiver in a closely watched proceeding to wind up the affairs of an insolvent debtor. Necessary administrative steps are the occasion for required orders, such as orders regarding appraisals, support payments to dependents, payment of claims and distributions. The responsibility of the personal representative is not ended until he submits his final account to the appointing authority and receives its order of discharge.[55]

In some states which have made maximum use of the logic that an estates court should have power to handle all estate matters formerly handled by the law court or chancery in England, the land of the decedent is included among assets for which the personal representative is responsible in routine cases.[56] In these states, full administration and settlement of estates involving land becomes a necessity from the standpoint of the land title examination specialists as well as from that of probate bondsmen, and probate court officials.

Most of the aspects of probate which the public has learned to identify and dislike in recent years are facets of supervised administration. Statutory time schedules, designed to give appraisers, personal representatives and creditors decent opportunity to attend to necessary steps or file claims, become impediments to quick settlement in uncontested cases. Since these schedules serve principally to

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mission on Estates, at 60, 62. Surely the power of the Surrogates Association was responsible for the fact that the 1961 enabling legislation specified that at least five of the Commission had to be surrogates designated by the governor.

The recommendations of the Special Commission in regard to small estates, proof of wills by affidavit, and holographic wills also appear to fall short of standards one might identify as critical to probate simplification. These recommendations deserve more attention than can be given here.

55. Though the degree of supervision varies among states which require personal representatives to obtain a closing order, the description of the modern Massachusetts system in Atkinson's article is useful. Atkinson, *supra* note 32. A recent survey of lawyers in 23 states provides useful insights concerning the variety of procedural detail which frame probate procedures in several states. *See*, *Estate Administration: Current Practices and Proposed Uniform Probate Code*, *supra* note 18.

56. *See* Simes and Basye, *supra* note 8, 43 MICH. L. REV. 113, 121, (1944).

separate orders by which the court adds its blessing to what dutiful fiduciaries and attorneys report to it, they have a greater potential for embarrassing the legal community with "unclosed" estates than for safeguarding private interests. Time consuming notice requirements for interim orders have proliferated under pressure of the *Mullane* decision.[57] At the same time, older requirements for wasteful publication of probate notices remain on the books as a reminder of a simpler day and the power of the legal news press.[58]

Overall, the time schedules and notice requirements are usually pointless, institutionalize delay, and add enormously to the work burden which is assumed by every personal representative and estate attorney. The routine which the statutory notice requirements create also tends to defeat the purpose of notice by making every warning paper ordinary.

Other troublesome details relate in a more indirect way to the notion that the appointing authority has some responsibility for personal representatives. Judges select appraisers, approve bonds, appoint special guardians to represent minors, absent or unborn persons and enjoy wide discretion in regard to these and other procedural points. Much of the popular literature about probate has emphasized abuses which have grown around these perquisites of local judges.[59]

Perhaps the most insidious aspect of supervised administration in many areas is that its promise of protection for survivors is almost totally deceptive. Real responsibility for enforcing fiduciary responsibility falls neatly between the court, the attorney for the estate and the survivors. Bar association pressure in most states, plus institutional doubt as to whether the probate official is a real judge or is more like a policeman, have made probate judges in many areas reluctant to serve the public except in response to a written complaint prepared by a lawyer. Sometimes, survivors who are forced to employ legal assistance to get the court to exercise its control over the estate by issuing letters, discover they must hire additional counsel to get

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57. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, (1949). Changes in Michigan procedures since the Mullane case illlustrate the point.

58. Current Michigan procedures involve mailed or delivered notice to all interested persons when an estate is commenced, and at the time of closing. In addition, two and usually three series of legal publications must be run in order to comply with accumulated statutory and practice requirements. *See* MICH. LAWS ANN., §§ 701.32, 702.29, 702.56, 708.2, Probate Rule 18.

59. *See supra* note 4.

relief from sub-standard performance by the original representative.[60] It is only in cases in which there is no controversy that the supervising court gets credit for protecting survivors via the costly machinery it superintends. Sadly, when the inherent deficiencies of this protective system are identified, the typical correction is to add more requirements and cost.[61]

Other problems of probate are traceable to supervised administration. The dependence of personal representatives on court orders has inhibited the development of useful inherent or implied powers for personal representatives.[62] The non-recognition of personal representatives in courts of states other than that of appointment is tied to their status as functionaries of the appointing office.[63]

The assumption that courts should be responsible to see that public authority over estates is not misused also has led to some grotesque situations in sparsely settled political subdivisions of some of our states and to widespread variance in practice in different areas of the same state. Law-makers have used the argument that probate offices should be located conveniently to all people to justify allocation of probate power to counties. But, many areas cannot or will not support lawyer-manned courts. Thus, lay judges are given the job of interpreting and following state-wide requirements concerning no-

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60. Michigan's recently revised Probate Rule 5a, *see supra* note 61, purports to require probate courts to appoint special fiduciaries when a prior appointee has failed to file an inventory within 30 days after appointment, render an account in accordance with the statutory schedule or otherwise failed to conform to statutory requirements designed to assure prompt settlement of estates. The rule says nothing about who is to pay attorneys' fees for the deposed representative or the special administrator. Further, Michigan statutes so limit the power of a special administrator that in many cases, a third appointment would be required in order to get someone with the necessary authority. See MCLA § 702.61. Rule 5a and its probable meaning in practice provide a vivid illustration of the inadequacies of so-called supervised administration.

61. In the wake of recent adverse publicty regarding unclosed estates, the Michigan Supreme Court recently adopted an amendment to the Probate Court Rules which requires the probate judge acting on his own motion to review files, and appoint special administrators "in the event the fiduciary or his attorney shall fail to perform the duties required of them within the time so limited." Rule 5a. One of the new requirements is that inventories be filed within 30 days of appointment. Since the work involved in identifying and appraising an estate frequently requires more than 30 days, the new rule is producing a flood of "temporary" inventories of little value to anyone.

62. *See* the survey cited in note 55, *supra*, for a summary of the powers now granted to personal representatives by law.

63. H. GOODRICH & E. SCOLES CONFLICTS (4th ed. 1964) § 190 and authorities cited.

tice, appearance, pleadings and conflict of interest. Even in states where most probate judges are lawyers, the relationship between court and attorney is such that the judge's view of state rules controls. Consequently, in some states there are almost as many ways of probating estates as there are counties. Neither of these conditions is conducive to public understanding of the institution.

The procedures in several states offer alternatives to supervised administration. The appointee of Pennsylvania's register of wills is under no obligation to return to the register or the Orphans' Court after appointment, though he assumes liabilities like those borne by a trustee.[64] New Jersey procedures offer generous opportunity for independent administration in testate and intestate estates. New York's recent probate legislation eliminated older provisions concerning appraisers and inventories which had been generally disregarded in practice.[65] Georgia recently added an important provision giving testators authority to insert will provisions which prevent probate court involvement in their estates after appointment of the personal representative.[66] Similar authority, sometimes little used, exists in other states.[67] Texas and Washington institutions involving "independent executors" and "non-intervention wills" have been widely recognized and discussed.[68] Finally, it seems likely that independent administration is achieved as a practical matter in many estates which are administered under supposed supervision of relatively weak or non-aggressive courts which do not attempt to compel court approval of final accounts.[69] Surely, it is difficult to force survivors or counsel

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64. *See supra* note 40.

65. *See* N.Y. STATE LEGISLATIVE ANNUAL, 45 (1964).

66. *See* GA. CODE ANN. §§ 113-1401.1, 113-2307, as amended, Acts, 1964, p. 269.

67. The statutes of South Carolina and Arizona provide examples. ARIZ. REV. STAT. (Rev. 1956) § 14-502; S.C. CODE (Rev. 1962) § 19-532.

68. *See* Fletcher, *Washington's Non-Intervention Executor — Starting Point for Probate Simplification,* 41 WASH. L. REV. 33 (1966); Marschall, *Independent Administration of Decedents' Estates,* 33 TEXAS L. REV. 95 (1954); Woodward, *Independent Administration under the New Texas Code,* 34 TEXAS L. REV. 687 (1956); Woodward, *Some Developments in the Law of Independent Administrations,* 37 TEXAS L. REV. 828 (1959).

69. At a recent meeting of the West Virginia State Bar Association, the author heard lawyers from various parts of the state describe a practice, apparently well established in the more populous areas, of ignoring statutory requirements for audit of accounts by so-called "commissioners of accounts" designated by the county courts.

back to court for approval of accounts and closing order when all monies have been distributed and everyone involved is satisfied.

D. Other Problems of the Probate Bureaucracy

Many by-products of the historic probate bureaucracy can be identified. Provincialism in probate, born of local public office control of each estate and nurtured by different state and local history as it has impacted on the stature and power of the office, has discouraged law school study of probate administration.[70] Among practicing lawyers, the relatively low prestige of trusts and estates work is indicated by the fact that though women have been systematically discouraged from engaging in many areas of law, women lawyers are relatively more heavily involved in trusts and estates work than men.[71] Not surprisingly, probate officials, trustmen and lawyers from relatively small communities[72] have dominated occasional efforts to revise probate law.[73] Consequently, though probate codes seem to be frequently amended, changes cutting anywhere close to the heart of the probate problem almost never occur.[74]

The stagnation attributable to the probate bureaucracy is manifest in almost every aspect of probate law. Intestate succession patterns in

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70. Only 36 teachers are listed under the subject "Fiduciary Administration" in the recent AALS Directory of Law Teachers (1968-70). By contrast, about 340 are listed under "Trusts and Estates" and about 200 under "Estate Planning". Many so-called Trusts and Estates courses involve very little on the subject of probate administration.

71. *See* White, *Women in the Law*, 65 MICH. L. REV. 1051 (1967).

72. The reference to small town lawyers is not derogatory. In the author's experience, lawyers from smaller communities are likely to be more concerned about probate law deficiencies than big-city lawyers of comparable prominence. For one reason, they are more familiar with the costs and problems relating to handling small estates than their counterparts in big firms.

73. The structure of N.Y.'s Commission on Estates is described in note 53, *supra*. The recently approved Wisconsin probate code was prepared by two committees appointed by the State Bar of Wisconsin. Each committee was chaired by a county judge. In all, five state probate officials, four trust officers, one "insurance counsel" and six practicing lawyers only one of whom was from Milwaukee, constituted the group which controlled two law professors who served as research reporters for the project. *See Proposed Wisconsin Probate Code* (West pamphlet). The thirteen member Governor's Commission in Maryland which made recommendations leading to adoption of the Maryland probate laws of 1968, included six persons listed as "Hon." The abbreviation "Esq." follows the names of the other seven. *See Second Report of Governor's Commission To Review and Revise the Testamentary Law of Maryland.* (State pamphlet, Dec. 5, 1968).

every state defy the intention of the average married person[75] by dividing even very small estates between surviving spouse and issue, and ancient distinctions between real and personal property still cause variations in inheritance patterns. Rights of inheritance from blood relatives frequently stand as glaring contradictions to the generally accepted idea that adopted children fare best if spared all knowledge of the identity of their family of origin.[76] Execution requirements for wills perpetuate ancient and demeaning ceremonies in a society which is generally accustomed to transacting business by mere signature. Inheritance rights for children are vigorously asserted, only to be more zealously guarded by cumbersome guardianship procedures which make no sense at all from the standpoint of the family.[77] The old game of protecting imaginary local creditors, combines with that of protecting local land titles from the tamperings of "foreign" courts of adjacent and other sister states, to force multiple probates on the survivors of persons with assets in two or more states.

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74. The proposed Wisconsin probate code makes estate administration a truly ponderous proceeding before a court of record. Prior notice to interested persons is required in regard to orders of probate and appointment, and strict time schedules plus appropriate enforcement mechanisms surround requirements which culminate in a court order closing each estate. *See Proposed Wisconsin Probate Code, supra,* note 73. The author has been informed that most of the draft code has been enacted with a postponed effective date. The recently approved Oregon Probate Code continues the state's tradition of *ex parte* probate, followed by supervised administration. Chap. 591 Oregon Laws, 1969 (effective July 1, 1970). Suggestions emanating from the second draft of the Uniform Probate Code regarding independent administration of estates were not accepted by the revision commission. The recently enacted code in Maryland was also drafted after the second tentative draft of UPC became available in the summer of 1967. In the introduction to the Second Report of the Governor's Commission, it is stated: "When there were major differences between Maryland practice and the Boulder draft, (the second draft, UPC) the Commission, in most instances, followed the existing Maryland practice." However, an important provision in the Commission's draft would have enabled estates to be administered independently of probate court supervision when a will so provided, or all heirs consented. *See* § 7-402 of the draft code, Second Report of the Governor's Commission (Maryland pamphlet, Dec. 5, 1968). This section was dropped by the legislature. The author has learned from reliable sources that protests by elected probate officials caused the deletion.

75. *See* Dunham, *The Method, Process and Frequency of Wealth Transmission.* 30 U. CHI. L. REV. 241 (1962).

76. The Laws of Michigan provide an illustration. *See* MICH. LAWS ANN. § 710.09.

77. A question and answer period followed presentation of papers on the Uniform Probate Code at the annual meeting of the Real Property, Probate and Trust Law Section, ABA, in Philadelphia in August, 1968. As has occurred many

Worse, these and many other examples of probate nonsense are jammed down the throats of the unhappy public as wave after wave of idealistic new probate officials assume their jobs with fresh dedication to see that the estates coming before them are handled with meticulous respect for law. It's a small wonder that community respect for this area of our legal system has all but disappeared in some areas of the country.

E. Collateral Responsibilities of Probate Courts

One other important aspect of the matter should be noted. Though the relationship of public offices to estates is at the heart of our probate problem, one cannot ignore other responsibilities of local probate officials. Probate offices, particularly those called courts but having less power within their area of subject-matter jurisdiction than regular courts, have received responsibility for an interesting array of odd jobs from state legislatures.[78] Varying degrees of jurisdiction over the person and affairs of orphans and other minors is frequently given to the office having control of estates. In recent times, this authority has broadened in many areas into jurisdiction over neglected and delinquent juveniles and their parents.[79] Authority over sanity proceedings involving adults who are alleged to be incompetent, or who need treatment involving curtailment of personal rights may be included. Guardians whose authority is limited to property matters sometimes may be appointed by order of the probate office. Sterilization proceedings relating to mentally defective persons, change of name proceedings, jurisdiction over trustees named by will, and authority to determine and possibly collect inheritance taxes sometimes are handled by probate courts.

II. The Uniform Probate Code

A. An Overview

The briefest description of existing probate problems suggests com-

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times, a probate judge raised questions concerning the protection under the code, then in its third draft, for minor children who share an inheritance with one parent upon the death of the other. The judge observed that he had found surviving parents to constitute the biggest class of probate cheats. *See Questions and Answers on Uniform Probate Code*, 3 Real Property, Probate & Trust L. J. 388 (1968).

78. *See* Simes and Bayse, *supra* note 8, part VI.

79. Michigan laws are an example. *See* Mich. Laws Ann. § 701.19.

plexity beyond the reach of simple remedies. The Uniform Probate Code is neither simple nor easy to describe.

In the preamble, it is stated that the Code relates to "affairs of decedents, missing persons, protected persons, minors, incapacitated persons and certain others". The open-ended reference to "certain others" does not mean that the Code deals with all subject areas presently associated with probate courts in some states. The important area of juvenile law is not covered and nothing is included regarding miscellaneous matters like inheritance taxes, sterilization proceedings, condemnation proceedings and various responsibilities regarding county government. On the other hand, the focus on "affairs of decedents" carries the Code into certain aspects of death benefit contracts,[80] and its coverage of procedures relating to testamentary trusts leads to treatment of procedures regarding inter-vivos trusts.[81] Functions for public offices in the areas covered include jurisdiction of optional proceedings involving decedents' estates, trusts, guardianships and protective arrangements for disabled persons for a full-power court,[82] and limited, non-judicial functions for a local public official, who should not be thought of as a judge.[83] Existing probate offices which do not meet either description may be upgraded or restricted as necessary, or left as now constituted to handle matters not dealt with by the Code.

The Code reflects the view that both substantive and procedural rules relating to affairs of decedents have been overly influenced by our historical preoccupation with safety of estates. As a corrective, substantive rules have been liberalized by more generous use of assumptions regarding the wishes of most owners, and by identifying as desirable rules for uniform adoption, those versions of existing

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80. UPC, Article VI.

81. UPC, Article VII.

82. Under Articles III and VII, the court has jurisdiction to handle all matters involving trusts and decedents' estates which are brought before it by petition. However, the CODE does not compel persons interested in trusts or estates to use court proceedings and offers alternative routes to accomplish normal objectives without judicial proceedings. However, orders of the court are required in regard to certain protective proceedings for disabled persons. *See* UPC, Article V.

83. *See* §§ 1-307, 5-105. UPC references are to the official version which will be published soon by West Publishing Company. The system for numbering subsections used by West varies from that appearing in Prentice-Hall's edition of UPC.

rules which expand opportunities for considering evidence of intention in particular cases. In regard to procedures, the object of the Code is to open opportunities now denied to survivors and their counsel in many states to select from among several available settlement procedures with an eye to finding the desirable balance of safety and efficiency. Procedural provisions have been designed around very limited and specific requirements for every estate which can be handled by non-judicial local probate officials under restrictions designed to curtail power and discourage development of new requirements and powers. Also, the Code offers decedents and survivors simple alternatives to use in case probate procedures remain or become undesirably cumbersome. Thus, prospective decedents will find that UPC significantly strengthens various non-probate methods for effecting transfers at death. For survivors who claim probate assets, the Code offers many alternative methods of perfecting title, some of which include a choice of the public official who will be involved. Finally, problems deriving from variety in state laws concerning succession should be eased by generous use of sections directing local courts to recognize and respect the relationship of the decedent to his domicile.

Because probate law is to be measured more in the way it is implemented in practice than in its formal statement, it is distinctly possible that adoption of the Code may not be followed by probate improvements which the public will perceive and appreciate. On the other hand, the Code certainly permits and encourages very significant improvement in practice in an area of law which has very obvious political overtones as well as a dollar and cents meaning for most families. If it can gain enactment, its potential as an instrument of law reform seems very great.

The package is too big to handle in useful detail in a single article. The approach here is to identify the major topics covered by the Code and the principal purpose of the draftsmen relating to each. Then, some of the more complex and important areas will be analyzed in depth.

B. "Court" Organization and Jurisdiction

The Code describes an office calling simply "Court" to which it assigns functions and proceedings relating to decedents' estates, guardianships, conservatorships and trusts.[84] As indicated by official

84. §§ 1-201(5), 3-105.

notes and comments, UPC's "Court" is more a product of the effort to write coherently of functions to be performed by public officials in any enacting state than an effort to describe an ideal organization.[85] Properly understood, the functions can be sorted in various ways between existing courts and offices in states receiving the Code. However, the Code makes it clear that the tribunal which handles binding adjudications relating to decedents' estates, trusts, guardians or conservators should be empowered to handle any civil litigation to which a fiduciary may be a party, with appeals going to courts handling appeals from courts of general jurisdiction.[86] Ideally, a division of the general trial court will receive this kind of subject matter jurisdiction. The Code is written as if a specialty court having power in limited subject areas equivalent to the general trial court were involved. However, this style merely reflects the need of the draftsmen to find an organizational form which offered the smallest invitation for endless discussions about the desirability of mixing estate dockets and general trial dockets.

The Code also includes a notice system for binding many and widely separated persons interested in judicial proceedings involving estates and fiduciaries.[87] This portion of the Code may be kept as part of a statute describing special procedures of a new, or continued special court, used in a statute describing estate proceedings before a court of general jurisdiction, or sorted into statute and court rule for either species of court.

The assumption of the Code is that a mailed notice affording interested persons warning of each *adjudicative* proceeding, and an opportunity to be heard, is required and desirable.[88]

UPC's "court" includes a "registrar" who is identified as the person designated by the judge to handle non-adjudicative proceedings contemplated by the Code.[89] Legislatures in states where non-lawyers are now permitted to serve as principal, local probate officials could, and parhaps should, assign the registrar functions under the Code to

85. *See* particularly the Comment following § 3-105.
86. §§ 1-302, 1-308, 3-105, 5-204, 5-304, 5-402, 7-204.
87. *See* Art. I, Part 4.
88. *See* §§ 3-403, 7-206. The informal proceedings described in Art. III, Part 3, are deemed non-adjudicative. See §§ 3-302 (effect of informal probate), 3-307(b) (effect of informal appointment), and 3-108 (time limit on testacy and appointment proceedings).
89. §§ 1-307, 3-105, and Art. III, Part 3.

these officials. Under the Code, the registrar handles "informal" proceedings to establish wills or appoint personal representatives.[90] Also, the registrar may be responsible to preserve various documents, notices and demands which may be filed in his office under provisions of the Code.[91]

C. Substantive Rules of Heirship and Family Protection

The Code contains a series of provisions which identify the successors to intestate estates. These are high on the list of provisions which warrant uniform enactment. Designed to work with the administrative provisions offering identical opportunities for simplified administration to testate and intestate estates and augmented by new provisions relating to the handling of property of minors and other disabled persons, the sections on descent are the core of a modern statutory estate plan which is designed to relieve most persons of ordinary means of the need to take affirmative estate planning steps.[92]

The Code also includes three sets of sections designed to protect the spouse and children of decedents from loss of essential family assets to the decedent's creditors, and to protect the spouse from loss of expectancy where the decedent, by design or neglect, disinherits the spouse by will or will substitute. One,[93] which includes a $5,000 "homestead allowance," an exemption for chattels worth up to $3,500, and a family allowance for support of spouse and dependent children during administration, will serve to prefer the close family of a married decedent to all unsecured creditors and takers by will in the first $14,500[94] of probate assets. Another protects after-born children, children believed to be dead, and spouses acquired after execution of a will from disinheritance through oversight or mistake.[95] The third, creating an "elective share", is designed to protect spouses

90. §§ 3-105, 3-301.

91. §§ 1-305, 1-307. Sections contemplating filings, which do not involve response by judge or registrar include §§ 3-204, 3-706, 3-804, 3-1003, 5-202, 5-302, 7-102. § 3-604, relating to the filing of bonds, is somewhat different.

92. Art. II, Part 1. *See* 3 REAL PROPERTY, PROBATE & TRUST L. J. 199 (1968) for a discussion of the law's estate plan.

93. §§ 2-401, 2-402 and 2-403.

94. The figure assumes that the personal representative grants the spouse the full amount or support allowance which can be given without approval of the court. *See* § 2-404.

95. Article II, Part 3 (§§ 2-301 - 2-302).

from transfers by will or will substitute which would reduce the spouse's share of the estate controlled by such transfers below 1/3.[96]

The latter system is as much a part of the subject of intestate succession as it is of the subject of wills. Gifts made by the decedent to the spouse, however effected, are included in the computation so that an electing spouse must take credit for all values received from the decedent before obtaining rights against other transferees by will or certain will substitutes.[97] Apart from procedural provisions of the Code which will be upsetting to vested interests, this new approach to the old forced share problem probably will prove more troublesome for persons studying the Code than any other area. Surely controversy about these provisions characterized the Reporters' discussions of preliminary drafts.

D. Wills

The final substantive system for decedents' estates relates exclusively to the subject of wills. A principal objective of these sections is to provide a uniform base for interpretation of the nation's wills. Another is to aid inartfully drawn wills by reducing recurring problems of meaning through use of rebuttable presumptions regarding a testator's intention.

Also, in order to accommodate testators who may not have sought any legal advice, the Code expands the kind of writings which may be effective as wills. Thus, holographic wills are validated,[98] certain informal dispositive lists referred to in wills are approved[99] and a flexible rule keyed to testator's intent as proved by any evidence is stated to govern the revival problem.[100]

Finally, the draftsmen moved rather boldly to increase the power of testators to choose the law applicable to their estates.[101] Whether or not the Code is ever generally adopted as a uniform law, this provision should dent the concept that the rules of the place of land must control its devolution.[102]

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96. Article II, Part 2, (§§ 2-201 - 2-207).
97. §§ 2-202, 2-207.
98. § 2-503.
99. § 2-513.
100. § 2-509.
101. § 2-602. *See* § 2-506 for a provision relating to choice of law regarding rules of execution of wills.
102. § 3-408 is also relevant in this connection.

E. Coverage Outside Decedents' Estates

The Code reaches beyond traditional limits of the rules for decedents' estates to deal with some problem areas traditionally associated with probate court jurisdiction. Also, it covers some problems bearing a close functional relationship to the general subject of affairs of decedents which are generally regarded as parts of probate law. The Code's coverage of guardianship and the relationship of various kinds of trusts to the probate court are examples of the first category; the second is reflected by the treatment in Article VI of non-probate transfers at death.

1. *Guardianship and Conservatorship*

Article V of the Code is entitled "Protection of Persons Under Disability and Their Property". Covering the subjects of guardians and of conservators, the article describes four separate systems for meeting or reducing problems relating to persons who because of minority, affliction or other circumstances are unable to discharge personal responsibility for their well-being or the care of their estates. Separate systems of personal guardianship are described for minors and for those whose incapacity is unrelated to minority.[103] The separation, due in part to a desire to facilitate removal of either or both subjects from a probate code, also reflects somewhat different procedural safe-guards relating to appointment[104] and different problems of discharge for guardians in the two categories.[105] Each kind of guardian is given limited powers over the ward's estate, consisting principally of the power to expend sums received by him as guardian for support and maintenance of the ward, and to preserve unused balances.[106] The limitations were designed to encourage use of separate, so-called "protective proceedings", leading possibly to appointment of a conservator for the estates of persons with complex financial affairs.

The Code contemplates that guardianship proceedings will be handled by the same full power court which will handle other judi-

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103. Article V, Parts 2 and 3.
104. *Compare* §§ 5-207 and 5-303.
105. *Compare* §§ 5-212 and 5-307.
106. *See* §§ 5-209 and 5-312.

cial business arising under the Code.[107] However, guardians of the person of minors may be appointed by will of the surviving parent.[108] No court proceeding for confirmation is necessary if a testamentary guardian files an acceptance.[109] Indeed, unless a testamentary guardianship is blocked by objection,[110] or ended by removal, the parental rights over the ward conferred on the testamentary guardian by the Code[111] will prevent court appointment after a will designation has been accepted.[112] Essentially the same idea is extended to designations of personal guardians for adult incompetents made by will of an incompetent's spouse or parents.[113] These two methods of identifying guardians further the overall purpose of the Code to provide nonjudicial remedies for recurring needs which may not involve controversy.

Separation of procedures for use in cases where the principal objective is to secure estate management or application for the benefit of the owner or his dependents, from personal guardianship proceedings, serves several objectives.[114] Financial problems for missing, ill, incompetent or minor persons may be remedied on grounds bearing no necessary relationship to the subject's sanity, and without implication that his personal liberty or his ability to contract should be restrained or questioned.[115] Where an owner needs both personal and property protection, more sensitive selection of persons with real interest in his well-being may be expected as the distinction between the guardian's job and that of managing the ward's estate is furthered by the Code. Also, the separate proceeding which is designed simply

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107. Since Article V does not make use of "informal proceedings" as does Article III (decedents' estates), all references in Article V are to "Court" rather than "Registrar". Consequently, the "Court" may not delegate its authority regarding guardianship matters to the Registrar as provided for some matters by § 1-307.

108. § 5-202.

109. §§ 5-201, 5-202.

110. § 5-203.

111. § 5-209.

112. § 5-204.

113. § 5-301. It should be noted that the possibility of securing appointment by the court of a guardian for an incompetent adult is not related to whether another has obtained parental rights of custody via acceptance of a testamentary appointment. *See* §§ 5-303 and 5-304.

114. Article V, Part 4 covers regimes designed to protect property interests.

115. The grounds for a protective order appear in § 5-401. The definition of "incapacitated person" in § 5-101 keys to the procedures of Part 3 of Article V, and has no relevance to Part 4.

to meet property management problems caused by an owner's disability easily includes a proceeding for court approval of a single transaction, like ratification of a minor's contract, or renewal of a lease or mortgage, without appointment of a conservator.[116]

For a conservator who may be appointed to provide continuing management for a disabled person, the Code offers a statutory charter of powers and duties designed to enable him to accomplish the usual purposes of a protective trust for the sole benefit of a person and his dependents.[117] No requests to the appointing court for authority to do what a managing trustee should be able to do, or regular reports or accountings to the court, are required. At the same time, the package offers an array of safeguards and remedies which enable the protected person or anyone interested in his welfare to compel performance of all statutory duties.[118]

Article V includes two features which are designed to minimize the need for guardians of minors and conservators for incompetent adults. For minors, a statutory facility of payment clause protects persons owing up to $5,000 per year to a minor who discharge their obligation by voluntary payment to any adult having the care and custody of the minor.[119] The recipient, who may not be a guardian in a formal sense, is under a duty to apply the funds received to the support and education of the minor, and preserve any unneeded balance for payment when the minority terminates.

The other scheme, changing the usual law of agency,[120] protects persons acting in good faith and without actual knowledge of the principal's death or loss of capacity under a power of attorney given by one who has since died or become incompetent.[121] Also, statutory effectiveness is extended to a provision in a power of attorney that the authority conferred shall not be terminated by known disability of the principal.[122]

It should be noted that Article V changed more drastically during the drafting process than any other portion of the Code. The preli-

116. § 5-409.
117. *See* §§ 5-420, 5-423, 5-424 and 5-425.
118. *See* §§ 5-413 and 5-416.
119. § 5-103.
120. The statutes of Virginia provided precedent for the Code. Code Va. (1950), 11-9.1.
121. § 5-502.
122. § 5-501.

minary drafts show vacillation about whether any coverage of guardians of adult incompetents should be included,[123] uncertainty regarding the effect of a protective proceeding on the subject's capacity to contract[124] and an abandoned proposal to subject creditors of a disabled person to non-claim statutes like those working against creditors of decedents.[125] There were many other, somewhat less drastic changes in content and several fairly major reorganizations of the material. This history accurately suggests that Reporters and Special Committee had a great deal of difficulty with this Article. Much of the subject matter seemed more relevent to the larger problems of mental health and juvenile legislation than to the business of framing modern substantive and procedural rules for decedents' estates and trusts. It would not be surprising if legislatures in enacting states see fit to alter many portions of Article V in varying ways. On the other hand, there is less concern about this subject by various vested interests who will question some of the decedents' estates provisions. Hence, overburdened legislators may be inclined to accept Article V with few changes.

2. *Non-Probate Transfers*

Article VI offers two quite different statutory approaches to two problem areas selected from the world of non-probate transfers. Multiple-party accounts in financial institutions, including joint accounts, Totten trust accounts and accounts providing explicitly for payment on death to persons having no withdrawal right until the decedent's death, are covered in detail in Part One. Part Two consists of a single section dealing with provisions in effective written instruments purporting to shift or cancel rights by reason of the death of an owner.

For joint accounts, the Code abandons the joint tenancy analysis

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123. Part 3 of Article V entitled "Guardians of Incompetents" which appeared in the "Summer 1967 Draft" was dropped from the Third Working Draft which was published in November, 1967.

124. § 5-424 of both the Third Working Draft and Working Draft #5 (distributed in January, 1969) provided that a protected person was incapable of making gifts and most contracts. In the Code as finally approved, § 5-408(5) expressly negates the idea that an order determining disability involves a finding of incapacity.

125. *Compare* §§ 5-425 and 5-427 of the Third Working Draft, with § 5-425 of Working Draft No. 5.

in favor of the broader concept that a surviving party to a multiple-party account contract is entitled to balances attributable to a decedent without regard to whether he had any present, beneficial interest prior to his death.[126] Testamentary benefit for survivors exists unless the account form or other clear and convincing evidence of intention as of the time the account was created indicate otherwise.[127] The Code also declares that a bank account in the name of one as "trustee" for another or others may be a vehicle for a valid testamentary disposition by the trustee to the other or others.[128] Accounts by trustees under trusts evidenced otherwise than by the form of the account are excluded.[129] Finally, accounts for one payable on his death to another, called "P.O.D. accounts" by the Code, are also validated as informal wills.[130] A transfer at death effected by any of the three forms of account has the status of a special specific bequest which passes outside probate administration without abatement in regard to other gifts made by will.[131] However, survivors' benefits in such accounts are subject to certain claims by the decedent's creditors, spouse and children if traditional probate assets are insufficient.[132]

Six of the thirteen sections in the part dealing with multiple-party accounts relate entirely to the relationship between persons who are named on the accounts, on the one hand, and financial institutions, on the other.[133] Reflecting a determination to keep questions involving beneficial ownership between parties completely separated from questions of banker liability, these sections nonetheless support the ownership provisions by stating when it is safe for bankers to pay various categories of persons named in the several forms of account.

Section 6-201 deals with written instruments which can be classified as contracts, conveyances, gifts or trusts and declares provisions therein calling for transfers of values at death to be non-testamentary. The section might prove to be a very important provision of the Code. On the other hand, it could be viewed as adding nothing to existing case law. The draftsmen followed the lead of a few existing statutes which

126. §§ 6-103, 6-104 and 6-106.
127. §§ 6-101(4), 6-104.
128. §§ 6-101(14), 6-104(c), 6-106.
129. § 6-101(14).
130. §§ 6-101(10), 6-104(b), 6-106.
131. §§ 6-104(e), 6-107.
132. § 6-107.
133. §§ 6-108 through 6-113.

exempt death benefit provisions in rather narrowly described arrangements, such as "a pension, retirement, death benefit, stock bonus or profit sharing contract plan, system or trust,"[134] but abandoned efforts to limit the statutory declaration to special categories or arrangements. In effect, the Code applies to any written provision which, but for its death benefit aspects, would be capable of creating or altering rights between individuals. If courts will respect various intra-family agreements which the section may invite, the provision could have very significant impact.[135] By offering courts a broad alternative to the probate route for effectuating expressions calling for transfers at death, the draftsmen may have created a form of competition for wills which might serve to assure that probate procedures will be and remain as simple as possible.

3. *Jurisdiction Relating to Trusts*

Many existing probate codes subject testamentary trusts to continuing jurisdiction by the same court which probated the will creating the trust.[136] The irrelevance of attendant requirements of qualification, bond and periodic court accountings and the awkwardness of the continuing jurisdiction idea when applied to cases where trustee and assets are located in different states, are generally recognized by lawyers and trustmen. Widespread enactment of the Uniform Testamentary Additions to Trusts Act or its equivalent,[137] though attributable in part to the desirability of unifying management of inter vivos and testamentary increments to trusts, probably occurred because the legislation offers well counselled testators a way of keeping trusts arising at death away from continuing and expensive probate court control.

But, state procedural codes sometimes leave trustees and others interested in inter vivos trusts with no effecient means of obtaining adjudications which will bind all interested persons.[138] The principal

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134. The quoted language comes from Illinois legislation, S.H.A. ch. 3, § 601.

135. *Cf.* Halldin v. Usher, 49 Cal. 2d 749, 321 P.2d 746, (1958).

136. *See* Simes and Basye, *supra*, note 8, 43 Mich L. Rev. 113, 133.

137. 9c, U.L.A. (1967 Supp.). According to the *Handbook of the National Conference of Commissioners on Uniform State Laws* for 1968, 41 jurisdictions had enacted the Uniform Testamentary Additions to Trusts Act, or substantially similar legislation, as of December 1, 1968.

138. Michigan procedures, now codified in its modern and comprehensive Revised Judicature Act, provide an example. Under RJA, jurisdiction over non-

difficulty, related to the traditional view that the relationship between a trustee and beneficiaries is *en personam,* lies in subjecting non-residents to the authority of the court. Legislation authorizing mailed notice to trust beneficiaries is clearly valid,[139] but not all legislatures have accepted the fact that there are many inter vivos trusts other than those creating common trust funds or involving local land which need legislative assistance.

One of the objectives of Article VII is to offer procedures for obtaining adjudications concerning trusts which apply equally to testamentary and inter vivos trusts.[140] Probate critic Norman Dacey has interpreted reports about the Code to mean that inter vivos trusts are subjected to the same kind of relationship to the probate court as is required now by typical probate code provisions dealing with testamentary trusts.[141] The Code is plainly to the contrary. It identifies what may be called a home base court for each trust by requiring trustees to register trusts with the court at the trust's principal "place of administration".[142] The court of registration is empowered to enter orders in proceedings initiated by interested parties which bind persons to whom prior notice has been given in accordance with the Code's basic system for notice of estate proceedings.[143] But, there is no duty on trustees or beneficiaries to initiate proceedings in the court of registration, and "neither registraton of a trust nor proceedings . . . result in continuing supervisory proceedings."[144] In effect, therefore, the Code offers both inter vivos trusts and testamentary trusts flexibility in regard to court proceedings like that currently available to inter vivos trusts and convenience in regard to extending proceedings to non-residents like that now available to what Professor

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resident beneficiaries of a trust cannot be obtained except through service of process in the state, or waiver, unless the litigation can be maintained under MICH. STAT. ANN. § 27A.705 which authorizes mailed notice in cases involving "ownership, use or possession of any real or tangible personal property within the state."

139. Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1949).

140. *See* Introduction to Article VII.

141. *See* newspaper article bearing Mr. Dacey's by-line and "Copyright, 1969, by North American Newspaper Alliance, Inc.," which appeared in several of the nation's newspapers in early 1969, including the Connecticut Sunday Herald edition of April 20, 1969.

142. § 7-101.

143. § 7-103.

144. § 7-201.

Casner has called "court trusts".[145] At the same time, it completely avoids requirements of court qualification, bond and mandatory accountings.

Article VII has another important objective. It is to strengthen the ability of an owner to devise property of any location to a trustee of his choice. Under the Code, a testamentary trustee derives his title and power from the will rather than from court appointment. The Code provides "unless otherwise doing business in this state, local qualification by a foreign trustee, corporate or individual, is not required in order for the trustee to receive distribution from a local estate or to hold, invest in, manage or acquire property located in this state, or maintain litigation."[146] It also provides, "A foreign corporate trustee is required to qualify as a foreign corporation doing business in this state if it maintains the principal place of administration of any trust within the state."[147] These provisions should go far to free corporate trustees of restrictions which have probably served more to discourage realization of the full potential of existing leads to new trust business, than to protect them from unwanted competition by out-of-state organizations.

The foregoing general description of the Uniform Probate Code only scratches the surface. Detailed analysis of many areas and sections will be needed before an accurate assessment of the Code can be made. For example, careful study of the Code's treatment of inheritance rights of illegitimate and adopted children should be related to existing habits of draftsmen dealing with class gifts.[148] Form book clauses for wills should be reviewed with careful attention to the Code's rules of construction.[149] Conflict of Laws scholars and proce-

145. ABA film, "The Revocable Trust".
146. § 7-105.
147. § 7-105.
148. The important sections are §§ 1-201(3), 1-201(17), 1-201(21), 1-201(29), 2-109 and 2-611. In regard to the last section, users of the Prentice-Hall edition of the Code published in August, 1969 should know that the publishers failed to notice a re-draft of the section which was accomplished during the proceedings of the Commissioners on Uniform State Laws at Dallas. The correct version of the section which is one of several dealing with construction of wills, is as follows: "Halfbloods, adopted persons and persons born out of wedlock are included in class gift terminology and terms of relationship in accordance with rules for determining relationships for purposes of intestate succession, except that a person born out of wedlock is not treated as the child of the father unless the person is openly and notoriously so treated by the father."
149. Article II, Part 6, is of particular relevance.

durists should give the provisions having closest relation to their area of interest close scrutiny. Old prejudices against guardians and conservators should be reconsidered in light of Article V. Bankers and others offering demand or time account contracts need to explore the wide new world of multiple-party accounts which is opened by Article VI. Estate planning specialists will find new uses for testamentary trusts and many other ideas made safe or efficient by the Code. The list could be extended.

F. Probate Procedures

1. *Introduction*

The heart of the UPC is its package of procedures, restrictions and limitations relating to decedents' estates. Consisting of 16 parts and 140 sections of Articles III and IV, and occupying about 46% of the pages of the entire work, the procedural and administrative core of the Code seeks to establish new rationality in probate through reduction of the necessity and importance of contacts between survivors and the Court or any public office. If enacted and used, these provisions implement purposes of the draftsmen to (i) take the critical question of how much procedure must attend each administration away from the probate office and to move this important power to persons interested in particular estates; (ii) provide methods of administering estates which will enable efficiency in succession equivalent to that associated with transfers at death via revocable trusts; (iii) eliminate the need for or advantage of separate administration for portions of a decedent's estate which happen to be located in various states.

If organization of the offices and courts dealing with estates is adjusted to make optimum use of the new procedures for decedents' affairs, the Code may reverse the historic tendency of minor probate officials to work themselves toward the postition of powerful members of the regular judiciary. In states where probate officials already have stature like that of trial court judges, the courts should be combined. In addition to the savings of public and estate funds which should follow if estates may be settled with fewer contacts with less important officials than at present, the new look promises new vitality for the nation's fiduciary industry and all associated with it.

The working relationship between the several parts and sections of Article III must be understood if the bright promise of the package is to be realized. Also, comprehension of the details of the system will be needed to answer criticisms which can be anticipated from some probate officials and two well organized and well financed commercial groups. The American Insurance Association, representing companies selling probate bonds and the National Newspaper Association representing county newspapers and metropolitan publications specializing in legal news and advertising, made it clear during the drafting stage that they are unhappy with the Code's provisions regarding probate bonds and published notices. Whatever else may be said of their respective positions, it is certain that their complaints will put pressure on advocates of the Code to demonstrate that its safeguards are adequate and that its system in regard to notices is fair and constitutional. The anticipated opposition from these groups and the importance of Article III to the cause of probate simplification warrant a more detailed analysis of this portion of the Code than can now be made of other important areas.

2. *Probate Procedure: Detail*

The first few sections of Article III describe the relationship between a public office and the complex of interests in a decedent's assets represented by his creditors and successors. Under Section 3-101, all the estate of a decedent, without distinction between real and personal assets, "devolves to the persons to whom it is devised by his last will . . . or in the absence of testamentary disposition, to his heirs . . . subject to [certain allowances] rights of creditors, . . . and to administration." Subject to exceptions which will be mentioned later, Section 3-102 requires that wills "be declared to be valid by an order of informal probate by the Registrar, or an adjudication of probate by the Court" if they are to be effective to prove a devise.[150] Section 3-103 then provides that one must be appointed by the court or rgeistrar to become an executor or administrator. Section 3-104 provides that claims of a decedent's creditors may not be enforced against his successors except through a personal representative or after property has been distributed by a personal representative.

150. The term "devise" is defined by § 1-201(17) to include any disposition by will of any kind of property.

Finally, Section 3-105 confers exclusive jurisdiction on the Code's court and registrar to grant orders on matters like probate of wills and grant of administration. Section 3-108, with appropriate exceptions for wills previously proved in the decedent's domicile and appointments necessary to complete unfinished administrations, bars either probate or appointment proceedings commenced more than three years from death. Section 3-803 bars unsecured claims against a decedent which are not presented to a personal representative within three years of death. The section applies whether or not a personal representative is appointed.

From these provisions, it can be seen that the Code continues the traditions of post-mortem probate of wills and creditor protection via a publicly appointed personal representative. But the limitations and other features of the sections offer new opportunities for survivors to avoid all contact with the probate court.[151]

When contact with the probate office is necessary or desirable, "informal proceedings" before the registrar, consisting largely of examination to determine whether sworn applications are complete and consistent with the Code's guidelines and involving no notice or delay (other than a mandatory period of five days after death) are available to handle the critical steps of probate and appointment.[152] By contrast "formal testacy proceedings" before the judge of the Code's court are offered to provide adjudications concerning testacy which may be original, corroborative of previous informal proceedings or motivated by someone's desire to contradict an informal order.[153] Also, formal appointment proceedings are available to aid

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151. The Code does not compel probate or appointment. If three years from death elapses before a decedent's survivors take any action involving the probate office, any wills of the decedent are barred from probate and unsecured claims against his estate are eliminated. The heirs to whom the estate devolves upon the decedent's death hold the estate free of claim or encumbrance except any resulting from tax legislation or existing against the decedent before his death. Of course, it may be necessary to determine who the heirs are, and § 3-102 leaves small possibilities that a later discovered will may be used to prove another succession. Also, certain rights to homestead and exempt property may be asserted without the necessity of administration. Still in many situations, the most significant compulsion for securing administration of a decedent's estate will be to gain the protection for purchasers and persons transferring a decedent's assets which are keyed to an appointment. See §§ 3-703, 3-714, 3-910.

152. Article III, Part 3.

153. Article III, Part 4.

resolution of disputes relating to priority or qualifications of an applicant for appointment.[154]

Another point should be noted. The Code permits a will to be probated, either informally by the registrar or in formal proceedings before the judge, with no attendant requirement that the executor named therein be appointed or otherwise empowered to settle the estate.[155] If the decedent is believed to have died intestate, a formal proceeding for an order finding this fact and determining heirs is available without appointment of an administrator. Thus, the Code avoids a problem of the *Model Probate Code* which swept the question of will or no will into a single proceeding involving administration.[156]

If no will is offered for probate and no steps are taken to administer an estate as intestate within three years of a decedent's death, the heirs are secure in their claim to the estate. Exceptions to 3-102 permit a later offered will to be admitted in evidence without having been probated, but only if there have been no estate proceedings of any kind *and* to confirm a possession enjoyed during the three year period by the devisee, or to prove succession to an asset which was unknown to successors of the decedent during the three year period for administration. Heirs will not be able to offer assurance to purchasers or transfer agents until the three years has elapsed, but unless and until someone proves a will or secures appointment of an administrator, their possession of an estate following the decedent's death is lawful and may be enforced against third persons who cannot show interest in the estate. Hence, a decent opportunity to avoid probate court contact is afforded heirs who possess a decedent's assets and satisfy his creditors. Predictably, prospective purchasers and transfer agents dealing with heirs who follow this route will require assurance concerning the identity of the heirs, the date of the owner's death and some proof relating to possession of the assets during the three year period.[157]

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154. § 3-414. The question of priority to serve as personal representative may be resolved by decision that the decedent died testate, or that he left no will. If so, the testacy proceeding described by § 3-401 would be appropriate.

155. §§ 3-301, 3-401.

156. The MODEL PROBATE CODE has been criticized for its failure to permit probate without administration. *See* Rheinstein *The Model Probate Code: A Critique*, 48 COLUM. L. REV. 534 (1948).

157. *See supra* note 151.

One who claims under a will and is also interested in minimum contact with the probate court, may obtain probate of the will in informal or formal proceedings and then await passage of time. If his probate proceeding was informal and therefore non-adjudicative, the running of three years from death will perfect his title as well as bar all claims of possible unpaid creditors. If the probate was formal, the title probably will have been perfected before three years bars any possible creditor who has not been paid.[158] The devisee who avoids administration will need releases from any spouse or children who have statutory rights to take ahead of the will.[159] Also, he will have the full burden of any interpretive problems concerning the will. Still, many cases can be imagined in which neither kind of difficulty will arise.

Having noted that administration of both intestate and testate estates can be avoided, it is appropriate to take a closer look at what administration under the Code entails. It's fair to say at the outset that administration should offer more advantages than problems for most categories of survivors.

Section 3-103 states that administration is commenced by appointment of a personal representative by the Court or by the Registrar. As noted above, either probate of a will, appointment of a personal representative, or both may be obtained in a non-adjudicative "informal proceeding". However, petitioners have the option of getting binding determinations by the Court regarding will or no will, or settling questions of priority and qualification regarding persons who seek to administer estates.

After securing letters, a personal representative whether acting as executor under a probated will, or as an administrator in intestacy, becomes in effect a statutory trustee. The Code gives him the duty and the necessary powers and protections to permit him to accomplish

158. § 3-412 permits vacation of an order in a formal testacy proceeding for certain reasons if the petition for vacation is filed prior to the earlier to occur of closing of an administration, one year from entry of the order, or three years from the date of death.

159. Certain family rights described by Parts 3 and 4 of Article II may be implemented without administration. The right to an elective share which a surviving spouse may assert under Part 2 of Article III is barred if not properly asserted within six months after the appointment of a personal representative. Although the Code is not explicit on the point, it would seem that the elective share is barred by the failure to commence an administration within three years after death. *See* §§ 2-205, 3-108.

the entire job of collecting assets, paying debts, and selling land or intangibles as needed to raise necessary cash and distributing the estate to the successor.[160] If desired, all of these steps can be handled without further court orders.[161] Again, however, isolated adjudications to answer particular questions or general orders settling accounts are available as needed.[162]

Creditor's claims are presented by simple statement to the representative, and barred by statutes of limitation if not presented.[163] Purchasers and transter agents are protected if they deal with a representative, even though he may be violating the will or otherwise breaching a duty.[164] Distributions will be on risk of liability by distributees for repayment unless suitable adjudications to eliminate risk occur.[165] Because the representative is not an officer of the court, and because the draftsmen sought to make intestacy resemble the will which an average person would want, no bond is required unless requested. Also, no reports or accounts need be filed with the Registrar or court unless a proceeding is commenced.[166]

The status of a personal representative, including all statutory powers and abilities to protect third persons, is the same whether his appointment is obtained in formal or informal proceedings.[167] Also, unless a special proceeding called "supervised administration" is ordered at the petition of an interested party,[168] the authority of either court or registrar over a personal representative ends with the appointment.[169] Later proceedings may bring the personal representative before the court for any appropriate order, but a petition by the

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160. Article III, Part 7, describes the duty and power of a personal representative. Article III, Part 8, describes methods by which a personal representative may secure protection against creditors of the decedent and the estate, and Parts 9 and 10 are relevant to the personal representative's liability regarding distributions. § 3-703(b) which protects a personal representative who proceeds without protection of a formal order regarding testacy is especially important.

161. §§ 3-107, 3-704.

162. § 3-105.

163. §§ 3-801 through 3-804.

164. § 3-714.

165. §3-909. But, purchasers from distributees are protected by § 3-910 and § 3-703 protects the personal representative unless the distribution was unauthorized by the terms of a probated will or involved a mistake as to the identity of devisees or heirs.

166. § 3-107; *See supra* note 82.

167. §§ 3-107, 3-307(b), 3-601, 3-602, 3-703.

168. Article III, Part 5, describes supervised administration.

169. § 3-107. *Cf.* § 3-602.

representative or other interested person is necessary to institute a later proceeding.[170] In this fashion, the Code offers the option of independent administration for both intestate and testate estates.

The meaning of all this is that unless someone demands notice as is possible under Section 3-204, the heirs of a decedent who is believed to have died intestate may obtain an appointment of a personal representative five days after the decedent's death.[171] After obtaining letters, the person or persons appointed assume a role very much like that of trustees of a well drawn revocable inter vivos trust who are directed to distribute trust estate remaining after the settlor's death after first satisfying all of his creditors. However, differing from such a trustee, the basis for the authority of the personal representative will be a matter of record in the registrar's office. Also, by accepting letters, a personal representative consents to personal jurisdiction of the Court in any proceedings which may relate to the estate.[172]

If a will is involved, its probate must be obtained prior to appointment of the named executor.[173] However, probate in informal proceedings will suffice. Even if the security of a binding order on the question of will or no will is desired, the Code encourages use of an informal probate to establish the will so that the executor may be appointed, after which a corroborative formal probate proceeding may be initiated without impugning the authority of the earlier appointee in any way.[174]

3. *Protective Features*

Before assessing the overall desirability or fairness of the administrative system, the Code's protective devices must be considered. Many relate to the fact that persons who seek to acquire useful control of a decedent's assets via a personal representative must make application to a public office for proof or authority. It is true that heirs acquire title to a decedent's assets upon his death and without prior contact with any public office, but their authority will not enable them to give a marketable title, at least for some considerable period.[175] Devisees are entitled to immediate possession pending ap-

170. § 3-105.
171. The five day waiting period is described by § 3-307.
172. § 3-602.
173. § 3-102.
174. § 3-401.
175. The devolution at death described by § 3-101 is "subject . . . to administration."

pointment of a personal representative, but only if they can prove their right and they may not use a will for the purpose unless it has been probated.

Several features of the public office contact required of survivors who seek to control a decedent's assets involve meaningful safeguards. The Code prescribes the content of applications for informal orders and forces applicants to divulge a good deal of information about the decedent, his survivors and his status in regard to known wills.[176] Misstatement may involve perjury.[177] Also, Section 1-106 specifies that one guilty of fraud in connection with any proceeding or statement filed with the Court remains personally liable to persons injured thereby until two years after discovery of the fraud. No order in an informal proceeding may be entered until five days from death has passed.[178] Any person with an interest in an estate may block the possibility that a future informal order may be made without notice to him by filing a demand for notice at any time after the decedent's death.[179] Also, a formal proceeding to probate a will or to declare that the decedent died intestate, or to secure appointment of a personal representative, or both, may be initiated at any time within three years after death by any interested person.[180] If initiated before an informal order has been made, this proceeding prevents issuance of an order without notice.[181] Notices required by the Code must be by personal service or mail.[182] Mere publication is not enough, except as it serves to start a limitation period which will bar creditors who fail to present claims.[183]

Further, anyone seeking appointment as a personal representative must satisfy the Registrar that he has priority ofr appointment under Section 3-203.[184] Unless there is a will, Section 3-203 assures priority for the spouse of the decedent, and if there is no spouse, gives a joint priority to all heirs. If there are several, each must concur before one or a nominee of the group may be appointed. If concurrence is not

176. § 3-301.
177. § 1-310.
178. §§ 3-302, 3-307.
179. §§ 3-204, 3-303, 3-308.
180. §§ 3-108, 3-401, 3-414.
181. § 3-401.
182. § 1-401.
183. §§ 3-801 — 3-803.
184. § 3-308(7). *Cf.* § 3-309.

demonstrated to the Registrar, the proceedings must be recast as formal proceedings.[185] Here, the judge may select a personal representative, but only after notice to all interested persons and an opportunity for hearing.

Finally, one having priority must qualify by posting any bond required by will, or required because another interested person has filed a demand for bond with the registrar before the appointment letters may issue.[186]

If an interested person fails to take steps to protect himself in advance against appointment of one he deems undesirable, and the inherent protection of being a beneficiary of a statutory trust is not sufficiently reassuring, there are several other remedies. The worried successor or creditor may impose a requirement of bond by demand,[187] institute proceedings to enjoin or limit the power of the appointee,[188] institute a formal testacy or appointment proceeding to test the basis of the appointment and thereby limit the broad power otherwise available to the appointee,[189] or obtain removal of the appointee if any misstatement appears in his application for appointment.[190] Also, he may initiate a special proceeding seeking supervised administration.[191] If his request for supervised administration is granted, the letters of the personal representative may be endorsed to indicate any special restrictions on power.[192] Also, a supervised personal representative may not distribute without order of the court.[193] As may seem from Appendix A, these precautions combine with other considerations to support omission from the Code of any blanket statutory requirement of bond.

4. *Notices*

Is the Code defensible in regard to notices? The approved version imposes a duty on every personal representative to mail notice to every interested person, including heirs apparently disinherited by

185. § 3-203(e).
186. § 3-601.
187. § 3-605.
188. § 3-607.
189. § 3-401.
190. § 3-611(b).
191. Article III, Part 5.
192. § 3-504.
193. § 3-504.

the will which provided the basis for his appointment.[194] Further, each personal representative is under a statutory duty to publish notice for creditors once each week for three weeks following his appointment.[195] Failure to advertise makes the personal representative personally liable to creditors who may prefer to reach him than to pursue distributed estates. No other notices are required unless some interested person seeks an adjudication in formal proceedings. Then, only those given notice in accordance with the Code's scheme for notice are bound.[196] If an adjudication of a decedent's testacy is sought, the Code requires mailed or delivered notices to all known persons having interests and a published notice for the benefit of possible unknown successors.[197] As previously noted,[198] if property is distributed to devisees under an informally probated will which is later contested successfully in proceedings started before the three year limitation period runs, the personal representative is exonerated, but the persons who received the estate remain personally liable to restore what they have received or its value. Purchasers from the personal representative, or from distributees following an unadjudicated distribution, are protected from liability to the heirs in the case supposed.[199] The same pattern of relationships apply to an estate which is distributed prior to discovery and probate of a will in a case where there was no prior adjudication of intestacy.

Lawyers in states which presently require some form of notice to interested persons before issuance of letters tend to recoil from the idea that the wide power over estate assets given by the Code to a personal representative may be obtained without some form of advance notice to interested persons. There are, however, several justifications for the Code's position on this point. The most important is that the proposed system, featuring issuance of letters without notice and non-supervised administration, has been proved satisfactory by generations of use in Pennsylvania.[200] Many other states also permit

194. § 3-705. In Working Draft Number 5, this section only required notice to heirs of a testate decedent when it appeared that the will related to less than all of the estate.

195. § 3-801.

196. § 3-106.

197. § 3-403.

198. *See* text *supra* at nn. 158 and 165.

199. §§ 3-174, 3-190.

200. *See* HASKINS, SMITH & GROSSMAN, PENNSYLVANIA FIDUCIARY GUIDE, *supra* note 49.

letters of administration to be obtained without advance notice,[201] and it is widely recognized that one with letters has full practical control of the decedent's liquid assets notwithstanding the degree of "supervision" exerted by the court following appointment. Thus, accumulated experience affirms that survivors do not avail themselves of the possible opportunity afforded by ability to get letters quickly and without notice to take advantage of fellow heirs.

Also, one urging that notice should be required before a personal representative can gain control of assets must assume the burden of explaining why the probate route to control of assets must be more awkward than non-probate alternatives which are freely available. Thus, joint accounts and revocable trusts, and the acknowledged ability of persons who are close to an owner before and immediately after death to cause his liquid assets to appear to belong to survivors, will continue to provide working alternatives to the probate route which will permit some survivors to gain control of assets without advance notice to other heirs. Family pressures and basic honesty must provide satisfactory controls for this power. Otherwise, our law of probate alternatives surely would not be as it is. Also, it is sensible to match probate rules functionally similar to those applicable to probate alternatives. Owners should be encouraged to allow their estates to flow through probate where some record of assumption of responsibility for control of assets is created.

Another reason for permitting letters to issue before notice is that many of the Code's safeguards tend to reduce any associated risk. Letters may not issue without notice to anyone having a better or equal right to letters. Letters may not issue without notice to anyone who has demanded notice.

Finally, a requirement of notice before probate has implications which tend over time to run against the objective of keeping succession procedures simple. An order after notice appears to be a judicial act which adjudicates rights. Traditional considerations relating to

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201. In a recent ABA survey, respondents from eleven of twenty-three states contacted indicated that no notice, other than possibly by publication, is required in regard to an application for appointment of an administrator. The states so indicated as supporting the proposition that letters are available without notice are: Colorado, Florida, Illinois, Iowa, Maryland, Minnesota, North Carolina, Ohio, Pennsylvania, Texas and Vermont. *See Estate Administration: Current Practices and Proposed Uniform Probate Code*, 3 REAL PROPERTY, PROBATE AND TRUST L. J. 2 (1968).

procedural due process suddenly become important though most would concede that a state does not have to dispense control of decedents' estates through judicial proceedings. A magistrate who has authority to make an order only after notice to interested persons may shrink his effective responsibility to that of checking notices. Such a dispersal of responsibility causes inefficiency. Worse, the magistrate may decide that he should require extrinsic proof of heirship to assist in determining whether a requirement customarily associated with jurisdiction has been met. Also, a requirement of advance notice creates a necessity for guardians for minor heirs who may receive or waive notice. After thinking the matter through, one who starts with the idea that a notice requirement would provide a simple way of providing safety for survivors, may well get to the conclusion that a requirement of advance notice almost guarantees that a supposedly simple system will become complicated.

The gist of the argument in support of the Code's provisions regarding notice, or the lack thereof, may be seen in an excerpt from a memorandum adopted by the co-chairmen of the Special Committee which controlled the drafting effort.[202] This responded to contentions by representatives of the legal advertising industry that due process considerations supported their request that published notice be required for every estate before issuance of letters, at the beginning of administration, and at closing.[203]

The position of the newspapers' representatives reflects a misapprehension about the system of administration described by the Code, and a dubious judgment about the effectiveness of legal publication as notice. Thus, the opening statement of their memorandum asserts: "When the state assumes a role in the marshalling and distribution of assets of an estate, it also assumes an obligation to afford due process to all interested parties."

But, the informal proceedings described by the Code are not proceedings leading to binding adjudications affecting rights. Rather, informal probate or informal appointment are events which individuals may cause because the statute sanctions them. No judicial

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202. Memorandum of July 17, 1969. Copies of this document may be obtained by request to the author. *See also* the law review comments cited *supra* at note 50.

203. Memorandum of National Newspaper Association dated July 15, 1968. According to the memorandum, additional copies may be obtained by request to Mr. Paul Conrad, 491 National Press Building, Washington, D. C., 20004.

order is involved. Also, the status and power of a personal representative are conferred by statute under described statutory conditions. Rights of possible successors of a decedent are not finally determined by the statutory proceedings unless and until the basic statute of limitations of three years elapses. Claims of possible successors cannot be cut off earlier except through the process of litigation. If this occurs, the Code makes it quite clear that the best possible notice must be given to persons whose interests may be affected by the questions involved.

Statutes create the power in owners to control their estates by will and define who takes in intestacy. We assume the newspapers recognize that statutes creating successors' rights may define those rights. This makes published notice unnecessary. If the newspapers are correct that notice is necessary, the no notice probate systems followed presently in several states are invalid. It would also follow that a state is powerless to provide an efficient system of succession to property owned at death. This lack of authority would be most unfortunate in view of the clear evidence that a simple system based on confidence in the basic honesty of people is desired by thousands. The committee believes that this authority exists.

5. *Bonds*

The surety bond industry sent a copy of a letter attacking the Code's provisions regarding probate bonds to every member of the National Conference of Commissioners on Uniform State Laws in advance of the 1969 meeting.[204] The gist of the industry's position was that there is no precedent for the Code's basic position that no bond is required of any personal representative except as specified by will, demanded by interested persons or required by the Court in formal proceedings.[205] The concluding paragraph of the letter con-

204. Communication of David Q. Cohen, Counsel, American Insurance Association, 85 John Street, New York, New York 10038, dated July 1, 1969, addressed to "The Commissioners on Uniform State Laws, The Special Committee and the Reporters on the Uniform Probate Code, the American Bar Association Committee to Review the Model Probate Code, The American Bar Association Advisory Committee to the Special Committee on UPC, and The American Bankers Association Liaison Committee."

205. A recent article about the Code erroneously reports that bond is required of personal representatives only when it is determined to be necessary by the court. *See* Lawrance, *Uniform Probate Code — Some Current Comments,* 108

tains the following sentence: "We believe the Code goes overboard in its treatment of the bonding of administrators and its fantastic reliance on naked legal rights as an effective substitute for security." In addition to the letter, several representatives of the industry met with members of the National Conference at a hearing in Dallas held on Sunday, August 3, 1969, to press the objection to the Code's bond provisions.

In response, the Special Committee prepared two documents which were on the desk of each commissioner at the beginning of the Dallas meetings. One of these, reflecting statistical data collected in an important research project concerning probate conducted in Cleveland, Ohio, illustrated that most probate estates are quite small and only a few involve controversy. The second was a detailed brief in support of the Code's position on bonds.

These documents are an important part of the legislative history of the Code. For this reason and in the interests of assisting state legislators who are certain to be bombarded with contentions that the Code does not provide adequate protection for inheritors of intestate estates, these documents are reproduced in the Appendix.

Conclusion

The American probate institution reflects more than two centuries of experience with an unfortunate legal premise. The accumulation of courts and procedures which now surround the simple matter of succession to property of a decedent is a sad monument to the predilections of the legal and political communities to serve their specialized interests when public ignorance or indifference permit. Though public interest in probate has come alive, it remains to be seen whether lawmakers will make the correct response. If they do not, the old institution will simply wither away as the public and responsive counsellors perfect private corrections for bad probate law. The Uniform Probate Code offers a way by which states can find a more constructive approach.

Trusts & Estates 1133 (1969). The Code requires that an executor must post bond before receiving letters if bond is required by the terms of the will (§§ 3-601, 3-603). In other cases, bond is required if demanded by any interested person (§ 3-605). Bond requirements so generated may be negated by the court upon finding that no bond is required, but the requirement remains until countermanded in formal proceedings.

In all probability, the Uniform Probate Code probably will not be adopted by any state in exactly the form approved at Dallas. Its substantive provisions invite changes in rules which are so old as to be confused with the natural order of family expectations. The tougher sledding will be against the vested interests which will seek to protect themselves by a few small and well camouflaged changes in the sections dealing with bonds, published notice and court control of estates. The complexity of the procedural provisions makes the Code vulnerable to this kind of attack and compromise.

But, the Code also places dozens of important and heretofore obscure details of probate procedure in a rational setting which may make it easier for proponents to show how each contributes to an important effort at law reform. Hence, it should be a valuable format for local studies. In the final analysis, however, the future of the Code is closely linked to the larger question of whether modern lawmakers are able to chart a course toward some reduction of a local political institution which has prescribed its own needs for function and growth for a very long period.

APPENDIX

The two documents which are reproduced here were distributed to members of the National Conference of Commissioners on Uniform State Laws at the beginning of the 1969 meeting in Dallas. The "Probate Fact Sheet" summarizes some data abstracted from the manuscript, *The Family and Inheritance, op. cit.*, note 33. The memorandum concerning bonds is described in the text at note 197.

PROBATE FACT SHEET

(From a survey of decedents' estates, Cuyahoga County, Ohio, closed or released from administration between Nov. 9, 1964 and Aug. 8, 1965, as revealed by a sample of one out of every 20 estates docketed.)

Frequency of Probates	*County population*	2 million
	# of estates per month	1,464
Testacy	% of testate estates	69%
	% of intestate estates	31%
Size of Gross Probate Estate	*Mean* gross value, all estates	$ 31,097
	Mean gross value, testate estates	41,218
	Mean gross value, intestate estates	8,599
	Median gross value, testate estates	15,000
	Median gross value, intestate estates	6,000
Frequency of large ($60,000) and small ($2000) estates	48 estates, or 7.3% of those sampled, grossed over $60,000. Only 2 of these were intestate. 85 estates, or 13% of those sampled, grossed under $2,000, and the remaining 526 grossed between $2,000 and $60,000.	

		#	%
Time in Probate	*up to 9 months*	210	or 31.9%
	9 to 15 months	290	or 44%
	over 15 months	159	or 24.1%
Survivor Patterns	Spouse only	60	9.1%
	Spouse and lineal heirs	321	48.7%
	Lineal heirs and no spouse	191	29.0%
	Collateral kin	75	11.4%
	No known kin	12	1.8%
			100.0%

Frequency of Disputes	Will contests were instituted in 6 or 1.3% of the testate cases. All 6 cases were settled. Claims for or against estates for debts alleged to be due, or assets alleged to belong in probate, occurred in 6 estates.
Creditors' Claims	Aside from funeral expenses, no debts of any sort appeared in probate records in *41% of all estates grossing between $6,500 and $15,500*. For smaller estates, the "no debt" category accounted for from 46% to 90% of all estates. The report concludes "In general, we do not find that debts constitute a significant problem in the settlement of an estate. First, the

debts usually constitute a small proportion of the gross estate. Second, the survivors of the decedent usually make provision for payment without the necessity of court proceedings."

MEMO

July 8, 1969

TO: The Special Committee, Uniform Probate Code

FROM: R. V. Wellman, Chief Reporter, Uniform Probate Code

RE: Probate Bonds and the Uniform Probate Code

The attached statement of the Chief Reporter responds to the memorandum concerning probate bonds by Mr. Cohen of the American Insurance Association. We concur with Professor Wellman in this response, and urge every Commissioner to give this document their careful attention.

You have received Mr. Cohen's memorandum of July 1, 1969 on behalf of the American Insurance Association, which presents the case against the draft Code's proposals relating to probate bonds. The purpose of this memorandum is to enable members of the National Conference to see both sides of the matter.

Provisions of Draft Code on Bonds

The draft code which the National Conference will consider at Dallas is not silent on the subject of bonds for fiduciaries who are subject to probate court jurisdiction. Sections 3-603 through 3-606 cover the subject as it relates to personal representatives of decedents; e.g. executors and administrators. Sections 5-411 and 5-412 cover bonds for conservators and Section 7-304 deals with bonds for trustees. It may be inferred that the American Insurance Association is content with the provisions concerning bonds for conservators and trustees, for Mr. Cohen's memorandum deals only with bonds for personal representatives. In any event, this memorandum is limited to a discussion of bonds for personal representatives of decedents.

The code uses the term "personal representative" to include executors under wills and administrators in intestacy. It proceeds from the assumption that there is no fundamental difference between these offices.

Section 3-603 provides that bond for a personal representative is required if:

(a) it is so ordered by the court in formal proceedings;

(b) any person having or claiming an interest in the estate worth in excess of $1,000, demands bond by writing filed with the probate court registrar with a copy mailed to the personal representative; or

(c) bond is required by the terms of the decedent's will.

The Section also states that bond is not required in other cases.

Elsewhere in Article III, the code specifies that a personal representative's appointment may result from adjudication after notice to interested persons by the judge of the probate court (formal appointment), or it may occur without notice or delay following application to the registrar (informal appointment). In either event, an appointment creates a statutory fiduciary who, unless appointed

in formal proceedings as a "supervised" personal representative, is beholden only to the creditors and successors of the decedent to carry out the purposes of administration as expressed by the code. The public office making the appointment has no further responsibility in the matter, unless and until its jurisdiction as a court is invoked in extraordinary estate proceedings by or against the personal representative. (3-107).

Some other details of the Code are relevant to bond. Except for a special representative, no informal appointment may be made after a petition seeking a court order concerning an appointment been filed (3-401; 3-414) and bond may be required for a special representative, however appointed. (3-603) This means that any interested person can be assured that the judge will have an opportunity to pass on the need for bond before any appointment is made. All he needs to do is to file a petition in a formal probate or appointment proceeding before an informal appointment has been made. In this connection, it is important to note that no informal appointment may be made until five days from death have elapsed. (3-307(a)) As to appointments in informal proceedings, an obligation to post bond arising from the provisions of a probated will must be met before the personal representative may receive any evidence of his authority. (3-601) An obligation to post bond arising from demand of an interested person made after a representative has been appointed is enforced by (a) the personal representative's statutory powers are suspended until the bond requirement has been met (3-605); (b) on petition, the personal representative may be restrained in any manner (3-607) and (c) if a demand for bond is not complied with within 30 days, on petition the personal representative can be removed. (3-605)

From the foregoing, it may be seen that the risk that someone can gain powers as a personal representative before a judge has had an opportunity to pass on the desirability of bond is narrower than the possibility that a personal representative may be appointed informally. The difference is measured by cases where a will's terms require bond. To the extent the probate office has authority to deny an informal application for appointment, thus forcing applicants to seek a judicial order after notice if they desire appointment of a personal representative, the risk is further reduced. It should be noted in this connection that Section 3-309 recognizes that the registrar may deny an application in informal proceedings for unspecified reasons. In a sense, therefore, the code provides public officials with an opportunity for discretion in regard to bond in advance of every appointment which may be requested.

Focus of the Insurance Industry's Criticism

It is important to see the exact thrust of Mr. Cohen's criticism of the code. He does not complain of the discretion re bond which the code grants to a judge who may be making an appointment in a formal proceeding. He says nothing about the provision, modelled after existing law in about 40 states, which gives testators some control over whether bond requirements should be visited on their executors. He seems to accept the blanket excuse from any bond requirement for fiduciaries who have complied with state statutes contemplating deposit of cash or collateral by professional fiduciaries. His sole complaint seems to lie in the possibility that an unbonded personal representative may be appointed informally in a case where the testator has said nothing about bond.

In passing, it is to be noted that either the decedent or his survivors can prevent the case which Mr. Cohen is concerned about from occurring. The decedent may require a bond by his will. If the will is probated, its provisions concerning the personal representative have priority over other mechanisms for identifying who should be the fiduciary (3-203), and if the decedent requires the person he

selects to post a bond, bond must be filed before the appointment can become effective. (3-601) In any event, any interested person can prevent an informal appointment by filing a demand for notice and initiating a formal proceeding for probate or appointment. (3-204; 3-401) Interested persons are further protected against surprise by the requirement that five days delay after death precede any appointment. Thus, in a significant sense, the decedent, his creditors and survivors have important control of whether a bond requirement should be imposed at the time of appointment. To cover cases where it may appear from the detailed recitals required of every petition that interested persons may not know what is occurring, the registrar may deny an informal appointment, thus guaranteeing notice and judicial discretion concerning a possible bond requirement before any appointment

We seem to be left with a large controversy over a relatively small category of cases involving intestate decedents whose survivors either know or care too little to avail themselves of the opportunities given them by the Code for preventing appointment of an unbonded individual.

Here, we must face the questions of who these appointees are likely to be and whether the position of the Code that no bond is required unless desired by someone from the court office or with an interest in the estate is sound. Once the risk area is identified, we must ask whether a bond requirement for every individual personal representative is the appropriate remedy, as compared with the Code's flexible system of remedies, including personal liability of any defaulting fiduciary, liability of persons who receive erroneous distributions, and an on-going opportunity for any person to demand bond, or initiate supervised administration.

Perhaps, however, we should assume that Mr. Cohen also objects to the approach of the Code in testate cases which is that a testator may alter the basic rule of no bond by a provision in his will. In many states, the matter is the reverse of this with testators having power by will to alter the law's basic requirement of bond. In this posture, the response to Mr. Cohen's criticism should lead us to an inquiry about the usual habits of professional will draftsmen in regard to bonds and to an analysis of the proper role of legislation relating to a subject commonly covered by wills.

Summary of Position in Support of Code

The argument in support of the Code's position regarding bonds in intestate estates is relatively simple. It rests on the fact that the heavy majority of cases falling within the category in question will involve very small estates being administered by a close family member for himself and other members of the family, or by an attorney or other outsider who is agreed to by the survivors after the decedent's death. The Code accepts the proposition that succession to small, unplanned estates should not be made relatively more expensive or complicated than succession to larger estates. Thus, bond requirements which are routinely avoided by persons planning large estates, should not be imposed on successors to modest estates. It also reflects the belief that the value of probate bonds is sufficiently unclear to make it unwise for state law to require bonds for any category of cases.

Finally, the Code proceeds from the assumption that existing probate statutes relating to administration of intestate estates must be improved rather than perpetuated if the nation's probate problems are to be corrected. Too much existing law regarding estates reflects the interests and attitudes of estate planners and others whose professional interests have made them acutely aware of problems which have nothing to do with the vast majority of estates in probate. Too little thought has been given to the concern about probate of most citizens.

Sources of Data: The Cleveland Project and the ABA Survey

A book will be published soon called *The Family and Inheritance*. Its authors are Marvin Sussman, Judith Cates and David Smith. Drs. Sussman and Cates are sociologists; Prof. Smith teaches law. The book is the report of a research project financed by a grant by Russell Sage Foundation and conducted by the authors under Dr. Sussman's direction at Case-Western Reserve University in Cleveland, Ohio, during the period from 1965 to 1969. The project involved a detailed analysis of a random sample of one out of every twenty estates closed in Cuyahoga County, Ohio, during a one year period extending from a date in 1964 to a date in 1965. The sample, reflecting 13,180 estates, consisted of 659 estates. Data from probate records was collected and survivors of the decedents involved were systematically interviewed by trained persons.

The survey and the report were planned and accomplished by professional social scientists who sought only to produce solid data for use by lawmakers. The results should be of enormous utility to everyone who is concerned with the problems of probate law. For convenience, data appearing in the manuscript of the report book is referred to as resulting from the "Cleveland project".

During the year 1967-68, the Committee on Administration and Distribution of Decedents' Estates of the Real Property, ABA Probate and Trust Law Section, distributed a questionnaire about probate procedures to its 28 members. Returns were received from lawyers in 23 different states. A report of their answers appears in Vol. 3, No. 2, Real Property, Probate and Trust Journal (Summer 1968) at p. 142. References in this memorandum to the ABA survey are to the answers as tabulated from the returned questionnaires rather than as summarized in the published report.

Relevant Data

a) Size of Estates

Most estates in probate are relatively small estates. According to the Cleveland project, 68.7% of estates are testate and 31.3% are intestate. The *median* testate estate grossed $15,000; the median intestate estate grossed only $6,000. The average or mean worth of all intestate estates was only $8,599. None of the thirty-two decedents in the sample whose estates were taxed under the federal estate tax law were intestate. It is safe to conclude, therefore, that more than half of all estates in probate gross less than $15,000, and that most intestate estates having some contact with probate court are significantly smaller than $15,000 in gross value.

These same figures demonstrate that there is a positive correlation between the size of estates and the likelihood that the decedent left a will.

b) Typical Survivor Patterns

Of the 659 estates involved in the Cleveland project sample, the surviving heirs consisted of spouse and descendants, spouse only, or descendants only, in all but 87 or 13% of the cases. In 12 of the 87, or about 2% of the total, the decedent appeared to have left no relatives, and in 75 cases, or about 11% of the total, collateral kin were the survivors.

c) Likelihood of Inheritance by Minors

Though the Cleveland project did not focus on the age of inheritors, some of its data is relevant to the probability of inheritance by minors. First, as suggested by a) above, inheritance by collateral heirs, including minors, is relatively rare. Second, the age of the decedents identified in the sample averaged 67.9 years. It is unlikely that many persons of this age have minor children. Third, the com-

monest instance of wills altering the intestate pattern occurs where the decedent had a wife and children. The draft of the Cleveland report states: "Testators who are survived by spouse and lineal kin most often deviate from the statutes to bequeath the entire estate to the spouse. Decedents survived by spouse and lineal kin had a high rate of testacy (72.8%) despite the fact that they are six to ten years younger than the other groups." (Chapter IV)

d) Protection of Creditors

Confirming beliefs which many have held for a long time, the Cleveland project demonstrates that probate procedures have little real meaning for creditors of decedents. 38.5% of all estates list no debts other than funeral expenses. The report states "This does not necessarily mean that the decedent had no debts at the time of his decease. It is likely that his spouse or another survivor paid the lawful debts and did not bother to render an accounting. It will be remembered that the vast majority of our estates were small and no tax advantage would accrue to the heirs from careful bookkeeping and reporting. [The following table] indicates the smaller the estate size, the higher the percent of estates with no debts." The report then indicates no debts were listed in 90% of estates under $2,500, 45% of estates between $2,500 and $6,500, and 41% of estates between $6,500 and $10,500. The section on debts is concluded with the following observation: "In general, we do not find that debts constitute a significant problem in the settlement of an estate. First, the debts usually constitute a small proportion of the gross estate. Second, the survivors of the decedent usually make provision for payment without the necessity for court proceedings."

e) Cost of Probate Bonds

The cost of probate bonds varies markedly from state to state. Respondents to the ABA questionnaire answered as follows to the question "What is the usual cost of a fiduciary bond for each $10,000 of estate assets?":

Vermont	$10.00
Florida	$20.00
Ohio	$25.00
N. Hampshire	$30.00
Iowa	$40.00
Colorado	$40.00
N. Dakota	$40.00
Wisconsin	$40.00
Illinois	$50.00
Minnesota	$50.00
Mississippi	$50.00
N. Carolina	$50.00
Rhode Island	$55.00
Texas	$55.00
Maryland	$60.00
Washington	$60.00
Michigan	$60.00
Oregon	$60.00
Kansas	$72.50
Oklahoma	$100.00

Another fact about the price of probate bonds which has been conceded by industry representatives is that current price scales for probate bonds have been in effect since 1929 in many areas of the country.

One can only surmise that these curious features of probate bond prices are related to the fact that bonds have been required by statute for generations. Local history in each state rather than the law of supply and demand, has controlled prices.

f) Frequency of Claims on Probate Bonds

It is difficult to estimate how many estates must have been within the experience of the lawyers who responded to the ABA questionnaire. It is commonly assumed that practitioners identifying themselves as probate lawyers tend to have more years of experience than other categories of practitioners. Nonetheless, only 5 of 22 respondents answered affirmatively to the following question: "Have you or has any member of your firm ever been involved in a suit to recover on a fiduciary bond?" One respondent from Illinois wrote as follows: "Prior to engaging in probate work with my employer, I practiced privately a number of years and never observed a suit to recover on a fiduciary bond. I inquired recently of the largest law firm in Chicago and they reported they could not recall such a suit, and, indeed, was so rare they could only cite an instance which hit the newspapers a few years ago."

Argument and Conclusions

Testate Cases

Testate cases arising under the code normally will involve fiduciaries selected by the decedent. The code invites testators who believe that the person chosen should be bonded to require bond. No prospect of exercise of fiduciary power before the bond requirement is met exists where the decedent imposes the bond requirement.

No blanket bond requirement should relate to testate cases where the will is silent on the question of bond. The fiduciary usually will be selected by the testator. Provisions excusing executors from bond requirements are boiler plate in the forty-two states where testators now can control bond. The practice of draftsmen suggests what the law should infer to be the wish of the occasional testator who says nothing about bond.

Further, the option of formal or informal probate offered by the code should serve to bring the most tension-ridden situations before the judge in a formal proceeding. To the extent this occurs, it is also quite probable that appointment of the personal representative will be by the judge who will thus have an opportunity to impose a requirement of bond if it seems desirable under the circumstances.

Intestate Cases

If we pay any attention at all to the facts developed by the Cleveland project, we must conclude that the typical intestate estate is quite small and so, under the Code's scheme of intestate distribution likely to pass entirely to the surviving spouse if any, or to children where there is no spouse. The insurance industry's representative concedes that bond is inappropriate where the personal representatives takes the whole estate. Either he agrees that the possibility of claims against the decedent does not warrant a bond, or his concession is meaningless for the *possibility* of debts will exist in every estate. The Code's system of priorities for selection of administrators in intestacy is set forth in Section 3-203. The spouse has priority over other heirs. As among heirs having equal priority, each is entitled to notice of even an informal application of any other and each must concur in identifying some one or more of their group or some outsider who may be selected. (3-310) If an application is falsified to prevent the registrar from identi-

fying persons with prior or equal right to appointment, the applicant may be charged with fraud, removed if appointed, or subjected to other appropriate remedies.

The argument recurs that bond must be imposed in every intestate estate in order to protect possible minor heirs, and persons who though presently unknown may turn up later and establish some right to the estate. These points need to be separately considered.

As to minors, we must remember that the average age of decedents is such as to make it unlikely that minors will be included in the usual circle of survivors. Secondly, unless there were children by a prior marriage, only relatively large (over $50,000) estates will devolve on children of the decedent if there is a surviving spouse. Third, the effect of Part 4 of Article II of the Code is to give a surviving spouse the first $14,000 or so of a gross estate ahead of the claims of creditors and any children by a prior marriage. Finally, under 5-103, the code approves of the idea that a parent or other adult with whom a minor resides may receive up to $5,000 per year from any person owing money to the minor. This section reflects the view that elaborate protective relationships can and should be avoided where relatively small property interests of minors are involved. It is a purpose of the Code to extend to small property interests the same flexibility and freedom from expensive and overly-elaborate protective arrangements which typical trust provisions and gifts to minors legislation indicate to be desired by wealthy persons.

Finally, we must not overlook the pressures built into the code which will tend to produce formal proceedings whenever significant values appear to be owned by minor or incompetent persons. As noted earlier, once formal proceedings occur, the court has discretionary power to require any appointee to post bond. Also, the court may appoint a guardian ad litem for any such person who appears to be interested in any formal proceeding and to be inadequately represented by parent, conservator or guardian. Remember, too, that the registrar has residual authority to decline informal applications and thus force formal proceedings. In this connection, it should be noted that applications are required to state the age of any minor heirs or devisees. There is a significant probability that any individual who undertakes to serve as personal representative where minors or incompetents are involved will want the protection of formal orders particularly if values of any consequence are involved. The Code encourages these persons to use formal proceedings by providing clear and flexible procedures and a competent, and possibly specialized, court.

A blanket requirement of bond cannot be justified as necessary to the protection of unknown heirs and devisees. Under the Code, a personal representative owes no duty to persons who might show up within the limitation period for probate or contest of wills and demonstrate that they are the true successors, unless they initiate proceedings before distribution is made. (3-703) Such persons have protected rights against those who received the estate but not against a fiduciary who acted in good faith. Thus, a bond insuring fidelity of the personal representative would not help them. The Code's position in this regard is defensible because it is keyed to the usual, rather than to the extraordinary case and is necessary to permit fiduciaries to distribute without court order.

Unknown persons who may appear as additional heirs or devisees entitled to share an estate as it is being administered have rights against the personal representative which are not cut off unless and until they are adjudicated to be nonexistent in formal proceedings. This will tend to move fiduciaries to the court for orders in formal proceedings in cases where there are important values or reasonable doubts. A bond requirement would add nothing to the absent person's ability to prevent a court order which cuts him off.

Doubts as to the Value of Probate Bonds

The National Conference should not accede to the demands of the insurance industry that their time-honored, legislatively guaranteed market be perpetuated without asking some obvious questions about the effectiveness of bonds in preventing disappointments in regard to inheritances and the relative cost of whatever salutory effect bonds may have.

Evidently, estate planning experts across the country think little of fidelity bonds as protection. Provisions in trusts requiring bonds of fiduciaries are quite uncommon. Will draftsmen routinely excuse bond requirements for testators whenever they can.

Receiverships and other extraordinary proceedings involving court-appointed business managers or liquidators bear little resemblance to succession of decedents' estates which is as natural as death itself and well accommodated by family traditions and community mores. The analogy the insurance industry attempts to draw between administration of decedents' estates and liquidation proceedings involving living debtors, though warranted in a superficial sense by our history of probate court supervision of decedents' estates, is inaccurate from a functional point of view.

The value of bonds as measured by their deterrent effect and cost is quite questionable. Some insurance industry spokesmen have indicated that there are no figures to indicate the relationship of bond premium income to losses covered by bonds. They also urge that figures as to dollars paid in claims are unimportant because they would not demonstrate the value of bonds in coercing proper discharge of fiduciary duties. Of course, it can be argued with equal force that since probate bonds have been routinely required by statute in intestate estates, we have no basis whatever for connecting the bond requirement to the behavior of individual fiduciaries. It could just as well be argued that the typical close relationship between individuals who serve as administrators, and the beneficiaries of intestate estates, totally explains the tendency for intestate estate settlements to be very routine and peaceful affairs so far as can be determined from the outside.

Surely, it is difficult to explain the variation in cost of bonds in the several states, other than as a phenomenon of forcing a market by statute.

Conclusion

Putting reasons for doubts about the value of probate bonds to one side, a blanket requirement of bond for every intestate estate being administered by any individual would be a clear instance of statutory overkill. It is submitted that statutory rules can and should be so cast that the routine requirements which apply to every estate will be relevant to facts usually to be anticipated in ordinary cases. Unusual situations should be the occasion for extraordinary procedures, rather than new routines for every estate. Present drafts of the proposed Code seek to achieve this ideal by making bond requirements fully responsive to the needs of a particular case as identified by interested persons and probate court personnel.

Finally, a statutory requirement of probate bonds in testate or intestate estates is inconsistent with the basic philosophy of the Uniform Probate Code that estates belong to survivors who are expected to look out for their own interests. The ancient idea that a probate court is a public agency through which all estates must pass in order that accuracy and honesty in regard to inheritances will be achieved has become intolerable to a vast majority of our people. It has outlived its usefulness and now deserves an honorable burial. Indeed, if it is not soon eliminated by forward looking legislation, the day when the overwhelming ma-

jority of dollars passing at death will be controlled by will and probate substitutes will be on us much sooner than might be imagined. As this day approaches, the estates left in probate to bear the expense of bond and other costs which better planned estates avoid, will come more and more to consist almost entirely of the little accumulations of the relatively poor and ignorant elements of our population. The Code must have the support of the average man and his organizations if it is to withstand the ordeal of battle in our legislatures. It should not be weakened by what is really an unnecessary concession.

SUGGESTIONS AND COMMENTS
ON THE
UNIFORM PROBATE CODE (SB 248)

(1) Suggestion

In sec. 13.11.125 et seq. the use of a description such as "Homestead Allowance" for the widow of decedent and for minor and dependent children might well be confused with the "Homestead Exemption" provided under AS 09.35.090, and the exemption provided in sec. 13.11.130 may be confused with the exemption provided by AS 09.35.080. We read the probate allowances and exemptions to be in addition to the homestead exemption and other exemptions as now provided under AS 09.35.080 and AS 09.35.090. We recommend that the probate code eliminate the description "Homestead Allowance". Likewise, we recommend the description "Exempt Property" be changed to "Personal Property Allowance".
(Alaska Bar Association)

Comment

I believe that the use of similar terms in two totally different and unrelated titles would not cause any confusion. Sections 13.11.125 et seq. relate to certain rights and values to which a surviving spouse and certain children of a deceased are entitled in preference over unsecured creditors of the estate and persons to whom the estate may be devised by will. AS 09.35.080 - 09.35.-090, on the other hand, specify what personal and real property cannot be taken from a judgment debtor by means of execution.

(2) Suggestion

Sec. 13.16.450 in conformance with the uniform code allows four months for presentation of claims by creditors. We recommend this be changed to 90 days to conform to our present probate code. Ninety days is considered sufficient, and will shorten the length of the probate proceedings.
(Alaska Bar Association)

Comment

While at first glance it may appear that this suggestion to retain the existing 90-day period for creditors to present claims would seem to go ahead of the UPC to shorten the length of the probate proceedings this is not the case. Presently the law (AS 13.30.250) states that "The notice shall require all persons having claims against the estate to present them, with proper vouchers, within three months...." (Emphasis added.) However, AS 13.30.260 provides that "A claim not presented within three months after the first publication of notice is not barred, but it cannot be paid until the claims presented within that period have been satisfied...." (Emphasis added.) The result of these two existing sections is that creditors' claims can be presented as long as assets remain in the estate. This procedure would not shorten the probate proceeding.

On the other hand, two sections in SB 248 go far to reduce the time it would take to probate an estate. These two provisions read:

"Sec. 13.16.450. NOTICE TO CREDITORS. Unless notice has already been given under this section, a personal representative upon his appointment shall publish a notice once a week for three successive weeks in a newspaper of general circulation in the judicial district announcing his appointment and address and notifying creditors of the estate to present their claims within four months after the date of the first publication of the notice or be forever barred."

and

"Sec. 13.16.460. LIMITATIONS ON PRESENTATION OF CLAIMS. (a) All claims against a decedent's estate which arose before the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:

(1) within four months after the date of the first publication of notice to creditors if notice is given in compliance with sec. 450 of this chapter; provided, claims barred by the non-claim statute at the decedent's domicile before the first publication for claims in this state are also barred in this state;

(2) within three years after the decedent's death, if notice to creditors has not been published.

(b) All claims against a decedent's estate which arise at or after the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:

(1) a claim based on a contract with the personal representative, within four months after performance by the personal representative is due;

(2) any other claim, within four months after it arises.

(c) Nothing in this section affects or prevents:

(1) any proceeding to enforce any mortgage, pledge, or lien upon property of the estate; or

(2) to the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which he is protected by liability insurance."

(Emphasis added.)

These sections make it mandatory that a creditor must submit his claim within four months after he has received notice or be forever

barred. Thus the possibilities of closing an estate more quickly under SB 248 are much greater than under present probate procedures.

When this same issue was raised by the Legislative Council while it was preparing the bill for introduction, Professor Richard V. Wellman of the University of Michigan Law School and the prime drafter of the UPC made some very meaningful remarks on why these provisions should be retained. (See Appendix A.)

(3) Suggestion

P. 130

We disagree with the power given a foreign personal representative under sec. 13.21.015, which requires only that the nonresident fiduciary may secure removal of assets of a nonresident decedent from Alaska upon furnishing a copy of his appointment and an affidavit as to death, Alaska administration, and entitlement to payment. Nothing is said or provided concerning Alaska debts of the nonresident decedent, except that should a creditor in Alaska know of the death and the whereabouts of assets in Alaska, that creditor may object. This is considered inadequate and likely to result in no recovery in most cases. Suit against the foreign representative in the foreign jurisdiction is not a good remedy. We recommend that sec. 13.21.015 be expanded to require some notice to Alaska creditors before removal of the assets from Alaska. We would add the following additional requirement to sec. 13.21.015.

> In addition to the foregoing requirements the domiciliary foreign representative shall furnish to any person having possession or control of personal property, or other asset sought to be removed from Alaska, proof that notice has been published in a newspaper of general circulation in the borough or city where such assets are located, at least once a week for three weeks, that such property or other asset will be removed unless objections are made. The notice shall specify the personal property or asset and its location in Alaska.

(Alaska Bar Association)

Comment

While this suggestion in regard to sec. 13.21.015 would be of considerable merit if we were dealing with traditional concepts of administering multi-state estates, I would not think it is particularly necessary under the approach taken by the UPC.

Traditionally there has always been a reluctancy on the part of one state which has assets and creditors of a person who dies domiciled in another state to turn over those assets to the decedent's domiciliary estate without first paying off local creditors.

> "Whenever more than one state is involved, administration at the present time is complex and difficult. Assembling assets from several states is not easy. While jurisdictions increase arithmetically, difficulties seem to increase geometrically. Just as troublesome is the possibility that the personal representative or the assets of the estate may be the subject of litigation in several states." (Multiple-State Estates Under The Uniform Probate Code, 27 Wash. & Lee L. Rev. 74 (Spring 1970))

To avoid these problems and complexities which have plagued the several states since their existence, the UPC in ch. 21 has provided a system whereby a personal representative in the state of the decedent's domicile has the same power over the title to property of the estate as an absolute owner would have and thus an entire estate, wherever located, can be administered in one proceeding. At first it may seem that creditors in a foreign state are left to the mercy of another state for their payment. This, however, is not the true case because the property is held in trust for the benefit of the creditors and other individuals having an interest in the estate (sec. 13.16.390). The code treats all creditors alike whether they are in the domiciliary state or another state. Besides having the same protection offered all creditors by the code, local creditors who are apprehensive that the domiciliary personal representative will withdraw assets from the local state may notify persons owing the decedent or having possession of state property not to pay or turn over property on affidavit (sec. 13.21.025). The creditor could also petition for local administration ("interested person" for all code purposes includes creditors) in order to prevent the domiciliary foreign personal representative from proceeding without local appointment (sec. 13.-21.040). Finally, sec. 13.16.520 provides equal treatment of all creditors in an insolvent estate.

(4) Suggestion

P. 42

Sec. 13.11.315 provides for deposit of a will with any court. This should be restricted to the superior courts inasmuch as the inferior courts, particularly in sparsely settled areas will not have the personnel or facilities to administer this provision. Basically we feel that secs. 13.11.315 and 13.11.320 might well be eliminated since they will burden the courts with additional duties, although it is assumed that the rules of court would require a charge to be made. The commentary to the UPC suggests that a central filing system be established soon and a statute be enacted requiring the registrar of the will to notify the central bureau so that any inquiries could be directed to the central bureau. All this seems unnecessary, and will require no end of additional court rules, record keeping, etc.
(Alaska Bar Association)

Comment

At the present time, of course, there is no way of knowing how many people would avail themselves of this provision and the resulting cost to the state, but if the idea seems feasible, the recommendation that only superior courts be used would seem a very good one.

(5) Suggestion

P. 11

Sec. 13.06.110, regarding notices under paragraphs (1) and (2), it is suggested "10 days" rather than "14 days".
(Keifer L. Gray, Standing Master in Probate)

Comment

I cannot see any particular need for the change.

(6) Suggestion

Sec. 13.11.045(1), add "provided the Native rights through blood of any person so adopted may be retained if provided for in the decree of adoption".
(Keifer L. Gray, Standing Master in Probate)

p. 17

Comment

In regard to this suggestion, the question has been raised as to how adoption affects the rights of inheritance from the natural parents.

After researching this question I have come to the conclusion that neither under existing law (AS 20.10.120, see Appendix B) nor under sec. 13.11.045(1) of SB 248 would an adopted child be precluded from inheriting from both his natural as well as his adopting parents.

The general law on this matter is quite clear:

> "Consanguinity is fundamental in statutes of descent and distribution, and the right of a child to inherit from his natural parents or to share in the intestate personalty of their estates is affected by the legal adoption of the child by another only to the extent that such rights are taken away or limited by the terms of the applicable statutes of adoption and descent and distribution, or by necessary implication therefrom. To state the rule another way, an adopted child is, in a legal sense, the child both of its natural and of its adopting parents, and is not, because of the adoption, deprived of its right of inheritance from its natural parents, unless the statute expressly so provides. In any event, the adoption of a child after the death of its parents does not affect its status as the heir of such parents.
>
> "The adoption of a child does not destroy his status as one of the 'issue' of his natural ancestors. The fact that by the terms of the adoption statutes the natural parents lose all rights over a child when it is adopted by another does not necessarily imply that the child may not inherit from such parents, nor is that implication to be drawn from the fact that the child becomes the legal child of its adopting parent and sustains all the rights and is subject to all of the duties of that relationship. A statute which includes as its dominant and principal feature the establishing of the adopted child as the heir of the adopting parent, without reference to inheritance from natural parents, is not likely to be construed as depriving the child of that inheritance." (Emphasis added.) (2 Am Jur 2d, Adoption, sec. 103)

To deal with this question a specific provision must be adopted and this has been done in a number of states.

> "Some statutes expressly save the rights of an adopted child to inherit from its natural parents; others by their express terms bar adopted children of the right to inherit from their natural parents and natural kin. Rights of dual inheritance from the natural parent as well as from the adoptive parent are denied by a statutory declaration that all rights and duties between the adopted child and his natural parent shall cease and determine and that the child

shall thereafter be deemed and held to be for every purpose the child of his adoptive parents. Such statutes are not open to attack on the ground of discrimination between minors whose natural parents died before the effective date of the statute and those whose natural parents died thereafter, but such a statute does not prohibit a natural parent from bequeathing property by will to a child whom he has permitted to be adopted by another." (Id)

As can be seen from a reading of AS 20.10.120 (see Appendix B) and sec. 13.11.045(1) of SB 248 neither the existing nor proposed provision specifically provide that an adopted child cannot inherit from his natural parents. In view of the state of the law as cited above, I believe that whichever approach the legislature takes should be specially stated in the bill. The House Judiciary Committee has already expressed its support for allowing an adopted child, at least to some degree, to inherit from his natural parents by the introduction of HB 722 (see Appendix C).

For a more extensive consideration of the entire question of how adoption affects the rights of inheritance through or from natural parents or other natural kin, please see annotations and cases in Appendix D.

(7) Suggestion

P. 25

Sec. 13.11.125, the homestead allowance should be a minimum of "$6,000" instead of "$5,000".
(Keifer L. Gray, Standing Master in Probate)

Comment

The Legislative Council changed this to $8,000 to correspond with present day needs in Alaska as reflected in existing law.

(8) Suggestion

Sec. 13.11.155, add a paragraph (a) which states:

P. 28 Relocated to 1/30

(a) Wills other than self-proving wills under sec. 165 of this chapter may be proven by the affidavits of the two witnesses to the will or, if one witness is deceased or cannot be located, by the testimony of one subscribing witness and other proof satisfactory to the court.

(Keifer L. Gray, Standing Master in Probate)

Comment

This seems like a very practical suggestion.

(9) Suggestion

P. 42

Add a new sec. 13.11.325 to read:

Sec. 13.11.325. PROCEDURE FOR NONINTERVENTION WILLS. If the last will and testament of a decedent provides that the estate shall be settled without the intervention of any

court, title of the decedent passes to the devisee or heirs on death. It is necessary only that the executor, or person or corporation nominated in his place if he fails to serve, submit the will to the court, prove it, secure letters testamentary, file an inventory, and submit proof of solvency. Thereafter, the estate shall be managed and settled without the intervention of any court. However, notice to creditors requiring them to submit their claims within three months shall be published once each week for four weeks in a newspaper of general circulation in the judicial district where the will is probated. The party probating the will may file a final account with the court if he desires and he shall make a report of any inheritance tax due the state or the United States and pay the same from estate funds. Nothing contained in this section shall be construed to prevent the court from ordering the filing of a final account if a petition demanding a final account is filed by an heir, devisee, legatee, creditor, the state or federal government or a person showing he is adversely affected by the failure to file the account. However, a full and complete report must be submitted to the court within one year from the date of filing such will for probate and proof of final distribution should be filed simultaneously. Extensions beyond this period of time may be granted only on the specific order by the court for good cause shown and then not to exceed six months.

(Keifer L. Gray, Standing Master in Probate)

Comment

In view of the fact that the UPC is based on the premise that a court should not intervene unless requested by an interested person, this suggested provision would seem unnecessary. Also, sec. 13.11.230 provides that "... the intention of the testator as expressed in his will controls...." The proposed amendment is drafted along the lines of existing law (AS 13.30.111) which reflects the traditional probate concepts.

(10) Suggestion

p. 49

Sec. 13.16.065, paragraph (1), substitute the figure "19" for the figure "21".
(Keifer L. Gray, Standing Master in Probate)

Comment

SB 248 has substitued "19" for "21".

(11) Suggestion

p. 82

Sec. 13.16.365, the last paragraph after the comma, instead of "he may file the original of the inventory with the court" it should read "he shall file the original of the inventory with the court", substituting the word "shall" for the word "may".
(Keifer L. Gray, Standing Master in Probate)

Comment

In regard to making the filing of an inventory permissive instead of mandatory, the drafters of the UPC seem to indicate that the

worth of an estate should be the concern of only interested persons and not of the general public (Uniform Probate Code, sec. 3-706).

(12) Suggestion

Sec. 13.16.680(1), change the value from "$5,000" to "$6,000". (Keifer L. Gray, Standing Master in Probate)

p. 118

Comment

This suggestion would correspond with present day needs in Alaska as reflected in existing law.

(13) Suggestion

p. 119

Sec. 13.16.695, add paragraph (d) to read:

> (d) The superior court may authorize the disposal in a manner it prescribes of personal property which has not been disposed of under this section by the end of six months if no heirs or claimants have been located.

(Keifer L. Gray, Standing Master in Probate and Superior Court Judge James M. Fitzgerald)

Comment

Because SB 248 is silent on this point and the necessity seems obvious, this suggestion should be added.

(14) Suggestion

Add a new sec. 13.16.700 to read:

p. 119

> Sec. 13.16.700. SETTLEMENT DIRECTED BY COURT. When a judge receives information that a person has died in his judicial district leaving an estate of $6,000 or less and no qualified person has appeared to take charge of the assets, the judge may immediately appoint some person, corporation, or attorney to settle the estate in the manner provided for in secs. 680 - 695 of this chapter or the appointee may administer the estate in the manner provided for in the administration of small estates.

(Keifer L. Gray, Standing Master in Probate)

Comment

This suggestion seems appropriate on the same basis as (13) above. However, because secs. 680 - 695 are the provisions for administering small estates, I would recommend deleting "or the appointee may administer the estate in the manner provided for in the administration of small estates".

(15) Suggestion

p. 125

Sec. 13.26.015(1), the age should be "19" and not "18". (Keifer L. Gray, Standing Master in Probate)

Comment

It should be changed to "19".

(16) Suggestion

Sec. 13.26.020, the time should be "not exceeding one year unless sooner revoked".
(Keifer L. Gray, Standing Master in Probate)

p. 126

Comment

Considering the purpose underlying sec. 13.26.020, this suggestion would seem appropriate because of the cost and distance involved in Alaska travel. The drafters of the UPC have stated on this point:

> "This section permits a temporary delegation of parental powers. For example, parents (or guardian) of a minor plan to be out of the country for several months. They wish to empower a close relative (an uncle, e.g.) to take any necessary action regarding the child while they are away. Using this section, they could execute an appropriate power of attorney giving the uncle custody and power to consent. Then if an emergency operation were required, the uncle could consent on behalf of the child; as a practical matter he would of course attempt to communicate with the parents before acting. The section is designed to reduce problems relating to consents for emergency treatment." (Uniform Probate Code, sec. 5-104, Comment)

(17) Suggestion

Sec. 13.26.045, add "or has failed to properly exercise his duties as such".
(Keifer L. Gray, Standing Master in Probate)

p. 127

Comment

This provision does not seem necessary in view of sec. 13.26.085 which provides specifically for the removal of guardians.

(18) Suggestion

Sec. 13.26.060, add an (e) to read:

> (e) A bond in the amount to be fixed by the court may be required of the guardian as the circumstances require.

p. 127

(Keifer L. Gray, Standing Master in Probate)

Comment

Under the provisions of the UPC guardians are appointed to protect only the person of the minor and not his property or other assets. If problems of property management arise, then a conservator would be appointed and a bond may be required under sec. 13.26.215.

(19) Suggestion

Sec. 13.26.070(4), add "at least once every year unless ordered sooner".
(Keifer L. Gray, Standing Master in Probate)

p. 129

Comment

I cannot see any harm in this suggestion but the benefit is also a little doubtful.

(20) Suggestion

p. 151

Sec. 13.26.280(a), change the age from "18" to "19".
(Keifer L. Gray, Standing Master in Probate)

Comment

This should be changed to "19".

(21) Suggestion

p. 2-3

Sec. 13.06.035, add a paragraph (3) to read:

> (3) a person who is absent for a continous period of five years, during which he has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry is presumed to be dead; his death is presumed to have occurred at the end of the period unless there is sufficient evidence for determining that death occurred earlier.

(F.E. Kester, State Registrar of Vital Statistics)

Comment

This suggestion is very important and should definitely be incorporated into SB 248.

(22) Suggestion

Adopted

Either Title 9 or 13 should contain provisions for wrongful death and survival of actions.
(Herbert A. Ross, Attorney at Law)

Comment

This is a very good suggestion and should definitely be made a part of the bill. Because the provisions relate to causes of action and not probate, I suggest they be made a part of Title 9 (Civil Procedure).

(23) Suggestion

Various age requirements in the bill should be made uniform.
(R. G. Laube, Vice President and Trust Officer, National Bank of Alaska and Chairman, Legislative Committee, Anchorage Estate Planning Council)

Comment

The age of 19 either has been or will be substituted for 18 where appropriate.

Appendix A

Excerpt from letter dated December 13, 1971, addressed to Frederick O. Eastaugh from Professor Richard V. Wellman of the University of Michigan Law School:

Let me move to another point on the list of deviations from U.P.C. that are indicated in Russell E. Mulder's letter of October 4, 1971, to Members of the Alaskan Bar Association. I am somewhat concerned about point 5 dealing with bar on unsecured creditors claims.

First, let me focus on the proposal to extend the non-claim period on unsecured claims following first advertisement for claims from four months to one year. Statutory notes to the Model Probate Code (1946) indicate that in the early 1940's when research on the project was accomplished, twenty-six states had fixed time limits in non-claim provisions. In twelve states, the basic time period was six months; in four the basic period was three or four months; in four the period was eight, nine or eleven months; in six the period was one year. Section 142 of the Model Probate Code set the non-claim period at 4 months. The recently enacted Surrogates Court Procedure Act in New York established a three month period and Wisconsin's new probate code permits the court to fix a non-claim period as short as three months. The non-claim period in the new codes in Maryland and Oregon is set at four months. Idaho's version of U.P.C. preserved the four month limitation period, as does the Law Revision Commission's recommendation in Arizona.

The pattern across the states, influenced I am sure, by the criticism that probate is too long, is distinctly toward a period that is much shorter than the year that is mentioned in Mr. Mulder's letter.

It may be pertinent, also, to note that during the several years of drafting of U.P.C., the project did not receive a contact, much less a protest, from any group representing creditors. This significant silence corroborates the careful study of attitudes about probate reported in Sussman, Cates and Smith's book, The Family and Inheritance (Russell Sage, 1970) which reported that problems with creditors were a very unimportant aspect of the typical probate proceeding.

During the drafting process, the Reporters were informed by researchers who had probed Chicago merchants about protection through probate for unsecured creditors claims. The second-hand reports back indicated that merchants gave very little attention to problems of collection from deceased debtors. On some kinds of accounts, like fuel oil contracts, credit life insurance is used. In other situations, joint obligations bind husband and wife so that the death of either is of little concern to creditors. Statistically death is not a serious risk for age levels where borrowing or credit purchasing is most common. Finally, creditors appear to believe that survivors will pay valid small debts of family members, if for no other reason than to maintain their own reputation for honesty and good credit.

In point of fact, therefore, there is much to support the proposition that the usual concern about creditors in probate proceedings comes only from the minds of lawyers who for generations, have been taught that the principal purpose of probate is to protect creditors.

Finally, lawyers have a good deal to gain from moves that may serve to shorten the time for routine probates. The length of non-claim periods will have a direct bearing on the standard time during which estates probably will remain undistributed. With the optional valuation date and the filing deadline for federal estate tax purposes now moved closer to date of death, it would be paradoxical if long non-claim provisions continued to impede prompt closing of estates. Surely, Alaskans will not want to be out of line with national trends on this point.

Second, I am concerned about the proposal to change the code so that a creditor who had good cause for not presenting a claim in time might escape the bar of non-claim. I think that such a provision may do more harm than good. First, it should be noted that the four months claim period does not apply to unsecured tort claimants who seek to reach the decedents insurance. See 3-803(c) (2). When one thinks of contract debts, who are the creditors who will not know of the decedents death within four months? All a creditor needs to do to prevent non-claim from running is to mail his bill to the personal representative or to the court.

Appendix B

Sec. 20.10.120. ADOPTION TERMINATES RELATIONSHIP OF PARENT AND CHILD. (a) By a decree of adoption, the natural parents, other than a spouse of an adopter, are divested of all legal rights and obligations in respect to the child, and the child shall be free from all legal obligations of obedience and maintenance in respect to them, and is, as to all legal incidents, the child, legal heir, and lawful issue of his adopter, entitled to all rights and privileges, including the right of inheritance and the right to take testamentary disposition, and subject to all the obligations of a child of the adopter.

(b) An adopter and the spouse of an adopted child, and their respective kin, have the rights of inheritance from the child as prescribed by the statutes of descent and distribution for natural parents, spouse and their respective kin to the exclusion of the adopted child's natural parents and kin, and any prior adopter and his kin. Where a natural parent is the spouse of an adopter, the natural and adopted parent and kin inherit the same as natural parents and their kin.

Introduced: 3/7/72
Referred: Judiciary

IN THE HOUSE BY THE JUDICIARY COMMITTEE

HOUSE BILL NO. 722

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act clarifying inheritance rights of adopted children; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 20.10.120 is amended by adding a new subsection to read:

(c) An adopted child and his issue have the rights of inheritance from the natural parents and their respective kin as prescribed by the statutes of descent and distribution unless the decree of adoption specifically provides for termination of those rights of inheritance.

* Sec. 2. This Act takes effect on the day after its passage and approval or on the day it becomes law without approval.

In Villier v. Watson's Adm'x, 168 Ky 631, 182 SW 869, LRA1918A, 820, the statute of adoption under which the case was decided is much unlike ours and we deem the case not in point. The same may be said of the cases of Dreyer v. Schrick, 105 Kan 495, 185 P 30, and Coonradt v. Sailors, 186 Tenn 294, 209 SW2d 859, 2 ALR2d 880. In the case of In re Roderick's Estate, 158 Wash 377, 291 P 325, 80 ALR 1398, the court considered a statute of adoption and held an adopted child could inherit from both adoptive and natural parents. However, note that the statute of Washington and also the statutes of Minnesota, California, and South Dakota, cited on page 1401 of 80 ALR, do not contain the emphatic language as does our adoption statute, particularly Section 453.090, supra.

We find no fault with the result reached in the cases of St. Louis Union Trust Co. v. Kaltenbach and Mississippi Valley Trust Co. v. Palms, supra. We limit our disapproval to the expressions and language which we deem obiter dictum contained in the opinions which lend support to the theory that persons legally adopted under the provisions of Chapter 453, supra, may inherit from their natural parents. After a full consideration of the case, we are convinced that the case of Shepherd v. Murphy, supra, was correctly decided and we find no sound reason that the same rule should not apply in this case.

The judgment of the trial court is reversed and the cause remanded with directions to enter a decree in conformity with this opinion. It is so ordered.

Dohling and Barrett, CC., concur.

Per Curiam.

The foregoing opinion by Westhues, C., is adopted as the opinion of the court.

All concur.

The Divisional opinion has been adopted as the opinion of the court en banc.

All the Judges concur, except Hyde, J., who dissents.

ANNOTATION

Adoption as affecting right of inheritance through or from natural parent or other natural kin

[See ALR Digests, Descent and Distribution § 28.]

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§ 1. In general.

This annotation supersedes 80 ALR 1403, and the supplement thereto in 123 ALR 1038, being division III of the latter annotation, at pp 1042 et seq.

The following annotations related to the present one may be noted:

Conflict of laws as to adoption as affecting descent and distribution of decedent's estate, 73 ALR 964, supplemented in 154 ALR 1179.

Status of child under contract to adopt not fully performed, 27 ALR 1325, supplemented in 142 ALR 84 and 171 ALR 1315.

Descent and distribution of property of adopted child, 170 ALR 742.

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The question whether an adopted child inherits from his natural parents is "one of statutory construction." Roberts v. Roberts (1924) 160 Minn 140, 199 NW 581.

"Since adoption is wholly statutory, all its incidents must be." Young v. Bridges (1933) 86 NH 135, 165 A 272.

So, except as the statutes otherwise provide, the adoption of a child does not deprive him of the right subsequently to inherit from his natural parents or to share in intestate personalty of their estates.

Arkansas.—Shaver v. Nash (1930) 181 Ark 1112, 29 SW2d 298, 73 ALR 961 (involving Texas law); Hawkins v. Hawkins (1951) 218 Ark 423, 236 SW2d 733.

California.—Re Darling (1916) 173 Cal 221, 159 P 606.

Colorado.—Re Wilson (1934) 95 Colo 159, 33 P2d 969.

Connecticut.—Slattery v. Hartford-Connecticut Trust Co. (1932) 115 Conn 163, 161 A 79.

Delaware.—Glanding v. Industrial Trust Co. (1946) 29 Del Ch 517, 46 A2d 881 (saying right to inherit not lost unless by "clear intent" of statute).

District of Columbia.—Re Penfield's Estate (1949, DC Dist Col) 81 F Supp 622.

Illinois.—Re Tilliski's Estate (1945) 390 Ill 273, 61 NE2d 24.

Indiana. — Humphries v. Davis (1885) 100 Ind 274, 50 Am Rep 788; Head v. Leak (1916) 61 Ind App 253, 111 NE 952.

Iowa.—Wagner v. Varner (1879) 50 Iowa 532.

Kansas.—Dreyer v. Schrick (1919) 105 Kan 495, 185 P 30; Re Yates's Estate (1921) 108 Kan 721, 196 P 1077 (arguendo); Bertram v. Holcomb (1921) 109 Kan 87, 198 P 192.

Kentucky.—Villier v. Watson (1916) 168 Ky 631, 182 SW 869, LRA1918A 820.

Michigan. — Re Klapp's Estate (1917) 197 Mich 615, 164 NW 381, LRA 1918A 818.

Minnesota. — Roberts v. Roberts (1924) 160 Minn 140, 199 NW 581.

Mississippi.—Sledge v. Floyd (1925) 139 Miss 398, 104 So 163.

Missouri. — Clarkson v. Hatton (1898) 143 Mo 47, 44 SW 761, 39 LRA 748, 65 Am St Rep 635 (saying that the child was not deprived of the right to inherit from natural parents "unless expressly so provided by stat-

ute"); St. Louis Union Trust Co. v. Kaltenbach (1945) 353 Mo 1114, 186 SW2d 578 (repeating the language of the Clarkson Case, supra).

South Dakota.—Sorenson v. Churchill (1927) 51 SD 113, 212 NW 488.

Tennessee. — Coonradt v. Sailors (1948) 186 Tenn 294, 209 SW2d 859, 2 ALR2d 880 (obiter).

Texas.—Shaver v. Nash (1930) 181 Ark 1112, 29 SW2d 298, 73 ALR 961 (involving Texas law).

Utah.—Re Benner (1946) 109 Utah 172, 166 P2d 257.

Washington.—Re Roderick (1930) 158 Wash 377, 291 P 325, 80 ALR 1398.

Wisconsin.—Re Sauer (1934) 216 Wis 289, 257 NW 28.

The right of a natural child to inherit from its blood parents "should not be taken from an adopted child unless clearly required by statute." Re Tilliski's Estate (1945) 390 Ill 273, 61 NE2d 24.

Similarly, unless the statutes otherwise provide, the adopted child does not lose his right to inherit from natural kin or to share in intestate personalty of their estates.

California.—Re Darling (1916) 173 Cal 221, 159 P 606.

Colorado.—Re Wilson (1934) 95 Colo 159, 33 P2d 969.

District of Columbia.—Re Penfield's Estate (1949, DC Dist Col) 81 F Supp 622.

Iowa.—Wagner v. Varner (1879) 50 Iowa 532.

New York.—Re Landers (1917) 100 Misc 635, 166 NYS 1036; Re Monroe (1928) 132 Misc 279, 229 NYS 476; Re Gourlay's Estate (1940) 173 Misc 930, 19 NYS2d 122.

North Carolina.—Grimes v. Grimes (1935) 207 NC 778, 178 SE 573.

The child's right to inherit from blood relatives having been once given by statute "can be taken away only by statute," except, of course, as the act of the individual or individuals involved may end it. Re Landers (1917) 100 Misc 635, 166 NYS 1036. This seems to be the generally prevailing view.

In Re Darling (1916) 173 Cal 221, 159 P 606, the court stated that it appeared to be well settled in all jurisdictions in which the common law constitutes the rule of decision, that the right of inheritance of a child is affected by its adoption "only to the extent that the statutes bearing on the matter in terms or by implication provide." (But that adoption was unknown to the common law, see infra.)

In Sorenson v. Churchill (1927) 51 SD 113, 212 NW 488, the court quoted with approval the language of Hockaday v. Lynn (1906) 200 Mo 456, 98 SW 585, 8 LRA NS 117, 118 Am St Rep 672, 9 Ann Cas 775, to the effect that consanguinity is so fundamental in statutes of descent and distribution "that it may only be ignored by construction when courts are forced so to do, either by the terms of express statute or by inexorable implication."

As late as the year 1917, a New York judge declared that his attention had been called to no authority in that or any other state, nor had he been able to find any, "which even hints at the possibility of an adopted child losing his rights of inheritance from natural kindred by reason of adoption." Re Lander's Estate (1917) 100 Misc 635, 166 NYS 1036. But see certain of the cases infra, §§ 2 and 3.

According to Young v. Bridges (1933) 86 NH 135, 165 A 272, the statutes regulating inheritance and the adoption statutes touching the same matter are in pari materia and should be construed together as if they were one law. In that case, which did not on its facts involve any question of the right of an adopted child to take two portions from a single estate (one as an adopted person and one as blood kin), the court nevertheless made use of the possibility of such a dilemma as arguing that the whole idea of dual heirship should be rejected and the child confined to the adopted inheritance. The court was of the opinion that any supposition of a legislative purpose to reserve the right to inherit from blood relatives was "negatived

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by the predominant policy of the inheritance statute against dual heirship." The court noted that the adoption statute provided that an adoption should make the child "the child of the petitioner to all legal intents and purposes," and concluded therefrom that, giving language its ordinary meaning and giving weight to the policy the statute disclosed, the result which followed was that an adoption establishes "a change of status by which in general the relatives become strangers in legal aspect and others take their place." Further as to the statute there in question, see the same case, infra, § 3.

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Since the right of adoption was unknown to the common law and exists in this country, in those states having that law as the basis of their jurisprudence only by virtue of statute (1 Am Jur, Adoption of Children § 3), but since it did exist under the civil law, the cases sometimes make reference to the civil law on the subject.[1]

In Humphries v. Davis (1885) 100 Ind 274, 50 Am Rep 788, where the question decided was not within the present subject, the court noted that the rule there followed did not cut off the child from inheriting from its natural relatives, and said that "it may inherit from them and from its adoptive parents. This was the rule of the civil law," citing Sandars' Justinian, 105. The opinion explained that the common law made no provision for the adoption of children and consequently no light could be obtained from that source, but that the Roman law did make provisions for adoption and that, as revised and changed by Justinian, formed a complete system whereby the adopted child was declared "assimilated, in many points, to a son born in lawful matrimony," and that at the same time "that law preserved to the child all the family rights resulting from his birth."

However, it has been said that the civil law's reservation of inheritance from the adopted child's natural relatives "does not shed much light to show the reservation in a statutory adoption," and that if the civil-law system of adoption may be of aid in determining the incidents of a statutory adoption, because of the absence of any common law on the subject, it can be so only on the theory that the statute was enacted with the design of incorporating in some measure the system. Young v. Bridges (1933) 86 NH 135, 165 A 272.

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This annotation is of course concerned only with the rights which an adopted person may possess as an heir or distributee by reason of the death of an intestate occurring subsequently to the adoption.

In Re Pillsbury (1917) 175 Cal 454, 166 P 11, 3 ALR 1396, the court declared that "unquestionably" since the adoption of the three minors followed the death of their father it did not affect their status as his heirs and that whatever rights had thus descended to them they retained.

§ 2. Inheritance from immediate parents.

The child will be entitled to take as heir or distributee of his natural parent dying intestate subsequently to the adoption save only as the statutes have in some form otherwise provided —see general citations touching this point, supra, § 1.

In the following cases the right to inherit from the natural parent was upheld.

United States. — For federal cases involving state law, see state headings infra.

Arkansas. — Hawkins v. Hawkins (1951) 218 Ark 423, 236 SW2d 733 (express statutory provision).

Delaware. — Glanding v. Industrial

1. The English Adoption of Children Act, of 1926 (16 & 17 Geo V, ch 29) was the first English statute to provide for the adoption of children. 17 Halsbury's L of Eng p 679, ¶1407. The effect of an adoption order thereunder is not to deprive the child of any right to or interest in property to which he would have been entitled without the adoption. Id. pp 687, 688, ¶1422.

Trust Co. (1946) 29 Del Ch 517, 46 A2d 881.

Florida. — Re Hewett's Estate (1943) 153 Fla 137, 13 So2d 904 (express statutory provision).

Georgia. — Macon, D. & S. R. Co. v. Porter (1942) 193 Ga 40, 22 SE2d 818, followed in Macon, D. & S. R. Co. v. Porter (1942) 68 Ga App 462, 23 SE2d 280 (per plain intent of statute).

Illinois.—Re Tilliski's Estate (1945) 390 Ill 273, 61 NE2d 24.

Indiana. — Humphries v. Davis (1885) 100 Ind 274, 50 Am Rep 788; Patterson v. Browning (1896) 146 Ind 160, 44 NE 993.

Kansas. — Dreyer v. Schrick (1919) 105 Kan 495, 185 P 30; Bartram v. Holcomb (1921) 109 Kan 87, 198 P 192.

Kentucky.—Villier v. Watson (1916) 168 Ky 631, 182 SW 869, LRA1918A 820.

Michigan. — Re Klapp's Estate (1917) 197 Mich 615, 164 NW 381, LRA1918A 818; Re Carpenter's Estate (1950) 327 Mich 195, 41 NW2d 349; Slattery v. Hartford-Connecticut Trust Co. (1932) 115 Conn 163, 161 A 79 (so held under Michigan law).

Minnesota. — Roberts v. Roberts (1924) 160 Minn 140, 199 NW 581.

Mississippi.—Sledge v. Floyd (1925) 139 Miss 398, 104 So 163.

Missouri. — Clarkson v. Hatton (1898) 143 Mo 47, 44 SW 761, 39 LRA 748, 65 Am St Rep 635 (so stating); Leeper v. Leeper (1941) 347 Mo 442, 147 SW2d 660, 133 ALR 536 (obiter); Rumans v. Lighthizer (1952) 363 Mo 125, 249 SW2d 397 (obiter); Burnes v. Burnes (1904, CC Mo) 132 F 485, affd (CA8th) 137 F 781, cert den 199 US 605, 50 L ed 330, 26 S Ct 746. But, contra, see Wailes v. Curators of Central College (1953) 363 Mo 932, 254 SW2d 645, 37 ALR2d 326, infra, § 3 (involving the later Missouri statute).

Montana. — Re Kay's Estate (1953) — Mont —, 260 P2d 391.

South Dakota.—Sorenson v. Churchill (1927) 51 SD 113, 212 NW 188.

Tennessee. — Coonradt v. Sailors (1948) 186 Tenn 294, 209 SW2d 859, 2 ALR2d 880.

Utah. — Re Benner (1946) 109 Utah 172, 166 P2d 257; Hendrich v. Anderson (1951, CA10th Utah) 191 F2d 242.

Washington. — Re Roderick (1930) 158 Wash 377, 291 P 325, 80 ALR 1398.

Wisconsin. — Re Sauer (1934) 216 Wis 289, 257 NW 23.

As indicated, the problem is ordinarily merely one of the construction of the adoption statute.

In Roberts v. Roberts (1924) 160 Minn 140, 199 NW 581, it was held that the right to inherit from the natural father was retained notwithstanding the adoption statute provided that an adopted child should become the legal child of the persons adopting him and they should become his legal parents, with all the rights and duties between them of natural parents and legitimate child, and that the child should inherit from the adopting parents or their relatives as though he were the legitimate child of such parents, and should not owe his natural parents or their relatives any legal duty, and that in case of his death intestate the adopting parents and their relatives should inherit his estate, as if they had been his parents and relatives in fact. From the opinion in that case it appears that at the time of the adoption, in the year 1898, the adoption statute contained a provision that no person by being adopted should lose his right to inherit from his natural parents or kindred, but that that saving provision had not been carried over into the revision of the statutes in 1905 and did not appear in the later statute; from which matters, viewed in connection with the explicit provisions of the adoption statute in force at the death of the decedent, which went so far as to disinherit the natural parents and relatives of the child, it would seem that a strong argument might have been constructed to the effect that by the later statutes the legislature intended to displace the natural parent-and-child relationship with the adopted one and not to save rights of inheritance from natural parents or kindred. In that case the adopted person claimed nothing under the express res-

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ervation of rights of inheritance contained in the statute as it existed at the time of the adoption proceeding.

In Re Sauer (1934) 216 Wis 289, 257 NW 28, where the pertinent section of the adoption statute provided, *in the first sentence*, that the adopted child should be deemed, "for the purposes of inheritance and succession and for all other legal consequences and incidents of the natural relation of parents and children," the same to all intents and purposes as if he had been born in lawful wedlock of the adoptive parents, but should not be capable of taking property expressly limited to the heirs of the body of an adoptive parent, and provided, *in the second sentence*, that the adoptive parents and their heirs and next of kin should be deemed for purposes of inheritance and succession by such parents, their heirs and next of kin, the same to all intents and purposes as if the child had been born in lawful wedlock of such adoptive parents, and should take in accordance with the general statutory provisions regulating inheritance and succession as between a parent and a child dying without issue, with the proviso that if no heirs or next of kin are found in the line of the adoptive parents the property of the deceased should go to the natural parents, and in case they shall have died, then "in their line of descent," and provided, *in the third sentence*, that the natural parents by the order of adoption should be deprived of such legal rights, if any, of whatsoever nature they may have had respecting the child and its property, and provided, *in the fourth sentence*, that the child should be free from all legal obligations of maintenance and obedience to the natural parents, subject to a further proviso clearly not of significance in the present inquiry—the court was of the opinion that the legislature did not by those provisions intend to deny to an adopted child the right to inherit from his natural parents. The court conceded that there would have been considerable force in the opposing contention if the section had contained no more than the first sentence, since had the legislature by that sentence intended the meaning argued for by the appellant it would have been unnecessary to have enacted much of the remainder of the section. It should be noted, however, that that ruling was made in view of a prior decision (Re Estate of Bradley (1924) 185 Wis 393, 201 NW 973, 38 ALR 1) which was stated to be to the effect that a statute which interferes with the descent of property to blood kindred or interrupts the natural course of descent should be strictly construed, especially since the established doctrine in Wisconsin is "that the right to inherit property is a natural right which the legislature cannot destroy." The court, in the Sauer Case, pointed out that in the adoption statute there was certainly no explicit and unmistakable language compelling a conclusion contrary to the one reached, and the court considered that under the Wisconsin decisions a child could not be deprived of the natural right of inheritance without the use of explicit and unmistakable language. But see Re Ries's Estate (1951) 259 Wis 453, 49 NW2d 483, 50 NW2d 397, infra, § 3.

In Re Tilliski's Estate (1945) 390 Ill 273, 61 NE2d 24, the court was of the opinion that in regard to the right of an adopted child to inherit from its natural mother the changes which had been made in the adoption and descent statutes effected no change in result, and in particular that the descent provision declaring that when a decedent leaves a surviving spouse and also a descendant, two-thirds of the property shall go "to the decedent's descendants per stirpes" was to be construed as including a child of decedent who had been adopted by a stranger, notwithstanding, as to adoptions, the statutes declared that a child lawfully adopted "is deemed a descendant of the adopting parent for purposes of inheritance." The court applied the principle that an adopted child is not deprived of the right to inherit from blood parents "unless clearly required by statute," and stressed that neither the prior statute of adoption, nor the

probate act involving the adoption language in question, nor the descent provisions, contained any language to the effect that a child should be incapable of inheriting from its natural parents.

In Re Kay's Estate (1953) — Mont —, 260 P2d 391, it was held that inasmuch as the statutes of descent provided that if a decedent left no surviving husband or wife but left issue, the whole estate should go to such issue "unless otherwise expressly provided by the laws of Montana," and there was in fact nothing to be found in the constitution or statutes expressly providing that because of their adoption by another the bodily issue of a natural parent should lose the right to inherit, the adopted child in question was entitled to take equally with his brother the entire estate of the natural father where the same passed as in case of intestacy.

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Some of the statutory language in question has seemingly been concerned with the personal and family relationships rather than with any matter implying a cessation of the child's rights of inheritance.

In Glanding v. Industrial Trust Co. (1946) 29 Del Ch 517, 46 A2d 881, the court said that the language of the Delaware adoption statute (providing that by the final order of adoption the natural parents should be divested of all legal rights and obligations in respect to the child and the child should be free from all legal obligations of obedience and maintenance respecting them) dealt with nothing more than the usual rights and obligations of parent and child while the latter remains a member of the family, and that thereby the natural status was not changed, the child continuing to be a child and heir at law and next of kin of his natural parents and the latter continuing to be the parents of the child with the same rights of inheritance as theretofore, save only for the proviso of the statute covering the case of an adopted child surviving the adoptive parent and dying without issue, when the property which came from the adopting parent and remains undisposed of shall pass to his or her next of kin and not to the next of kin of the adopted child. The court expressed the opinion that an adoption statute taken in connection with an inheritance statute should not be construed to change the devolution of intestate property "unless it shows a clear intent on the part of the legislature to do so."

In Sledge v. Floyd (1925) 139 Miss 398, 104 So 163, where the report does not set out the language of the adoption statute but the court stated that the act did not provide "in terms" that the adopted child should cease to be regarded as the child of his natural parents but divested the natural parents of the custody and control without in terms relieving them from the legal obligations imposed on them by law and without in terms providing that the child should cease to be regarded as their child, the court said that the adoption proceeding conferred on the child "such rights" as were therein "mentioned," and it was held that since neither the statute nor the proceeding purported to deprive the child of her right to inherit from her blood relatives such right was retained, and in particular that she was entitled to inherit from her natural father notwithstanding the adoption. The court remarked that it did not think that the adoption statute intended to deprive children of their rights to inherit from their blood parents and blood relatives, since to do so "would raise grave questions where a child having expectations should be adopted against its consent or without its power to consent during the tender years of minority."

In Sorenson v. Churchill (1927) 51 SD 113, 212 NW 488, the court said that the pertinent sections of the South Dakota adoption statutes were similar to those in question in Re Darling (1916) 173 Cal 221, 159 P 606, infra, yet the South Dakota court declined to follow the Darling Case. The court observed that the adoption statute fixed the status of the adopting person and of the adopted child and defined the rights and obligations of each to the other, without making any mention of the interests either might

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have in the estate of the other, and concluded, therefore, that notwithstanding the adoption the child was entitled to take the entire estate of his natural mother to the exclusion of the latter's brothers and sisters.

In Re Benner (1946) 109 Utah 172, 166 P2d 257, wherein the court said that the adoption statute in question was similar to the statute of South Dakota dealt with in Sorenson v. Churchill (1927) 51 SD 113, 212 NW 483, supra, the court quoted with approval language of the latter opinion to the effect that the adoption statute did not so limit that part of the succession statute in question as to cause an adopted child to lose the right to inherit from his natural parents, and that that conclusion was fortified by the consideration that under the law of adoption the consent of both natural and adopting parent is essential, and by his consent each is bound, whereas, "no one consents for the innocent and helpless subject of the transfer that he shall lose the right to inherit from his natural parent."

In Re Roderick (1930) 158 Wash 377, 291 P 325, 80 ALR 1398, where the court stated that Washington adoption statutes were substantially the same as those of California, Minnesota, and South Dakota, and the Washington provisions were that by the adoption the natural parents should be divested of "all legal rights and obligations" in respect of the child and the child should be free from all legal obligations of maintenance and obedience respecting them, and should be to all intents and purposes the child and legal heir of his or her adopter or adopters, and be entitled to all the rights and privileges and subject to all the obligations of a child of such person or persons begotten in lawful wedlock, with the proviso that in case of the decease of persons who have adopted a child and the subsequent decease of the child without issue, property coming from the adopting parents should descend to their next of kin and not to the next of kin of the child, it was held that a child of the decedent who had been adopted by a stranger remained entitled to inherit from the decedent and that the consequence was that since he had made no provision for her in his will and did not mention her therein, he in law died intestate as to her and she became entitled to share in the estate in the same manner as though he had died intestate. The latter consequence followed from the statute providing that if a person shall make his last will and die leaving a child, not named or provided for therein, who was born after the making of the will or the death of the testator, the testator as to such child shall be deemed to have died intestate, etc.

In Hale v. Department of Labor & Industries (1944) 20 Wash2d 14, 145 P2d 285 (where it was held that a child who had been receiving compensation from the department of labor and industries on account of the death of her father did not lose the right to further monthly amounts because of having been adopted by another) the court stated it was committed to the rule that an adoption does not effect a dissolution of the natural relationship between kindred, and that an adopted child is not deprived of the benefits arising therefrom, citing the Roderick Case (Wash) supra.

But compare the California cases, infra.

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A statute which includes as a principal or dominant feature the establishing of the child as an heir of the adopting parent, without making reference to the inheritance from natural parents, is not likely to be construed as depriving the child of that inheritance.

In Shaver v. Nash (1930) 181 Ark 1112, 29 SW2d 298, 73 ALR 961, the court declared, arguendo, that under the Texas statute (providing that any person wishing to adopt another "as his legal heir" should file in a designated office a written statement of a character described and that when made and recorded the statement should entitle the adopted child to all the rights and privileges of "a legal heir" of the adoptive parent) an adopted child retains all his rights to the

protection "and to the estate of, his natural parent."

In Burnes v. Burnes (1904, CC Mo) 132 F 485, affd (CA8th) 137 F 781, cert den 199 US 605, 50 L ed 330, 26 S Ct 746, the court stated that under the Missouri statutes then applying, no judicial proceeding was needed for the adoption of children and that all the statutes seemed to require was a signing by the adopting parent of a specified instrument, its due acknowledgment, and its recording, and that the effect of it was that the child could inherit from its foster parent, even though adopted without his knowledge or consent; in fact could inherit "both from his natural father and the adopting father. Such is and has been the law of Missouri." But see Wailes v. Curators of Central College (1953) 363 Mo 932, 254 SW2d 645, 37 ALR2d 326, infra, § 3, involving a very different statute.

In Slattery v. Hartford-Connecticut Trust Co. (1932) 115 Conn 163, 161 A 79, involving an adoption in Michigan under a statute declaring that the person adopting a child shall stand in the place of a parent to the child and be liable to all the duties and entitled to all the rights of a parent, and that the child shall thereupon become an heir at law of the person adopting him the same as if he were in fact the child of the adopting person, the court said that, under that statute as construed in Michigan, the person adopted would inherit from both natural and adopting parents even though the statute did not specify that the child should retain the inheritance from his natural parents. The ruling made was that the child was entitled to inherit as a child of his natural parent in Connecticut notwithstanding, the court stated, it had seemed wise to the Connecticut legislature to debar a child adopted under the Connecticut statutes from inheriting from his natural parents.

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Various cases disclose statements or intimations to the effect that the child retains the right of inheritance from his natural parents notwithstanding the adoption.

In Villier v. Watson (1916) 168 Ky 631, 182 SW 869, LRA1918A 820, the court stated that "all the authorities agree, that the fact of adoption does not lose the adopted child's right of inheritance from his parents," and the court reasoned therefrom that it was "difficult to see why a child could not inherit from two or more persons who might by adoption bestow that right upon him."

In Clarkson v. Hatton (1898) 143 Mo 47, 44 SW 761, 39 LRA 748, 65 Am St Rep 635, the court went so far as to say that by the adoption the child becomes, in a legal sense, the child of the adopting parents, and at the same time remains the child of his natural parents, and is not deprived of his rights of inheritance from them "unless expressly so provided by statute." That language, however, was doubtless used obiter. Compare the ruling in Wailes v. Curators of Central College (1953) 363 Mo 932, 254 SW2d 645, 37 ALR2d 326, infra, § 3.

In Rumans v. Lighthizer (1952) 363 Mo 125, 249 SW2d 397, a contest between the blood kin of the adopted child on the one side and the blood kin of the adoptive parent on the other, both child and parent having died intestate (and therefore not involving the right of an adopted child to inherit from its natural parents or kin), the court cited the Clarkson Case (1898) 143 Mo 47, 44 SW 761, 39 LRA 748, 65 Am St Rep 635, supra, as authority for the proposition that the adopted child inherits "from its adoptive parents and from its natural parents." Yet at the same time the court observed that the Missouri adoption statute of 1917 differed materially from the prior law, and the court quoted language of the 1917 Act, including the provision that when a child is adopted under and in accordance with the act "all legal relationship, and all rights and duties, between such child and its natural parents shall cease and determine," and moreover, the court quoted the language of St. Louis Union Trust Co. v. Hill (1934) 336 Mo 17, 25, 76 SW2d 685, 689, to the effect that under the later law an adopted child's relations with its natural parents cease and by

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law it becomes the child of its adopting parents "for every purpose as fully as though born to the adopting parents in lawful wedlock," and that the adopted child "is taken out of the blood stream of its natural parents" and placed, by operation of law, in the blood stream of its adopting parents.

In Re Klapp's Estate (1917) 197 Mich 615, 164 NW 381, LRA1918A 818, the court conceded, with reference to an adoption statute declaring that upon the adoption taking effect the child should become an heir at law of the adoptive parent or parents, the same as if he or she were in fact the child of such person or persons, that it was "pretty well settled by the adjudicated cases that an adopted child may inherit from both his natural and adoptive parents." However, the matter there to be decided was whether the adopted child lost the right to inherit from the adoptive parent when he was thereafter adopted by another.

In Re Carpenter's Estate (1950) 327 Mich 195, 41 NW2d 349, where the matter to be decided was whether the child remained an heir at law of the first adoptive parents notwithstanding a second adoption (the ruling being in the negative), the court incidentally stated that "there is no question but that the child will always remain an heir at law of her natural parents."

In Patterson v. Browning (1896) 146 Ind 160, 44 NE 993, the court, in holding that the right of an adopted child to inherit from the adoptive parent was not destroyed by a second adoption occurring after the death of the first adoptive parent, relied, arguendo, upon the fact that an adopted child may inherit from both the natural and the adoptive parents.

In Dreyer v. Schrick (1919) 105 Kan 495, 185 P 30, the court, in holding that the fact that a child is the subject of a second adoption does not cut off the capacity to inherit under the former one, asserted that an adopted child may inherit from both the natural and the adoptive parents.

Re Anderson's Estate (1935) 23 Pa D & C 332, involved the construction of a will rather than of statutes of descent or adoption. It was there held that the child was entitled to share in the corpus of a testamentary trust established for the benefit of the natural parent for life, to be paid at his decease "to his child or children living," notwithstanding during the lifetime of his natural parent the child was adopted by a stranger. It is true that at one point the auditing judge said that the question involved the determination of the status of an adopted person "as respects inheritance" from or through a natural parent, but in his ruling he in effect departed from that language. The opinion in confirmation placed no reliance on the mere inheritance laws.

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The adoption statutes of certain states have expressly saved the child's right to inherit from his natural parents.

Arkansas. — Hawkins v. Hawkins (1951) 218 Ark 423, 236 SW2d 733.

Florida.—Re Hewett's Estate (1943) 153 Fla 137, 13 So2d 904.

Massachusetts. — Delano v. Bruerton (1889) 148 Mass 619, 20 NE 308, 2 LRA 698.

New York. — Re Landers (1917) 100 Misc 635, 166 NYS 1036; Re Monroe (1928) 132 Misc 279, 229 NYS 476; Re Gourlay's Estate (1940) 173 Misc 930, 19 NYS2d 122; Re Ferris' Estate (1948, Sur) 79 NYS2d 12; Re Fodor (1952) 202 Misc 1100, 117 NYS2d 331.

Ohio. — National Bank of Lima v. Hancock (1948) 85 Ohio App 1, 88 NE 2d 67 ("nothing in this act shall be construed as debarring a legally adopted child from inheriting property of its natural parents or other kin"); Re Crossley (1939) 135 Pa Super 524, 7 A2d 539 (involving Ohio statute).

Pennsylvania. — Re Crossley (1939) 135 Pa Super 524, 7 A2d 539 (involving express provision of Ohio statute).

Wisconsin.—Re Ries's Estate (1951) 259 Wis 453, 49 NW2d 483, 50 NW2d 397.

In Re Hewitt's Estate (1943) 153 Fla 137, 13 So2d 904, a case involving the right of an adopted child to inherit from kindred of the adoptive parent or parents, and therefore not on its

facts within this annotation, the Florida statute of 1933 in question provided that an adopted child "shall inherit the estate of its blood parents, but such blood parents shall not inherit from such adopted child."

In Hawkins v. Hawkins (1951) 218 Ark 423, 236 SW2d 733, the court said it was the settled law of Arkansas that an adopted child "can inherit from its natural parents," and moreover, that by the adoption statute of 1947 it had been expressly provided that "the adopted child should inherit from its natural parents."

In Macon, D. & S. R. Co. v. Porter (1942) 195 Ga 40, 22 SE2d 818, followed in Macon, D. & S. R. Co. v. Porter (1942) 68 Ga App 462, 23 SE2d 280, not involving rights of inheritance but a question whether the adopted child remained the child of his natural father so as to be able to recover for the latter's wrongful death, the adoption statute provided that the adoption decree should declare the child to be the adopted child of the adoptive parent and capable of inheriting his estate, and that as between them the relation of parent and child should exist "except that the adoptive father shall never inherit from the child. To all other persons the adopted child shall stand as if no such act of adoption had been taken."

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Notwithstanding the general judicial tendency to uphold the child's right to inherit from his natural parents where the adoption statute may be construed as establishing a personal and family status without intent to affect existing rights of inheritance (see generally the cases supra, especially Sorenson v. Churchill (1927) 51 SD 113, 212 NW 488), the California courts have proceeded to an opposite conclusion.

In Re Darling (1916) 173 Cal 221, 159 P 606, the court declared that the adoption statute specifying that the parents of an adopted child are from the time of the adoption "relieved of all parental duties" toward and "all responsibility" for the child and have "no right over it" had the effect of providing that the adopted child could no longer inherit from his parents because so far as they were concerned "he is no longer their child." The question presented, however, was whether the adopted child could inherit from his grandfather, representatively in the place of his father deceased, and it was held that he could.

In Re Tilliski's Estate (1945) 390 Ill 273, 51 NE2d 24, the court commented that in the Darling Case (Cal) supra, "The somewhat illogical result was reached that an adopted child could not inherit from its natural parents, but could inherit from its natural grandparents." And notice in this connection Sorenson v. Churchill (1927) 51 SD 113, 212 NW 488, supra.

In Re Hunsicker (1923) 65 Cal App 114, 223 P 411, where the adoption occurred in Pennsylvania under statutes merely providing that it should be lawful for any person desirous of adopting any child "as his or her heir" to present a petition declaring such desire and that he or she would perform the duties of a parent to the child, etc., and that the court, if satisfied that the welfare of the child would be promoted by the adoption, might with the consent of the parents of the child decree that the child assume the name of the adopting parent and have all the rights of a child and heir of such adopting parent and be subject to the duties of such a child, and further, that if the adopting parent shall have other children the adopted one shall share the inheritance only as one of them, and that he, she, or they shall respectively inherit from and through each other "as if all had been the lawful children of the same parent," it was held that a natural daughter of the decedent, the will not mentioning her or her children, nor containing any language to indicate that the omission was intentional, could not claim the estate as a pretermitted child (by virtue of the California statute declaring that when any testator omits to provide in his will for any of his children or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, shall take the same share in the

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estate of the testator as if he had died intestate), for the court was of the opinion that the daughter of the decedent was not one of his children under that statute, the relation of parent and child existing between her and her father having, in the view of the court, been supplanted by a new relation created by the adoption. It seems that the principal contention of the daughter was that upon the death of the adoptive parent the natural relation of parent and child between herself and father had been restored. One might have supposed that the import of the Pennsylvania adoption statute was simply to establish the relation of parent and child between the child and the adopting parent and entitle the child to share by inheritance with the natural children of the adoptive parent in case of intestacy, and that it disclosed no intent to destroy any right to inherit from other persons.

In Re Martin's Estate (1948) 86 Cal App2d 474, 195 P2d 839, where the theory of appellant was that respondent was not entitled to inherit as a daughter of the decedent because she had been adopted out of the family in the year 1910 by a Minnesota adoption decree, the court seemed to assume that had the adoption been valid the result contended for would have followed, but held that the adoption decree was without effect for want of proper notice.

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A few statutes very plainly deprive the child of the right to inherit from the natural parents.

In Slattery v. Hartford-Connecticut Trust Co. (1932) 115 Conn 163, 161 A 79, where the court quoted with evident approval the language of Re Darling (1916) 173 Cal 221, 159 P 606, to the effect that it is well settled in all jurisdictions in which the common law constitutes the rule of decision that "the right of inheritance of a child is affected by its adoption only to the extent that the statutes bearing on the matter in terms or by implication provide," the court, without quoting or paraphrasing the Connecticut adoption statute, remarked that it had "seemed wise to our legislature to debar a child adopted under our statute from the right of inheritance from his natural parents, and it has to this extent established our public policy."

In Re Tilliski's Estate (1945) 390 Ill 273, 61 NE2d 24, the court noted that Connecticut had "an express statute precluding inheritance from the natural parent."

And notice the District of Columbia statute in question in Re Penfield's Estate (1949, DC Dist Col) 81 F Supp 622, infra, § 3.

Apparently by a recent Minnesota statute (Laws 1951, ch 508, MSA §§ 259.21 et seq) it is expressly provided that an adopted child (perhaps simply that an adopted illegitimate child) shall not inherit from his natural father, since in O'Dell v. Hingeveld (1951) 235 Minn 223, 50 NW2d 476, the opinion states that prior to that statute, an illegitimate child, adopted by a stranger inherited from its natural father just as did a legitimate child—the court citing Roberts v. Roberts (1924) 160 Minn 140, 199 NW 581, supra.

The Missouri statute, which contains strong language touching the point, has been construed as cutting off the natural inheritance—see Wailes v. Curators of Central College (1953) 363 Mo 932, 254 SW2d 645, 37 ALR2d 326, infra, § 3.

In Re Hampton's Estate (1942) 55 Cal App2d 543, 131 P2d 565, it was conceded that the daughter of the testatrix would have no standing to contest the will if her adoption by another in Kansas was valid, the court stating in reference to that point that the California Probate Code provided that "an adopted child does not succeed to the estate of a natural parent when the relationship between them has been severed by the adoption," citing Re Darling's Estate (1916) 173 Cal 221, 159 P 606, supra. But in the Darling Case the court distinctly stated: "There is no provision in any of our statutes of succession or those relating to adoption that in terms refers to the matter of inheritance."

§ 3. Inheritance from grandparents or other natural kin.

The right of the child to inherit from his grandparents or other natural kin, or to share in the distribution of personalty of intestate persons so related, is not affected by the adoption except as the statutes otherwise provide—see the general citation of cases touching this point, supra, § 1.

In the following cases, such right was upheld:

California.—Re Darling (1916) 173 Cal 221, 159 P 606.

Colorado.—Re Wilson (1934) 95 Colo 159, 33 P2d 969.

District of Columbia.—Re Penfield's Estate (1949, DC Dist Col) 81 F Supp 622.

Georgia.—Macon, D. & S. R. Co. v. Porter (1942) 195 Ga 40, 22 SE2d 818, followed in Macon, D. & S. R. Co. v. Porter (1942) 68 Ga App 462, 23 SE2d 280.

Indiana. — Humphries v. Davis (1885) 100 Ind 274, 50 Am Rep 788; Billings v. Head (1916) 184 Ind 361, 111 NE 177; Head v. Leak (1916) 61 Ind App 253, 111 NE 952.

Iowa.—Wagner v. Varner (1879) 50 Iowa 532.

Kansas. — Bartram v. Holcomb (1921) 109 Kan 87, 198 P 192.

Missouri.—St. Louis Union Trust Co. v. Kaltenbach (1945) 353 Mo 1114, 186 SW2d 578. But see Wailes v. Curators of Central College (1953) 363 Mo 932, 254 SW2d 645, 37 ALR2d 326, infra, this section.

New York.—Re Landers (1917) 100 Misc 635, 166 NYS 1036; Re Gourlay's Estate (1940) 173 Misc 930, 19 NYS2d 122.

Utah. — Re Benner (1946) 109 Utah 172, 166 P2d 257.

In Re Landers (1917) 100 Misc 635, 166 NYS 1036, the right of the child, a half sister of the decedent, to share equally in the distribution of personalty with a sister of the whole blood was held unaffected by the adoption statutes (which, as first enacted, declared that the adopted child and the adoptive parent should sustain toward each other the legal relation of parent and child and have all the rights and be subject to all the duties of that relation, "excepting the right of inheritance," but which as amended, left out the words "excepting the right of inheritance," and substituted the words "including the right of inheritance," and further declared that the heirs and next of kin of the adopted child should be the same as they would be were he the legitimate child of the adopting parent, and also that "his rights of inheritance and succession from his natural parents remain unaffected by such adoption"), for although the statutes made no reference to other kin of the adopted child the court concluded that this simply indicated that "there is no altered relation created by statute."

The grandchildren of an intestate have frequently been allowed to share as heirs or distributees notwithstanding adoption by a stranger.

In Re Darling (1916) 173 Cal 221, 159 P 606, the view taken was that the California adoption statute (providing simply for an order of adoption declaring that the child "shall thenceforth be regarded and treated in all respects as the child of the person adopting," and that the child and the person adopting shall sustain toward each other the legal relation of parent and child and have all the rights and be subject to all the duties of that relation, and further, that the parents of an adopted child shall from the time of adoption be "relieved of all parental duties" toward and all responsibility for the child and have "no right over it") did not have the effect of providing in any manner, either expressly or by implication, that an adopted child should not inherit from blood relatives, and accordingly it was held that the child was entitled to share in the estate of his grandfather, representatively through his deceased father, under that provision of the code declaring that if a decedent leaves no surviving husband or wife but leaves issue, the whole estate shall go to such issue and that if such issue consists of more than one child living, "or one child living and the lawful issue of one or more deceased children," then the estate should go in equal shares to the children living, "or to the child living

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and the issue of the deceased child or children by right of representation." In short, the adopted child in that case remained the "issue" of his grandfather under the law of succession notwithstanding the adoption.

In St. Louis Union Trust Co. v. Kaltenbach (1945) 353 Mo 1114, 186 SW2d 578, the court, in holding that the child remained capable of inheriting from his grandfather, that is, the court said, "through his own father," notwithstanding the California adoption proceeding, noted that the Missouri statute did not expressly provide that an adopted child should not inherit from his natural parents, and in that connection the court referred to the language of Clarkson v. Hatton (1898) 143 Mo 47, 44 SW 761, 39 LRA 748, 65 Am St Rep 635, to the effect that an adopted child remains the child of its natural parents "and is not deprived of its rights of inheritance from them unless expressly so provided by statute." However, in the Kaltenbach Case the specific ruling was simply that the minor child did not lose his rights of inheritance through his own father by a proceeding of which the father had been given no notice and in which no guardian ad litem had been appointed to represent and protect the child's interests.

In Re Gourlay's Estate (1940) 173 Misc 930, 19 NYS2d 122, it was held, upon the authority of Re Landers (1917) 100 Misc 635, 166 NYS 1036, supra, and seemingly under the same or similar statutory provisions, that a child adopted in New Jersey was entitled to share in New York in the distribution of New York assets of which the child's natural grandfather had died possessed.

And, in general, see the cases infra, § 4.

It may be noted that in Re Esposito's Estate (1943) 57 Cal App2d 859, 135 P2d 167, it was held that a granddaughter of the testator, notwithstanding her adoption by a stranger, could claim under the will, substitutionally, an interest in the estate left to her father, the father having predeceased the testator, for notwithstanding her adoption the granddaughter was a "lineal descendant" of her grandfather within the meaning of the statute providing that if a devisee or legatee dies during the lifetime of the testator the testamentary disposition to him fails unless an intention appears to substitute another, except that when any estate is devised or bequeathed "to any kindred" of the testator and the devisee or legatee dies before the testator "leaving lineal descendants," such descendants shall take the estate in the same manner as the devisee or legatee would have done had he survived the testator. The argument to the contrary was largely based on a further statute which dealt with the rights of illegitimate children, but which the court held did not apply and did not control the plain language of the statute first above referred to. The court noted that the granddaughter's claim was not founded upon the succession laws but arose under the laws relating to wills.

It may be noted that in Taylor's Estate (1946) 57 Pa D & C 311, it was held that the child, an illegitimate son of a daughter of one William McDaniels, could take under the provision of a will directing distribution "to the issue of William McDaniels"; this notwithstanding the child had been adopted by a stranger and the adoption statute provided that adopted persons should not be entitled "to inherit or take from or through their natural parents, grandparents, or collateral relatives."

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But in Re Ries's Estate (1951) 259 Wis 453, 49 NW2d 483, 50 NW2d 397, where it appeared that in the year 1947 the Wisconsin legislature had rephrased and condensed the language of the adoption statute which was in question in Re Sauer (1931) 216 Wis 289, 257 NW 289, supra, § 2, although generally it seems without intent to change the meaning, but there was added the distinct provision: "The adopted person does not lose the right to inherit from his natural parent," it was held that the addition of that provision, which had been included to

codify the ruling made in the Sauer Case, had the effect of preventing any extension of the doctrine of inheritance from natural relatives additional to parents, and that consequently the child in question by reason of her adoption was prevented from inheriting from her father's aunt. The court conceded that but for the added provision of the statute the Sauer Case might have become a precedent for decisions allowing adopted children to inherit from their natural relatives generally, but, the court said, "now the amendment has intervened," so as to set as a limit the point of decision in the Sauer Case. The language of the first sentence of that section of the adoption statute in question, as altered by the legislative condensation and rephrasing, contained the words that the effect of the order of adoption should be to "completely change the legal status" of the adopted person, language which seems to readily lend itself to the construction that the adopted relationship was to be substituted for the former one.

In Wailes v. Curators of Central College (1953) 363 Mo 932, 254 SW2d 645, 37 ALR2d 326, the first Missouri case to require a decision of the question whether an adopted child may inherit from or through its natural parents, the question was answered in the negative, this on the strength of the language of the Missouri adoption statute of 1917 providing that when a child is adopted in accordance with the provisions thereof all legal relationships "and all rights and duties between such child and his natural parents . . . shall cease and determine" and such child shall thereafter be deemed and held to be "for every purpose" the child of his parent or parents by adoption as fully as though born to him or them in lawful wedlock. The court stressed that it required "some ingenuity to reason that 'all rights' means all except one." There the precise question was whether the adopted children were the heirs of their grandparents, and therefore could be pretermitted heirs entitled to take notwithstanding the joint will of the grandparents, made no mention of them and they were the only children of the only child of such persons and such child had predeceased the decedents. The conclusion reached was that the children, having been validly adopted by strangers, were not heirs of their grandparents, and, therefore, could not be pretermitted heirs of such persons. The court cited Clarkson v. Hatton (1898) 143 Mo 47, 44 SW 761, 39 LRA 748, 65 Am St Rep 635, as indicating that prior to the 1917 change in the adoption law of Missouri an adopted child might inherit from both adoptive and natural parents.

In Young v. Bridges (1933) 86 NH 135, 165 A 272, the child, who was born in wedlock, had unquestionably inherited her mother's interest in the real estate in question, since that interest had come to the mother upon the death of the grandmother and had passed to the child upon the mother's death and was clearly unaffected by the subsequent adoption proceeding. The adoption then occurred, after which the maternal grandfather, who owned an interest in the same real estate, died. The ruling made under those circumstances was that the child could not share in the real estate as an heir of the grandfather, notwithstanding the statutes as amended made illegitimates "heirs of the mother and her kindred," for the court was of the opinion that the adoption statute in making the adopted child "the child of the petitioner to all legal intents and purposes," fairly disclosed an intention that the adoption should establish a "change of status by which in general the relatives become strangers in legal aspect and others take their place." The court took the view that the general purpose of the statute was to free the child from his status arising from his relationships by blood and to give him a new status and that he was to be regarded as "taken in legal contemplation from his natural family and made a member of a new family." As supporting that conclusion the court examined the dilemmas which can arise when the dual inheritance is preserved, by which striking

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inequalities can result, and the court said that when no dual inheritance has been explicitly enacted "the argument against its implication is reinforced by the unnatural and abnormal possibilities to which it leads." It is to be noted that the adoption statute there in question contained no terms peculiarly decisive of the problem, for it merely provided in not unusual terms that the child should bear the same relationship to the adopting parents and their kindred in respect to the inheritance of property, and all other incidents pertaining to the relation of parent and child, that he would bear were he the natural child of such parents, except that he should not take property expressly limited to the heirs of the body or bodies of the adopting parents, and should he die under age or intestate, leaving property received by gift "or inheritance from his natural kindred," such property should be distributed as if there had been no decree of adoption. As to the language last quoted from the statute, the court was of the opinion that any supposed implication thereof contrary to the conclusion reached could be explained by the possibility that at the time of adoption a child might have become the owner of property received by inheritance from natural kindred.

In Re Hunsicker (1923) 65 Cal App 114, 223 P 411, where the Pennsylvania adoption statute (declaring it to be lawful for any person desirous of adopting any child as his or her heir to present a petition, etc., and stipulating that the decree of adoption should provide that the child should assume the name of the adopting parent and have all the rights of a child and heir of such parent and be subject to the duties of a child and that in case the adoptive parent has other children, he, she, or they should respectively inherit from and through each other "as if all had been the lawful children of the same parent") was held not to entitle the daughter of the decedent to take as a pretermitted child by virtue of the California statute providing that when any testator omits to provide in his will for any of his children, or for "the issue of any deceased child," unless it appears that such omission was intentional, such child, or the issue of such child, shall have the same share in the estate of the testator as if he had died intestate, since the daughter had been adopted by a stranger, the further conclusion reached was that the children of the daughter were not entitled to share since they could not be described as "the issue of any deceased child" within the language of the California pretermission statute.

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Some of the statutes expressly save the right of the child to inherit from his natural kin.

Georgia.—See Macon, D. & S. R. Co. v. Porter (1942) 195 Ga 40, 22 SE2d 818, followed in Macon, D. & S. R. Co. v. Porter (1942) 68 Ga App 462, 23 SE 2d 280, supra, § 2.

Massachusetts.—Delano v. Bruerton (1889) 148 Mass 619, 20 NE 308, 2 LRA 698.

Ohio.—National Bank of Lima v. Hancock (1949) 85 Ohio App 1, 88 NE 2d 67 ("nothing in this act shall be construed as debarring a legally adopted child from inheriting property of its natural parents or other kin"); Re Crossley (1939) 135 Pa Super 524, 7 A2d 539 (involving Ohio statute).

Pennsylvania.—Re Crossley (1939) 135 Pa Super 524, 7 A2d 539 (involving Ohio statute).

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Pennsylvania and District of Columbia statutes have expressly cut off the child's right of inheritance from natural kin. Re Penfield's Estate (1949, DC Dist Col) 81 F Supp 622; Re Zoell's Estate (1942) 345 Pa 413, 29 A2d 31, cert den 318 US 778, 87 L ed 1146, 63 S Ct 855; Re Crossley (1939) 135 Pa Super 524, 7 A2d 539; Re Fisher (1942, Pa) 58 Montg Co LR 134; Re Wessman (1944, Pa) 29 North Co R 242; Re Kallenberger's Estate (1946, Pa) 36 Del Co 389.

The Pennsylvania statute of 1917, in question in Re Zoell's Estate (1942) 345 Pa 413, 29 A2d 31, cert den 318

US 773, 87 L ed 1146, 63 S Ct 855, contained the express provision that adopted persons "shall not be entitled to inherit or take from or through their natural parents, grandparents, or collateral relatives." Thereunder it was held that appellant, a niece of the intestate, who had been adopted by another in New Jersey, was not entitled to share in the estate even though the New Jersey decree purported to save to the child rights of natural inheritance.

In Re Penfield's Estate (1949, DC Dist Col) 81 F Supp 622, it was held that a Nevada adoption decree of March, 1922, did not exclude the adoptee from receiving as next of kin of a decedent personal property in the District of Columbia, notwithstanding the code of the District, becoming effective August 25, 1937, declared that all rights and duties "including those of inheritance and succession between the adoptee, his or her natural parents, their issue, collateral relatives, etc., shall be cut off," for the statute also provided that it should have no retroactive effect and should not be construed as affecting in any way the rights and relations obtained "by any decree of adoption entered prior to August 25, 1937."

The ruling in Stamford Trust Co. v. Lockwood (1922) 98 Conn 337, 119 A 218, did not involve the question whether an adopted child may take by inheritance from his natural parent or kin, but whether the testamentary words "the lawful issue," as applied to children of a son of the testator, included one who was born after testator's death and was adopted by a stranger. It was held that, by force of the adoption statute, the grandchild ceased to be the child of her father and became the child of her parents by adoption and could not take as "lawful issue." The report does not set out or paraphrase the statutory language construed to have had that effect, but seemingly it was language explicitly cutting off the right of inheritance—see Slattery v. Hartford-Connecticut Trust Co. (1932) 115 Conn 163, 161 A 79, supra, § 2.

§ 4. Inheritance in two capacities from one estate.

Decisions from Colorado, Iowa, Kansas, and Utah have allowed a child adopted by his grandparent to take as a "child" of the grandparent and also to take as a grandchild representing the stock of the immediate parent deceased, the latter recovery (except in Utah) having been allowed under statutes of descent and distribution manifestly designed to avoid the inequality which would result from an entire exclusion of the stock of the immediate parent, where a brother or sister of the latter survives, and seemingly not with any intent to produce a double inheritance.

In Wagner v. Varner (1879) 50 Iowa 532, where the intestate had adopted the two children of a deceased daughter, and was survived by them and also by certain children, it was held that the adoptees were entitled to share in the estate as children and also as grandchildren, taking in the latter capacity the share their mother would have taken had she outlived the decedent—this because the adoption statute declared that the rights, duties, and relations between parent and child by adoption should in all respects, including the right of inheritance, "be the same that exist by law between parent and child by lawful birth," and the descent statute provided that in case a child of the decedent be dead the heirs of such child shall inherit the share such child would have taken had he outlived his parent. The court said that there was no escape from the conclusion announced unless it could be said that a child by the adoption becomes disinherited by its natural parent, and the court noted that in certain contingencies adoption could be had without the consent of the natural parents, so that, in the view of the court, under the contention made an adopted child might be "disinherited by the natural parent without the consent of the latter." The further argument of the opinion was that by the adoption the child acquires certain additional rights and there was nothing in the act of adoption which in and of

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itself took away existing rights or any which might subsequently accrue, except as by statute provided, that the grandchildren in question remained the children of their natural parents, and the act of adoption did not deprive them of the statutory right of inheriting from their natural parents; in fact the court said: "We think the contrary is expressly provided." It may be noted, however, that in such a situation as that presented, no right to inherit from the natural parent is involved, the latter having predeceased the intestate; the question arising is simply whether the adopted child may share twice in the one estate.

In Bartram v. Holcomb (1921) 109 Kan 87, 198 P 192, where the intestate had had two children, one of whom died in his lifetime leaving an only child, and such child was then adopted by the intestate and survived him and eventually claimed one share in the estate as the representative of his mother and another as adopted son, the court in allowing the double sharing regarded it as the logical result of the rule that an adopted child may inherit from both the natural and the adopted parents, the court in that connection stating that the only question presented was whether the grandson could inherit from his grandfather as an adopted child "and at the same time as the sole surviving heir of his mother." The court did not set out or paraphrase the language of the descent statute, but evidently it was one in the familiar form dividing the estate of an intestate into as many shares as there are children surviving and children deceased who have left issue surviving.

In Re Wilson (1934) 95 Colo 159, 33 P2d 969, where, following the decease of both natural parents, the child was adopted by his grandfather, it was held that upon the latter's death the child was entitled to inherit from his grandfather both as an adopted child and as a grandchild, since the statutes of descent and distribution provided that intestate property should go to the decedent's children surviving and to the descendants of his children who were dead, while the adoption statute simply provided that to all intents and purposes legally adopted children should be children and legal heirs of the persons adopting them and was to be construed as depriving an adopted child of nothing but as conferring on him certain additional rights of inheritance.

In Re Benner (1946) 109 Utah 172, 166 P2d 257, the only surviving heirs of the intestate were three grandchildren, the issue of a deceased daughter, and the intestate had adopted one of those grandchildren. It was held that the child did not thereby lose the right to inherit from and through his mother, for in its bearing on that question the adoption statute merely provided that the adopted person and the adoptive parent should sustain the legal relation of parent and child and have all the rights and be subject to all the duties of that relation and that the natural parents should be relieved of all parental duties toward and all responsibility for the child and should have "no further rights over it," and the court was of the opinion that the reasonable construction of that language was that it did not touch the matter of inheritance but had reference rather to custody and control. Moreover, the conclusion which was held to follow (one judge dissenting) was that since the statute of descent and distribution provided that if a decedent leaves no husband or wife but leaves issue, the whole estate should go to such issue, the child was entitled to take a one-third share as "issue," besides the greater share he was entitled to as adopted child.

But in Billings v. Head (1916) 184 Ind 361, 111 NE 177, where the decedent left as his heirs a widow, four children, and a grandchild (the latter being the daughter of a deceased son who had been adopted by the grandfather), it was held with reference to the statutes of descent providing that an intestate's land should descend one-third to his widow and the remainder to his children equally, and that if a child be dead leaving a child surviving the latter should take the share which

the parent would have inherited if living, and also with reference to the adoption statute providing that an adopted child should be entitled to all the rights in the estate of the adopting father or mother, by descent or otherwise, that the child would be entitled to if a natural heir of the adopting father or mother, that the grandchild in question was entitled to take either two-fifteenths of the estate as the representative of her father or two-fifteenths as the adopted daughter of the intestate but was not entitled to take a double share. The court conceded that the statutes contained no language dealing with the situation presented, placing the decision upon the broad ground that it was "not the legislative purpose" that an adopted grandchild should ever inherit more of the adopting parent's estate than would one of his natural children. It was not decided in that case whether the grandchild took as adopted child or on the contrary through her father, although the court pointed out that in the future it might be important to know under which statute, the adoption statute or the descent statute the interest was taken, for by an express provision of the adoption statute if an adopted child should die the owner of property acquired through the adoption, rather than as a blood descendant, the same should descend to the heirs of the adopting father or mother and not otherwise. Later in Head v. Leak (1916) 61 Ind App 253, 111 NE 952, involving a distribution of the surplus of personal estate of the deceased adoptive parent, the grandfather of the adopted child, it was held that the principle to be followed in determining in which capacity the child took from her grandfather was that she should be held to take in that capacity which would give her the greatest interest and that since there was no proviso attaching to the further descent of property taken as a natural heir and it would descend according to the general laws of descent, and the child's rights in the property would consequently be greater as a natural heir than as an adopted child, the conclusion indicated was that she took as a natural heir through her deceased father.

In Morgan v. Reel (1905) 213 Pa 81, 62 A 253, it was held that the adoption statute, providing that the adopted child should have the rights of a child and heir of the adopting parent, although if the latter should have other children the adopted child could share only as one of them, and that in case of intestacy, he, she, or they, should respectively inherit from and through each other as if all were the lawful children of the same parent, certainly did not expressly provide for the case of a grandparent adopting his grandchild, yet that nevertheless the intent was plain that the status of the adopted child should be equal but not superior to that of the others and that such intent was enough to indicate that the child could share in the grandfather's estate only as his child by adoption and could not also share as a representative of her deceased mother. The result was that the estate was held to descend in four stocks: one to each of the two actual daughters, another to the adopted daughter, and the remaining one to the son of the deceased daughter. Said the court: "Thus, and thus only, can the equality intended by the statute be maintained." In Reel's Estate (1902) 12 Pa Dist 608, involving the same estate and adopted child and right of inheritance as were in question in Morgan v. Reel (Pa) supra, it had been held (contrary to the later ruling in the Morgan Case) that the grandchild of decedent having been adopted by him was entitled to take a fourth share of the estate as his child and also an eighth as a natural grandchild, the latter by virtue of the statute of inheritance entitling issue of a deceased child to take the share of the parent, representatively.

In Delano v. Bruerton (1889) 148 Mass 619, 20 NE 308, 2 LRA 698, where the intestate, who left as his heirs at law and distributees five daughters and also a grandson, the latter the only child of a deceased son, and he

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had adopted the grandson, and the adoptee claimed a share in the personal estate as an adopted son and also a further like amount as a grandson representing his deceased father, relying upon a provision of the adoption statute that "no person shall, by being adopted, lose his right to inherit from his natural parents or kindred," the court was of the opinion that in making the latter provision the legislature was not to be understood as intending that the word "kindred" should include the adopting parent, the intent having been rather to save the right of inheritance "from other parties," after having provided for the right of inheritance from the adopting parent. The court stressed that it was not dealing with the question whether the grandson could inherit as a son by adoption and at the same time inherit as a son of his own father, but the sole question was as to the right to inherit from the grandfather in two capacities. The court did not cite the statutes of descent, which evidently provided for the division of personalty of an intestate into as many shares as he leaves children surviving and children deceased who have left issue surviving.

In Burnes v. Burnes (1904, CC Mo) 132 F 485, aff'd (CA8th) 137 F 781, cert den 199 US 605, 50 L ed 330, 26 S Ct 746, the court, although conceding that under the then Missouri statute (which seemed to require no judicial proceeding but simply the signing by the adopting parent of acertain instrument, and its due acknowledgment and recording) the effect of an adoption was that the child could inherit both from the natural father and the adoptive one, said that the child could not inherit "from one person's estate in the dual capacity of a blood relation and as an adopted child."

In Grimes v. Grimes (1935) 207 NC 778, 178 SE 573, involving the rights of an adopted child in the estate of his grandfather who had died intestate, it was apparently not disputed that the child was entitled to share in the interest which his mother, a daughter of the intestate, would have taken had she not predeceased him, but the child's additional claim that since he had been adopted by his uncle, a son of the intestate, and the uncle, too, had predeceased the intestate, claimant was entitled to take a further share, representatively, through the uncle, was disallowed, this upon the ground that the effect of the adoption was simply to create in the child a right to inherit from the adoptive parent and not to inherit through him from the latter's kin. The fact that a blood relationship existed between the child and the adoptive parent and the latter's father was held not to alter the result.

It may be noted that in Einstein v. Michaelson (1919) 107 Misc 661, 177 NYS 474, the ruling made was simply that the only child of the testator's deceased son, which child had been adopted by the testator, could not take under the will both as a child and as a grandchild.

And in Mississippi Valley Trust Co. v. Palms (1950) 360 Mo 610, 229 SW2d 675, involving the right of grandchildren of the testator to take under his will as "heirs at law," so designated by the instrument, and consequently not in strictness within the scope of this annotation, the conclusion reached was that since the will manifested throughout its provisions the testator's intention to provide equally for his children, and also for his grandchildren per stirpes, the two grandchildren in question could not take as such, and also as adopted children of their mother's sister, although the court seemed to concede that despite their adoption the children remained heirs of their natural mother and, had their grandfather died intestate, might have been entitled to share in his estate through her.

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