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.

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

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

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

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.

¶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.

[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-

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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

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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.*