49 HI FILE NO 6

may be substituted for him in any action or proceedings in this state."[47] This continuity in administration reflects the underlying policy of unifying estate administration which is found in the UPC.

Since there may be some confusion about the powers in this period of transition, the UPC protects a relying party by providing that

> No person who before receiving actual notice of a pending local administration has changed his position by relying on the powers of a foreign personal representative shall be prejudiced by reason of the application or petition for, or grant of, local administration.[48]

5. Ancillary Administration

A. *Procedure*

Another method of dealing with the assets of a nonresident decedent, provided in the Uniform Probate Code, is ancillary administration.

Under the UPC the appointment of a personal representative can be sought first by persons given priority. These include:

(1) the person with priority as determined by a probated will including a person nominated by a power conferred in a will;
(2) the surviving spouse who is a devisee of the decedent;
(3) other devisees of the decedent;
(4) the surviving spouse of the decedent;
(5) other heirs of the decedent;
(6) 45 days after the death of the decedent, any creditor.[49]

It is clear that persons without priority may seek the appointment of a personal representative although only in a formal proceeding.[50] Should appointment be sought, then the local court must, if there are local assets of the decedent, appoint a personal representative and so open an ancillary administration of the estate. This ancillary administration will be instituted even though there is a domiciliary personal representative who has filed authenticated copies of his appointment and of his bond, if any.[51] This ancillary administration will probably be sought by someone other than the domiciliary personal representative since he can obtain all of the powers of a local personal representative

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[47] *Id.*
[48] *Id.*
[49] *Id.* § 3-203.
[50] *Id.* § 3-203(e). Formal proceedings are judicial and are covered by Article III, Part 4: Informal involve only the Registrar, § 1-201(ii), and are covered by Article III, Part 3.
[51] *Id.* § 4-206.

without going through the procedures of informal or formal appointment.[52]

A non-domiciliary administration may be had where there is no administration in the place of domicile of the decedent. It is possible that a decedent might die with all of his assets outside his state of domicile or under circumstances so that there would be no administration at his place of domicile. This might happen, for example, in the case of an Iowa farmer who decided to retire to Florida. He might have a farm and equipment in Iowa—the bulk of his wealth—while his residence is in Florida. On death there might not be an administration in Florida, his place of residence, while there might be an administration in Iowa. This latter would be an ancillary, not domiciliary, administration.[53]

Ancillary administration under the UPC follows the general pattern of administration under Article III. There are, however, some points of difference. In an original administration there is a three year period of time within which the appointment of the personal representative must take place. This statute of limitation does not apply if there has been a prior appointment. If a personal representative has been appointed in one state, then additional appointments are possible under the UPC even though the three year period has run.[54]

The proper venue for the appointment of a personal representative is the place of domicile of the decedent. In the case of a non-resident there is no place of domicile in the state and the Code provides that the proper venue for an ancillary appointment is "any [county] where property of the decedent was located at the time of his death."[55] To solve some of the problems concerning the location of property, subsection (d) establishes some rules. It provides:

> A debt, other than one evidenced by investment or commercial paper or other instrument in favor of a non-domiciliary is located where the debtor resides or, if the debtor is a person other than an individual, at the place where it has its principal office. Commercial paper, investment paper and other instruments are located where the instrument is. An interest in property held in trust is located where the trustee may be sued.[56]

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[52] *Id.* § 4-205. A decedent in his will may provide for different personal representatives in the domicillary jurisdiction and an ancillary jurisdiction. The UPC will not interfere with such a decision. *See* §§ 3-203(g), 3-611(b). This multiple appointment will destroy to some extent the unity sought under the UPC. A provision for different personal representatives can be implemented in the ancillary judisdiction only by a formal appointment. *See* discussion Sections 3 B and C text *infra*.

[53] *See* cases cited note 16 *supra*.

[54] UNIFORM PROBATE CODE § 3-108.

[55] *Id.* § 3-201(a)(2).

[56] *Id.* § 3-201(d).

In the proceedings brought for the appointment of a personal representative in a non-domiciliary jurisdiction the procedures set out in Article III, Part 3 (informal appointment) or Part 4 (formal appointment) would be used. Those seeking the appointment of a personal representative could choose either of the tracks, formal or informal.[57]

B. *Informal Appointment*

The informal procedure, involving only the Registrar, is not available if a personal representative has been named in the domiciliary jurisdiction. Section 3-308 provides that an application for informal appointment must be denied if it is indicated that

> the decedent was not domiciled in this state and that a personal representative whose appointment has not been terminated has been appointed by a Court in the state of domicile . . . .

This indicates that an ancillary appointment, where there is a domiciliary personal representative, can be obtained only in a formal proceeding under Part 4 of the UPC.

The basic provision concerning the application for informal appointment is section 3-301 which includes a requirement of disclosure of, among other things, the place of domicile of the decedent and "a statement identifying and indicating the address of any personal representative of the decedent appointed in this state or elsewhere whose appointment has not been terminated."

Section 3-307, dealing with informal appointment, includes a proviso that

> if the decedent was a non-resident, the Registrar shall delay the order of appointment until 30 days have elapsed since death unless the personal representative appointed at the decedent's domicile is the applicant, or unless the decedent's will directs that his estate be subject to the laws of this state.

This provision, that a domiciliary personal representative can be appointed an ancillary personal representative through the informal procedure, seems inconsistent with section 3-308 which states that informal appointment is not available for a non-domiciliary decedent where a personal representative has been named in the state of domicile A state adopting the Uniform Probate Code would probably wish to resolve this apparent inconsistency by either (1) clearly allowing an informal appointment under section 3-308 if the domiciliary personal representative is the applicant, or (2) deleting the exception for the domiciliary personal representative in section 3-307. It would seem

[57] *Id.* § 4-207.

that the first alternative is preferable. If a domiciliary personal representative is the applicant, there would seem to be little reason for requiring a formal proceeding.

The notice provided in the informal appointment of a personal representative includes notice to all persons having a prior or equal right to appoint. The priority concerning appointment is established by section 3-203 and this includes in (g) the following:

> A personal representative appointed by a court of the decedent's domicile has priority over all other persons except where the decedent's will nominates different persons to be personal representatives in this state and in the state of domicile. The domiciliary personal representative may nominate another, who shall have the same priority as the domiciliary personal representative.

Therefore, anyone seeking an ancillary appointment where there is a domiciliary personal representative would be required, by this section, to notify the latter of the applicant's intention to seek an informal appointment. As indicated above, this informal appointment would be proper only if there is no known domiciliary personal representative.

C. *Formal Appointment*

In the typical estate where there is a domiciliary personal representative recourse would (absent the change suggested above) be to the appointment of an ancillary personal representative through the formal proceeding involving a judge. Notice under section 3-403 must be given to

> executors named in any will that is being, or has been, probated, or offered for informal or formal probate in the [county], or that is known by the petitioner to have been probated, or offered for informal or formal probate elsewhere, and any personal representative of the decedent whose appointment has not been terminated.

So here, as in the case of informal appointment, notice must be given to the domiciliary personal representative if there is one.

The appointment in the formal proceeding is provided for in section 3-414. Reference in that section is made to the priority established by section 3-203 which gives preference to the domiciliary personal representative. Here, as in the informal ancillary appointment, preference is given to the domiciliary personal representative in an attempt to maintain the unity of the estate administration.

D. *Estate Administration*

Once the ancillary personal representative has been named the provisions of Article III control and the administration follows the general pattern established by that article.[58] There are, however, some special provisions for ancillary administrations dealing with exceptional problems which may arise.

The UPC attempts to minimize conflicting adjudications where assets are located in more than one state. To this end, section 3-408 provides that an adjudication in the court of the state of domicile

> determining testacy, the validity or construction of a will, made in a proceeding involving notice to and an opportunity for contest by all interested persons must be accepted as determinative by the courts of this state . . . .

By so applying the concept of res judicata/preclusion the UPC again emphasizes the unity of the estate administration. Recognizing that some jurisdictions may not provide for the probating of a will, section 3-409 provides in part:

> A will from a place which does not provide for probate of a will after death, may be proved for probate in this state by a duly authenticated certificate of its legal custodian that the copy introduced is a true copy and that the will has become operative under the law of the other state.

This procedure, of course, does not rise to the level of the binding effect of section 3-408 where a will has been established. It does, however, provide a simple method of proving the document.

Where an ancillary personal representative has been named, other than the domiciliary personal representative, there may be a desire to unify the administration by having the domiciliary personal representative named in the ancillary jurisdiction. Section 3-611 (b) states in its last sentence:

> Unless the decedent's will directs otherwise a personal representative appointed at the decedent's domicile, incident to securing appointment of himself or his nominee as ancillary personal representative, may obtain removal of another who was appointed personal representative in this state to administer local assets.

Under this a domiciliary personal representative can oust any person serving as ancillary personal representative regardless of the sequence of appointment.

[58] *Id.* § 4-205.

During the course of the administration of the estate in the ancillary jurisdiction, the personal representative is under an obligation to notify creditors of his appointment.[59] Under the UPC the non-claim period, that time during which creditors must present their claims or else be barred, is four months, which runs from the date of the notice.[60] In the case of ancillary administration a serious problem arises where notice to creditors is given at different times in different jurisdictions. The problem of different statutes of limitations and different non-claims periods gave the draftsmen of the UPC a gr at deal of trouble. The final draft provides that any claims against the decedent's estate arising prior to the decedent's death are barred unless presented within the four-months' period, with the proviso that "claims barred by the non-claim statute at the decedent's domicile before the first publication for claims in this state are also barred in this state . . . ."[61] So if the non-claims provision has run in the domiciliary jurisdiction before the first advertisement in the ancillary administration, claims will be barred in both jurisdictions. This may seem to be unfair to the local creditor who has relied on the assets of the decedent available in the local state. However, he does have the right to initiate administration[62] and should do so to protect himself if it is not started promptly by those with superior priority.

If the first advertisement in the ancillary state should occur before the running of the non-claim period in the domiciliary jurisdiction, then claims are not barred. Some interesting possibilities may occur under this section. Assuming that a domiciliary personal representative has been appointed, knowledgeable creditors will file in the domiciliary administration. Should there be, however, uncertainty about a group of creditors, an attempt might be made to extend the period for filing by starting an ancillary administration and thus taking advantage of secti on 3-803(1).

A creditor, with sixth priority forty-five days after the death of the decedent,[63] can seek an appointment as a personal representative. This would have to be in a formal proceeding.[64] The creditor could attempt to time his appointment to come close to the end of the four-months' non-claim period in the domiciliary jurisdiction. A vindictive creditor

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[59] *Id.* § 3-801.

[60] *Id.* § 3-803(1).

[61] This provides for three published notices at weekly intervals in a newspaper of general circulation in the county.

[62] UNIFORM PROBATE CODE § 3-203(a)(6).

[63] *Id.*

[64] Since a domiciliary personal representative has been named. See discussion at Section 5 C text *supra*.

could thus effectively extend the non-claim period for somewhat less than four months giving creditors who were unascertained or uncertain an additional period of time in which to file. This, of course, assumes the existence of assets of the decedent in the ancillary jurisdiction.

In the administration of the estate in the ancillary jurisdiction, the personal representative must recognize that "[a]ll assets of estates being administered in [the ancillary state] are subject to all claims, allowances and charges existing or established against the personal representative wherever appointed."[65] Should the assets in the domiciliary jurisdiction prove to be insufficient to pay homestead allowance, or family allowance, or exempt property allowance, then the assets in the ancillary jurisdiction would be used to make up the difference.

E. *Insolvent Estate*

The troublesome problem of the estate which is insolvent in a single state while solvent in other states has not been satisfactorily settled in the general provisions of the UPC. In the First Tentative Draft of the Model/Uniform Probate Code, dated July, 1966, in Part III, section 317, there was a provision dealing with an "insolvent estate transferred to federal bankruptcy court." This provision was included in section 3-112 of the Honolulu Draft, 1967, in the following language:

> Incident to a petition for supervised administration, if it appears that the estate is insolvent, the court may, upon petition of the principal creditor or creditors, order the proceedings transferred to the jurisdiction of the federal district court in bankruptcy, provided federal laws permit such court to administer an insolvent decedent's estate, and provided, further, that the rights of the surviving spouse and children of the decedent to homestead, family, and support allowances and to exempt property, are or can be protected in the process.

In the UPC there is no such provision concerning an insolvent estate. Section 3-815, however, does cover the payment of claims in case of insolvency. Under this section the family exemptions and allowances and prior charges are to be satisfied, and then all claimants whose claims have been allowed "either in this state or elsewhere in administrations of which the personal representative is aware" are to be paid equal proportions of his claim. The local jurisdiction in its distribution is authorized to balance out inequitable treatment given in another

[65] UNIFORM PROBATE CODE § 3-815(a).

state.[66] Section 3-815(c) sets forth a procedure to be used in a non-domiciliary jurisdiction when local assets available for the payment of claims are either greater than or smaller than necessary to pay the correct proportional share. If assets beyond the proper proportional share are available locally, these are to be transferred to the domiciliary personal representative.[67] Again, the unity theory which runs through this entire Code in its treatment of multi-state estates can be seen. The ancillary administraion does not stand apart from the domiciliary administration; rather the two are considered together.

F. *Final Distribution*

The provision concerning the final distribution of the estate in the ancillary jurisdiction also reflects the unity concept. This section, 3-816, provides:

> The estate of a non-resident decedent being administered by a personal representative appointed in this state shall, if there is a personal representative of the decedent's domicile willing to receive it, be distributed to the domiciliary personal representative for the benefit of the successors of the decedent . . . .

There are, however, exceptions to this general provision. First, if the decedent's will provides that his successors are to be identified "pursuant to the local law" of the forum state then the transfer of funds need not be made. Second, if according to the applicable choice of laws rules, the successors are to be determined "pursuant to the local law of [the forum state] without reference to the local law of the decedent's domicile." One obvious application of this exception would be in the case of real property located in the forum state. Under the usual conflicts rule this property will pass according to the law of the state of situs—the forum state—and therefore the property would not be distributed to the domiciliary personal representative. The apparent reasoning is that if the law of the forum state is to be applied, the forum state should apply it.

A third exception to the transfer of funds to the domiciliary jurisdiction occurs when the local personal representative is unable to discover a domiciliary personal representative. If he cannot find a domiciliary personal representative through "reasonable inquiry," he has no duty to transfer funds. Finally, a court in a proceeding for

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[66] *Id.* § 3-815(b).

[67] *Id.* § 3-815(c). This section was derived from the UNIFORM ANCILLARY ADMINISTRATION OF ESTATES ACT as amended in 1953. 9 UNIFORM LAWS ANNOTATED 69-70 (1957).

closing under section 3-1001, or in a supervised administration, can order local distribution or make any other order regarding distribution which it feels appropriate.[68]

6. Jurisdiction Over Ancillary Personal Representative

Section 3-602 provides:

> By accepting appointment, a personal representative submits personally to the jurisdiction of the Court in any proceeding relating to the estate that may be instituted by any interested person.

This section also sets out the procedure to be used in serving notice on the personal representative. By using the procedure set forth, service can be made on any personal representative, domiciliary or ancillary, named by a court of the state. Since there is a substantial contact between the individual and the state there would seem to be no constitutional question about the validity of the provision for service.[69]

7. Jurisdiction Over Foreign Personal Representative

Section 4-301 is designed to deal with the foreign personal representative who has not been appointed a local representative by the local court. The foreign personal representative who (1) collects funds as authorized by section 4-201, (2) files his authenticated copies of his appointment thereby getting all the powers of a local personal representative, or (3) does any act as a personal representative which would give the state jurisdiction over him as an individual, submits to the jurisdiction of the courts of the local state.[70] In the case of collection of funds, jurisdiction is "limited to the money or value of personal property collected."[71]

In all of these situations there seems to be a sufficient minimum contact so that it is reasonable for the state to exercise jurisdiction over the foreign personal representative.[72]

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[68] Uniform Probate Code § 3-1001(a).

[69] McGee v. International Life Ins. Co., 355 U.S. 220 (1957); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[70] Uniform Probate Code § 4-301. Only a domiciliary personal representative can file authenticated copies of his appointment under section 4-204. Collecting funds under section 4-201 can be done only by a domiciliary personal representative; either a domiciliary or an ancillary personal representative could do acts in the state which might give the state jurisdiction over "him as an individual" thus giving the state jurisdiction over the personal representative.

[71] *Id.* § 4-301.

[72] *See* cases cited note 69 *supra*.

The UPC also provides in section 4-302, that "a foreign personal representative is subject to the jurisdiction of the courts of this state to the same extent that his decedent was subject to jurisdiction immediately prior to death." This provision covers the situation, for example, where the decedent, involved in an automobile accident outside the state of his residence, tortiously injured another person and died. Had the tortfeasor lived, the injured person would have been able to bring an action under the usual non-resident motorist provision.[73] Because of the death of the tortfeasor, a rather complex legal problem arises. Some states have held that they could not exercise jurisdiction over the person of the foreign personal representative even though he had been served in the forum state or had appeared in the proceeding. The theory seems to be that the person *qua* personal representative can be found only in the state of appointment and that only the courts of that state have any power over him.[74] The federal court sitting in Iowa, speaking to this point, stated:

> [A]n executor or administrator appointed in one state, cannot by voluntary appearance in an action in another state confer upon the court of such other state jurisdiction to render judgment against him in his representative capacity where there is no property belonging to the estate in the state where the action is brought.[75]

The court concluded that the Iowa provision for service on the foreign personal representative was invalid and that the court acquired no jurisdiction over the foreign administration.[76] Although there is some question about this judgment,[77] the Iowa General Assembly decided to use a different technique to reach assets of the non-resident motorist who is deceased.[78]

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[73] Joy, *Non-Resident Motorists Service of Process Acts*, 33 F.R.D. 151 (1964).

[74] Thorburn v. Gates, 225 F. 613 (S.D.N.Y. 1915); Burton v. Williams, 63 Neb. 431, 88 N.W. 765 (1902) (foreign personal representative could not be sued in Nebraska); State *ex rel.* Scott v. Zinn, 74 N.M. 224, 392 P.2d 417 (1964) (Texas personal representative not subject to suit in New Mexico). For a good discussion of the possibility of suing foreign personal representative see Note, *Amenability of Foreign Administrators to Suit Under Non-Resident Motorist Statutes*, 57 YALE L.J. 647 (1948).

[75] Knoop v. Anderson, 71 F. Supp. 832, 845 (N.D. Iowa 1947).

[76] *Id.* at 852.

[77] *See* Brooks v. National Bank of Topeka, 251 F.2d 37 (8th Cir. 1958) (contra to the *Knoop* case); *In re* Estate of Fagin, 246 Iowa 496, 504, 66 N.W.2d 920, 925 n.1 (1954) (Mulroney, J., dissenting). *See also* Note, *Amenability of Foreign Administrators to Suit Under Non-Resident Motorist Statutes*, 57 YALE L.J. 647, 653-54 (1948); Note, *Should Iowa Again "Reach Out" for Estate Representatives of Nonresident Motorists?*, 44 IOWA L. REV. 402 (1959); 36 IOWA L. REV. 128 (1950).

[78] *See* IOWA CODE § 321.512 (1966).

The more numerous group of states has decided that a state can exercise jurisdiction over the non-resident tortfeasor's personal representative named by another state. This is the path chosen by the UPC.[79]

The UPC, if adopted in the state of domicile of the deceased tortfeasor, would give the personal representative the right to defend when so served. Section 3-715 provides that a personal representative (here of the deceased tortfeasor) may "(22) prosecute or defend claims, or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the performance of his duties." Section 3-703(c) also provides:

> A personal representative of a decedent domiciled in this state at his death has the same standing to sue and be sued in the courts of this state and *the courts of any other jurisdiction as his decedent had immediately prior to death.* (Emphasis supplied.)

This provision, being tied to the status of the decedent prior to death, is the complementing provision to that dealing with service on the personal representative under conditions when the decedent could have been reached immediately prior to death.

The mechanics of service are covered by section 4-303 which states:

> (a) Service may be made upon the foreign personal representative by registered or certified mail, addressed to his last known address, requesting a return receipt signed by addressee only. Notice by ordinary first class mail is sufficient if registered or certified mail service to the addressee is unavailable.
>
> Service may be made upon a foreign personal representative in the manner in which service could have been made under other laws of this state on either the foreign personal representative or his decedent immediately prior to death.

The foreign personal representative so served is to be given at least thirty days in which to move or appear.[80]

8. Effect of Adjudication; Unity of Administration

The final section of Article IV provides:

> A prior adjudication rendered in any jurisdiction for or against any personal representative of the estate is as conclusive as to the local personal representative as if he were a party to the adjudication.[81]

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[79] Uniform Probate Code § 4-302.
[80] *Id.* § 4-303(b).
[81] *Id.* § 4-401.

This general statement of res judicata/preclusion in connection with the administration of the estate is still another part of the general attempt to unify the estate administration. This not only provides that adjudications in the domiciliary jurisdiction will be preclusive: it also provides that an adjudication in any other ancillary administration will be binding. This binding effect includes both issue preclusion and claim preclusion.[82] Although there is no fraud exception specifically set out, it is obvious that an adjudication resulting from fraud or collusion would not be binding.[83]

9. Thrust of Provisions

An examination of the provisions of Article IV indicates that the draftsmen have hoped to achieve some very specific ends. First is simplicity in the handling of the assets of the estate outside the domiciliary jurisdiction. Second is the unifying of the administration to avoid conflicting fiduciaries or, more positively, to simplify and expedite administration. Third is the goal of centralizing all of the problems in the domiciliary administration by allowing suits against the domiciliary personal representative in a number of jurisdictions. The unifying of administration is promoted, finally, by the res judicata/preclusion effect to be given adjudications "in any jurisdiction for or against any personal representative of the estate."

All of these attempts of the draftsmen—to simplify, to unify the administration, to centralize the problems of the estate—if successful will make estate administration a much more attractive way of handling the passage of property from one generation to another.[84] In the multistate estate provisions of the UPC, the draftsmen have presented a document which deserves the careful consideration of the legal profession.

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[82] *See generally* Vestal, *Extent of Claim Preclusions*, 54 Iowa L. Rev. 1 (1968); Vestal, *Res Judicata/Claim Preclusion: Judgment for the Claimant*, 62 Nw. U.L. Rev. 357 (1967); Vestal, *Preclusion/Res Judicata Variables: Nature of the Controversy*, 1965 Wash. U.L.Q. 158; Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 Iowa L. Rev. 27 (1964).

[83] There is an overriding fraud provision in Uniform Probate Code § 1-106.

[84] Wellman, *The Uniform Probate Code: A Possible Answer to Probate Avoidance*, 44 Ind. L.J. 191 (1969).

UNIFORM PROBATE CODE

Some Current Comments

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In August of this year, after several working drafts and seven years of study in cooperation with the Real Property, Probate and Trust Law Section of the American Bar Association, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Probate Code, and the House of Delegates of the American Bar Association approved it.

Some General Comments

The work of the Conference was conducted in cooperation with an American Bankers Association Trust Division Liaison Committee. The Conference work has also been followed with interest by several groups including the American College of Probate Counsel, which is interested for obvious reasons; the Veterans Administration, which is concerned over veteran guardianships; newspaper groups, which are concerned over the code's minimum requirements for published notice; and insurance groups, which are concerned over the code's minimum requirements for posting bond. These activities are evidence that the code has broad significance, and will be presented to various state legislatures in the very near future.

Professor Richard V. Wellman of the University of Michigan Law School addressed the Midwinter Trust Conference and the Mid-Continent Trust Conference on this subject in 1968. The text of these talks has been printed in *Trusts & Estates* [T&E, Mar. '68, p. 238 and Jan. '69, p. 29] and in *The Trust Bulletin,* thus offering trust men an excellent written overview of the code.

As Chief Reporter for the Uniform Probate Code Project, Professor Wellman speaks to our industry as an advocate—indeed a brilliant advocate—of the code. Today I intend to cover briefly the contents of the code, raise some questions and indicate some of the code provisions which may have an impact upon the corporate fiduciary. I should also like to speculate briefly upon the probability that the code will be accepted by the several states.

It is clear that legislation of this magnitude will generate controversy. For example, although it has many forward-looking features, it may not meet the required standards of all communities and although it is immensely well integrated, there is something in it to offend everyone.

The code consists of eight articles. Let me outline them briefly.

General Provisions And Definitions

Article I contains general provisions and definitions. It covers court jurisdiction and notice. Here the purposes and policies of the code are stated. The code expressly encourages simplicity, speed and efficiency in the administration of estates.

The probate court is given subject matter jurisdiction over all trusts, whether created by will or otherwise, as well as jurisdiction over estates of decedents and protected persons.

Article I provides a definite statute of limitations applicable wherever fraud is perpetrated in connection with matters covered in the code. These provisions are intended to replace various existing equitable remedies and limitations, such as the uncertain limitation embodied in the principle of laches. Action must be commenced against the perpetrator of a fraud within two years from discovery of the fraudulent act, and against non-perpetrators within five years from the time the fraud was committed.

For example, if a will known to be a forgery is probated informally—an option provided in the code, under which no notice is required—and the contest period runs, heirs may proceed against the perpetrator within two years from discovery of the fraud, but may proceed against innocent distributees only if action is commenced within five years from the time of the fraudulent act. The same limitations would apply where a will has been fraudulently concealed.

Treatment of Fraud

Let me pause here for a general comment. The code concept of fraud is new and reflects a basic approach, repeated in the code, to the effect that persons interested in a decedent's estate should be free to prove a will or not; commence legal proceedings or not; have a personal representative appointed or not—all in terms of whether or not they are willing to assume the risks involved.

The traditional legislative approach to probate administration, in contrast to this, has been one of more formality. And while this very formality has been criticized and even ridiculed, such formality was probably developed in an effort to insure that heirs and creditors, including taxing authorities, would always receive some kind of notice, and to make it clear that all interested persons were protected by the presence of a personal representative, responsible to the court as well as personally responsible in the administration and distribution of an estate.

In very general terms the code would now say: "Injured party, you have your remedy against those who take innocently and against those who perpetrate a fraud, but your rights as against an innocent personal representative will be strictly limited. We want personal representatives to act without delay and without fear."

In the same general terms I suggest that innocent distributees whose inheritance is later recovered by a superior claimant, and injured parties who attempt to collect personally either against perpetrators of fraud or in-

From address at 43rd Western Trust Conference, San Diego, Calif., Nov. 1, 1969 nocent distributees, may well be expected to let go with a far more pertinent outcry against our legal system and how it operates than Norman Dacey ever considered. If property is improperly distributed, legal costs of recovery will certainly be high and the problem aggravated by the very real possibility that defendants may have disposed of their windfall by the time they are reached.

Moreover, I fear that the innocent personal representative may not be safe from attack as might be assumed. Faced with a difficult case, a court may well broaden its concepts of fraud in order to place responsibility for injury where the court, in retrospect, feels the responsibility should be placed.

As between an innocent personal representative and an innocent injured heir it is not beyond my imagination, for example, that a court might conclude that a personal representative should have known that formal rather than informal administration was called for because the latter is better designed to give notice; that some greater investigation was called for or that some other such thing tainted his acts sufficiently to constitute "fraud" so that he rather than the innocent heir should suffer.

Probate And Administration

Article II covers intestate succession, wills, rules of construction, the spouse's elective share and custody by and deposit of wills with the court. The code provides for deposit of an executed will with any court for safekeeping.

Article III covers probate of wills and administration. The code provides an option of informal or formal probate of a will. Administration is not mandatory, but a personal representative may be appointed, again either informally or formally. Regardless of how an administration is commenced problems may be referred to the court for hearing after notice.

Article III includes the Uniform Estate Tax Apportionment Act without change. Incidentally, there are other uniform acts embodied in the code. For example, Article II includes the Uniform Testamentary Additions to Trust Act. In this regard while California, for example, has adopted the Uniform Testamentary Additions To Trust Act, the tax apportionment act has met with strong resistance, primarily on the grounds that our existing apportionment statutes in California are workable and the ultimate test of any such legislation is its workability. Introducing a change in this respect has been and will probably continue to be troublesome.

Article IV covers foreign personal representatives and ancillary administration.

Disability—Power of Attorney

Article V deals with the protection of persons under disability and their property. This article introduces some new terminology. "Guardian" as here used is the term to define what we know as guardian of the person, except that there are certain specified instances in which the guardian may in fact handle the property of the disabled or incompetent person.

The word "conservator" is here used to define what we now know as conservator or guardian of the estate. That is, it is the conservator who is primarily responsible for managing the property of the disabled persons.

Article V covers powers of attorney. In this article the flexibility of a power of attorney is substantially increased in order to permit persons to do that which a number of them are already doing anyway. That is, the code would permit using a power of attorney beyond the time when the principal becomes disabled. Under the new provisions, if a power of attorney contains language to the effect that the power shall not be affected by disability of the principal, or that it shall become effective upon the disability of the principal, or similar words showing intent that the authority conferred shall be exercisable notwithstanding disability, then the authority of the attorney in fact or agent is exercisable by him as provided in the power.

Article V also contains express provisions protecting persons who deal with the holder of a power of attorney, which power might previously have been revoked or terminated, so long as they had no actual knowledge of revocation, death, disability or incompetency of the principal.

Non-Probate Transfers

Article VI covers non-probate transfers. Like Article V, it is designed so as to include within the probate code specific coverage of various will-substitutes which are being used. Article VI deals with bank accounts which are joint, payable on death to named persons, or bank trust accounts, such as *Totten Trusts*. Provisions are included in Article VI defining more clearly than any existing law the rights of the various persons named in such bank accounts. This article includes protective provisions for banks in dealing with survivors as well as creditors of the depositor.

Administration of Trusts

Article VII is entitled "Trust Administration." It is contemplated that the probate court, as defined in the code, would have subject matter jurisdiction over all trusts administered in the state. Article VII requires registration of a trust.

A trust is registered by the trustee in a court of the state in the county of the principal place of trust administration. This registration is not a registration of the trust instrument. That is to say, there is no need for filing a copy of the trust instrument with the court. What is required is a disclosure of the name of the settlor or testator, the date of the trust and, of course, the identity of the trustee. There are provisions in Article VII designed to coerce the registration of trusts and to smoke out a number of "Dacey Trusts" now in existence.

Under Article VII, resort to the court is possible for any number of reasons in order to resolve actual controversy and to end up with a binding order which will serve as some protection to all persons concerned. A trustee under this section may resort to the court for review and settlement of interim or final accounts.

It is clearly stated that neither registration of a trust nor proceedings under Article VII will result in continuing court supervision. It is also provided here that the management and distribution of a trust are intended to proceed expeditiously, consistent with the terms of the trust, free of judicial intervention and without order, approval or other action of any court.

Possible Shortcomings

I am not entirely satisfied with these portions of the code since a trustee who may submit accountings might well conclude for any number of reasons that he must submit accountings to the court for approval, if only to cut off contingent liabilities Moreover, I should think some attention would have been given to the possibility that an attorney might provide in a trust which he drafts that the trustee must submit periodic accountings to the court.

For the corporate fiduciary, I believe we generally agree that court accounting procedures are somewhat more costly than non-court accounting procedures. If we accept that fact, and then recognize that a number of inter vivos trusts contain express fee provisions, I can envision some profit squeeze here because of the code provisions.

Article VIII is the effective date and repealer section. As I said earlier the code itself is immensely well integrated. I might add here that it also overlaps a number of other statutes in California. I am sure the same is true in other states. It is also clear that one cannot automatically repeal an entire existing probate statute and expect the Uniform Probate Code to cover all subjects which were dealt with in the repealed law. For example, the existing California Probate Code contains clear provisions eliminating bond requirements for the corporate fiduciary. The Uniform Probate Code is silent on this subject.

Advantage of Flexibility

As mentioned, the code does embrace some forward-looking features. The flexible system of administration of decedent's estates, involving formal and informal probate, formal and informal administration, supervised administration and so on is the heart of the Uniform Probate Code, and is based on the premise that the court's role in connection with probate and administration, and the court's relationship to personal representatives, who derive their power from public appointment, is wholly passive until some interested person invokes the court's power in order to resolve a controversy. In other words, as stated in the code comments, the state, through the court, should provide remedies which are suitable and effective to protect any and all rights regarding succession, but should be restrained from intruding into family affairs unless requested to do so.

Role of the Corporate Fiduciary

I am not yet certain how the corporate fiduciary will fit into this flexible probate system. I anticipate, for example, that a certain amount of pressure may be brought to bear on the corporate fiduciary to proceed informally wherever possible on the assumption that this will reduce costs. The corporate fiduciary is of course also interested in protecting itself and never has a personal interest in the estate of its customers. The code, it seems to me, has been drafted on the assumption that the personal representative in many if not most instances *will* have a personal interest in the estate and for that reason be willing to choose his alternative courses with regard to what is best for him.

I am a little timorous here. Banks may be pressured into pursuing a course which would disregard the fact that some risk and exposure is involved, particularly in the no-notice, informal alternatives which are available and optional with the personal representative. I suspect, in other words, that banks would generally proceed with supervised administration, but I hesitate to offer this as a recommendation since it is contrary to the spirit in which the code has been drafted and offered to the public.

(Continued on page 1136)

Code's Forward-Looking Features

Whatever may be said about the flexible system of administration of decedent's estates which is embodied in the code it is at least possible to say that this, since it is the heart of the code, is the basic forward-looking feature of it. What has been written in our industry journals already is sufficient to explain some of the other major features of the code. Following are some forward-looking features, selected at random for review, based on personal experience:

1. The code provides that no person is disqualified to take as an heir because he or a person through whom he claims is or has been an alien. Existing reciprocity statutes in the several states, including Oregon and California, have caused expensive legal controversy in an attempt to prove up the current law on this subject in some foreign country. We have evidence that this type of litigation is being conducted notwithstanding severe doubts as to the constitutionality of such legislation. The constitutional limitation is based on the assumption that such statutes force an excursion by a state into foreign affairs, which matters are basically entrusted to the President and Congress.

2. The code clearly covers matters of accession and ademption. The code provides that if properties specifically devised are sold by a conservator prior to a testator's death the devisee has the right to receive a general pecuniary devise equal to the net sale price.

Incidentally, the code defines the term "devisee" to mean any person designated in a will to receive a gift, whether the gift is of real or personal property, and thereby would wipe out a problem I have had, particularly with older trust men and lawyers, in selecting the proper words when referring to a bequest, a devise or a legacy. So far as accessions are concerned, the code is pretty good with respect to stock splits and other corporate distributions, including mutual fund reinvestments under a plan originated by the testator.

3. The code attempts to set forth a definition of what is meant by "surviving spouse" where there have been a number of marriages and divorces, some of which were invalid. These provisions are set out in the intestate succession and wills portion of Article II of the code and include, as an illustration, a statement to the effect that the term "surviving spouse" does not include a person who, following a decree or judgment of divorce which may not have become final, then participates in a marriage ceremony with a third person.

While I regard this as a forward-looking feature of the code, I am somewhat concerned over the fact that no effort was made to deal with this rather complicated subject in Article V, concerning the protection of persons under disability. In this connection we as conservator are faced with the problems of support which arise where a husband becomes incapacitated having left a trail of marriages and divorces in an unresolved state of bigamy and confusion.

4. The code expressly permits the conservator to examine the will of his conservatee when the same is in custody of a third person.

5. The nomination provisions are very broad. Even the conservator of the estate of a protected person may exercise rights of nomination. While I regard these provisions with optimism and hope I am sure that the various public administrators are already sharpening their ax on this subject.

Representative's Investment Powers

6. The investment powers conferred upon a personal representative of a decedent's estate are very broad. Again it is contemplated that these powers will be exercised in a fiduciary capacity and without submitting investment questions to the court.

Several months ago, one of my colleagues in the trust business who works in a state which permits unsupervised administration, severely chastised California trust men for not attempting to change the California law on this point. He stated his opinion very bluntly to the effect that complicated investment transactions should be resolved by qualified corporate fiduciaries and not be tendered to some judge.

7. The code contains separate provisions regarding personal representatives, conservators and trustees, to the effect that such fiduciaries are individually liable for obligations arising from ownership or control of property of the estate or for torts committed in the course of administration *only* if they are personally at fault. There has been a great deal of dispute on this subject which these code provisions would tend to resolve.

Conservator's Powers

8. I am particularly interested in the provisions of Article V regarding the powers of a conservator as well as powers of the court with respect to the affairs of protected persons. After hearing, and upon determining that grounds for an appointment or other

protective order exist with respect to a person, the court has for the benefit of that person all the powers over his estate and affairs which that person could exercise if present and not under disability, except the power to make a will.

These powers are stated to include the power to make gifts, to exercise or release a protected person's powers as trustee or personal representative, to enter into contracts, to create revocable or irrevocable trusts, and so on. Here for the first time we have in this proposed legislation recognition of the fact that trusts and other will substitutes do exist. I feel that the one major defect with most existing conservatorship and guardianship statutes is that they simply fail to contemplate that property will descend upon death of the protected person in any way other than by will or by intestate succession. It is curious to me, however, that while the court may create revocable trusts for the protected person it may not make a will for him or her.

Provisions Affecting Banks

With regard to banks, several provisions of the code should be studied carefully, including the following:

1. The code provides that an executor or administrator is entitled to reasonable compensation. It is entirely silent on the subject of attorney's fees. Enactment of the code would probably be followed by the informal adoption of a number of fee schedules or fee guidelines both for attorneys and for executors or administrators. I hope that the banks will be able to deal tactfully with attorneys and cooperate with them on this rather delicate point.

2. Bond is required under the code only if the court determines that a bond is necessary. This is true even where a will expressly requires bond. So long as the corporate fiduciary can obtain a blanket statutory exemption from bonding requirements, this type of provision may work to our benefit. That is to say, since the testator has no control over bonding he would, if the code were adopted, look to the corporate fiduciary as the best source of protection for his heirs. I personally prefer the bonding requirement even though testators in most cases waive bond. The reason for this is that all of us in this business suffer whenever any estate is raided and heirs suffer for lack of bonded protection.

3. I have already mentioned concern over the pressure which would be applied to banks to elect the informal, no-notice options available under the code. This pressure would probably be applied with the objective of keeping the costs down. As I stated before, this is where the representative has a personal interest as heir or as a relative of an heir who enjoys benefits under an estate. Banks never enjoy benefits under decedent's estates which they administer. Accordingly, the pressure to select the informal no-notice options would, under the code, present us with what is essentially a fee controversy right from the beginning.

Foreign Fiduciaries—Family Allowance

4. The provisions of the code regarding the conduct of trust business by foreign fiduciaries are of concern to me to the extent they permit foreign executors and administrators to act locally. The trust provisions of the code, however, expressly provide that a foreign corporate fiduciary may not administer trusts in a state unless it satisfies the laws of the state of administration relating to the qualification of a corporate fiduciary to conduct business there.

5. The family allowance provisions of the code authorize the personal representative of a decedent's estate to pay, as a lump sum or in periodic installments, a reasonable allowance for support of the surviving spouse of a decedent and his dependent children. This is a grant of discretionary powers, but the code does not specify what factors are to be taken into consideration in exercising such discretion.

The comment to this particular Code Section (2-403) does suggest the various factors to consider. I am nonetheless concerned since in the related provisions of Article V covering protected persons, and in particular Section 5-425, specific standards *are* set forth to guide the conservator in expending funds reasonably necessary for the support, education, care or benefit of the protected person. That is, he must pay due regard to the size of the estate, the duration of the conservatorship, a likelihood that the protected person may at some future time become able to manage his affairs, the accustomed standard of living of the protected person and members of his household as well as other funds or sources available for the support of that person. It is not clear to me why similar guidelines are not offered for the personal representative of a decedent's estate.

6. The code provides that any person may renounce an inheritance by a written instrument at any time within six months after the death of the decedent. This offers the heir an excellent opportunity to wipe out what may

be a creditor's only real hope of payment.

In addition, unless our tax laws were also revised, I question whether the various tax collectors would read this renunciation privilege literally. I suspect the heir would be taxed as if he received the inheritance, at least in those cases where this will produce a larger tax.

7. The code provides that a will may be deposited by the testator or his agent with any court for safekeeping, under such rules as the court may promulgate. This section should have been drafted after consultation with those who do accept wills for safekeeping. The expense to the public of this kind of safekeeping service may well turn out to be prohibitive. The draftsmen might have considered the court custodian in a large metropolitan area dealing with hundreds of thousands of wills, for any one of which an individual may be repeatedly asking the custodian to bring out her wills and all of her holographic codicils so that she can look them over for another change. I use the feminine reference arbitrarily.

Appraisal

8. The code provides that the personal representative will act as appraiser for his own estate. While payment of a percentage of the total value of an estate to an appraiser may be obnoxious to some persons, it is also true in some states that the appraiser not only determines values but also computes the tax, which computation in some instances is a highly complex and technical job for which percentage fees may or may not be adequate. Whatever the case may be, adoption of the Uniform Probate Code with this provision in it would probably necessitate revision of the tax laws of any state.

9. The code provides that where there are two or more co-representatives, any co-representative may receive and receipt for property due the estate. Problems can and often do arise where banks act with family members as co-representatives. These problems are sufficiently common so that I am completely unable to understand why receipt of both co-representatives is not required. In my opinion, this provision makes sense only if representatives are generally bonded, and since the bonding requirements have for all practical purposes been eliminated I fail to understand the logic behind this particular section of the code.

Reform—Two Sides of the Coin

Some of the facts of life which are suggested as a basis for reconsidering existing laws on the management and distribution of the property of deceased and incapacitated persons have frequently been discussed. These include increasing affluence in our society, the complexity of modern investment techniques, the frequency of second and third marriages, the diffusion of family members, which is a part of the population mobility which our soiety seems to encourage, and increased taxes.

Professor Wellman has admitted that a number of sections of the code do not necessarily have to be accepted in every state. This makes the Uniform Probate Code different from other uniform laws which have been offered. The historical distinction between the uniform laws and the model codes is that the uniform laws are offered with the idea that no local changes would be made, whereas model codes were simply offered as a sort of food for thought which could be borrowed in whole or in part as any legislature might see fit. Professor Wellman has described the Uniform Probate Code, however, as a form of uniform model act, or model uniform act, but in any case he concedes at the outset that some localization is to be expected.

So far as the opposing groups are concerned, I feel that the various newspapers might oppose the code because of its broad no-notice provisions, and the general elimination of required published notice in legal newspapers. I suppose the insurance industry will object to the reduction of bonding requirements. Corporate fiduciaries, as well as lawyers, will probably fear the code to some extent because it requires them to study and learn an entire new approach to what has been a bread-and-butter portion of their work. All of this would indicate that we may now be entering a period of public debate and controversy over the subject of estate administration and distribution, which has in the past been a very dull subject.

I feel that the code will attract some attention on the grounds that it aims to reduce the number of required contacts with the court, thus reducing public expense or at least freeing a judge so that he can handle other m[...]ters. Today it seems that our appel[...] courts are being forced to devote [...] inordinate amount of time trying [...] define and balance the rights of [...] individual citizen as against those [...] the citizenry as a whole. This ma[...] it important that controversy rega[...]ing property matters, including est[...] and trusts, be resolved at the low[...] possible level.

While the code may be a step [...] that direction, we should recogn[...] that a skillful and responsible job [...] administration also tends to red[...] controversy. This is where our indus[...] deserves recognition. We have don[...] fine job, often notwithstanding the v[...]ious probate laws, and I would h[...] that this new code will not be accep[...] if it operates to minimize the sign[...]cance of our work.

One burden that the commission[...] have not borne in the code or in th[...] comments, or even in the prior wo[...]ing drafts of the code, is the burden [...] proof to show why uniformity is n[...]essary in all the areas covered by [...] code. I can understand, for examp[...] why a uniform law on the subject [...] intestate succession is advisable. I c[...] also understand the advisability of h[...]ing more or less uniform approach[...] in the several states to the treatm[...] of persons who are incapacitated. T[...] is understandable from the fact t[...] people do move and it seems absurd [...] impose technical legal barriers up[...] free interstate mobility.

I am unable to endorse the bli[...] proposal that uniformity is a desiral[...] end in itself. In connection with th[...] uniform laws it is my strong feeli[...] that one must first ask if the propos[...] new law is really better than the exi[...]ing law. In California a great deal h[...] been done recently to up-date our pr[...]bate laws. We now have some limit[...] authority to invest estate funds if [...] will so provides. The claim period h[...] been shortened. We have a new pr[...]vision covering powers of a testame[...]tary trustee. These are just a few [...] many changes which have been ma[...] here. I consider the existing Califor[...] probate system to be quite good a[...] certainly not subject to the critici[...] which has been generally directed t[...]ward probate law and practice.

If there are provisions in the co[...] which would improve existing law th[...] I suggest we consider those provisio[...] only and accept Professor Wellma[...] suggestion that this package be treat[...] like a model code.

Uniform Probate Code:

Probate costs are high because of antiquated procedures lawyers must follow.

By Harrison K. Chauncey, Jr.

A certain Jarndyce, in an evil hour, made great fortune, and made a great Will. In the question how the trusts under that Will are to be administered, the fortune left by the Will is squandered away; the legatees under the Will are reduced to such a miserable condition that they would be sufficiently punished, if they had committed an enormous crime in having money left them; and the Will itself is made a dead letter.
CHARLES DICKENS — BLEAK HOUSE 1853

THE SAVAGE CRITICISM of probate practice that Dickens vented in *Bleak House* had little effect in Victorian England, but in our day the public is not so placid. Criticism of our probate courts is increasingly harsh.[1] Indeed, in some Florida counties our judges have warned us that we are killing the goose that lays the golden egg of probate practice.

There is no question that estate administration is costly. But it is arguable that one reason those costs are high is due to the antiquated, time-consuming probate procedures that lawyers must follow. If those procedures could be streamlined the estate would not be overburdened in costs and the attorney would not be forced to spend valuable time in unproductive paper-shuffling.

In 1963 (two years before Norman Dacey came upon the national scene) a group of lawyers in the American Bar Association who were deeply concerned with our probate practice urged and eventually obtained approval for a study of probate practice by the National Conference of Commissioners on Uniform State Laws and the ABA Section of Real Property, Probate and Trust Law. The object of the study was to suggest reforms to, and update the Model Probate Code which had been completed in 1947.[2] The result was the Uniform Probate Code, promulgated in 1969.[3]

The reporters of the National Conference first endeavored to pinpoint the manner in which our probate laws impeded the efficient administration of estates. They found that the problem was, in some respects, historical.[4] Our probate courts occupy a position uniquely American; that is they are administrative rather than judicial courts. In civil jurisdictions no public agency becomes involved in the administration of a decedent's estate unless disputes arise. The draftsmen also concluded that our 50 jurisdictions have developed a variation of procedures that have unduly complicated the administration of estates, especially in multistate administration.[5]

Also, it is clear that the laborious and expensive procedures adopted by the various states in the name of protecting the beneficiaries and creditors have overburdened the probate courts and unnecessarily postponed distribution to beneficiaries for a period of from two to four years.

The probate practitioner might retort that the procedures developed by the probate courts in America are important. There is need for the protection of creditors heirs and beneficiaries and the laws that have been developed do these things. Laymen, however, do not agree. They simply say, "I want my wife to get my estate"—and they find a way to do it. For

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Attempted Reform

example, 55 percent of all the land in Iowa was, in 1964, held as joint tenancies. Thirty percent of all savings accounts in New York in 1964 was held as joint tenancies. In 1965, shares traded on the New York Stock Exchange and valued at 48 billion dollars were jointly held.[6] The life insurance field has found it possible to merchandise various wealth-passing devices that avoid probate. And now the *inter vivos* trust is a favorite way to pass on property without a will and without subjecting a decedent's estate to probate procedures.

Although it may be that many of these probate-avoidance vehicles would have been successful no matter how little a lawyer charged or how simple probate might be, most fairminded members of the Bar will agree that there is an urgent need for reform in probate procedure. The draftsmen of the Code in promulgating it have suggested that a probate law flexible enough to serve a changing society is at least useful as a guide to probate reform in the various jurisdictions.[7]

Because the Uniform Probate Code contains more than 400 pages of typewritten text and combines in one code areas of the law now covered in many separate statutes, it would be impossible to discuss the entire work here in detail. About all that can be attempted is to give a general outline of the Code and highlight some of its more unfamiliar aspects.

Article I of the Code contains general provisions including definitions and the scope of probate jurisdiction of courts. It also codifies the present rules respecting fraud in estate matters.[8] Article II concerns intestate succession and wills. Article III gives the rules for probate of wills and administration of estates. Article IV is involved with foreign personal representatives and ancillary administration. Article V provides rules for protection of persons under disability and their property. Article VI governs nonprobate transfers. Article VII respects trust administration and Article VIII contains the repealer and effective date.

Four Changes in Florida

At least four substantial changes in Florida practice and substantive law would occur if the Code were adopted—and they would be controversial changes. The first is the concept called Code estate planning; the second is reform of widow's rights and the theory of the augmented net estate; the third is the new procedure for administering estates by revolutionizing (for Florida, at least) the probate practice rules; and fourth is the Code approach to ancillary administration. These four areas engendered much of the controversy during the drafting stages and certainly will continue to do so. Lawyers have been particularly vociferous in attacking the portions of the Code relating to descent and distribution and the Code estate plan.

Although present statutes on descent and distribution vary widely from state to state, the widow's share is usually less than half of the estate.[9] This type of intestacy statute seems to be totally unacceptable to the average American today. For example, in a recent study by sociologists and lawyers at Case-Western Reserve University, a survey of lawyers, laymen and trust men asked the question, "How would you wish your property to be left in the event you died without a will?" By far the majority of people surveyed indicated that they wanted all their property left to their surviving spouses.[10] Contrary to most state laws on intestacy that do not reflect the desires of the average person, the Code takes a new tack.

Spouse Gets Entire Estate

The Code would give the surviving spouse the entire estate if there is no surviving issue or parent of the decedent. The widow would receive the first $50,000 if there is surviving issue or a parent plus one-half of the balance of the estate. If there is surviving issue of the decedent but not of the surviving spouse, then the surviving spouse takes only half of the estate and the surviving issue takes the balance.[11]

The result of the provision is that many estates may be "Code probated." That is, no will would be necessary if a man wishes his spouse to receive one-half of an estate of $100,000. The full marital deduction would thus be saved and the interests of issue would be protected. It is obvious that a large number of estates in Florida would fall within this provision and it would make unnecessary many wills drawn today. It is therefore easy to see why Richard Wellman, chief reporter for the Code, found lawyers objecting to this provision of the proposed Code.[12] As might be imagined the draftsmen are accused of attempting to legislate lawyers out of business by providing a basic estate plan within the Code. This view not only makes the spokesmen appear to be grasping will-hoarders, it is also shortsighted for several reasons.

First, the average layman is keenly interested in probate matters and wants the substance and procedure of the practice reformed. Two surveys have been cited to support this. One survey was held in the 18th Senatorial District of Michigan where a state senator sent questionnaires to his constituents asking them to rank, in order of priority, 13 topics of possible legislative activity. Of the 500 returns picked at random from 3,500 responses the percentage of respondents indicating an interest in probate reform was topped only by concern about unsolicited credit card charges and cancellation of automobile insurance.[13] Another survey of a 35,000 member consumer organization in Detroit placed estate law reform second only to assistance in garnishment procedures.[14]

Second, the Code estate plan might actually enable the lawyer to use his time more effectively. Consider the relatively large amount of time the lawyer takes to draw a will for the small estate; and for which he can charge only a small fee. If the practitioner were able to avoid drafting the simple will and spend more time on complex estate plans for which he could charge a reasonable fee, both he and his clients might be better served.

Widow's Elective Share

Those who find the intestate succession provisions surprising will be staggered by the provisions dealing with the widow's elective share; it involves a concept known as the augmented net estate. To really understand the idea it is first necessary to understand what the draftsmen were trying to cure.

Suppose *T* has $1,000,000; and suppose that before his death he gives $600,000 jointly to *S1*, *S2* and himself. Then he gives away $200,000 to the community chest. He dies and his will leaves his entire probate estate to his wife. It also directs the executors to pay estate taxes from residue. In this case *T* could ignore the needs of his wife in giving the bulk of his estate to his sons and to charity, because in Florida dower extends only to personalty owned by *T* at the time of his death.[15]

Now suppose a different case. *T* gives $600,000 outright to his wife. He pays a gift tax and dies four years later leaving the rest of his estate, say, approximately $300,000 equally to his three sons. *W* elects to take against the will in Florida and she receives $100,000 of the $300,000. Of course, the sons' shares are burdened with the payment of estate taxes, administration expenses and debts. In this case the wife has used her dower privilege to obtain an unfair advantage and in the process, to destroy her husband's estate plan.

What would the Code do? Very simply, it gives the widow one-third of the "augmented estate." That is computed by adding to the value of the estate (reduced by the amount of claims, expenses and allowances) the sum of the following: (1) all *inter vivos* transfers by the testator to someone other than his wife including those in which he retained any life interest, control, power of revocation, or consumption or right of survivorship; transfers of over $3,000 to any one person within two years of death; and (2) generally all property derived from the decedent by the surviving spouse during marriage and owned by the spouse at the decedent's death, plus all such property transferred by the spouse during marriage to one other than the decedent.[16] The Code then directs that the wife's share be funded by deducting from one-third of the augmented estate all property comprising the augmented estate which has been transferred to her during the marriage, by the will or by intestate succession.[17] The balance, if any, is charged to the probate estate and other transferees of the decedent.

Although the fairness of the provisions respecting the augmented net estate must be admitted, there will be many instances in which the complexity of the device will generate extensive litigation. Collection problems also could be very difficult. Although the Code provides for collection in cases where estate assets are insufficient to fund the share,[18] the Code leaves some blanks that will need to be filled. For example, is income on transferred assets collectable? If so, for what period of time? Any legislature contemplating the enactment of the Code should weigh the prospect of extensive litigation against the basic fairness of the Code's approach to the widow's share

Independent Administration

Somewhat less complex than the augmented net estate, the concept of simplified or of independent administration forms the heart of the Code. It has been said that the purpose of independent administration is to provide a flexible system with as much or as little probate procedure as circumstances may require.[19]

The basic idea of independent administration is simple. The draftsmen assumed first that estate matters are administrative matters and not judicial. They also assumed that if there are no disputes and the rights of all persons are protected then court supervision of the administration of an estate is unnecessary.[21] But they also make provision for supervision of an estate when necessary or desirable.

For example, assume *T* dies and leaves a wife and three sons. His probate estate is $250,000 and his wife is named executrix. The wife would proceed as follows: after five days from the decedent's death she may apply for informal probate before the registrar (the administrative official), which simply means that she files a short application with the registrar.[22] The will can accompany the application or be preproved or prefiled with the court. Upon the registrar's finding that the application is complete and verified and that the will appears validly executed, he will issue a statement of informal probate and appoint the widow executrix.[23] The executrix then administers the estate without the necessity of an appraiser by simply giving notice of her appointment and a copy of the inventory to the beneficiaries.[24] She publishes a notice to creditors and pays bills on the creditors' statements. No formal claims are necessary—although creditors may file such claims.[25] In general, the claims period expires four months from the issuance of letters.[26] At the end of the fifth month, the widow is free to distribute and file a sworn "closing statement" describing her administration.[27] After filing of the informal closing statement however, the widow is not discharged, but remains liable to creditors and interested parties for a period up to three years from the time of distribution.

This kind of simplified procedure would certainly eliminate much of the unnecessary and duplicative work incident to the administration of most moderate-sized estates, and that should be a welcome prospect. The problem, however, is whether the beneficiaries, contesting parties, creditors and even the fiduciary are adequately protected under the informal procedure.

Adequate Protection?

To illustrate, assume that *T* dies leaving his present wife, a former wife and a son by the former marriage who himself is a defendant in a divorce proceeding. (The example really is not that farfetched.) There is a probate estate of $500,000 and *T*'s widow and a bank are executors. The widow (and the bank) are worried that the son or the former wife or even the daughter-in-law might obstruct an informal proceeding, and perhaps contest the will.

Under the Code the executors may file a formal petition for probate asking that validity of the will be judicially determined and that the court (not the registrar) appoint the executors.[28] Upon the filing of this petition there must be notice to all heirs.[29] If the will is found to be valid, then (subject to a couple of exceptions) all right to contest it is terminated.[30] The executors, subject to the decision of the court, might then proceed in a variety of ways. On the one hand, the court might have found that the administration should be supervised by the court; or, it may have found that non-supervised informal administration would be preferable. The executors could perform some administrative steps informally and operate under supervised procedure for others; or they could administer the estate as did the widow in the former example and then formally petition for an order of settlement and discharge.[31]

If the court is persuaded to continue the estate in supervised administration, all important administrative matters may, upon motion, be approved by the court.[32] There could then be an order entered for the payment of claims, orders of distribution, orders for any compromises and the executors would file formal accountings. After an accounting proceeding and distribution and discharge, any rights any creditor or party might have had would be foreclosed except in the event of fraud.[33]

Finding Administrators

One seemingly troublesome question that might arise under the Code concerns the availability of supervised administration; that is, the supervisory proceeding is possible only when the court finds it to be necessary or when the will so directs.[34] Some contend this tends to put the burden on inexperienced and, perhaps, minor beneficiaries to come in and ask for supervised administration. The draftsmen answer that is exactly where the burden belongs because the beneficiaries are the best ones to protect their own rights.[35]

Perhaps some middle ground is preferable in Florida. An ombudsman or guardian or the registrar himself might be a proper person (in addition to the beneficiaries) to initiate a petition for supervised administration at any point. It may be unrealistic to hope that a beneficiary or a court, on its own motion, will find supervised administration necessary and some other policing official may be necessary.

The above examples give only the barest, oversimplified outlines of the procedure available under the Code. The important administrative concept is, of course, that any degree of either independent or supervised administration is possible. There can be no doubt of the flexibility of the proposed procedure.

Similarly, it is wasteful to go through the motions of obtaining court orders if none is really necessary. On the other hand, our Bar might argue that Florida now has a form of independent administration; orders are obtained only when the executor wants or needs them and partial distributions are often made without order for tax reasons. Even final distributions are sometimes made on simple receipt and release.

Statute Needs Reform

Although it is common knowledge that our courts and lawyers often wink at the statutory probate provisions and do not follow them, it is submitted that this is a sign that the statute needs reform.

Even assuming the Code does not survive its legislative trip in Florida, it and the critics of our current procedure will have accomplished much by focusing critical public attention on outmoded procedure.

The portion of the Code which could cause a mild panic in some parts of Florida is that respecting ancillary administration.[36] The Code sets the sweeping tone of Article IV by defining a foreign personal representative as any "personal representative of another jurisdiction."[37]

The first right that the foreign representative has in Florida (without any qualification here) is the right to demand a Florida debtor pay a debt to the foreign personal representative.[38] Although this flies in the teeth of the usual jurisdictional or territorial limitations on personal representatives, many states expressly permit this as an exception to that territorial limitation.[39]

Foreign Fiduciaries

The bombshell for Florida, however, is the provision allowing a foreign personal representative to file authenticated copies of his letters in the ancillary state and then act in all respects in that state as a domicilliary representative in a local, informal probate administration.[40] This provision would permit foreign corporate fiduciaries to act in Florida. It would be understandable if New York, Illinois, California and a few other states with powerful, national trust companies should approve this provision but it is difficult to see how it could pass through the Florida Legislature unscathed—no matter how socially beneficial it might be.

These highlights of the Code are by no means all the important provisions. The articles dealing with trusts, wills and guardianship are equally new to Florida and in most respects are convincing efforts to solve in a practical manner many difficult problems besetting the lawyer who advises fiduciaries.

Last summer at the American Bar Association meeting in Dallas, Texas, the Code was recommended for adoption to the states. If the history of the Uniform Commercial Code is pertinent—it was promulgated in 1952—it will be many years before Florida finally adopts the Code. □

FOOTNOTES

[1]See, generally, Bloom, *Time to Clean Up Our Probate Courts*, READER'S DIGEST, January 1970; reprinted from NATIONAL CIVIC REVIEW, September 1969.

[2]See Simes, *Improving Probate Procedure*, 38 T & E 277 (1948). Professor Simes details the efforts of the American Bar Association to reform the probate practice since 1879.

[3]The Uniform Probate Code, in its complete text, has been published as a service to the Bar, by Prentice-Hall, Inc. Copies are available at $3 per copy from the publisher at Englewood Cliffs, N.J. 07632. In Prentice-Hall, *Successful Estate Planning Ideas and Methods*, Harrison F. Durand has written a lucid *Introduction to the Uniform Probate Code*, ¶ 15,001 (Sept. 1969).

[4]See Prefatory Note, 5th Working Draft, Uniform Probate Code (1969).

[5]*Ibid.*

[6]See Report of Committee on Administration and Distribution of Decedents' Estates, 2 Real Prop., Prob. & Tr. J. 273 (1967) at 274.

[7]*Op. cit. supra* note 4.

[8]The Uniform Probate Code will be cited herein as UPC.

[9]In Florida the surviving spouse takes equally with the decedent's children unless she elects to take dower under § 731.34 Fla. Stat. 1969; so, if a decedent is survived by a wife and two children, the wife would receive only a third of the estate. § 731.23 Fla. Stat. 1969.

[10]Wellman, *Selected Aspects of Uniform Probate Code,* 3 Real Prop., Prob. & Tr. J. 199 (1968) at 204.

[11]UPC § 2-102. A detailed discussion of the intestate succession provisions appears in Professor Wellman's article cited at Note 10.

[12]Wellman, *op. cit. supra* note 10 at 205.

[13]*Id.* at 206.

[14]*Ibid.*

[15]§ 731.34 Fla. Stat. 1969.

[16]UPC § 2-201.

[17]UPC § 2-207.

[18]UPC § 2-207(b) and (c).

[19]See note 4 *supra.*

[20]*Ibid.*

[21]See the Introduction to Article II of the UPC.

[22]UPC §§ 3-301, 3-302.

[23]UPC § 3-303.

[24]Article III, Part 7, UPC; see also UPC §§ 3-703 and 3-704.

[25]See General Comment to Part 8 of Article III, UPC.

[26]UPC § 3-803.

[27]UPC § 3-1201; see also the more detailed discussion in Report of Committee on Administration and Distribution of Decedents' Estates, 3 Real Prop., Prob. & Tr. J. 143 (1968) at 152.

[28]UPC Part 4, §§ 3-401-414.

[29]UPC § 3-403 (a).

[30]UPC § 3-412. The exceptions referred to in the text are that such an order may be vacated if there is a later discovered will, an unknown heir is found or the alleged decedent is alive.

[31]UPC §§ 3-1101 and 3-1102.

[32]See the Comments to § 3-501 and 3-502 of the Code.

[33]Report of Committee on Administration and Distribution of Decedents' Estates, *op. cit. supra,* note 27 at 152.

[34]UPC § 3-502(2). See also Durand, *op. cit. supra* note 4 and the discussion beginning at page 395 in Wellman, *The Uniform Probate Code—Questions and Answers,* 3 Real Prop., Prob. & Tr. J. 388 (1968).

[35]See the *Report, op. cit. supra* note 6 at 279.

[36]UPC, Article IV.

[37]UPC § 1-201. This is one place where the draftsmen may have tried to do too much. In the introduction to the 5th Draft of the Code (page 211) the then proposed Article IV was available only to personal representatives in jurisdictions of the U.S. and others having a common law tradition. In the final draft this was omitted. Thus, if a state adopts the Code then *any* foreign personal representative (whether or not reciprocity exists) may exercise all Article IV powers.

[38]UPC § 4-201.

[39]Report of the Committee on Administration and Distribution of Decedents' Estates, 4 Real Prop., Prob. & Tr. J. 242 (1969) at 247.

[40]UPC §§ 4-204 and 4-205.

The New Uniform Probate Code

by Richard V. Wellman

The product of a long study and gestation, the new Uniform Probate Code now has been approved by the American Bar Association and is available to the states for study and enactment. The new code modernizes one of the oldest and most creaky institutions of the law—an institution whose shortcomings have been a source of embarrassment for the legal profession.

LAST AUGUST the House of Delegates of the American Bar Association approved the Uniform Probate Code. This action came a few days after the code had been approved by the National Conference of Commissioners on Uniform State Laws, which sponsored the code in a co-operative project with the Real Property, Probate and Trust Law Section of the Association. The completion of the code and its approval mark an extraordinary achievement by the American Bar Association and the National Conference. The accomplishment indicates that lawyers serving these national organizations faced and resolved doubts about the desirability and feasibility of a significant reform of state probate laws. Similar doubts will be entertained by other lawyers as the code is considered for adoption in the several states.

To some lawyers, our tradition of nonuniform, local laws for the administration of decedents' estates, guardianships and trusts is a complete reason for opposing uniformity in probate laws. Others are traditionalists in the sense that the *status quo* will be favored until persuasive reasons for changes required to achieve uniformity become apparent. The negative or skeptical attitudes of many lawyers regarding the project pose a handicap.

The size of the code and the pervasive and complex nature of its concepts present additional difficulties. The printed code with official comments runs to 278 pages.[1] The subject of property rights at death is terribly complex. In many states it is intertwined with community property concepts that will continue to cause interstate diversities affecting succession, though all states adopt a common code of probate. Many of the old rules, although possibly not justified by the current attitudes of laymen, appear suitable to lawyers as points of departure for planning and drafting. Subjects like restrictions on testamentary power, the rights of dependents and creditors of a decedent and the role of formalities in preparing wills pose the trap of interminable debate for anyone advocating abandonment of provincial rules in favor of some national norm. The investment that counselors and estate planners have in an education that enables them to live with the existing complexities seems threatened by change.

Lawyers interested in probate law improvement soon realize that their work will not be much noticed by the public. The development of the new code received little financial or moral support from any but the sponsoring organizations and their members. The work, which forced participants to take a close look at the details as well as the over-all functioning of the nation's elaborate probate institution, attracted little outside attention. Representatives of the Trust Division, American Bankers Association, watched the formative process carefully but, except for a general memorandum of approval issued last summer in regard to the fifth working draft, avoided any assertion of control or influence. The American College of Probate Counsel was interested but provided little leadership or encouragement. Ultimately, hundreds of lawyers and other interested persons acquainted themselves with the major premises of the code, which remained fairly constant through six preliminary drafts. Their familiarity, of vital importance to final approval of the code,

1. See the official text of the code and appended comments prepared by West Publishing Company, which was published in March, 1970.

came about largely because of the hard work of the Section of Real Property, Probate and Trust Law, accomplished through committees that worked closely with the draftsmen from the inception of the project.

Why, in spite of these obstacles, did the project manage to produce an officially approved code? Several reasons can be identified. Many are relevant to the prospects for widespread adoption of the Uniform Probate Code.

The most important is the concern all members of the legal profession share for the recent and widespread public criticism of the American probate institution.[2] Much of the biting commentary has been directed most squarely at practicing lawyers. Some of it has suggested that a conspiracy exists among courts, legislatures and lawyers which works to rob survivors of their inheritances. The discussion weakened public confidence in an important American legal institution. Focusing on an area lawyers themselves have long recognized as needing reform, the criticism called for action rather than words. The profession answered in the form of the Uniform Probate Code.

History of the Project Goes Back to the 1940s

But the code is much more than a mere response to embarrassing criticism! Its roots go back to the early 1940s and the careful work which culminated in 1946 with the publication by the University of Michigan Law School of the Model Probate Code,[3] a project of a special committee of the Probate Law Division of the Real Property, Probate and Trust Law Section. Although not conceived as a uniform code or officially approved by more than a small advisory committee, the model code was a major effort to bring some rational order out of our chaotic probate laws. It had a significant influence on probate code changes adopted in several states after 1946.

The Uniform Probate Code project originated with a move in 1962 in the Real Property, Probate and Trust Law Section to revise the earlier work and to encourage wider recognition of its recommendations. The move reflected growing professional concern about a continued provincialism in probate and represented an effort to take advantage of more than a decade of experience with the earlier code. Viewed together, the two projects represent a long-standing, forceful effort by national committees of lawyers to improve probate law.

The long history of the project and the renewal of activity in 1962 allowed participants to release their accomplishments in time to take some advantage of the probate publicity. The first tentative draft of the code, rushed to completion by two reporters in the summer of 1966, reflected the benefit of nearly twenty years of experience with the earlier model code and four years of committee discussions about how that code might be improved and extended. The fact that the project was able to produce a comprehensive draft as quickly as it did following the wave of adverse probate publicity was a source of important support and momentum for the effort. Also the demonstration of progress served in some states to delay proposals for quick legislative reaction to adverse probate publicity. It is hoped that the code now will be received for local study by committees that will give some weight to the time-consuming care with which it was prepared.

Major Premises of the Code Are Based on Experience

The research and experience gained from the Model Probate Code project and the discussions from 1962 to 1966 enabled the evolution of some major premises that have proved popular. These good ideas, which served to offset much of the initial skepticism about the project, form the major characteristics of the new code. Framing a package that will enable the profession to meet the legitimate demands of the public, they provide some additional basis for believing that the code may be well received by state legislatures.

The area of probate procedure posed the toughest challenge for the code's architects. Intertwined with widely varying ideas across the country concerning the appropriate status, power and function of local probate offices, procedures relating to decedents' estates are characterized by local eccentricities that contribute significantly to the inefficiency of the succession process. Except for Louisiana, our states subscribe to the idea that wills must be probated after the testator's death and that a publicly appointed personal representative is the appropriate authority to marshal assets for the benefit of creditors and successors of decedents. Having said this, one has described the only common threads in the practice existing in the fifty states.

Sometimes postmortem proof of wills occurs in an adjudication after

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2. The principal probate critics are Norman F. Dacey, author of *How To Avoid Probate*, and Murray Teigh Bloom, author of two *Readers' Digest* articles on probate and of the book, *The Trouble With Lawyers*.

3. The book, PROBLEMS IN PROBATE LAW, INCLUDING A MODEL PROBATE CODE, 1946, is better known as MODEL PROBATE CODE. The volume includes a model code and comments (197 pages), an appendix of statutory notes comparing the code with statutes and cases in all states (110 pages), and four important law review articles by Lewis M. Simes and Paul E. Basye. Copies of a reprint in paperback form are available from Legal Publications, University of Michigan Law School.

notice. Usually, but not invariably, it is linked with the appointment of an executor. Sometimes the appointment of a personal representative in intestacy involves an adjudication after notice. Administrators in some states and executors under well-drawn wills in a few others assume the role of unsupervised fiduciaries who have no purely statutory obligation to account to their appointing authority or other tribunal. At the other extreme, probate administration is frequently a tightly controlled affair requiring several hearings to enable superintending courts to satisfy themselves of full compliance with all rules.

The code offers a flexible system for the administration of decedents' estates. The purpose is to offer alternatives that permit the details of procedure to be determined by the needs of each estate, rather than to be dictated by state statute. Another objective is to create substantial opportunities for some sets of survivors to avoid any contact with a public office if no will or need for administration appears within a set number of years after death.

Under the code, wills are ineffective unless probated after death.[4] Whether or not a will is probated, the appointment of a personal representative is optional,[5] but successors will find that appointment will be a practical necessity if they wish to protect transfer agents and purchasers during the first three years after a decedent's death.[6] After three years, unsecured claims against the decedent and any proceeding for probate or appointment in regard to his estate are barred.[7] This period of limitation co-ordinates with a provision passing title to all estate assets at death, subject to probate and administration, and aids survivors who want to avoid all probate or appointment steps.[8]

Timely proceedings for probate, appointment or both may be informal, nonadjudicative and handled by a probate registrar, or they may be formal, with a judge of a court having the power of a court of equity to enter a final order after notice and hearing on relevant questions.[9] After appointment, a personal representative may proceed without further court or registrar activity, using statutory duties and powers and periods of limitation to accomplish all objectives of administration.[10] Or a procedure called supervised administration is available on petition, so that persons who see some advantage to keeping an estate "in court" until distribution may obtain their goals under the code.[11] Unless supervised administration is ordered, the appointing court or registrar has no responsibility to check or answer for the acts of the appointee.[12]

A galaxy of remedies is provided for individuals having interests in estates, however, so that there is little prospect that any personal representative will get away with illegal conduct offensive to others.[13] The unsupervised personal representative has full optional access to an appropriate court for resolution of any problem or for judicial review of his administration and discharge.[14] The code includes a jurisdictional system for making interested persons parties to any proceeding by mailed notice, so that the option of obtaining judicial review of any question involving an estate may be pursued without undue procedural difficulty.[15]

Flexibility of the System Is Attractive to Lawyers

Several aspects of this flexible system of administration make it attractive to lawyers. First, each of its features is based on a tested characteristic of some state's existing probate law. Only the combination is different, and even it is similar to procedures now available in Pennsylvania.[16] Second, the system will enable lawyers in a particular state or part of a state to handle estates as they are accustomed to handling them or to innovate with new combinations designed to lower costs or improve client relations. No one will be pushed into strange new practices. If changes in practice occur, it will be because estate counselors and their clients desire change. Third, the system will enable an efficient handling of estates that, in view of the successors' circumstances, are small enough to be free of serious risks for the personal representative. Once a mandatory waiting period of five days from death has passed, a probate and appointment can be obtained through informal proceedings that can be completed in a single trip to the courthouse and without the necessity of notices or citations to witnesses or heirs.[17] Only an affidavit procedure is involved, and full control of estate assets can be gained by one willing to assume a trustee's responsibility, and administration can be completed without any return trip to the courthouse once the registrar makes the appointment. The idea of having efficient procedures available for use in any estate that appears risk free to the personal representative and other interested persons has more appeal for lawyers than dramatic proposals to exempt all estates under $60,000 or some other arbitrary figure from all probate requirements.[18] A full array of effective procedures may be more important to some persons who have interests in a $25,000 estate than to others who share an estate worth hundreds of thousands of dollars.

Finally, the code offers viable alternatives to the tight control over estate procedures assumed by probate magistrates over the generations. It is frequently difficult at the state level to find officials accustomed to control who are willing to relinquish any authority. These officials have tended to dominate local probate law revision efforts to the point that many probate code reforms entail the addition, rather than relaxation, of expensive and mandatory requirements. The national

4. Section 3-102.
5. Sections 3-107, 3-301 and 3-401.
6. Sections 3-103, 3-307, 3-414, 3-601, 3-703 and 3-714.
7. Sections 3-108 and 3-803.
8. Section 3-101.
9. Sections 3-102, 3-103 and Parts 3 and 4 of Article III.
10. Sections 3-107, 3-704 and Parts 7 through 12 of Article III.
11. Part 5, Article III.
12. Section 3-107.
13. See, for example, Sections 3-204, 3-602, 3-605, 3-607, 3-611 and 3-105.
14. Sections 3-105, 3-704, 3-1001 and 3-1002.
15. Part 4, Article I and Section 3-106.
16. See Haskins, Smith & Grossman, Pennsylvania Fiduciary Guide (1962).
17. See Part 3, Article III.
18. See Bloom, *Our Probate Mess*, 58 Nat'l Civic Rev. 361 (1969), reprinted in the January, 1970, issue of Readers' Digest.

package, with a rational answer for every apprehension and the blessing of the American Bar Association, should help legislatures see that much of the probate bog is the result of the long-standing propensities of publicly elected probate officials to overemphasize the risks in estates administration to magnify their own role as public protectors. It remains to be seen, of course, whether legislatures will perceive the public interest in changes that reorder accumulated political power.

Should the Law of Intestate Succession Be Uniform?

Another sticky portion of the job of probate reform relates to the substantive law of intestate succession. What objectives justify a uniformity we have been able to do without? Why change the rules without good reason? The answers evolved by the project participants have favorable public relations implications for the Bar and wide practical appeal for lawyers whose clients, like most people of substance today, have business and personal connections with more than one state.

The code offers a respectable statutory estate plan for married persons of modest means. The principal feature of the code's scheme of exemptions is that approximately the first $15,000 of gross probate estate of a married decedent will pass to the surviving spouse ahead of creditors and the provisions of any will.[19] Intestate estate in excess of exemptions will pass entirely to the spouse unless it exceeds $50,000, or unless the decedent left issue by a prior marriage.[20] Common accident problems are avoided by a five-day survival requirement for heirs.[21] Modern considerations control the definitions of spouse and other takers by descent.[22] These features combine with the administrative system of the code, which treats administrators in intestacy exactly like executors and gives both offices the statutory power and protection necessary to permit efficiency in collection, management and distribution of estates.

The code reduces the pressure on married persons with modest estates to make wills in order to insure that the survivor will have full control of family resources. The many lawyers on committees controlling the project and others who reacted to the drafts were quickly in favor of this approach. Possibly they felt that the purpose of restoring confidence in a basic system for transmitting savings at death outweighed any possible advantage of a system that tends to force persons of average circumstances into law offices for wills. They felt that persons with estates falling within federal estate tax brackets would be moved by tax considerations to continue to support a high volume of personalized estate planning service.

The idea that the code offers persons of modest means a statutory plan having a potential for efficiency well beyond that of all highly touted will substitutes struck many as guaranteeing that the code would be popular from a political point of view. Without this broad appeal, the odds against getting the code's administrative system enacted over the protests of local politicians, who have vested interests in present systems, were heavy.

Standing alone, the idea of uniformity in the law of wills seems to many to be a good idea, but hardly worth fighting for. On the other hand, lawyers from metropolitan areas embracing two or more states tend to put the code's objectives of substantive uniformity and of unification of probate administration at domicile high on the list of reasons why the code should be vigorously supported.

Substantive uniformity in succession matters will depend on the general adoption of the code. In contrast, many of the code's ideas to enable unified administration of probate estates located in two or more states may be picked up by states that do not accept the entire code. One key procedure enables personal representatives appointed at the domicile of their decedents to secure authority to collect, sell and distribute local assets by local filing of their domiciliary letters.[23] Another involves submission to the jurisdiction of local courts by any nonresident who obtains local appointment as a personal representative.[24] The latter provision permits abandonment of residency requirements for executors and administrators, which have tended to complicate administration of multistate estates. Another section would require courts of enacting states to accept prior adjudications regarding validity and meaning of wills entered at decedents' domiciles.[25] Ancillary administrations remain possible under the code, but these and other provisions serve to reduce significantly the practical likelihood of multiple administrations.

A moment's reflection suggests that lawyers everywhere should applaud steps tending to make the will more suitable as an estate planning tool for the 1970s and beyond. If the will can be freed of procedural and stateline limitations, the advantages of its characteristics as a unilateral and ambulatory device tend, over time, to assure that it may again become the principal instrument for sophisticated estate planning. Lawyers are still much more closely associated in the public mind with the will than they are with other estate planning devices. Steps that tend to popularize the will tend to assure estate specialists of plenty of interesting work for the decades ahead.

Code Goes Beyond Subject of Decedents' Estates

The code ranges well beyond the subject of decedents' estates. It encourages, but does not demand, realignment of administrative and judicial responsibilities among public offices so that the judge who handles true adjudications relating to estates and other proceedings under the code will be indistinguishable from and ideally a part of the trial court of general jurisdiction.[26] Routine contacts required for every estate would be with local probate offices having the authority of the registrar described by the code. Other ways of allocating the public authority

19. Part 4, Article II.
20. Section 2-102.
21. Section 2-104.
22. Sections 2-109, 2-802.
23. Sections 4-204, 4-205.
24. Sections 3-602, 4-301 and 4-302.
25. Section 3-408.
26. Sections 1-302, 3-105 and 3-106.

contemplated are illustrated by the code and comments, however.[27] In short, it should be easy to fit the code's important features into almost every combination of probate office arrangement as now recognized.

In its coverage of guardianships and conservatorships, the code is best described as a collection of new, good ideas. There is virtually no dissent from the proposition that this badly neglected area of our state codes critically needs improvement, and the goal of uniformity supplies a needed catalyst to consideration of new ideas.

The code uses the term "guardian" to refer to what has been commonly known as a guardian of the person and "conservator" to refer to one who is concerned primarily with estate management.[28] Subject to veto power in the prospective ward, a guardian of a minor or an incompetent adult may attain official status by filing a written acceptance of appointment as expressed by the will of a parent or spouse.[29] When no one has th[illegible]odial rights of a parent or guardian, or after removal of a testamentary guardian, the court may appoint a guardian for a minor or incapacitated person after notice and hearing. A conservator, who occupies a position much like that of trustee of all assets of a disabled person as it might be described in a well-drawn trust instrument, may be created only by court order in what are called "protective proceedings".

In protective proceedings, the court may solve an estate management problem without appointment of a conservator as, for example, by ratifying a minor's contract or ordering renewal of a lease or mortgage for a disabled adult, or it may determine that continuing management is necessary and appoint a conservator.[30] The proceedings are designed to handle cases in which a person disappears leaving dependents who should be assisted by use of his estate.[31] If a conservator is appointed, he may use statutory powers to manage and distribute the estate, and so avoid further contact with the court that neither he nor any person interested in the affairs of the disabled person desires or seeks.[32]

The code article dealing with the affairs of minors and disabled persons also includes various devices designed to eliminate many recurring reasons for guardians or conservators. One is a facility of payment provision which gives statutory protection to debtors of minors who make payment to parents and others as prescribed by the code.[33] Other provisions permit powers of attorney to be used as reliable sources of authority to manage the affairs of persons who may become incompetent after execution of powers.[34]

In general, the code avoids the temptation to straighten out the world of nontestamentary transfers at death and to co-ordinate it with that of transfers through probate. However, joint accounts, Totten trust accounts and related arrangements are the subject of a rather ambitious effort to strengthen these much-used arrangements and eliminate stateline booby traps. The general subject of joint tenancy is not touched by the code except indirectly through the position that a joint and survivor account should not be considered a joint tenancy at all, but merely a contract enforceable according to its terms, as far as the bank is concerned, and a valid mutual will which is good without probate between persons named as depositors.

The final article of the code deals with court procedures for testamentary and *inter vivos* trusts. Proceeding from the assumptions that many existing state laws require unnecessary and expensive qualification and accounting requirements for testamentary trustees and that frequently there is an absence of effective procedures for handling problems relating to *inter vivos* trusts, the article offers a common procedural system for both forms of trust. Under it, no trustee is under statutory compulsion to qualify or account in court for the affairs of the trust. However, there are provisions designed to establish a relationship between each trust and a court that is convenient to the trust's place of administration.[35] Either trustee or beneficiary may use that court as a forum for resolving issues which may require resolution. Orders are binding on the trust interests of all who are notified by mail of pending procedures.[36] The easy availability of optional court procedures will not embarrass the ability of trustees and beneficiaries who face no controversy to handle their business without making any court record indicating the assets, beneficiaries or terms of their arrangement.

Code Deserves Support

Lawyers will react with varying degrees of enthusiasm or dismay to the Uniform Probate Code. But the solid reasons that impelled hundreds of well-informed lawyers to urge and obtain overwhelming support from the House of Delegates for this most ambitious package of proposals should apply with more rather than less force to the question of local enactment.

The code offers an affirmative, balanced and long-range solution to the dilemma posed by our old and overprotective probate law. Its enactment should be accompanied and followed by a period of public education that should go far toward restoring public confidence in the basic institution of succession and in the lawyers who are so closely related to it. Many more lawyers than are involved in estate planning and probate work have been embarrassed by the controversy about our defective probate institution. The code gives them an answer to some serious problems that have proved to be practically beyond the power of individual state law reform efforts.

It remains to be seen whether most members of the legal profession have the ability to receive as well as give good counsel. If they have, the Uniform Probate Code may have a very significant impact on our state laws and the probate institution. If they have not, a tragedy of some dimension will occur if events prove that Norman F. Dacey was right when he said that lawyers would see that legislatures do nothing to correct probate law deficiencies.

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27. See comments following Sections 3-105 and 3-106.
28. Sections 5-209, 5-312 and 5-410 to 5-426.
29. Sections 5-201, 5-202, 5-203 and 5-301.
30. Sections 5-401, 5-409.
31. Section 5-401(b).
32. Sections 5-419 to 5-425.
33. Section 5-103.
34. See Part 5, Article V.
35. See Part 1, Article VI.
36. See Part 2, Article VII.

THE UNIFORM PROBATE CODE: BLUEPRINT FOR REFORM IN THE 70's

*Richard V. Wellman**

Introduction

PROBATE law changes slowly. On August 13, 1969, the House of Delegates of the American Bar Association promulgated the Uniform Probate Code, completing a project which began in 1962.[1] The UPC project has been described as a continuation of an earlier effort by elements of the ABA to modernize and unify American probate laws which resulted in preparation of the Model Probate Code.[2] Viewing the two projects as one, the 30 plus years of effort to improve probate law may appear as an exercise in killing an unwanted idea by perpetual debate.[3] The Connecticut story, as told by other contributors to this symposium, is representative of the experience in other states where efforts to improve probate law have been frustrated by foot-dragging tendencies of local elements who derive power or profit from the old rules. An observer might well conclude that national efforts at probate reform would be more of the same.

But there is more to the new Code. Though it may not have been conceived for purpose of reform, the recent project matured in a period of unparalleled public criticism of the existing probate institution.[4] Also, the project was supported by both ABA committees

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1. For a brief discussion of the action by the House of Delegates, *see* 55 A.B.A.J. 976 (1969).

2. *See* 4 Real Property, Probate & Trust L. J. 206 (1969).

3. The recent motion for final approval also chartered the Real Property, Probate and Trust Law Section of the American Bar Association to engage in continuing "in-depth" studies of the relative merits of uniformity and provincialism in regard to probate laws. The resolution of the House of Delegates authorizing the Section of Real Property, Probate & Trust Law to present the views of the Association followed a resolution of Section Council published in 4 Real Property, Probate & Trust L. J. 206 (1969).

4. N. Dacey, How to Avoid Probate (1965); Bloom, *The Mess in Our Probate Courts*, Readers Digest, Oct., 1966; *Needed: Better Probate Laws*, Changing Times, Jan., 1969; *Personal Finance: How to Avoid a Costly Probate*, N. Y. Times, Nov. 14, 1966; *Probing the Source of Probate Pains*, Wall St. Journal, May 14, 1968; *The Probate Fuss*, Look Magazine, Nov. 29, 1966; *Editorial*, Columbus ,Ohio Citizen-Journal, Jan. 18, 1967.

and the National Conference of Commissioners on Uniform State Laws. Bolstered by broad support, and challenged by the goal of framing rules meeting the diverse and idealistic demands of the Commissioners, the draftsmen sought to produce a truly useful guide to significant probate reform in the seventies.

And there are many reasons for believing that a forward-looking Code will be welcome on the state level. Widespread public discussion of probate law problems has resulted in the formation in many states of study committees charged with responsibility to recommend changes meeting on public concerns. UPC will provide conscientious committee members with a strongly recommended alternative to proposals from local probate officials whose control of probate rules has caused many of the current problems.[5] Practicing lawyers also are ready for a turnabout in probate law. The tendency for local probate officials to extend their responsibility through generation of more red tape for estates has been dominant too long. Consequently, existing legal requirements in many areas not only irritate the public but complicate settlement of quite modest estates to the point where someone, usually a lawyer, must work for very little or nothing if titles are to be cleared.[6] Also, the new Code probably would not have been promulgated were it not for a growing realization by the legal profession that its traditional monopoly in regard to estate services has been broken by the ever increasing array of popular devices for avoiding probate.[7] Streamlined probate procedure has become an important objective of law-oriented estate planners who must innovate constantly to keep abreast of client demands. Perhaps, there-

5. UPC's procedural package, though designed to reduce the traditional control by probate officials of decedents' estates, can be described as conventional for it merely offers, as options for use in every state, various procedures which exist today in the various states. *See* "Introduction to Article III", *Uniform Probate Code,* 34, (Prentice-Hall, 1969). [Hereinafter cited as UPC.]

6. Informal surveys conducted by members of the Committee on Professional Economics, Michigan State Bar Association, resulted in unpublished estimates that between 35 and 45 hours of professional time is required to handle the usual responsibilities of counsel for a personal representative in Michigan. It might be noted, however, that Michigan's probate code requires a minimum of three court appearances for the simplest estate.

7. *See* Wellman, *The Lawyer's Stake in Probate Reform,* 47 MICH. ST. B .J. 10 (1968), reprinted in 9 LAW OFFICE ECONOMICS & MANAGEMENT 415 (1969); Wellman, *The Uniform Probate Code: A Possible Answer to Probate Avoidance,* 44 IND. L.J. 191 (1969).

fore, three decades of talk about probate law improvement will produce results the public will find beneficial.

I. From Court to Complexity: The American Probate Problem

One confronted with the task of describing today's American probate institution is best advised to seek another approach or other employment. Happily, there is a way out. The legal situation has been so lightly touched by change in the twenty-three years since Simes and Basye prepared their careful analyses of probate laws, that their articles continue to provide an accurate picture.[8] It is one of disarray. There is general agreement that wills must be validated by probate after death to be effective to prove a bequest or devise,[9] and that creditors of decedents should seek their remedies against publicly appointed personal representatives.[10] But local procedures for probate of wills range from procedures involving little more than public deposit of a will, with appropriate, accompanying affidavits,[11] through various intermediates,[12] to formal litigation against every-

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8. Simes and Basye, *The Organization of the Probate Court in America*, 42 Mich. L. Rev. 965 and 43 Mich. L. Rev. 113 (1944); *The Function of Will Contests*, 44 Mich. L. Rev. 503 (1946). The same articles appear in Problems of Probate Law — Model Probate Code (1946) at 385, 683. The latter volume is better known as Model Probate Code and this shorter reference will be used hereinafter.

9. *See* comment to § 85, Model Probate Code; T. Atkinson, Wills 503 (2d ed. 1953).

10. Louisiana adheres to the civil law view that acceptance of a succession by an adult heir makes the acceptor personally liable for the decedent's debts. LSA Civ. Code (Rev. 1950) Art. 1013. *See* Rheinstein, *European Methods for Liquidation of the Debts of Deceased Persons*, 20 Iowa L. Rev. 431 (1935).

11. In Texas, common form probate may occur on the strength of a petition accompanied by a deposit of a "pre-proved" will. A will may be pre-proved in the Texas Probate Code which became effective January 1, 1956, by attachment of an acknowledgement of the testator and affidavits of attesting witnesses in the form prescribed by § 59, Chapter 4, Vernon's Ann. Civ. St.. However, it appears that a probate magistrate in Texas may, in the exercise of discretion, decline to probate a will which has been presented to him.

12. Connecticut procedures involve probate after notice before one called a judge. However, any elector of a probate district, whether or not trained in law or licensed to practice, can be elected probate judge. Also, the notice may be "public" or "private". "Public notice" consists merely of publication. Gill v. Bromley, 107 Conn. 281, 140 A. 721 (1928). Indiana statutes patterned after the Model Probate Code direct that a petition for probate of a will shall be "heard forthwith" by the court or by the clerk if filed when the court is in vacation. Notice to interested persons occurs after probate and appointment of a personal representative. The new Iowa code gives the district attorney authority (which

one in the world.[13] Administration may be a dispensable procedure which affects testate and intestate estates only when unpaid creditors or title clearance considerations compel it;[14] or it may be inseparable from probate of a will in testate cases,[15] and it may be required in intestate estates to prevent opportunities for public administrators to take over.[16] Once commenced by appointment of an executor or administrator, administration may resemble a form of non-court trust in that the appointee is expected to proceed on his own to settle the estate in accordance with legal duties, with no more being required by or of the appointing or other authority unless some interested person petitions for relief.[17] More commonly the appointee is obliged to return for authority to take various steps required for estate settle-

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may be exercised by the clerk) to order probate immediately upon receipt of a will and petition for probate. Testimony of one of the attesting witnesses is sufficient, and may be supplied by affidavit executed after the testator's death. Notice follows probate.

13. Illinois Probate Act, 1965 ILL. REV. STAT., Chapter 3, Par. 63, *et seq.*; LAWS ANN., § 702.21 *et seq.*

14. Careful analysis of the perils of attempting to settle estates by family agreement appear in Basye, *Dispensing with Administration,* 44 MICH. L. REV. 329 (1945). *See also* HASKINS, SMITH & GROSSMAN, PENNSYLVANIA FIDUCIARY GUIDE ch. 1 (1962).

15. ABA members from twenty-three states responded to a questionnaire prepared by the Committee on Administration and Distribution of Decedents' Estates which included a question about probate without administration. The respondents from twelve states (Col., Fla., Iowa, Md., Mo., N.Y., N.C., N.D., Ohio, Penn., Tex., Vt.) indicated that a will could be probated without appointment of an executor, while answers from eleven states (Ill., Kan., Me., Mich., Minn., N.H., Okla., Ore., R.I., Wash., Wisc.) indicated the contrary.

16. For example, Michigan statutes authorize the public administrator to petition for administration whenever it appears that the surviving spouse or kin have neglected to petition within 30 days after death. In practice, the power conferred appears not to be exercised frequently except where the decedent resided in a large metropolitan area and left no resident kin.

17. The text describes administration under a non-intervention will in Texas. *See* Marschall, *Independent Administration of Decedents' Estates,* 33 TEXAS L. REV. 95 (1954); Woodward, *Independent Administration Under the New Texas Probate Code,* 34 TEXAS L. REV. 687 (1956). "While he takes charge of and administers the estate of his testator without action of the county court in relation to the settlement of the estate, and may do, without an order, every act which an executor administering an estate under the control of the court may do with such order, he is uncontrolled, uninformed, unchecked and untrammeled by orders of the court, directing, informing or commanding what he shall do in the management and administration of the estate. He is an executor at large, exercising his own judgment and discretion, acting and doing what he pleases, unless brought to account for his actions by someone interested in the estate . . ." Altgelt v. Mernitz, 37 Civ. 397, 83 S.W. 891, 894 (Tex.Civ.App. 1904).

ment and the appointing authority is expected to review and approve accounts and make other orders deemed necessary to assure proper performance of the appointee's duties.[18]

Also, the public office controlling inheritances varies markedly from state to state in name and stature. For example, both New York and New Jersey confer original jurisdiction for probate of wills and issuance of letters on officials called surrogates.[19] However, the surrogate's office in New York has grown to become a powerful court with complete, original jurisdiction over matters involving probate and appointment,[20] while the New Jersey surrogate who is also clerk of the probate division of the county court, may handle only uncontested probates and appointments.[21] The New Jersey officer resembles Pennsylvania's "register of wills" in that both appear to perform approximately the same function once performed by the English "ordinary", who had little effective power other than to probate wills and issue letters.[22] Thus, neither New Jersey's surrogate nor Pennsylvania's register may entertain proceedings for approval of accounts. But, one must not conclude that the title of "ordinary" always signifies similar limitations on authority. Thus, Georgia uses this term for its probate official to whom it gives jurisdiction to handle common form and solemn form probates, proceedings for orders of sale and proceedings for review of accounts.[23] However, orders of the Georgia "ordinary" in contested matters are reviewable by trial de novo in the superior court.[24] Nor does the term "probate court" con-

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18. In fifteen of twenty-three states covered by returned questionnaires, ABA members reported that personal assets cannot be sold by a personal representative without court order or express will-power. The same survey reports that a personal representative's final account must be approved before he can make final distribution. *Estate Administration: Current Practices and Proposed Uniform Probate Code,* 3 Real Property, Probate & Trust L. J. 143 (1968).

19. McKinney's Consol. L. Const. Art. VI, § 12(d), 3-A . . . Stat. Anno., § 3-17. The term "surrogate" reflects the circumstance that the governor of the New York province held the probate authority exercised in England by the ordinary, which was exercised through delegates. A Dr. Bridges, appointed probate deputy by Lord Cornbury in 1702, seems to have been the first to use the title "surrogate". Reppy and Tomkins, Historical and Statutory Background of the Law of Wills 165. (1928).

20. *See* McKinney's Consol. L., Const., Art. VI, §§ 11, 12, 25.

21. N. J. Stat. Ann., §§ 2A—3-2, 3A—2-3.

22. Purdon's Penna. Stat. Ann., Title 20, §§ 1840.201, 1840.205, 1840.207; T. Atkinson, Wills 15-19 (2d ed. 1953).

23. Ga. Code Ann. (Rev. 1959) § 24.1901.

24. Ga. Code Ann. (Rev. 1959) § 6-201.

vey any meaning which can be safely exported from one state to another. For example, differences outweigh similarities when one tries to compare the Massachusetts' version with the organization carrying the same name in Connecticut. The former is a lawyer-manned court of considerable stature,[25] while the latter connotes a job for which any qualified elector in a probate district is qualified.[26] It goes without saying that activities of the two kinds of organization have quite different legal significance.

How can this jungle of procedures and organizations be explained? Obviously, the shape of probate rules in each state is rooted more in local history than in the English traditions regarding the subject which all states save Louisiana[27] have accepted. The old assumptions that wills should be publicly established after death, and that personal representatives should be publicly appointed or identified, have survived, to be sure. But the differences in these requirements as they exist today in the several states are so great as to suggest that the old ideas have served principally as a cover for more important considerations. The variety demonstrates that the dominant factor in growth of our probate institution has been the preoccupation of our legislative and legal community with the power represented by assets of decedents. The story of probate is a story of expansion and dispersal of this power among local politicians and the legal profession.

The variety of the country's probate offices and procedures also provides legislators who become serious about probate reform with a wide assortment of working models for comparison with local assumptions. Hopefully, comparative study will lead to reconsideration of a series of incremental judgments which the political and legal communities in some key states seem to have made with inadequate attention for any but their own concerns.

The complexity of the probate institution is, of course, a major reason for its perpetuation. Relatively few lawyers, including many who regularly handle simple estates, seem to be well founded in regard to the rationale and weaknesses of their own state's probate rules. Even fewer have had the necessity or opportunity to learn

25. Atkinson, *The Development of the Massachusetts Probate System*, 42 MICH. L. REV. 425 (1943).

26. CONN. GEN. STAT. (Rev. 1958) § 45-6.

27. Under the Civil Law concept of universal succession which is accepted in Louisiana, unqualified acceptance of an ancestor's estate by an adult heir makes the inheritor personally liable for the decedent's debts. *See supra* note 10.

about the laws of several states. There will be few improvements in the law in this area if the process of change requires many to grasp most of the procedural niceties of several states. The discussion must focus on some fairly simple propositions.

With full recognition of the risks of generalization, it is suggested that legislative discussion about probate reform should center around three major questions: (a) Is a "court" the appropriate agency to handle routine applications for probate and appointment? (b) Are routine probate and appointment orders properly viewed as adjudications which must conform to all requirements of procedural due process of law which might apply to a condemnation proceeding, for example? (c) Should responsibility for accurate and complete administration of decedents' estates be assumed by any state agency?

In areas where probate procedures and bureaucracies have ballooned to maximum proportion, each of these questions has been answered affirmatively.[28] Understandably, local experts in these areas are convinced about the propriety,[29] if not the necessity, of their complex systems. Nevertheless, examples from other states are available to show that different answers produce wholly satisfactory and vastly simpler results.

A. Courts as the Proper Agencies to Administer State Authority Over Estates.

It is unclear whether English ordinaries exercised much effective control over decedents' estates. Summaries of English probate history suggest a declining role which, at the time of formation of American colonies, probably was reduced to the point where it served to assure that authority over personal assets of a decedent passed to one who solemnly undertook to collect and distribute with full regard for rights of the decedent's creditors and family.[30] In recognizing and appointing personal representatives, ordinaries doubtless performed

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28. States such as California and Illinois which confer probate jurisdiction on the court having general civil jurisdiction and whose probate procedures involve required, fully supervised administration for all but small estates, provide the best examples.

29. *See* Marshall, *Probate Code — The New Look*, 47 TAXES 139 (1969). *See also* 47 TAXES 244 (1969) for a reply to Judge Marshall's article.

30. *See* Bordwell, *An Introduction to Wills and Administration*, 14 MINN. L. REV. 1 (1929); Simes and Bayse, *The Organization of the Probate Court in America*, 42 MICH. L. REV. 965, 967-970. (1940).

a magistrate's role, but it seems inaccurate to bracket them with courts in the present sense of the term. In any event, judicial authority over estates and personal representatives seems to have been sufficiently diffused between the ordinaries, the law courts and chancery to provide fair assurance in most cases that no judge with significant authority could exert much unwanted control over an estate after the business of identifying the personal representative had occurred.[31]

In England, the awkward rule which attributed the title of a decedent's goods to his personal representative after appointment, probably worked well because of the role of the ecclesiastical authorities. The same rule created a troublesome gap in control of family assets when applied in colonies which sought to avoid a state church. Representatives of the civic authority appeared on the scene to remedy the problem.

In some American colonies whose probate history has been carefully reconstructed, early patterns indicate that although local delegates or magistrates had little to do with testate estates other than to receive proof of wills and inventories, they exercised virtually unlimited power over goods of intestates.[32] Understandably, law and organizations to enforce it grew to control this power which, in a

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31. Simes, *op. cit.*, note 30, pp. 391-395.

32. Atkinson, *The Development of the Massachusetts Probate System*, 42 MICH. L. REV. 425 (1943). At page 436, the author reports as follows regarding the contents of an unpublished judicial notebook of a magistrate who served in what later became Springfield: "Pynchon's notebook confirms what may be found in the regularly organized courts. Proof of wills, grants of administration and exhibition of inventories were apparently necessary in all cases. Generally, further matters were settled by agreement without coming again into court, but if there were doubt, dispute or special circumstances the court would determine the matter. In an early case the court appointed commissioners to settle the executor's account; after confirmation of the report, the executor was discharged. Particularly in the division of small intestate estates there was the utmost judicial discretion and paternalism both as to the shares which each member of the family should receive and the time, form and manner of payment. The magistrates' notions of the welfare of the particular family seem to have been the sole criterion in many cases." *See also*, the account of the development of the law of probate and administration in New York by Surrogate Charles P. Daly (later Chief Justice), in Matter of Brick's Estate, 15 Abb. Prac. Rep. 12, 17-31. Concerning the power of local delegates of the governor to supervise the estate of intestates, Surrogate Daly notes, at p. 24,: "This power of supervising the estate of intestates was in consequence of a clause in the act of 1692, which provided, that where any any person died intestate, two freeholders of the town, to be annually elected, should inquire into the real and personal estate of the deceased, and make an inventory of it, and return it, under oath, to the person in the county delegated

community where wills probably were unusual,[33] must have been very obvious. Also, the circumstances were lacking which served in England to prevent the ordinary's jurisdiction over testamentary causes from becoming a self-expanding legal complex.[34] The local probate officials exercised the same state-delegated power as that of local magistrates exercising general civil and criminal jurisdiction. Only the reason for and the technique of exercise distinguished the probate official. The importance of their power increased as they asserted authority over wills and real estate like that formerly exercised by various tribunals in England. Imperceptibly, the assumption

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by the governor to supervise the estate of intestates; that the persons delegated should cause the goods and chattels to be sold, retaining the proceeds for those who should appear and have a right to claim them . . ."

33. Some guess work about will-making habits in the seventeenth century can be based on data from this century. Various studies suggest that the tendency for persons to make and leave wills has increased markedly during the 20th century. Powell and Looker, examining the period from 1915 to 1929 found a steady increase. Among the jurisdictions studied, the range was from 25 percent testate in Cook County, Illinois, to 64 percent testate in Chelain County, Washington. Powell and Looker, *Decedents' Estates*, 30 COLUM. L. REV. 930 (1930). Studies relating to Dane County, Wisconsin, found testate cases accounting for 61.9% of estates in 1929, 45.9% in 1934, and 39.1% in 1944. A study of Cook County, Illinois records in the years 1953 and 1957 indicates that 58% of estates involve wills. Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 250 (1962). A careful study, as yet unpublished, of Cuyahoga County, Ohio, probate records shows 69% of the estates to involve wills. Sussman, Cates and Smith, "The Family and Inheritance" (1963 manuscript). It suggests also that testacy is positively associated with age (75% and up of all persons over 70 leave wills), marital status (single persons are least likely to have wills; married and widowed persons are most likely), and size of estate (median testate estate is $15,000 gross, compared with $6,000 for intestate; average testate estate is $41,218, compared with $8,599 for intestate.) Overall, this data suggests that except for the wealthy, will-making habits turn importantly on the amount of information persons have about probate laws.

34. The principal circumstance, of course, was that testamentary causes were under the jurisdiction of ecclesiastical courts which, from a relatively early date, declined in importance as the temporal courts grew in power. As explained in Bordwell, *Introduction to Wills*, 14 MINN. L. REV. 1 (1929), this eventually resulted in a situation where the tribunal which touched every estate served effectively only to accept proof of due execution of wills and to issue letters of authority to personal representatives. The Law Court's writ of prohibition prevented the ecclesiastical court from exercising authority over executors and administrators. Eventually, the court of Chancery developed effective procedures to handle problems involving administration and distribution of estate, but it asserted jurisdiction only in those cases brought before them by proper pleading of an interested person. *See also* SIMES AND FRATCHER, CASES AND MATERIALS ON FIDUCIARY ADMINISTRATION (2d ed. 1956) at 12-18 and authorities cited.

grew that agencies handling routine probate matters should be thought of as specialty courts, having within the range of the subject matters assigned to them approximately the power of any court of general jurisdiction.[35]

The notion that routine probates and grants of administration are properly the business of an office which is, or aspires to be, a court in the usual sense of the word is at the root of most of today's probate complications. Of course, lawyers have not questioned the connection, for the presence of a court creates a service monopoly protecting lawyers, not only from other specialists, but from survivors themselves.[36] Even though required estate procedures in a given state have remained or become minimal, the routing of every estate to an office resembling a court leaves the legal profession pretty much in control of the situation. The arrangement would be acceptable were it not for the historic tendency of judges and lawyers to serve each other's need for function and status, a tendency which has been particularly obvious in probate matters. Here, public ignorance and dispersal, distaste for death planning and lack of concern by survivors about pre-receipt erosion of inherited assets have left an open field for those who would emphasize, rather than minimize, the need for expensive safeguards. The assumption that a court is the proper agency to handle essential services to decedents' estates undoubtedly contributes to pyramiding legal requirements.

What is the alternative? In England, the modern system enables persons interested in estates to apply in person for letters to any of 26 District Probate Registries, or in cases of estates of small value, to any of 374 customs and excise offices.[37] If a solicitor is involved, a mailed application suffices.[38] Two-thirds of approximately 300,000 grants of probate per year are made in District Probate Registries which, as of the time of Professor Fratcher's careful report, were manned by a total of seventeen District Registrars receiving annual salaries in the £3,550 to £4,100 range.[39] The systems in Pennsylvania and New Jersey bear some resemblance to the English system in that

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35. *See* Atkinson, *supra* note 25; Reppy & Tomkins, *supra* note 19.

36. *See* State ex rel. Baker v. County Court of Rock County, 29 Wisc.2d 1, 138 N.W.2d 162 (1965).

37. Fratcher, *Fiduciary Administration in England*, 40 N.Y.U. L. REV. 12, 49 (1965).

38. *Id.* at 49.

39. *Id.* at nn, 241 and 258.

the fundamental steps of probate and appointment are handled by a statutory official who, though connected to a court having jurisdiction over estates, acts on his own in routine cases.[40] In both states, the power of the magistrate is sharply limited so that he has a relatively minor role in contested cases, and no responsibility to review acts and accounts of his appointees. The probate offices in these states constitute a standing contradiction to any assumption that a modern state must interpose a powerful court between survivors and the estates they would claim.

B. Probate and Appointment As Adjudications Requiring Notice

The initial step in administration of a testate estate is to secure probate of the will. If there is no will, the appointment of an administrator starts things. The English procedures first followed in the early colonies included common form probate,[41] which is generally understood to permit wills to be proved and appointments to be made without notice to interested persons, delay or elaborate proofs.

Traditionally, orders so obtained have not been accorded the respect or finality accorded orders entered in ordinary judicial proceedings, but they have served an obvious purpose in situations in which there was no contention.

Early intestate administrations differed somewhat in that the probate magistrate through his appointees seems simply to have taken charge of intestate estates coming to his attention. The notion that appointment of an administrator in intestacy involves a finding that there is no will was a much later development which is still incomplete.[42]

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40. PENN. CONST., ART. 5 § 22. For Pennsylvania, *see* 20 PURDON'S PENN. STAT. ANN. §§ 1840.201, 1840.207. *See also*, HASKINS, SMITH & GROSSMAN, PENNSYLVANIA FIDUCIARY GUIDE (1962) §§ 3.4, 3.14, 3.15; Straus, *The Uniform Probate Code Approved: A Bold and Progressive Reform*, 41 PENN. B. ASS'N. Q. 71 (1969); Hauptfuhrer, *The Uniform Probate Code — A Modern Approach for Pennsylvania*, 41 PENN. B. ASS'N. Q. 79 (1969).

41. Simes, *The Function of Will Contests*, 44 MICH. L. REV. 503 (1946).

42. In Michigan, for example, a later discovered will cannot be probated after an estate has been settled and closed under a prior will and normal periods for vacation and delayed appeal have passed. But, if the estate was distributed as intestate after a finding that there was no will, there appears to be no time limit on proceedings to probate a later discovered will. This curious situation is attributable, in part, to a statute which provides for revocation of letters of administration incident to probate of a later discovered will. *See* In re Broffee's Estate, 206 Mich. 107, 172 N.W. 541 (1919); Young v. Young, 200 Mich. 236, 167 N.W. 23 (1918). *Cf.* In re Butts' Estate, 173 Mich 504, 139 N.W. 244 (1913).

In both New York and Massachusetts, common form probate simply disappeared as the estates court grew in power and stature.[43] Presumably, the office holders aided their evolution toward the status of powerful judges by adopting procedures like those followed in regular courts.

Common form probate still exists in some states as an optional method of establishing a will or initiating an administration.[44] In many, the choice between notice and no-notice procedures gives successors some control over the time when the probate order becomes conclusive.[45]

Following the lead of the Model Probate Code, several states have accepted the idea that probate of a will initiates a continuous court proceeding which is not concluded until entry of an order approving final distribution and discharging the personal representative.[46] The logic of this approach permits notice of probate to be given after administration has been commenced, for until the closing order, the position of those who would take in the absence of a will is not finally determined.[47] The system offers significant advantages over that of

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43. *See* Surrogate Fowler's account of New York history involving common form probate in In re Hock, 74 Misc. 15, 129 N.Y.S. 196 (Sur.Ct. 1911). Atkinson notes that early probate laws in Massachusetts provided very little guidance concerning the necessity and manner of notice of proceedings before probate magistrates and lists the present notice requirements under the heading "Modern Developments". Atkinson, *supra* note 25, at 442 and 449. In *The Function of Will Contests, supra* note 41, Simes suggests that the abandonment of the English system of ex parte probate by many jurisdictions may have been due to extension of probate court jurisdiction to land as well as to a tacit assumption that due process requires that interested persons be given advance notice of orders affecting them.

44. Simes, *supra,* note 41. The Codes of New Hampshire, Indiana, Missouri and Arkansas have been changed in regard to notice since publication of the Simes article.

45. The Florida procedures described by Simes provide an example. Simes, *supra* note 41. *See also* GA. CODE ANN. (Rev. 1959, Supp. 1969) §§ 113-601, 113-605; 12 DEL. CODE § 1310.

46. The Codes of Arkansas, Indiana, Iowa and Missouri provide examples.

47. MODEL PROBATE CODE §§ 64-81. The Code enables will proponents to use a prior notice probate proceeding to shorten the time available for contestants to raise all objections except revocation by subsequently discovered will. Under § 81, the order of probate or grant of administration remains vulnerable to proof of another will "not theretofore presented to the court" which is offered "prior to the decree of final distribution." If the estate was opened on an assumption of intestacy, the order may be vacated for good cause under section 19 at any time prior to the expiration of the time for appeal from the closing order. The effect of these provisions is to require full administration and closing of an estate as a

states which require notice to all interested persons to proceed entry of an order of probate or determining intestacy. The tactical position of trouble-making heirs is enhanced very considerably when, as is true in many prior notice states, only special administrators with quite limited powers can be appointed to manage the estate pending entry of the order of probate.[48]

Nevertheless, the cost of probate or appointment without prior notice to interested persons is too high when the package includes a

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condition to complete finality of an order of probate which was entered after full notice and hearing. The authors offer the following observations which tend to justify the Model Probate system:

> As to noncontentious matters, the situation may be different. Here it is conceivable that the estate could be distributed without any judicial intervention at all. Indeed, the Roman law system, with its conception of universal succession, accomplished just that. And the modern tendency of legislation in the United States to dispense entirely with administration in the case of small estates is to the same effect. Nevertheless, there are many cases where some judicial action is desirable even though there are no controversies among the interested parties. This becomes particularly important in view of the current trend, elsewhere noted, to provide that the probate court distribute land by its decree. In spite of the lack of disagreement among persons interested in the estate, they may well need the aid of the court to determine what is a just basis of distribution; they may wish to distribute in such a way as to avoid disputes in the future; and, to further that end, they may desire to have an official record of the distribution which has been made. Thus, the noncontentious business of the court is an important function of the judicial organization. No statistics are required to justify the observation that the vast majority of smaller estates is handled by American probate courts without any controversies whatsoever. Administration in court is then desired solely for the purpose of having the property of the decedent disposed of in an orderly way.

48. Prior notice of probate is required in Massachusetts and New York, as well as in many other states. The following appears in Report No. 3.3A, N.Y. Commission on Estates 2d Report (March 31, 1963) at 60:

> In a large number of cases on the probate trial calendar, the person who files objections to the probate of the will has no reasonable basis to expect any measure of success in the contest except that which may inure to him because of his ability to delay the administration of the estate. Estate representatives and beneficiaries are frequently willing to pay the nuisance value of a contest in order to avoid delay and even greater expense. We believe that a grant to an estate fiduciary of an authority somewhat greater than that possessed by an executor will speed the administration and reduce the number of feigned objections. One of the advantages of probate in the common form is said to be its discouragement of groundless probate contests. That is an objective which would save much time and money for the people of the State.

The new provisions governing the appointment of temporary administrators in New York appear at § 901 *et seq.*, SCPA (McKinney, 1967).

requirement of court supervision and closing of every estate. A more flexible concept works quite satisfactorily today in Pennsylvania and New Jersey where probate and appointment by limited power magistrates may initiate administrations which need not be closed by court order.[49]

It may be contended that an order determining the validity, invalidity or absence of a will denies procedural due process if it is entered without prior notice to interested persons.[50] The concern is valid if it is also conceded that a probate settlement necessarily involves an adjudicative process resolving recognized private rights. The steady self-induced growth of local probate magistrates toward the position of powerful judges has gone hand in hand with development of probate as a court proceeding.

The Model Probate Code, reflecting the drive of three decades ago to organize and rationalize the existing situation rather than the current concern about probate simplification, added impetus to this view.[51] Serious efforts to simplify probate must involve review of these developments, for the cost of the courts and lawyers necessarily involved under an adjudicative approach is simply more than the public should or will tolerate. The English system[52] as well as those presently working in Pennsylvania and New Jersey point to a better

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49. *See* HASKINS, SMITH & GROSSMAN, PENNSYLVANIA FIDUCIARY GUIDE (1962), for a discussion of Pennsylvania procedures. *See especially* §§ 4.8 and 15.2. For New Jersey, *see* the authority referred to in note 40.

50. *See, Informal Proceedings Under the Uniform Probate Code: Notice and Due Process,* 3 PROSPECTUS 39 (1969); Comment, 53 IOWA L. REV. 508 (1967).

51. The Model Probate Code originated in the Probate Division, the Real Property, Probate and Trust Law Section, American Bar Association. Professor Simes used research resources of the University of Michigan Law School to secure assistance for the project and the same resources made publication of the volume possible. In conversations with the principal participants, the author has formed the impression that the earlier project had to be cut along very conservative lines in order to achieve any degree of success. These observations are not offered as criticisms. Surely, the Uniform Probate Code project could not have succeeded without the earlier effort. UPC originated with a proposal to update the MODEL PROBATE CODE and the careful statutory research and analysis of the '40's relieved the participants in UPC from the awesome obligation of combing the current codes of fifty states to achieve legitimacy. In this connection, it should be noted that Professor Simes has served on the ABA committee which has guided the current project. Also, during the summer of 1966, as a special consultant to the project, he reviewed the first tentative draft. Professor Basye, a major participant in the earlier project, had much to do with origination of the UPC project, and served as a Reporter.

52. *See* Fratcher, *supra* note 37.

way. The failure of the New York Commission on Estates to recommend common form probate as a part of its sweeping revision of New York laws and procedures was disappointing, evidently even to some of those involved.[53] In the absence of better explanation, it must be attributed to the fact that surrogates and former surrogates controlled the effort.[54]

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53. The following paragraph opens a report entitled, "Simplification of New York Probate", prepared by staff assistants of the New York Commission on Estates which is published in the Second Report of the Commission (1963) at 60: "Many of the advisory committees suggested to the Commission that it recommend to the Legislature the adoption in New York of one of the variants of probate in the common form. The Commission studied the proposal, heard extensive argument, and voted not to approve probate in the common form. Undoubtedly those advisory committees and individual lawyers who recommended the adoption in this State of the so-called simple probate, were motivated by a desire to simplify our probate procedure and to reduce delay and expense. Many other lawyers and legal groups that were unwilling to go so far as probate in the common form, have also suggested that present procedures be simplified, made less expensive and more expeditious. They have also suggested that provision be made to reduce the large number of probate contests that have no real merit and are prosecuted solely for their nuisance value. At the request of Chairman Bennett, your Committee on Simplification of New York Probate was organized. We accept the decision of the Commission which disapproved probate in the common form (although some members of your Committee favor it), and we take that decision as our starting point."

54. Eight of fourteen of the original Commission were surrogates or former surrogates. (First Report (1962), at 9). The more than 3,700 pages of printed reports of the Special Commission contain rather extended reports about various matters of narrow importance, such as the 35 page report about nuncupative and holographic wills. The subject of common form probate was not overlooked. Indeed, it was identified by a paragraph in the first Report which concluded: "The study of simple probate, or probate in common form, is therefore of high priority". (First Report, (1962) at 25). Other notations in the voluminous reports indicate only that the matter was "tabled" at a Commission meeting on June 22, 1962, after a single meeting on May 31, 1962, between a former surrogate who represented the Commission and members of the New Jersey and Connecticut bars who were invited to explain their state's version of simplified probate (Second Report (1963) at 3). Surely, in view of the extensive staff reports on other rather esoteric matters, the Commission did *not* accord the topic "high priority" in any sense other than the speed with which it was dropped as a study topic.

The disappointing performance of the Special Commission in the area of probate simplification surely reflects the fact that surrogates dominated the Commission. Indeed, it may be more than coincidental that the legislation authorizing the special commission was enacted by the same 1961 session which produced two bills permitting proof of wills by affidavit. The bills passed both houses but were vetoed by Governor Rockerfeller who appears to have accepted arguments by the Surrogates Association which urged that proposals for probate procedure changes be deferred for study by the Special Commission then being recommended. *See* N.Y. Legislative Annual, 1961, at 589; Report 3.3A, Second Report (1963); Com-

C. Public Office Responsibility for Acts of Personal Representatives

Perhaps the most awkward heritage of the American tradition of permitting probate courts to grow just as probate judges and compliant lawyers have thought best is the concept of supervised administration. The notion is accepted in most states that the personal representative handles the business of administration as if he were a receiver in a closely watched proceeding to wind up the affairs of an insolvent debtor. Necessary administrative steps are the occasion for required orders, such as orders regarding appraisals, support payments to dependents, payment of claims and distributions. The responsibility of the personal representative is not ended until he submits his final account to the appointing authority and receives its order of discharge.[55]

In some states which have made maximum use of the logic that an estates court should have power to handle all estate matters formerly handled by the law court or chancery in England, the land of the decedent is included among assets for which the personal representative is responsible in routine cases.[56] In these states, full administration and settlement of estates involving land becomes a necessity from the standpoint of the land title examination specialists as well as from that of probate bondsmen, and probate court officials.

Most of the aspects of probate which the public has learned to identify and dislike in recent years are facets of supervised administration. Statutory time schedules, designed to give appraisers, personal representatives and creditors decent opportunity to attend to necessary steps or file claims, become impediments to quick settlement in uncontested cases. Since these schedules serve principally to

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mission on Estates, at 60, 62. Surely the power of the Surrogates Association was responsible for the fact that the 1961 enabling legislation specified that at least five of the Commission had to be surrogates designated by the governor.

The recommendations of the Special Commission in regard to small estates, proof of wills by affidavit, and holographic wills also appear to fall short of standards one might identify as critical to probate simplification. These recommendations deserve more attention than can be given here.

55. Though the degree of supervision varies among states which require personal representatives to obtain a closing order, the description of the modern Massachusetts system in Atkinson's article is useful. Atkinson, *supra* note 32. A recent survey of lawyers in 23 states provides useful insights concerning the variety of procedural detail which frame probate procedures in several states. *See*, *Estate Administration: Current Practices and Proposed Uniform Probate Code*, *supra* note 18.

56. *See* Simes and Basye, *supra* note 8, 43 MICH. L. REV. 113, 121, (1944).

separate orders by which the court adds its blessing to what dutiful fiduciaries and attorneys report to it, they have a greater potential for embarrassing the legal community with "unclosed" estates than for safeguarding private interests. Time consuming notice requirements for interim orders have proliferated under pressure of the *Mullane* decision.[57] At the same time, older requirements for wasteful publication of probate notices remain on the books as a reminder of a simpler day and the power of the legal news press.[58]

Overall, the time schedules and notice requirements are usually pointless, institutionalize delay, and add enormously to the work burden which is assumed by every personal representative and estate attorney. The routine which the statutory notice requirements create also tends to defeat the purpose of notice by making every warning paper ordinary.

Other troublesome details relate in a more indirect way to the notion that the appointing authority has some responsibility for personal representatives. Judges select appraisers, approve bonds, appoint special guardians to represent minors, absent or unborn persons and enjoy wide discretion in regard to these and other procedural points. Much of the popular literature about probate has emphasized abuses which have grown around these perquisites of local judges.[59]

Perhaps the most insidious aspect of supervised administration in many areas is that its promise of protection for survivors is almost totally deceptive. Real responsibility for enforcing fiduciary responsibility falls neatly between the court, the attorney for the estate and the survivors. Bar association pressure in most states, plus institutional doubt as to whether the probate official is a real judge or is more like a policeman, have made probate judges in many areas reluctant to serve the public except in response to a written complaint prepared by a lawyer. Sometimes, survivors who are forced to employ legal assistance to get the court to exercise its control over the estate by issuing letters, discover they must hire additional counsel to get

57. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, (1949). Changes in Michigan procedures since the Mullane case illlustrate the point.

58. Current Michigan procedures involve mailed or delivered notice to all interested persons when an estate is commenced, and at the time of closing. In addition, two and usually three series of legal publications must be run in order to comply with accumulated statutory and practice requirements. *See* MICH. LAWS ANN., §§ 701.32, 702.29, 702.56, 708.2, Probate Rule 18.

59. *See supra* note 4.

relief from sub-standard performance by the original representative.[60] It is only in cases in which there is no controversy that the supervising court gets credit for protecting survivors via the costly machinery it superintends. Sadly, when the inherent deficiencies of this protective system are identified, the typical correction is to add more requirements and cost.[61]

Other problems of probate are traceable to supervised administration. The dependence of personal representatives on court orders has inhibited the development of useful inherent or implied powers for personal representatives.[62] The non-recognition of personal representatives in courts of states other than that of appointment is tied to their status as functionaries of the appointing office.[63]

The assumption that courts should be responsible to see that public authority over estates is not misused also has led to some grotesque situations in sparsely settled political subdivisions of some of our states and to widespread variance in practice in different areas of the same state. Law-makers have used the argument that probate offices should be located conveniently to all people to justify allocation of probate power to counties. But, many areas cannot or will not support lawyer-manned courts. Thus, lay judges are given the job of interpreting and following state-wide requirements concerning no-

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60. Michigan's recently revised Probate Rule 5a, *see supra* note 61, purports to require probate courts to appoint special fiduciaries when a prior appointee has failed to file an inventory within 30 days after appointment, render an account in accordance with the statutory schedule or otherwise failed to conform to statutory requirements designed to assure prompt settlement of estates. The rule says nothing about who is to pay attorneys' fées for the deposed representative or the special administrator. Further, Michigan statutes so limit the power of a special administrator that in many cases, a third appointment would be required in order to get someone with the necessary authority. See MCLA § 702.61. Rule 5a and its probable meaning in practice provide a vivid illustration of the inadequacies of so-called supervised administration.

61. In the wake of recent adverse publicty regarding unclosed estates, the Michigan Supreme Court recently adopted an amendment to the Probate Court Rules which requires the probate judge acting on his own motion to review files, and appoint special administrators "in the event the fiduciary or his attorney shall fail to perform the duties required of them within the time so limited." Rule 5a. One of the new requirements is that inventories be filed within 30 days of appointment. Since the work involved in identifying and appraising an estate frequently requires more than 30 days, the new rule is producing a flood of "temporary" inventories of little value to anyone.

62. *See* the survey cited in note 55, *supra,* for a summary of the powers now granted to personal representatives by law.

63. H. GOODRICH & E. SCOLES CONFLICTS (4th ed. 1964) § 190 and authorities cited.

tice, appearance, pleadings and conflict of interest. Even in states where most probate judges are lawyers, the relationship between court and attorney is such that the judge's view of state rules controls. Consequently, in some states there are almost as many ways of probating estates as there are counties. Neither of these conditions is conducive to public understanding of the institution.

The procedures in several states offer alternatives to supervised administration. The appointee of Pennsylvania's register of wills is under no obligation to return to the register or the Orphans' Court after appointment, though he assumes liabilities like those borne by a trustee.[64] New Jersey procedures offer generous opportunity for independent administration in testate and intestate estates. New York's recent probate legislation eliminated older provisions concerning appraisers and inventories which had been generally disregarded in practice.[65] Georgia recently added an important provision giving testators authority to insert will provisions which prevent probate court involvement in their estates after appointment of the personal representative.[66] Similar authority, sometimes little used, exists in other states.[67] Texas and Washington institutions involving "independent executors" and "non-intervention wills" have been widely recognized and discussed.[68] Finally, it seems likely that independent administration is achieved as a practical matter in many estates which are administered under supposed supervision of relatively weak or non-aggressive courts which do not attempt to compel court approval of final accounts.[69] Surely, it is difficult to force survivors or counsel

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64. *See supra* note 40.

65. *See* N.Y. STATE LEGISLATIVE ANNUAL, 45 (1964).

66. *See* GA. CODE ANN. §§ 113-1401.1, 113-2307, as amended, Acts, 1964, p. 269.

67. The statutes of South Carolina and Arizona provide examples. ARIZ. REV. STAT. (Rev. 1956) § 14-502; S.C. CODE (Rev. 1962) § 19-532.

68. *See* Fletcher, *Washington's Non-Intervention Executor — Starting Point for Probate Simplification,* 41 WASH. L. REV. 33 (1966); Marschall, *Independent Administration of Decedents' Estates,* 33 TEXAS L. REV. 95 (1954); Woodward, *Independent Administration under the New Texas Code,* 34 TEXAS L. REV. 687 (1956); Woodward, *Some Developments in the Law of Independent Administrations,* 37 TEXAS L. REV. 828 (1959).

69. At a recent meeting of the West Virginia State Bar Association, the author heard lawyers from various parts of the state describe a practice, apparently well established in the more populous areas, of ignoring statutory requirements for audit of accounts by so-called "commissioners of accounts" designated by the county courts.

back to court for approval of accounts and closing order when all monies have been distributed and everyone involved is satisfied.

D. Other Problems of the Probate Bureaucracy

Many by-products of the historic probate bureaucracy can be identified. Provincialism in probate, born of local public office control of each estate and nurtured by different state and local history as it has impacted on the stature and power of the office, has discouraged law school study of probate administration.[70] Among practicing lawyers, the relatively low prestige of trusts and estates work is indicated by the fact that though women have been systematically discouraged from engaging in many areas of law, women lawyers are relatively more heavily involved in trusts and estates work than men.[71] Not surprisingly, probate officials, trustmen and lawyers from relatively small communities[72] have dominated occasional efforts to revise probate law.[73] Consequently, though probate codes seem to be frequently amended, changes cutting anywhere close to the heart of the probate problem almost never occur.[74]

The stagnation attributable to the probate bureaucracy is manifest in almost every aspect of probate law. Intestate succession patterns in

70. Only 36 teachers are listed under the subject "Fiduciary Administration" in the recent AALS Directory of Law Teachers (1968-70). By contrast, about 340 are listed under "Trusts and Estates" and about 200 under "Estate Planning". Many so-called Trusts and Estates courses involve very little on the subject of probate administration.

71. *See* White, *Women in the Law*, 65 MICH. L. REV. 1051 (1967).

72. The reference to small town lawyers is not derogatory. In the author's experience, lawyers from smaller communities are likely to be more concerned about probate law deficiencies than big-city lawyers of comparable prominence. For one reason, they are more familiar with the costs and problems relating to handling small estates than their counterparts in big firms.

73. The structure of N.Y.'s Commission on Estates is described in note 53, *supra*. The recently approved Wisconsin probate code was prepared by two committees appointed by the State Bar of Wisconsin. Each committee was chaired by a county judge. In all, five state probate officials, four trust officers, one "insurance counsel" and six practicing lawyers only one of whom was from Milwaukee, constituted the group which controlled two law professors who served as research reporters for the project. *See Proposed Wisconsin Probate Code* (West pamphlet). The thirteen member Governor's Commission in Maryland which made recommendations leading to adoption of the Maryland probate laws of 1968, included six persons listed as "Hon." The abbreviation "Esq." follows the names of the other seven. *See Second Report of Governor's Commission To Review and Revise the Testamentary Law of Maryland.* (State pamphlet, Dec. 5, 1968).

every state defy the intention of the average married person[75] by dividing even very small estates between surviving spouse and issue, and ancient distinctions between real and personal property still cause variations in inheritance patterns. Rights of inheritance from blood relatives frequently stand as glaring contradictions to the generally accepted idea that adopted children fare best if spared all knowledge of the identity of their family of origin.[76] Execution requirements for wills perpetuate ancient and demeaning ceremonies in a society which is generally accustomed to transacting business by mere signature. Inheritance rights for children are vigorously asserted, only to be more zealously guarded by cumbersome guardianship procedures which make no sense at all from the standpoint of the family.[77] The old game of protecting imaginary local creditors, combines with that of protecting local land titles from the tamperings of "foreign" courts of adjacent and other sister states, to force multiple probates on the survivors of persons with assets in two or more states.

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74. The proposed Wisconsin probate code makes estate administration a truly ponderous proceeding before a court of record. Prior notice to interested persons is required in regard to orders of probate and appointment, and strict time schedules plus appropriate enforcement mechanisms surround requirements which culminate in a court order closing each estate. *See Proposed Wisconsin Probate Code, supra,* note 73. The author has been informed that most of the draft code has been enacted with a postponed effective date. The recently approved Oregon Probate Code continues the state's tradition of *ex parte* probate, followed by supervised administration. Chap. 591 Oregon Laws, 1969 (effective July 1, 1970). Suggestions emanating from the second draft of the Uniform Probate Code regarding independent administration of estates were not accepted by the revision commission. The recently enacted code in Maryland was also drafted after the second tentative draft of UPC became available in the summer of 1967. In the introduction to the Second Report of the Governor's Commission, it is stated: "When there were major differences between Maryland practice and the Boulder draft, (the second draft, UPC) the Commission, in most instances, followed the existing Maryland practice." However, an important provision in the Commission's draft would have enabled estates to be administered independently of probate court supervision when a will so provided, or all heirs consented. *See* § 7-402 of the draft code, Second Report of the Governor's Commission (Maryland pamphlet, Dec. 5, 1968). This section was dropped by the legislature. The author has learned from reliable sources that protests by elected probate officials caused the deletion.

75. *See* Dunham, *The Method, Process and Frequency of Wealth Transmission*, 30 U. CHI. L. REV. 241 (1962).

76. The Laws of Michigan provide an illustration. *See* MICH. LAWS ANN. § 710.09.

77. A question and answer period followed presentation of papers on the Uniform Probate Code at the annual meeting of the Real Property, Probate and Trust Law Section, ABA, in Philadelphia in August, 1968. As has occurred many

Worse, these and many other examples of probate nonsense are jammed down the throats of the unhappy public as wave after wave of idealistic new probate officials assume their jobs with fresh dedication to see that the estates coming before them are handled with meticulous respect for law. It's a small wonder that community respect for this area of our legal system has all but disappeared in some areas of the country.

E. Collateral Responsibilities of Probate Courts

One other important aspect of the matter should be noted. Though the relationship of public offices to estates is at the heart of our probate problem, one cannot ignore other responsibilities of local probate officials. Probate offices, particularly those called courts but having less power within their area of subject-matter jurisdiction than regular courts, have received responsibility for an interesting array of odd jobs from state legislatures.[78] Varying degrees of jurisdiction over the person and affairs of orphans and other minors is frequently given to the office having control of estates. In recent times, this authority has broadened in many areas into jurisdiction over neglected and delinquent juveniles and their parents.[79] Authority over sanity proceedings involving adults who are alleged to be incompetent, or who need treatment involving curtailment of personal rights may be included. Guardians whose authority is limited to property matters sometimes may be appointed by order of the probate office. Sterilization proceedings relating to mentally defective persons, change of name proceedings, jurisdiction over trustees named by will, and authority to determine and possibly collect inheritance taxes sometimes are handled by probate courts.

II. THE UNIFORM PROBATE CODE

A. An Overview

The briefest description of existing probate problems suggests com-

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times, a probate judge raised questions concerning the protection under the code, then in its third draft, for minor children who share an inheritance with one parent upon the death of the other. The judge observed that he had found surviving parents to constitute the biggest class of probate cheats. *See Questions and Answers on Uniform Probate Code*, 3 REAL PROPERTY, PROBATE & TRUST L. J. 388 (1968).

78. *See* Simes and Bayse, *supra* note 8, part VI.

79. Michigan laws are an example. *See* MICH. LAWS ANN. § 701.19.

plexity beyond the reach of simple remedies. The Uniform Probate Code is neither simple nor easy to describe.

In the preamble, it is stated that the Code relates to "affairs of decedents, missing persons, protected persons, minors, incapacitated persons and certain others". The open-ended reference to "certain others" does not mean that the Code deals with all subject areas presently associated with probate courts in some states. The important area of juvenile law is not covered and nothing is included regarding miscellaneous matters like inheritance taxes, sterilization proceedings, condemnation proceedings and various responsibilities regarding county government. On the other hand, the focus on "affairs of decedents" carries the Code into certain aspects of death benefit contracts,[80] and its coverage of procedures relating to testamentary trusts leads to treatment of procedures regarding inter-vivos trusts.[81] Functions for public offices in the areas covered include jurisdiction of optional proceedings involving decedents' estates, trusts, guardianships and protective arrangements for disabled persons for a full-power court,[82] and limited, non-judicial functions for a local public official, who should not be thought of as a judge.[83] Existing probate offices which do not meet either description may be upgraded or restricted as necessary, or left as now constituted to handle matters not dealt with by the Code.

The Code reflects the view that both substantive and procedural rules relating to affairs of decedents have been overly influenced by our historical preoccupation with safety of estates. As a corrective, substantive rules have been liberalized by more generous use of assumptions regarding the wishes of most owners, and by identifying as desirable rules for uniform adoption, those versions of existing

80. UPC, Article VI.

81. UPC, Article VII.

82. Under Articles III and VII, the court has jurisdiction to handle all matters involving trusts and decedents' estates which are brought before it by petition. However, the CODE does not compel persons interested in trusts or estates to use court proceedings and offers alternative routes to accomplish normal objectives without judicial proceedings. However, orders of the court are required in regard to certain protective proceedings for disabled persons. *See* UPC, Article V.

83. *See* §§ 1-307, 3-105. UPC references are to the official version which will be published soon by West Publishing Company. The system for numbering subsections used by West varies from that appearing in Prentice-Hall's edition of UPC.

rules which expand opportunities for considering evidence of intention in particular cases. In regard to procedures, the object of the Code is to open opportunities now denied to survivors and their counsel in many states to select from among several available settlement procedures with an eye to finding the desirable balance of safety and efficiency. Procedural provisions have been designed around very limited and specific requirements for every estate which can be handled by non-judicial local probate officials under restrictions designed to curtail power and discourage development of new requirements and powers. Also, the Code offers decedents and survivors simple alternatives to use in case probate procedures remain or become undesirably cumbersome. Thus, prospective decedents will find that UPC significantly strengthens various non-probate methods for effecting transfers at death. For survivors who claim probate assets, the Code offers many alternative methods of perfecting title, some of which include a choice of the public official who will be involved. Finally, problems deriving from variety in state laws concerning succession should be eased by generous use of sections directing local courts to recognize and respect the relationship of the decedent to his domicile.

Because probate law is to be measured more in the way it is implemented in practice than in its formal statement, it is distinctly possible that adoption of the Code may not be followed by probate improvements which the public will perceive and appreciate. On the other hand, the Code certainly permits and encourages very significant improvement in practice in an area of law which has very obvious political overtones as well as a dollar and cents meaning for most families. If it can gain enactment, its potential as an instrument of law reform seems very great.

The package is too big to handle in useful detail in a single article. The approach here is to identify the major topics covered by the Code and the principal purpose of the draftsmen relating to each. Then, some of the more complex and important areas will be analyzed in depth.

B. "Court" Organization and Jurisdiction

The Code describes an office calling simply "Court" to which it assigns functions and proceedings relating to decedents' estates, guardianships, conservatorships and trusts.[84] As indicated by official

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84. §§ 1-201(5), 3-105.

notes and comments, UPC's "Court" is more a product of the effort to write coherently of functions to be performed by public officials in any enacting state than an effort to describe an ideal organization.[85] Properly understood, the functions can be sorted in various ways between existing courts and offices in states receiving the Code. However, the Code makes it clear that the tribunal which handles binding adjudications relating to decedents' estates, trusts, guardians or conservators should be empowered to handle any civil litigation to which a fiduciary may be a party, with appeals going to courts handling appeals from courts of general jurisdiction.[86] Ideally, a division of the general trial court will receive this kind of subject matter jurisdiction. The Code is written as if a specialty court having power in limited subject areas equivalent to the general trial court were involved. However, this style merely reflects the need of the draftsmen to find an organizational form which offered the smallest invitation for endless discussions about the desirability of mixing estate dockets and general trial dockets.

The Code also includes a notice system for binding many and widely separated persons interested in judicial proceedings involving estates and fiduciaries.[87] This portion of the Code may be kept as part of a statute describing special procedures of a new, or continued special court, used in a statute describing estate proceedings before a court of general jurisdiction, or sorted into statute and court rule for either species of court.

The assumption of the Code is that a mailed notice affording interested persons warning of each *adjudicative* proceeding, and an opportunity to be heard, is required and desirable.[88]

UPC's "court" includes a "registrar" who is identified as the person designated by the judge to handle non-adjudicative proceedings contemplated by the Code.[89] Legislatures in states where non-lawyers are now permitted to serve as principal, local probate officials could, and parhaps should, assign the registrar functions under the Code to

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85. *See* particularly the Comment following § 3-105.

86. §§ 1-302, 1-308, 3-105, 5-204, 5-304, 5-402, 7-204.

87. *See* Art. I, Part 4.

88. *See* §§ 3-403, 7-206. The informal proceedings described in Art. III, Part 3, are deemed non-adjudicative. See §§ 3-302 (effect of informal probate), 3-307(b) (effect of informal appointment), and 3-108 (time limit on testacy and appointment proceedings).

89. §§ 1-307, 3-105, and Art. III, Part 3.

these officials. Under the Code, the registrar handles "informal" proceedings to establish wills or appoint personal representatives.[90] Also, the registrar may be responsible to preserve various documents, notices and demands which may be filed in his office under provisions of the Code.[91]

C. *Substantive Rules of Heirship and Family Protection*

The Code contains a series of provisions which identify the successors to intestate estates. These are high on the list of provisions which warrant uniform enactment. Designed to work with the administrative provisions offering identical opportunities for simplified administration to testate and intestate estates and augmented by new provisions relating to the handling of property of minors and other disabled persons, the sections on descent are the core of a modern statutory estate plan which is designed to relieve most persons of ordinary means of the need to take affirmative estate planning steps.[92]

The Code also includes three sets of sections designed to protect the spouse and children of decedents from loss of essential family assets to the decedent's creditors, and to protect the spouse from loss of expectancy where the decedent, by design or neglect, disinherits the spouse by will or will substitute. One,[93] which includes a $5,000 "homestead allowance," an exemption for chattels worth up to $3,500, and a family allowance for support of spouse and dependent children during administration, will serve to prefer the close family of a married decedent to all unsecured creditors and takers by will in the first $14,500[94] of probate assets. Another protects after-born children, children believed to be dead, and spouses acquired after execution of a will from disinheritance through oversight or mistake.[95] The third, creating an "elective share", is designed to protect spouses

90. §§ 3-105, 3-301.

91. §§ 1-305, 1-307. Sections contemplating filings, which do not involve response by judge or registrar include §§ 3-204, 3-706, 3-804, 3-1003, 5-202, 5-302, 7-102. § 3-604, relating to the filing of bonds, is somewhat different.

92. Art. II, Part 1. *See* 3 REAL PROPERTY, PROBATE & TRUST L. J. 199 (1968) for a discussion of the law's estate plan.

93. §§ 2-401, 2-402 and 2-403.

94. The figure assumes that the personal representative grants the spouse the full amount or support allowance which can be given without approval of the court. *See* § 2-404.

95. Article II, Part 3 (§§ 2-301 - 2-302).

from transfers by will or will substitute which would reduce the spouse's share of the estate controlled by such transfers below 1/3.[96]

The latter system is as much a part of the subject of intestate succession as it is of the subject of wills. Gifts made by the decedent to the spouse, however effected, are included in the computation so that an electing spouse must take credit for all values received from the decedent before obtaining rights against other transferees by will or certain will substitutes.[97] Apart from procedural provisions of the Code which will be upsetting to vested interests, this new approach to the old forced share problem probably will prove more troublesome for persons studying the Code than any other area. Surely controversy about these provisions characterized the Reporters' discussions of preliminary drafts.

D. Wills

The final substantive system for decedents' estates relates exclusively to the subject of wills. A principal objective of these sections is to provide a uniform base for interpretation of the nation's wills. Another is to aid inartfully drawn wills by reducing recurring problems of meaning through use of rebuttable presumptions regarding a testator's intention.

Also, in order to accommodate testators who may not have sought any legal advice, the Code expands the kind of writings which may be effective as wills. Thus, holographic wills are validated,[98] certain informal dispositive lists referred to in wills are approved[99] and a flexible rule keyed to testator's intent as proved by any evidence is stated to govern the revival problem.[100]

Finally, the draftsmen moved rather boldly to increase the power of testators to choose the law applicable to their estates.[101] Whether or not the Code is ever generally adopted as a uniform law, this provision should dent the concept that the rules of the place of land must control its devolution.[102]

96. Article II, Part 2, (§§ 2-201 - 2-207).
97. §§ 2-202, 2-207.
98. § 2-503.
99. § 2-513.
100. § 2-509.
101. § 2-602. *See* § 2-506 for a provision relating to choice of law regarding rules of execution of wills.
102. § 3-408 is also relevant in this connection.

E. *Coverage Outside Decedents' Estates*

The Code reaches beyond traditional limits of the rules for decedents' estates to deal with some problem areas traditionally associated with probate court jurisdiction. Also, it covers some problems bearing a close functional relationship to the general subject of affairs of decedents which are generally regarded as parts of probate law. The Code's coverage of guardianship and the relationship of various kinds of trusts to the probate court are examples of the first category; the second is reflected by the treatment in Article VI of non-probate transfers at death.

1. *Guardianship and Conservatorship*

Article V of the Code is entitled "Protection of Persons Under Disability and Their Property". Covering the subjects of guardians and of conservators, the article describes four separate systems for meeting or reducing problems relating to persons who because of minority, affliction or other circumstances are unable to discharge personal responsibility for their well-being or the care of their estates. Separate systems of personal guardianship are described for minors and for those whose incapacity is unrelated to minority.[103] The separation, due in part to a desire to facilitate removal of either or both subjects from a probate code, also reflects somewhat different procedural safe-guards relating to appointment[104] and different problems of discharge for guardians in the two categories.[105] Each kind of guardian is given limited powers over the ward's estate, consisting principally of the power to expend sums received by him as guardian for support and maintenance of the ward, and to preserve unused balances.[106] The limitations were designed to encourage use of separate, so-called "protective proceedings", leading possibly to appointment of a conservator for the estates of persons with complex financial affairs.

The Code contemplates that guardianship proceedings will be handled by the same full power court which will handle other judi-

103. Article V, Parts 2 and 3.
104. *Compare* §§ 5-207 and 5-303.
105. *Compare* §§ 5-212 and 5-307.
106. *See* §§ 5-209 and 5-312.

cial business arising under the Code.[107] However, guardians of the person of minors may be appointed by will of the surviving parent.[108] No court proceeding for confirmation is necessary if a testamentary guardian files an acceptance.[109] Indeed, unless a testamentary guardianship is blocked by objection,[110] or ended by removal, the parental rights over the ward conferred on the testamentary guardian by the Code[111] will prevent court appointment after a will designation has been accepted.[112] Essentially the same idea is extended to designations of personal guardians for adult incompetents made by will of an incompetent's spouse or parents.[113] These two methods of identifying guardians further the overall purpose of the Code to provide non-judicial remedies for recurring needs which may not involve controversy.

Separation of procedures for use in cases where the principal objective is to secure estate management or application for the benefit of the owner or his dependents, from personal guardianship proceedings, serves several objectives.[114] Financial problems for missing, ill, incompetent or minor persons may be remedied on grounds bearing no necessary relationship to the subject's sanity, and without implication that his personal liberty or his ability to contract should be restrained or questioned.[115] Where an owner needs both personal and property protection, more sensitive selection of persons with real interest in his well-being may be expected as the distinction between the guardian's job and that of managing the ward's estate is furthered by the Code. Also, the separate proceeding which is designed simply

107. Since Article V does not make use of "informal proceedings" as does Article III (decedents' estates), all references in Article V are to "Court" rather than "Registrar". Consequently, the "Court" may not delegate its authority regarding guardianship matters to the Registrar as provided for some matters by § 1-307.

108. § 5-202.

109. §§ 5-201, 5-202.

110. § 5-203.

111. § 5-209.

112. § 5-204.

113. § 5-301. It should be noted that the possibility of securing appointment by the court of a guardian for an incompetent adult is not related to whether another has obtained parental rights of custody via acceptance of a testamentary appointment. *See* §§ 5-303 and 5-304.

114. Article V, Part 4 covers regimes designed to protect property interests.

115. The grounds for a protective order appear in § 5-401. The definition of "incapacitated person" in § 5-101 keys to the procedures of Part 3 of Article V, and has no relevance to Part 4.

to meet property management problems caused by an owner's disability easily includes a proceeding for court approval of a single transaction, like ratification of a minor's contract, or renewal of a lease or mortgage, without appointment of a conservator.[116]

For a conservator who may be appointed to provide continuing management for a disabled person, the Code offers a statutory charter of powers and duties designed to enable him to accomplish the usual purposes of a protective trust for the sole benefit of a person and his dependents.[117] No requests to the appointing court for authority to do what a managing trustee should be able to do, or regular reports or accountings to the court, are required. At the same time, the package offers an array of safeguards and remedies which enable the protected person or anyone interested in his welfare to compel performance of all statutory duties.[118]

Article V includes two features which are designed to minimize the need for guardians of minors and conservators for incompetent adults. For minors, a statutory facility of payment clause protects persons owing up to $5,000 per year to a minor who discharge their obligation by voluntary payment to any adult having the care and custody of the minor.[119] The recipient, who may not be a guardian in a formal sense, is under a duty to apply the funds received to the support and education of the minor, and preserve any unneeded balance for payment when the minority terminates.

The other scheme, changing the usual law of agency,[120] protects persons acting in good faith and without actual knowledge of the principal's death or loss of capacity under a power of attorney given by one who has since died or become incompetent.[121] Also, statutory effectiveness is extended to a provision in a power of attorney that the authority conferred shall not be terminated by known disability of the principal.[122]

It should be noted that Article V changed more drastically during the drafting process than any other portion of the Code. The preli-

116. § 5-409.

117. *See* §§ 5-420, 5-423, 5-424 and 5-425.

118. *See* §§ 5-413 and 5-416.

119. § 5-103.

120. The statutes of Virginia provided precedent for the Code. Code Va. (1950), 11-9.1.

121. § 5-502.

122. § 5-501.

minary drafts show vacillation about whether any coverage of guardians of adult incompetents should be included,[123] uncertainty regarding the effect of a protective proceeding on the subject's capacity to contract[124] and an abandoned proposal to subject creditors of a disabled person to non-claim statutes like those working against creditors of decedents.[125] There were many other, somewhat less drastic changes in content and several fairly major reorganizations of the material. This history accurately suggests that Reporters and Special Committee had a great deal of difficulty with this Article. Much of the subject matter seemed more relevent to the larger problems of mental health and juvenile legislation than to the business of framing modern substantive and procedural rules for decedents' estates and trusts. It would not be surprising if legislatures in enacting states see fit to alter many portions of Article V in varying ways. On the other hand, there is less concern about this subject by various vested interests who will question some of the decedents' estates provisions. Hence, overburdened legislators may be inclined to accept Article V with few changes.

2. *Non-Probate Transfers*

Article VI offers two quite different statutory approaches to two problem areas selected from the world of non-probate transfers. Multiple-party accounts in financial institutions, including joint accounts, Totten trust accounts and accounts providing explicitly for payment on death to persons having no withdrawal right until the decedent's death, are covered in detail in Part One. Part Two consists of a single section dealing with provisions in effective written instruments purporting to shift or cancel rights by reason of the death of an owner.

For joint accounts, the Code abandons the joint tenancy analysis

123. Part 3 of Article V entitled "Guardians of Incompetents" which appeared in the "Summer 1967 Draft" was dropped from the Third Working Draft which was published in November, 1967.

124. § 5-424 of both the Third Working Draft and Working Draft #5 (distributed in January, 1969) provided that a protected person was incapable of making gifts and most contracts. In the Code as finally approved, § 5-408(5) expressly negates the idea that an order determining disability involves a finding of incapacity.

125. *Compare* §§ 5-425 and 5-427 of the Third Working Draft, with § 5-425 of Working Draft No. 5.

in favor of the broader concept that a surviving party to a multiple-party account contract is entitled to balances attributable to a decedent without regard to whether he had any present, beneficial interest prior to his death.[126] Testamentary benefit for survivors exists unless the account form or other clear and convincing evidence of intention as of the time the account was created indicate otherwise.[127] The Code also declares that a bank account in the name of one as "trustee" for another or others may be a vehicle for a valid testamentary disposition by the trustee to the other or others.[128] Accounts by trustees under trusts evidenced otherwise than by the form of the account are excluded.[129] Finally, accounts for one payable on his death to another, called "P.O.D. accounts" by the Code, are also validated as informal wills.[130] A transfer at death effected by any of the three forms of account has the status of a special specific bequest which passes outside probate administration without abatement in regard to other gifts made by will.[131] However, survivors' benefits in such accounts are subject to certain claims by the decedent's creditors, spouse and children if traditional probate assets are insufficient.[132]

Six of the thirteen sections in the part dealing with multiple-party accounts relate entirely to the relationship between persons who are named on the accounts, on the one hand, and financial institutions, on the other.[133] Reflecting a determination to keep questions involving beneficial ownership between parties completely separated from questions of banker liability, these sections nonetheless support the ownership provisions by stating when it is safe for bankers to pay various categories of persons named in the several forms of account.

Section 6-201 deals with written instruments which can be classified as contracts, conveyances, gifts or trusts and declares provisions therein calling for transfers of values at death to be non-testamentary. The section might prove to be a very important provision of the Code. On the other hand, it could be viewed as adding nothing to existing case law. The draftsmen followed the lead of a few existing statutes which

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126. §§ 6-103, 6-104 and 6-106.
127. §§ 6-101(4), 6-104.
128. §§ 6-101(14), 6-104(c), 6-106.
129. § 6-101(14).
130. §§ 6-101(10), 6-104(b), 6-106.
131. §§ 6-104(e), 6-107.
132. § 6-107.
133 §§ 6-108 through 6-113.

exempt death benefit provisions in rather narrowly described arrangements, such as "a pension, retirement, death benefit, stock bonus or profit sharing contract plan, system or trust,"[134] but abandoned efforts to limit the statutory declaration to special categories or arrangements. In effect, the Code applies to any written provision which, but for its death benefit aspects, would be capable of creating or altering rights between individuals. If courts will respect various intra-family agreements which the section may invite, the provision could have very significant impact.[135] By offering courts a broad alternative to the probate route for effectuating expressions calling for transfers at death, the draftsmen may have created a form of competition for wills which might serve to assure that probate procedures will be and remain as simple as possible.

3. *Jurisdiction Relating to Trusts*

Many existing probate codes subject testamentary trusts to continuing jurisdiction by the same court which probated the will creating the trust.[136] The irrelevance of attendant requirements of qualification, bond and periodic court accountings and the awkwardness of the continuing jurisdiction idea when applied to cases where trustee and assets are located in different states, are generally recognized by lawyers and trustmen. Widespread enactment of the Uniform Testamentary Additions to Trusts Act or its equivalent,[137] though attributable in part to the desirability of unifying management of inter vivos and testamentary increments to trusts, probably occurred because the legislation offers well counselled testators a way of keeping trusts arising at death away from continuing and expensive probate court control.

But, state procedural codes sometimes leave trustees and others interested in inter vivos trusts with no effecient means of obtaining adjudications which will bind all interested persons.[138] The principal

134. The quoted language comes from Illinois legislation, S.H.A. ch. 3, § 601.

135. *Cf.* Halldin v. Usher, 49 Cal. 2d 749, 321 P.2d 746, (1958).

136. *See* Simes and Basye, *supra*, note 8, 43 Mich L. Rev. 113, 133.

137. 9c, U.L.A. (1967 Supp.). According to the *Handbook of the National Conference of Commissioners on Uniform State Laws* for 1968, 41 jurisdictions had enacted the Uniform Testamentary Additions to Trusts Act, or substantially similar legislation, as of December 1, 1968.

138. Michigan procedures, now codified in its modern and comprehensive Revised Judicature Act, provide an example. Under RJA, jurisdiction over non-

difficulty, related to the traditional view that the relationship between a trustee and beneficiaries is *en personam,* lies in subjecting non-residents to the authority of the court. Legislation authorizing mailed notice to trust beneficiaries is clearly valid,[139] but not all legislatures have accepted the fact that there are many inter vivos trusts other than those creating common trust funds or involving local land which need legislative assistance.

One of the objectives of Article VII is to offer procedures for obtaining adjudications concerning trusts which apply equally to testamentary and inter vivos trusts.[140] Probate critic Norman Dacey has interpreted reports about the Code to mean that inter vivos trusts are subjected to the same kind of relationship to the probate court as is required now by typical probate code provisions dealing with testamentary trusts.[141] The Code is plainly to the contrary. It identifies what may be called a home base court for each trust by requiring trustees to register trusts with the court at the trust's principal "place of administration".[142] The court of registration is empowered to enter orders in proceedings initiated by interested parties which bind persons to whom prior notice has been given in accordance with the Code's basic system for notice of estate proceedings.[143] But, there is no duty on trustees or beneficiaries to initiate proceedings in the court of registration, and "neither registraton of a trust nor proceedings . . . result in continuing supervisory proceedings."[144] In effect, therefore, the Code offers both inter vivos trusts and testamentary trusts flexibility in regard to court proceedings like that currently available to inter vivos trusts and convenience in regard to extending proceedings to non-residents like that now available to what Professor

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resident beneficiaries of a trust cannot be obtained except through service of process in the state, or waiver, unless the litigation can be maintained under MICH. STAT. ANN. § 27A.705 which authorizes mailed notice in cases involving "ownership, use or possession of any real or tangible personal property within the state."

139. Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1949).

140. *See* Introduction to Article VII.

141. *See* newspaper article bearing Mr. Dacey's by-line and "Copyright, 1969, by North American Newspaper Alliance, Inc.," which appeared in several of the nation's newspapers in early 1969, including the Connecticut Sunday Herald edition of April 20, 1969.

142. § 7-101.

143. § 7-103.

144. § 7-201.

Casner has called "court trusts".[145] At the same time, it completely avoids requirements of court qualification, bond and mandatory accountings.

Article VII has another important objective. It is to strengthen the ability of an owner to devise property of any location to a trustee of his choice. Under the Code, a testamentary trustee derives his title and power from the will rather than from court appointment. The Code provides "unless otherwise doing business in this state, local qualification by a foreign trustee, corporate or individual, is not required in order for the trustee to receive distribution from a local estate or to hold, invest in, manage or acquire property located in this state, or maintain litigation."[146] It also provides, "A foreign corporate trustee is required to qualify as a foreign corporation doing business in this state if it maintains the principal place of administration of any trust within the state."[147] These provisions should go far to free corporate trustees of restrictions which have probably served more to discourage realization of the full potential of existing leads to new trust business, than to protect them from unwanted competition by out-of-state organizations.

The foregoing general description of the Uniform Probate Code only scratches the surface. Detailed analysis of many areas and sections will be needed before an accurate assessment of the Code can be made. For example, careful study of the Code's treatment of inheritance rights of illegitimate and adopted children should be related to existing habits of draftsmen dealing with class gifts.[148] Form book clauses for wills should be reviewed with careful attention to the Code's rules of construction.[149] Conflict of Laws scholars and proce-

145. ABA film, "The Revocable Trust".

146. § 7-105.

147. § 7-105.

148. The important sections are §§ 1-201(3), 1-201(17), 1-201(21), 1-201(29), 2-109 and 2-611. In regard to the last section, users of the Prentice-Hall edition of the Code published in August, 1969 should know that the publishers failed to notice a re-draft of the section which was accomplished during the proceedings of the Commissioners on Uniform State Laws at Dallas. The correct version of the section which is one of several dealing with construction of wills, is as follows: "Halfbloods, adopted persons and persons born out of wedlock are included in class gift terminology and terms of relationship in accordance with rules for determining relationships for purposes of intestate succession, except that a person born out of wedlock is not treated as the child of the father unless the person is openly and notoriously so treated by the father."

149. Article II, Part 6, is of particular relevance.

durists should give the provisions having closest relation to their area of interest close scrutiny. Old prejudices against guardians and conservators should be reconsidered in light of Article V. Bankers and others offering demand or time account contracts need to explore the wide new world of multiple-party accounts which is opened by Article VI. Estate planning specialists will find new uses for testamentary trusts and many other ideas made safe or efficient by the Code. The list could be extended.

F. Probate Procedures

1. *Introduction*

The heart of the UPC is its package of procedures, restrictions and limitations relating to decedents' estates. Consisting of 16 parts and 140 sections of Articles III and IV, and occupying about 46% of the pages of the entire work, the procedural and administrative core of the Code seeks to establish new rationality in probate through reduction of the necessity and importance of contacts between survivors and the Court or any public office. If enacted and used, these provisions implement purposes of the draftsmen to (i) take the critical question of how much procedure must attend each administration away from the probate office and to move this important power to persons interested in particular estates; (ii) provide methods of administering estates which will enable efficiency in succession equivalent to that associated with transfers at death via revocable trusts; (iii) eliminate the need for or advantage of separate administration for portions of a decedent's estate which happen to be located in various states.

If organization of the offices and courts dealing with estates is adjusted to make optimum use of the new procedures for decedents' affairs, the Code may reverse the historic tendency of minor probate officials to work themselves toward the postition of powerful members of the regular judiciary. In states where probate officials already have stature like that of trial court judges, the courts should be combined. In addition to the savings of public and estate funds which should follow if estates may be settled with fewer contacts with less important officials than at present, the new look promises new vitality for the nation's fiduciary industry and all associated with it.

The working relationship between the several parts and sections of Article III must be understood if the bright promise of the package is to be realized. Also, comprehension of the details of the system will be needed to answer criticisms which can be anticipated from some probate officials and two well organized and well financed commercial groups. The American Insurance Association, representing companies selling probate bonds and the National Newspaper Association representing county newspapers and metropolitan publications specializing in legal news and advertising, made it clear during the drafting stage that they are unhappy with the Code's provisions regarding probate bonds and published notices. Whatever else may be said of their respective positions, it is certain that their complaints will put pressure on advocates of the Code to demonstrate that its safeguards are adequate and that its system in regard to notices is fair and constitutional. The anticipated opposition from these groups and the importance of Article III to the cause of probate simplification warrant a more detailed analysis of this portion of the Code than can now be made of other important areas.

2. *Probate Procedure: Detail*

The first few sections of Article III describe the relationship between a public office and the complex of interests in a decedent's assets represented by his creditors and successors. Under Section 3-101, all the estate of a decedent, without distinction between real and personal assets, "devolves to the persons to whom it is devised by his last will . . . or in the absence of testamentary disposition, to his heirs . . . subject to [certain allowances] rights of creditors, . . . and to administration." Subject to exceptions which will be mentioned later, Section 3-102 requires that wills "be declared to be valid by an order of informal probate by the Registrar, or an adjudication of probate by the Court" if they are to be effective to prove a devise.[150] Section 3-103 then provides that one must be appointed by the court or rgeistrar to become an executor or administrator. Section 3-104 provides that claims of a decedent's creditors may not be enforced against his successors except through a personal representative or after property has been distributed by a personal representative.

150. The term "devise" is defined by § 1-201(17) to include any disposition by will of any kind of property.

Finally, Section 3-105 confers exclusive jurisdiction on the Code's court and registrar to grant orders on matters like probate of wills and grant of administration. Section 3-108, with appropriate exceptions for wills previously proved in the decedent's domicile and appointments necessary to complete unfinished administrations, bars either probate or appointment proceedings commenced more than three years from death. Section 3-803 bars unsecured claims against a decedent which are not presented to a personal representative within three years of death. The section applies whether or not a personal representative is appointed.

From these provisions, it can be seen that the Code continues the traditions of post-mortem probate of wills and creditor protection via a publicly appointed personal representative. But the limitations and other features of the sections offer new opportunities for survivors to avoid all contact with the probate court.[151]

When contact with the probate office is necessary or desirable, "informal proceedings" before the registrar, consisting largely of examination to determine whether sworn applications are complete and consistent with the Code's guidelines and involving no notice or delay (other than a mandatory period of five days after death) are available to handle the critical steps of probate and appointment.[152] By contrast "formal testacy proceedings" before the judge of the Code's court are offered to provide adjudications concerning testacy which may be original, corroborative of previous informal proceedings or motivated by someone's desire to contradict an informal order.[153] Also, formal appointment proceedings are available to aid

151. The Code does not compel probate or appointment. If three years from death elapses before a decedent's survivors take any action involving the probate office, any wills of the decedent are barred from probate and unsecured claims against his estate are eliminated. The heirs to whom the estate devolves upon the decedent's death hold the estate free of claim or encumbrance except any resulting from tax legislation or existing against the decedent before his death. Of course, it may be necessary to determine who the heirs are, and § 3-102 leaves small possibilities that a later discovered will may be used to prove another succession. Also, certain rights to homestead and exempt property may be asserted without the necessity of administration. Still in many situations, the most significant compulsion for securing administration of a decedent's estate will be to gain the protection for purchasers and persons transferring a decedent's assets which are keyed to an appointment. See §§ 3-703, 3-714, 3-910.

152. Article III, Part 3.

153. Article III, Part 4.

resolution of disputes relating to priority or qualifications of an applicant for appointment.[154]

Another point should be noted. The Code permits a will to be probated, either informally by the registrar or in formal proceedings before the judge, with no attendant requirement that the executor named therein be appointed or otherwise empowered to settle the estate.[155] If the decedent is believed to have died intestate, a formal proceeding for an order finding this fact and determining heirs is available without appointment of an administrator. Thus, the Code avoids a problem of the *Model Probate Code* which swept the question of will or no will into a single proceeding involving administration.[156]

If no will is offered for probate and no steps are taken to administer an estate as intestate within three years of a decedent's death, the heirs are secure in their claim to the estate. Exceptions to 3-102 permit a later offered will to be admitted in evidence without having been probated, but only if there have been no estate proceedings of any kind *and* to confirm a possession enjoyed during the three year period by the devisee, or to prove succession to an asset which was unknown to successors of the decedent during the three year period for administration. Heirs will not be able to offer assurance to purchasers or transfer agents until the three years has elapsed, but unless and until someone proves a will or secures appointment of an administrator, their possession of an estate following the decedent's death is lawful and may be enforced against third persons who cannot show interest in the estate. Hence, a decent opportunity to avoid probate court contact is afforded heirs who possess a decedent's assets and satisfy his creditors. Predictably, prospective purchasers and transfer agents dealing with heirs who follow this route will require assurance concerning the identity of the heirs, the date of the owner's death and some proof relating to possession of the assets during the three year period.[157]

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154. § 3-414. The question of priority to serve as personal representative may be resolved by decision that the decedent died testate, or that he left no will. If so, the testacy proceeding described by § 3-401 would be appropriate.

155. §§ 3-301, 3-401.

156. The MODEL PROBATE CODE has been criticized for its failure to permit probate without administration. *See* Rheinstein *The Model Probate Code: A Critique*, 48 COLUM. L. REV. 534 (1948).

157. *See supra* note 151.

One who claims under a will and is also interested in minimum contact with the probate court, may obtain probate of the will in informal or formal proceedings and then await passage of time. If his probate proceeding was informal and therefore non-adjudicative, the running of three years from death will perfect his title as well as bar all claims of possible unpaid creditors. If the probate was formal, the title probably will have been perfected before three years bars any possible creditor who has not been paid.[158] The devisee who avoids administration will need releases from any spouse or children who have statutory rights to take ahead of the will.[159] Also, he will have the full burden of any interpretive problems concerning the will. Still, many cases can be imagined in which neither kind of difficulty will arise.

Having noted that administration of both intestate and testate estates can be avoided, it is appropriate to take a closer look at what administration under the Code entails. It's fair to say at the outset that administration should offer more advantages than problems for most categories of survivors.

Section 3-103 states that administration is commenced by appointment of a personal representative by the Court or by the Registrar. As noted above, either probate of a will, appointment of a personal representative, or both may be obtained in a non-adjudicative "informal proceeding". However, petitioners have the option of getting binding determinations by the Court regarding will or no will, or settling questions of priority and qualification regarding persons who seek to administer estates.

After securing letters, a personal representative whether acting as executor under a probated will, or as an administrator in intestacy, becomes in effect a statutory trustee. The Code gives him the duty and the necessary powers and protections to permit him to accomplish

158. § 3-412 permits vacation of an order in a formal testacy proceeding for certain reasons if the petition for vacation is filed prior to the earlier to occur of closing of an administration, one year from entry of the order, or three years from the date of death.

159. Certain family rights described by Parts 3 and 4 of Article II may be implemented without administration. The right to an elective share which a surviving spouse may assert under Part 2 of Article III is barred if not properly asserted within six months after the appointment of a personal representative. Although the Code is not explicit on the point, it would seem that the elective share is barred by the failure to commence an administration within three years after death. *See* §§ 2-205, 3-108.

the entire job of collecting assets, paying debts, and selling land or intangibles as needed to raise necessary cash and distributing the estate to the successor.[160] If desired, all of these steps can be handled without further court orders.[161] Again, however, isolated adjudications to answer particular questions or general orders settling accounts are available as needed.[162]

Creditor's claims are presented by simple statement to the representative, and barred by statutes of limitation if not presented.[163] Purchasers and transter agents are protected if they deal with a representative, even though he may be violating the will or otherwise breaching a duty.[164] Distributions will be on risk of liability by distributees for repayment unless suitable adjudications to eliminate risk occur.[165] Because the representative is not an officer of the court, and because the draftsmen sought to make intestacy resemble the will which an average person would want, no bond is required unless requested. Also, no reports or accounts need be filed with the Registrar or court unless a proceeding is commenced.[166]

The status of a personal representative, including all statutory powers and abilities to protect third persons, is the same whether his appointment is obtained in formal or informal proceedings.[167] Also, unless a special proceeding called "supervised administration" is ordered at the petition of an interested party,[168] the authority of either court or registrar over a personal representative ends with the appointment.[169] Later proceedings may bring the personal representative before the court for any appropriate order, but a petition by the

160. Article III, Part 7, describes the duty and power of a personal representative. Article III, Part 8, describes methods by which a personal representative may secure protection against creditors of the decedent and the estate, and Parts 9 and 10 are relevant to the personal representative's liability regarding distributions. § 3-703(b) which protects a personal representative who proceeds without protection of a formal order regarding testacy is especially important.

161. §§ 3-107, 3-704.

162. § 3-105.

163. §§ 3-801 through 3-804.

164. § 3-714.

165. §3-909. But, purchasers from distributees are protected by § 3-910 and § 3-703 protects the personal representative unless the distribution was unauthorized by the terms of a probated will or involved a mistake as to the identity of devisees or heirs.

166. § 3-107; *See supra* note 82.

167. §§ 3-107, 3-307(b), 3-601, 3-602, 3-703.

168. Article III, Part 5, describes supervised administration.

169. § 3-107. *Cf.* § 3-602.

representative or other interested person is necessary to institute a later proceeding.[170] In this fashion, the Code offers the option of independent administration for both intestate and testate estates.

The meaning of all this is that unless someone demands notice as is possible under Section 3-204, the heirs of a decedent who is believed to have died intestate may obtain an appointment of a personal representative five days after the decedent's death.[171] After obtaining letters, the person or persons appointed assume a role very much like that of trustees of a well drawn revocable inter vivos trust who are directed to distribute trust estate remaining after the settlor's death after first satisfying all of his creditors. However, differing from such a trustee, the basis for the authority of the personal representative will be a matter of record in the registrar's office. Also, by accepting letters, a personal representative consents to personal jurisdiction of the Court in any proceedings which may relate to the estate.[172]

If a will is involved, its probate must be obtained prior to appointment of the named executor.[173] However, probate in informal proceedings will suffice. Even if the security of a binding order on the question of will or no will is desired, the Code encourages use of an informal probate to establish the will so that the executor may be appointed, after which a corroborative formal probate proceeding may be initiated without impugning the authority of the earlier appointee in any way.[174]

3. *Protective Features*

Before assessing the overall desirability or fairness of the administrative system, the Code's protective devices must be considered. Many relate to the fact that persons who seek to acquire useful control of a decedent's assets via a personal representative must make application to a public office for proof or authority. It is true that heirs acquire title to a decedent's assets upon his death and without prior contact with any public office, but their authority will not enable them to give a marketable title, at least for some considerable period.[175] Devisees are entitled to immediate possession pending ap-

170. § 3-105.
171. The five day waiting period is described by § 3-307.
172. § 3-602.
173. § 3-102.
174. § 3-401.
175. The devolution at death described by § 3-101 is "subject . . . to administration."

pointment of a personal representative, but only if they can prove their right and they may not use a will for the purpose unless it has been probated.

Several features of the public office contact required of survivors who seek to control a decedent's assets involve meaningful safeguards. The Code prescribes the content of applications for informal orders and forces applicants to divulge a good deal of information about the decedent, his survivors and his status in regard to known wills.[176] Misstatement may involve perjury.[177] Also, Section 1-106 specifies that one guilty of fraud in connection with any proceeding or statement filed with the Court remains personally liable to persons injured thereby until two years after discovery of the fraud. No order in an informal proceeding may be entered until five days from death has passed.[178] Any person with an interest in an estate may block the possibility that a future informal order may be made without notice to him by filing a demand for notice at any time after the decedent's death.[179] Also, a formal proceeding to probate a will or to declare that the decedent died intestate, or to secure appointment of a personal representative, or both, may be initiated at any time within three years after death by any interested person.[180] If initiated before an informal order has been made, this proceeding prevents issuance of an order without notice.[181] Notices required by the Code must be by personal service or mail.[182] Mere publication is not enough, except as it serves to start a limitation period which will bar creditors who fail to present claims.[183]

Further, anyone seeking appointment as a personal representative must satisfy the Registrar that he has priority ofr appointment under Section 3-203.[184] Unless there is a will, Section 3-203 assures priority for the spouse of the decedent, and if there is no spouse, gives a joint priority to all heirs. If there are several, each must concur before one or a nominee of the group may be appointed. If concurrence is not

176. § 3-301.
177. § 1-310.
178. §§ 3-302, 3-307.
179. §§ 3-204, 3-303, 3-308.
180. §§ 3-108, 3-401, 3-414.
181. § 3-401.
182. § 1-401.
183. §§ 3-801 — 3-803.
184. § 3-308(7). *Cf.* § 3-309.

demonstrated to the Registrar, the proceedings must be recast as formal proceedings.[185] Here, the judge may select a personal representative, but only after notice to all interested persons and an opportunity for hearing.

Finally, one having priority must qualify by posting any bond required by will, or required because another interested person has filed a demand for bond with the registrar before the appointment letters may issue.[186]

If an interested person fails to take steps to protect himself in advance against appointment of one he deems undesirable, and the inherent protection of being a beneficiary of a statutory trust is not sufficiently reassuring, there are several other remedies. The worried successor or creditor may impose a requirement of bond by demand,[187] institute proceedings to enjoin or limit the power of the appointee,[188] institute a formal testacy or appointment proceeding to test the basis of the appointment and thereby limit the broad power otherwise available to the appointee,[189] or obtain removal of the appointee if any misstatement appears in his application for appointment.[190] Also, he may initiate a special proceeding seeking supervised administration.[191] If his request for supervised administration is granted, the letters of the personal representative may be endorsed to indicate any special restrictions on power.[192] Also, a supervised personal representative may not distribute without order of the court.[193] As may seem from Appendix A, these precautions combine with other considerations to support omission from the Code of any blanket statutory requirement of bond.

4. *Notices*

Is the Code defensible in regard to notices? The approved version imposes a duty on every personal representative to mail notice to every interested person, including heirs apparently disinherited by

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185. § 3-203(e).
186. § 3-601.
187. § 3-605.
188. § 3-607.
189. § 3-401.
190. § 3-611(b).
191. Article III, Part 5.
192. § 3-504.
193. § 3-504.

the will which provided the basis for his appointment.[194] Further, each personal representative is under a statutory duty to publish notice for creditors once each week for three weeks following his appointment.[195] Failure to advertise makes the personal representative personally liable to creditors who may prefer to reach him than to pursue distributed estates. No other notices are required unless some interested person seeks an adjudication in formal proceedings. Then, only those given notice in accordance with the Code's scheme for notice are bound.[196] If an adjudication of a decedent's testacy is sought, the Code requires mailed or delivered notices to all known persons having interests and a published notice for the benefit of possible unknown successors.[197] As previously noted,[198] if property is distributed to devisees under an informally probated will which is later contested successfully in proceedings started before the three year limitation period runs, the personal representative is exonerated, but the persons who received the estate remain personally liable to restore what they have received or its value. Purchasers from the personal representative, or from distributees following an unadjudicated distribution, are protected from liability to the heirs in the case supposed.[199] The same pattern of relationships apply to an estate which is distributed prior to discovery and probate of a will in a case where there was no prior adjudication of intestacy.

Lawyers in states which presently require some form of notice to interested persons before issuance of letters tend to recoil from the idea that the wide power over estate assets given by the Code to a personal representative may be obtained without some form of advance notice to interested persons. There are, however, several justifications for the Code's position on this point. The most important is that the proposed system, featuring issuance of letters without notice and non-supervised administration, has been proved satisfactory by generations of use in Pennsylvania.[200] Many other states also permit

194. § 3-705. In Working Draft Number 5, this section only required notice to heirs of a testate decedent when it appeared that the will related to less than all of the estate.

195. § 3-801.

196. § 3-106.

197. § 3-403.

198. *See* text *supra* at nn. 158 and 165.

199. §§ 3-174, 3-190.

200. *See* HASKINS, SMITH & GROSSMAN, PENNSYLVANIA FIDUCIARY GUIDE, *supra* note 49.

letters of administration to be obtained without advance notice,[201] and it is widely recognized that one with letters has full practical control of the decedent's liquid assets notwithstanding the degree of "supervision" exerted by the court following appointment. Thus, accumulated experience affirms that survivors do not avail themselves of the possible opportunity afforded by ability to get letters quickly and without notice to take advantage of fellow heirs.

Also, one urging that notice should be required before a personal representative can gain control of assets must assume the burden of explaining why the probate route to control of assets must be more awkward than non-probate alternatives which are freely available. Thus, joint accounts and revocable trusts, and the acknowledged ability of persons who are close to an owner before and immediately after death to cause his liquid assets to appear to belong to survivors, will continue to provide working alternatives to the probate route which will permit some survivors to gain control of assets without advance notice to other heirs. Family pressures and basic honesty must provide satisfactory controls for this power. Otherwise, our law of probate alternatives surely would not be as it is. Also, it is sensible to match probate rules functionally similar to those applicable to probate alternatives. Owners should be encouraged to allow their estates to flow through probate where some record of assumption of responsibility for control of assets is created.

Another reason for permitting letters to issue before notice is that many of the Code's safeguards tend to reduce any associated risk. Letters may not issue without notice to anyone having a better or equal right to letters. Letters may not issue without notice to anyone who has demanded notice.

Finally, a requirement of notice before probate has implications which tend over time to run against the objective of keeping succession procedures simple. An order after notice appears to be a judicial act which adjudicates rights. Traditional considerations relating to

201. In a recent ABA survey, respondents from eleven of twenty-three states contacted indicated that no notice, other than possibly by publication, is required in regard to an application for appointment of an administrator. The states so indicated as supporting the proposition that letters are available without notice are: Colorado, Florida, Illinois, Iowa, Maryland, Minnesota, North Carolina, Ohio, Pennsylvania, Texas and Vermont. *See Estate Administration: Current Practices and Proposed Uniform Probate Code,* 3 REAL PROPERTY, PROBATE AND TRUST L. J. 2 (1968).

procedural due process suddenly become important though most would concede that a state does not have to dispense control of decedents' estates through judicial proceedings. A magistrate who has authority to make an order only after notice to interested persons may shrink his effective responsibility to that of checking notices. Such a dispersal of responsibility causes inefficiency. Worse, the magistrate may decide that he should require extrinsic proof of heirship to assist in determining whether a requirement customarily associated with jurisdiction has been met. Also, a requirement of advance notice creates a necessity for guardians for minor heirs who may receive or waive notice. After thinking the matter through, one who starts with the idea that a notice requirement would provide a simple way of providing safety for survivors, may well get to the conclusion that a requirement of advance notice almost guarantees that a supposedly simple system will become complicated.

The gist of the argument in support of the Code's provisions regarding notice, or the lack thereof, may be seen in an excerpt from a memorandum adopted by the co-chairmen of the Special Committee which controlled the drafting effort.[202] This responded to contentions by representatives of the legal advertising industry that due process considerations supported their request that published notice be required for every estate before issuance of letters, at the beginning of administration, and at closing.[203]

The position of the newspapers' representatives reflects a misapprehension about the system of administration described by the Code, and a dubious judgment about the effectiveness of legal publication as notice. Thus, the opening statement of their memorandum asserts: "When the state assumes a role in the marshalling and distribution of assets of an estate, it also assumes an obligation to afford due process to all interested parties."

But, the informal proceedings described by the Code are not proceedings leading to binding adjudications affecting rights. Rather, informal probate or informal appointment are events which individuals may cause because the statute sanctions them. No judicial

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202. Memorandum of July 17, 1969. Copies of this document may be obtained by request to the author. *See also* the law review comments cited *supra* at note 50.

203. Memorandum of National Newspaper Association dated July 15, 1968. According to the memorandum, additional copies may be obtained by request to Mr. Paul Conrad, 491 National Press Building, Washington, D. C., 20004.

order is involved. Also, the status and power of a personal representative are conferred by statute under described statutory conditions. Rights of possible successors of a decedent are not finally determined by the statutory proceedings unless and until the basic statute of limitations of three years elapses. Claims of possible successors cannot be cut off earlier except through the process of litigation. If this occurs, the Code makes it quite clear that the best possible notice must be given to persons whose interests may be affected by the questions involved.

Statutes create the power in owners to control their estates by will and define who takes in intestacy. We assume the newspapers recognize that statutes creating successors' rights may define those rights. This makes published notice unnecessary. If the newspapers are correct that notice is necessary, the no notice probate systems followed presently in several states are invalid. It would also follow that a state is powerless to provide an efficient system of succession to property owned at death. This lack of authority would be most unfortunate in view of the clear evidence that a simple system based on confidence in the basic honesty of people is desired by thousands. The committee believes that this authority exists.

5. *Bonds*

The surety bond industry sent a copy of a letter attacking the Code's provisions regarding probate bonds to every member of the National Conference of Commissioners on Uniform State Laws in advance of the 1969 meeting.[204] The gist of the industry's position was that there is no precedent for the Code's basic position that no bond is required of any personal representative except as specified by will, demanded by interested persons or required by the Court in formal proceedings.[205] The concluding paragraph of the letter con-

204. Communication of David Q. Cohen, Counsel, American Insurance Association, 85 John Street, New York, New York 10038, dated July 1, 1969, addressed to "The Commissioners on Uniform State Laws, The Special Committee and the Reporters on the Uniform Probate Code, the American Bar Association Committee to Review the Model Probate Code, The American Bar Association Advisory Committee to the Special Committee on UPC, and The American Bankers Association Liaison Committee."

205. A recent article about the Code erroneously reports that bond is required of personal representatives only when it is determined to be necessary by the court. *See* Lawrance, *Uniform Probate Code — Some Current Comments,* 108

tains the following sentence: "We believe the Code goes overboard in its treatment of the bonding of administrators and its fantastic reliance on naked legal rights as an effective substitute for security." In addition to the letter, several representatives of the industry met with members of the National Conference at a hearing in Dallas held on Sunday, August 3, 1969, to press the objection to the Code's bond provisions.

In response, the Special Committee prepared two documents which were on the desk of each commissioner at the beginning of the Dallas meetings. One of these, reflecting statistical data collected in an important research project concerning probate conducted in Cleveland, Ohio, illustrated that most probate estates are quite small and only a few involve controversy. The second was a detailed brief in support of the Code's position on bonds.

These documents are an important part of the legislative history of the Code. For this reason and in the interests of assisting state legislators who are certain to be bombarded with contentions that the Code does not provide adequate protection for inheritors of intestate estates, these documents are reproduced in the Appendix.

CONCLUSION

The American probate institution reflects more than two centuries of experience with an unfortunate legal premise. The accumulation of courts and procedures which now surround the simple matter of succession to property of a decedent is a sad monument to the predilections of the legal and political communities to serve their specialized interests when public ignorance or indifference permit. Though public interest in probate has come alive, it remains to be seen whether lawmakers will make the correct response. If they do not, the old institution will simply wither away as the public and responsive counsellors perfect private corrections for bad probate law. The Uniform Probate Code offers a way by which states can find a more constructive approach.

TRUSTS & ESTATES 1133 (1969). The Code requires that an executor must post bond before receiving letters if bond is required by the terms of the will (§§ 3-601, 3-603). In other cases, bond is required if demanded by any interested person (§ 3-605). Bond requirements so generated may be negated by the court upon finding that no bond is required, but the requirement remains until countermanded in formal proceedings.

In all probability, the Uniform Probate Code probably will not be adopted by any state in exactly the form approved at Dallas. Its substantive provisions invite changes in rules which are so old as to be confused with the natural order of family expectations. The tougher sledding will be against the vested interests which will seek to protect themselves by a few small and well camouflaged changes in the sections dealing with bonds, published notice and court control of estates. The complexity of the procedural provisions makes the Code vulnerable to this kind of attack and compromise.

But, the Code also places dozens of important and heretofore obscure details of probate procedure in a rational setting which may make it easier for proponents to show how each contributes to an important effort at law reform. Hence, it should be a valuable format for local studies. In the final analysis, however, the future of the Code is closely linked to the larger question of whether modern lawmakers are able to chart a course toward some reduction of a local political institution which has prescribed its own needs for function and growth for a very long period.

APPENDIX

The two documents which are reproduced here were distributed to members of the National Conference of Commissioners on Uniform State Laws at the beginning of the 1969 meeting in Dallas. The "Probate Fact Sheet" summarizes some data abstracted from the manuscript, *The Family and Inheritance, op. cit.*, note 33. The memorandum concerning bonds is described in the text at note 197.

PROBATE FACT SHEET

(From a survey of decedents' estates, Cuyahoga County, Ohio, closed or released from administration between Nov. 9, 1964 and Aug. 8, 1965, as revealed by a sample of one out of every 20 estates docketed.)

Frequency of Probates	*County population*		2 million
	# of estates per month		1,464
Testacy	% of testate estates		69%
	% of intestate estates		31%
Size of Gross Probate Estate	*Mean* gross value, all estates		$ 31,097
	Mean gross value, testate estates		41,218
	Mean gross value, intestate estates		8,599
	Median gross value, testate estates		15,000
	Median gross value, intestate estates		6,000

Frequency of large ($60,000) and small ($2000) estates — 48 estates, or 7.3% of those sampled, grossed over $60,000. Only 2 of these were intestate. 85 estates, or 13% of those sampled, grossed under $2,000, and the remaining 526 grossed between $2,000 and $60,000.

		#	%
Time in Probate	*up to 9 months*	210	or 31.9%
	9 to 15 months	290	or 44%
	over 15 months	159	or 24.1%
Survivor Patterns	Spouse only	60	9.1%
	Spouse and lineal heirs	321	48.7%
	Lineal heirs and no spouse	191	29.0%
	Collateral kin	75	11.4%
	No known kin	12	1.8%
			100.0%

Frequency of Disputes — Will contests were instituted in 6 or 1.3% of the testate cases. All 6 cases were settled. Claims for or against estates for debts alleged to be due, or assets alleged to belong in probate, occurred in 6 estates.

Creditors' Claims — Aside from funeral expenses, no debts of any sort appeared in probate records in *41% of all estates grossing between $6,300 and $15,500.* For smaller estates, the "no debt" category accounted for from 46% to 90% of all estates. The report concludes "In general, we do not find that debts constitute a significant problem in the settlement of an estate. First, the debts usually constitute a small proportion of the gross estate. Second, the survivors of the decedent usually make provision for payment without the necessity of court proceedings."

MEMO

July 8, 1969

TO: The Special Committee, Uniform Probate Code

FROM: R. V. Wellman, Chief Reporter, Uniform Probate Code

RE: Probate Bonds and the Uniform Probate Code

The attached statement of the Chief Reporter responds to the memorandum concerning probate bonds by Mr. Cohen of the American Insurance Association. We concur with Professor Wellman in this response, and urge every Commissioner to give this document their careful attention.

You have received Mr. Cohen's memorandum of July 1, 1969 on behalf of the American Insurance Association, which presents the case against the draft Code's proposals relating to probate bonds. The purpose of this memorandum is to enable members of the National Conference to see both sides of the matter.

PROVISIONS OF DRAFT CODE ON BONDS

The draft code which the National Conference will consider at Dallas is not silent on the subject of bonds for fiduciaries who are subject to probate court jurisdiction. Sections 3-603 through 3-606 cover the subject as it relates to personal representatives of decedents; e.g. executors and administrators. Sections 5-411 and 5-412 cover bonds for conservators and Section 7-304 deals with bonds for trustees. It may be inferred that the American Insurance Association is content with the provisions concerning bonds for conservators and trustees, for Mr. Cohen's memorandum deals only with bonds for personal representatives. In any event, this memorandum is limited to a discussion of bonds for personal representatives of decedents.

The code uses the term "personal representative" to include executors under wills and administrators in intestacy. It proceeds from the assumption that there is no fundamental difference between these offices.

Section 3-603 provides that bond for a personal representative is required if:

(a) it is so ordered by the court in formal proceedings;

(b) any person having or claiming an interest in the estate worth in excess of $1,000, demands bond by writing filed with the probate court registrar with a copy mailed to the personal representative; or

(c) bond is required by the terms of the decedent's will.

The Section also states that bond is not required in other cases.

Elsewhere in Article III, the code specifies that a personal representative's appointment may result from adjudication after notice to interested persons by the judge of the probate court (formal appointment), or it may occur without notice or delay following application to the registrar (informal appointment). In either event, an appointment creates a statutory fiduciary who, unless appointed in formal proceedings as a "supervised" personal representative, is beholden only to the creditors and successors of the decedent to carry out the purposes of administration as expressed by the code. The public office making the appointment has no further responsibility in the matter, unless and until its jurisdiction as a court is invoked in extraordinary estate proceedings by or against the personal representative. (3-107).

Some other details of the Code are relevant to bond. Except for a special representative, no informal appointment may be made after a petition seeking a court order concerning an appointment been filed (3-401; 3-414) and bond may be required for a special representative, however appointed. (3-603) This means that any interested person can be assured that the judge will have an opportunity to pass on the need for bond before any appointment is made. All he needs to do is to file a petition in a formal probate or appointment proceeding before an informal appointment has been made. In this connection, it is important to note that no informal appointment may be made until five days from death have elapsed. (3-307(a)) As to appointments in informal proceedings, an obligation to post bond arising from the provisions of a probated will must be met before the personal representative may receive any evidence of his authority. (3-601) An obligation to post bond arising from demand of an interested person made after a representative has been appointed is enforced by (a) the personal representative's statutory powers are suspended until the bond requirement has been met (3-605); (b) on petition, the personal representative may be restrained in any manner (3-607) and (c) if a demand for bond is not complied with within 30 days, on petition the personal representative can be removed. (3-605)

From the foregoing, it may be seen that the risk that someone can gain powers as a personal representative before a judge has had an opportunity to pass on the desirability of bond is narrower than the possibility that a personal representative may be appointed informally. The difference is measured by cases where a will's terms require bond. To the extent the probate office has authority to deny an informal application for appointment, thus forcing applicants to seek a judicial order after notice if they desire appointment of a personal representative, the risk is further reduced. It should be noted in this connection that Section 3-309 recognizes that the registrar may deny an application in informal proceedings for unspecified reasons. In a sense, therefore, the code provides public officials with an opportunity for discretion in regard to bond in advance of every appointment which may be requested.

Focus of the Insurance Industry's Criticism

It is important to see the exact thrust of Mr. Cohen's criticism of the code. He does not complain of the discretion re bond which the code grants to a judge who may be making an appointment in a formal proceeding. He says nothing about the provision, modelled after existing law in about 40 states, which gives testators some control over whether bond requirements should be visited on their executors. He seems to accept the blanket excuse from any bond requirement for fiduciaries who have complied with state statutes contemplating deposit of cash or collateral by professional fiduciaries. His sole complaint seems to lie in the possibility that an unbonded personal representative may be appointed informally in a case where the testator has said nothing about bond.

In passing, it is to be noted that either the decedent or his survivors can prevent the case which Mr. Cohen is concerned about from occurring. The decedent may require a bond by his will. If the will is probated, its provisions concerning the personal representative have priority over other mechanisms for identifying who should be the fiduciary (3-203), and if the decedent requires the person he