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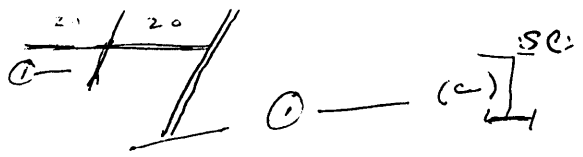

PROPOSED OUTLINE FOR ALASKA PROBATE CODE

✓ Art. I: Wills

Cv. Part 1. Execution — {(1) 19, (2) holographic will forced, (3) Nuncupative will; statute; ~~conditional revocation~~;

Cv. Part 2. Revocation — {conditional revocation

Cv. Part 3. Taking Against the Will — {subsidiary for dower i.e. taxable - $5,000

Cv. Part 4. Miscellaneous Provisions — {lapse, ect; deposit of will

✓ Art. II: Cv. Descent and Distribution — {changes in general; abolished dower

Art. III: General Administration

Part 1. Probate and Grant of Administration — in rem; ad proceeding - w/o notice; w notice

Part 2. Administrators and Executors — by clerk; control w/i 4 mos.; - issuance of letter + revocation + securing p.r.

Part 3. Bonds - amount set by court.

Part 4. Inventory - defined report more fully; + appraisement or not;

Cv. Part 5. Allowances - homestead l & e; exempt $2,000; allowance by Ct.

Part 6. Management - more liberal + less Ct control; contains treasurer + exchange

Part 7. Claims - + encumbrances classification same; pd on allowance by Ct

Part 8. Sales -

Part 9. Accounting -

Part 10. Distribution and Discharge -

Art. IV: Cv. Administration of Small Estates — {(1) $1,500 - not bar admin; (2) $4,000 - if allowances get all + not enough; (3) $5,000 - shall exist.

Art. V: Cv. Ancillary Administration — add resp. {(1) need attorney + suit - only no need letter. (2) what for. reps can do in Alaska - no ancillary letters (3) recog. with probate in other jur. (4) if need letter of admin — + to Ct in which dom.

Art. VI: Cv. Administration of Partnership Interest {① partner admin assets + winding up new - not admin. ② " can continue as limited partnership.

Art. VII: Cv. Guardianship — ① Not Guardianship now; ② minor or missing or insane, ③ more complete + present liberal, ④ sep. guardian

Art. VIII: Formal Provisions

Williams to Fosta

OK

PROPOSED ALASKA PROBATE CODE

ARTICLE I

WILLS

Part 1. Execution

Section 1.01. WHO MAY EXECUTE A WILL. ~~Every~~ Any person (1) of sound mind, ~~who~~ (2) (a) has attained the age of 19 years, or ~~who~~ (b) is or has been lawfully married, or (a) who is a member of the armed forces of the United States or of the auxiliaries thereof, or of the maritime service, ~~may make a will~~ may make a will if he.

COMMENT:

Present Alaska law permits a person who is 21 years of age to make a will. Sec. 59-1-2, ACLA 1949. However, in view of the fact that the state constitution permits persons age 19 to vote, and that the general age of majority has recently been changed to 19 (Sec. 20-1-1, ACLA 1949, as amended by Ch. 37, SLA 1959) the present law is amended to reflect these policy decisions.

Many states make exceptions of varying degrees for persons in the armed forces or married. See Rees, "American Wills Statutes," 46 VIR. L. REV. 613 at 635-5 (1960). The complete alleviation of the age requirement is taken from the Indiana provision. Ind. Ann. Stat. (Repl. Vol. 1953) Sec. 6-501. See also, Gen. Tex. Probate Code Ann. (1956) Sec. 57.

Sec. 1.02. EXECUTION. ~~The execution of~~ A will, other than a holographic or nuncupative will, ~~must be by the signature of~~ is valid only if signed by the testator and ~~by~~ at least two witnesses as follows:

(1) Testator. The testator ~~shall~~ signifies to the attesting witnesses that the instrument is his will and either

(a) Himself sign, or

(b) Acknowledge his signature already made, or

(c) At his direction . . .

William E Foster

ARTICLE II

DESCENT AND DISTRIBUTION

Section 2.01. GENERAL RULES OF DESCENT. The net estate of a person dying intestate shall descend and be distributed as follows:

(1) Share of surviving spouse. The surviving spouse shall receive the following share:

(a) One half of the net estate if the intestate is survived by issue; or

(b) The first five thousand dollars and one-half of the remainder of the net estate, if there is no surviving issue, but the intestate is survived by one or more of his parents, or of his brothers, sisters or their issue; or

(c) All of the net estate, if there is no surviving issue nor parent nor issue of a parent.

(2) Shares of others than surviving spouse. The share of the net estate not distributable to the surviving spouse, or the entire net estate if there is no surviving spouse, shall descend and be distributed as follows:

(a) To the issue of the intestate; if they are all in the same degree of kinship to the intestate, they shall take equally, or if of unequal degree, then those of more remote degrees shall take by representation.

(b) If there is no surviving issue of the intestate, then to the surviving parents, brothers and sisters and the issue of deceased brothers and sisters of the intestate. Each living parent of the intestate shall be treated as of the same degree as a brother or sister and

ARTICLE III

GENERAL ADMINISTRATION

Part 1. Probate and Grant of Administration

COMMENT:

Before 1960 probate had been within the jurisdiction of the United States Commissioners (Sec. 61-1-1, ACLA 1949). By Sec. 17, Ch. 50, SLA 1959, the power over probate matters was vested in the Superior Court, a court of general jurisdiction. There are, therefore, no probate courts as such in Alaska.

Much of the law relating to the probate of wills and the administration of decedents' estates, having grown from English roots, has retained anachronistic features, and seldom provides for the most efficient and inexpensive redistribution of property of a decedent. It is intended by this article to provide law, not only more modern than that now prevailing in the state, but also more complete and flexible.

In England, the power to deal with decedents' estates was divided among three bodies: the ecclesiastical and manorial courts, which acted particularly in this realm; the chancery courts, which dealt with executors and administrators as trustees; and the common law courts, which dealt with other functions of these officers. 1 Woerner, Sec. 141.

In the United States, courts of the first group never got a foothold, but their place was taken by statutorily-created probate courts. Like the ecclesiastical courts, however, their powers have generally been regarded as "special," "limited" or "inferior" compared to those of the courts of general jurisdiction. 1 Woerner, Sec. 143.

The inferior nature of the United States Commissioner as the probate court has been asserted in Alaska. A party offering or relying upon a judgment of a probate court must establish "not only the fact that the order was made, but also those steps leading up to the granting of the order, which show that the probate court had not only jurisdiction of the subject matter, but that it acquired jurisdiction of the person by the proper acts through the medium of its process and its officers." Sylvester's Adm'r. v. Willson's Adm'rs, 2 Alaska 325, 334 (1905). "Every power exercised by it must be found in and derived from the law, and must be exercised in the mode and manner prescribed by law..." Sylvester Adm'r. v. Willson's Adm'rs, supra, at 335. The probate courts have not enjoyed a presumption of regularity in their proceedings. In re Decker's Estate, 3 Alaska 106 (1906).

Since the superior court is a court of both law and equity, (Sec. 17. Ch. 50. SLA 1959) and the powers of probate are given

ARTICLE III

Part 7. Claims

Sec. 3.95. PRESENTATION AND PAYMENT OF CLAIMS. The personal representative shall pay valid claims against the estate when they are allowed by the court. Claims verified by affidavit are filed with the court, and for the claim to be allowed the statement of claims must describe:

(1) the nature of the claim;

(2) the amount of the claim;

(3) when the claim became or is to become due;

(4) any setoffs known to the claimant;

(5) a contingency, if any;

(6) (when the claim is founded upon a writing, and the writing is not offered) the reasons for failure to produce the writing;

(7) security held for the claim, if any.

COMMENT:

The section is based on Model, Sec. 137; Mo., Sec. 145; Sec. 61-13-3, ACLA 1949; Cal. Prob. C.A., Sec. 705.

This section is based primarily upon Model, Sec. 137, but has been changed considerably to eliminate matters of procedure and to confine the section to the substance of claims. All claims except for expenses of administration must be allowed by the court before payments.

Sec. 3.96. CLAIMS FOR AMOUNTS NOT YET DUE. The court shall allow a claim for an amount which will become due at some future time at its present value. Payment may be made as in the case of an absolute claim which has been allowed. Alterna-

ARTICLE III

Part 10. Distribution and Discharge

Sec. 3.151. DELIVERY OF SPECIFIC PROPERTY TO DISTRIBUTEE BEFORE FINAL DECREE. Upon application of the personal representative or of any distributee, with or without notice as the court may direct, the court may order the personal representative to deliver to any distributee who consents to it, possession of any specific property to which he is entitled by will or intestacy, provided that other distributees and claimants are not prejudiced thereby. At any time before the decree of final distribution the court may order him to return the property to the personal representative, if it is for the best interests of the estate. The court may require the distributee to give security for the return of the property.

COMMENT:

The section is based on Model, Sec. 182(a); Mo., Sec. 216.

This section is designed to provide for the disposition of a specific piece of real or personal property which may more conveniently remain in the possession of an heir or devisee than in the possession of the personal representative. See Model, Sec. 182, comment. For example, a musical instrument, painting, or valuable piece of furniture would have to be stored if an heir or devisee could not take possession. A tract of land may be similarly turned over, to be maintained and enjoyed by a particular distributee.

The delivery provided for in this section is different from the partial distribution of Sec. 3.152 in being permitted immediately, before the end of the nonclaim period and without notice. Sec. 3.152 and comment. No similar provisions exist in Alaska. As to the common law power of the personal representative to distribute, see 3 Woerner, Sec. 519.

Sec. 3.152. DISTRIBUTION OF [illegible] OF ESTATE. After the [illegible] of the time limited for the filing of claims and

William C. Rice

OK

ARTICLE IV

ADMINISTRATION OF SMALL ESTATES

GENERAL COMMENT:

Under present Alaska law, three groups of provisions are applicable to administration of small estates: (1) Sec. 61-10-1, ACLA 1949 dispensing with administration when a decedent specifies it in his will, and certain other conditions are met; (2) certain general provisions (Secs. 61-11-1 to 61-11-7, ACLA 1949) relating to settlement of estates of less than $1,000 with reduced administration; and (3) a special provision (Secs. 61-19-1 to 61-19-3, ACLA 1949) relating to estates of Indians and other Aboriginal peoples.

The first procedure, dependent in part on the will of a testator, is entirely inapplicable in cases of intestacy. Further, in the case of small estates, it is a reasonable assumption that few wills will be made with advice from counsel familiar with the impracticalities of administration. Therefore, the utilization of the section for estates where it is most needed seems remote.

The second existing procedure also seems to accomplish little. Administration costs, though reduced, are still existent, together with court costs which are often substantial. In the case of an estate of only a few hundred dollars, the entire estate may go toward paying costs of administration.

Whereas the third procedure may prove useful in certain instances, it would seem most efficacious to work out an applicable general procedure whereby special provisions need not be enacted for Indians. Different procedures for different races should be avoided if one provision could meaningfully apply to all groups. A provision of general application has the effect of avoiding litigation as to the application of a special section to persons of mixed racial ancestry.

The suggested revision sets forth three basic procedures for minimizing administration of small estates. The first (Secs. 4.01-4.04) relates to estates of less than $1500, and eliminates administration entirely unless an interested party petitions for it. The procedure is available to all parties and entails the transfer of property without judicial supervision, by means of affidavit. Separate provisions govern the transfer of real and personal property, commensurate with the desire to settle questions of title to real property as quickly as possible.

The second procedure (Secs. 4.10-4.13) is only open to those parties who are entitled to a family allowance. It provides for a summary distribution of a small estate to the surviving spouse or minor children where the estate, exclusive of homestead, would be entirely consumed in the payment of a family allowance. The upper limit on the amount distributed is that to be prescribed in Art. III of the revised code, which will state the maximum family allowance. (For present allowance provisions, see Secs. 61-12-2, 61-12-3. Also see Sec. 61-12-4 which contemplates the setting apart of the entire estate for support, but in-

William C Foster

ARTICLE V

ANCILLARY ESTATES

GENERAL COMMENT:

This Article has specific application to the situation where a decedent, domiciled elsewhere, leaves assets in Alaska. Several complex problems arise in this context. Of a fundamental importance is a determination of the necessity for ancillary administration, and of the relationship between the domiciliary administration and the ancillary one if the latter occurs. If there is a will, further difficulties arise as to the effect of domiciliary probate or rejection from probate on the estate in the ancillary jurisdiction, and as to the procedure for probate there.

Few states have codified law applicable to ancillary estates. In some states statutory provisions regarding the subject are practically nonexistent. Alaska is presently one of these states. Outside of one provision (Sec. 61-3-1, ACLA 1949) prohibiting a nonresident from acting as an executor or administrator, and two regarding foreign wills (Secs. 61-2-8, 9, ACLA 1949), the entire Alaskan law is silent regarding special provisions for ancillary probate or administration. This is undoubtedly a direct consequence of the traditional common law view which regards each administration as an entirely separate proceeding. E.g., In re Braun's Estate, 276 Mich. 598, 268 N.W. 890 (1936). The theory of separate administrations, while legally defensible, has declined steadily in recent years. The decline may be traced to the fact that a strict adherence to the individual nature of affairs in each state may result in administration costs wholly out of proportion to the size of the affairs involved. This fact, coupled with the duplication and confusion which may accompany present procedures of ancillary administration, has resulted in a strong movement toward a complete re-evaluation of the separation theory. E.g., Goodrich, "Problems of Foreign Administration," 39 HARV. L. REV. 797 (1928). Atkinson, "The Uniform Ancillary Administration and Probate Acts," 67 HARV. L. REV. 619 (1954).

In recognition of the problems inherent in separate administration and probate proceedings, the National Conference of Commissioners on Uniform State Laws has promulgated three acts on the subject. Those acts compose the fundamental source of the first three parts of this Article. The purpose of the Acts as a whole is to allow ancillary and domiciliary administration to proceed as a unit, insofar as possible. In all three cases, it is recognized that the only feasible method for accomplishing this end is to allow the proceedings at the domicile to control all ancillary proceedings. Each act deals with the situation from the standpoint of the ancillary state; the provisions have no application when the decedent was domiciled in the state enacting the laws.

Part 1 of the Article is directed toward obviating the need for [illegible] ancillary administrations, by allowing the domiciliary representative to act in this state without the necessity of acquiring ancillary letters

ARTICLE VI

ADMINISTRATION OF PARTNERSHIP INTERESTS

GENERAL COMMENT

Though legal theorists are not entirely united on the theory of partnership association, it is clear that under any theory a partnership represents a highly delicate form of business relationship. The delicacy arises from the power of any one partner to bind the entire partnership jointly as well as his copartners severally. Kadota Fig Ass'n of Producers v. Case-Swayne Co., 73 Cal. App. (2d) 796, 167 P.(2d) 518 (1946); Southgate & Linton, 181 Tenn. 540, 181 S.W.(2d)(1944). To insure that partners are not associated with those whom they do not choose, or bound by a relationship not originally contemplated, if a partner ceases because of death or some other reason to be a member of the partnership there occurs a legal terminology, a "dissolution." Trecker v. Trecker, 334 Ill. App. 263, 73 N.E. (2d) 843 (1948); Heiden v. Benttler, 11 F. Supp. 290 (N.D. Iowa 1934); Uniform Partnership Act, Sec. 29. Absent an agreement between the partners, dissolution normally requires a "winding up" of partnership affairs resulting ultimately in "termination." Charleston First Nat. Bank v. White, 268 Ill. App. 414 (1932); Webber v. Rosenberg, 318 Mass. 768, 64 N.E.(2d) 98 (1945); Uniform Partnership Act, Sec. 30. These terms are distinct. "Dissolution" designates the point in time when the partners cease to carry on the business together while "termination" is the point in time when all partnership affairs after dissolution are wound up. "Winding up" is the process of settling partnership affairs after dissolution. See Commissioner's Note, 7 UNIFORM LAWS ANNO. 165 (1949).

At common law, it was clear that at the death of a partner the surviving partners had the duty of winding up the partnership forthwith. See discussion in Woerner, THE AMERICAN LAW ON ADMINISTRATION, (3rd ed.) Secs. 123-130, c.f. Easton v. Courtwright, 84 Mo 27 (1884). The result of the winding up was that the deceased partner's share was paid to his representative who otherwise could not enter into the management or the winding up procedure. Woerner, THE AMERICAN LAW ON ADMINISTRATION, supra Sec. 123; c. f. Andrews v. Stinson, 254 Ill. 111, 98 N.E. 222. The surviving partner was treated in equity as a trustee of partnership assets for the payment of the debts of the partnership and for the benefit of the heirs and distributees of the deceased. Renfrow v. Pearce, 68 Ill. 125; Anderson v. Droge, 216 Iowa 159, 248 N.W. 344. The common law rule was founded on the law of self interest and self preservation. The surviving partners, unlike ordinary administrators, have a direct pecuniary interest in the assets of the partnership. Preservation of this interest was considered a sufficient safeguard in protecting the decedent's interest in partnership assets from waste and spoilation. Against any misconduct, neglect, or delay of the survivor, the creditors at common law had the protection of the

ARTICLE VII

GUARDIANSHIP

Part 1. General Provisions

Sec. 7.01. DEFINITIONS AND USE OF TERMS. When used in Parts 1, 2, 3, 4 and 5 unless otherwise apparent from the context:

(1) A "guardian" is one appointed by a court to have the care and custody of an incompetent person or of the estate of an incompetent person or of both.

(2) An "incompetent" is any person who is

(a) Under the age of 19; or

(b) Incapable by reason of insanity, mental illness, imbecility, idiocy, senility, habitual drunkenness, excessive use of drugs, or other incapacity, of either managing his property or caring for himself or both.

(3) A "missing person" is one who owns property within the state, and cannot be located upon reasonable inquiry.

(4) A "ward" is an incompetent or missing person for whom a guardian has been appointed.

COMMENT:

A guardian is generally appointed for minors and for persons who are so mentally deficient that they are unable to care for themselves or their property. E.g., Secs. 62-1-1 thru 62-1-6, ACLA 1949 (minors); Sec. 62-1-11, ACLA 1949 (insane or incompetent); Mo. Stat. Anno. (1956), Sec. 475.010 (incompetents). The cause of the mental deficiency is immaterial - it may result from illness, old age, or be a congenital defect. See Annotation 13 ALR 354 (1938)(incompetents).

Physical disability has not been included within the purview of "incompetent," for guardianship purposes. Statutory attempts to do so have previously been declared unconstitutional as an unwarranted interference of liberty and right to property. Schafer v. Haller, 108 Ohio Rep. 322, 140 N.E. 517 (1923). Also see Note, 37 HARV. L. REV. 151. If an individual's mind

Comments on the Code in general.

1. Effect of taking it out of the hands of the comrs. and giving it to a court of general jurisdiction. What powers will the court have as a court of general j.

2. Eff of making the proceeding one in rem: obviates the service problem: a notice that proceedings are being carried on, as an exercise of the power of the state over property within its borders. Subsituted service is OK but it must be reasojably calculated to reach the persons entitled to know. Old "stat cts" eliminated.

3. Point out that the amount of litigation in Alaska is comparatively very small, but that some of what there has been has been costly ahd long. As a resultof confusion of the powers of the personal representative, and of the court to re moveand replace the administrators, Sylv Est. v Willsons Adm'rs got very complicated. Had the proceeding been carried on under the provisions of this code, the difficulties wouldn't have arisen. The same estate was atain in litigation in 1925 as a result of confusion as to what the law was respecting the withholding of property by a personalrepresentative and the reopeining of a probate decree.

4. In general the law in Alaska is hao hazard-- there are a confusion of miscellaneous statutes which are not properly a code at all. They are furthermore ripe for axing because of thw amount of procedure they contain.

5. Mo has used much of this.

6. Where the code came from: The Model PC in which:
Statutes of all common-law American states were read and classified.
Case law examined with respect to particular problems.
Laws which the modern codes replaced.
Examination of older statutes in such states as Mass.
Examination of Uniform Laws.
All of these statutes were weighed and considered, but when no satisfactory solution was found, original provisions were drawn.

7. The draftsmen of the Code (Drafting subcommittee of the Committee on the Model Probate Code, Probate Division, Section of Real Property, Probate and Trust Law, American Bar Ass'n.) feel the following points to be among the most importqnt in the Model Probate Code as a whole.

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1. The Probate judge is the same as the Trial Judge, or Coordiante with the Trial J. This has been accomplished by the giving of Proabte to a court of General Jurisdiction. Ch 50, Art. II, sec 17 SLA 1959.

2. General Administration may be initiated without notice.

has further reduced the importance of the distinction. This Code is drawn up with the initial assumption that there is no difference between the two types. The personal representative takes possession of land just as personalty, and the title to both passes to the distributees at the decedent's death.

4. There is a limitation on the contest of wills. This is a problem of much smaller magnitutde where acourt of general jurisdiction has probate.

5. Notice to creditors has become part of the original notice. Systematization and reduction of notice provisions reduces the expense of the administration, especially imporatnat in the case of small estates.

5. The time sscedule hasbeen drawn to ensure that the estate will be administered and sitributed quickly.

(several minor advantage omitted from this list)

6. Dispensing with Administration. It is thought that the provisions for dispensing with administration will save a considerable amount of money for distributees of small estates.

Talk with one lawyer who has handled probate work in Alaska (Doug Gregg, whom God preserve, of Utrecht) reveals that 1. Probate requires the adminstrator to obtain a lawyer, and requires that they go through the ritual of administration, which has certain steps which cannot be avaiodedm no matter how unnecessary in the particular case. The example given of this was the neccessity of an executrix being obliged to come to Juneau from remote parts to appear in court for the hearing on the final accounting. The costs of administration are fixed, and while they may be negligible in a large estate, are large in a small estate. The attorney himself may find that, although his fees are large in relation to the estate, yet even so it is a marginal operation for him;

One thing which would be well to work out is the relationship between this section and the section on dispensing with administration. There are three categories of non- or simplified administration. The first requires for estates of under $1,500 in value, the court need not be brought in at all; for estates under $4000, the court may grant an order of no administration; and for estates under $10; 000, the court may permit, by sec 4.20, the use of simplified procedures. It appears that the simplified procedures power is given to the court by the provisions relating to administration in general, and that this section but provides that the court ought to use these powers. These sections will probably have to be dovetailed a bit.