LDIR#224
PROBATE CODE
1961
REVISION

THE COUNCIL OF STATE GOVERNMENTS

1313 EAST SIXTIETH STREET, CHICAGO 37, ILLINOIS

June 1, 1960

Mr. William C. Foster
Deputy Director
Alaska Legislative Council
Box 2199
Juneau, Alaska

Dear Mr. Foster:

Mr. Ingraham has asked me to send you a loan copy of the Final Report of the Joint Probate Laws Revision Committee which is being sent to you under separate cover.

If we can be of any further assistance, please do not hesitate to let us know.

Sincerely,

Muriel Hoppes

Muriel Hoppes
Legislative Reference Librarian

MAH:mf

REPORT ON FIRST TWO ARTICLES
OF PROPOSED REVISED PROBATE CODE
SENATE BILL NO.4

Article I, Sec. 1.01 Your committee has no comments with respect to subparagraph 1 and 2.

With respect to subparagraph 3, your committee is of the opinion that the present wording /IS A MEMBER OF THE ARMED SERVICES OF THE UNITED STATES OR OF THE AUXILIARIES THEREOF OR OF THE MARITIME SERVICE/ should be stricken and in its place new material substituted as follows: is in active military service or is doing duty on shipboard at sea. This language is similar to that of Deering's Probate Code of California, Sec. 54 and our own Statute 59-1-3.

Sec. 1.02 - No comment.

Sec. 1.03 - Your committee is concerned by reason of the fact that the phrase "interested witness", line 9, is not defined. There is a definition, however, in Sec. 8.01 (10) having "interested persons" as meaning:

> "heirs, devisees, spouses, creditors, representatives of the deceased, or any others having a property right in or claim against the estate."

A question immediately arises as to whether or not the defined phrase "interested persons", which ~~excludes~~ includes a creditor would include "interested witness". Your committee feels subsection (b) of Sec. 1.03 can be given clarity redrafting subsection (b) as follows:

> "No will is invalid because it was attested by a witness for whom provision is made in the will, but such witness forfeits so much of such provisions as in the aggregate exceeds in value, as of the date of the testator's death, what he would have received had the testator died intestate, unless the will is also attested by two disinterested witnesses."

Your committee recommends that the word /Bequest/, line 15, Subsection (c) be changed to devise because the definition of "devise" in Sec. 8.01(3) is more inclusive.

Sec. 1.04 Your committee unanimously recommends that provision in this Section be made for the dating of a holographic will because it is elementary that a certain period in time is desirable for the purpose of ascertaining the mental competency of a testator to make a will. See Sec. 3-3, [illegible]

JUNEAU BAR ASSOCIATION COMMITTEE

REPORT ON ARTICLE III, PROPOSED PROBATE CODE

(Parts 1 through 4)

Sec. 3.01. No comment.

Sec. 3.02. No comment.

Adopted Sec. 3.03. Your committee believes that the word [INTERESTED] should be stricken on line 17. Reasons:

(1) "Interested person", as defined on p.109(10) is not as broad as the class of persons who may qualify as personal representative (Sec. 3.04). Your committee believes any person who may qualify as personal representative should be able to petition for his own appointment.

(2) A stranger to the estate should have a right to petition, since ~~he may wish~~ to purchase property of the estate, the title to which can only be cleared through administration of the estate.

Sec. 3.04. Your committee would redraft subdivision (3) as follows:

"(3) a non-resident, except that:

OK (a) a person named or specified as executor, who is not a resident, may qualify by becoming a resident [, REPLACING AN ADMINISTRATOR WITH THE WILL ANNEXED IF ONE HAS BEEN APPOINTED, OR BECOMING A JOINT EXECUTOR IF ANOTHER EXECUTOR HAS QUALIFIED];

(b) a personal representative who is not a resident, or who is a resident at the time of his appointment and thereafter becomes a non-resident, [OR ONE WHO IS NOT A RESIDENT AND DOES NOT BECOME A RESIDENT] may qualify by filing a bond to be approved by the court, and an irrevocable power of attorney constituting a lawyer who practices law in the judicial district wherein such estate is being probated [THE CLERK OF THE COURT] agent to accept service of process or notice in any proceeding relating to administration of the estate."

Your committee believes the first part of the material shown as deleted from clause (3)(a) should be taken care of in Sec. 3.32 by adding a new subdivision (6) (see that section), and that the remainder of the material shown as deleted is surplusage.

In (b)(3), the [illegible] are simply to clarify the language. The "clerk of court" as agent for service has been replaced

COMMENTS TO "COMMENTS" BY BAR ASSOCIATION

(Changes not specifically commented upon are considered sound)

Sec. 3.03

Reason (1): It seems to the drafters that the criteria of Sec. 3.04 are too broad. Should "interested" be stricken, it would permit a person having no interest other than administrators fees to apply, which does not seem desirable.

Reason (2): The drafters disagree with the Committee's reason. A prospective purchaser of property has no such right with respect to property of a living owner. One having no interest could threaten to su subject the estate to an administration, or to cause heirs or devisees to act against their will, at awkward times, etc., in a way which would never be tolerated with respect to property of a living person. One who seeks to buy estate property ought to approach the heir or devisee, or prospective personal representative, and if he has a bona fide offer, then an interested person can petition as appropriate.

Sec. 3.04.

(b) We suggest that both the original and the proposed redraft suffer from grammatical inaccuracy, in that they speak of a personal representative who is not a resident being able to qualify when what is meant is that a person named in the will be be personal represen-

M E M O R A N D U M

November 8, 1960

To : Legislative Council
P. O. Box 1346
Anchorage, Alaska

From: Jack F. Scavenius
Master for the Superior Court

Re: Proposed Probate Legislation

Section 1.07.(3)b. Nuncupative Will

"The nuncupative will may dispose of personal property only, and to an aggregate value not exceeding $1,000.00, except in the case of persons in active military, air or naval service in time of war the aggregate amount may be $10,000.00."

I fail to see that there is any material difference between persons civilian or military "in imminent peril of death" in time of peace and civilians being in that predicament in time of war, on one side, and persons in active military, air or naval service being in that predicament in time of war.

I would strongly suggest that a limitation of the aggregate value of property to be disposed of by a nuncupative will should be not less than $10,000.00 in any case, and should also include real property. Ten thousand dollars nowadays is not much money.

Section 1.22. Conditional Revocation

This Section seems to throw the burden of proof entirely upon the "Testator's" personal representative rather than on the parties contesting the state of intestacy. Considering the pro-

NOTE: Look over Sec. 3.104 on when creditors claims must be filed or be barred.

Changes to first draft of notes:

"3.05. . . .

(3) [(2) IF THERE IS NEITHER SURVIVING SPOUSE OR NEXT OF KIN, OR] if none of the [DESIGNATED] persons described in subdivisions 1 and 2 files a petition for letters within 30 days after the death of the decedent, then to any other qualified person. "

Delete the balance of present subsection (2) and all of present subsections (3) and (4).

3.06. The section is redrafted with only the grammatical change shown:

"Sec. 3.06. DEMAND FOR NOTICE OF PROBATE OR APPOINTMENT. Any interested person may [AT ANY TIME] file a demand for notice at any time before hearing on a petition to admit a will to probate or to appoint a personal representative other than a special administrator. After the filing of this demand, the court may not hear the petition without giving notice."

3.09. The section is redrafted as follows:

"Sec. 3.09. CONTEST OF PROBATE OR APPOINTMENT AFTER HEARING WITHOUT NOTICE. a. Any heir or devisee [INTERESTED PERSON] may oppose the appointment or probate after a hearing without notice by filing a statement of

Sec. 3.16. Your committee recommends that this section be deleted. In its opinion, prohibiting probate of a will or administration of an estate after five years from the death of a decedent would serve no useful purpose and would impose a hardship in many cases. The committee considers that probate proceedings are not commenced by attorneys unless there is a valid need on behalf of some interested party. There are many cases where clearance of title, determination of succession after intervening life estates, administration of trust estates, or probate of wills of decedents whose death is not known for many years, require commencement of proceedings more than five years after date of death. The present Alaska law, which contains no time limit for starting probate or administration, should be retained.

Sec. 3.17. Redrafted as follows:

Sec. 3.17. FINALITY OF ORDER. The court order admitting the will to probate, or appointing a personal representative is final if not contested within the time specified in Section 309d. or appealed. [FROM EXCEPT THAT:]

[(1) IT MAY BE CHANGED OR REVOKED BEFORE THE DECREE OF FINAL DISTRIBUTION TO ADMIT TO PROBATE A SUBSEQUENT WILL NOT PREVIOUSLY PRESENTED TO THE COURT;]

[(2) IT MAY BE VACATED OR MODIFIED FOR CAUSE;]

[(3) THE FINDING OF THE FACT OF DEATH IS CONCLUSIVE AS TO THE ALLEGED DECEDENT ONLY IF NOTICE OF THE HEARING ON THE PETITION FOR PROBATE OR FOR THE APPOINTMENT OF A

STATE OF REVIEW OF PARTS 1 - 4
ART. III, PROPOSED PROBATE CODE

3.01. No comment

3.02. No comment

3.03. The majority of your committee believes that the word [INTERESTED] should be stricken on line 17. Reasons:

(1) "Interested person", as defined on p. 109 (10) is not as broad as the class of persons who may qualify as personal representative (Sec. 3.04). The majority of your committee believes any person who may qualify as personal representative should be able to petition for his own appointment.

(2) The majority of your committee believes a stranger to the estate should have a right to petition, since he may wish to purchase property of the estate, the title to which can only be cleared through administration of the estate. The minority of your committee believes the advantages of the majority's position are outweighed by the consideration that a non-interested party should not be allowed to harass the heirs by bringing a probate action. In small estates this could be too costly, and the heirs might be persuaded to buy off the outsider to keep him from bringing the proceeding.

3.04. Your committee ~~believes the first part~~ would redraft subdivision (3) as follows:

Sec. 3.04. . . . Any person may serve as personal representative except

* * *

(3) a non-resident, except that:

(a) a person named or specified as executor, who is not a resident, may qualify by becoming a resident, [REPLACING AN ADMINISTRATOR WITH THE WILL ANNEXED IF ONE HAS BEEN APPOINTED, OR BECOMING A JOINT EXECUTOR IF ANOTHER EXECUTOR HAS QUALIFIED;]

(b) a personal representative who is a resident at the time of his appointment and thereafter becomes a non-resident, or one who is not a resident [AND DOES NOT BECOME A RESIDENT] may qualify by filing a bond to be approved by the court, and an irrevocable power of

PROBATE CODE

Art. I. WILLS

Part 1. Execution. The part authorizes a person of 19 to execute a will. Holographic wills are still favored. A mortemain statute has been added. The use of nuncupative wills has been expanded.

Part 2. Revocation. An express provision for conditional revocation has been added.

Part 3. Taking Against the Will. New provisions for taking against the will have been added as a substitute for dower ($5,000).

Part 4. Miscellaneous Provisions. Specific provision is made for lapse and the deposit of wills with the clerk of the court.

Art. II. DESCENT AND DISTRIBUTION - Clarification has been made to the descent and distribution and dower has been abolished.

Art. III. GENERAL ADMINISTRATION

Part 1. Probate & Grant of Administration. Probate is expressly made an in rem proceeding and all questions will be considered within the one action. The appointment of personal representatives may be made without notice in court discretion but is subject to question by any person within 4 months thereafter. Upon appointment of personal representatives notice is given by the court clerk. Contests of the probate or grant of administration is brought within 4 months.

Part 2. Administrators & Executors. Additional provisions are made regarding the revocation of letters issued to administrators and executors and the powers of surviving personal representatives when more than one has been appointed.

Part 3. Bonds. The amount of bonds will be set by the court and may be subsequently amended.

Part 4. Inventory. The inventory is defined more fully and appraisement may be waived.

Part 5. Allowances. Allowances has been changed substantially. the proposed provisions include a life estate on the homestead ($5,000), an exemption for $2,000 and an allowance of 6 months or more set by the court.

ALASKA LEGISLATIVE COUNCIL
TELEPHONE 6-1434
BOX 2199
JUNEAU, ALASKA

November 14, 1960

Jack F. Scavenius, Esq.
Master for the Superior Court
628 F Street
Anchorage, Alaska

Dear Mr. Scavenius:

Mr. Doyle asked me to reply to your letter of November 9 in which you made comment to the first draft of a proposed Alaska Probate Code.

First may I say we always appreciate very much when interest is shown by others in the work we are doing. We are particularly appreciative when the comments come from someone with knowledge and experience in the field such as yourself. Your thoughts will be communicated directly to the Council.

As you perhaps understood, this first draft was prepared by the staff at the request of the Council and circulated to interested parties. The staff will report to the Council on the first draft and comments that have been received at our Anchorage meeting. You may arrange a personal appearance by contacting the Chairman of the Legislative Council, Representative Peter J. Kalamarides.

Sincerely yours,

William C. Foster
Deputy Director

WCF:nd

M E M O R A N D U M

November 8, 1960

: Legislative Council
P. O. Box 1346
Anchorage, Alaska

From: Jack F. Scavenius
Master for the Superior Court

Re: Proposed Probate Legislation

Section 1.07.(3)b. Nuncupative Will

"The nuncupative will may dispose of personal property only, and to an aggregate value not exceeding $1,000.00, except in the case of persons in active military, air or naval service in time of war the aggregate amount may be $10,000.00."

I fail to see that there is any material difference between persons civilian or military "in imminent peril of death" in time of peace and civilians being in that predicament in time of war, on one side, and persons in active military, air or naval service being in that predicament in time of war.

I would strongly suggest that a limitation of the aggregate value of property to be disposed of by a nuncupative will should be not less than $10,000.00 in any case, and should also include real property. Ten thousand dollars nowadays is not much money.

Section 1.22. Conditional Revocation

This Section seems to throw the burden of proof entirely

parties contesting the state of intestacy. Considering the pro-

ROBERTSON, MONAGLE, EASTAUGH & ANNIS
ATTORNEYS AT LAW

P. O. BOX 1211
200 SEWARD BLDG.
PHONE: JU 6-3340
JUNEAU, ALASKA
CABLE ADDRESS:
ROMEA

October 27, 1960

Mr. Jack Doyle, Director
Alaska Legislative Council
Alaska Office Building
Juneau, Alaska

Dear Jack:

Enclosed is a copy of a letter to me from C. O. Jorgensen, Consul General of Norway as well as copy of my letter to David Luce, Administrator of Courts.

I believe that both letters are self-explanatory and I wonder if you would not refer the matter for consideration during the present revision of the probate laws.

Sincerely yours,

F. O. EASTAUGH

Enclosures

LAW OFFICES
OF
ZIEGLER, ZIEGLER & CLOUDY
P. O. BOX 1079
KETCHIKAN, ALASKA

A. H. ZIEGLER
ROBERT H. ZIEGLER, SR
CHARLES L. CLOUDY

September 24, 1960

Mr. William C. Foster
Deputy Director
Alaska Legislative Council
Box 2199
Juneau, Alaska

Dear Bill:

With further reference to the Probate Code Revision, it appears that it would be impractical for me to give you my comments on the material received thus far until I receive the balance of the same. I note in the comments that explanatory references and tie-in references are made to other articles that I do not yet have. Quite possibly some of my questions relating to the material I have on hand will be cleared up by the other material that is forthcoming. Consequently I shall withhold my comments until I have a chance to review the whole.

Best regards.

C. L. Cloudy

CLC/om

Part V. Allowances and Homestead

Sec. 3. . HOMESTEAD. At any time after the return of the inventory the court, of its own motion or upon application, shall set apart the homestead to the decedent's spouse, or in case of his death, to the minor children. The court may set apart the homestead to any adult children who have been declared incompetent by order of court. The homestead may be set aside without filing of inventory if no administration is had under Article IV of this code. Any homestead set apart under this section shall not be subject to administration and shall be exempt from all claims against the estate excepting any lian thereon at the time of the decedent's death.

COMMENT: The homestead has traditionally been exempt from the claims of unsecured creditors; both during life and after death. E.g., Secs. 55-9-79 and 61-12-2, ACLA 1949. The function of the exemption is to provide a place for the family and its surviving members where they may live free of fear of deprivation. After death, the homestead provides "shelter, care, and support for the widow and minor children." Shively Estate, 145 Cal. 400, 78 P. 869 (1904); Kachigian Estate, 20 Cal.(2d) 787, 128 P.(2d) 865 (1942).

This section does not state a legal definition of "homestead." That definition is set out in Sec. 55-9-79, ACLA 1949, as amended by Ch. 61, SLA 1957, Sec. 1. Also see Seagreen v. Wendler, 5 A. 715 (1917); Williams v. Thompson, 7 A. 601 (1927). While perhaps some distinction might be made in terms of definition before and after death it has not been the usual custom to do so. E.g., Mass. Laws Anno. (Supp. 1959) c. 188, Sec. 4.

The third sentence of the section is inserted to avoid any

XI. Simultaneous Death

Sec. 12.01. No Sufficient Evidence of Survivorship.

Where the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he or she had survived, except as provided otherwise in this Act.

Source:

Comment:

/ok/

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 spoila-

[illegible] creditors at common law had the protection of the supervisory powers of courts of equity. See Easton v. Court-

File
March 9, 1962

CS FOR SB #4

REPORT OF SENATE JUDICIARY COMMITTEE

ALASKA PROBATE CODE

CS FOR SB #4 is a revision of the present law found in Titles 59 -- 61, 63, and 64, ACLA 1949, as amended. This bill does not affect Title 62 "Guardian and Ward."

The present law is formally revised by this bill so that it conforms with the state constitution and the state judicial system. Procedure has been deleted as in the codes of civil and criminal procedure (SB #105 and SB #119). The substantive changes noted below were made to eliminate existing difficulties in probate law and to improve and modernize it. The attached chart indicates the derivation of each section of CS FOR SB #4 and whether a substantive change was made. If a change is indicated on the chart, specific information on the change can be found below.

The effective date of this Act is January 1, 1963 so it will take effect at the same time as the codes of civil and criminal procedure and the Revised Rules of the Supreme Court.

The contents of CS FOR SB #4 are:

Substantive Changes

Sec. 1.02 (Sec. 59-1-2)

Persons can make wills who are 19 years of age or older under this section. The present law requires a person to be 21 years of