

**LDIR#226
PROBATE
CODE
1961
REVISION**

PROPOSED ALASKA PROBATE CODE

ARTICLE I

WILLS

Part 1. Execution

Section 1.01. WHO MAY EXECUTE A WILL. Every person of sound mind, who has attained the age of 19 years, or who is or has been lawfully married, or 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.

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 the testator and of at least two witnesses as follows:

- (1) Testator. The testator shall signify 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 and in his presence have

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 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 partnership'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

DOWER

<u>State</u>	<u>Dower Exists</u>	
Alabama	Dower	Statutory right of election as to dower & personal property as in intestacy
Alaska	Dower	Election as to dower
Arizona	Dower abolished Community property state.	
Arkansas	Dower and $\frac{1}{3}$ interest of personal property	Election to take under will or by intestacy.
California	Dower abolished	Community Property state
Colorado	Dower abolished	Election to take one-half of the estate
Connecticut	Dower abolished	Election to take $\frac{1}{3}$ of estate for life
<u>Dower: The following states have dower,</u>		
Delaware	Dower	
Dist. C.		
D.C.	Dower	
Florida		
Georgia	Montana	S. Carolina
Hawaii	New Hampshire	Tennessee
Illinois	New Jersey	Vermont
Kentucky	N. Carolina	Virginia
Maryland	Ohio	W. Virginia
Mass.	Oregon	Wisconsin
Mich.	Rhode Island	
No dower in these states,		
Idaho	Missouri	Indiana
		v. Trust in all

✓ OR administrator, he may sell such property if the heir or heirs so direct in a written request filed in the Superior Court having the probate of the Estate."

61-16-4 ✓ Line 3 after word "Executor" insert ", except in case of a non-intervention will,"

✓ Line 7 strike all of last sentence to end and substitute following:

✓ "Upon the filing of the final account, the Superior Court shall make an order directing notice of hearing thereon be given by publishing such order one time in a newspaper of general circulation within the judicial district and posting notices in three public places within the precinct, ~~and~~ ~~not~~ not less than thirty days setting the time and place for hearing objections to such final account.

✓ Ch. 19 - Sec. 61-19-1 thru 61-19-3

Delete entire Chapter

✓ Title 63 - Dower & Curtesy

"... D . . .

T A . . .

The changes which these amendments would make to the title "Decedents' Estates" are listed below. It is believed that these changes will eliminate existing difficulties in probate law and improve and modernize it.

AS 13.05.010.

The present law requires a person to be 21 years of age or older before they can make a will. This amendment would lower the age to 19 years.

AS 13.05.105

This is a new section creating a spouse's election.

COPY REST OF ATTACHED.

CHART OF ACLA SECTIONS
ALASKA PROBATE CODE

<u>ACLA SECTION</u>	<u>AMENDED BY</u>	<u>SECTION OF CS FOR SB #4</u>	<u>SUBSTANTIVE CHANGE</u>
ART. I. WILLS			
59-1-1		1.01	
2		1.02	* ✓
3		1.03	
4		1.04	
5		1.05	
59-2-1		1.06	
2		1.07	
3		1.08	
4		1.09	
5		1.10	
6		1.11	
		1.12	New ✓
59-3-1		1.13	
2		1.14	
3		1.15	
4		1.16	
5		1.17	
6		1.18	
59-4-1		1.19	
2		1.20	
3		1.21	
59-5-1		1.22	
2		1.23	
3		1.24	
4		1.25	
ART. II. SUCCESSION			
60-1-1		2.14	
2			Deleted ✓
3	am 35/51	2.01	
4	am 35/51	2.02	
5		2.03	
6		2.04	
7		2.05	
8		2.06	
9		2.07	
10		2.08	
11		2.09	
12		2.10	
13		2.11	
14		2.12	
15	add 193/55	2.13	

HOUSE CS FOR SB #39 (ch 38 S.A. 1963)

REPORT OF HOUSE JUDICIARY COMMITTEE

The purpose of SB #39 and HCS for SB #39 is to eliminate existing difficulties in the law relating to decedents' estates and to improve and modernize it. The changes which this bill would make in existing law are as follows:

AS 13.05.010

The present law requires a person to be 21 years of age or older before he can make a will. This amendment lowers the age to 19 years.

AS 13.05.105

This is a new section creating a spouse's election. A spouse's election is his or her choice whether or not to take under the will or under the statute; that is, whether or not to accept the provision made for him or her in the will and acquiesce in the disposition of the property under the will, or disregard it and claim what the law allows. Under this section, the law allows the spouse to elect to take one-third of the net estate instead of under the will. This type of provision is found in many states. See discussion below under "Repeals," AS 13.35.

AS 13.05.120

Under present law, a will made by an unmarried person is revoked by his or her subsequent marriage. Under the amendment, the will would not be revoked if it provides for the spouse by name.

AS 13.15.130

(1) The reference to "six months" has been changed to "three months" in (a) and (b) of this section.

(2) An amendment to (b) of this section would allow a person suffering a legal disability only three months after appointment of a guardian for that person to contest the probate of a will or its validity.

AS 13.20.030, and 13.20.040

These sections refer to the persons to whom letters testamentary are issued; "state banking associations" has been added.

AS 13.30.325

This is a new section which makes the provisions relating to administration of partnership property in this title supersede the provisions of the Uniform Partnership Act (AS 32.05).

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.

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:

(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.

Under (3)(b) the first insertions are simply to clarify the

JUNEAU BAR ASSOCIATION COMMITTEE

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

Article I, Sec. 1.01 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 includes a creditor would include "interested witness". Your committee feels subsection (b) of Sec. 1.03 can be given clarity by 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. 8.02 (3) is more inclusive.

Sec. 1.04 - Your committee unanimously recommends that provision be made for the making of a holographic will because it is elementary that a certain period in time is desirable for the purpose of ascertaining the