

LDIR# 236

UPC NOTES

UPC NOTES

First Issue July 1972

Idaho: First UPC State

On the first of July, 1972, the Idaho version of the Uniform Probate Code came into effect. In enacting Senate Bill 1050 in March, 1971, Idaho became the first state in the union to accept the total basic package of probate reform offered by the Uniform Probate Code. The road to acceptance has been a long one: two years spent in study, battle, legislative consideration and preparation. The real test of the Code's efficacy will begin only after July first; but the history of its enactment may be enlightening to those concerned with the process of probate revision.

ORIGINS OF REFORM

The genesis of the probate reform movement in Idaho was consumerism. Early in 1970, a legislative flurry over a community property agreement that, without the requirement of a will, would allow the decedent's interest in community property to be passed to third persons after death, produced a flood of mail from constituents, indicating nearly unanimous support of the concept. The reason: it reduced the cost of probate. Given the intricacies of existing probate practice in Idaho, the public's support of the community property agreement was rather like clutching at straws; many legislators and some concerned lawyers realized this and, as a result, began a re-consideration of Idaho's entire probate system which led finally to the enactment of the Uniform Probate Code.

STUDY

A Legislative Council Committee on probate was authorized to study the need for revision and the Uniform Probate Code in the spring of 1970. Its chairman was Senator Edith Klein, who also chaired the Senate Judiciary and Rules Committee and was later the sponsor and a major proponent of Senate Bill 1050. A lawyers' advisory committee was invited to assist the Legislative Council study group. Composed of three Idaho Bar Association members, a law professor, a judge and one representative each of a title and trust company and the Idaho Bankers' Association, the advisory group's membership was representative of those interests most important to, and affected by, probate concerns.

Two attorneys were selected as advisors and instructed to report to the study group on the compatibility of the Uniform Probate Code with existing Idaho laws. The advisors, J. Charles Blanton, an attorney in an important Boise law firm, and Philip E. Peterson, a University of Idaho law professor and a practitioner of Lewiston, presented the results of their studies to the committee in November. A section by section comparison of the Uniform Probate Code and current Idaho legislation, and a chart comparing the judicial steps for estate settlement required by Idaho at that time with the

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A Note on UPC Notes

Newsletters are as thick as flies, and generally about as interesting. At worst, they are abominably dull. By all rights, *UPC Notes* should be anything but dull: abominable, perhaps, but never dull. The need for information about the Uniform Probate Code — its progress, its problems, its mounting successes — is vital, national and very real. *UPC Notes* is being published to fill that need. It will, hopefully, be analytical, educational and informative. It will be issued bi-monthly, at least in the beginning; and will also be free, at least for the present.

Undoubtedly, some people who ought to be, are not yet on the mailing list. We will happily send the newsletter to anyone interested in following the progress of the Uniform Probate Code, and welcome any suggestions as to names of persons who might have been missed in the first-issue scramble. Comments and suggestions are also welcome and should be addressed to:

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UPC Notes is published by the Joint Editorial Board for the Uniform Probate Code under the direction of Richard V. Wellman, Educational Director.

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Proposals to Modify the UPC

This speech was given by Richard V. Wellman, Educational Director of the Joint Editorial Board, to a symposium on "The Uniform Probate Code in 1972" held by the American College of Probate Counsel in San Francisco August 11, 1972.

Several kinds of changes or variations in the Uniform Probate Code have been suggested and considered in the three years since the Code was approved and printed.

ACCEPTABLE VARIATIONS WITHIN THE CODE

The design of the Code accommodates several possible variations that should be distinguished from suggested changes. For example, there are brackets in §1-306 to indicate that the Uniform Law Commissioners took no position on whether will contestants should have a right to jury trials. Also, §2-803, dealing with the effect of homicide by a beneficiary of a transfer at death, and §3-914, dealing with disposition of unclaimed inheritances, are bracketed to indicate that the text is merely suggested as distinguished from being recommended as uniform. Further, the \$50,000 amount in the section describing the share of the spouse in intestacy and the \$5,000 amount in the homestead exemption section are bracketed to indicate that the Commissioners did not undertake to specify the right amounts.

Another form of built-in options relates to three sections and two special definitions offered for use by community property states. Individual states' definitions of "community" and "separate" property may be inserted in the Code's section of general definitions. Alternative provisions for the spouse's intestate share, devolution of estates at death and abatement of assets are offered for cases in which community property is involved.

Still another form of alternatives is implicit in the inclusion in the Code of two older Uniform Acts, the Uniform Testamentary Additions to Trusts Act and the Uniform Estate Tax Apportionment Act. Obviously, states that already have these acts, or something quite similar, would not be expected to include these portions of the Code in a local enactment.

Along this line, the Conference is now discussing the Uniform Disclaimer of Gifts and Bequests Act, which would change §2-801, dealing with the renunciation of succession. The Uniform Legitimacy Act now being considered by the Conference also may affect UPC sections 2-109 and 2-611, which define "parents" and "children" for purposes of succession.

Finally, many Code provisions that describe the court to which probate jurisdiction is assigned, and much of Article III dealing with probate of wills and administration of decedents' estates, are explained by official comments as subject to many wholly acceptable changes in terminology and arrangement. Different words may be necessary to adopt the Code to local names for courts and officials. Procedural provisions can be

dropped or compressed in states that rely extensively on court rules. Overall, we won't conclude that a state is changing the Code's Flexible System of Administration unless it deviates from the twelve principles that are set forth in the General Comment at the beginning of Article III.

PARTIAL ADOPTION APPROVED

There is still another phenomenon that may be confused with changes in the Code. This is partial adoption of the UPC. It didn't happen in Washington this year, but might have, for a bill that passed the House and died in Senate Committee in Olympia would have enacted most of Articles I, III, IV and V of the Code. This would have given effect to the procedures regarding decedents' estates and to the provisions relating to multiple-party bank accounts in Article VI. The sponsors deferred introduction of UPC articles dealing with intestacy and wills, guardians, conservators and trust procedures, which they felt were more controversial.

In New Jersey, sections selected from all articles that are deemed especially attractive are being moved forward in the legislature on the premise that their acceptance will create a positive attitude in the legal community toward the Uniform Probate Code. One such provision is the durable powers of attorney concept found in §5-501 and §5-502 of the Code. Incidentally, this concept already has been enacted in Texas where practitioners have told me that it works wonderfully well. Unlike the case in Washington and New Jersey, however, this limited use of the UPC in Texas does not appear to be connected to an organized purpose of enacting most of the Code in the near future. Texas has some constitutional problems relating to its probate court that apparently must be solved first.

CHANGES SUGGESTED BY J.E.B.

Now I can start talking about changes. First, you should know that the Joint Editorial Board has produced a list of 32 changes, including a list of eighteen typographical errors that should be corrected in West's next printing of the Code. Three other changes affect comments only. The remaining eleven changes are J.E.B. recommendations for changes involving something more than correction of manuscript or printing errors. In due time, these will be presented to the National Conference for official approval. The most important include:

(First) A change in §3-805 relating to priority in payment of claims that would place expenses of a decedent's last illness below claims due to the federal government. The approved Code conflicts with federal laws.

(Second) A change in the intestacy section [§2-103] that would eliminate use of the words "brother" and "sister," sub-

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NUMBER 3

DECEMBER 1972

Attorneys' Fees Under the Code

The following comments by Malcolm A. Moore, a Seattle, Washington attorney and member of the Joint Editorial Board, are taken from a speech given by Mr. Moore to a symposium on "The Uniform Probate Code in 1972" held by the American College of Probate Counsel in San Francisco on August 11, 1972.

Probate fees and the Uniform Probate Code may be a raw nerve as far as the Bar is concerned. Of course fees are concerned as part of the UPC's impact on attorneys, although what we can say regarding their impact is really rank speculation -- the worst kind of rank speculation, because nothing is said in the Code with respect to fees. There are only a few provisions of the Code which bear directly on the subject. One is § 3-420 which states that a personal representative is entitled to reasonable compensation for his services. Well, that doesn't say much. Related to this is a section which authorizes a personal representative to employ attorneys within the basic restriction applicable to all authority given the personal representative that the transaction be reasonable and to the benefit of all persons. So, the only comment made by the UPC is that attorneys' fees should be reasonable. I think it's more useful to look at the points of difference between the systems of administration authorized by the Code and existing methods of administration to see how these may be important to the subject of fees, quite apart from what the Code itself says.

SAVINGS IN TIME AND COST

First of all, let's look at the Code from the point of not what the attorney will get, but what he'll save. I think it's

safe to say that the Code will eliminate many court appearances -- and we can argue whether or not they're needless court appearances -- but it will certainly eliminate a number of them, and hence cut down on attorneys' hours spent in probate. It will eliminate a lot of paper work in uncontested matters, and this should supposedly save attorney time and reduce office costs. Let's go into that in a little bit of detail.

Take the problem of small estates -- generally, say, estates under \$40,000 or \$50,000. In supervised jurisdictions it is often the case that a lawyer will nurse along a small estate's file for months on end, finally close it and collect a few hun-

WHO . . .

. . . do you know that should be getting the *UPC Notes*? Anyone interested in probate matters might very well be interested in the *Notes*, for the two have more in common than just subject matter. For better or worse, both are rather like collages -- as Webster says, "agglomerations of fragments such as match boxes, bus tickets, playing cards, pasted together and transposed, often with relating lines or color dabs, into an artistic composition of incongruous effect." I'm not sure that anyone would accuse either the *Notes* or probate laws of being artistic; but the newsletter does try to pull together some of the more important issues and events relating to probate law revision that are going on in many states. So, if you know of colleagues who might like to receive *UPC Notes*, please send their names and addresses to:

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dred dollars. Should the informal provisions of the UPC be used, he might be able to do that in a matter of three or four hours and, even if he is being paid on an hourly basis, he can collect a decent fee for that work and be done with it, rather than have that file hanging around his office for a good long

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NUMBER 4 MARCH 1973

Seven Months Later: Signs of Success in Idaho

By Senator Edith Miller Klein

The Uniform Probate Code has now been in effect in Idaho for some seven months. It is difficult to gauge its acceptance by practicing lawyers except in a general way. One indication is the fact that to date no repeal measure, such as had been introduced but failed to pass in the 1972 session, has yet been introduced in the 1973 session of the Idaho Legislature which convened on January 8, 1973. In addition, surprisingly few requests for modification of the law have been received from practicing lawyers, and all of these were designed to strengthen, not detract from, the Code.

If these facts indicate acceptance of the Code by the great majority of lawyers, most of the credit is due the Idaho State Bar Association officials who planned and presented a series of three most effective Continuing Legal Education courses on the Code at various locations throughout the state during May, 1972. Made available at these training courses were an excellent text prepared by Professor Philip E. Peterson of the College of Law, University of Idaho, and forms prepared by Judge Gerald F. Schroeder, the District Court Magistrate who regularly handles all probate in Ada County, the most populous county in Idaho, where the capital is located.

More recently, Judge Schroeder and Professor Peterson have also prepared comprehensive articles discussing procedures and answering questions on the application of the Code provisions. These articles have been published in *The Advocate*, a monthly magazine distributed by the Idaho State Bar Association. Much credit is due also to the Joint Editorial Board for its generous assistance in interpreting some of the provisions of the Code, making avail-

Senator Edith Miller Klein, a partner in the Boise, Idaho firm of Langroise, Clark, Sullivan & Smylie, led the successful effort to enact the UPC in Idaho in 1971. A member of the D.C., New York, Idaho and U.S. Supreme Court bars, she has been an attorney for the FCC (Washington, D.C.) and the FHA (New York City). Mrs. Klein served as a municipal judge and State Representative in Idaho before being elected to the State Senate in 1969, and is now Chairman of the Senate's Judiciary and Rules Committee.

able forms which were being prepared, and participating in these training courses.

The Code does require major changes in procedures and forms, but I personally have found the change-over to be relatively painless because of the dedicated work of these people and many others who assisted in putting the Probate Code in operation.

I have been informed that some lawyers who had practiced for many years under the old code provisions have not yet made the fullest use of the simplified procedures of the Uniform Code, but I feel sure that with continued use, they will gradually develop confidence in the effectiveness

(Continued on Page 2)

Wherein if I happen to be unaccurate or miftaken,
the Obfcurety of the Subject will, I fuppofe,
procure me Excufe amongft candid readers.

I Madox, *History and Antiquities of
the Exchequer of the Kings of Eng-
land, 84.*

Even now, hundreds of years after I Madox begged Excufe for his miftakes in this area of the law, the subject of the administration of decedents' estates remains Obfcure. And even the Uniform Probate Code, whose avowed purpose is to "simplify and clarify the law," runs to 278 pages of complex, technical prose. One citizen -- a layman interested in law reform who liked what he'd heard about the Code, and wanted to know more -- took one look at the Official Text, and threatened to take it to an old college professor to "have it reduced to a single page of simple English." Busy legislators have also indicated that a brochure of questions and answers about the Code would be welcomed.

Such a brochure is now in the works, and we need your help. If you have questions about the Code, please send them in to the Educational Director's office. If you have answers to go with those questions, the odds are twenty-four to one that you live in Alaska or Idaho. We'd love to hear from you anyway. --Ed.

On, Wisconsin: UPC's "Flexible System" Is Near

Ninety days after it is signed by the Governor, a bill providing for unsupervised administration of estates will become law in Wisconsin. House and Senate versions of the bill, a compromise worked out between lay legislators and lawyers representing the Wisconsin State Bar Association, were passed unanimously by both houses of the state legislature in May. Minor differences between the House and Senate versions were resolved and, on June 5, the Senate sent the bill to Governor Patrick Lucey, who is sure to sign it.

When the measure becomes effective, Wisconsin will reportedly have the "flexible system of administration" which forms the procedural core of the Uniform Probate Code. With this feature added, the new (1971) Wisconsin Probate Code -- already quite like the UPC in many substantive respects -- will be brought practically in line with all UPC Articles except V and VI, dealing with guardianships, conservatorships and multiple-party accounts.

Few measures are passed unanimously in Wisconsin. But in the case of the unsupervised administration bill, legislators really had no choice.

Three hundred thousand citizens in the previous ten months had signed petitions demanding simplified probate procedures that would give heirs the option of settling estates out of court and, if they so chose, without attorneys.

The Wisconsin State Bar, having overcome initial resistance to the concept of unsupervised administration, had drafted and urged the adoption of its own carefully-wrought proposal for "Informal Administration of Estates" which, the Bar promised, would give Wisconsin citizens the options they demanded.

And Governor Lucey himself had promised the public that he would "remain vigilant and lend every effort to see that the strongest possible probate reform bill was passed."¹

Small wonder, then, at the voting record on the compromise bill. But the eleventh-hour unanimity belied the fact that the road to major probate revision in Wisconsin has been a turbulent one.

THE LONG ROAD

In 1971, a new Wisconsin Probate Code went into effect. Drawn up in 1969 by Wisconsin State Bar committees using the UPC as a model, the new code incorporated most of the

substantive and many of the procedural provisions of the UPC. But, because they could not agree on the details and principles embodied in the concept of non-court administration, the drafters chose not to include options for unsupervised administration in Wisconsin. Instead, the topic was set aside for further study.²

That decision meant that, in spite of the touted reforms, court supervision of every estate remained mandatory. This, in turn, gave lawyer-critics reason to complain that lawyers would remain the "hidden heirs" of each estate, since a widely-publicized 1965 Wisconsin Supreme Court decision had previously ruled against *pro se* probates under traditional Wisconsin probate rules.

Whatever were its reasons for keeping the status quo -- and members of the Bar now insist that "we really were never

² Jackson R. Bruce, Jr., in *WisBar Newsletter*, 10/13/72

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Arizona Enacts Code

On the first day of 1974, Arizona will join the roster of states where the UPC is in effect. H.B. 2002 was sent off to the Governor at the end of April after the House ratified, 58-0, the Senate's amendments to the new "Revised Probate Code."

That vote climaxed over two years' work by legislators, bar members and others to hammer out an acceptable version of the UPC for Arizona. Richard W. Effland, a law professor at Arizona State University, acted as reporter, mediator and general work-horse for the entire project.

Much of the Code's legislative success, reports UPC State Chairman Robert A. May, of the Tucson firm of May & Dees, is due to the genius and dedication of Sen. Sandra D. O'Connor, an attorney and Senate Majority Leader.

A full report on the UPC *à la* Arizona will be featured in a forthcoming issue of *UPC Notes*.

¹ Reported in *The Milwaukee Sentinel*, 12/19/72

UPC NOTES

NUMBER 6

OCTOBER 1973

ABA Reaffirms Support of UPC - Resoundingly

Thanks to a rebellious minority of Nebraska lawyers, the Uniform Probate Code received a considerable amount of attention and what amounted to a strong vote of re affirmation at the recent American Bar Association meeting in Washington, D.C.

THE NEBRASKA REBELLION

The story began with a small group of Nebraska practitioners who were described by one observer as persons who "devote the bulk of their time to trial work, do not appreciate the level of technical expertise required in a well-run probate, and really do fear the probate process can be handled by uneducated clerks. These are the same people who have regularly opposed modernization of our present Nebraska Code pleading practice." This group objected to a resolution adopted last fall by the House of Delegates of the Nebraska State Bar Association, endorsing the Uniform Probate Code "in principle" and authorizing a bar committee to prepare a bill "patterned along the lines of the Uniform Probate Code" for submission to the Legislature.

As reported previously [*UPC Notes*, June 1973], after various legislators collaborated to introduce a bill containing a verbatim copy of the Official Text of UPC in the unicameral Legislature this spring, the dissidents circulated an "Initiative Petition" calling for an official poll of the bar association membership on whether they favored or opposed the Code. With the petitions, which were mailed to all active Nebraska lawyers, the sponsors enclosed a copy of a seriously defective commentary on the Code from an earlier publication of the Oklahoma Trial Lawyers Association. They also enclosed a letter, signed by a L. Murphy, who described himself as "Chairman, Private Practice Committee, The Association of Trial Lawyers of America," that associated "possible serious conse-

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National Progress Encouraging

When Governor John Love signed the new Colorado Probate Code into law in June, 1973, the roster of states that have enacted the full Uniform Probate Code rose to five. Idaho and Alaska versions of the Code are already in operation; Arizona's new code will become effective in January, 1974; followed by Colorado's in July, 1974, and North Dakota's, in July, 1975.

The states of Oregon and Wisconsin are also in the process of bringing their relatively new probate codes, both patterned after early drafts of the UPC, into substantial conformity with the Official Text. Earlier this year, Wisconsin added options for "independent administration" to its 1971 Code [*UPC Notes*, June, 1973]. Oregon legislators, who recently enacted UPC Article V (dealing with guardians and conservators), are now considering whether to bring their present code into line with UPC by installments, or whether simply to enact the entire Official Text. Maryland, whose 1968 code was based on the Second Working Draft of UPC, claims to be the first state to have enacted legislation modelled on the Uniform Code.

Clearly, there is more to come. At least 17 other states saw the introduction of bills incorporating the Uniform Probate Code in 1973, including California, Delaware, Florida, Illinois, Kansas, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Jersey (selected sections), Nebraska, Ohio, South Dakota, Vermont, Washington and Wyoming.

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UPC Notes is published by the Joint Editorial Board for the Uniform Probate Code under the direction of Richard V. Wellman, Educational Director. Editor: Kate O'Neill, Hutchins Hall, University of Michigan Law School, Ann Arbor, Michigan 48104. The opinions expressed in UPC Notes are those of the editor and authors of accredited manuscripts. Original manuscripts are invited, and should be submitted to the editor.

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