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THE CALIFORNIA CRAWL: REFORMING PROBATE ADMINISTRATION IN CALIFORNIA

Charles P. Kindregan*

INTRODUCTION

To many lawyers, judges, and legislators in other jurisdictions, California symbolizes a progressive, forward-looking state in its attitude toward law reform. Major changes in defining legal concepts have been boldly proclaimed in domestic law,¹ as to the living will,² in tort law,³ and in other areas affecting legal rights and remedies. It is therefore surprising that the nation's largest state has been relatively slow in responding to the growing movement aimed at the overhaul of our traditional approach to the probate of decedents' estates.

This is not to suggest that California's approach to probate is entirely out of pace with that of the contemporary world. Its acceptance and application of community property to cases of intestate succession evidences California's anticipation of favored treatment to the surviving spouse:⁴ an approach that other jurisdictions have now begun to emulate. Moreover,

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1. California was the first state to adopt no-fault divorce legislation, CAL. CIV. CODE §§ 4506-4508 (West Supp. 1978); and the first state to recognize marital-type property divisions based on contract rather than status, *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

2. CAL. HEALTH & SAFETY CODE §§ 7185-7195 (West Supp. 1978).

3. California courts led the breakthrough in setting aside traditional property classifications which limited the ability of victims to recover from owners and occupiers of land, *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968); in extending the concept of recovery by third parties for professional malpractice, *Lucas v. Hamm*, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961); *Heyer v. Flaig*, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969); *Donald v. Garry*, 19 Cal. App. 3d 769, 97 Cal. Rptr. 191 (1971); in broadening the concept of *res ipsa loquitur*, *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944); and in broadening the duty of insurers in cases relating to a judgment in excess of policy limits for refusing an offer to settle within limits, *Crisci v. Security Insurance Co.*, 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967).

4. CAL. PROB. CODE § 201 (West Supp. 1978). California also allows the half of community property passing to either spouse by will or intestacy to avoid probate administration. CAL. PROB. CODE § 202 (West Supp. 1978). See generally Meserve, Crary & Grant, *Senate Bill 570 and 1846*, 50 L.A. B. BULL. 9 (1974-1975).

while California's law regarding the summary administration of small estates may not be as generous as that permitted elsewhere, neither is it as backward as the law in a great majority of states.⁵ California now permits testamentary trusts created by wills executed on or after July 1, 1977, to be administered independently of court supervision unless the testator directs court supervision in his will.⁶

California progressivism in probate reform has been demonstrated by its adoption of legislation⁷ eliminating abuses in probate conservatorships.⁸ California has also enacted a series of acts developing the use of disclaimers as an aid to tax and estate planning.⁹ These and other examples clearly indicate California's desire to bring its probate practice into accord with contemporary standards of social utility, fairness, and freedom.¹⁰

5. South Dakota allows summary administration of small estates with assets valued up to \$60,000 in personal property. S.D. COMPILED LAWS ANN. tit. 30, ch. 30-11-1 (1976). New York recently considered its own scheme for summary administration, but raised the limit on small estates to only \$5,000. N.Y. Surr. Ct. Proc. Act § 1301(1). California compares favorably to New York. In 1976, the legislature raised the limit to \$20,000 in valued personal property. CAL. PROB. CODE § 630 (West Supp. 1978). In fact, a California estate may be administered by affidavit even if the defendant had a life estate or an interest as a joint tenant which was terminated upon his death in either realty or personalty. CAL. PROB. CODE § 632 (West Supp. 1978). This has the effect of excluding from the small estate limitation such common assets as joint bank accounts and jointly-owned pension benefits.

6. CAL. PROB. CODE § 1120 (West Supp. 1978). Under a 1976 amendment to CAL. PROB. CODE § 1138.13 (West Supp. 1978), the trustee or beneficiary of a living trust may apply for court supervision of the trust.

7. For example, CAL. PROB. CODE § 610 (West Supp. 1978) now makes the executor or administrator liable for injury arising from his failure to file a timely inventory. CAL. PROB. CODE § 1025.5 (West Supp. 1978) now requires the executor or administrator to file a petition for final distribution within one year of the issuance of letters for estates in which no federal tax return is required, and within eighteen months when a federal estate tax return is required.

8. 1976 Cal. Legis. Serv. ch. 1357, §§ 25-35, at 5986 (formerly A.B. 1417).

9. California took a major step in establishing a procedure for treatment of mentally-disordered persons by adoption of the Lanterman-Petris-Short Act, codified as CAL. WELF. & INST. CODE §§ 5000-5120 (West Supp. 1978). This Act, however, was circumvented by the use of conservatorships and guardianships under the provisions of CAL. PROB. CODE §§ 1460-1463 and §§ 1701-1755.5 (West Supp. 1978). 1976 Cal. Legis. Serv. ch. 1357, at 5986 (formerly A.B. 1417) added CAL. PROB. CODE §§ 1461.1, 1500.1, 1500.2, 1606.5, 1754.1, 1851.1, 1851.2 and 2006 (West Supp. 1978), as well as amending existing Probate Code provisions relating to conservators and guardians. Incompetence now refers to a legal rather than a medical disability, and the Act further provides procedural protections for the conservatee or ward. A thoughtful analysis of these reforms is found in Note, *Probate Code Conservatorships: A Legislative Grant of New Procedural Protections*, 8 PAC. L.J. 73 (1977).

10. CAL. PROB. CODE § 190 (West Supp. 1978). See generally Comment, *How to Look A Gift Horse in the Mouth—Disclaimers Under California Law and the Tax Reform Act of 1976*, 18 SANTA CLARA L. REV. 217 (1978).

Probate reform in California, however, remains incomplete. The most critical area of probate reform relates to the system by which the estates of decedents are administered. Yet it is in this area that California has been most reluctant to take account of modern social realities and consumer expectations. This reluctance is particularly illustrated by California's failure to embrace the Uniform Probate Code (U.P.C.) and its concept of non-supervised estate administration.

The purpose of this article is to analyze the factors underlying the reluctant reform of estate administration in California. First, the development of the Uniform Probate Code will be examined. Then, the article will examine California's half-loaf efforts at reform. Finally, attention will be devoted to the impact that adoption of the U.P.C. would have on estate administration in California.

THE MOVEMENT TOWARD NON-SUPERVISED PROBATE ADMINISTRATION

Probate administration in the United States received many of its formative concepts and procedures from English law, especially those developed by the ecclesiastical courts.¹¹ However, while English law made allowances for informal probate of wills, permitted administration of estates without court supervision,¹² and provided for *ex parte* proceedings,¹³ the American norm became compulsory court supervision of all but very small estates. Such supervision first developed during the colonial period in Massachusetts.¹⁴ Perhaps in a rapidly developing society, with a mobile population spread over a large land mass, a highly controlled system of protecting survivors and creditors had to be developed.¹⁵ Whatever the explanation,

11. See generally J. LOMBARD, *MASSACHUSETTS PRACTICE: PROBATE LAW AND PRACTICE* §§ 1, 2 (1962).

12. England was not unique in allowing the informal probate of wills, as most European countries did not require court supervision of estates. Limbaugh, *Probate and Administration under the Uniform Probate Code*, 29 J. Mo. B. 430 (1973).

13. See Note, *The Constitutionality of the No-Notice Provisions of the Uniform Probate Code*, 60 MINN. L. REV. 317, 318 (1976), and authorities cited therein. English probate proceedings involved only personal property since title to realty passed directly to the devisees on the death of the owner. *Id.* See W. FRATCHER, *PROBATE CAN BE QUICK AND EASY: TRUSTS AND ESTATES IN ENGLAND* (1968).

14. The development of the Massachusetts Probate Court system was recounted by Chief Justice Shaw in *Peters v. Peters*, 62 Mass. (8 Cush.) 529 (1851). See also Atkinson, *The Development of the Massachusetts Probate System*, 42 MICH. L. REV. 425 (1943).

15. Professor Thomas Atkinson described supervised administration as a means

compulsory court supervision of the administration of estates prevailed in almost all American states, including California.

During the last two decades, however, compulsory court supervision of estates became the subject of considerable criticism. Accompanying this criticism were many proposals for reform.¹⁶ Although much of the early criticism came from those with a venomous dislike for attorneys,¹⁷ a more rational criticism was later generated by the consumer movement and the premise that unnecessary professional services should be eliminated and necessary services should bear a cost which was rationally related to work actually done.

The major impetus to a rethinking of probate administration, nevertheless, came from the legal profession. In 1962, the Real Property, Probate and Trust Law Section of the American Bar Association initiated a movement eventually resulting in the development of the Uniform Probate Code.¹⁸ After many drafts, the "Official Text" of the U.P.C. was approved in 1969 by the National Conference of Commissioners on Uniform State Laws and the American Bar Association.¹⁹ The U.P.C. proposed substantial reforms in the law of intestate succession,²⁰ the probate effect of adoption,²¹ illegitimacy,²² and

of protecting "the respective rights of creditors, debtors and beneficiaries." T. ATKINSON, *WILLS* § 103, at 565 (2d ed. 1953). Even modern courts have acknowledged that "a representative of an estate is the fiduciary of its creditors. . . ." *Estate of Hollinger*, 93 Misc. 2d 926, 929, 403 N.Y.S.2d 857, 860 (Sup. Ct., Nassau Co. 1978).

16. The first comprehensive effort to develop a new probate code was the Model Probate Code developed by T. E. Atkinson, L. Simes, T. Basye, and R. G. Patton in the 1930's. See Atkinson, *Wanted—A Model Probate Code*, 23 J. AM. JUD. SOC'Y 183 (1940). The model code was published in ABA MODEL PROBATE CODE COMM., *PROBLEMS IN PROBATE LAW—A MODEL PROBATE CODE* (1946).

17. N. DACEY, *HOW TO AVOID PROBATE* (1965); M. BLOOM, *THE TROUBLE WITH LAWYERS* 208-63 (1969). Typical is Dacey's description of probate procedures as "a form of tribute levied by the legal profession upon the estates of its victim." N. DACEY, *supra*, at 7.

18. See L.H. AVERILL, JR., *UNIFORM PROBATE CODE* §§ 1.01, 1.02, 1.03 (1978); Wellman, *Introduction to the Uniform Probate Code*, 9 CREIGHTON L. REV. 446 (1976).

19. See *UNIFORM PROBATE CODE: OFFICIAL TEXT AND COMMENTS* (West 1969). After approval of the U.P.C., the Joint Editorial Board for the Uniform Probate Code was created. This Board publishes the U.P.C. Notes at the University of Georgia School of Law.

20. For example, the U.P.C. cuts off intestate succession between grandparents and their issue on the theory that succession should be confined to those within the scope of the contemporary family relationship. *UNIFORM PROBATE CODE* § 2-103. Many states permit distant relatives to inherit on the theory that escheat to the state should be avoided.

21. Under the U.P.C., the adopted child is no longer an heir of its natural parents, except where the spouse of a natural parent adopts the child—in which case the heir may choose to inherit the larger share based on either the natural or adoptive relationship. *UNIFORM PROBATE CODE* § 2-114.

22. Under a 1975 amendment to *UNIFORM PROBATE CODE* § 2-109(2), the marital status of the parents is irrelevant to inheritance from or to a child. The term "child"

jurisdiction over decedents' estates,²³ and created such concepts as the augmented estate²⁴ and the self-proved will.²⁵

The most controversial reform proposed by the U.P.C. was its provision for the non-supervised administration of estates. Critics claimed that the prevailing system of compulsory court administration involved the court in matters where litigation was frequently not necessary, resulted in unnecessary attorneys' fees, produced unnecessary expenses for the estate through newspaper notices and appraisers' fees, and necessitated delay in the final distribution. The last criticism was the most damaging, since in a time of rapidly escalating inflation, the mere passage of time produces a substantial economic loss in assets which are not used productively.

The U.P.C. proposals for non-supervised estate administration were viewed as a giant step toward the elimination of these complaints. The comments to the official text of the U.P.C. made it absolutely clear that these provisions were the essence of the proposed reform.²⁶

Since it was first officially proposed in 1969, the U.P.C. has been seen by many as the most efficient, forward-looking means of reforming probate procedures. Its proposals for the flexible administration of estates clearly balanced the interests

or "children" used in a will clearly includes illegitimate children. UNIFORM PROBATE CODE § 2-611. These amendments bring the U.P.C. into conformity with the Uniform Parentage Act of 1975, which is designed to create priority between legitimate and illegitimate children. The drafters of the U.P.C. included a bracketed optional provision in UNIFORM PROBATE CODE § 2-611 which would limit the relationship between a father and his illegitimate child to one where the father has openly and notoriously treated the child as his own if the state prefers this policy. In *C.L.W. v. M.J.*, 254 N.W.2d 446 (N.D. 1977), the court ruled that the Uniform Probate Code permits a child born out of wedlock to maintain an action of paternity against the estate of his unreported father.

23. For example, UNIFORM PROBATE CODE §§ 3-602, 4-301, 4-302 extend the jurisdiction of the court over foreign personal representatives.

24. The augmented estate is a concept created by the drafters of the U.P.C. to bring the elective share of the surviving spouse into the contemporary world. UNIFORM PROBATE CODE § 2-202.

25. A will is "self-proved" by a notarized affidavit executed by the testator and the witnesses. UNIFORM PROBATE CODE § 2-504. A "self-proved" will does not need the testimony of a subscribing witness to be admitted to probate. UNIFORM PROBATE CODE § 3-406(b).

26. The provisions of this Article describe the Flexible System of Administration of Decedents' Estates. Designed to be applicable to both intestate and testate estates and to provide persons interested in decedents' estates with as little or as much by way of procedural and adjudicative safeguards as may be suitable under varying circumstances, this system is the heart of the Uniform Probate Code.

UNIFORM PROBATE CODE, art. III, General Comment.

of the consumer movement with the need to provide an ordered method of protecting the various interests in estates of deceased persons. Whereas a decade ago the layman, frustrated by the costs and delays of probate administration, was likely to turn to illusory schemes of probate avoidance,²⁷ the U.P.C. offered new hope for speedy and inexpensive probate of estates in which there was no substantial legal dispute.²⁸

Consumer groups studying the issue of probate administration responded enthusiastically to the U.P.C.²⁹ Legal scholars compared the U.P.C. to the existing probate procedures of various states and commented favorably on the Code's proposals.³⁰ Others outlined the U.P.C.'s potential impact on court reform.³¹ Even the Chief Justice of the Supreme Court of the United States gave his support to the U.P.C. as a means of reducing the cost of probate administration.³²

27. See N. DACEY, *supra* note 17.

28. Wellman, *The Uniform Probate Code: A Possible Answer to Probate Avoidance*, 44 IND. L.J. 191 (1969).

29. For example, at its 1977 annual convention, the American Association of University Women adopted a resolution urging its members to study the U.P.C. and "support legislation that will permit the use of this simplified code for transfer of property after death" UNIFORM PROBATE CODE NOTES, No. 21, at 7 (Dec. 1977).

30. Averill, *Wyoming's Law of Decedents' Estates, Guardianships, and Trusts: A Comparison with the Uniform Probate Code-Part I*: 7 LAND AND WATER L. REV. 169 (1972), -Part II: 8 LAND AND WATER L. REV. 187 (1973), -Part III: 9 LAND AND WATER L. REV. 567 (1974), -Part IV: 10 LAND AND WATER L. REV. 155 (1975); Crapo, *The Uniform Probate Code—Does It Really Work?*, 1976 B.Y.U. L. REV. 395; Drury, *The Uniform Probate Code and Illinois Probate Practice*, 6 LOY. U. L.J. 303 (1975); Efland, *Estate Planning under the New Arizona Probate Code*, 1974 ARIZ. ST. L.J. 1; Emery, *The Utah Uniform Probate Code—Protection of the Surviving Spouse—The Elective Share*, 1976 UTAH L. REV. 771; Kassow, *Probate Law and the Uniform Code: 'One for the Money . . .'*, 61 GEO. L.J. 1357 (1973); Limbaugh, *Probate and Administration Under the Uniform Probate Code*, 29 J. MO. B. 430 (1973); Minzner, *Article VII of the New Probate Code: In Pursuit of Uniform Trust Administration*, 6 N.M. L. REV. 213 (1976); Peterson, *Idaho's Uniform Probate Code: A Bird's Eye View*, 8 IDAHO L. REV. 289 (1972); Robertson, *The Uniform Probate Code: An Opportunity for Mississippi Lawyers to Better Serve the Weak and the Grieving*, 45 MISS. L.J. 1 (1974); Robertson, *How the Family Fares: A Comparison of the Uniform Probate Code and the Ohio Probate Reform Act*, 37 OHIO ST. L.J. 321 (1976); Scheller, *Recent Illinois Probate Law and the Uniform Probate Code*, 24 DE PAUL L. REV. 442 (1975); Schmidt, *Family Protection Under the Uniform Probate Code*, 50 DEN. L. J. 137 (1973); Semerod, *The Uniform Probate Code and the New York Law Compared*, 43 N.Y. ST. B.J. 96 (1976); Smith & Thune, *The Uniform Probate Code: The Way to Probate in North Dakota*, 50 N.D. L. REV. 593 (1974); Wellman & Gordon, *Uniformity in State Inheritance Laws: How the U.P.C. Article II has Fared in Nine Enactments*, 1976 B.Y.U. L. REV. 357 (1976); Note, *Flexibility, The Uniform Probate Code's Procedural Articles and Some Comparisons with Kentucky Statutes*, 62 KY. L.J. 1083 (1974).

31. See Lilly, *The U.P.C. and Judges: Reforming the Traditional Role*, 12 TULSA L.J. 234 (1976).

32. On May 21, 1974, Chief Justice Warren E. Burger told the American Law Institute that leaders of the bar "should lend their active support not only to the

Notwithstanding its impressive origins and support, the U.P.C. has not found an overly enthusiastic response in the state legislatures.³³ This response, in part, can be attributed to the lobbying powers of various groups which have an economic interest in retaining a system of compulsory court estate administration. In several respects, California is a microcosm reflecting this legislative reluctance towards reform in the area of probate administration, and thus, warrants closer examination.

CALIFORNIA'S HALF-LOAF OF REFORM

In California, development of the U.P.C. prompted extensive commentary on the merits of probate reform. There, the prevailing system of probate administration required court supervision of all³⁴ but very small estates.³⁵ To the contrary, the U.P.C. proposed a flexible system of estate administration under which court supervision took place only when requested by the personal representative or an interested party.³⁶

The State Bar of California adopted a cautious stand on the proposed Code. An ad hoc committee created by the State Bar to study the U.P.C. issued its report in 1973, damning the U.P.C. with faint praise and concluding that California's probate structure was superior to that proposed by the U.P.C.

The Uniform Probate Code may well be an improvement over the laws of many states. In each state the question

acceptance of this new Code, but also to the process of continuing evaluation of its work so as to keep it up to date, and, above all, to maintain it as a procedure to serve the public at the lowest possible cost." Address by C.J. Burger, American Law Institute (May 21, 1974), reprinted in AMERICAN LAW INST., 51ST ANNUAL PROCEEDINGS 32 (1974).

33. With some modifications, the U.P.C. has been adopted by several states. ALASKA STAT. § 13 (1973); ARIZ. REV. STAT. § 14 (Spec. Pamphlet 1974); COLO. REV. STAT. §§ 15-10 to 17 (1973); HAW. REV. STAT. § 560 (1976); IDAHO CODE § 15 (Cum. Supp. 1975); MINN. STAT. ANN. § 524 (Spec. Pamphlet 1975); MONT. REV. CODES ANN. § 91A (Pamphlet 1974); N.M. STAT. ANN. § 32 A (Pamphlet 1975); N.D. CENT. CODE § 30.1 (Spec. Supp. 1975); UTAH CODE ANN. § 75 (Spec. Pamphlet 1975). South Dakota also adopted the U.P.C., but repealed it on February 27, 1976. S.D. UNIFORM PROB. CODE (Spec. Supp. 1974) (repealed by 1976 S.D. Sess. Laws ch. 175, § 2; ch. 177, § 3). The Massachusetts Omnibus Probate Act, 1976 Mass. Acts ch. 515, bears little relationship to the U.P.C. in either detail or philosophy.

34. Kindregan, *Probate Procedure in California Compared to the U.P.C.*, in COMPARATIVE PROBATE LAW STUDIES 563-76 (L. Newman, R. Wellman & J. Kossow eds. 1977).

35. Dawson, *Collection of Personal Property by Affidavit and Summary Administration of Small Estates: A Comparison of California Law with the Uniform Probate Code*, in COMPARATIVE PROBATE LAW STUDIES, *supra* note 34, at 281-325.

36. UNIFORM PROBATE CODE § 3-502.

must be "will the adoption of the Uniform Probate Code constitute an improvement over the existing probate system?" In California the answer is a firm and confident "no."³⁷

A bill calling for the adoption of the U.P.C. was subsequently defeated by the California legislature later that year.³⁸

In addition, the president of the Los Angeles Bar Association attacked the U.P.C., arguing that: "The many criticisms of probate which have been publicized in the media are not valid in California."³⁹ A former chairman of the State Bar Probate and Trust Committee attacked the U.P.C. provisions dealing with unsupervised administration of estates, arguing that they "assume that the personal representative administering an estate is both honest and competent."⁴⁰

Although the State Bar resisted adoption of the U.P.C., it did realize some changes had to be made. Under the guise of reform, and with the distinct odor of probate reform scenting the legislative halls in Sacramento, the profession gave its support to a bill called the Independent Administration of Estates Act (I.A.E.A.).⁴¹ The I.A.E.A. was subsequently adopted and became operative law in California on July 1, 1975.⁴²

At first, the I.A.E.A. appears to be a major step toward reducing court supervision of estates, thus achieving a system of non-supervised estate administration similar to that envisioned by the drafters of the U.P.C. This appearance of independence, however, is in fact an illusion. Whereas the U.P.C. was designed to create a flexible system of probate administration that fits the needs of each particular estate, the I.A.E.A. does not eliminate the need for court supervision. On the contrary, the basic premise of the I.A.E.A. is that the executor or administrator must obtain "authority to administer the es-

37. COMM. ON PROBATE & TRUST LAW, THE UNIFORM PROBATE CODE: ANALYSIS AND CRITIQUE, A REPORT (1973).

38. S.B. 1, 1973-1974 Reg. Sess. (1973) (Uniform Probate Code) (bill was not passed).

39. Hall, *Probate Reform: Evolution or Revolution?*, 48 L.A. B. BULL. 146, 147 (1973). In support of the California probate system, Mr. Hall cited the fact that California attorneys are limited to a statutory fee schedule for estate work, that an independent appraiser system avoided patronage in the probate proceedings, that California did not abuse the guardian *ad litem* system, and that California's in rem system was certain, rapid, and ended fiduciary personal liability.

40. Gother, *The Impending Probate Reform*, 48 CAL. ST. B.J. 417, 418 (1973).

41. 1974 Cal. Stats. ch. 961, at 2001-07.

42. CAL. PROB. CODE §§ 591.1-591.6 (West Supp. 1978). Sections 591.2 and 591.6 were amended in 1977. 1977 Cal. Stats. ch. 243, §§ 2-3, at 784-85.

tate."⁴³ He must also administer the estate "in the same manner"⁴⁴ as other court-appointed executors or administrators who have not been granted authority to act independently. In addition, he must obtain court supervision to sell or exchange real estate, to borrow money, to complete the decedent's contract to convey real or personal property, to continue family allowances for more than twelve months, to obtain approval for executor's and administrator's fees or attorney's fees, to obtain preliminary and final distribution and discharge, and to do other acts associated with the role of the personal representative.⁴⁵

While the I.A.E.A. does empower the executor or administrator to do certain acts without court supervision, many of these acts still require that prior notice be given to all persons affected. Acts requiring prior notice include the sale or exchange of personal property (subject to some statutory exceptions), leasing of real property for more than one year if the will authorizes or directs such leases, entering into any contract other than leases of real property which are not to be performed within two years, the continuation, sale, or incorporation of an unincorporated business, the first payment of or increase in a family allowance, and the investment of funds.⁴⁶

The only instances in which the I.A.E.A. allows the executor or administrator to act independently of court supervision are those relating to the routine management of the estate, including the investment of estate funds in banks and government bonds, borrowing, encumbering estate property, abandoning worthless assets, making repairs, voting securities, insuring assets, paying or rejecting claims against the estate, paying taxes, and continuing the decedent's business.⁴⁷

The I.A.E.A. does not really create independent administration, nor does it offer the alternatives available under the U.P.C. Under the I.A.E.A., courts and lawyers, by necessity, continue to play a dominant role. What the I.A.E.A. does, at best, is to offer the court-appointed executor or administrator a slightly less controlled kind of administration than would

43. CAL. PROB. CODE § 591.2 (West Supp. 1978).

44. *Id.*

45. *Id.*

46. CAL. PROB. CODE § 591.3(a)—.3(f) (West Supp. 1978). Notice must be given to persons affected by the proposed action, CAL. PROB. CODE § 591.4 (West Supp. 1978), and any such person may seek a restraining order, CAL. PROB. CODE § 591.5 (West Supp. 1978).

47. CAL. PROB. CODE § 591.6 (West Supp. 1978).

otherwise be the case. The fundamental premises of the pre-existing California law on probate administration have not changed. Court supervision of the opening and closing of the estate, together with court supervision of the most important acts of the administrator or executor remain the rule rather than the exception.

Who profits most from this feeble effort at reform in California? At least one author has proposed that the economic self-interest of the bar and legal newspapers favor the continuation of extensive court supervision.⁴⁸ The organized bar clearly favors the I.A.E.A. since an attorney will still be needed to open and to close the estate under that Act. An attorney will also be needed for court supervision of such common estate actions as the selling of real estate, preliminary or final distributions, and completing the decedent's contract to convey realty and personal property.⁴⁹ In addition, statutes entitle attorneys to be paid both "ordinary" and "extraordinary" fees for conducting probate proceedings.⁵⁰ The attorney is paid at the rate of seven percent for the first \$1,000, four percent for the next \$9,000, three percent for the next \$40,000, two percent for the next \$100,000, one and one-half percent for the next \$350,000, and one percent for anything above \$500,000 in an ordinary probate proceeding.⁵¹ The court is directed by statute to allow additional fees which are "just and reasonable for extraordinary services."⁵² Thus, attorneys have a clear financial interest in continuing the prevailing system of probate.

Publishers of legal newspapers also have an interest in the supervised administration of estates since it increases the number of newspaper publication notices.⁵³ One commentator has

48. Note, *Probate Reform: California's Declaration of Independent Administration*, 50 S. CAL. L. REV. 155, 155-60 (1976). The student author demonstrates that legal newspapers lobbied effectively for the version of the I.A.E.A. that was finally enacted, along with the organized bar. *Id.* at 160-61 nn.37-40.

49. CAL. PROB. CODE § 591.2 (West Supp. 1978).

50. *Id.* § 910.

51. *Id.* § 901.

52. Section 910, setting attorneys' fees, provides that fees for "attorneys for executors and administrators shall be allowed out of the estate . . . the same amounts as are allowed . . . to executors and administrators." CAL. PROB. CODE § 901 (West Supp. 1978).

53. CAL. PROB. CODE § 1201 (West Supp. 1978) requires publication of petitions as to the sale or option of mines, to borrow money, to execute a mortgage or deed of trust, or to execute a lease. Publication of notice to creditors is also required under California law. CAL. PROB. CODE §§ 700-702 (West Supp. 1978). Appointment of an executor or administrator requires notice by publication. CAL. PROB. CODE §§ 327-328 (West Supp. 1978).

stated that newspapers lobbied to keep the four administrative functions under the I.A.E.A. as finally enacted.⁵⁴

Bondsmen have an active economic interest in the maintenance of court supervision in California, in that an administrator or executor might execute a bond with surety or with two other persons before obtaining appointment by the court,⁵⁵ and before selling real estate.⁵⁶ The I.A.E.A. fails to provide any flexibility as to these bonding requirements.

In summary, the I.A.E.A. promises much but delivers little in the manner of reform, as it leaves intact the economic advantages enjoyed by attorneys, legal newspapers, and bondsmen in compulsory court supervision. Adoption of the U.P.C., on the other hand, would permit a more flexible system of administration, allowing attorneys to play their proper roles both as litigators in disputed matters and as legal advisers to the personal representative. Such reform would eliminate the paternalistic role which the court assumes under current California law. In this light, it would be worthwhile to examine the specific manner in which the enactment of the U.P.C. would affect the administration of estates in California.

THE U.P.C. AND ITS IMPACT ON THE ADMINISTRATION OF ESTATES IN CALIFORNIA

Adoption of the U.P.C. would clearly effect fundamental changes on the prevailing system of probate in California. The impact of a reform may be seen in four areas: 1) informal administration, 2) supervised administration, 3) the details of administration, and 4) the expenses of administration.

The U.P.C. and Informal Administration

Estates are administered in California on the assumption that a decedent's property is "subject to the possession of the executor or administrator and to the control of the Superior Court for the purpose of administration, sale, or other disposi-

54. See Note, *supra* note 48, at 160-61. The four administrative functions requiring bonds are: 1) the borrowing of money or execution of a deed of trust, CAL. PROB. CODE § 591.2(f) (West Supp. 1978); 2) the lease of real property at a rental of more than \$250 a month for more than one year, unless authorized by will, *id.* § 591.2(g); 3) completion of the decedent's contract to convey property, *id.* § 591.2(h); and 4) the determination of third party claims to property held by the decedent or of the decedent's claim to property held by another person, *id.* § 591.2(i).

55. CAL. PROB. CODE § 541 (West Supp. 1978).

56. *Id.* § 542 (West 1956).

tion”⁵⁷ The court has in rem jurisdiction over the property of deceased persons.⁵⁸ Beyond the limited opportunity to conduct estate business independently of court supervision under the I.A.E.A., California does not provide any alternative to formal court supervision. Neither does it offer “an alternative procedure for determining questions of heirship in connection with rights of succession or the probate of wills, nor one in which the court has jurisdiction over all heirs and other claimants, both known and unknown.”⁵⁹

The U.P.C. would alter this system by eliminating the court’s inherent supervisory power over decedents’ estates. The U.P.C. is designed to achieve a flexible system of administration suiting the needs of each particular estate. Adoption of this system would eliminate any need to invoke the power of the court unless an interested person presented a problem requiring judicial determination or court supervision.

The elimination of court administration, however, would not affect the present requirement in California that a personal representative be appointed by a judicial officer before the representative is authorized to act.⁶⁰ Rather, the U.P.C. would require the person seeking appointment to obtain his appointment on the submission of information about himself and the estate in a verified statement.⁶¹ In addition, the U.P.C. would require an applicant to swear that his representations are true.⁶² Any person injured by fraudulent representations could obtain relief against the wrongdoer for a period of two years after the discovery of such fraud.⁶³ Unlike the U.P.C., however, California probate law does not require that the petition for letters of administration be made under oath.⁶⁴

Another aspect of unsupervised administration of estates

57. *Id.* § 300. See generally *Anguisola v. Arnaz*, 15 Cal. 435 (1876); *Colen v. Costello*, 50 Cal. 2d 363, 122 P.2d 959 (1942).

58. *In re Palm’s Estate*, 68 Cal. App. 2d 204, 213, 156 P.2d 62, 67 (1945).

59. *Colden v. Costello*, 50 Cal. 2d 363, 370, 122 P.2d 959, 963 (1942).

60. UNIFORM PROBATE CODE § 3-103 requires that the personal representative be appointed by order of the Court or the Registrar. The Registrar is either a judge or a person designated by the Court to carry out the acts and orders specified by the Code as coming under the power of the Registrar. UNIFORM PROBATE CODE § 1-307.

61. *Id.* § 3-301.

62. *Id.* § 1-310.

63. *Id.* § 1-106. There is also an action against one who benefits from the fraud, whether innocent or not, other than a bona fide purchaser, within five years of the commission of the fraud. *Id.*

64. CAL. PROB. CODE §§ 326, 440 (West Supp. 1978) require a written statement of the jurisdictional facts, the names of the heirs, and the estimated value and character of the estate.

that the U.P.C. would introduce into California is the informal probate of wills by a registrar. According to the U.P.C., if an informal probate takes place at least 120 hours after the death of the testator, it is deemed inclusive as to all persons until superseded by an order in a formal testacy proceeding.⁶⁵ This contrasts with current law in California where only the Superior Court may admit a will to probate⁶⁶ by way of judicial order if the will is uncontested or conversely by judgment if it is contested.⁶⁷

Informal probate proceedings under the U.P.C. would also change the notice requirements presently in effect in California. Although California does not require notice of the appointment of an executor or administrator with will annexed,⁶⁸ interested parties do receive prior notice since the Code requires ten days notice to the devisees, legatees and heirs of the testator.⁶⁹ On the contrary, the U.P.C. would not require any prior notice beyond a notice of fourteen days by mail or delivery⁷⁰ to any person who has filed a demand for notice with the court.⁷¹ "No other notice of informal probate is required"⁷² under the U.P.C.

In addition, the U.P.C. would create a post-appointment notice not now existing under California law. This provision would require the personal representative to give notice of his appointment to the heirs and devisees⁷³ by mail within thirty days of his appointment.⁷⁴ Prior notice would also be given to interested parties when supervised administration is sought,⁷⁵ a provision in conformity with existing law in California.⁷⁶

65. UNIFORM PROBATE CODE § 3-302.

66. CAL. PROB. CODE §§ 320-25, 330-32 (West 1956); *id.* §§ 326-29 (West Supp. 1978).

67. *In re Estate of Jamison*, 107 Cal. App. 2d 433, 237 P.2d 546 (1951).

68. CAL. PROB. CODE § 407 (West 1956); *id.* § 409 (West Supp. 1978).

69. CAL. PROB. CODE § 328 (West Supp. 1978). CAL. PROB. CODE § 327 (West Supp. 1978) also requires notice by publication for hearings and petitions for probate. In addition, California provides for revocation of letters which have been issued to anyone other than a spouse, child, parent, brother, sister or public administrator of an intestate if one of these persons petitions for appointment. *See* CAL. PROB. CODE § 450 (West 1956); *In re O'Dea's Estate*, 34 Cal. App. 2d 174, 93 P.2d 222 (1939).

70. UNIFORM PROBATE CODE § 1-401(a)(1)-(2).

71. *Id.* § 3-204.

72. *Id.* § 3-306. For a discussion of the constitutionality of no-notice provisions in the U.P.C., see Note, *The Constitutionality of the No-Notice Provision of the Uniform Probate Code*, 60 MINN. L. REV. 317 (1976).

73. Under the U.P.C., a devisee is any person designated in the will to receive real or personal property. UNIFORM PROBATE CODE § 1-201(7)-(8).

74. *Id.* § 3-705.

75. *Id.* § 3-502.

76. Compare CAL. PROB. CODE § 441 (West 1956) with UNIFORM PROBATE CODE § 3-502.

In its efforts to achieve the greatest degree of flexibility, the U.P.C. also creates a "formal proceeding concerning the appointment of a personal representative."⁷⁷ This is a formal petition regarding the priority or qualification of one who seeks appointment, or of one who has been previously informally appointed. The petition is required regardless of whether the estate is to be administered formally or informally.

The U.P.C. and Supervised Administration

The U.P.C. would retain court-supervised administration of estates in a format similar to that now existing in California. However, this system of administering estates by court supervision is only an option under the U.P.C., available for those cases where it is appropriate. A petition for supervised administration under the U.P.C. would be filed with the court by either the personal representative or an interested party. The court would grant the petition for supervised administration only if (1) the decedent has directed by will that his estate be supervised by the court, or (2) if supervised administration is necessary to protect someone interested in the estate, even if the will directs unsupervised administration, or (3) supervised administration is necessary under the circumstances.⁷⁸

Under current California law, an administrator of an estate is merely a "stakeholder" acting under the order and supervision of the court in every estate.⁷⁹ The U.P.C. would change this situation by allowing a personal representative to conduct the affairs of the estate as a trustee without court authorization for specific acts.⁸⁰ This is true whether or not the estate is supervised by the court. Thus, even when the estate is court supervised, it would not be necessary for the personal representative to seek approval for such acts as settling tort claims, selling real estate, or doing other acts for which approval is now required.⁸¹ The U.P.C., however, would permit the court that is supervising an estate to restrict the powers of a personal representative by endorsing that restriction on the letters of appointment.⁸²

77. UNIFORM PROBATE CODE § 3-414(a).

78. *Id.* § 3-502.

79. Estate of Walker, 176 Cal. 402, 359 P. 689 (1917).

80. UNIFORM PROBATE CODE §§ 3-703, 3-704. Section 3-711 gives the personal representative power to deal with estate assets or their "owner" in trust for interested parties; section 3-715 sets out 27 authorized transactions for personal representatives.

81. UNIFORM PROBATE CODE § 3-704.

82. *Id.* § 3-504.

The U.P.C. and Details of Administration

The U.P.C. would not substantially change the California rules for determining priority among persons seeking appointment as personal representatives,⁸³ although a number of significant distinctions, warranting closer scrutiny, would be made.

Under existing California law, a person having superior rights to an appointment may move to revoke the letters granted to one with a lesser priority.⁸⁴ Under the U.P.C., a personal representative would have exclusive authority to act until his appointment is revoked.⁸⁵ Objection to such an appointment could only be made in a formal proceeding.⁸⁶ In addition, letters issued to another person would not entitle the second appointee to possession of the estate assets.⁸⁷ General letters of appointment, however, would protect the second appointee for acts done in good faith before receiving notice of the prior appointment.⁸⁸

In California, the law presently requires that an executor or administrator file an inventory or appraisal with the superior court and the county assessor.⁸⁹ The U.P.C. would radically change this procedure by requiring that the inventory and appraisal be completed within three months of appointment. It would not be necessary to file copies with the court, although copies must be provided to interested persons who request such a copy.⁹⁰ The U.P.C. would also remove the appointment of appraisers from the court and leave such tasks to the personal representative.⁹¹

The California Probate Code also requires the prompt publication of notice to creditors after the opening of an estate.⁹² The U.P.C. has a similar requirement.⁹³ In addition, California preserves the existing right of a creditor to present his claim either to the court or to the personal representative⁹⁴

83. CAL. PROB. CODE §§ 324, 409, 442 (West Supp. 1978); UNIFORM PROBATE CODE § 3-203.

84. CAL. PROB. CODE §§ 450, 452 (West Supp. 1978).

85. UNIFORM PROBATE CODE § 3-702.

86. *Id.* § 3-203.

87. *Id.* § 3-702.

88. *Id.*

89. CAL. PROB. CODE § 600 (West Supp. 1978).

90. UNIFORM PROBATE CODE § 3-706.

91. *Id.* § 3-707.

92. CAL. PROB. CODE § 700-02 (West Supp. 1978).

93. UNIFORM PROBATE CODE § 3-801.

94. CAL. PROB. CODE § 701 (West Supp. 1978). The California courts have not

within a four month period.⁹⁵ The U.P.C. would bar claims of creditors three years after the death of the decedent even though no notice had been published.⁹⁶ The protection of creditors is often cited as a reason for requiring court supervision of estates,⁹⁷ but in most cases the court supervision of such matters is a mere formality.⁹⁸ Even so, it is clear that the U.P.C. would not radically change the system currently used to protect creditors in California.

Under existing California law, a bond must be obtained by the executor or administrator, either with a surety or with two other persons.⁹⁹ Bonding is not required when the testator waives the bond requirement in his will¹⁰⁰ or when the executor or administrator verifies under oath that he is the sole beneficiary or heir.¹⁰¹ Bonding, however, is always required when the administrator or executor seeks to sell real estate.¹⁰²

The U.P.C. would change this approach to bonding. A bond would not be required of a personal representative in an informal probate proceeding except when 1) a special administrator is appointed, 2) the will requires a bond, or 3) an interested party or creditor with an interest valued at more than \$1,000 demands a bond.¹⁰³ Under the U.P.C., the court would also require a bond in a formal probate proceeding unless the will excuses the posting of such a bond.¹⁰⁴

Both California and the U.P.C. permit interim orders for partial distribution.¹⁰⁵ The U.P.C. also permits the personal

been consistent in interpreting the meaning of presentment of claims. *See United States Gypsum Co. v. Shaffer*, 7 Cal. 2d 454, 60 P.2d 998 (1936); *Bernstein v. Rubin*, 152 Cal. App. 2d 51, 312 P.2d 755 (1957); *Bank of America v. Gesler*, 252 Cal. App. 2d 565, 60 Cal. Rptr. 657 (1967); *Estate of Vose*, 4 Cal. App. 3d 454, 84 Cal. Rptr. 347 (1970); *Nathanson v. Superior Court of Los Angeles County*, 12 Cal. 3d 355, 525 P.2d 687, 115 Cal. Rptr. 783 (1974).

95. CAL. PROB. CODE § 700 (West Supp. 1978). *Nathanson v. Superior Court of Los Angeles County*, 12 Cal. 3d 355, 525 P.2d 687, 115 Cal. Rptr. 783 (1974).

96. UNIFORM PROBATE CODE § 3-803(a)(2).

97. COMM. ON PROBATE AND TRUST LAW STATE BAR OF CALIFORNIA, *THE UNIFORM PROBATE CODE: ANALYSIS AND CRITIQUE* xxi (1973).

98. *See generally* Summer, *The Independent Executor: A Proposal*, 43 CAL. ST. B.J. 333, 340 (1968).

99. CAL. PROB. CODE § 541 (West Supp. 1978).

100. CAL. PROB. CODE § 543 (West Supp. 1978) allows the court to require bond notwithstanding the will's exemption.

101. CAL. PROB. CODE § 541 (West Supp. 1978).

102. *Id.* § 542.

103. UNIFORM PROBATE CODE §§ 3-603, 3-605.

104. *Id.* § 3-603. Even when the will excuses the bond, the court can require it in the petition of an interested party or creditor. *Id.* § 3-605.

105. *Id.* § 3-505; CAL. PROB. CODE § 1000 (West Supp. 1978). *See Estate of Molera*, 23 Cal. App. 3d 993, 100 Cal. Rptr. 696 (1972), allowing preliminary and

representative to obtain an order for final distribution of assets in a formally supervised estate.¹⁰⁶ Contrary to the U.P.C., California requires notice to all creditors, heirs, and legatees prior to both preliminary and partial distributions.¹⁰⁷ In California, notice must also be given of the filing of the final account,¹⁰⁸ while the U.P.C. requires notice to all interested parties only before the court approves the settlement and distribution of a supervised estate.¹⁰⁹

Finally, California probate law requires that an executor or administrator render an accounting to the court in supervised estates.¹¹⁰ Under the U.P.C. the court can require a final accounting, but it is not required in every case.¹¹¹

The U.P.C. and Expenses of Administration

Adoption of the U.P.C. would undoubtedly reduce the expenses of administering estates in California. In addition to savings of estate assets, the reduction of court supervision in estate matters would also ease the burden on the California court system and would help reduce the amount of public money used to maintain court supervision of estates.

The first state to adopt the U.P.C. was Idaho.¹¹² While it is still not possible to assess the long term effects of the U.P.C. on the costs of probate administration in Idaho, there are some preliminary indications that the U.P.C. has reduced expenses. While Idaho is a much smaller state than California, there is no reason to believe that a similar effect would not take place should California decide to adopt the U.P.C. A study comparing claims for attorney's fees in Idaho in 1971 (a pre-U.P.C. year) to claims in 1973 (a post-U.P.C. year) showed 1449 claims for attorney's fees, totaling \$2,088,489.62 in 1971. Thus, the average attorney's fee was \$1,441.33, which was 3.5382 percent of the gross estate. The median attorney's fee was \$750, which

partial distribution even if there is a potential will contest. The court, however, must determine who the heirs are and frame sufficient safeguards.

106. UNIFORM PROBATE CODE § 3-504.

107. Compare CAL. PROB. CODE § 926 (West 1956) with UNIFORM PROBATE CODE § 3-505. The Official Comment to UNIFORM PROBATE CODE § 3-505 suggests that the point could be covered by court rule.

108. CAL. PROB. CODE § 926 (West 1956).

109. UNIFORM PROBATE CODE § 3-1001(a).

110. CAL. PROB. CODE § 922 (West Supp. 1978) requires a full and verified account within 30 days after the time for presentment of claims and final accounting.

111. UNIFORM PROBATE CODE § 3-1001(a).

112. IDAHO PROB. CODE tit. 15 (Supp. 1978).

was 3.1510 percent of the gross estate.¹¹³ In 1973, there were 892 claims for attorney's fees totaling \$1,008,082.93. The average attorney's fee was \$1,130.13, which was 1.8017 percent of the gross estate. The median attorney's fee was \$500, which was 2.3329 percent of the gross estate.¹¹⁴

Sixty percent of the attorneys in Idaho believed that the adoption of the U.P.C. has reduced the time required to administer an estate.¹¹⁵ Sixty-eight percent felt that the alternative forms of administration provided for by the U.P.C. have helped them meet their client's needs.¹¹⁶ Only fourteen percent of Idaho's lawyers set their fees by a percentage of the estate after the adoption of the U.P.C.,¹¹⁷ in contrast to the California system of statutory fees based on a percentage.¹¹⁸ Fees based upon "reasonable compensation,"¹¹⁹ rather than a "percentage of the gross," would probably reduce fees payable to both the personal representative and attorneys. At least such fees would more likely become a matter of private agreement rather than being set by statute on the basis of the estate's assets.¹²⁰

CONCLUSION

Adoption of the Uniform Probate Code would bring about major changes in California probate procedure. Such a reform would reduce the expense of estate administration and eliminate unnecessary services. Yet the economic self-interest of attorneys, newspapers, and bondsmen seems to present a major obstacle to the adoption of the U.P.C. Naturally, the courts are reluctant to forego any of their current jurisdictional prerogative, but it is the legal profession that should take the initiative in bringing about an improvement of the current system. Attorneys are trained in the art of advocacy and are duty bound to render professional legal services in those situations where the

113. Kinsey, *A Contrast of Trends in Administrative Costs in Decedents' Estates Between a Uniform Probate Code Jurisdiction (Idaho) and a Non-Uniform Probate Code Jurisdiction (North Dakota)*, 50 N. D. L. REV. 523, 526 (1974).

114. *Id.* at 526-27.

115. Crapo, *The Uniform Probate Code—Does It Really Work?*, 1976 B.Y.U. L. REV. 396, 398.

116. *Id.*

117. *Id.* at 403.

118. CAL. PROB. CODE §§ 901, 910 (West Supp. 1978).

119. UNIFORM PROBATE CODE § 3-719.

120. Of course, a state could adopt the flexible system of administration provided by the U.P.C. and still maintain a percentage approach to establishing fees for attorneys and personal representatives. A few states have done this. *See* MONT. REV. CODES ANN. § 91A-3-719 (Supp. 1977); UTAH CODE ANN. § 75-3-78 (Supp. 1978).

layman cannot protect himself. When an attorney is needed to fill his proper role in the administration of an estate, he should participate and be compensated in a suitable manner. An attorney, however, should not have the right to charge fees for rendering services which a layman alone could accomplish.¹²¹ If indeed the position of the California Bar is based on economic self-interest, then attorneys in California ought to begin to question whether their position is consistent with the noble ideals of the legal profession.

121. A thoughtful article in the California State Bar Journal recently commented that:

[T]he dangerous idea that lawyers are in some instances dispensable does not seem likely to take hold in America, least of all in California. And if it should, many within our ranks would doubtless urge the commencement of a public relations campaign and censure of any member who did not hold the fort.

Kline, *Law Reform and the Courts: More Power to the People or the Profession?*, 53 CAL. ST. B.J. 14, 17 (1978).

