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# Some Suggestions for a Model Estates Code

*Any model law must be forward-looking to be useful as a guide for the form and content of statutes of various jurisdictions. The American Bar Association has recently undertaken a revision of the Model Probate Code, an occasion appropriate for reflection about what probate law ought to be. In this Article, Professor Boyd sets forth his proposals concerning the scope of a probate code, notice in probate proceedings, and fiduciary powers and duties. He concludes that the revisers should not simply redraft a few provisions of the existing code, but should seek an integrated statutory approach to the problems of trust, probate, and guardianship administration through the adoption of a Model Estates Code.*

## Willard L. Boyd\*

Seventeen years have elapsed since the publication of the *Model Probate Code*. This masterful code and the monographs accompanying it were prepared by Professor Lewis M. Simes and Paul E. Basye.<sup>1</sup> The work of these two men and their colleagues has been both cause and effect in the revision of American probate law since 1946.<sup>2</sup> The Code has substantially influenced probate revisions in Arkansas,<sup>3</sup> Indiana,<sup>4</sup> Iowa,<sup>5</sup> Missouri,<sup>6</sup> North Car-

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\* Professor of Law, State University of Iowa. The author gratefully acknowledges the assistance of Lester Johnson of the third-year class at Iowa Law School and of the members of the Special Committee on Probate Law of the Iowa State Bar Association.

1. In addition, three articles written by Professor Thomas E. Atkinson were among the significant factors responsible for the preparation of the *Model Probate Code*. *Organization of Probate Courts and Qualifications of Probate Judges*, 23 J. AM. JUD. SOC'Y 93 (1939); *Old Principles and New Ideas Concerning Probate Court Procedure*, *id.* at 137; *Wanted—A Model Probate Code*, *id.* at 183 (1940).

2. Straus, *Wanted: A Model Probate Code*, 1 American College of Probate Counsel, Newsletter, No. 7, Feb. 1963.

3. ARK. STAT. §§ 57-101 to 58-408, 60-101 to -3109 (Supp. 1961).

4. IND. ANN. STAT. §§ 6-101 to 8-218 (1953).

5. IOWA PROBATE CODE §§ 1-718 (1963). [The probate provisions of the *Iowa Code* were substantially revised by the 1963 Iowa General Assembly; the revised provisions, without chapter number, are hereinafter cited as IOWA PROBATE CODE (1963).]

6. MO. REV. STAT. §§ 472.010—475.480 (1959).

olina,<sup>7</sup> Pennsylvania,<sup>8</sup> and Texas.<sup>9</sup>

In the period since the drafting of the *Model Probate Code*, a veritable revolution has occurred with respect to estates. Provisions for the marital deduction in the Revenue Act of 1948,<sup>10</sup> along with post-war productivity and inflation, have made every lawyer an estate planner. Moreover, a redefining of procedural due process and notice occurred in 1950 with the Supreme Court decision in *Mullane v. Central Hanover Bank & Trust Co.*<sup>11</sup> In light of these and other changed conditions, it is appropriate that the Council of the Section on Real Property, Probate and Trust Law of the American Bar Association has concluded that the *Model Probate Code* should be revised. The Council has entrusted this work to an outstanding committee,<sup>12</sup> and this committee is maintaining close contact with a special committee of the National Commissioners on Uniform State Laws<sup>13</sup> interested in the feasibility of a uniform probate code.

Uniformity in the law governing estate planning and administration is both possible and necessary. Notwithstanding the local nature of this law, the diversity in the applicable state law is not as great as might be presumed. Common principles and techniques do exist, and their existence makes it possible to draft model and uniform statutes. Furthermore, the mobility and consequent dispersion of American property holders, their beneficiaries, and their assets, make uniformity essential, for estate problems are becoming increasingly national in scope.

The task confronting the revisers of the *Model Probate Code* is a prodigious one. Not only is the subject matter vast, but also every lawyer has particularized opinions as to what this law ought to be. In examining proposed legislation dealing with estates, lawyers tend to consider general solutions in terms of the specific cases in which they have been involved. This approach can be beneficial in exposing faulty draftmanship and neglected problems, but in some instances a broader view is required.

7. N.C. GEN. STAT. §§ 28-1 to 37-15 (Supp. 1961).

8. PA. STAT. ANN. tit. 20, §§ 1.1-3470.15 (Supp. 1962).

9. TEX. PROB. CODE §§ 1-434 (Supp. 1962).

10. Revenue Act of 1948, ch. 168, § 361, 62 Stat. 117 (now INT. REV. CODE OF 1954, § 2056), ch. 168, § 372, 62 Stat. 125 (now INT. REV. CODE OF 1954, § 2523).

11. 339 U.S. 306 (1950).

12. Paul E. Basye, Chairman; Laura Andreas; Allison Dunham; Harrison F. Durand; William F. Fratcher; Russell D. Niles; Lewis M. Simes. Professor Fratcher is directing the research of the Committee.

13. Clarke A. Gravel; Fred T. Hanson; Judge James T. Harrison; Charles Horowitz; George D. Locke; Herbert H. McAdams; Harvey S. Reynolds; Judge Sverre Roang; Clarence Swainson; Joe W. Worley.

In spite of these difficulties, the revisers will find the American bar receptive to their efforts. Most lawyers realize that codification of common law and good practice will expedite and improve estate planning and administration. In addition, the realities of practice, coupled with extensive and continuing legal education, have made the bar more receptive to innovation in this field. The acceptance of probate revisions based on the *Model Probate Code* by rural-oriented legislatures demonstrates a willingness to meet the common needs of country and city clients. Thus, the time for revision is propitious, and a broad approach to the subject is desirable. Among the significant questions that must be considered by the revisers are the scope of the Code, notice in probate proceedings, and general provisions relating to fiduciaries. This Article sets forth proposals in each of these areas.

### I. SCOPE OF A PROBATE CODE

Any revision of the *Model Probate Code* must begin with an expansion in the scope of the Code. Modern estate planning and administration, concerned as it is with probate, guardianship, and trust law, requires a comprehensive and integrated statutory statement of the law in these fields. Numerous uniform and model acts promulgated by the Commissioners on Uniform State Laws both before<sup>14</sup> and after<sup>15</sup> the *Model Probate Code* attest to this

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14. The following uniform acts were approved by the National Conference of Commissioners on Uniform State Laws prior to 1946: UNIFORM FIDUCIARIES ACT (1922); UNIFORM VETERANS' GUARDIANSHIP ACT (1928) (rev. 1942) (Part IV incorporated in the *Model Probate Code*); UNIFORM PRINCIPAL AND INCOME ACT (1931) (amend. 1958, rev. 1962); UNIFORM TRUSTEES' ACCOUNTING ACT (1936); UNIFORM TRUSTS ACT (1937); UNIFORM COMMON TRUST FUND ACT (1938) (amend. 1952); UNIFORM ABSENCE AS EVIDENCE OF DEATH AND ABSENTEES' PROPERTY ACT (1939); UNIFORM SIMULTANEOUS DEATH ACT (1940) (amend. 1953); UNIFORM ACT GOVERNING SECURED CREDITORS' DIVIDENDS IN LIQUIDATION PROCEEDINGS (1941) (§ 139 incorporated in the *Model Probate Code*); UNIFORM POWERS OF FOREIGN REPRESENTATIVES ACT (1944) (Part V incorporated in the *Model Probate Code*). See also MODEL EXECUTION OF WILLS ACT (1940) (§§ 45-50 incorporated in the *Model Probate Code*); MODEL CY-PRES ACT (1944). The draftsmen of the *Model Probate Code* also suggested that certain other acts prepared by the National Conference of Commissioners on Uniform State Laws were related to the subject matter of the *Probate Code* and could be consulted in revising a state code. MODEL PROBATE CODE 12 (Simes 1946). Among those acts listed were: UNIFORM PARTNERSHIP ACT (1914); UNIFORM FRAUDULENT CONVEYANCE ACT (1918); UNIFORM ILLEGITIMACY ACT (1922); UNIFORM JOINT OBLIGATIONS ACT (1925); UNIFORM RECIPROCAL TRANSFER TAX ACT (1928); UNIFORM PROPERTY ACT (1938); MODEL WAR SERVICE VALIDATION ACT (1944).

15. The following uniform acts have been approved by the National Conference of Commissioners on Uniform State Laws since 1946: UNI-

interrelationship. Unfortunately, the multiplicity of these separate acts confounds and confuses state committees charged with the responsibility of producing a unified code governing estates. Since the Uniform Commissioners desire to co-operate in the revision of the *Model Probate Code*, the time has come both to review the adequacy of the older uniform and model acts affecting estate planning and to incorporate all relevant acts into a single estates code.

Ideally, an estates code should constitute an extensive treatment of the law of trusts, of guardianships, and of decedents' estates and their administration.<sup>16</sup> Short of this, there are two minimum requirements of any statutory revision affecting estates. The first is to vest in one court the jurisdiction to administer all such estates; the second is an omnibus procedure for securing judicial determination of problems arising out of the administration of these estates.

#### A. CONSOLIDATION OF JURISDICTION OVER ESTATES AND TRUSTS

Prior to the drafting of the *Model Probate Code*, Professor Thomas Atkinson argued for a more competent probate judiciary.<sup>17</sup> He noted that the jurisdiction of the probate court had been expanded in a number of states to include broader powers over the estates of decedents, minors, and incompetents. Because of growth in the size and complexities of these estates, he contended that lay-

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FORM ANCILLARY ADMINISTRATION OF ESTATES ACT (1949) (amend. 1953) (Part V incorporated in the *Model Probate Code*); UNIFORM PROBATE OF FOREIGN WILLS ACT (1950) (recommended that this act be incorporated in the *Model Probate Code*); UNIFORM SUPERVISION OF TRUSTEES FOR UNIFORM ESTATE TAX APPORTIONMENT ACT (1958); UNIFORM ACT (1956); UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT (1955); UNIFORM ESTATE TAX APPORTIONMENT ACT (1958); UNIFORM ACT FOR SIMPLIFICATION OF FIDUCIARY SECURITY TRANSFERS (1958); TESTAMENTARY ADDITIONS TO TRUSTS ACT (1960). See also MODEL SMALL ESTATES ACT (1951). In addition, the Conference has a special committee working on the *Uniform Trustees' Powers Act*; the committee expects to have a first tentative draft of an act ready for presentation at the annual meeting of the Conference in August, 1963.

The Committee on Fiduciary Legislation of the Trust Division of the American Bankers Association has prepared several model acts relating to estates. See TRUST DIV., THE AMERICAN BANKERS ASS'N, TRUST AND ESTATE LEGISLATION (1961).

16. See, e.g., DEL. CODE ANN. tit. 12, §§ 101-4103 (1953); MO. REV. STAT. §§ 456.010-475.480 (1959) (although the probate code only includes probate and guardianship, it is under the same title as trusts); N.C. GEN. STAT. §§ 28-1 to 37-15 (Supp. 1961); PA. STAT. ANN. tit. 20, §§ 1-3414 (1950), §§ 3441-3611 (Supp. 1962).

17. Atkinson, *Organization of Probate Courts and Qualifications of Probate Judges*, 23 J. AM. JUD. SOC'Y 93, 94-97 (1939); accord, SIMFS & BASYE, PROBLEMS IN PROBATE LAW 421-23, 466-82, 486-88 (1946).

men should be prohibited from serving as probate judges and that part-time probate courts should be abolished. As a practical alternative, he urged that there be a single court of general jurisdiction having equity, law, and probate powers. Although Professor Atkinson was concerned about the quality of the probate bench, his suggestion also provides an opportunity for greater co-ordination in the administration of estates.

The need for this co-ordination is recognized by section 6 of the *Model Probate Code*, which grants to a single court jurisdiction to administer testamentary trusts as well as decedents' and guardianship estates.<sup>18</sup> Unfortunately, the administration of inter vivos trusts is not included within the jurisdiction of the same court. The draftsmen did, however, acknowledge that there was no valid reason for distinguishing between testamentary and inter vivos trusts. They stated that this differentiation poses no problem where there is a unified court of general jurisdiction, but where the probate courts were separate, the draftsmen favored enacting a separate statutory scheme governing the administration of both inter vivos and testamentary trusts.<sup>19</sup>

Today, there is no longer any justification for refusing to expand the jurisdiction of the probate court to include the administration of inter vivos trusts. Since the advent of the *Model Probate Code*, the pour over trust has become a standard estate planning technique,<sup>20</sup> and it is now common for a decedent's estate to in-

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18. MODEL PROBATE CODE § 6 (Simes 1946) provides:

The [ ] court shall have plenary jurisdiction of the administration, settlement and distribution of estates of decedents, whether consisting of real or personal property or both, the probate of wills, the granting of letters testamentary, of administration and guardianship, the construction of wills, whether incident to the administration of an estate or as a separate proceeding, the determination of heirship, the administration of testamentary trusts, and the administration of guardianships of minors and other incompetents. It shall have the same legal and equitable powers to effectuate its jurisdiction and to carry out its orders, judgments and decrees, and the same presumptions shall exist as to the validity of such orders, judgments and decrees in probate as in other matters.

In several states, jurisdiction over testamentary trusts is vested in the probate court. See MICH. COMP. LAWS §§ 701.19, 704.1 (1948); MO. REV. STAT. § 472.020 (1959); N.Y. Surr. Ct. Act § 40. See also SIMES & BASYE, PROBLEMS IN PROBATE LAW 462-64 (1946); 1 WOERNER, AMERICAN LAW OF ADMINISTRATION 518-19 (3d ed. 1923). As to the constitutionality of vesting jurisdiction over testamentary trusts in the probate court, see MODEL PROBATE CODE 13 (Simes 1946); Summers, *Introduction*, 25 MO. ANN. STAT. v (1956).

19. MODEL PROBATE CODE 21-22 (Simes 1946). See also SIMES & BASYE, PROBLEMS IN PROBATE LAW 483-86 (1946) containing an excellent and complete history of probate courts.

20. This fact is evidenced by the promulgation of the *Uniform Testa-*

volve problems of inter vivos and testamentary trusts as well as probate and guardianship. The co-ordination necessary to administer such an estate cannot be achieved solely by providing for courts of general jurisdiction. In exercising their powers, such courts are likely to utilize separate divisions or dockets for law, equity, and probate. As a consequence, traditional differences in jurisdiction are preserved, and if appropriate relief cannot be obtained in probate, it must be sought in the proper division or docket by transferring the action or commencing a separate action. This situation impedes the expeditious administration of an estate having a number of facets.<sup>21</sup> To simplify administration, jurisdiction over trusts, guardianships, and probate should be vested in a single division or court<sup>22</sup> according to whether a state

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*mentary Additions to Trust Act.* At the time the *Model Probate Code* was drafted, pour over wills were sometimes used, but the draftsmen concluded that this matter was beyond the scope of a probate code. See MODEL PROBATE CODE § 6, comment (Simes 1946).

21. See 1 MCCARTY, IOWA PROBATE §§ 6, 24 (1942); SIMES & BAYSE, PROBLEMS IN PROBATE LAW 417-18, 429, 483-86 (1946).

22. For example, these powers have been combined in IND. ANN. STAT. §§ 4-303, -2910, -3010, -3040 (1946); ME. REV. STAT. ANN. ch. 153, § 2 (1954); MASS. GEN. LAWS ANN. ch. 215, § 6 (Supp. 1962); NEV. REV. STAT. §§ 3.210, 165.130-140 (1961); PA. STAT. ANN. tit. 20, §§ 2080.301-309 (Supp. 1961) (Orphans' Ct.). See also SIMES & BAYSE, PROBLEMS IN PROBATE LAW 463-64 (1946). In Kansas, the probate court has jurisdiction of all testamentary trusts and of nontestamentary trusts if the beneficiary is subject to guardianship. KAN. GEN. STAT. ANN. § 59-301 (1949). See also IOWA PROBATE CODE § 10 (1963):

Jurisdiction. The district court sitting in probate shall have jurisdiction of:

1. Estates of decedents and absentees.

The probate and contest of wills; the appointment of personal representatives; the granting of letters testamentary and of administration; the administration, settlement and distribution of estates of decedents and absentees, whether such estates consist of real or personal property or both.

2. Construction of wills and trust instruments.

The construction of wills and trust instruments during the administration of the estate or trust, whether said construction be incident to such administration or as a separate proceeding.

3. Conservatorships and guardianships.

The appointment of conservators and guardians; the granting of letters of conservatorship and guardianship; the administration, settlement and closing of conservatorships and guardianships.

4. Trusts and trustees.

The appointment of trustees; the granting of letters of trusteeship; the administration of testamentary trusts; the administration of express trusts where jurisdiction is specifically conferred on the court by the trust instrument; the administration of express trusts where the administration of the court is invoked by the trustee, beneficiary or any interested party; the administration of trusts which are established by a decree of court and result in the administration thereof by the court; and the settlement and closing of all such trusts.

has a court of general jurisdiction or an independent probate court.<sup>23</sup>

## B. PROCEDURE FOR DEALING WITH ADMINISTRATION OF ESTATES

The second fundamental requirement of an estates code revision is an adequate procedure by which the court can resolve the numerous issues arising in the administration of estates. With respect to decedents' estates and guardianships, this problem is dealt with extensively throughout the *Model Probate Code*. For example, with respect to the construction of a will, the *Model Probate Code* utilizes the declaratory judgment procedure;<sup>24</sup> it also notes the applicability of the *Uniform Declaratory Judgments Act* to probate matters in those jurisdictions that have adopted that act.<sup>25</sup> Thus in the United States, the declaratory judgment procedure has been successfully used to construe wills<sup>26</sup> and to determine both heirship<sup>27</sup> and the rights of remaindermen in estate assets.<sup>28</sup> The possibility exists, therefore, that the declar-

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23. See MODEL PROBATE CODE 12-13, 15-16 (Simes 1946).

24. *Id.* § 60.

25. *Id.* at 47.

Section 4 of the *Uniform Declaratory Judgments Act* provides:

Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or legal relations in respect thereto:

(a) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or

(b) To direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or

(c) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

This provision was derived from the English SUPREME COURT OF JUDICATURE RULES, ORDER LV, *Rule 3* (1883) authorizing fiduciaries, beneficiaries, and creditors of decedents' estates and trusts to apply to Chancery for the determination of their rights and duties. By making declaratory relief available, it was possible to settle isolated estate issues without resorting to the expensive and complicated administration procedures that had developed in England at the time. BORCHARD, *DECLARATORY JUDGMENTS* 226-28 (2d ed. 1941).

26. *In re Estate of Pierce*, 245 Iowa 22, 60 N.W.2d 894 (1953); *Radintz v. Northwestern Nat'l Bank & Trust Co.*, 207 Minn. 56, 289 N.W. 777 (1940); *Dickey v. Herbin*, 250 N.C. 321, 108 S.E.2d 632 (1959). See generally BORCHARD, *DECLARATORY JUDGMENTS* 699-740 (2d ed. 1941).

27. *Whisler v. Whisler*, 249 Iowa 645, 88 N.W.2d 68 (1958) (intestate share of surviving spouse); *Kane v. Kane*, 146 Ohio St. 686, 67 N.E.2d 783 (1946) (determining heirship in court having concurrent jurisdiction with probate court).

28. *Robinson v. Robinson*, 273 Ala. 192, 136 So. 2d 889 (1962); *Herbst*



atory judgment procedure might afford a comprehensive technique for settling questions arising in the administration of estates.

Nevertheless, it must be recognized that this procedure has its limitations. To secure relief, a justiciable controversy must exist—a requirement that precludes a fiduciary from using this method to secure court instructions in the absence of a dispute with the beneficiaries or creditors.<sup>29</sup> Also, since a declaratory judgment act is a procedural rather than a jurisdictional statute, the extent to which this proceeding can be used depends on the court's jurisdiction over the parties and the subject matter.<sup>30</sup>

A declaratory judgment action before a probate court having jurisdiction over trusts, guardianships, and decedents' estates may be an *in rem*, a quasi *in rem*, or an *in personam* proceeding, depending on the nature of the interests being adjudicated. Assuming adequate notice to all interested parties, known and unknown, resident and nonresident, the determination would be final as to the res where jurisdiction is *in rem* or quasi *in rem* and as to all persons properly before the court where the proceeding is *in personam*.<sup>31</sup> Where the declaratory judgment procedure is

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v. Treinen, 249 Iowa 695, 88 N.W.2d 820 (1958); *Katz Inv. Co. v. Lynch*, 242 Iowa 640, 47 N.W.2d 800 (1951).

29. *Stetson v. Community Chest*, 24 N.J. Super. 243, 93 A.2d 796 (Ch. 1952); *Pape v. Title & Trust Co.*, 187 Ore. 175, 210 P.2d 490 (1949). See also Fraser, *A Survey of Declaratory Judgment Actions in the United States*, 39 IOWA L. REV. 639-41 (1954).

30. UNIFORM DECLARATORY JUDGMENTS ACT § 1; 3 AMERICAN LAW OF PROPERTY 741-42 (Casner ed. 1952); 6 MOORE'S FEDERAL PRACTICE § § 57.05, .23 (1953) (Federal Declaratory Judgment Act).

31. Section 11 of the *Uniform Declaratory Judgments Act* provides in part: "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. . . ." See 1 ANDERSON, ACTIONS FOR DECLARATORY JUDGMENTS § 157 (2d ed. 1951); BORCHARD, DECLARATORY JUDGMENTS 272 (2d ed. 1941). See also *Schuster v. Schuster*, 75 Ariz. 20, 251 P.2d 631 (1952); *National Shawmut Bank v. Morey*, 320 Mass. 492, 70 N.E.2d 316 (1946); *Phillips v. Phillips*, 163 Neb. 282, 79 N.W.2d 420 (1956); *Rich Marina Corp. v. Detroit & Cleveland Nav. Co.*, 116 N.Y.S.2d 203 (Sup. Ct. 1952); *In re Hosford*, 26 N.J. Super. 412, 98 A.2d 332 (Super. Ct. 1953); *In re Stone*, 21 N.J. Super. 117, 91 A.2d 1 (Ch. 1952).

But see Basye, *Determination of Heirship*, 54 MICH. L. REV. 737, 742-43 (1956), where the author questions the usefulness of the declaratory judgment procedure as a means for determining descent and distribution because of the requirement that all interested persons must be made parties. This requirement does not, however, make all declaratory judgment actions *in personam* proceedings. Section 11 of the *Uniform Declaratory Judgments Act* serves to satisfy the due process requirement that interested parties are entitled to reasonable notice of, and an opportunity to be heard in, any proceeding affecting their rights regardless of whether it is an *in personam*, *in rem*, or quasi *in rem* action. In those jurisdictions where Mr. Basye states that notice at the commencement of a

made available in probate, it can be resorted to for the construction of inter vivos trust instruments<sup>32</sup> and the determination of other justiciable matters over which the probate court has jurisdiction.<sup>33</sup> Declaratory relief may, consequently, prove a convenient and efficient device for settling numerous problems of administration.

## II. NOTICE OF PROBATE PROCEEDINGS

### A. MULLANE V. CENTRAL HANOVER BANK & TRUST CO.

The applicability to probate of the notice concepts enunciated in *Mullane v. Central Hanover Bank & Trust Co.*<sup>34</sup> is a highly contentious issue among some members of the American bar. Succinct and clear, the decision represents a realistic approach to notice generally. Left behind are legal concepts that must yield if effective notice to interested parties is to be achieved and property rights are to be protected in practice as well as in theory.

The question involved in the *Mullane* case was whether the due process clause of the fourteenth amendment had been vio-

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probate proceeding eliminates the necessity for further notice when determination of descent and distribution is sought, § 11 would constitute an additional notice requirement if the determination is sought through the device of a declaratory judgment. *Id.* at 743-48.

32. *Greenley v. Bynum*, 266 Ala. 584, 97 So. 2d 893 (1957) (proceeding in equity); *Miller v. Dauphin Deposit Trust Co.*, 46 Dauph. 212 (Pa. Orphans' Ct., Pa. 1938). See also *In re Estate of McKinstry*, 34 Ohio Op. 300, 71 N.E.2d 318 (P. Ct. 1946), where the court stated that the *Declaratory Judgments Act* did not expand the jurisdiction of the probate court, and the court did not have jurisdiction to construe the terms of an inter vivos trust. As to construction of inter vivos trust instruments, see generally 2 ANDERSON, ACTIONS FOR DECLARATORY JUDGMENTS § 573 (2d ed. 1951).

33. See *id.* §§ 575-84; Fraser, *supra* note 29, at 654. See also IOWA PROBATE CODE § 11 (1963):

Declaratory judgments—determination of heirship—distribution.

During the administration of an estate, the district court sitting in probate shall have full, legal and equitable powers to make declaratory judgments in all matters involved in the administration of the estate, including those pertaining to the title of real estate, the determination of heirship, and the distribution of the estate. It shall have full, legal and equitable powers to enter final orders and decrees in all probate matters to effectuate its jurisdiction and to carry out its orders, judgments and decrees. The same presumption shall exist as to the validity of such orders, judgments and decrees in probate as in other actions.

The term "estate" is defined in § 3(15), which provides:

Estate—the real and personal property of a decedent, a ward, or a trust, as from time to time changed in form by sale, reinvestment or otherwise, and augmented by any accretions or additions thereto and substitutions therefor, or diminished by any decreases and distributions therefrom.

As to the jurisdiction of the probate court in Iowa, see note 22 *supra*.

34. 339 U.S. 306 (1950).

lated by a statute that authorized a trustee administering a New York common trust fund to publish notice of the surrogate court hearing to settle finally the fiduciary's first account. The surrogate court appointed two attorneys as special guardians to represent persons known and unknown who did not appear and who had or might subsequently have an interest in the income or principal of the common trust fund.

It is imperative to remember that a final decree was sought approving the trustee's management of the common trust fund during the period covered by the accounting. Since a conclusive settlement would bar any cause of action that the beneficiaries might have against the trustee for "negligent or illegal impairments of their interests"<sup>35</sup> during this period, the accounting proceeding could result in depriving the beneficiaries of a property right. Moreover, the Court reasoned that a deprivation of the beneficiaries' property could also occur by the allowance of fees to the special guardians "who, in [the beneficiaries'] names but without their knowledge, may conduct a fruitless or uncomensatory contest."<sup>36</sup> Because property rights were in jeopardy, it was essential that the notice to the beneficiaries satisfy the requirements of due process.

In developing a notice test, the Court rejected the assertion that New York's jurisdiction over the accounting proceeding was predicated on in personam, in rem, or quasi in rem jurisdiction, and instead chose simply to rely upon the well-established authority of any state to settle the interests of any resident or nonresident person in trusts being administered in its courts so long as adequate notice is afforded.<sup>37</sup> As a criterion for determining whether due process requirements had been met, the Court stated:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . . The notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance . . . .<sup>38</sup>

In assessing the adequacy of notice in *Mullane* against this criterion, the Court unequivocally stated that notice published in a newspaper was not a dependable method of actually informing persons, particularly if they reside outside the newspaper's usual

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35. *Id.* at 313.

36. *Ibid.*

37. For an analysis of the nature of the jurisdiction involved in the *Mullane* case, see Fraser, *Jurisdiction by Necessity—An Analysis of the Mullane Case*, 100 U. PA. L. REV. 305-12, 319 (1951).

38. 339 U.S. at 314-15.

circulation area. Nevertheless, the Court acknowledged the propriety of published notice in situations where it was not "reasonably possible or practicable to give more adequate warning";<sup>39</sup> published notice was thus sufficient as to those beneficiaries whose interests, names, or addresses could not be ascertained with due diligence.

With respect to the accounting proceeding in *Mullane*, published notice was deemed ample to notify contingent beneficiaries, but because of its ineffectiveness as a method of informing, published notice was insufficient as to those present beneficiaries whose names and addresses were known. As an effective alternative, the trustee was directed to inform personally, at least by ordinary mail, those resident and nonresident beneficiaries whose names and addresses were known. The approval of mailed notice represented a compromise. Personal service of citation on the known resident and nonresident beneficiaries was unnecessary in the *Mullane* case because of the great number of small interests in a common trust fund. Although not as effective as personal service, the Court reasoned that mailed notice would reach most of the trust beneficiaries, and because of their identity of interest, objections to the trustee's accounting raised by some beneficiaries would accrue for the benefit of all. The Court refused, however, to approve published notice on the basis that the trustee or special guardian adequately represented the interests of those beneficiaries whose names and addresses were known.

[T]hese beneficiaries do have a resident fiduciary as caretaker of their interest in this property. But it is their caretaker who in the accounting becomes their adversary. Their trustee is released from giving notice of jeopardy, and no one else is expected to do so. Not even the special guardian is required or apparently expected to communicate with his ward and client, and, of course, if such a duty were merely transferred from the trustee to the guardian, economy would not be served and more likely the cost would be increased.<sup>40</sup>

Thus, the trustee's duty to inform these beneficiaries exists regardless of the existence of a special guardian.

In reaching its decision, the Court noted that at the time the first investment was made in the common fund for each trust, the trustee pursuant to statute notified by mail those adult and competent persons whose names and addresses were known and who were either income beneficiaries of the newly participating trust or remaindermen who would share in the principal if the trust estate were distributable at the time the notice was mailed. The trustee

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39. *Id.* at 317.

40. *Id.* at 316-17.

included in the notice a copy of the statutory provisions relating to the notice being given and to the judicial settlement of the common trust fund accounts. Referring to the inadequacy of published notice of the accounting proceeding for the income beneficiaries, the Court said:

Certainly sending them a copy of the statute months and perhaps years in advance does not answer this purpose. The trustee periodically remits their income to them, and we think that they might reasonably expect that with or apart from their remittances word might come to them personally that steps were being taken affecting their interests.<sup>41</sup>

## B. IMPACT OF MULLANE ON PROBATE PROCEEDINGS

The impact of the *Mullane* case on American concepts of notice has been considerable. The Court has subsequently followed it in bankruptcy, condemnation, and tax lien foreclosure proceedings,<sup>42</sup> and it has also influenced state statutes providing for published notice.<sup>43</sup> While some state courts and legislatures have construed *Mullane* narrowly,<sup>44</sup> the Court's use of the case in different areas indicates that it has broad application.

As if in anticipation of *Mullane*, the *Model Probate Code* prescribed as minimal notice publication plus mailed notice to those persons whose names and addresses are known,<sup>45</sup> and the decision itself has accelerated this linking of publication and mailing in American probate notice.<sup>46</sup> This joinder is justifiable, for like

41. *Id.* at 318.

42. *Schroeder v. City of New York*, 371 U.S. 208 (1962) (condemnation); *Walker v. City of Hutchinson*, 352 U.S. 112 (1956) (condemnation); *Covey v. Town of Somers*, 351 U.S. 141 (1956) (tax lien foreclosure); *City of New York v. New York, N.H. & H.R.R.*, 344 U.S. 293 (1953) (bankruptcy); see Note, 70 HARV. L. REV. 1257 (1957); Note, 32 WASH. L. REV. 165 (1957).

43. Hayward, *The Effect of Mullane v. Central Hanover Bank and Trust Company Upon Publication of Notice in Iowa*, 36 IOWA L. REV. 47 (1950); Vestal, *A Decade of Practice Under the Iowa Rules of Civil Procedure*, 38 IOWA L. REV. 439, 444-45 (1953).

44. See, e.g., *In re Estate of Pierce*, 245 Iowa 22, 60 N.W.2d 894 (1953); Note, *Mullane v. Central Hanover Bank and Trust Co.—Statutory Reaction*, 39 IOWA L. REV. 665 (1954); Note, 27 U. CINC. L. REV. 76, 77-78 n.9 (1958).

45. MODEL PROBATE CODE §§ 14, 69, 70 (Simes 1946). Generally, notice is to be sent by ordinary mail to all persons whose names and addresses are given in the petition, but registered mail is required to notify each heir and devisee either of the hearing on the petition for admission of the will to probate or for the appointment of a general administrator or, if this is not done, of the appointment of the personal representative. See SIMES & BAYSE, PROBLEMS IN PROBATE LAW 489 (1946). At the time the *Model Probate Code* was published, some states required more than published notice to the estate beneficiaries. *Id.* at 522.

46. See, e.g., IND. ANN. STAT. § 6-112 (Supp. 1962); MICH. STAT. ANN. § 27.3178(32) (1962); MO. ANN. STAT. § 472.100 (Supp. 1962); WIS.

a trust proceeding, a probate proceeding is comprised of a series of orders, many of which should be final. Among the most important final orders the probate court can render are those concerning the admission of a will to probate, the issuance of letters to the personal representative, the sale of estate assets, the determination of claims against the estate, the settlement of fiduciary accounts, and the determination of descent and distribution.<sup>47</sup> Traditionally, these probate proceedings have been described as *in rem* to signify that the estate property is within the court's jurisdiction and that the court's decrees affecting the property are binding on all interested parties.<sup>48</sup> Earlier cases indicated that no notice is needed in probate proceedings because of judicial control over the assets,<sup>49</sup> but this position fails to recognize that the court must determine the rights of individuals in these assets. If the due process concept is to be a meaningful guardian of the individual's property rights, his interest in an estate cannot be finally adjudicated until he has "had reasonable notice and an opportunity to be heard."<sup>50</sup>

Realistically, the notice required in an *in rem* proceeding like probate cannot be as extensive as in an *in personam* action because probate proceedings determine the interests of an uncertain number of individuals whose interests, names, and addresses may not be known.<sup>51</sup> The *Mullane* case, however, provides the criterion for determining the adequacy of the notice needed to secure a final order under these circumstances. Ordinarily, this would consist of publication coupled with a mailing to those persons whose interests, names, and addresses can be ascertained with due diligence. It is difficult to deny the applicability of the *Mullane* doctrine to probate proceedings both because of the similarity between trust and probate proceedings and because of the Su-

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STAT. §§ 310.04, 311.03, 324.18 (Supp. 1963). See generally Levy, *Probate in Common Form in the United States: The Problem of Notice in Probate Proceedings*, 1952 WIS. L. REV. 420, 424; Note, *Mullane v. Central Hanover Bank and Trust Co.—Statutory Reaction*, 39 IOWA L. REV. 665, 668 n.22 (1954).

47. SIMES & BASYE, PROBLEMS IN PROBATE LAW 493 (1946); Tilley, *The Mullane Case: New Notice Requirements*, Mich. S.B.J., Jan. 1951, pp. 12, 15-16, 19.

48. LADD & BOYD, IOWA PROBATE PRACTICE 3 n.5 (1957); SIMES & BASYE, PROBLEMS IN PROBATE LAW 489-504 (1946); Note, 50 MICH. L. REV. 124, 127-29 (1951).

49. SIMES & BASYE, PROBLEMS IN PROBATE LAW 505 (1946). *But see* discussion at 491-504 citing probate cases in which notice was required. As to differences over the definition of probate *res*, see *id.* at 517-21.

50. SIMES & BASYE, PROBLEMS IN PROBATE LAW 505-06, 516 (1946).

51. RHEINSTEIN, CASES ON DECEDENTS' ESTATES 573-74 (2d ed. 1955); SIMES & BASYE, PROBLEMS IN PROBATE LAW 505-06, 516 (1946).

preme Court's refusal to judge the adequacy of notice in terms of in rem, quasi in rem, or in personam jurisdiction.<sup>52</sup>

Although a probate proceeding consists of a series of court orders, a number of jurisdictions treat the administration of an estate as a single proceeding, requiring notice only at the commencement of the proceeding and requiring no additional notice when the court subsequently enters any decree relating to the estate.<sup>53</sup> Where this is the case, the initial notice must certainly be reasonable.<sup>54</sup> At the same time, however, some of these jurisdictions may treat the sale of realty and the decree of heirship as being entirely independent proceedings requiring separate notice;<sup>55</sup> moreover, state statutes sometimes provide for additional notice with respect to claims contests and hearings on the personal representative's final report.<sup>56</sup> Subsequent probate notice may also be required by due process considerations. Of special significance in this connection is the refusal of the Court in *Mullane* to regard the adequate notice given when a trust joined the common fund as being of any effect with respect to the hearing on the first account 15 months later, even though the original mailing included a copy of the statute providing for mailed notice of the accounting proceeding. To be safe under the *Mullane* doctrine, adequate notice should be given whenever a final order is sought in probate proceedings that might deprive interested parties of their property rights.<sup>57</sup>

52. Hayward, *supra* note 43, at 56-57; Levy, *supra* note 46, at 438-49; Tilley, *supra* note 47, at 14-20; Note, 70 HARV. L. REV. 1257 (1957); Note, 37 IOWA L. REV. 74, 78, 81 (1951); Note, 50 MICH. L. REV. 124, 138 (1951); Note, 27 U. CINC. L. REV. 76, 86 (1958); 1950 WIS. L. REV. 688. *But see In re Estate of Pierce*, 245 Iowa 22, 60 N.W.2d 894 (1953); Tilley, *supra* at 19; Note, 50 MICH. L. REV., *supra* at 129-39; Note, 32 WASH. L. REV. 165, 178-79 (1957).

53. SIMES & BASYE, PROBLEMS IN PROBATE LAW, 448-49, 506-15, 526 (1946). See also MODEL PROBATE CODE § 62 (Simes 1946); Basye, *supra* note 31, at 737, 743-44 (1956); Note, 50 MICH. L. REV. 124, 136 (1951).

54. SIMES & BASYE, PROBLEMS IN PROBATE LAW 510-15 (1946).

55. LADD & BOYD, *op. cit. supra* note 48, at 21-22; SIMES & BASYE, PROBLEMS IN PROBATE LAW 449, 509-10 (1946); Basye, *supra* note 31, at 737.

56. LADD & BOYD, *op. cit. supra* note 48, at 37, 63-67; SIMES & BASYE, PROBLEMS IN PROBATE LAW 515 (1946).

57. See LADD & BOYD, *op. cit. supra* note 48, at 21-22, 37, 63-67; Fraser, *Jurisdiction by Necessity—An Analysis of the Mullane Case*, 100 U. PA. L. REV. 305, 316-17 (1951); Tilley, *supra* note 56, at 14-20; Note, 45 IOWA L. REV. 134, 141-44 (1959); *cf.* Note, 32 WASH. L. REV. 165, 178-79 (1957), arguing that heirs are not entitled to notice of an order awarding the homestead to the widow because the heirs were notified of the representative's appointment and, pursuant to statute, could request that the representative give them notice of certain pending probate matters.

When applying *Mullane* to probate proceedings, attention must also be directed to the problem of defining "interested parties." Since the time of death determines the heirs, devisees, or legatees,<sup>58</sup> such beneficiaries are clearly "interested parties" entitled to adequate notice. In the event of a will, the intestate as well as the testate beneficiaries should be notified because of a possible will contest.<sup>59</sup> Less clear is the case of estate creditors. It is generally assumed, even after *Mullane*, that published notice will suffice, but the Supreme Court has cast some doubt on this matter where the names and addresses of creditors are known.<sup>60</sup>

Although the United States Supreme Court has not expressly applied the *Mullane* doctrine to probate proceedings, its subsequent reliance on the doctrine in analogous situations has raised the possibility that it will do so when confronted with a probate case.<sup>61</sup> Furthermore, under the *Mullane* doctrine, failure to give adequate notice constitutes a jurisdictional defect rendering the proceeding void,<sup>62</sup> and a statute of limitations will not afford any protec-

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58. At common law, the title and right to possession of realty vested instantly in the heirs or devisees, while the title and right to possession of personality passed to the personal representative for purposes of administration. LADD & BOYD, *op. cit. supra* note 48, at 21, 23; MODEL PROBATE CODE § 124, comment (Simes 1946).

59. Tilley, *supra* note 47; at 17: "[T]he 'interested parties' are the heirs at law or, after a will is admitted to probate, the devisees, legatees, and trust beneficiaries, if any . . . ." *But see In re Estate of Pierce*, 245 Iowa 22, 60 N.W.2d 894 (1953).

60. See *City of New York v. New York, N.H. & H.R.R.*, 344 U.S. 293 (1953) (bankruptcy). It has been argued that mailing is required to creditors whose names and addresses can be ascertained by the personal representative from an examination of decedent's records. Note, 32 WASH. L. REV. 165, 178 (1957).

MODEL PROBATE CODE § 3(k) (Simes 1946) contains the following:

"Interested persons" means heirs, devisees, spouses, creditors or any others having a property right in or claim against the estate of a decedent being administered. This meaning may vary at different stages and different parts of a proceeding and must be determined according to the particular purpose and matter involved.

As to the persons entitled to notice under the *Model Probate Code*, see note 45 *supra*. Although MO. REV. STAT. § 472.010(15) (1959) defines "interested persons" substantially the same as under the *Model Probate Code*, creditors are entitled to mailed notice only when the court so orders. MO. REV. STAT. § 472.100 (1959).

61. Note, *Requirements of Notice in In Rem Proceedings*, 70 HARV. L. REV. 1257, 1264 (1957).

62. See *Walker v. City of Hutchinson*, 352 U.S. 112 (1956) (condemnation proceeding collaterally attacked); Levy, *supra* note 46, at 429-30, 437-38 (by making lack of proper notice jurisdictional, it is more likely that the proper notice will be given); Note, 37 IOWA L. REV. 74, 79-80 (1951). As to the possible consequences of failure to give notice to persons specified in a statute, see SIMES & BASYE, *PROBLEMS IN PROBATE LAW* 522-23 (1946).



tion.<sup>63</sup> As a minimum precaution, therefore, each state ought to provide by statute<sup>64</sup> for at least one mailed notice<sup>65</sup> during the

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63. *Schroeder v. City of New York*, 371 U.S. 208 (1962). The case dealt with the validity of published and posted notice provided for in a New York statute establishing the procedure to be followed in condemning property rights required for a water supply. The statute also provided that claims for damages by riparian owners were barred after three years. The action to restrain continued diversion of water was brought by a riparian owner after the expiration of three years on the basis of inadequate notice of the condemnation proceedings. The Supreme Court held that published notices and notices posted off the owner's land were not adequate notice of the condemnation proceedings where the owner's name and address were readily ascertainable from both tax rolls and deed records. *Standard Oil Co. v. New Jersey*, 341 U.S. 428 (1951), cannot be cited for the proposition that a statute of limitations will foreclose an attack based on inadequate notice. In that case, the Court sustained an escheat proceeding based on published notice since the names and addresses of the interested parties were, of course, unknown.

With respect to estate creditors, however, it is important to remember that while a nonclaims period is started by a notice to creditors where the estate is being probated, nevertheless, many state statutes provide that the claims of creditors will be barred after the expiration of a set time where the estate is not administered and no notice to creditors is given. See MODEL PROBATE CODE § 135 (Simes 1946); *Basye*, *supra* note 31, at 774-75.

64. See *Wuchter v. Pizzutti*, 276 U.S. 13 (1928); *Hayward*, *supra* note 43, at 59 ("notice not authorized by statute is nothing more than actual notice and actual notice does not satisfy the constitutional requirements.").

65. A properly addressed notice sent by ordinary mail was sustained in *Nelson v. City of New York*, 352 U.S. 103 (1956), even though it was not actually received by the interested party. Notice mailed to a known incompetent having no guardian was held to violate the requirements of due process. *Covey v. Town of Somers*, 351 U.S. 141 (1956).

Although posted notice has been a traditional form of probate notice, *Basye*, *supra* note 31, at 743, it seems unlikely that the Supreme Court would sustain such notice in probate proceedings in light of the *Mullane* case. *Schroeder v. City of New York*, 371 U.S. 208 (1962), might be construed as indicating by implication that under proper circumstances, posted notice will satisfy the due process requirement. The Court there held that posting was not sufficient notice of the condemnation proceedings where the plaintiff's property was vacant at the time of posting, the posting was done in the general vicinity but not on the plaintiff's property, and the plaintiff's name and address as owner of the property were readily ascertainable from both tax rolls and deed records. The Court's language in *Schroeder* suggests that posting might be adequate notice if placed on the property affected by the proceeding in a place where the owner is known to be likely to see it. 371 U.S. at 213. Certainly, notice posted on the property would not be sufficient if the property is known to be unoccupied. In the *Mullane* case, the Court stated that notice by posting is reinforced by seizure of the property. 339 U.S. at 316. Possession of the decedent's property by the estate representative does not, however, constitute a seizure where the beneficiaries have not been in possession of the property. Moreover, the representative, like the trustee in *Mullane*, does not constitute a caretaker for the beneficiaries' interests in all situations because his interests may conflict with the beneficiaries as in an accounting proceeding. See note 40 *supra* and accompanying text.

period of administration to the heirs, devisees, and legatees whose names and addresses can be ascertained with due diligence.<sup>66</sup>

### III. GENERAL PROVISIONS RELATING TO FIDUCIARIES

Among the foremost needs of modern probate practice is adequate authority for the personal representative to manage the estate assets. The increasingly complex and diverse forms of decedents' investments make it imperative that personal representatives have power to take whatever action is required to pay creditors and transmit the remainder of the assets in the most advantageous form to the beneficiaries or their guardians or trustees.

If there is to be an expansion of the management powers of personal representatives, some attention must be given to statutory organization. Because of the similarities and interrelationships in the management needs of estate fiduciaries, a number of states have enacted general statutory provisions governing decedents' representatives, trustees, and guardians. In many instances the *Uniform Fiduciaries Act* has been adopted,<sup>67</sup> but in other cases more extensive provisions have been enacted.<sup>68</sup> Even though differences in the purposes of administration require variations in the handling of decedents' estates, guardianships, and trusts, certain common management problems exist. This is especially true where estate planning, death, and incompetency combine to subject one estate to all three types of administration. Accordingly, it seems desirable to include a section on fiduciaries in a model estates code. Where, however, material differences in the nature of the fiduciary responsibility exist, the applicable statute should be inserted in the probate, guardianship, or trust section of the code.<sup>69</sup>

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66. As to the meaning of "due diligence" under *Mullane*, see Note, 32 WASH. L. REV. 165, 178; Note, 32 IND. L.J. 469, 479-81 (1957).

67. The following 25 jurisdictions have adopted the *Uniform Fiduciaries Act*: Alabama, Arizona, Colorado, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Louisiana, Maryland, Minnesota, Missouri, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Virgin Islands, Wisconsin, and Wyoming. 9B UNIFORM LAWS ANN. 16 (Supp. 1962).

68. Such general fiduciary statutes usually include provisions for the appointment, qualification, removal, discharge, substitution, and compensation of fiduciaries and proper investments and accounting for fiduciaries. Various uniform acts are sometimes included. See COLO. REV. STAT. ANN. § 152-10 (1953) (guardians and decedents' estates representatives); DEL. CODE ANN. tit. 12, §§ 3301-08 (1953); MICH. STAT. ANN. §§ 27.3178(251)-(311) (1962); N.C. GEN. STAT. §§ 32-1 to 37-15 (1950) (includes *Uniform Fiduciaries Act*, *Uniform Trusts Act*, *Uniform Common Trust Fund Act*, *Uniform Principal and Income Act*); PA. STAT. ANN. tit. 20, §§ 320.932-.946, .1043 (1950) (trustees and guardians); TEX. PROB. CODE §§ 178-372 (1956) (guardians and decedents' estates representatives).

69. MODEL PROBATE CODE 14 (Simes 1946).

When examining fiduciary powers, two basic concepts must be considered. The first is the relationship of the fiduciary to the estate, third persons, and the beneficiaries; the second is the extent of the fiduciary's powers.

## A. STATUS OF THE FIDUCIARY

### 1. *Relationship to the Estate*

As to the relationship of the fiduciary to the estate, it is essential to bear in mind that an "estate" is not regarded as an entity for purposes of administration.<sup>70</sup> Unlike a corporation, an estate has no capacity to act; the administrative powers and duties are vested in the fiduciary.<sup>71</sup> Furthermore, the fiduciary is personally liable to third persons for the consequences of his acts, and while he may have a right of reimbursement from the estate, his liability is not limited to the extent of the estate assets.<sup>72</sup>

In discussing the entity concept of the estate prior to the *Model Probate Code*, Professor Atkinson concluded that even though there might be advantages in treating an estate as an entity, such a restructuring of administration concepts would bewilder the legal profession.<sup>73</sup> Accordingly, the *Model Probate Code* abides by tradition and does not adopt the entity theory. Some of its provisions, however, are consistent with the entity concept.<sup>74</sup> Thus, a parallel exists with the *Uniform Partnership Act*, where the draftsmen declined to recognize the partnership as an entity,<sup>75</sup> but nevertheless, codified the consequences of the theory in particular situations.<sup>76</sup>

### 2. *Relationship to Third Persons*

Consistent with its rejection of the entity concept, the *Model Probate Code* does not limit the personal liability of the representative to third persons arising out of his contracts or torts. The

70. An estate may be treated as an entity for other purposes. See INT. REV. CODE OF 1954, § 641(a).

71. ATKINSON, WILLS § 107 (2d ed. 1953); Atkinson, *Old Principles and New Ideas Concerning Probate Court Procedure*, 23 J. AM. JUD. SOC'Y 137-38 (1939); 36 IOWA L. REV. 377, 378 (1951).

72. 3 SCOTT, TRUSTS §§ 262, 264 (2d ed. 1956); 36 IOWA L. REV. 377, 380-81 (1951).

73. Atkinson, *supra* note 71, at 137-38.

74. See, e.g., MODEL PROBATE CODE § 136 (Simes 1946), authorizing the treatment of a separate action against the personal representative for the decedent's liabilities as a claim filed against the estate.

75. CRANE, PARTNERSHIPS § 3 (2d ed. 1952).

76. See, e.g., UNIFORM PARTNERSHIP ACT § 8(3), authorizing ownership of real property in partnership name, § 25, setting out limitations on the rights of partners in partnership property.

possibility of such a restriction does exist in section 131, which authorizes the court to order continuation of the decedent's business. That section specifically states that the court may indicate in its order the extent of the personal representative's liability for debts resulting from the operation of the business.<sup>77</sup> The draftsmen of the Code approached this exception to the general rule of liability cautiously by making it a matter of judicial discretion.

In contrast to the *Model Probate Code*, other statutes have moved in the direction of eliminating the contractual liability of fiduciaries to third persons. Section 23 of the *Model Business Corporation Act* provides that a fiduciary shall not be personally liable to a corporation as a holder of or subscriber to shares.<sup>78</sup> The *Uniform Trust Act* codifies the common-law rule permitting a trustee to exclude himself from personal liability on a contract.<sup>79</sup> Pennsylvania has restated the *Uniform Trusts* provision in more positive terms and made it applicable to both personal representatives and trustees;<sup>80</sup> its statute provides that if a fiduciary discloses that he is contracting as a fiduciary, he will not be personally liable on any written contract within the scope of his authority. With respect to tort liability, the Pennsylvania law authorizes the fiduciary to insure against liability to third persons at estate expense.<sup>81</sup> These statutory attempts to deal with the personal liability of fiduciaries demonstrate the need for a thorough re-examination of the contractual and tort liability of fiduciaries to third persons.<sup>82</sup>

### 3. Relationship to Beneficiaries

Limiting the personal liability of fiduciaries to third persons does not, of course, relieve estate representatives of their fiduciary duties to the beneficiaries of the estate. In administering the estate, a fiduciary is subject to a duty of care and loyalty. The existence of this obligation is well established at common law,<sup>83</sup> but

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77. MODEL PROBATE CODE § 131(b) (Simes 1946).

78. ABA-ALI MODEL BUS. CORP. ACT § 23 (1953).

79. UNIFORM TRUSTS ACT § 12(3). See also §§ 12-14 as to the contract and tort liability of the trustee and trust estate. For the common-law rule, see RESTATEMENT (SECOND), TRUSTS §§ 262-63 (1959).

80. PA. STAT. ANN. tit. 20, §§ 320.522, .939 (1950). See also ORE. REV. STAT. §§ 126.215, 126.290 (1961).

81. PA. STAT. ANN. tit. 20, §§ 320.503, .933 (1950). See 3 SCOTT, TRUSTS § 264 (2d ed. 1956). See also UNIFORM TRUSTS ACT § 13, relating to the right of the trustee to exoneration or reimbursement for tort liability.

82. See TRUST DIV., AMERICAN BANKERS ASS'N, TRUST AND ESTATE LEGISLATION 174-75 (1961); Fratcher, *Powers and Duties of Guardians of Property*, 45 IOWA L. REV. 264, 299-300, 333 (1960); King, *Protecting a Fiduciary from Personal Liability*, Prac. Law., Nov. 1955, pp. 11-14.

83. See, e.g., *Smith v. Tolversen*, 190 Minn. 410, 252 N.W. 423 (1934).

it has not always been clearly articulated in statutory form. This duty is so fundamental that it should be adequately and carefully dealt with by statute to the greatest possible extent.

Under the common law, the fiduciary is not an insurer of the safety of the estate funds and is not liable for mere errors in judgment.<sup>84</sup> However, he is required to act in good faith and to exercise that degree of care and prudence in the management of the estate that ordinarily prudent men exercise in regard to their own affairs.<sup>85</sup> Section 172 of the *Model Probate Code* provides that the personal representative shall be liable for his negligence in the performance of certain functions.<sup>86</sup> This section neither sets forth a general standard of care nor encompasses all aspects of the fiduciary's administration. By way of contrast, the *Model Prudent Man Investment Act* has adopted a variation of the common-law standard of care and provides that:

In acquiring, investing, reinvesting, exchanging, retaining, selling and managing property for the benefit of another, a fiduciary shall exercise the judgment and care under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital. . . .<sup>87</sup>

For purposes of clarity, an estates code should contain a statutory definition of the requisite standard of care and should make it applicable to all of the fiduciary's acts.<sup>88</sup> In this broad context, some question might be raised as to whether the same criter-

84. *Costello v. Costello*, 209 N.Y. 252, 261, 103 N.E. 148, 152 (1913).

85. *Speight v. Gaunt*, 9 App. Cas. 1, 19, 20 (1883) (Lord Blackburn).

86. MODEL PROBATE CODE § 172(c) (Simes 1946), which provides:

Every personal representative shall be liable and chargeable in his accounts for neglect or unreasonable delay in collecting the credits or other assets of the estate or in selling, mortgaging, or leasing the property of the estate; for neglect in paying over money or delivering property of the estate he shall have in his hands; for failure to account for or to close the estate within the time provided by this Code; for any loss to the estate arising from his embezzlement or commingling of the assets of the estate with other property; for loss to the estate through self-dealing; for any loss to the estate arising from wrongful acts or omissions of his co-representatives which he could have prevented by the exercise of ordinary care; and for any other negligent or willful act or nonfeasance in his administration of the estate by which loss to the estate arises.

See also MICH. STAT. ANN. §§ 27.3178(286), (294)(1962).

87. MODEL PRUDENT MAN INVESTMENT ACT § 1. See also DEL. CODE ANN. tit. 12, § 3302 (1953); SIMES & FRATCHEL, CASES ON FIDUCIARY ADMINISTRATION 148-49 (2d ed. 1956).

88. See TEX. PROB. CODE § 230 (1956) (executor, administrator, and guardian to take care of and manage the estate property as a prudent man would his own property).

ion ought to apply to guardians, trustees, and decedents' representatives, and whether the common-law terminology adequately reflects the proper degree of conservatism required of these fiduciaries. It might, therefore, be more accurate to state the degree of care as that which ordinarily prudent men would exercise under similar circumstances, or that which ordinarily prudent guardians, trustees, or decedents' representatives would exercise under the circumstances. As a practical matter, it is unlikely that such differences in language would materially affect a court's determination of liability.<sup>89</sup>

In addition to his duty of care, the fiduciary has a duty of loyalty.<sup>90</sup> Statutes dealing with the duty of loyalty are of two types; they either permit self-dealing or they prohibit it completely. By implication, the *Model Probate Code* apparently permits self-dealing, for it provides merely that the personal representative shall be liable for any loss to the estate resulting from self-dealing.<sup>91</sup> The alternative is illustrated by the provisions of the *Uniform Trusts Act* that prohibit a trustee from lending trust funds to himself<sup>92</sup> and from dealing in property with the trust.<sup>93</sup> Although it is unlikely that a trust would ever benefit by lending money to the trustee, it might benefit from either a sale of trust assets to him or a purchase of assets from him, if the transaction is surrounded by sufficient safeguards. Since the *Model Probate Code* deals only indirectly with the problem, further clarification of the duty of loyalty is warranted.<sup>94</sup>

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89. See BOGERT, TRUSTS AND TRUSTEES § 541 (2d ed. 1960); 2 SCOTT, TRUSTS § 174 (2d ed. 1956).

90. *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (1929).

91. See note 86 *supra*. See also MODEL PROBATE CODE § 155 (Simes 1946). *But see* proscriptions on self-dealing by guardians, *id.* §§ 226, 230(b), 252.

92. UNIFORM TRUSTS ACT § 3.

93. *Id.* § 5. Section 6 prohibits the sale of property from one trust to another, while § 7 precludes a corporate trustee from purchasing its own stock for the trust. On the other hand, § 4 permits a corporate trustee, upon providing adequate security, to deposit funds with itself pending investment, distribution, or payment of debts. See 2 SCOTT, TRUSTS § 170 nn.3-5 (2d ed. 1956) for a listing of statutes expressly prohibiting self-dealing by fiduciaries. See also Fratcher, *Trustees' Powers Legislation*, 37 N.Y.U.L. REV. 627, 643 n.102 (1962).

94. The choices available to the revisers are illustrated by IOWA PROBATE CODE § 159 (1963):

No fiduciary shall in any manner deal with himself, and shall derive no profit other than his distributive share in the estate from the sale or liquidation of any property belonging to the estate;

MONT. REV. CODES ANN. § 86-303 (1949):

Neither a trustee nor any of his agents may take part in any transaction concerning the trust in which he or any one for whom he acts as agent has an interest, present or contingent, adverse to that of his beneficiary, except as follows:

Even if the duties of care and loyalty are specified in an estates code, the fiduciary may be relieved of these duties by means of an exculpatory clause.<sup>95</sup> Courts generally have strictly construed or held invalid as against public policy exculpatory clauses that seek to lower the standards to which fiduciaries are held by law.<sup>96</sup> Notwithstanding this judicial attitude, the *Uniform Trusts Act* expressly denies the settlor or beneficiaries the right to remove prohibitions on the trustee's borrowing of money from the trust and dealing in property with the estate,<sup>97</sup> and a New York statute invalidates any attempt to provide for the exoneration from liability of an executor or testamentary trustee where he fails to exercise reasonable care.<sup>98</sup>

## B. POWERS OF THE FIDUCIARY

### 1. *Express and Implied Powers*

The extent of a fiduciary's powers is not altogether clear. Although a few specific powers are accorded him by the common law,<sup>99</sup> a fiduciary for the most part can exercise only those pow-

1. When the beneficiary, having capacity to contract, with full knowledge of the motives of the trustee, and of all other facts concerning the transaction which might affect his own decision, and without the use of any influence on the part of the trustee permits him to do so;

2. When the beneficiary, not having capacity to contract, the property court, upon the like information of the facts, grants the like permission; or,

3. When some of the beneficiaries, having capacity to contract, and some not having it, the former grant permission for themselves, and the proper court for the latter, in the manner above prescribed.

For additional alternatives, see CAL. PROB. CODE § 583; MICH. STAT. ANN. §§ 27.3178(252), (288) (1962); MONT. REV. CODES ANN. §§ 86-301 to -311 (1955); N.D. CENT. CODE §§ 59-01-09 to -18 (1960); S.D. CODE §§ 59.0106 -.0115 (1939); BOGERT, TRUSTS AND TRUSTEES § 543 (2d ed. 1960); Fratcher, *Powers and Duties of Guardians of Property*, 45 IOWA L. REV. 264, 321-25 (1960).

95. In recent years, there appears to have been a substantial decline in the use of exculpatory clauses in trust instruments. See BOGERT, TRUSTS AND TRUSTEES § 542, at 474-75 (2d ed. 1960).

96. See *Countiss v. Whiting*, 306 Ill. App. 548, 29 N.E.2d 277 (1940); cf. *Browning v. Fidelity Trust Co.*, 250 Fed. 321 (3d Cir.), cert. denied, 248 U.S. 564 (1918).

97. UNIFORM TRUSTS ACT §§ 17-18. See also § 19, empowering the court to relieve a trustee who has acted honestly and reasonably from liability under the act.

98. N.Y. DECED. EST. LAW § 125. With respect to statutory provisions relating to exculpatory clauses, see BOGERT, TRUSTS AND TRUSTEES § 542 (2d ed. 1960).

99. For example, the personal representative has power to compromise claims of third persons against the estate and to sell personal property. ATKINSON, WILLS §§ 117, 122 (2d ed. 1953).

ers expressly conferred on him by statute or by instrument.<sup>100</sup> Aside from these express powers, the fiduciary cannot be certain as to what additional powers he has. Although a corporation has by implication all those powers necessary to achieve its purposes,<sup>101</sup> the fiduciary cannot assume that the law allows him to exercise any power that he may reasonably deem appropriate to the efficient administration of the estate.<sup>102</sup> As a consequence, a major portion of estate planning is devoted to the drafting of powers clauses that will enable the fiduciary to cope with the complex problems of contemporary administration.

The *Model Probate Code* grants the personal representative and the guardian numerous powers that can be exercised pursuant to court order.<sup>103</sup> Some jurisdictions have sought to expand the powers of trustees by codifying the standard clauses used in inter vivos and testamentary instruments.<sup>104</sup> Thus, the statutory approach has been to enumerate powers rather than to rely on any concept of implied or inherent powers.<sup>105</sup> Nevertheless, Pennsylvania<sup>106</sup> and Colorado<sup>107</sup> have statutes that refer to the inherent

100. BOGERT, TRUSTS AND TRUSTEES § 551 (2d ed. 1960). See also *In re Estate of Munger*, 168 Iowa 372, 150 N.W. 447 (1915); Fratcher, *supra* note 94, at 627.

101. HENN, CORPORATIONS § 185 (1961).

102. BOGERT, TRUSTS AND TRUSTEES § 551 (2d ed. 1960); RESTATEMENT (SECOND), TRUSTS § 186 (1959). The Supreme Court of Iowa has stated:

The powers, duties and obligations of the executor or administrator with respect to the estate are defined and limited by the will or statute. He has no implied powers beyond those necessary to effectuate the powers expressly conferred . . . .

*In re Estate of Munger*, 168 Iowa 372, 375, 150 N.W. 447, 449 (1915).

103. MODEL PROBATE CODE §§ 126 (compromise of claims held by the estate), 147 (compromise of claims against the estate), 158-59 (sale of personalty) (Simes 1946). See notes 100 *supra* and 111 *infra*.

104. The following statutes relate to the powers of trustees: ARK. STAT. ANN. § 58-116 (Supp. 1961); FLA. STAT. § 691.03 (1951); IOWA PROBATE CODE § 699 (1963); OKLA. STAT. tit. 60, § 175.24 (1961); TEX. REV. CIV. STAT., art. 7425b-25 (1960); WASH. REV. CODE § 30.99.070 (1963). See generally Fratcher, *Trustees' Powers Legislation*, 37 N.Y.U.L. REV. 627, 629-39, 659-60 (1962). For a discussion of statutes permitting courts to confer powers on trustees, see *id.* at 655-56, 659. As to guardians, see CAL. PROB. CODE § 1853, which allows the court discretion to grant the conservator additional powers which are extensively enumerated; PA. STAT. ANN. tit. 20, §§ 1144.1-9 (Supp. 1962), which provides that the powers of guardians shall be the same as trustees with respect to certain specified powers.

105. For the distinction between inherent and implied powers, see STEPHENSON, DRAFTING WILLS AND TRUST AGREEMENTS, ADMINISTRATIVE PROVISIONS § 2.1 (1952).

106. PA. STAT. ANN. tit. 20, §§ 320.523, .951, .1044 (1950).

107. COLO. REV. STAT. ANN. § 152-10-13 (1953).



powers of the fiduciary, and a Louisiana statute deals with implied powers.<sup>108</sup>

Since tradition and certainty necessitate a comprehensive statutory statement of fiduciary powers, the revisers of the *Model Probate Code* should ascertain the need for including additional powers. Moreover, it would seem advisable to consider the desirability of a provision relating to implied powers.<sup>109</sup> Another matter that should be considered is the need for a specific court order relating to the exercise of any given power. Although the court historically has played a greater role in the supervision of decedents' estates and guardianships than of trusts,<sup>110</sup> it is common in the modern will to grant the same powers to the executor as are granted to the testamentary trustee, and to permit the exercise of these powers without obtaining a court order.<sup>111</sup>

108. LA. REV. STAT. ANN. § 9.1991 (1951).

109. Testamentary and inter vivos instruments, after enumerating various specific powers, often conclude by providing that the fiduciary shall also be authorized:

To do all the acts, . . . in his judgment needful or desirable for the proper and advantageous management of the trust estate, to the same extent and with the same effect as might legally be done by an individual in absolute ownership and control of the said property.

STEPHENSON, *op. cit. supra* note 105, § 2.47, at 43. See OKLA. STAT. tit. 60, § 171 (1961), which provides that trusts may be created with power in the trustee to do certain specified acts "and generally to do any lawful act in relation to such trust property which any individual owning the same absolutely might do."

The *Model Business Corporation Act* sets forth certain corporate powers and concludes by providing that:

Each corporation shall have power:

(r) To have and exercise all powers necessary or convenient to effect any or all of the purposes for which the corporation is organized. ABA-ALI MODEL BUS. CORP. ACT § 4(r) (1953).

110. SIMES & BASYE, PROBLEMS IN PROBATE LAW 462-64 (1946).

111. After setting forth the powers, the will might state: "To exercise any and all the foregoing rights, powers, and discretion without giving prior notice to any person and without first obtaining an order of court therefor." STEPHENSON, *op. cit. supra* note 105, § 2.36, at 36. See generally Polasky, *Planning for the Disposition of a Substantial Interest in a Closely Held Business*, 44 IOWA L. REV. 83, 95-96 (1958); materials cited in note 126 *infra*. See also MODEL PROBATE CODE § 151 (Simes 1946):

When power to sell, mortgage, lease or exchange property of the estate has been given to any personal representative under the terms of any will, the personal representative may proceed under such power, or may proceed under the provisions of this Code, as he may determine.

In adapting § 126 and § 147 of the *Model Probate Code*, which deal with the compromise of claims held by and against the estate, the new Iowa Code eliminates any requirement of a court order with only one exception. IOWA PROBATE CODE §§ 114-15 (1963). The Iowa Code also authorizes the sale of personal property of a perishable nature or for which

## 2. *The Power to Delegate*

An ancillary problem is posed by the fiduciary's need for assistance in the administration of particular aspects of an estate. Historically, a fiduciary has not been allowed to delegate many of his responsibilities to others.<sup>112</sup> In general, this rule is sound, for efficient administration is fostered by centralizing responsibility in the fiduciary and holding him accountable for the proper handling of the estate. Unfortunately, however, if this restriction on delegation is applied strictly, the fiduciary may be foreclosed from utilizing the services of third persons whose aid would be of benefit to the estate.

To facilitate administration, statutes have been enacted authorizing the delegation of specific fiduciary responsibilities.<sup>113</sup> Although in Pennsylvania personal representatives, trustees, and guardians are authorized to perform any acts of administration through attorneys-in-fact, the statute specifically provides that this does not authorize the delegation of any discretionary power.<sup>114</sup>

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there is a regularly established market without court order. IOWA PROBATE CODE § 387(1) (1963). Section 122 provides that "the acts of the fiduciary without prior approval of court after notice, may be contested by any interested person at or before the entry of the order discharging the fiduciary." IOWA PROBATE CODE § 122 (1963).

112. See *Bates v. Jones*, 224 Ala. 83, 139 So. 242 (1932); *Gaver v. Early*, 191 Cal. 123, 215 Pac. 394 (1923). See generally BOGERT, TRUSTS AND TRUSTEES §§ 555-57 (2d ed. 1960); RESTATEMENT (SECOND), TRUSTS § 171 (1959); 2 SCOTT, TRUSTS §§ 171-171.4 (2d ed. 1956); SIMES & FRATCHER, CASES ON FIDUCIARY ADMINISTRATION 147-48 (2d ed. 1956); Fratcher, *Powers and Duties of Guardians of Property*, 45 IOWA L. REV. 264, 325-26 (1960).

113. As to statutes:

(a) authorizing an agreement between a fiduciary and a surety that deposited funds of the estate shall not be withdrawn without the consent of the surety, see MODEL PROBATE CODE §§ 108, 198 (Simes 1946); BOGERT, TRUSTS AND TRUSTEES § 556, at 80-81 (2d ed. 1960); Fratcher, *Powers and Duties of Guardians of Property*, 45 IOWA L. REV. 264, 326 (1960);

(b) authorizing investment in mutual funds securities, see BOGERT, TRUSTS AND TRUSTEES § 679, at 311-13 (2d ed. 1960); 3 SCOTT, TRUSTS § 227.9A (2d ed. 1956);

(c) authorizing an attorney-in-fact to conduct a sale of property, see CAL. CIV. CODE § 2924(a); GA. CODE § 4-104 (1933); PA. STAT. ANN. tit. 20, §§ 320.509, .941, .1043 (Supp. 1962);

(d) authorizing voting by proxy, see ABA-ALI MODEL BUS. CORP. ACT § 31 (1960); BOGERT, TRUSTS AND TRUSTEES § 556, at 76-80 (2d ed. 1960); 2 SCOTT, TRUSTS § 193.3 (2d ed. 1956); UNIFORM TRUSTS ACT § 8;

(e) authorizing conduct of business as a partnership or corporation, see MODEL PROBATE CODE § 131(a) (Simes 1946).

114. PA. STAT. ANN. tit. 20, §§ 320.509a, .941a, .1043 (Supp. 1962).

Statutes in Texas<sup>115</sup> and Oklahoma<sup>116</sup> authorize trustees to employ "attorneys, accountants, agents, and brokers reasonably necessary in the administration of the trust estate." A more comprehensive statute has been enacted in Iowa. Under that statute, the court may authorize a fiduciary to

engage, at estate expense, outside specialists, and he may delegate to them, or consult with them for advice regarding the performance of aspects of the estate management which require professional skills or facilities which he does not possess, or does not possess in sufficient degree, and he may employ, at estate expense, subordinates and agents to perform ministerial acts and carry on or complete details of estate business under the policies and terms established by him.<sup>117</sup>

It is further provided that the fiduciary shall not be liable personally for the conduct of the person engaged unless such conduct would constitute a breach of duty by the fiduciary had he been the actor and, in addition, the fiduciary had either directed or approved the conduct or had failed to exercise proper care in the selection or supervision of the person engaged.<sup>118</sup>

### 3. Powers of Co-Fiduciaries

Where there are two or more personal representatives, the *Model Probate Code* requires that they must all join in the exercise of certain specified powers although other powers can be exercised by any one of them.<sup>119</sup> While statutes may differ as to whether action should be taken by all,<sup>120</sup> by a majority,<sup>121</sup> or by only

115. TEX. REV. CIV. STAT. art. 7425b-25(H) (1960). For similar provisions concerning trustees and executors, see ARK. STAT. ANN. 58-116(w) (Supp. 1961).

116. OKLA. STAT. tit. 60, § 175.24(H) (1961). See also CAL. PROB. CODE § 1853, authorizing the court to grant to the conservator the power to employ attorneys, accountants, investment counsel, agents, depositaries, and employees at estate expense.

117. IOWA PROBATE CODE § 84 (1963). See also BOGERT, TRUSTS AND TRUSTEES § 557 (2d ed. 1960); Note, *Delegation of Fiduciary Duties*, 46 IOWA L. REV. 127, 144-45 (1960).

The English Trustee Act of 1925 makes broad provision for the delegation of fiduciary duties. Trustee Act, 1925, 15 & 16 Geo. 5, c. 19, §§ 23, 25. See BOGERT, TRUSTS AND TRUSTEES § 555, at 59-62 (2d ed. 1960).

118. IOWA PROBATE CODE § 85 (1963). Section 86 authorizes the court to reduce the fiduciary's fee where the services rendered by the person engaged would normally be performed by the fiduciary. *Id.* § 86.

119. MODEL PROBATE CODE § 102 (Simes 1946). See also IND. ANN. STAT. §§ 7-410 (1953) (based on the *Model Probate Code*), -411 (where all are required to act and there is disagreement, the court shall direct the action upon petition).

120. *E.g.*, IOWA PROBATE CODE § 76 (1963) (in the event of a deadlock, fiduciaries may apply to the court, which shall direct).

121. UNIFORM TRUSTS ACT § 11 (majority may act where there are more than three trustees). See also PA. STAT. ANN. tit. 20, §§ 320.519, .949 (1950) (where there is no majority, the court may direct upon petition);

one of the fiduciaries,<sup>122</sup> some provision should be made concerning fiduciaries who do not participate in the action. Thus, the *Uniform Trusts Act* stipulates that no trustee shall be liable to the beneficiaries for the consequences of any act in which he has not participated.<sup>123</sup> If he is directed by the majority trustees to join in the act, he can relieve himself of any liability for the action by filing a written dissent with any of his co-trustees at or before the time of the joinder. Moreover, in any statute requiring more than one fiduciary to act, it would also be desirable to set forth a procedure for resolving a deadlock.<sup>124</sup>

### CONCLUSION

Because of its comprehensive analysis and organization of probate and guardianship law,<sup>125</sup> the *Model Probate Code* has been the single factor most responsible for statutory improvements in these fields. At the same time, the 17 years since the publication of the Code have wrought significant changes in estate planning and administration. As a consequence, the *Model Probate Code* is now under revision.

The revisers of the Code are, of course, immediately confronted with specific problems of probate and guardianship law that need re-examination.<sup>126</sup> Nevertheless, they cannot confine their efforts to the redrafting of a few provisions within the existing structure of the Code. Instead, their task is not unlike that of the drafters of the *Uniform Commercial Code*, for changed circumstances require an integrated statutory approach to the problems of trust, probate, and guardianship administration. This result can best be achieved through a Model Estates Code.

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Fratcher, *Trustees' Powers Legislation*, 37 N.Y.U.L. REV. 627, 637 (1962).

122. *E.g.*, TEX. PROB. CODE § 240 (1956).

123. UNIFORM TRUSTS ACT § 11(1). Section 11(2) states that this provision does not excuse a co-trustee from liability for inactivity in the administration of the trust nor for failure to attempt to prevent a breach of trust. For similar provisions, see PA. STAT. ANN. tit. 20, §§ 320.519 (personal representatives), 949 (trustees) (1950).

124. See notes 119-21 *supra*.

125. For a comprehensive survey of the Code, see Niles, *Model Probate Code and Monographs on Probate Law: A Review*, 45 MICH. L. REV. 321 (1947).

126. For an incisive analysis and suggestions pertaining to the improvement of the *Model Probate Code*, see Rheinstejn, *Some Observations on Wills Under the Indiana Probate Code of 1953*, 30 IND. L.J. 152 (1955); Rheinstejn, *The Model Probate Code: A Critique*, 48 COLUM. L. REV. 534 (1948). As to simplifying and dispensing with the administration of estates, see Basye, *Streamlining Administration Under the New Texas Probate Code*, 35 TEXAS L. REV. 165, 170-87 (1956).

