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# MONTANA UNIFORM PROBATE CODE: A CHECKLIST FOR PROBATE

Elaine M. Hightower

## I. INTRODUCTION

Montana's Uniform Probate Code<sup>1</sup> [hereinafter referred to as MUPC], adopted in 1974, provides a flexible and simplified approach to probate administration. The MUPC allows a choice of formal or informal proceedings for each step of the probate process, and thus enables the personal representative to enlist the court's help only when necessary.<sup>2</sup> Supervised administration remains available to those who desire a court's constant supervision during the estate's administration.<sup>3</sup> For small estates, the MUPC also offers an abbreviated procedure.<sup>4</sup>

This comment is not an exhaustive study on the intricacies of probate procedure; rather, it sets forth a basic checklist of essential steps in the probate process. Informal, formal, and small estate procedures are discussed separately.

## II. THE NECESSITY OF PROBATE

The MUPC recognizes a decedent's right, subject to the limitations of the code, to leave property by will or to die intestate.<sup>5</sup> If the decedent leaves a will, the will must be declared valid by formal or informal order of the court.<sup>6</sup> The MUPC lists two exceptions to this general rule.<sup>7</sup> A will need not be declared valid if: (1) no probate occurred because the devisees believed the property to be owned in joint tenancy with rights of survivorship or (2) the devisees were unaware an estate existed.<sup>8</sup> Additionally, a will administered under the small estate provisions need not be pro-

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1. Montana's Uniform Probate Code is codified at several places within title 72 of the Montana Code Annotated. See MONT. CODE ANN. § 72-1-101: "Chapters 1 through 5 and Chapter 16 part 6, shall be known and may be cited as the 'Uniform Probate Code.'"

2. MONT. CODE ANN. tit. 72 ch. 3 Official Comments annot. (1984).

3. MONT. CODE ANN. §§ 72-3-401 to -406 (1983).

4. MONT. CODE ANN. §§ 72-3-1101 to -1104 (1983).

5. MONT. CODE ANN. § 72-3-101 (1983).

6. MONT. CODE ANN. § 72-3-102 (1983).

7. A will, not yet probated, may be admitted as evidence of a devise if no court proceedings have occurred and if either the devisee possessed the willed property or no one possessed the property because of the decedent's title during testacy proceedings. MONT. CODE ANN. § 72-3-102(1), (2) (1983).

8. MONT. CODE ANN. § 72-3-102 annot. (1984).

bated.<sup>9</sup> Thus, unless one of the exceptions apply, the decedent's estate should be either formally or informally probated.<sup>10</sup>

Any interested person may begin probate proceedings.<sup>11</sup> An interested person, wishing notice of subsequent filings and proceedings, may demand such notice by filing a demand with the court.<sup>12</sup> Persons must file in the county of proper venue, in the county where the decedent was last domiciled, or if not domiciled within Montana, then in any county containing the decedent's property.<sup>13</sup> An order by a court of proper venue is conclusive as to all persons given notice even "though less than all interested persons [were] notified."<sup>14</sup>

In order to hasten a sometimes lengthy administration, the MUPC urges closure of the estate within two years from appointment of the personal representative.<sup>15</sup> Upon failure to close within two years, the personal representative must demonstrate to the court good cause for such failure. Failure to show good cause may result in a court order to close the estate within thirty days.<sup>16</sup> This, however, rarely occurs.

The MUPC, unlike the Uniform Probate Code [hereinafter referred to as UPC], does not require commencement of probate proceedings within three years of decedent's death if no prior proceed-

9. MONT. CODE ANN. § 72-3-102 (1983).

10. MONT. CODE ANN. tit. 72 ch. 3 Official Comments annot. (1984). Additionally, if a decedent leaves motor vehicles not exceeding a combined value of \$15,000, and leaves no other property requiring probate, the vehicles may be transferred to an heir without probate. MONT. CODE ANN. § 61-3-201(5)(a) (1983).

11. MONT. CODE ANN. § 72-3-105 (1983). The MUPC defines an interested person as any person "having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person which may be affected by the proceeding. It also includes persons having priority for appointment as personal representative and other fiduciaries representing interested persons." MONT. CODE ANN. § 72-1-103(21) (1983).

12. MONT. CODE ANN. § 72-3-106 (1983). The interested person must state "the name of the decedent; the nature of his interest in the estate; and the demandant's address or that of his attorney." Then the clerk of court will mail the demand to the personal representative. See *Montana Probate Procedure* (State Bar of Montana 1982-83 Edition) [hereinafter cited as *Montana Probate Procedure Forms*].

13. MONT. CODE ANN. § 72-3-112(1) (1983). The court may transfer venue to a proper county, but after proper venue is established, the court then obtains exclusive jurisdiction of all subsequent proceedings. MONT. CODE ANN. § 72-3-112(2), (3) (1983). This comment does not include provisions on foreign probate. If probate proceedings have occurred in another state, the MUPC specially provides for appointment of a personal representative and proceedings in Montana. See MONT. CODE ANN. §§ 72-4-101 to -402 (1983). The Montana Supreme Court in *In Re Estate of Brown*, 156 Mont. 170, 447 P.2d 882 (1970), held that MONT. CODE ANN. § 72-3-112 (1983) was mandatory and that any probate administered in an improper county was void.

14. MONT. CODE ANN. § 72-3-111 (1983).

15. MONT. CODE ANN. § 72-3-1015(1) (1983).

16. MONT. CODE ANN. § 72-3-1015 (1983).

ings have been filed. If a prior probate, however, has been commenced, it may not be challenged after three years.<sup>17</sup> Again, exceptions to this general rule exist. If a personal representative previously probated a will at decedent's domicile, if a court previously dismissed probate proceedings for failure to establish decedent's death, or if an interested person brought proceedings to contest a prior informal probate, then further proceedings can commence after the three year statute of limitations has run. Proceedings to contest an informal probate may commence within one year of informal probate or three years of decedent's death, whichever occurs last.<sup>18</sup>

The running of the three year limitation creates a final assumption of intestacy.<sup>19</sup> It also finalizes an informal probate.<sup>20</sup> Courts strictly enforce the limitation. In *Matter of Estate of Taylor*,<sup>21</sup> the Montana Supreme Court upheld the statute and stated that:

Montana's Uniform Probate Code establishes a strong public policy to administer estates of decedents expeditiously and without unreasonable delay. Such public policy would be rendered meaningless and illusory if personal agreements and disputes between persons involved in estate administration could be litigated by raising estoppel as a bar to time limitations in the probate code many years later. If such were permissible there would be no finality to administration and distribution of the estates.<sup>22</sup>

Based on the running of the three year limitation, the court in *Taylor* upheld both the assumption of intestacy and the former informal probate.<sup>23</sup>

### III. THE CHOICE OF PROBATE PROCEEDINGS

To probate an estate, interested persons may choose supervised administration, formal procedures, informal procedures, or

17. MONT. CODE ANN. § 72-3-122(1), (2) (1983).

18. *Id.* The three year statute of limitations does not limit an interested person's right to use the will as evidence of a devise. MONT. CODE ANN. § 72-3-102 (1983).

19. MONT. CODE ANN. § 72-3-102 annot. (1983).

20. *Id.* The three year statute of limitations can be shortened by filing for a formal testacy proceeding.

21. \_\_\_ Mont. \_\_\_, 675 P.2d 944 (1984).

22. *Id.* at \_\_\_, 675 P.2d at 946. In *Taylor*, the petitioner filed a petition to probate seven years after the decedent had died. The estate had previously been informally probated under the provisions of intestate succession. Petitioner argued that the original representative fraudulently misrepresented the contents of the will. The supreme court held that the three year statute of limitations barred probate of the will.

23. *Id.*

small estates procedures. Supervised administration provides for one continuous court proceeding where all steps of administration are taken formally.<sup>24</sup> Since supervised administration requires court supervision of the entire administrative process, it is both costly and time consuming. Only when the testator so wishes, or an interested person desires assurance that all necessary steps are completed, should supervised administration be undertaken.<sup>25</sup> In all other instances, formal or informal proceedings prove most desirable.

A personal representative should initiate formal proceedings when there exists a possibility of contested issues. Otherwise, informal proceedings are less costly and more time efficient. Since "[e]ach proceeding before the court or clerk is independent of any other proceeding involving the same estate . . .,"<sup>26</sup> the MUPC encourages the personal representative to utilize a mixture of formal and informal proceedings. Unless presented with an issue where a court order is desired, the personal representative should administer the estate informally.

The simplest method involves small estates.<sup>27</sup> Administration occurs simply through use of affidavits and/or a personal representative's sworn statement to close.<sup>28</sup> A devisee can fully administer an estate without court filing.

#### IV. BEGINNING AN INFORMAL PROBATE

##### [x] *Application for Informal Probate*<sup>29</sup>

- [x] Notify persons, if required, of the application for probate and for appointment.
- [x] File a verified application with the clerk of court (include will if died testate).
- [x] Obtain an Order of Informal probate.

Any interested person can apply for informal probate.<sup>30</sup> The informal petition offers simple notification procedures. The applicant must notify only those interested persons who have filed a demand for notice with the court and any currently appointed personal representative of the estate.<sup>31</sup> The MUPC lists the state-

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24. MONT. CODE ANN. § 72-3-401 (1983).

25. MONT. CODE ANN. §§ 72-3-401, -402 annot. (1984).

26. MONT. CODE ANN. § 72-3-121(1) (1983).

27. MONT. CODE ANN. § 72-3-1101(1)(a) (1983).

28. MONT. CODE ANN. §§ 72-3-1101, -1102, -1104 (1983).

29. Montana Probate Procedure Forms also provides a useful checklist.

30. MONT. CODE ANN. § 72-3-105 (1983).

31. MONT. CODE ANN. § 72-3-211 (1983).

ments required in the application<sup>32</sup> and enumerates additional requirements for informal probate under a will.<sup>33</sup> The applicant must verify and file the application with the clerk of court.<sup>34</sup>

The clerk will grant informal probate if the interested person completed the application, affirmed the truth of the statements made, appeared as an interested person, filed in a county of proper venue, produced for the clerk an original, executed an unrevoked will or verified the absence of a will, gave notice of application, and filed within the time limit for original probate.<sup>35</sup> The clerk, without further proof, can probate a will containing a proper attestation clause.<sup>36</sup>

The clerk, however, must deny informal probate if there appears to be a previously appointed personal representative in another county, a prior probate order, or a series of valid testamentary instruments.<sup>37</sup> The MUPC lists two exceptions to this general rule of denial. First, the clerk can grant informal probate of a previously probated will upon "deposit of an authenticated copy of the will and of the statement probating it from the office or court where it was first probated."<sup>38</sup> Second, the clerk can also grant informal probate of a will, written in a state which does not provide for probate, "upon receipt by the clerk of a duly authenticated copy of the will and a duly authenticated certificate of its legal custodian that the copy filed is a true copy and that the will has become operative under the law of the other place."<sup>39</sup> In addition, denial by the clerk does not preclude an application for and subsequent grant of formal proceedings by the court.<sup>40</sup>

Once the clerk decides to grant informal probate, and 120 hours have elapsed from the date of decedent's death, the clerk will issue an order of informal probate. Such an order renders the informal probate conclusive as to all persons, unless it is later superseded by formal proceedings. A later discovered defect in the application procedure will not disrupt the probate.<sup>41</sup>

32. MONT. CODE ANN. § 72-3-203 (1983).

33. MONT. CODE ANN. § 72-3-203 (1983). See Montana Probate Procedure Form 10.

34. MONT. CODE ANN. § 72-3-201 (1983). Verification promotes deterrence of fraud.

35. MONT. CODE ANN. § 72-3-212 (1983).

36. MONT. CODE ANN. § 72-3-213(1) (1983). This statute also provides that "[i]n other cases the clerk may assume execution if the will appears to be properly executed, or he may accept a sworn statement or affidavit of any person having knowledge of the circumstances, whether or not the person was a witness to the will."

37. MONT. CODE ANN. § 72-3-213(2), (5) (1983).

38. MONT. CODE ANN. § 72-3-213(3) (1983).

39. MONT. CODE ANN. § 72-3-213(4) (1983).

40. MONT. CODE ANN. § 72-3-214(2) (1983).

41. MONT. CODE ANN. § 72-3-215 (1983). See Montana Probate Procedure Form 10-A.

[x] *Application for Informal Appointment of Personal Representative*

- [x] Notify persons of the application.
- [x] File application for appointment with the clerk (include will if died testate).
- [x] Obtain an Order of Informal Appointment.
- [x] Post bond, if required.
- [x] Obtain letters issued by the clerk.
- [x] Give notice and information of appointment.
- [x] Obtain proof of service by mail.

The MUPC encourages an interested person to combine the applications for informal probate and informal appointment of personal representative.

Under a combined application, the separate procedure for appointment of personal representative may be incorporated with the application for informal probate. The personal representative must apply with and be appointed by the clerk, who will issue the personal representative letters of administration.<sup>42</sup> A person seeking informal appointment, must first notify any interested party who has filed a demand for notice and any other person "having a prior or equal right to appointment not waived in writing and filed with the court."<sup>43</sup> Second, the applicant must file a verified application with the clerk of court.<sup>44</sup> The clerk of court will then grant or deny appointment.<sup>45</sup>

The MUPC directs the clerk to appoint a personal representative based on priority. The code requires appointment of a person over eighteen years old in the following priority:

- (1) the person with priority as determined by a probated will including a person nominated by a power conferred in a will; (2) the surviving spouse of the decedent who is a devisee of the decedent; (3) other devisees of the decedent; (4) the surviving spouse of the decedent; (5) other heirs of the decedent; (6) public administra-

42. MONT. CODE ANN. § 72-3-103 (1983).

43. MONT. CODE ANN. § 72-3-221 (1983).

44. MONT. CODE ANN. § 72-3-201 (1983). MONT. CODE ANN. § 72-3-202 (1983) lists the details to be included in the application for personal representative. If the application is made for appointment of personal representative to probate a will, the details listed in MONT. CODE ANN. § 72-3-203 (1983) must also be included. If the application is for appointment of personal representative to probate an intestate estate, then MONT. CODE ANN. § 72-3-204 (1983) should also be consulted. See *Montana Probate Procedure Forms 10 and 11*.

45. MONT. CODE ANN. § 72-3-222 (1983). The clerk of court will make findings as to whether the applicant completed the application, affirmed the statements made, qualified as an interested person, filed in a county of proper venue, gave proper notice, and maintained priority for appointment, and whether "any will to which the requested appointment relates has been formally or informally probated." The MUPC defines "interested person" in MONT. CODE ANN. 72-1-103(21) (1983).

tor; (7) 45 days after the death of the decedent, any creditor.<sup>46</sup>

When persons of equal priority neither renounce nor concur in the appointment of another, the court can appoint any qualified person.<sup>47</sup> The clerk, upon finding no reason to decline appointment, will issue an Order of Informal Appointment of Personal Representative and accompanying letters.<sup>48</sup>

The clerk must deny appointment if there exists a previously appointed personal representative, if the application is incomplete, or if there appears the possibility of more than one testamentary instrument.<sup>49</sup> Additionally, the clerk may decline appointment for any other reason.<sup>50</sup> Denial of informal appointment, however, does not prevent a later formal appointment.<sup>51</sup>

Prior to receiving letters, the personal representative must accept the duties of office and post any required bond.<sup>52</sup> Posting bond is unnecessary unless either an interested person with a claim greater than \$1000 requests the bond or the will expressly requires a bond.<sup>53</sup> The bond, if required, must give "suitable security" in an amount covering the estate's estimated value.<sup>54</sup>

This done, the personal representative has thirty days to notify all heirs and devisees whose addresses are reasonably available of his appointment. Notification can be either delivered in person or sent by ordinary mail,<sup>55</sup> with proof of service required.<sup>56</sup> Personal representatives most often combine this notice with the re-

46. MONT. CODE ANN. § 72-3-502 (1983). The Montana Supreme Court in *Matter of Estate of Karst*, \_\_\_ Mont. \_\_\_, 650 P.2d 792, 794 (1982), enforced the priority provisions of MONT. CODE ANN. § 72-3-502 (1981). The court also stated that "[t]he UPC does not require that an applicant for appointment as a personal representative prove some kind of economic interest in an estate in order to qualify." *Id.*

47. MONT. CODE ANN. § 72-3-504 (1983).

48. MONT. CODE ANN. § 72-3-225 (1983). If decedent was a resident of Montana, the clerk can make appointment after 120 hours. If decedent was a nonresident, the clerk can make appointment only after 30 days of decedent's death, unless the applicant was previously appointed personal representative at decedent's domicile. See Montana Probate Procedure Forms 10-A, 10-B, 11-A, and 11-B. MONT. CODE ANN. § 72-3-602 (1983) provides that "[a] person to whom general letters are issued first has exclusive authority under the letters until his appointment is terminated or modified."

49. MONT. CODE ANN. § 72-3-223 (1983).

50. MONT. CODE ANN. § 72-3-224(1) (1983).

51. MONT. CODE ANN. § 72-3-224 (2) (1983).

52. MONT. CODE ANN. § 72-3-512 (1983). See Montana Probate Procedure Forms 10-A, 10-B, and 11-B.

53. MONT. CODE ANN. §§ 72-3-513(1), -514(1) (1983). See Montana Probate Procedure Form 14.

54. MONT. CODE ANN. § 72-3-515 (1983). MONT. CODE ANN. § 72-3-516 (1983) enumerates the required terms of bond. See Montana Probate Procedure Form 10-C.

55. MONT. CODE ANN. § 72-3-603 (1983). See Montana Probate Procedure Form 16.

56. MONT. CODE ANN. § 72-1-301(3) (1983). Proof of service must be filed.



quired notice to creditors.

After the opening but prior to the personal representative's appointment, the clerk can informally appoint a special administrator to preserve and manage the estate. If the personal representative dies, the clerk may also appoint a special administrator. Formal appointment of a special administrator must occur in all other instances.<sup>57</sup> The MUPC prefers appointment of the will's named personal representative, but if that person is unavailable, then the appointment of any other proper person will suffice.<sup>58</sup>

The appointment of a personal representative or a special administrator terminates on the occurrence of certain events. Most commonly, the appointment terminates one year from the date of the filing of the closing statement in an informal closing. An appointment also terminates when a change of testacy status occurs or when a personal representative is removed for cause, resigns, dies, or suffers a disability.<sup>59</sup> The clerk can then appoint a successor personal representative.<sup>60</sup>

## V. BEGINNING THE FORMAL PROBATE

### [x] *Application for Formal Probate*

- [x] File a petition for formal probate.
- [x] Obtain an order fixing time and place of hearing.
- [x] Give notice of the hearing.
- [x] Obtain and file proof of service.
- [x] Obtain an Order of Formal Probate.

An interested person usually initiates a formal opening when a contested will is at issue. Formal proceedings suspend all informal proceedings, including the actions of an informally appointed personal representative.<sup>61</sup> Formal testacy proceedings also effectively supersede informal proceedings.<sup>62</sup>

An interested person can commence formal testacy proceedings within the three year limitation, regardless of a prior informal probate.<sup>63</sup> To do so, an interested person must petition the court and request a judicial order after notice has been given and a hearing has been held. The MUPC enumerates the statements neces-

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57. MONT. CODE ANN. § 72-3-701 (1983). See Montana Probate Procedure Forms 9, 9-A, 9-B, and 9-C.

58. MONT. CODE ANN. § 72-3-702 (1983).

59. MONT. CODE ANN. §§ 72-3-522 to -526 (1983).

60. MONT. CODE ANN. § 72-3-527 (1983). See MONT. CODE ANN. § 72-3-621 (1983).

61. MONT. CODE ANN. §§ 72-3-303, -304 (1983).

62. MONT. CODE ANN. § 72-3-215(2) (1983).

63. MONT. CODE ANN. § 72-3-302(1), (2), (3) (1983).

sary for a valid petition.<sup>64</sup>

Upon issuance by the court of an order fixing the time and place of hearing,<sup>65</sup> the petitioner must give notice of the hearing.<sup>66</sup> Formal proceedings increase the number of persons to be notified. In addition to persons who have filed a demand for notice and any currently appointed personal representative, fourteen days prior to the hearing, notice must be given to the surviving spouse, children and heirs of the decedent, devisees and personal representatives named in the will, and to any other interested person.<sup>67</sup>

The MUPC prescribes procedures for notice. The interested person may deliver notice by certified, registered, or ordinary first class mail or may deliver notice in person. For all those with unknown addresses, notice must be published in a newspaper three different times during a span of ten days. As always, the personal representative must retain proof of notice.<sup>68</sup>

Any party objecting to probate must file his objection with the court.<sup>69</sup> If there are no objections, the court can enter judgment on the pleadings.<sup>70</sup> After any necessary hearing, the court will enter an order of formal probate or an order of intestacy, as it deems appropriate upon its findings.<sup>71</sup> The order "is final as to all persons with respect to all issues concerning the decedent's estate that the court considered or might have considered incident to its rendition relevant to the question of whether the decedent left a valid will and to the determination of heirs . . . ."<sup>72</sup> The MUPC, however, does permit the order to be appealed, modified, and vacated.<sup>73</sup>

64. MONT. CODE ANN. § 72-3-301 (1983). The MUPC requires differing statements for probate of a will as opposed to an adjudication of intestacy. See *Montana Probate Procedure Forms 12 and 13*.

65. MONT. CODE ANN. § 72-3-305(1) (1983). See *Montana Probate Procedure Forms 12-A and 13-A*.

66. See *Montana Probate Procedure Forms 12-B and 13-B*.

67. MONT. CODE ANN. §§ 72-3-305(2), (3), and -301(1) (1983). Notice, when decedent's death is in doubt, must be sent to the alleged decedent's last known address. MONT. CODE ANN. § 72-3-306(1) (1983).

68. MONT. CODE ANN. § 72-1-301(3) (1983).

69. MONT. CODE ANN. § 72-3-308 (1983).

70. MONT. CODE ANN. § 72-3-307 (1983).

71. MONT. CODE ANN. § 72-3-313(1) (1983). The court must first find that the testator is dead, the venue is proper, and the petition was filed within the statute of limitations. The court will then determine the decedent's domicile, his heirs, and the state of his testacy. MONT. CODE ANN. § 72-3-314 (1983) allows the court to order formal probate of more than one instrument, and MONT. CODE ANN. § 72-3-315 (1983) provides for an order of partial intestacy. The court must accept as determinative any final order from another state, in which decedent was last domiciled. MONT. CODE ANN. § 72-3-312 (1983). See *Montana Probate Procedure Forms 12-E and 13-C*.

72. MONT. CODE ANN. § 72-3-317 (1983).

73. MONT. CODE ANN. § 72-3-318 (1983).

[x] *Application for Formal Appointment of Personal Representative*

- [x] Notify persons of the petition.
- [x] File a petition for appointment with the court.
- [x] Obtain an Order of Formal Appointment.
- [x] Post bond, if required.
- [x] Obtain letters issued by the court.
- [x] Give notice and information of appointment (combine publication of this notice with notice to creditors).
- [x] Obtain proof of service by mail.

Like the applications for informal openings and appointment of personal representatives, an applicant can combine an application for formal probate and a formal request for appointment of personal representative.<sup>74</sup>

The formal probate petition should incorporate formal appointment procedures, which differ from the informal appointment procedures in three respects. First, the formal petition for appointment of personal representative includes all statements required in the informal application plus additional statements.<sup>75</sup> Second, the personal representative must notify those persons notified in informal proceedings, and also "all interested persons."<sup>76</sup> Third, the petition for formal appointment is directed to the court, not the clerk of court. Other than these differences, proceedings for formal and informal appointment are generally the same.<sup>77</sup>

## VI. COLLECTION AND DISTRIBUTION OF THE ESTATE

Upon the opening of the probate and appointment, the personal representative, without further direction of the court, "shall proceed expeditiously with the settlement and distribution of the decedent's estate . . . ."<sup>78</sup> The personal representative, however, may invoke the court's jurisdiction to resolve specific questions of administration.<sup>79</sup> Otherwise, the MUPC grants the personal representative considerable authority to possess and control the estate.<sup>80</sup>

74. MONT. CODE ANN. § 72-3-302(4) (1983).

75. MONT. CODE ANN. § 72-3-301 (1983).

76. MONT. CODE ANN. § 72-3-319 (1983).

77. It should be noted that objection to an appointment and appointment of one not having priority can only be made in formal proceedings. MONT. CODE ANN. §§ 72-3-503 to -507 (1983).

78. MONT. CODE ANN. § 72-3-605 (1983).

79. *Id.*

80. The MUPC grants broad powers to the personal representative as enumerated in MONT. CODE ANN. §§ 72-3-605, -606, and -613 (1983). MONT. CODE ANN. § 72-3-610 imposes a fiduciary duty upon the personal representative.

[x] *Inventory of the Estate*

[x] Value each asset.

[x] File the Inventory and Appraisal with the court, or send a copy to those persons requesting one.

[x] File a copy with the Department of Revenue.

The personal representative must collect the estate's property, and within three months of appointment, inventory all property.<sup>81</sup> The Department of Revenue provides a form entitled "Inventory and Appraisal," with which the personal representative can inventory the estate.<sup>82</sup> Because the MUPC requires "a statement of full and true value of the decedent's interest in every item," the personal representative must arrange for each item's appraisal.<sup>83</sup> The personal representative must then file a copy of the "Inventory and Appraisal" with the Department of Revenue; additionally, he must send a copy to those interested persons who requested one, or file a copy with the court.<sup>84</sup>

[x] *Determination of Taxes Due*

[x] File Decedent's Final Federal Income Tax Return, and pay any tax.

[x] File federal estate tax return and pay any tax.

[x] File Application for Determination of Inheritance Tax, and pay amount of tax determined.

[x] Receive receipt for payment of inheritance tax.

[x] File state estate tax return, if needed.

The personal representative must file both federal income tax and federal estate tax returns for the decedent's estate. He must file a final individual income tax return for the taxable year in which the decedent died.<sup>85</sup> The tax will be paid from the dece-

81. MONT. CODE ANN. § 72-3-607 (1983). Property to be inventoried includes property which:

(a) the decedent owned, had an interest in or control over, individually, in common, or jointly, or otherwise had at the time of his death; (b) the decedent had possessory or dispositive rights over at the time of his death or had disposed of for less than its fair market value within 3 years of his death; or (c) was affected by the decedent's death for the purpose of inheritance or estate taxes.

MONT. CODE ANN. § 72-3-607(1)(a)-(c) (1983).

82. See Montana Probate Procedure Form 17, and Inventory and Appraisalment INH-1.

83. MONT. CODE ANN. § 72-3-607(2) (1983). Any competent person can appraise the estate, or several persons can be used to appraise various portions of it. For publicly held stocks and bonds, the New York Times or the Wall Street Journal can be helpful. For collectibles, assistance can be obtained from a recognized collector's handbook.

84. MONT. CODE ANN. § 72-3-607(3) (1983). Property, omitted in the original inventory, shall be included in a supplementary inventory and appraisalment in accordance with MONT. CODE ANN. § 72-3-609 (1983).

85. I.R.C. § 6012(a) and (b).

dent's estate. Additionally, a federal estate tax return must be filed within nine months of the decedent's death.<sup>86</sup>

The personal representative must also pay all assessed taxes at the state level. After completing the Inventory and Appraisalment, he must then complete an Application for Determination of Inheritance Tax.<sup>87</sup> From this information the state department of revenue determines the tax due.<sup>88</sup> The personal representative should pay the tax within eighteen months of the decedent's death. If the tax is paid within eighteen months, then a five percent discount is deducted from the inheritance tax due, and thus the estate effectively pays only ninety-five percent of the total tax due.<sup>89</sup> If the tax is paid after eighteen months of decedent's death, then interest is charged at a rate of ten percent, unless the cause of the delay is "unavoidable," in which case the rate of interest is six percent.<sup>90</sup> Upon payment of the tax, the personal representative should receive a receipt of payment.<sup>91</sup> A Montana estate tax is due only to the extent that the federal credit for state death taxes has been taken.<sup>92</sup> A state estate tax is rarely imposed.

[x] *Payment of Creditor's Claims*

- [x] Notify creditors of appointment (combine with Notice of Personal Representative's Appointment).
- [x] Obtain proof of publication, and file with the clerk.
- [x] Mail notice of allowance or disallowance of claim.
- [x] Distribute assets to claimants.

The personal representative, upon his appointment, must "publish a notice once a week for 3 successive weeks in a newspaper of general circulation [in the county] . . . notifying creditors of the estate to present their claims within 4 months after the date of the first publication of the notice or forever be barred."<sup>93</sup> This notice is often combined with the notice of the personal representative's appointment. The personal representative must then file proof of publication with the clerk.<sup>94</sup>

To preserve their claims, creditors must present them within

86. I.R.C. §§ 6018 and 6075.

87. MONT. CODE ANN. § 72-16-401(1) (1983).

88. MONT. CODE ANN. § 72-16-402 (1983).

89. MONT. CODE ANN. § 72-16-440 (1983). The personal representative may also request to defer payment of the tax. MONT. CODE ANN. § 72-16-438 (1983).

90. MONT. CODE ANN. § 72-16-441 (1983).

91. MONT. CODE ANN. § 72-16-434 (1983).

92. MONT. CODE ANN. §§ 72-16-904, -905 (1983).

93. MONT. CODE ANN. § 72-3-801 (1983). See Montana Probate Procedure Form 18.

94. *Id.*

four months of publication.<sup>95</sup> The running of any applicable statute of limitations also bars a creditor's claim. The MUPC suspends the running of an applicable statute of limitations during the four months following decedent's death, effectively adding four months to the statute.<sup>96</sup> If the personal representative fails to publish notice to creditors, a three year statute of limitations, measured from the decedent's death, runs to bar a creditor's claim.<sup>97</sup> This three year statute of limitations coincides with the three year period within which an interested person should file for probate.

Again, exceptions to these rules exist. These limitations do not apply to "any proceeding to enforce any mortgage, pledge, or other lien upon property of the estate," to any proceeding for which liability insurance covers and protects the estate or personal representative,<sup>98</sup> or to any claims for taxes or claims founded on tort.<sup>99</sup> Additionally, if court proceedings were already pending at decedent's death, the creditor need not present the claim.<sup>100</sup> Thus, but for the exceptions mentioned, a creditor must present his claim within the earlier of four months, from the first date of publication, or the running of an applicable statute of limitations. If no notice of publication has been given, a creditor must present his claim within the earlier of three years of death or the running of the applicable statute of limitations.

After a creditor has presented this claim, the personal representative can allow or disallow it.<sup>101</sup> To disallow a claim, the personal representative must mail a notice of disallowance to the creditor, or he must let sixty days elapse, without notice, from the claim's original date of presentation. The creditor, to preserve the claim upon disallowance, must file a petition of allowance with the court within sixty days from disallowance.<sup>102</sup> If the creditor fails to file a petition within sixty days, the claim is barred.<sup>103</sup>

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95. *Id.*; MONT. CODE ANN. § 72-3-803(1)(a) (1983). A claim against the personal representative must also be presented within four months. MONT. CODE ANN. § 72-3-803(2) (1983).

96. MONT. CODE ANN. § 72-3-802 (1983). "[T]he proper presentation of a claim under 72-3-804 is equivalent to commencement of a proceeding on the claim." *Id.*

97. MONT. CODE ANN. § 72-3-803(1)(b) (1983).

98. MONT. CODE ANN. § 72-3-803(3) (1983).

99. MONT. CODE ANN. § 72-3-803(1) (1983).

100. MONT. CODE ANN. § 72-3-804(2). The Montana Supreme Court in *Reese v. Reese*, 196 Mont. 101, 637 P.2d 1183 (1981), upheld the plain language of the MUPC. The court stated that since property settlement proceedings were in progress at the date of decedent's death, the ex-wife did not need to present her claim to the personal representative. *Id.*

101. MONT. CODE ANN. § 72-3-805 (1983). See Montana Probate Procedure Forms 19-A and 19-B.

102. MONT. CODE ANN. § 72-3-805(1) (1983).

103. Sixty days is not a strict limit. To prevent injustice, the court can order a 60 day

After four months from the date of first publication, the personal representative can pay the claims presented in order of priority.<sup>104</sup> First, the personal representative must provide for the homestead, family, and support allowances.<sup>105</sup> Thereafter, he will make payments in the following order:

- (a) costs and expenses of administration; (b) reasonable funeral expenses and reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation of persons attending him; (c) federal estate and Montana estate and inheritance taxes; (d) debts with preference under federal and Montana law; (e) other federal and Montana state taxes; (f) all other claims.<sup>106</sup>

Payments in the same class maintain equal priority.<sup>107</sup> The MUPC contains special provisions for the payment of secured claims,<sup>108</sup> encumbered assets,<sup>109</sup> and contingent and unliquidated claims.<sup>110</sup> The personal representative can deduct any counterclaim of the estate from the payment.<sup>111</sup> He can also accept, with the approval of the heirs or devisees or the court, a compromise of the claim.<sup>112</sup>

[x] *Distribution of the Remaining Estate*

- [x] Prepare a proposal for distribution.
- [x] Mail the proposal to distributees.
- [x] Execute and deliver, if necessary, a Deed of Distribution, or an Instrument of Distribution.
- [x] Obtain a receipt of distribution.

The personal representative, after paying creditors, must distribute the remaining estate in accordance with the probated will or the laws of intestate succession. This process begins with a proposal for distribution. The proposal enumerates the assets to be received by each distributee.<sup>113</sup> The personal representative, usu-

extension, unless the statute of limitations has run. MONT. CODE ANN. § 72-3-804(3) (1983).

104. MONT. CODE ANN. § 72-3-808(1) (1983). The personal representative can pay claims, prior to the four month expiration, but may be held personally liable on the debt, if he does so. MONT. CODE ANN. § 72-3-808(3)(a) (1983).

105. MONT. CODE ANN. § 72-3-808(1) (1983).

106. MONT. CODE ANN. § 72-3-807(1) (1983). If administration takes place in more than one state, assets of this state are subject to claims existing in the other state. MONT. CODE ANN. §§ 72-3-821, -822 (1983).

107. MONT. CODE ANN. § 72-3-807(2) (1983).

108. MONT. CODE ANN. § 72-3-811 (1983).

109. MONT. CODE ANN. § 72-3-812 (1983).

110. MONT. CODE ANN. § 72-3-814 (1983).

111. MONT. CODE ANN. § 72-3-806 (1983).

112. MONT. CODE ANN. § 72-3-815 (1983).

113. The personal representative will offset any amounts due the estate against the distributee's assets. MONT. CODE ANN. § 72-3-912 (1983).

ally after four months from the date of first publication to creditors, mails or delivers the proposal to all distributees who have a right to object to distribution.<sup>114</sup>

The MUPC prefers that assets be distributed in kind,<sup>115</sup> and when the estate is left with insufficient assets, it prescribes a priority of abatement, beginning with the least specific devise.<sup>116</sup> If a distributee is entitled to the homestead, personal property, or family allowances, then the distributee can request, in place of money, value in kind.<sup>117</sup> Further, a distributee of an undivided interest may petition the court for partition.<sup>118</sup> Among themselves, the distributees can also agree "to alter the interests, shares, or amounts to which they are entitled under the will of the decedent or under the laws of intestacy in any way they provide in a written contract executed by all who are affected by its provisions."<sup>119</sup> If a distributee is unsatisfied with his distribution, he must object in a writing addressed to the personal representative within thirty days after receipt of the proposal for distribution.<sup>120</sup>

After resolving any objections, the personal representative distributes the assets. In order to ensure title of a distribution in kind, the personal representative will execute an instrument of distribution for personal property, or a deed of distribution for real property.<sup>121</sup> If property is sold, the personal representative executes a deed of conveyance. Both an instrument of distribution and a deed of conveyance conclusively prove that "the distributee has succeeded to the interest of the estate in the distributed assets, as against all persons interested in the estate, . . ."<sup>122</sup> The personal representative should obtain a receipt of distribution from the distributee. Improper distribution, however, results in the dis-

114. MONT. CODE ANN. § 72-3-903(1) (1983). See Montana Probate Procedure Form 20.

115. MONT. CODE ANN. § 72-3-902 provides: "Unless a contrary intention is indicated by the will, the distributable assets of a decedent's estate shall be distributed in kind to the extent possible . . ."

116. MONT. CODE ANN. § 72-3-901(1) (1983). The will may provide a different order of abatement. MONT. CODE ANN. § 72-3-901(3) (1983).

117. MONT. CODE ANN. § 72-3-902(2) (1983). The MUPC prescribes different valuation methods: securities maintain a value equal to that on the day prior to distribution, debts are valued at the sums due plus interest, and other assets must be valued by a qualified appraiser. MONT. CODE ANN. § 72-3-902(3) (1983).

118. MONT. CODE ANN. § 72-3-914 (1983).

119. MONT. CODE ANN. § 72-3-915 (1983).

120. MONT. CODE ANN. § 72-3-903(2) (1983).

121. MONT. CODE ANN. § 72-3-904 (1983).

122. MONT. CODE ANN. § 72-3-905 (1983). If no administration occurs, devisees may use a probated will to establish title, and heirs may establish title by "proof of the decedent's ownership, his death, and their relation to the decedent." MONT. CODE ANN. § 72-3-911(1), (2) (1983).



tributee's liability for the amount of property improperly distributed and the property's subsequent income.<sup>123</sup>

## VII. THE INFORMAL CLOSING

- [x] Complete a final accounting.
- [x] Confirm payment of all taxes.
- [x] File a Sworn Statement to Close with the clerk.

The personal representative must prepare, under oath, a final accounting "showing the amount of money received and expended by him, the amount of all claims presented against the estate, and the names of the claimants and all other matters necessary to show the state of its affairs."<sup>124</sup> He must either file the final accounting with the court or deliver it to all interested persons.<sup>125</sup>

To informally close the estate, the personal representative files a sworn statement to close with the court "no earlier than 6 months after the date of original appointment of a general personal representative . . ."<sup>126</sup> In the statement he must verify that he published notice to creditors more than six months before this statement, fully administered the estate, completed a final accounting, and paid inheritance taxes.<sup>127</sup> Upon passage of one year from the filing of the closing statement, the personal representative's appointment terminates, provided that no court proceedings are pending.<sup>128</sup>

## VIII. THE FORMAL CLOSING

- [x] Compete a final accounting, and distribute it to interested persons.
- [x] Petition the court to close.
- [x] Receive order fixing time and place of hearing.
- [x] Notify all interested persons of hearing.
- [x] Confirm payment of all taxes.
- [x] Obtain formal order to close at hearing.

Rather than a sworn statement to close, a formal closing requires a petition for an order of complete settlement of the estate.

123. MONT. CODE ANN. § 72-3-906 (1983).

124. MONT. CODE ANN. § 72-3-1005(1) (1983). "If the personal representative is the sole residual beneficiary of the estate, no accounting need be made." MONT. CODE ANN. § 72-3-1005(3).

125. MONT. CODE ANN. § 72-3-1005(3) (1983).

126. MONT. CODE ANN. § 72-3-1004(1) (1983).

127. *Id.* See Montana Probate Procedure Form 25.

128. MONT. CODE ANN. § 72-3-1004(2) (1983).

The personal representative or interested person, following a formal application for probate, may petition the court one year after the appointment of the original representative.<sup>129</sup> Upon issuance of an order fixing time and place of the hearing, he must then notify all interested persons.<sup>130</sup>

Even following an informal opening, the personal representative or a devisee may petition the court for a formal closing. The petition, however, may not request adjudication of the decedent's testacy status, as determined in an informal opening.<sup>131</sup> Likewise, upon issuance of an order fixing time and place of the hearing, he must notify the personal representative and all devisees.<sup>132</sup>

In either case, the petitioner may request the court to consider and approve the final account and distribution of the estate and to construe the will.<sup>133</sup> The court will then hold a hearing and issue its final order.<sup>134</sup> Except for the personal representative's sworn statement to close, a formal closing must include all additional steps required by an informal closing.

## IX. PROBATE OF THE SMALL ESTATE

- [x] Collect property of the estate.
- [x] Present affidavit to creditor.
- [x] Informally appoint personal representative, only if estate contains real property.
- [x] Send closing statement to all distributees and creditors, if required.
- [x] File a personal representative's sworn statement to close, if representative was appointed.

The MUPC offers a simplified abbreviated procedure for estates valued at less than \$7500 or estates valued at less than the total of "liens and encumbrances . . . homestead allowance, exempt property, family allowance, costs and expenses of administra-

129. MONT. CODE ANN. § 72-3-1001(1) (1983). A petition may not be filed prior to expiration of the time for presenting claims. See Montana Probate Procedure Forms 21 and 23.

130. *Id.* See Montana Probate Procedure Forms 21-B, 21-C, 23-A, and 23-B.

131. MONT. CODE ANN. § 72-3-1003(1) (1983). See Montana Probate Procedure Forms 22 and 24.

132. MONT. CODE ANN. § 72-3-1003 (1983). See Montana Probate Procedure Forms 22-A, 22-B, 24-A, and 24-B.

133. MONT. CODE ANN. §§ 72-3-1001(2), -1003(2) (1983). Additionally, "[i]f one or more heirs or devisees were omitted as parties in or were not given notice of a previous formal testacy proceeding, the court, on proper petition . . . [and notice] . . . may determine testacy as it affects the omitted persons and confirm or alter the previous order of testacy as it affects all interested persons as appropriate in the light of new proofs." MONT. CODE ANN. § 72-3-1002 (1983).

134. See Montana Probate Procedure Forms 21-D, 22-C, 23-C, and 24-C.

tion, reasonable funeral expenses, and reasonable and necessary medical and hospital expenses of the last illness of the decedent . . . ."<sup>135</sup> This procedure is generally referred to as the small estates procedure. The administration of a small estate, consisting only of personal property and evidences of indebtedness, can occur without a personal representative. Thus, provisions for summary administration of real property demand informal appointment of a personal representative.<sup>136</sup>

To collect personal property or evidences of indebtedness, a successor, entitled to the property, must present an affidavit to the debtor. The affidavit should state that the estate, less liens and encumbrances, is valued at less than \$7500, that thirty days have elapsed since the decedent's death, that no pending application for or appointment of a personal representative exists, and that the successor is entitled to the property.<sup>137</sup> The person charged with transferring the property must transfer it within thirty days.<sup>138</sup> The transfer of property effectively releases the transferor from all liability, just as if he had dealt with the personal representative.<sup>139</sup> If the transferor refuses to transfer the property, the successor may bring a proceeding to compel such transfer.<sup>140</sup>

If the estate includes any real property, then after informal appointment, a personal representative, "without giving notice to creditors, may immediately disburse and distribute the estate . . . ." <sup>141</sup> He will then issue any required deed of distribution. To close, the personal representative may file a sworn statement or engage in formal closing procedures.<sup>142</sup> The verified sworn statement to close must state that the estate fell within the value limitations and was fully administered, and that the personal representative sent a closing statement to all distributees and creditors.<sup>143</sup>

135. MONT. CODE ANN. § 72-3-1103 (1983).

136. MONT. CODE ANN. tit. 72 ch. 3 pt. 11 Official Comments annot. (1984).

137. MONT. CODE ANN. § 72-3-1101(1) (1983). See Montana Probate Procedure Form 26.

138. MONT. CODE ANN. § 72-3-1101(1) (1983). Upon presentation of the affidavit, the corporation's transfer agent must change the stock's registered ownership. MONT. CODE ANN. § 72-3-1101(2) (1983).

139. MONT. CODE ANN. § 72-3-1102(1) (1983). The transferor need not inquire into the truth of the affidavit.

140. MONT. CODE ANN. § 72-3-1102(2) (1983).

141. MONT. CODE ANN. § 72-3-1103 (1983).

142. MONT. CODE ANN. § 72-3-1104 (1983). See MONT. CODE ANN. § 72-3-1104 Official Comments annot. (1984).

143. MONT. CODE ANN. § 72-3-1104(1) (1983). The personal representative's appointment terminates one year after he files the closing statement, provided no actions are pending in court. MONT. CODE ANN. § 72-3-1104(2) (1983). See Montana Probate Procedure Form 25.

## XI. CONCLUSION

The MUPC provides for simplified probate procedure and promotes flexible administration. Each step in the probate process may be conducted formally or informally, allowing the procedure to fit the needs of the particular situation. Informal procedures do not require court supervision, and thus result in less costly and more time-efficient administration. If no questionable issues arise, the personal representative can administer the entire estate informally, saving both time and money.

