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## THE IMPACT OF THE UNIFORM PROBATE CODE ON COURT STRUCTURE

Ralph P. Dupont\*

Court reform has always moved slowly and seemingly against both the legislative and judicial grain.<sup>1</sup> It is presently the case that the majority of American states has not yet begun to consider the structural inhibitions on fiduciary efficiency which are inherent in the antiquated systems of probate courts found in these states.<sup>2</sup> In

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<sup>1</sup> Consolidation of the probate courts with courts of general jurisdiction has been advocated by many of the nation's outstanding legal scholars for over twenty-five years, without major success. See, e.g., R. POUND, ORGANIZATION OF THE COURTS (1940); L. SIMES & P. BASYE, PROBLEMS IN PROBATE LAW: MODEL PROBATE CODE (1946); Pound, *Principles and Outline of a Modern Unified Court Organization*, 23 J. AM. JUD. SOC'Y. 225 (1940). The parallel experience in the United Kingdom terminated over 100 years ago in unification of all courts (including probate) as divisions of the High Court of Justice. See Simes & Basye, *The Organization of the Probate Court in America: II*, 43 MICH. L. REV. 113, 113-17 (1944). Advocates of probate court reorganization should note that reform in the United Kingdom apparently took more than twenty-five years to achieve, as measured from the date of publication of the first major study of court organization. Associations of inferior court judges have discouraged court reorganization, and even the grant of broad rulemaking power over the probate courts has not resulted in prompt exercise of that power. For example, in Florida effectuation of revisions of the rules of probate required a period from November 6, 1956, to January 1, 1968. See generally Clark, *Rules of Probate and Guardianship Effective Jan. 1*, 41 FLA. B.J. 1158 (1967). But cf. Whitman, *The Concept of A Probate Court Administrator*, 111 TRUSTS & ESTATES 12 (1972). See also Healey, *The Connecticut Probate Courts: Simple, Direct, Efficient, Practical*, 32 CONN. B.J. 249 (1958). See also MICH. COMP. LAWS ANN. § 701.53 (1968), providing for an annual convention of probate judges. If such organizations of judges are engaged in attempts to influence legislation a question exists as to whether a person holding judicial office may maintain membership in such an organization under the revised Code of Judicial Ethics. See ABA CANONS OF JUDICIAL ETHICS NOS. 3, 4, 5, 7 (Tent. Draft 1971).

<sup>2</sup> See, e.g., Alabama (ALA. CONST. art. 6, § 149; ALA. CODE tit. 13, § 278 (1959)); Arkansas (ARK. STAT. ANN. § 62-2004 (1971)); Connecticut (CONN. GEN. STAT. REV. §§ 45-1 to -4 (1960), as amended, (Supp. 1972)); Delaware (DEL. CONST. art. 4, §§ 2, 36, 37; ch. 402, §§ 3-5, [1969] DEL. LAWS 1165-66, enacted under authority of DEL. CONST. art. 4, § 36, vests probate jurisdiction in the court of chancery. Although no reference to probate courts is made, this separation of law and equity is continued in the proposed constitution, to be effective July 1, 1973, art. 4, §§ 4.01-.07.); Georgia (GA. CONST. § 2-4101); Indiana (IND. ANN. STAT. §§ 29-2-1-1 (1972), §§ 4-5101, 4-5201, 4-5301, 4-531 to -533 (1968)); Kansas (KAN. CONST. art. 3, § 8); Kentucky (KY. REV. STAT. §§ 25.110, 23.030(2) (1971)); Maine (ME. REV. STAT. ANN. tit. 4, §§ 251, 401 (1964)); Michigan (MICH. CONST. art. 6, §§ 15, 19; MICH. COMP. LAWS ANN. § 701.19 (1968), § 701.45a-d

fact the probate courts of some jurisdictions have remained virtually unchanged since the American Revolution.<sup>3</sup>

In contrast to the majority, a smaller number of states has in recent years overhauled and streamlined their probate courts. Approximately twenty states<sup>4</sup> have placed probate jurisdiction in their trial courts of general jurisdiction. It can be argued that consolidation of probate jurisdiction with general trial court jurisdiction is more efficient and more in accord with the needs of

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(Supp. 1972)); Minnesota (MINN. CONST. art. 6, § 6; MINN. STAT. ANN. § 525.71 (1969)); Mississippi (MISS. CODE ANN. § 9-5-83 (1972)); Missouri (MO. CONST. art. 5, § 16; MO. ANN. STAT. § 472.020 (1956), §§ 472.010(6), 472.200, 472.250 (1956), *as amended*, (Supp. 1973)); Nebraska (NEB. CONST. art. V, §§ 15, 17; NEB. REV. STAT. §§ 24-503, 24-504, 24-541 (1964)); New Hampshire (N.H. REV. STAT. ANN. §§ 547:1 to :3, 547:30 (1955), §§ 491:7, 498:1 (1968), *as amended*, (Supp. 1972); §§ 490-A:1 to :3 (Supp. 1972)); New Jersey (N.J. CONST. art. 6, § 5; N.J. STAT. ANN. §§ 3A:2-1 to 2-5 (county court), 3A:3-17 (surrogate's court), 3A:6-3 (superior court) (1953)); New Mexico (N.M. STAT. ANN. §§ 16-4-1, 16-4-10, 16-4-18 (1953), § 30-2-24 (1953), *as amended*, (Supp. 1972)); North Dakota (N.D. CENT. CODE § 27-07-02 (1960)); Rhode Island (R.I. GEN. LAWS ANN. §§ 8-9-3 to -4, 33-23-1 (1968), §§ 8-9-2.2 to -2.3 (Supp. 1971)); South Carolina (S.C. CODE ANN. §§ 15-401, 15-444, 7-201 (1962)); South Dakota (S.D. CONST. art. V, §§ 19, 20; S.D. COMPILED LAWS ANN. §§ 16-9-11, 16-9-16 (1967), §§ 16-9-13, 30-35-1 (Supp. 1972)); Tennessee (TENN. CODE ANN. §§ 16-601, 16-609, 16-610, 16-615, 16-701, 16-709, 16-711, 16-717, 16-719, 18-604 to -606, 18-608, 27-401 to -408 (1955), § 16-330 (Supp. 1972), § 1-205(7) (1971). The last section cited continued those special courts existing prior to the enactment of the Tennessee Code, and these are the Probate Courts of Shelby and Davidson Counties and the Law and Equity Courts of Dyer and Blount Counties.); Texas (TEX. CONST. art. V, §§ 8, 16; TEX. PROB. CODE §§ 3(e)-(g), 4, 5 (1956)); Vermont (VT. STAT. ANN. tit. 4, §§ 271, 273-277, 311 (1972), tit. 4, § 219 (Supp. 1972), tit. 12, § 2553 (1958), § 2555 (1958), *as amended*, (Supp. 1972), § 2386 (a) (Supp. 1972)); Virginia (VA. CODE ANN. §§ 64.1-75 (1968), *as amended*, (Supp. 1972), §§ 17-117 to -119.1 (1960), *as amended*, (Supp. 1972), § 17-123 (1960) (circuit courts); §§ 17-136, 17-137 (1960), §§ 17-135, 17-139 (1960), *as amended*, (Supp. 1972) (corporation or hustings courts); and probate jurisdiction is otherwise in the city-based courts, as follows: (1) Richmond, §§ 17-153.1, 17-154 (1960), *as amended*, (Supp. 1972), § 17-161 (1960); (2) Norfolk, § 17-186 (1960) (concurrent among law and chancery, circuit and corporation courts); (3) Roanoke, § 17-210 (1960) (concurrent as among the three city courts); and (4) Hampton, §§ 17-221.18, 17-221.19 (Supp. 1972) (concurrent among two city courts)); West Virginia (W. VA. CONST. art. 8, §§ 22-24; W. VA. CODE ANN. §§ 7-1-1 to 7-1-9 (1969), *as amended*, (Supp. 1970), § 7-1-3 (1969), § 58-3-1 (1966)).

<sup>3</sup> See generally Simes & Basye, *The Organization of the Probate Court in America: I*, 42 MICH. L. REV. 965 (1944).

<sup>4</sup> See, e.g., Alaska (ALASKA STAT. §§ 13.06.050(5), 13.06.065 (1972)); Arizona (ARIZ. CONST. art. 6, § 14); California (CAL. CONST. art. 6, § 5; CAL. PROB. CODE § 301 (West 1956)); Colorado (COLO. REV. STAT. ANN. § 37-13-5(2) (Supp. 1965)); Florida (FLA. CONST. art. 5, § 7); Hawaii (HAWAII REV. STAT. § 603-22(13) (1968)); Idaho (IDAHO CODE ANN. §§ 15-1-201(6), 15-1-301 (Supp. 1972)); Illinois (ILL. CONST. art. 6, § 9; ILL. ANN. STAT. ch. 3, § 2 (1961), *as amended*, (Supp. 1972)); Iowa (IOWA CODE ANN. § 633.10 (1964)); Louisiana (LA. CONST. art. 7, §§ 35, 81); Montana (MONT. CONST. art. VIII, § 11; MONT. REV. CODES ANN. § 93-318 (1949)); Nevada (NEV. CONST. art. 6, § 6; NEV. REV. STAT. § 3.210 (1971)); North Carolina (N.C. CONST. art. IV, § 12(3); N.C. GEN. STAT. §§ 7A-3 to -4 (1969), § 7A-40 (1969), *as amended*, (Supp. 1971)); Ohio (Ohio Const. art. IV, § 4c; OHIO REV. CODE ANN. § 2101.45 (1968)); Oregon (ORE. REV. STAT. §§ 111.005-111.185 (1972)); Oklahoma (OKLA. CONST. art. 7, § 7); Pennsylvania (PA. CONST. art. 5, §§ 4-5; PA. STAT. ANN. tit. 20, §§ 2080.012(2), 2080.201 to .203, 2080.301 (1964), *as amended*, (Supp. 1972)); Utah (UTAH CONST. art. XXIV, § 9; UTAH CODE ANN. § 75-1-6 (1953)); Washington (WASH. CONST. art. 4, § 6; WASH. REV. CODE ANN. § 2.08.010 (1957)); Wyoming (WYO. CONST. art. 5, § 10; WYO. STAT. ANN. § 2-3 (1957)).

persons interested in probate proceedings. Several states have also recently taken other steps to modernize their probate systems.<sup>5</sup>

Although the move toward court reform in general has accelerated of its own accord in the past several years, an impetus to probate court reform has been generated by the Uniform Probate Code (UPC or Code).<sup>6</sup> The Code is primarily concerned with matters of substantive law, but it also makes important procedural reforms. Section 1-201(5) of the Code suggests that jurisdiction over trusts, estates, guardianships and probate matters should be vested in a single court. Although the Code contemplates vesting jurisdiction over probate matters in a single court, it does not require the adoption of any particular court system. Thus, on adoption of the Code, the states will largely be free to restructure their courts as they see fit. Idaho, for example, has vested its

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<sup>5</sup> For example, Idaho (IDAHO CODE ANN. tit. 15 (Supp. 1972)); Maryland (MD. ANN. CODE art. 93 (1969), *as amended*, (Supp. 1972)); New York (N.Y. SURR. CT. PROC. (1967)); and, most recently, Alaska (ALASKA STAT. tit. 13 (1972)) have substantially revised their substantive law of probate. See also Hildreth, *The New SCPA—Aspects of Practice Relating to Jurisdiction, Proceedings, Appearances, and Protection of Persons Under Disability*, 34 BROOKLYN L. REV. 359, 361-65 (1968). Florida has finally adopted revised rules for probate practice, and has integrated the probate function of the county court, formerly involving about sixty judges, with its circuit court and has created a probate division of that court. See FLA. CONST. art. 5, § 37. See also Clark, *supra* note 1. In Connecticut the probate court administrator recently completed a revision of the probate rules which may be of great significance because the administration of "noncontentious business" may be made easier. The new rules may be a step toward reversing the old line about "a court that is not required to know any law and does not know any more than the law requires." *Caron v. Old Reliable Gold Mining Co.*, 12 N.M. 211, 226, 78 P. 63, 67 (1904). Connecticut is still struggling with needed structural reforms and a general upgrading of the qualifications of probate judges because the need for reform is only dimly perceived by the legislature. Cf. Brennan, *Probate Reform*, 42 CONN. B.J. 1 (1968); Dupont, *The Impact of the Uniform Probate Code on Connecticut Court Structure*, 2 CONN. L. REV. 563, 563-64 & nn. 4-6 (1970).

<sup>6</sup> All citations are to the official text of the Uniform Probate Code (UPC) unless a statute of a particular state is involved. In that case the statute will be cited without reference to the parallel provisions of the Uniform Probate Code, unless the statute differs from the Code.

While the Code does not require restructuring of vested centers of judicial power, it certainly encourages an examination of all aspects of probate court administration. See Wellman, *The New Uniform Probate Code*, 56 A.B.A.J. 636, 639-40 (1970). As a result, serious scholarly effort is beginning to be expended on the present role of the probate judge, and, as proposed under the Code, with concomitant emphasis on the extent of court reorganization required by the Code. See, e.g., McKleroy, *The Uniform Probate Code: A Comparison with Existing Alabama Probate Law*, 2 CUM.-SAM. L. REV. 1, 3-5 (1972); Rollison, *Commentary on the Uniform Probate Code*, 29 ALA. LAW. 427, 428 (1968); and Comment, *The Office of the Probate Judge in Alabama: His Duties, Qualifications and Problems*, 22 ALA. L. REV. 157 (1969). Indeed, one commentator, reporting for an Illinois lawyers' study group, has gone so far as to suggest that the structural and procedural reforms offered by the Code are its best feature and should be enacted independently of substantive law portions of the Code. See Zartman, *An Illinois Critique of the Uniform Probate Code*, 1970 U. ILL. L.F. 413, 414-415, 535.

district courts (the general trial courts) with jurisdiction over all matters covered by the Code.<sup>7</sup>

As will be discussed later in this article, it is the author's contention that vesting probate jurisdiction in the general trial courts will be optimal in terms of court consolidation and effectuation of the aims of the Code. In those jurisdictions which have already unified their probate courts, the extent of court reorganization required as a consequence of enactment of the Code would be minimal. Minor structural changes would be required in several other states if the Code were adopted.<sup>8</sup> For those states which have not restructured their systems,<sup>9</sup> however, a decision to adopt the UPC would also involve a consideration of significant structural changes in their court systems. The purpose of this article is to examine the extent of structural change which will be necessitated by adoption of the Code and to identify the factors involved in making a choice among the alternatives reasonably available.

After considering the present pattern of probate court structure in the United States, this article considers the need for probate court reform as reflected in the deficiencies of the present system. It further indicates that a realistic choice of court structure by legislatures will ultimately be made from among three options: (1) to enlarge the jurisdiction of the present probate court of the state<sup>10</sup> more nearly to approximate the form currently obtaining in

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<sup>7</sup> See IDAHO CODE ANN. §§ 15-1-201(6), 15-1-301 (Supp. 1972). See also Peterson, *Idaho's Uniform Probate Code: A Bird's Eye View*, 8 IDAHO L. REV. 289 (1972).

<sup>8</sup> This would be the case in Colorado, Ohio and Oregon. Colorado has a separate probate court for the City and County of Denver. (COLO. REV. STAT. ANN. § 37-13-5(2) (Supp. 1965)). The district court, the state's second tier trial court, otherwise possesses jurisdiction over Code matters. See COLO. REV. STAT. ANN. § 37-13-5(2) (Supp. 1965). OHIO REV. CODE ANN. § 2101.46 (1968) would have to be repealed, because it encourages the expansion of inferior probate courts as a matter of elective option subject to a local population requirement. Cf. MICH. CONST. art. 6, § 15, which permits voter-approved consolidation of county courts into probate districts. See also MICH. COMP. LAWS ANN. §§ 701.2a, .2b (Supp. 1972).

Oregon assigns probate jurisdiction among the circuit court (general trial court), the district court (second tier trial court), the juvenile court, and the county court. Only six county courts exercise probate powers, but even this slight variation would seem to run counter to the Code's requirement of a single court, although the result, in fact, may be reasonable and wholly consistent with goals of the Code, for the legislature apparently has found this allocation of judicial personnel most efficient in view of the business transacted in these counties. Compare UPC §§ 1-201(5) and 1-302(b), with ORE. REV. STAT. §§ 111.055-111.185 (1969).

<sup>9</sup> See note 2 *supra*.

<sup>10</sup> Those states having large numbers of part-time probate judges and with a limited number of lawyers serving as judges, (see notes 45-52 and 56-59 and accompanying text *infra*) will probably be unwilling to permit the judicial power conferred by the Code to be exercised by such judges. Therefore, this alternative is probably not a realistic one in those jurisdictions. But see MICH. COMP. LAWS ANN. § 701.45d (Supp. 1972) abolishing trials *de novo* and providing for jury trials in the probate courts, in which the judges must be

several states;<sup>11</sup> (2) to appoint a new body of probate judges and thus create an entirely new court;<sup>12</sup> and (3) to enlarge the jurisdiction of the present general trial court to include all matters cognizable under the Code.<sup>13</sup> In choosing among these alternatives care must be taken to understand the nature of the probate situation in each state so that a practical solution will take into account reasonable objections to systemic reforms by interested parties such as current officeholders.

## I. THE EXISTING PROBATE COURT SYSTEM IN THE UNITED STATES

### A. *Patterns of Probate Court Structure*

Although probate court structures are not susceptible to easy classification, several basic patterns can be delineated in the United States today.<sup>14</sup> A significant number of states has vested jurisdiction over all probate matters in general trial courts. Others have left original jurisdiction in inferior probate courts with a trial de novo in a higher court serving as an appeal. A few states have placed many aspects of their probate jurisdiction in a separate tier of courts. Still others have adopted a specific mechanism for allocating jurisdiction among the various courts.

In the approximately twenty states which have vested their general trial courts with probate jurisdiction,<sup>15</sup> probate matters

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lawyers, even though some are not serving full time. On the other hand, Massachusetts, for example, might confer the power to conduct jury trials on its probate court because the Commonwealth already has eleven full-time skilled jurists.

<sup>11</sup> MASS. GEN. LAWS ANN. ch. 215, §§ 3, 6 (Supp. 1971); N.Y. CONST. art. VI, § 12; N.Y. Surr. Ct. Proc. §§ 201, 209 (1967). The surrogate's court would require added powers to deal with inter vivos trusts, jurisdiction over which is now exclusively vested in the supreme court. See Siegel, *Practice Commentary*, N.Y. Surr. Ct. Proc. 42, 46-47 (1967). See also WIS. STAT. ANN. §§ 851.25, 879.27 (1971), § 253.10 (1971), as amended, (Supp. 1972); MD. ANN. CODE art. 93, § 2-102 (1969).

<sup>12</sup> The trend is certainly not in this direction as witnessed by the fact that only four such court systems are extant. See note 11 and accompanying text *supra*. Arguably Michigan also falls in this category. See note 10 *supra*.

Legislation to create a two-tiered system of probate courts was introduced in Connecticut in 1969: an upper level of full-time probate judges elected as required by Article 5, Section 4 of the Connecticut Constitution, and a lower level of registrars of probate exercising the nonjudicial functions contemplated by the Code. See Dupont, *supra* note 5, at 573-74. Doubtlessly the considerable political problems involved in tampering with the positions of 125 Connecticut probate judges played a decisive role in the legislative process from drafting to the final defeat of the bill.

<sup>13</sup> This route has already been followed in about twenty states. See note 4 *supra*.

<sup>14</sup> See generally L. SIMES & P. BASYE, PROBLEMS IN PROBATE LAW: MODEL PROBATE CODE 385-488 (1946); Comment, *supra* note 6; Wellman, *The Uniform Probate Code: Blueprint For Reform in the 70's*, 2 CONN. L. REV. 453, 460 n.32 (1970).

<sup>15</sup> See note 4 *supra*.

are, of course, but one of a wide range of issues dealt with by these courts. These states have apparently avoided the expenditure of time and money involved in an initial probate court hearing followed by a duplicative and wasteful trial de novo. In addition, lodging probate jurisdiction in the general trial court affords the litigation the attention of a skilled jurist from the outset, rather than only after a complete presentation in a lower court.

In those states with the trial de novo, the system of inferior courts is overlain by an appellate system in which the general trial court sits as a court of probate<sup>16</sup> which conducts appeals in the form of full trials.<sup>17</sup> In the appeal-trial a record is made for the first time,<sup>18</sup> and a jury trial may or may not be had, as may be appropriate.<sup>19</sup> These appeals may finally require determination by the highest appellate court of the state in the usual form for appeals from trial courts.<sup>20</sup>

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<sup>16</sup> Those states employing the trial de novo are among those listed in note 2 *supra*. Occasionally, direct appeal to the state's highest appellate court is provided for if the appeal is limited to a question of law. *See, e.g.,* VT. STAT. ANN. tit. 12, § 2551 (1958), §§ 2555, 2386(a) (Supp. 1972). In other states, failure to frame the appeal properly may limit the scope of the trial de novo. *See, e.g.,* N.D. CENT. CODE § 30-26-08 (1962). In still others, the court may limit the scope of the de novo proceedings in its discretion. The state of Michigan (MICH. COMP. LAWS ANN. § 701.45a(2) (Supp. 1972)) simply prohibits de novo trials, although it is at least questionable whether Michigan can always afford the probate litigant an initial hearing of the quality obtainable in the four states whose probate courts are completely on a par with their general trial courts. *See also* Nelson, *The Uniform Probate Code: A Model for Probate Reform in South Dakota*, 16 S.D.L. REV. 382, 392-93 (1970).

<sup>17</sup> The close relationship between equity and probate may well be somewhat responsible for the widespread use of the trial de novo, for equity appeals usually were only renewed attempts to secure the relief originally requested and denied. Indeed, the trial de novo has found present-day justification among some who support the probate status quo. They claim it is a device for reducing the amount of litigation which would otherwise occupy the time of the general trial courts. Although there is no known supporting data of any sort, it is said that the number of cases tried in the probate court is a greater number of cases than actually reaches the general trial court for trial de novo, thus achieving a reduction in the number of matters that would otherwise require attention by the general trial court. Nevertheless this would not seem to be any greater reduction in the caseload than would probably have been achieved in any event as a result of amicable dispositions. Of course, the expense and delay in the attendant decisional process of two full trials in many cases would seem far to outweigh whatever benefit the trial courts might secure from the disposition of some cases in another forum.

<sup>18</sup> Questions have arisen as to whether all courts of probate are courts of record within the meaning of Article IV, Section 1 of the United States Constitution. *See* Hopkins, *Extraterritorial Effect of Probate Decrees*, 53 YALE L.J. 221, 229-36 (1944).

<sup>19</sup> Jury trials are constitutionally required in many matters which might involve fiduciaries: wrongful death actions, claims arising on a contract entered into by the decedent prior to death; debts of the decedent; and many other matters involving factual issues determined by juries at common law. *See* U.S. CONST. amend. VII. *See also* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 92, at 402-09 (1970).

<sup>20</sup> There are differences among the states in this regard. In Vermont, for example, there are eighteen probate districts having original jurisdiction, with appeals directly to the supreme court on questions of law and otherwise to the county courts, where a trial de novo is had. *See* VT. STAT. ANN. tit. 12, § 2551 (1958), §§ 2555, 2386(a) (Supp. 1972). In

Four states have developed probate courts which are independent of, and equal in stature to, the general trial courts. These courts have virtually full jurisdiction over probate matters, with direct appeal to the state appellate courts.<sup>21</sup> Similar to this situation is the continuance of the wholly separate law and chancery courts, with the latter exercising probate jurisdiction. Three states,<sup>22</sup> and arguably a fourth<sup>23</sup> have these bifurcated systems.

A distribution of probate jurisdiction among several levels of courts is found in Indiana, Virginia, and Oregon. Indiana presents the situation in which the legislature has individually authorized several specific courts of probate, while generally granting concurrent jurisdiction of probate matters to the superior court and the circuit court.<sup>24</sup> Virginia has reacted in a similar fashion, and its probate jurisdiction is widely dispersed.<sup>25</sup> In a fashion somewhat different from Virginia, the Oregon legislature parcels out probate jurisdiction among the various inferior courts.<sup>26</sup> Significantly, the legislature has, with few exceptions, assigned probate jurisdiction to the circuit court, the general trial court of that state.<sup>27</sup>

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Texas the district court, as a court of general jurisdiction, has cognizance of appeals from the decisions of the county courts and a trial de novo is required. TEX. PROB. CODE § 5 (1956). The district court, however, also has original jurisdiction of some probate matters, unlike the Connecticut Superior Court, for example, jurisdiction of which is confined to appeals from probate. Compare TEX. PROB. CODE § 5 (1956), with CONN. GEN. STAT. REV. § 45-288 (1958).

<sup>21</sup> These states are Massachusetts, Maryland, New York and Wisconsin, although Michigan and South Dakota perhaps could be included. See note 11 *supra*.

<sup>22</sup> See ARK. CONST. amend. 24; ARK. STAT. ANN. § 62-2004 (1971). There may, however, be some Arkansas probate courts which have not been consolidated with chancery. Furthermore, the chancellor apparently can appoint a referee in probate as needed. See also MISS. CODE ANN. § 9-5-83 (1972); N.J. STAT. ANN. § 3A:6-3 (1953). The county court in New Jersey has a probate division which apparently has countywide jurisdiction over probate matters. Nevertheless, the chancery division of the superior court obviously has the necessary equitable power to entertain many matters involving descendants' estates. An example would be a case involving an escheat. *Id.* § 2A:37-14 (1953). The surrogate is, however, the clerk of the county court, and apparently functions as a registrar of probate. *Id.* § 3A:3-17.

<sup>23</sup> DEL. CONST. art. 4, §§ 2, 36.

<sup>24</sup> Jurisdiction over probate matters is generally vested in the circuit court. IND. ANN. STAT. §§ 29-2-1-1, 33-4-4-3 (1972). The legislature has, however, seen fit to create two county probate courts. IND. ANN. STAT. §§ 4-5101 to 4-5123, 4-5301 to 4-5325 (1968), as amended, (Supp. 1972). In a number of instances, probate jurisdiction is granted concurrently in varying degrees to county superior courts. See IND. ANN. STAT. §§ 4-401 to 4-3217 (1968), as amended, (Supp. 1971). This court organization does not seem to be compatible with the Code.

<sup>25</sup> See VA. CODE ANN. §§ 64.-1.74 (1968), §§ 17-117 to -119 (1960), as amended, (Supp. 1972), § 17-123 (1960) (circuit courts), §§ 17-135 to -139 (1960), as amended, (Supp. 1972) (corporation courts); probate jurisdiction is otherwise in the city-based courts, as follows: (1) Richmond, §§ 17-154, 17-161 (1960); (2) Norfolk, § 17-186 (1960) (concurrent among law and chancery, circuit and corporation courts); (3) Roanoke, § 17-210 (1960) (concurrent as among the three city courts); and (4) Hampton, § 17-221.19 (Supp. 1972) (concurrent among two city courts).

<sup>26</sup> ORE. REV. STAT. §§ 111.055-.185 (1972).

<sup>27</sup> In Oregon jurisdiction of probate matters is vested in county courts in six counties.



## B. The Need for Court Consolidation

1. *Practical Difficulties in Reform*—In order to achieve a more uniform and appropriate system for the application of probate law, jurisdictional reform of the probate court appears necessary. This reform will not, of course, be without difficulty. In some states probate courts organized in a designated manner are required by the state constitution. In Alabama, for example, the abolition or consolidation of probate courts is constitutionally forbidden.<sup>28</sup> These provisions create the contradictory situation of enlightened theories of justice<sup>29</sup> existing side-by-side with constitutional provisions which in effect permit great numbers of persons untrained in the law to serve as part-time probate judges.<sup>30</sup> Another difficulty can be seen in that although probate courts are more in need of reform than many other courts, they are the courts most solidly rooted in the legal and social establishment, and thus are the ones least susceptible to reorganization.<sup>31</sup> An attempt at reform of the Connecticut probate courts in 1969, for example, was rebuffed in a summary manner.<sup>32</sup> It is now clear that something more than a best-selling book urging the complete avoidance of probate<sup>33</sup> is needed if substantial probate reform is to be accomplished in this

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The state's second-tier trial court, known as the circuit court, exercises probate jurisdiction in nine counties. It would seem that this division of probate jurisdiction may violate the single court concept of the UPC, and yet is really serving the purposes of the Code by promoting judicial efficiency in light of Oregon's needs. Doubtlessly, the Code draftsmen would have no strenuous objection to a broader definition of the word "court" in § 1-201(5) in states wishing to adopt the Oregon approach. If there were no constitutional difficulties involved, the legislature might wish to invest the state's highest tribunal with authority to allocate jurisdiction among inferior courts and between those courts and the state's trial court or courts.

<sup>28</sup> ALA. CONST. art. VI, § 171.

<sup>29</sup> It seems remarkable that a state could have adopted the "second look" doctrine almost twenty years ago to ameliorate the draconian affects of the rule against perpetuities and yet continue an outmoded probate court system. See, e.g., CONN. GEN. STAT. REV. §§ 45-95, -96 (1958), as amended, Conn. P.A. 127, § 68, [1972] Public & Special Acts 129, 167.

<sup>30</sup> See CONN. CONST. art. V, § 4; CONN. GEN. STAT. REV. §§ 45-1, 45-1a (1958), as amended, (Supp. 1972), § 45-1(b) (Supp. 1972).

<sup>31</sup> See, e.g., Whitman, *Report to the Probate Administrator on the State of the Probate Courts in Connecticut*, 2 CONN. L. REV. 579 (1970).

<sup>32</sup> Indeed, soon after the bill was brought to the Judiciary Committee [of the Connecticut General Assembly] and lobbied against, the Committee failed to report the bill out, the Commission [to Study and Report on a Revision of the Probate Laws of the State of Connecticut] was summarily disbanded and the work of the Reporters for the Commission, comparing the present Connecticut probate law to the Uniform Probate Code, was terminated.

*Id.* at 583.

<sup>33</sup> N. DACEY, *HOW TO AVOID PROBATE* (1965). See also Wellman, *supra* note 14, at 453 n.4; Rubinow, *Symposium on Probate Law: Introduction*, 2 CONN. L. REV. 449, 450 n.4 (1970); Whitman, *supra* note 31, at 583 n.7.

century.<sup>34</sup> These considerations indicate that reform does not occur in a vacuum. One who seeks to restructure probate courts must cast at least an occasional backward glance at the political implications of the conclusions reached.

2. *Deficiencies in the Current System*—Having acknowledged the practical difficulties in reform, it is appropriate to enumerate the deficiencies of current probate court structure. While it may not be enough merely to recite the shortcomings and advantages of the present system, this is certainly the first step in the analysis. There are several basic systemic problems which emphasize the need for reform. Present court systems suffer from limitations of subject matter jurisdiction, diversity of structure, multiplicity of forums, and complexity of jurisdictional definitions. A further problem underlying the probate court structure of each state is the demographic variations which generate radical differences in the complexity of dockets between cities on the one hand and small towns and rural settings on the other.<sup>35</sup>

The sporadic development of American courts has produced a number of problems in the probate system. One result of this development is that those probate courts which are not general trial courts are courts of special or limited jurisdiction. These jurisdictional limitations are, on the one hand, administratively inefficient because they divide cases which might truly arise out of the same facts, and, on the other hand, they are a great source of confusion for litigants, lawyers, and interested parties. Although they are intimately involved with the administration of the decedent's estate, these courts cannot, for example, try a wrongful

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<sup>34</sup> It has been reported that:

A substantial number of people now have a large stake in the present system [Connecticut's probate courts] and do not look forward to any real change, regardless of its merits. Accordingly, much of the discussion of probate court reorganization and reform falls on deaf ears and simply generates an abundance of wheel spinning. This fact, coupled with the legislature's tendency to react to pressures exerted upon it, means that politics, power struggles, personal gain, and pride, as much as, or more than, concern for the public good, will underlie positions taken on the probate courts. It is thus not surprising that arguments for or against the probate courts are often polarized and emotionally charged.

Whitman, *supra* note 31, at 581.

<sup>35</sup> In Connecticut, for example, there are 125 separate probate courts, each *individually* authorized by the legislature. There is no difference in jurisdiction among the courts except by legislatively imposed territorial limits (usually co-extensive with town lines). For a full discussion of Connecticut's probate courts, see Whitman, *supra* note 31. An even more critical and detailed analysis of the Alabama probate judges has also been done. See *generally* Comment, *supra* note 6. Regrettably, however, other states have by-passed the opportunity to make a critical evaluation of their own systems or have remained pointedly silent about court reorganization while otherwise making a rather detailed study of the need for probate law revision. See, e.g., Chaffin, *Improving Georgia's Probate Code*, 4 GA. L. REV. 505 (1970); GOVERNOR'S COMMISSION TO REVIEW AND REVISE THE TESTAMENTARY LAW OF MARYLAND, SECOND REPORT (1968).

death action. This is true even though the probate court may ultimately be required to approve the fiduciary's decision to dispose of the claim, for example, by making an out-of-court settlement. The court would also be involved with the distribution of the avails of the action.<sup>36</sup>

Other limitations on subject matter jurisdiction come to mind readily. There are various limitations on a given probate court as to whether it can try title to the decedent's real estate,<sup>37</sup> construe his will or trust,<sup>38</sup> determine damages in an action based on a predeath contract,<sup>39</sup> render a judgment for money damages consequent upon a disapproval of an accounting,<sup>40</sup> or exercise full equitable powers.<sup>41</sup>

In contrast to those states which curtail the powers of the probate judge, other states have placed substantial nonprobate responsibilities on probate judges. In Alabama, for example, the range of duties given to the probate judge is enough to satiate even the most ambitious politician's quest for power.<sup>42</sup> An Alabama probate judge is involved in almost every aspect of county government, from the issuance of hunting licenses to the collection of beer taxes.<sup>43</sup>

It is submitted that the patterns of these limitations and nonprobate responsibilities vary widely across the nation, and only after the adoption of the structural changes and jurisdictional reforms embodied in the Uniform Probate Code will a single state court in each state possess the power and jurisdictional range required to act efficiently in all matters regarding decedent's estates.<sup>44</sup>

A further problem plaguing the current system is the great number of probate courts within each state. The number of courts also may not bear any relationship to the need for the services of probate jurists. In Florida, for example, a state in which there is a considerable volume of probate activity, these matters were managed until recently by sixty county courts.<sup>45</sup> In Georgia, county organization is also employed, with the probate system of that

<sup>36</sup> See, e.g., CONN. GEN. STAT. REV. § 45-280 (Supp. 1969).

<sup>37</sup> See *Appeal of Wilson*, 84 Conn. 560, 80 A. 718 (1911); *Lockett v. Doyle*, 148 Conn. 639, 173 A.2d 507 (1961).

<sup>38</sup> See *Union & New Haven Trust Co. v. Sherwood*, 110 Conn. 150, 147 A. 562 (1929); *Dupont*, *supra* note 5, 566-67 & nn. 18-26.

<sup>39</sup> See 1 W. LOCKE & P. KOHN, *CONNECTICUT PROBATE PRACTICE* § 73, at 137 & n.7 (1951).

<sup>40</sup> See *Phillips v. Moeller*, 147 Conn. 482, 163 A.2d 95 (1960).

<sup>41</sup> See 1 W. LOCKE & P. KOHN, *supra* note 39, §§ 96-102.

<sup>42</sup> See generally Comment, *supra* note 6.

<sup>43</sup> *Id.* at 164-74.

<sup>44</sup> UPC §§ 1-201(5), 1-302, 3-105.

<sup>45</sup> FLA. CONST. art. 5, § 7; FLA. STAT. ANN. § 36.01 (1961). A recent amendment to FLA. CONST. art. 5, § 7, has remedied this multiplicity of courts.

state consisting of approximately 140 courts of ordinary.<sup>46</sup> Connecticut<sup>47</sup> and Michigan<sup>48</sup> follow Georgia among the leaders in the number of probate courts.<sup>49</sup> Some states, such as Connecticut,<sup>50</sup> Kansas<sup>51</sup> and Alabama,<sup>52</sup> have gone so far as to enshrine constitutionally their large number of probate courts.

This multiplicity of courts leads, in some states, to the associated problem of overlapping jurisdictions. Under several current systems jurisdictional tangles of great magnitude are possible, and the opportunity for confusion respecting which court has jurisdiction is not uncommon. In Texas, for example, the county courts are given exclusive jurisdiction over probate matters, except in those counties in which a probate court has been created by statute, with an appeal to the district court (general trial court).<sup>53</sup> Tennessee not only has exceptions to its general rule that jurisdiction is exercised by its county courts,<sup>54</sup> but trials *de novo* on appeal are conducted in either the chancery court or the circuit court, depending upon which county produces the appeal.<sup>55</sup> It should be no surprise to recognize that in addition to those confusions concerning the proper forum, interested parties must also contend with the limitations on the subject matter jurisdiction of the appropriate forum.

The need for probate court reform is further highlighted by some of the miscellaneous oddities inhering in current probate court structures. For example, it is often the case that laymen serve as judges in probate courts.<sup>56</sup> Connecticut, for example, is one of several states which elect their judges and where candidates for office need not be attorneys.<sup>57</sup> Lay judges may also

<sup>46</sup> GA. CONST. § 2-4101.

<sup>47</sup> CONN. GEN. STAT. REV. §§ 45-1 to -4 (1960), *as amended*, (Supp. 1969). Connecticut may yet capture the distinction of being the leader. Because its probate districts are often drawn along town lines (*Id.* § 45-1.), and since there are 169 towns, the possibility of further probate courts is not extinct.

<sup>48</sup> MICH. COMP. LAWS ANN. § 701.1 (1968).

<sup>49</sup> Other states also have numerous local courts in their probate systems: *e.g.*, Missouri (80 courts) (MO. CONST. art. 5, § 16; MO. REV. STAT. §§ 472.010(6), 472.020, 472.200, 472.250 (1956), *as amended*, (Supp. 1973) ); New Mexico (30 courts) (N.M. STAT. ANN. §§ 16-4-1, 16-4-10, 16-4-18 (1953), § 30-2-24 (Supp. 1971) ).

<sup>50</sup> CONN. CONST. art. V, § 4.

<sup>51</sup> KAN. CONST. art. 3, § 8. The number of probate courts in Kansas has been fixed at 105.

<sup>52</sup> ALA. CONST. art. VI, § 171.

<sup>53</sup> TEX. CONST. art. V, §§ 8, 16; TEX. PROB. CODE §§ 4-5 (1956), §§ 3(e)-(g) (1956), *as amended*, (Supp. 1972).

<sup>54</sup> TENN. CODE ANN. § 1-205(7) (1955).

<sup>55</sup> *Id.* §§ 27-401 to -408.

<sup>56</sup> See Whitman, *supra* note 31, at 585.

<sup>57</sup> CONN. CONST. art. 5, § 4. Since the voting age was lowered to 18 years, there is a possibility—although perhaps not a probability—of a teenage probate judge in Connecticut. The only requirement for election to the office of probate judge is that one be an elector. See CONN. GEN. STAT. REV. § 45-6 (1960); Conn. P.A. 127, § 1, [1972] Public & Special Acts 129.

serve in West Virginia<sup>58</sup> and in one town of Rhode Island.<sup>59</sup> The former also act as county commissioners (a three "judge" panel); in the latter instance the members of the Town Council of New Shoreham, Rhode Island also serve as judges of probate.

### C. *Benefits of Reform*

Arguably the existing system of probate courts in the United States—outside of those states which have granted jurisdiction in probate matters to the general trial courts<sup>60</sup>—is relatively harmless, even though inefficient. Nevertheless, the allocation of probate jurisdiction among several different courts, the use of diverse appellate procedures, and the restraints on subject matter jurisdiction (as in accountings and construction of a will) act together to confuse the beneficiary and attorney alike. Existing probate courts are too often rule-encrusted,<sup>61</sup> not susceptible to recommended court administrative procedures,<sup>62</sup> and productive of costly make-work for lawyers and fiduciaries alike.<sup>63</sup> The result of these factors is direct financial costs imposed upon those who are parties to a proceeding. Members of the general public, of course, pay a tax on the transmission of wealth whenever any cost is imposed directly or indirectly by the state incident to the passage of property from one person to another. It matters little to the ultimate beneficiary whether that cost is called a death duty or a cost of administration. The situation now obtaining in our probate courts should be of great concern to lawyers, trust officers, and beneficiaries alike.<sup>64</sup>

Adoption of the court system suggested by the Uniform Probate Code would reap benefits for virtually all parties. A streamlined system would benefit both beneficiaries and fiduciaries (both institutional and noninstitutional) by the cost savings it would generate. It would also benefit attorneys by making their practices simpler and probably economically more sound.

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<sup>58</sup> W. VA. CONST. art. 8, §§ 22-24; W. VA. CODE ANN. §§ 7-1-1 to 7-1-9 (1969), as amended, (Supp. 1970).

<sup>59</sup> R.I. GEN. LAWS ANN. §§ 8-9-2.2 to -2.3 (Supp. 1972).

<sup>60</sup> See note 4 *supra*.

<sup>61</sup> See, e.g., N.Y. CONST. art. VI, § 12; N.Y. SURR. CT. PROC. §§ 201, 209 (1967).

<sup>62</sup> See, e.g., note 24 *supra*.

<sup>63</sup> See, e.g., TEX. PROB. CODE § 5, *Interpretive Commentary* (1956).

<sup>64</sup> An intensive use of the revocable lifetime trust appears to be developing as a means of avoiding what is believed to be the undue delay, unnecessary interference, and unwarranted costs of probate proceedings. There is also some reason to believe that the testamentary instrument is being reduced to an estate planning tool useful only in pouring over assets into an existing lifetime trust. Concerned lawyers should be aware of the fact that only the sophisticated client can in reality exercise this choice. See Wellman, *The Uniform Probate Code: A Possible Answer to Probate Avoidance*, 44 IND. L.J. 191, 205 (1969).

## II. COURT REFORM: THE AIMS OF THE UNIFORM PROBATE CODE

Since much has been written about the Uniform Probate Code only the most generalized comments are appropriate here.<sup>65</sup> On August 13, 1969, the Uniform Probate Code was promulgated by resolution of the House of Delegates of the American Bar Association. The Code was the outgrowth of earlier attempts by the American Bar Association to create a modern law of probate. Although initial support for changes in the probate laws was uneven,<sup>66</sup> by 1969 public criticism of existing probate practices was such that broad professional support for probate reform developed.<sup>67</sup>

The Uniform Probate Code is a relatively lengthy document not susceptible to brief description; a detailed narrative consideration of the substance of the Code is beyond the scope of this article. The broad changes in the judicial treatment of decedents' estates offered by the Code involve an attempt by the draftsmen to bring probate law into conformity with the apparent desires of testators and beneficiaries when viewed in light of present-day tax and economic considerations. The attempt has been made by reshaping the role of the courts vis-à-vis probate matters. Hence many of the Code's changes are largely procedural. The basic concept of the Code regarding the role of the court is that resort to a court should be had only where there is need for court supervision or where there is a contest requiring adjudication. Court supervision is not, however, denied to anyone who wishes to secure review of a fiduciary's activities.

Professor Richard V. Wellman<sup>68</sup> has stated the role of the courts vis-à-vis the Code to be as follows:

The major change we propose is not novel or dramatic. We simply propose that the relationship of probate court to estates be made more like the normal relationship that courts bear toward persons in respect of civil matters. Thus, we have designed a system in which the judge occupies a passive, supportive relationship to every estate. We have sought to give every interested person easy access to a judge capable of fully handling any kind of question relating to an estate. But, we have sought to have the ultimate question of whether and when a judge will be involved determined by the interested persons, rather than by a system which denies survi-

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<sup>65</sup> See generally Wellman, *supra* note 6; Wellman, *supra* note 14.

<sup>66</sup> See Wellman, *supra* note 6, at 636.

<sup>67</sup> See Wellman, *supra* note 14, at 453-54.

<sup>68</sup> Professor of Law, University of Michigan Law School.

vors their assets until they pay their homage to the probate court. We have sought also to keep the scope of judicial matters to the dimensions dictated by questions raised in the pleading. Hence, unless someone with interest in an estate wants a judicial order for the resolution of a question, or the elimination of a risk, no judicial order will be required by the State Code.<sup>69</sup>

As previously noted,<sup>70</sup> the Code does not mandate any particular type of court. Section 1-201(5) of the Code defines court to mean "the Court or branch having jurisdiction in matters relating to the affairs of decedents."<sup>71</sup> The states, therefore, will be free to retain the various names used commonly such as probate court,<sup>72</sup> court of ordinary,<sup>73</sup> chancery court,<sup>74</sup> orphans' court,<sup>75</sup> or county court.<sup>76</sup> Because it defines the extensive scope of jurisdiction vested in the designated court, Section 1-302 reflects the aims of the Code in this regard. It provides:

(a) To the full extent permitted by the constitution, the Court has jurisdiction over all subject matter relating to (1) estates of decedents, including construction of wills and determination of heirs and successors of decedents, and estates of protected persons; (2) protection of minors and incapacitated persons; and (3) trusts.

(b) The Court has full power to make orders, judgments and decrees and take all other action necessary and proper to administer justice in the matters which come before it.

Enactment of Section 1-302 would result in an immediate change in any state whose probate courts do not exercise jurisdiction of this scope. Moreover, Section 1-308 would appear to preclude the continued existence of probate appeals in the form of trials de novo in courts of general jurisdiction,<sup>77</sup> for appeals from the designated court are to be treated as is an appeal from an equity case in the general trial court.

The Code simplifies venue problems to the point where they are virtually nonexistent.<sup>78</sup> It also adopts the rules of procedure of

<sup>69</sup> See Address by Professor Richard V. Wellman, in *UNIFORM PROBATE CODE, Preliminary Note* (Working Draft No. 5, 1969). See also Wellman, *The Lawyer's Stake in Probate Reforms*, 47 MICH. ST. B.J., Mar., 1968, at 14-17.

<sup>70</sup> See note 6 and accompanying text *supra*.

<sup>71</sup> UPC § 1-201(5).

<sup>72</sup> E.g., CONN. GEN. STAT. REV. §§ 45-1, 45-4 (1958).

<sup>73</sup> E.g., GA. CONST. § 2-4101.

<sup>74</sup> E.g., ARK. CONST. amend. 24; ARK. STAT. ANN. § 62-2004 (Supp. 1971).

<sup>75</sup> E.g., MD. ANN. CODE art. 93, § 2-101 (1969).

<sup>76</sup> Other names in addition to county court occasionally appear (for example, circuit court) although territorial jurisdiction is usually limited to a particular county. Indiana is an example of this. See note 24, *supra*.

<sup>77</sup> See UPC § 1-308.

<sup>78</sup> *Id.* § 1-303.

the general trial court of the state to the fullest extent possible<sup>79</sup> and vests the court with full judicial power, including that needed to grant equitable remedies and to conduct jury trials.<sup>80</sup>

Undoubtedly, the major change advocated in the Code concerns the use of the court's personnel. In order to reduce judicial involvement in affairs which do not involve actual disputes as to decedents' estates, the Code provides that nonadjudicative functions may be performed by a registrar. The court to which the legislature grants probate jurisdiction may appoint a judge or an official of that court, including a clerk, as registrar.<sup>81</sup> By allocating to the registrar certain functions which, because they do not relate to judicial determination of the disputed issue, may be exercised administratively, the draftsmen of the Code sought to bring about efficient, inexpensive, and uncomplicated procedures for the settlement of estates.<sup>82</sup> This allocation also subserves the Code's goal of removing the administration of estates from the active supervision of the courts.<sup>83</sup>

The Code envisions two styles of probate proceedings: informal, in which the registrar administers the presentation and certification of wills and appointment of personal representatives;<sup>84</sup> and formal, in which matters regarding probate of wills, appointment of representatives, and settlement of estates are litigated in the designated court.<sup>85</sup> Formal proceedings also include litigation to obtain orders in matters within the full jurisdiction of the court, including matters not traditionally deemed decedents' estates, if the court's jurisdiction is that broad.<sup>86</sup> In order to obtain informal probate or appointment, the personal representative applies to the registrar.<sup>87</sup> Since proceedings for the probate of wills may be combined with proceedings for the appointment of personal representatives,<sup>88</sup> the registrar, if he is satisfied with the sufficiency of the information submitted to him,<sup>89</sup> can expedite the

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<sup>79</sup> *Id.* § 1-304.

<sup>80</sup> *Id.* §§ 1-302(b), 1-306.

<sup>81</sup> *Id.* §§ 1-201(3), 1-307.

<sup>82</sup> Wellman, *supra* note 64, at 198-200.

<sup>83</sup> UPC art. 3, General Comment reads in part:

Overall, the system accepts the premise that the Court's role in regard to probate and administration, and its relationship to personal representatives . . . is wholly passive until some interested person invokes its power to secure resolution of a matter. The state, through the Court, should provide remedies which are suitable and efficient to protect any and all rights regarding succession, but should refrain from intruding into family affairs unless relief is requested, and limit its relief to that sought.

<sup>84</sup> *Id.* §§ 3-301 to 3-311.

<sup>85</sup> *Id.* §§ 3-401 to 3-618.

<sup>86</sup> *Id.* § 3-105.

<sup>87</sup> *Id.* § 3-301.

<sup>88</sup> *Id.* § 3-107.

<sup>89</sup> *Id.* §§ 3-301, 3-308.



settlement of the estate by entering an informal order.<sup>90</sup> The powers of the registrar also include functions which are more clerical in nature. For example, a person qualifying as personal representative must, if required, execute and file a bond with the registrar,<sup>91</sup> and an interested party or creditor who seeks to have the representative provide a bond must file his demand with the registrar.<sup>92</sup> The registrar, in his capacity as court official, may also perform the wholly clerical tasks of filing notices and receiving papers, among others. The responsibilities of the registrar, although characterized as nonjudicial, are not only broad, but essential as well to the functioning of the probate court system.

Finally, the enactment of the Code will not summarily terminate the services of a judge not qualified for appointment under the Code,<sup>93</sup> although all newly appointed probate judges must have the same qualifications as a judge of the state court exercising general jurisdiction.<sup>94</sup>

### III. APPROACHES TO COURT STRUCTURE: A CONSIDERATION OF ALTERNATIVES

Given the varied structures of present probate court systems, the most immediate question is how states enacting the Code should restructure their courts. Although the changes introduced by the Code arguably could be accommodated within the existing court systems of most states, the allocation by the Code of subject matter jurisdiction, with enhanced judicial power, to a single court necessitates structural change in those states that have not yet consolidated their courts. The enactment of the Code would seem to require that the state legislature select one tribunal and grant it exclusive original jurisdiction over probate matters.<sup>95</sup> Additionally Section 3-105 of the Code vests this tribunal with concurrent jurisdiction to hear matters involving succession or to which the estate is a party. Thus, the court selected by the legislature is likely to be either (1) the existing system of probate courts, or (2) the present general trial court. Where there is no constitutional impediment to doing so, a third alternative would be for the legislature to empower the state supreme court to assign probate jurisdiction to the inferior courts, without otherwise disturbing the existing court structure. In fact, under this alternative the delegation of administrative or nonjudicial functions to probate judges may offer a solution to the vexing problem of the future of in-

<sup>90</sup> *Id.* §§ 3-302, 3-307(a), 3-1003.

<sup>91</sup> *Id.* § 3-604.

<sup>92</sup> *Id.* § 3-605.

<sup>93</sup> *Id.* § 8-101.

<sup>94</sup> *Id.* § 1-309.

<sup>95</sup> *Id.* §§ 1-201(5), 1-302.

cumbent judges whose qualifications may be less than the Code's requirements.<sup>96</sup> An existing, constitutionally entrenched body of probate judges, politically resistant to serious change might otherwise pose a serious obstacle to adoption of the UPC.

On the other hand the Code is so drafted as to be adaptable to those states whose legislatures are constitutionally unable to re-shape their courts. This feature of the Code was, of course, quite intentional. The draftsmen stated:

If any particular state finds constitutional amendment is necessary to increase the power of the judicial side of the probate court, it might side step the difficulty by assigning the judicial functions described to a division of the general trial bench, and the non-judicial functions to existing inferior probate officers. The important point, however, is that the judicial assignments contemplated by the draft call for a fully equipped court with appeals therefrom being handled like appeals from other equity causes.<sup>97</sup>

In those states where constitutional impediments make legislative action alone insufficient to dismantle the probate courts, the legislature might nonetheless be able to assign the nonadjudicative functions of the registrar to existing, inferior probate court judges without significant structural change.<sup>98</sup> It should also be noted that in some states nonadjudicative officials, such as the registrar, might exercise these functions. If this step were taken, the Connecticut experience indicates that it would be prudent to appoint a judge of the general trial court as probate court administrator, with power to insure full coordination of effort among officials at all levels of the probate court structure.<sup>99</sup> The primary duty of the probate court administrator would be to make uniform the disposition of probate matters among the several courts of the state.

In light of the existing probate court structures of the several states, it would seem reasonable to predict that one of the following plans of court reorganization will be adopted as a necessary adjunct to the enactment of the Uniform Probate Code:

1. Retain the existing state probate court structure and divest all other courts of their present original or concurrent jurisdiction over probate matters.
2. Create a wholly new probate court having exclusive original jurisdiction of all matters cognizable under the Code. The new probate court would have a trial bench composed of judges pos-

<sup>96</sup> See Dupont, *supra* note 5, at 571. See also notes 81-82 and accompanying text *supra*.

<sup>97</sup> Address by Professor Richard V. Wellman, *supra* note 69. See also UPC § 3-105, Reporters' Notes (Working Draft No. 5, 1969).

<sup>98</sup> See note 81 and accompanying text *supra*.

<sup>99</sup> See generally Whitman, *supra* note 1.

sessing the same qualifications as the judges of the general trial court. Appeals would be taken to the supreme court, as in other equity cases.

3. Enlarge the exclusive original jurisdiction of the general trial court (or appropriate inferior trial court), and either (a) abolish the office of probate judge by constitutional amendment or legislative action, or (b) retain probate court judges currently in office and delegate to them the nonadjudicative administrative functions contemplated by the Code.

#### *A. Enlarging the Powers and Jurisdiction of Present Probate Courts*

Any plan calling for expansion of the jurisdiction of the present probate courts would seem to be a realistic alternative only in those states whose courts presently exercise extensive probate jurisdiction independent of the general trial courts.<sup>100</sup> Because of the complexity of issues often arising in litigated probate disputes no one would seriously argue that a lay probate judge or part-time jurist should preside over a jury trial.<sup>101</sup> Moreover, in those states which use the trial *de novo* as an appeal, the determination of contested matters in the general trial courts has already proved satisfactory, except as to the cost and delay attendant upon the first trial in the inferior probate court. Thus, it would seem unwise to enact legislation designed to terminate the services of skilled judges of the general trial courts, while simultaneously broadening the jurisdiction of largely untrained, part-time judges of inferior courts of probate which exist in vast numbers in states such as Connecticut, Georgia, and South Carolina.<sup>102</sup> This proliferation of judges ensconced by legislative action and occasionally by fundamental law in their tiny probate fiefdoms cannot be squared with the aims of sound judicial administration.<sup>103</sup> To augment their power would almost certainly not result in significant probate reform.

Moreover, even if such power were to be granted, the qualifications of these probate judges would have to be upgraded far beyond merely being an elector in a particular probate dis-

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<sup>100</sup> These states include Maryland, Massachusetts, New York, and Wisconsin. See notes 21-23 and accompanying text *supra*.

<sup>101</sup> Whitman, *supra* note 31, at 595-98.

<sup>102</sup> For these and other states with seemingly large numbers of judges see text accompanying notes 45-52 *supra*.

<sup>103</sup> See Whitman, *supra* note 31, at 585 n.15, 586 n.16, 587 n.18, 588-90, 592-602, 606-07, 611-14. See also Comment, *supra* note 6. More studies of this type are needed in order to provide political leaders with a factual basis to support their decisions. It is suggested that this type of project should be inaugurated in every state.

trict.<sup>104</sup> Notwithstanding the fact that the UPC would permit current judges of probate who lack the qualifications for office imposed by the Code to continue in office,<sup>105</sup> this provision cannot be used to justify the grant of plenary judicial powers, now held only by the general trial courts of the state, to lay judges and part-time probate officials. Indeed, this pattern of court consolidation would require the legislatures of some states to reverse their prior determinations denying jurisdiction over guardianships, conservatorships, adoptions, and affairs of minors and protected persons to existing inferior probate courts.<sup>106</sup> This reduction of the jurisdiction of the general trial courts might be too costly in terms of loss of judicial expertise to be acceptable.

### *B. A Surrogate Court*

The second alternative is to create a wholly new probate court system having exclusive original jurisdiction of all matters enumerated by the Code. In those states (such as Massachusetts) whose probate courts are exercising independent and extensive jurisdiction over decedents' estates, the existing courts could continue with some modifications in the range of cognizable subject matter.<sup>107</sup> In those states which have delegated probate jurisdiction to the chancery courts the Code would require the creation of probate courts and the divestiture by chancery courts of all probate jurisdiction.<sup>108</sup> This new system of courts, however independent, would nevertheless be vested by Section 3-105 of the Code with some jurisdiction concurrent with the general trial courts. This plan would allow for the retention of existing probate officials in those states having numerous (and sometimes

<sup>104</sup> See Whitman, *supra* note 31, at 595-97. In Alabama, any attempt to impose a requirement that all judges exercising probate jurisdiction be lawyers would violate the state constitution. See ALA. CONST. art. VI, § 154.

<sup>105</sup> UPC § 8-101(b)(6).

<sup>106</sup> See, e.g., KY. REV. STAT. § 25.110 (1971).

<sup>107</sup> In Massachusetts this would appear to involve only elimination of the concurrent jurisdiction of the superior court in matters committed to the probate court under the Code. See MASS. GEN. LAWS ANN. ch. 215, §§ 3, 6 (1955), *as amended*, (Supp. 1971). Maryland would need to expand the jurisdiction of its orphans' courts to include jurisdiction over trusts as well as estates. Additionally, equity jurisdiction appears to be limited, so that full equitable relief may not be obtainable in all cases. See MD. ANN. CODE art. 93, § 2-102 (1969). Jurisdiction over inter vivos trusts would have to be conferred on New York's surrogate's courts. See N.Y. CONST. art. VI, § 121 N.Y. SUR. CT. PRO. § 209 (4) (1967). Concurrent jurisdiction over inter vivos trusts could not be retained by Wisconsin's circuit courts. See WIS. STAT. ANN. §§ 253.10, 851.25, 879.27 (1971).

<sup>108</sup> In Arkansas, for example, the consolidation of the probate courts and the chancery courts is incomplete at this time. See ARK. CONST. amend. 24. In New Jersey, three courts may become involved in matters required to be confined to a single court under the UPC, although to some extent the function of the surrogate is akin to that of the registrar contemplated by the Code. See note 22 *supra*.

part-time) elected probate judges.<sup>109</sup> These officials could administer informal probate proceedings as registrars or could be variously designated as surrogates, registrars of probate, or simply as clerks. Additionally, there is nothing in the Code to prevent the election of these officials in any state which has a constitutional requirement to that effect.<sup>110</sup> The retention of some official responsibilities for existing inferior court judges could be accomplished under this alternative as well as under the suggested plan for enlarging the jurisdiction of the general trial court discussed below. In effect the expertise of these officials could be transferred from the former courts and be wholly incorporated into the newly created courts.

In creating a wholly new probate court system, a legislature might well be moved to consolidate a number of probate jurisdictions by way of designating seats of court.<sup>111</sup> If the legislature is unable to make this difficult political decision, then the supreme court or the probate court administrator might determine the location of the probate courts. In either event, a more efficient and rational allocation of judicial resources than presently exists could result.

Yet any plan to "spin off" probate jurisdiction will increase specialization of the judiciary to an unwarranted degree and further isolate the functions and facilities of the probate court from the general trial courts. Moreover, it would seem that any plan of court reorganization which emphasizes the distinction between courts of law and equity is a backward step today, even if the existing general trial courts are already heavily burdened, or are themselves no model of adequate court facilities or procedures. The desirability of reversing the present trend toward court consolidation, for whatever purpose, is at least open to question. There are also other costs attendant upon the creation of a wholly new and independent probate court system. Skilled jurists may be difficult to obtain since a high degree of specialization will be required with concomitant repetitiveness of assignments. Furthermore, the flow of work may be sporadic and difficult to regulate, with a collateral effect on judicial efficiency. Finally, a considerable expenditure of funds for new court facilities may make such a plan too costly to consider.

<sup>109</sup> See notes 45-52 and accompanying text *supra*.

<sup>110</sup> See note 28 and accompanying text *supra*.

<sup>111</sup> States such as Connecticut could reduce the number of districts electing probate officials. Alabama, however, has a constitutional provision forbidding consolidation. See note 28 *supra*. The Michigan legislature currently has the power to combine counties into probate districts, subject to the approval of the electorate of the affected counties. MICH. CONST. art. 6, § 15. See also MICH. COMP. LAWS ANN. § 701.2a (Supp. 1972).

### C. *Court Consolidation in the General Trial Court*

If the jurisdiction of the general trial court were expanded, and minor court judges were retained as nonjudicial officials serving in their present probate districts, then a considerable reallocation of subject matter jurisdiction would have occurred, even though the extent of apparent structural reform would be modest. The resulting court structure would be in accord with the minimal requirements of the Code.<sup>112</sup> Two basic problems might arise as a consequence of consolidating the probate and general trial courts. First, the trial courts might initially be faced with some matters with which they are unfamiliar. This problem would, however, be mitigated by extant guideposts for the trial judge such as case law and treatises in the probate field. In this sense the trial courts would be in a somewhat more favorable position than when they must confront a matter brought under a newly enacted statute, where there are fewer indicators of appropriate considerations.

Second, there is the issue of what becomes of present probate officials. Retention of judges as registrars of the court would accomplish the requisite change while avoiding a seemingly harsh treatment of those persons, most of whom have served their constituencies as well as the existing system permits.<sup>113</sup> For both practical and idealistic reasons, probate reform probably should not incur the enmity of such men and women, and using their skills in this manner would avoid this difficulty.

A legislature could also confer upon the state supreme court the duty of assigning probate functions, whether judicial or nonjudicial, to inferior courts, including the probate court. The jurisdiction of probate courts would thereby be narrowly confined to administrative matters requiring little or no adjudication. If the supreme court were permitted to define the probate districts as

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<sup>112</sup> UPC §§ 1-201(5), 1-308.

Traditionally not all disputes relating to the estate of a decedent could be litigated in a court of probate. In a probate proceeding, the question before the court is whether the testamentary instrument is the legal and valid will of the decedent unrevoked at the time of his death. For example, where plaintiffs sought to prevent probate of a will on the ground that decedent's spouse had fraudulently prevented the revocation of the will, the California Supreme Court ruled that relief was unavailable in a probate proceeding and had to be obtained in a court of equity. *Estate of Silva*, 169 Cal. 116, 121-22, 145 P. 1015, 1017 (1915). The order of the probate court admitting the will did not preclude plaintiff from seeking constructive trust relief in equity. *Brazil v. Silva*, 181 Cal. 490, 493, 185 P. 174, 175 (1919). Thus, it is not sufficient for probate courts merely to be located within the general trial court. In order to be able to settle an estate in its entirety, the court designated to probate wills and appoint representatives should have jurisdiction concurrent with the general trial court to hear all matters involving the estate or its representative. See UPC § 3-105 and Comment.

<sup>113</sup> See Whitman, *supra* note 31, at 599.

well, then the numbers of judges and seats of court could be selectively brought into line with judicial needs. In addition a probate court administrator could play a significant role in this regard.

In many jurisdictions, the general trial courts currently have little or no involvement with probate matters. Thus, consolidating probate jurisdiction in the trial court may deprive probate matters of the specialized attention of a probate judge. Selecting the general trial court as the Code-mandated court might, however, have a positive aspect in that the court would not be compelled to change its current role toward fiduciaries, who will have greater freedom from court supervision under the Code.<sup>114</sup> Presumably these courts now hear probate matters only when an interested party brings suit.

It would seem that those jurisdictions which have either drastically reduced the numbers of probate judges or wholly eliminated probate courts, while consolidating probate jurisdiction, have demonstrated that this last discussed plan is the most efficient and least costly solution to reconciling the existing state court structures and the Uniform Probate Code. The selection of the general trial court follows logically from the Code's policy of locating extensive jurisdiction over matters involving decedents' estates in a fully competent court.

#### IV. CONCLUSION

Retention of existing probate courts and an enlargement of their powers and jurisdiction would appear not to be a sound choice for those states considering structural changes. The creation of a new probate court modeled on the Massachusetts or New York systems would create problems for court administrators because it would result in dispersion of court personnel and facilities. Enlarging the subject matter jurisdiction of the existing general trial court would seem to be the only sound approach. The fact that many states have already moved in this

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<sup>114</sup> See notes 81-83 and accompanying text *supra*.

The draftsmen of the Model Probate Code, which preceded the Uniform Probate Code, advocated that the probate court "should be the same court as the court of general jurisdiction or should be a division of it." L. SIMES & P. BASYE, *supra* note 14, at 483. As part of this structure, they argued that:

It would seem that, if, as is herein advocated, a noncontentious, summary procedure is permitted, efficiency would require that some judicial powers be given to the clerk or register [sic] in these matters. However, the judge should be held to strict accountability for these acts.

*Id.* at 487. In arriving at this conclusion, Simes and Bayse surveyed the then-existing roles of nonjudicial court officials. *Id.* at 477-82. See also Model Probate Code § 11 (1946).

direction,<sup>115</sup> and that Idaho, the first state to adopt the Uniform Probate Code,<sup>116</sup> has done likewise, suggests that the conclusion urged is an acceptable one. With this approach existing probate judges could be continued in office, with a gradual reduction in the number of probate districts and increase in the qualification of court personnel.

To smooth the path for this transition, a detailed analysis of the workloads of the existing inferior probate courts and courts of general jurisdiction should be undertaken at once by interested attorneys, organizations, and bar associations.<sup>117</sup> Failure to make such studies will militate against the enactment of the Uniform Probate Code except in those jurisdictions wherein probate matters are presently handled by the general trial court.

Consideration of structural reforms need not impede enlightened discussion of the Code itself because the Code draftsmen have not sought to impose upon the states a plan of court reorganization. Rather they have created a body of procedural law which can be used in a variety of structural settings. As this article has attempted to illustrate, consolidation of the courts would seem to be the path most consistent with the goals the Code seeks to achieve.

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<sup>115</sup> See note 4 *supra*.

<sup>116</sup> The Code became effective in Idaho on July 1, 1972. Ch. 111, § 28. [1971] Idaho Sess. Laws 382.

<sup>117</sup> The efforts already made in this direction by the *Alabama Law Review* and *Connecticut Law Review* have provided much valuable data and charted a course for others to follow. See *Symposium on Probate Law*, 2 CONN. L. REV. 449 (1970).