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The Uniform Probate Code - A Refreshing Approach to Probate Reform

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NOTES

THE UNIFORM PROBATE CODE—A REFRESHING APPROACH TO PROBATE REFORM

"One who seeks to find a solution to the problems of dispensing with or shortening the administration of decedents' estates is literally a voice crying in the wilderness."[1]

INTRODUCTION

While Professor Atkinson's above metaphorical statement may prove to be incorrect, it is undeniably true that there is widespread dissatisfaction with the American system of administering decedents' estates. Indeed, the entire probate process has been recently depicted as a disgraceful ogre and something to be avoided like the plague; hence, the title of a recent publication, *How to Avoid Probate,* by Norman F. Dacey.[2] Mr. Dacey leveled a vituperative attack on bench and bar alike and on our probate system in general by suggesting that it is a time-consuming, costly racket and conspiracy.[3] He, of course, suggested various non-probate vehicles for use in the wealth-transmission process of which the inter vivos trust was his main suggested "cure-all." That the general public is truly dissatisfied with this system of estate administration is perhaps evidenced by the fact that as of May, 1967, over 673,000 copies of Mr. Dacey's book had been sold.[4]

Rather than dismiss Mr. Dacey as a "crackpot," perhaps the proper approach is to realize that some of what he relates may be true. He is certainly not alone in his conclusion that the dissatisfaction with our probate system stems from two primary criticisms — delay and cost.[5] However, Mr. Dacey's proposition that

1. T. ATKINSON, WILLS 545 (2d ed. 1937).
2. N. DACEY, HOW TO AVOID PROBATE (1965).
3. *Id.* at 6, 8.
4. Wellman, *The Uniform Probate Code: A Possible Answer to Probate Avoidance,* 44 IND. L. J. 191, 192 (1969). Furthermore, in an interview with various attorneys in the Fargo, North Dakota—Moorhead, Minnesota area on November 22, 1969, it was reported that since 1966 many clients have either referred to Mr. Dacey or inquired as to the possibility of using the inter vivos trust in their estate plan.
5. Lubke, *An Intervivos Look at Dacey,* 42 WIS. B. BULL. 32, 36-37 (1969); Sheard, *Avoiding Probate of Decedent's Estates,* 36 U. CIN. L. REV. 70, 71-73 (1967).

attorneys will never aid in probate reform is clearly erroneous. Indeed, the seeds of probate reform were planted by attorneys long before Mr. Dacey arrived on the scene in 1966.

In addition to a Model Probate Code published in 1947,[6] a most industrious program for probate reform begun in 1962 was culminated in 1969 with the adoption of the Uniform Probate Code. The Uniform Probate Code (hereinafter referred to as the Code) is the finished product of a joint effort between a subcommittee of the Real Property, Probate and Trust Law Section of the American Bar Association and the National Conference of Commissioners on Uniform State Laws.[7] The project was instigated by the American Bar Association in 1962 and in 1963 the ABA's research was turned over to the National Commissioners with the ABA serving in an advisory capacity.[8] The Code was adopted by the National Conference of Commissioners on Uniform State Laws in Dallas, Texas in August of 1969 and was further endorsed by the House of Delegates of the American Bar Association.

This Code presents a most refreshing approach to reform of both the substance and the procedure of probate laws. It will be the purpose of this writing to focus primarily on the procedural aspects of the Code, however. The writer's purpose is not to present a complete section-by-section analysis of a most comprehensive Code. Rather, in light of the two above-mentioned criticisms of our probate system (delay and cost), the writer will show selectively how the Code (through some of its flexible procedures) attempts to reduce both cost and delay in the settlement of decedents' estates. This showing will be hopefully accomplished by comparing various provisions of the Code with the present North Dakota statutory scheme for the administration of decedents' estates.

SOME PRELIMINARY OBSERVATIONS ABOUT PROBATE

It would perhaps be premature to plunge into a discussion of a Code which purports to produce drastic reform in an institution without first examining briefly the make-up of that institution. In other words, what is this institution labeled "probate" and what is its function?[9] It seems only obvious that when a property owner dies, some efficient means must be provided to accumulate his property and distribute it to those named in the decedent's will

6. 4 REAL PROP. PROBATE & TRUST J. 207 (1969).
7. *Id.*
8. *Id.*
9. The term "probate" has its derivation from a Latin word meaning "to prove." Strictly speaking, probate refers only to the process of establishing the validity of a will. Apparently, however, the term has taken on a broader connotation since it appears to the writer that the term now refers to all matters over which probate courts have jurisdiction. 1 BANCROFT, PROBATE PRACTICE § 110, at 261 (2d ed. 1950).

or to those entitled to the property under the laws of intestacy if no valid will exists.

It is interesting to note that at common law the real property of a decedent was not subject to any probate administration process. Furthermore, the decedent's simple contract debts could not be satisfied from the real property in his estate.[10] Today, generally speaking, administration of a decedent's real and personal property is required by statute.[11] Basically, the statutory administration procedure is designed to: prove the decedent's will or determine his or her heirs; give notice to possible devisees and legatees or heirs; gather and preserve all the decedent's property; pay debts by liquidation of certain property, if necessary; pay taxes; settle any litigation; and distribute the remaining property to the proper distributees.[12]

It should be noted that, in theory at least, the policy of the law

> favors speedy administration and settlement of estates. The policy is to reach final settlement and distribution with the greatest dispatch commensurate with reasonable protection of all interests involved. It is accordingly the policy of the law to curtail dilatory proceedings.[13]

In practice, however, "speedy administration and settlement" of decedents' estates simply has not materialized. In fact, it has been reported that estate administration moves so sluggishly that even the smallest of estates may be held open for at least two years.[14] In a recent survey taken by a former assistant dean of the University of North Dakota Law School, he reported that the typical settlement time for decedents' estates in North Dakota ranged anywhere from 8 to 16 months.[15]

With waiting periods like these, is it not only natural that people may seek avenues for wealth transmission other than via the will or through intestacy? Indeed, the writer wonders if many people simply are not *forced* by our existing inefficient statutory estate administration procedures to do exactly as Dacey advocates and to "avoid probate." It is somewhat tragic to consider that individuals will feel compelled to avoid a system and procedure which may, in actuality, be best suited for their own circumstances. Indeed, as one practicing attorney recently remarked:

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10. *Id.* § 1, at 1.
11. *Id.* § 2, at 3; *See* N.D. CENT. CODE tit. 30 (1960 and 1969 Supp.).
12. Sheard, *supra* note 5, at 71; BANCROFT, PROBATE PRACTICE § 14, at 34; *see* N.D. CENT. CODE tit. 30 (1960, Supp. 1969).
13. 1 BANCROFT, PROBATE PRACTICE § 15, at 35 (2d ed. 1950).
14. Sheard, *supra* note 5, at 71.
15. J. JOHNSON & J. WHITE, FAMILY ESTATE PLANNING 28 (N.D. State University Bull. No. 463, 1966).

> For many people, especially those who are young, the execution of a will, followed by probate, is the simplest and cheapest estate plan. The expense and effort of utilizing. . . inter vivos tools. . . simply are not justified for many property owners.[16]

Individuals should not be forced (by a costly and time-consuming system) to employ other estate planning devices which are really not suited to their individual needs. Clearly, one must reject Dacey's proposal that there is a standard plan for all. Obviously, domestic and financial circumstances are too varied for any standard plan.[17] Whether one chooses to bypass probate by trust, joint tenancy, gift or life insurance will obviously depend upon the family situation, the type and amount of property involved, and tax considerations. The point is, however, that individuals should have at their disposal an efficient estate administration procedure in the event they choose to travel that particular estate planning route. As Professor Wellman (the Chief Reporter of the Code project) recently remarked:

> [M]any people are sufficiently resentful about being pushed toward probate-avoiding devices by bad law that they would gladly support legislative correction of the probate probblems. . . .[18]

Since the applicable statutory procedures are partly if not wholly responsible for the cost and delay in estate administration it is necessary to examine a select few of those procedures as they presently exist in North Dakota and to ascertain in what way the Code might provide a better solution.

THE CODE—SOME SOLUTIONS TO THE PROBLEM OF COST AND DELAY IN THE ESTATE ADMINISTRATION PROCESS

In addition to the obvious purpose of the Code to make probate law uniform among the states,[19] it also has another important enumerated purpose. That purpose is ". . . to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to successors."[20] And how does the Code propose to promote this speedy and efficient administration? First of all, the Code contemplates a single probate court having general jurisdiction over all matters relating to decedents' estates (including will construction and heir determination), estates of protected persons, pro-

16. Sheard, *supra* note 5, at 74.
17. Lubke, *supra* note 5, at 37.
18. Wellman, *supra* note 4, at 194-95.
19. *See* UNIFORM PROBATE CODE § 1-102(b)(5).
20. *Id.* (b)(3).

tection of minors and incapacitated persons,[21] and all matters relating to trusts—both inter vivos and testamentary.[22] Thus, the Code envisions the establishment of a court of general jurisdiction which as an incident of its general jurisdiction would entertain proceedings in trust and estate administration.

As provided by the North Dakota Constitution, however, the county court (which presently handles probate matters) is one of rather special and limited jurisdiction.[23] Pursuant to the Constitution, the North Dakota Legislature has enumerated the jurisdictional limits and powers of the county court.[24] In spite of the wide range of subject matter subsumed under the county court's jurisdiction, it is doubtful that it possesses the power and jurisdiction required as contemplated by the Code.[25]

The problem in North Dakota is that the jurisdiction of the county court is limited and parties are required to resort to the district court for relief in certain other matters affecting probate. It is this undesirable procedure of transfer from the county court to the district court of general jurisdiction which causes delay in estate administration and settlement. Under the Code, this problem would be eliminated. The Code-envisioned court would have all the necessary power (both legal and equitable) to adjudicate and provide relief for all issues relating to estate administration and settlement. As Professor Rollison crisply commented about the Code court:

> The probate court is given general jurisdiction over all matters connected with the settlement and distribution of a decedent's estate. That is to say, the probate (*sic*) is given jurisdiction to get the job done from beginning to end. There is no good reason for transfer. . . to a circuit court or a court of equity from the probate court—a matter involving time and extra expense.[26]

Once an examination of the court structure has been undertaken, it is appropriate at this point to include a statement concerning the role of this court from the Introduction to Article III of the

21. For a definition of the terms, "protected person" and "incapacitated person," *see* UNIFORM PROBATE CODE § 5-101.
22. UNIFORM PROBATE CODE §§ 1-301, 1-302.
23. N.D. CONST. art IV, § 111.
24. N.D. CENT. CODE §§ 27-07-02, -09 (1960).
25. As examples, it has been held by the North Dakota Supreme Court that the county court does *not* have the following jurisdictional powers: To settle accounts of inter vivos trustees: *See* Graves v. First Nat'l. Bank, 138 N.W.2d 584 (N.D. 1965); To liquidate a partnership estate: Gardner Hotel Co. v. Hagaman, 47 N.D. 434, 182 N.W. 685 (1921); To try title questions regarding real property: Arnegaard v. Arnegaard, 7 N.D. 475, 75 N.W. 797 (1898); Gjerstadengen v. Van Duzen, 7 N.D. 612, 76 N.W. 233 (1898). It thus appears that a Constitutional amendment may be in order if North Dakota is to adopt the court structure as contemplated by the Code.
26. Rollison, *Commentary on the Uniform Probate Code*, 30 ALA. LAW. 334, 343 (1969).

Code. This is important since it goes to the very heart of the Code's procedures:

> 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.[27] (emphasis added).

Furthermore, the Code contemplates the establishment of a non-judicial officer (labeled a Registrar)[28] who would act on any informal applications.[29] The judge of the probate court would, of course, hear and decide the formal petitions.[30]

To illustrate this concept, note that North Dakota procedure allows but one method for the probate of a will; namely, adversary judicial proceedings in which evidence is presented and a subscribing witness testifies, if available.[31] Notice must be given to all heirs, all devisees and legatees named in the will, and any person who would take a property interest under the will.[32] The Code, however, provides that a will may be declared valid in one of two ways; that is, either informally by the Registrar or adjudicated valid by the court.[33]

This optional "informal probate" procedure without notice and without testimony of witnesses should aid in expediting the administration of decedents' estates. The applicant would simply make application for informal probate to the Registrar on the strength of the applicant's belief that the will is validly executed, that this instrument is the decedent's last will, and that he is unaware of any other will or codicil revoking the will.[34] If at least *five* days (and note *only* five days) have elapsed from the decedent's death, the Registrar may, in his discretion,[35] issue a written statement of informal probate.[36] Obviously, the statement of informal probate

27. UNIFORM PROBATE CODE Introduction to Article III.
28. *Id.* § 1-307.
29. *Id.* § 3-105.
30. *Id.*
31. N.D. CENT. CODE §§ 30-05-11, -12 (1960).
32. *Id.* §§ 30-02-07 through -12; 30-05-08 (1960).
33. UNIFORM PROBATE CODE § 3-102.
34. Section 3-301 (a) sets out certain information which must be submitted to the Registrar for *either* informal probate of a will *or* informal appointment of a personal representative. Section 3-301 (b) requires additional information besides that contained in (a) for informal probate of a will. In addition to the requirements enumerated in the text of the article at page 10, the applicant must also state that the original of the decedent's will is in the possession of the court or accompanies the application here for informal probate. The applicant must also state that the time limit for informal probate has not run. The time limit is three years from the decedent's death.
35. *See* UNIFORM PROBATE CODE § 3-305. The power to grant informal probate is entirely discretionary with the Registrar. If he believes that the necessary requirements for informal probate as enumerated in § 3-303 have not been met, he may decline the informal probate application.
36. *Id.* § 3-302.

is no adjudication and formal probate proceedings still may be had if desired by an interested party.[37] The important point is, however, that the Code provides for a simple non-adversary procedure to prove a will. As the comment to Section 3-302 points out:

> 'Informal probate', it is hoped, will serve to keep the simple will which generates no controversy from becoming involved in *truly* judicial proceedings.[38]

THE POWER OF THE PERSONAL REPRESENTATIVE UNDER THE CODE

The executive vice-president of the Manufacturers Hanover Trust Company in New York recently observed that "[n]early every state's law unduly restricts the authority of the personal representative and subjects him to too much supervision by the court."[39] His conclusion was that as a result of this procedure, estate settlement is made inefficient and costly. In fact, research indicates that there are only four jurisdictions in the United States which really purport to grant broad authority to a personal representative. In these four states—Arizona, Idaho, Texas, and Washington[40]—independence from the probate court in estate administration may be had *if the testator so provides in his will.*[41] The will is termed a "non-intervention will" and the personal representative named in the will is termed an "independent executor."[42] The underlying theory behind the non-intervention will and broad conferral of power on the independent executor is simply that:

> [T]he process of winding up is largely ministerial and usually non-litigious; the court should be invoked only when there is need for its strong arm or its adjudicative capacity. Other contact is unnecessary and costly.[43]

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37. *Id.* § 3-305. Formal probate (actual litigation) will probably be commenced in either of three basic situations. It will be commenced originally instead of informal probate. It may be brought to obstruct a pending informal probate application. (See comment to § 3-401). Finally, it may be brought to contradict a previous informal probate order.

38. UNIFORM PROBATE CODE § 3-302, Comment.

39. Harris, *A Uniform Probate Code,* 104 TRUSTS & ESTATES 337 (1965).

40. ARIZ. REV. STAT. ANN. § 14-502 (1956); IDAHO CODE ANN. §§ 15-237, -238 (1948); TEX. CIV. STAT. ANN. § 145 (Vernon Supp. 1969); WASH. REV. CODE ANN. § 11.68.010 (Supp. 1969).

41. Note the language from the Washington statute, as an example: "In all cases where it is provided in the . . . will . . . of the deceased that . . . such estate shall be settled without the intervention of any court . . . it shall not be necessary to take out letters . . . except to admit the will to probate and to file a true inventory, . . . and give notice to creditors. . . ."

"After the probate of any such will . . . all such estates may be *managed and settled without the intervention of the court, if the . . . will . . . so provides.*" (emphasis added). WASH. REV. CODE ANN. § 11.68.010 (Supp. 1969).

42. *See generally* Fletcher, *Washington, Non-Intervention Executor-Starting Point for Probate Simplification,* 41 WASH. L. REV. 33 (1966).

43. *Id.* at 37-38.

North Dakota severly hampers the power of the personal representative with the county court tightly supervising the administration of a decedent's estate. Basically, the representative is entitled to possession of all the decedent's property,[44] he may lease real property in certain instances,[45] and he may obtain loans[46] and make sales of the property in certain limited circumstances.[47] The theory behind limiting a personal representative's authority is, of course, one of protection to beneficiaries from incompetent representation.[48] But as has been suggested, this can be accomplished ". . . without unnecessarily hampering a competent and honest fiduciary."[49] The Code has provided for the option of an "informal administration" of decedents' estates. Very simply, the personal representative may administer the estate without constant hearings, court orders, and general court-supervised administration *unless* such supervised administration is directed.[50] The Code contemplates, simply, that the court will be available to assist the parties *in any contested matter*, but otherwise, the personal representative will administer the estate without judicial supervision.

Of course, supervised administration may be necessary in some instances. The Code provides, therefore, that supervised administration will be had if the decedent's will directs supervised administration[51] or if the court finds supervised administration ". . . necessary under the circumstances."[52] But it appears that even when supervised administration is directed the only real restriction placed upon the personal representative is that he may not make any distribution without court order.[53] If any other restriction is placed on his authority it must be endorsed on his letters of appointment.[54] Otherwise, a supervised personal representative ". . . has the same

44. *See* N.D. CENT. CODE § 30-13-04 (1960). This is true with the exception of any homestead or exempt property. *Id.* The executor is under a duty to protect the real property from waste, also.

45. The executor or administrator must lease farm property only for a cash rental or only for no less than one-fourth of the share of the crops produced on the rural real property. N.D. CENT. CODE § 30-13-05 (1960).

46. The only loans which an executor or administrator may make, however, are loans on harvested cereal crops from the federal government or any of its agencies or from any private institution when guaranteed from the federal government. N.D. CENT. CODE § 30-13-24 (1960).

47. The personal representative has somewhat more discretion over sales of *personal* property from the estate. Sales of personal property may be made without court order but the statute specifies a minimum price. *See* N.D. CENT. CODE § 30-19-01. (1960). Real property, however, must be sold on court order. N.D. CENT. CODE §§ 30-19-06, 09 (1960).

48. Harris, *supra* note 39, at 337.

49. *Id.*

50. UNIFORM PROBATE CODE §§ 3-502, 3-704.

51. *Id.* §§ 3-501, 3-502. It is interesting to note here that the preference is for an *informal* administration *unless* the testator directors otherwise in the will. (Even then the court may find that conditions have changed since will execution and still direct an informal administration). Compare this with the non-intervention statutes, *supra* note 40, which express a preference for a *supervised* administration *unless* the testator directs otherwise. *See* § 3-502, Comment.

52. *Id.* § 3-502.

53. *Id.* §§ 3-501, 3-504.

54. *Id.* § 4-504. As the Comment to this section points out, any restriction on a personal representative must be endorsed on his letters in order to be effective as to a person dealing in good faith with the representative.

duties and powers as a personal representative who is not supervised,"[55] and may administer the estate without obtaining court orders.

If the personal representative is to have a "free hand," so to speak, and to act wihout the protection of court orders, it is only logical that the personal representative should know precisely what his powers and duties are. It is probably only common sense that dictates if he is in doubt as to those powers and duties he should seek the protection of a court order.[56] Part 7 of Article III clearly defines the powers and duties of a personal representative. He is deemed to be a fiduciary subject to the same standard of care as a trustee.[57] Therefore, he may be held liable for damage to an interested party caused by any improper exercise of power affecting the estate.[58] His basic responsibility is to quickly proceed with the settlement of a decedent's estate without a court order unless supervised administration has been ordered or he desires to invoke the court's jurisdiction to resolve a question.[59] So that there would be little question as to a representative's authorized transactions, the Code has specifically enumerated 27 such transactions.[60] The representative has a wide latitude of power under the Code. But it must be mentioned at the risk of stating the obvious that any of the 27 authorized transactions could not, of course, be effected if expressly prohibited in the will or by the court. Suffice it to say without listing all 27 transactions that substantially greater power is given to a personal representative under the Code than under existing North Dakota probate law.[61]

But with this theory of personal representative activity and corresponding probate court passivity, might not this invite misuse of power by a personal representative? The Code drafters were no doubt aware of this concern and made provision for a check upon possible abuse of this power. First of all, the Code does provide that a personal representative shall give notice no later than 30 days after his appointment as such to the interested heirs and devisees.[62] This notice or "information" is to include "the name and address of the representative, indicate that it is being sent to persons who have or may have some interest in the estate

55. *Id.* § 3-501.
56. *Id.* § 3-704.
57. *Id.* §§ 3-703, 3-711.
58. *Id.* § 3-712.
59. *Id.* § 3-704.
60. While all 27 authorized transactions provide the personal representative with awesome power, note particularly numbers: 4, 5, 6, 12, 16, 23, 24, and 25. The writer assumes that this list is not meant to be all-inclusive. It would seem that a personal representative could transact other business not specifically enumerated here if "consistent with the best interests of the estate." UNIFORM PROBATE CODE § 3-703. Of course, if a representative were in doubt about a particular transaction, it would seem only prudent on his part to obtain the protection of a court order.
61. N.D. CENT. CODE §§ 30-13-04, -24, 30-19-01, -06, -09 (1960).
62. UNIFORM PROBATE CODE § 3-705.

being administered, indicate whether bond has been filed, and describe the court where papers relating to the estate are on file."[63] Obviously, in a system which contemplates a wide latitude of authority to a fiduciary, interested persons should be apprised of certain information. This is true since those interested parties may desire to invoke the jurisdiction of the court if they become apprehensive as to the progress of estate settlement.

Further, it should be noted, the Code provides that an interested party may demand that a personal representative give bond.[64] Also, an interested party may make written petition to the court for an order *restraining* certain performance by a personal representative.[65] Also, an interested party may petition the court for the *removal* of a personal representative for cause at any time.[66] Finally, the Code establishes a general fraud provision in Section 1-106.[67]

OTHER CODE FEATURES PROMOTING A TIME AND COST SAVINGS IN ESTATE ADMINISTRATION

Under present North Dakota probate procedure the county judge is required to appoint *three* appraisers to value the property listed in the personal representative's inventory.[68] This is a practice which has been highly criticized by writers in the probate field. Witness the statements of two such writers:

> The present system of court-appointed appraisers is, it is safe to say, nothing but political patronage and a waste of an estate's money.[69]
>
> and:
>
> appraisers originally performed substantial functions, . . . but today they frequently sign whatever the executor presents, often without even reading the contents.[70]

While appraisers' fees may not always be substantial, nevertheless, under the Code, court-appointed appraisers are not required.[71]

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63. *Id.*
64. *Id.* § 3-605.
65. *Id.* § 3-607.
66. *Id.* § 3-611.
67. *Id.* § 1-106; *see also* § 3-712.
68. N.D. CENT. CODE § 30-15-07 (1960).
69. Harris, *supra* note 39, at 338.
70. Sheard, *supra* note 5, at 72, n. 17.
71. UNIFORM PROBATE CODE §§ 3-706, -707. It is appropriate to insert at this point a further observation about the Code as it relates to the criticism of present probate procedure. Note in Code Section 3-706 that: "The personal representative shall send a copy of the inventory to interested persons who request it, *or* he may file the original inventory with the court." (emphasis added). The significance of this section is that publicity of the value of estate assets *may* be avoided. This is so, since the representative has the option of merely sending a copy of the inventory to the interested persons rather than filing it with the court whereupon it would become a public record.

Publicity of estate assets has, of course, been another criticism of present probate

The writer suggests that this Code provision is most desirable and that North Dakota's law on this subject is antiquated. Probably, years ago when most estates consisted largely of real property there was a genuine need for the arbitrary figure of three appraisers. However, today, when an estate may consist largely of shares of common stock or of investment companies, the need for three appraisers has all but vanished. Today, it may require no more than the executor's checking of a daily market quotation to value an estate. Of course, if the executor needs the assistance of an appraiser, then he may simply want to employ one.[72] This, however, seems to be a better approach rather than a mandatory requirement of three appraisers to assist in the settlement of every estate regardless of the composition of the assets.

Under present North Dakota probate procedure every personal representative is required to give bond[73] in an amount prescribed by the county court[74] *unless bond is waived* in a will.[75] Under the Code, the situation is reversed: Bond is not required *unless specifically demanded* in the will.[76] This is probably a desirable feature since other protections mentioned previously may provide as much if not more protection to beneficiaries, creditors, and other interested parties than a mandatory bond requirement.[77] Also, the writer would hazard a speculation that most decedents in a testate estate situation probably do waive an executor's bond in their will. If so, the Code's approach of not requiring bond *unless demanded* by the testator is probably correct.

As far as the procedures relating to creditors' claims are concerned, it appears that North Dakota has a speedy and efficient system. For example, the time specified for filing claims is *three* months from the date of the first publication of notice after which time the claim is forever barred.[78] Under the Code, the time period is *four* months from the date of first publication.[79] In North Dakota, if any claim is disapproved by the personal representative, a hearing on the claim is held and the court makes an order allowing or disallowing the claim.[80] The order is final and either party may then appeal from the order.[81] Under the Code, the personal repre-

practice in addition to cost and delay. *See* Harris, *supra* note 39, at 338. *See also* UNIFORM PROBATE CODE § 3-604.

72. UNIFORM PROBATE CODE § 3-707.
73. N.D. CENT. CODE §§ 30-11-06, -07 (1960).
74. *Id.* § 30-11-06(2) (1960).
75. *Id.* § 30-11-12 (1960).
76. *See* UNIFORM PROBATE CODE § 3-603.
77. *Id.*, Comment: "It is believed that the total package of protection thus afforded may represent more real protection than a blanket requirement of bond."
78. N.D. CENT. CODE § 30-18-02 (1960).
79. UNIFORM PROBATE CODE §§ 3-801, -803.
80. N.D. CENT. CODE § 30-18-08 (1960).
81. *Id.*

sentative may disallow a claim and if he does so, he must mail notice to any claimant stating that his particular claim has been disallowed.[82] The burden is then on the claimant to either file a petition for allowance in the court or commence an action against the personal representative no later than 60 days after the mailing of the notice of disallowance,[83] lest his claim be forever barred.

At the end of the four month period from the date of first published notice to creditors, the personal representative may proceed to pay all claims filed without any court order. He may do this after making provision for any homestead and family allowance and for any unbarred claims which have yet to be presented.[84] Thus in this area, it appears that the North Dakota procedure may be just as expeditious as the Code. At least for claims which are allowed, it is possible that they may be settled quicker under North Dakota law (three months for filing claims) than under the Code (four months).

With the increased mobility of our population in recent years it is very likely that a particular decedent may have owned property in a state other than his domicile. Estate administration is further complicated when property owned by a decedent is scattered throughout the various states. This is true, since, first of all, the personal representative administering the estate in the state of domicile may have no power to gather assets in another state. Since the property is located in another state, the courts of that state obviously have *in rem* jurisdiction over the property located within the state's boundaries. Consequently, "ancillary administration" may be required in the state where other property is located and a personal representative from that state may need to be appointed.[85] The basic theory underlying ancillary administration is one of protection to local creditors—that is, creditors in the non-domicile state where the other property may be located.[86] The procedure of ancillary administration falls squarely within both criticisms of American estate administration. It is both time-consuming and costly.[87]

North Dakota, however, fortunately provides that a non-resident individual may qualify as an executor of an estate.[88] This provision no doubt contemplates the situation in which a decedent domiciled in a foreign state (that is, in one other than North Dakota) appoints a representative from that state to administer his estate. While an

82. UNIFORM PROBATE CODE § 3-806.
83. *Id.*
84. *Id.* § 3-807.
85. *See Id.* Article IV; *see generally* Shriver, *The Multi-State Estate,* 3 REAL PROP. PROBATE AND TRUST J. 189 (1968).
86. Shriver, *The Multi-State Estate,* 3 REAL PROP. PROBATE AND TRUST J. 189, 193 (1968).
87. *Id.*
88. N.D. CENT. CODE § 30-11-02 (1960).

ancillary administration in North Dakota may be required for any property located in North Dakota, at least the non-resident representative appointed by the non-resident decedent may act as the executor in North Dakota. It would seem desirable that the domiciliary representative and the ancillary representative be one and the same person. Also under the Code, a foreign personal representative may enter another state (the local state) in which the decedent owned property and handle administration matters just as he could in the state of the decedent's domicile.[89] Upon filing copies of his appointment and of his bond (if any) with the local probate court the foreign personal representative may exercise as to assets in the local state "all powers of a local personal representative."[90] While the Code does not prohibit ancillary administration in the local state, the writer would think it safe to say that it does not *encourage* such a procedure.[91] If ancillary administration is requested in another state where the non-domiciled decedent owned property, the Code takes a common-sense approach for facilitating administration. For example, priority for appointment of a personal representative is given to the representative appointed in the decedent's domicile.[92] As mentioned previously, allowing the domiciliary representative and the ancillary representative to be the same person appears to be most desirable.

The writer notes, too, that under the Code, debtors in the local state (such as a bank holding a deposit) or other holders of a decedent's property would be protected by transferring such property in good faith to a foreign domiciliary personal representative at any time more than 60 days after the decedent's death.[93] Local creditors will be afforded ample protection under the Code. The above-mentioned payments by the decedent's debtor or other holder of the decedent's property may not be made if a local creditor of the decedent notifies the debtor or holder of his interest in this property.[94]

It should perhaps be mentioned in passing that both the Code[95] and the North Dakota Code[96] provide for a speedy summary administration of "small" estates. The basic difference appears to be that the North Dakota Code places a maximum dollar amount on an estate in order to qualify for summary administration ($5,000.00); whereas, the Code does not.[97]

89. UNIFORM PROBATE CODE §§ 4-204 to 206, 4-301.
90. UNIFORM PROBATE CODE § 4-205.
91. *See Id.* § 4-206.
92. *Id.* § 3-203 (g).
93. *Id.* §§ 4-201, -202.
95. *Id.* § 3-1203.
94. *Id.* § 4-203.
96. N.D. CENT. CODE § 30-17-01 (Supp. 1969).
97. Rather than place a fixed dollar amount upon an estate, the Code simply provides that summary administration may be had if the value of the estate, less any liens and

EXECUTOR'S AND ATTORNEY'S FEES

No discussion of probate reform would be complete without a reference to various fees levied against an estate, the most important of which are the following: (1) Probate court fees (2) Executor's or Administrator's fees and (3) Attorney's fees.[98] Probate court fees are probably not excessive considering the amount of the court's intervention in the administration of decedents' estates in North Dakota.[99] However, the writer would suggest that court fees theoretically should be substantially reduced if the Code is adopted in North Dakota; especially if the administration is informal in a particular case. In informal administration the court would play a very minor role; hence, there should result correspondingly lower probate court fees.

Under the North Dakota Century Code, an executor or administrator receives a fee based upon a percentage of the value of the estate settled.[100] No statutory provision exists for attorneys fees; but rather a sliding percentage also based on the size of the estate is contained in a fee schedule drafted by the North Dakota Bar Association.[101] The basic objection to both these executor's and attorney's fees is simply that they are based on the size of an estate rather than on the value of services rendered. A large estate means a larger fee for an executor even though, as a practical matter, the executor probably turns most of the work over to the attorney for the estate. The attorney also receives a larger fee on an estate of substantial assets.

The Code in Section 3-721 provides only that the compensation of a personal representative be reasonable.[102] On petition of any interested party, the reasonableness of the compensation of any representative could be reviewed by the court.[103] Also the reasonableness of the compensation of one employed by the personal representative (such as an attorney) could be reviewed by the court.[104] Thus, the Code questions the appropriateness of a fee schedule which is based on the size of the estate.

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encumbrances does not exceed " . . . homestead allowance, exempt property, family allowance, expenses of the last illness of the decedent. . . ." UNIFORM PROBATE CODE § 3-1203.

98. J. JOHNSON & J. WHITE, *supra* note 15, at 28-31.

99. *Id.* at 30.

100. N.D. CENT. CODE § 30-20-04 (1960).

101. N.D. ST. B. ASSN, Lawyers Desk Manual 25 (1965). The minimum attorney's fees for estate settlement are as follows: 4% of the first $25,000.00 of appraised value and 3% of the appraised value in excess of $25,000.00. For any estate valued at less than $6,000.00, the fee must be at least $250.00.

102. UNIFORM PROBATE CODE § 3-721. As Professor Wellman commented on this section: "The Code does not contain a schedule of fees. It says that personal representatives shall receive reasonable compensation. It backs away from the notion that a schedule keyed to the size of the estate is appropriate." Wellman, *The Uniform Probate Code—Questions and Answers*, 3 REAL PROP. PROBATE & TRUST J. 388, 389 (1968).

103. UNIFORM PROBATE CODE § 3-721.

104. *Id.*

SOME REFLECTIONS

The Code has been critically analyzed throughout the progression of this writing; however, in retrospect, some thoughts occur. It seems to this writer that the very laws which were originally designed to protect a decedent's right to dispose of his property have now become a major obstacle in the wealth transmission process. The typical property owner probably desires that his property pass to his heirs or devisees as quickly and efficiently as possible. This desire is thwarted by rather obsolescent probate laws as exemplified previously by some North Dakota probate procedures. From the heirs' and devisees' standpoint, they must wait for a substantial length of time only to receive an estate depleted by administration expenses. One might argue that what possible difference can it make to an heir or devisee how time-consuming and costly the estate administration process may happen to be. After all, they are receiving a windfall anyway, are they not? However, this probably overlooks the fact that those individuals to whom the decedent has left property (especially to family members) probably contributed at least indirectly to the decedent's amassing of wealth. In addition, holding an estate open for a lengthy period of time may make a widow and children most apprehensive about their support during the period of administration.

The strength of the Code lies primarily in its flexibility. It directs no fixed, rigid procedure; on the contrary, options for estate settlement are freely available. The concept of the passivity of the probate court whose adjudicative power will not be invoked unless desired is an excellent concept. This will allow the typical honest fiduciary to proceed with the administration of an estate in which there simply are no disputes and no need for court intervention. This cannot help but produce the desired effect of eliminating probate red tape and making the entire system more efficient. If the Code is adopted, there may be a further desired effect in that public confidence in the will as a wealth-transmission device may be restored. One would think also that confidence in the Bar would be restored for attempting to solve some problems in an area of the law which have produced violent public criticism.

Without any practical experience in this area it is sometimes difficult to envision future problems with the adoption of particular legislation. The writer notes, however, that the personal reprresentative has awesome power under this Code. The writer's only concern here is that sufficient safeguards actually will exist, in practice, under the Code to check the incompetent fiduciary. Perhaps it might also be desirable in the administration process for the court to establish deadlines for the personal representative. (The Code

rule, anyway.) Then if these deadlines are not met, *impose fines* upon the representative. This practice would seem to be an inducement for more expeditious estate settlement.

Overall, the Code's scheme for decedent estates' administration is an excellent one as has been suggested throughout this writing. It appears that trumpets of probate reform are blowing. North Dakota might do well to heed their cry.

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