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## Illinois Independent Administration of Decedent's Estates - A Will without Probate, 14 J. Marshall L. Rev. 519 (1981)

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## ILLINOIS INDEPENDENT ADMINISTRATION OF DECEDENTS' ESTATES—A WILL WITHOUT PROBATE

As a rule, property laws aim at facilitating the transmission of wealth.<sup>1</sup> Many rules, statutes, and laws have been enacted and enforced to achieve this end.<sup>2</sup> Yet the laws regarding the transmission of a decedent's estate, specifically probate laws, have become increasingly complex.<sup>3</sup> As a result, several states, including Illinois, have enacted statutes<sup>4</sup> making probate and the transmission of wealth at death simpler.<sup>5</sup>

Independent administration<sup>6</sup> of a decedent's estate, one attempt to facilitate the transmission of wealth at death, provides for the administration of an estate, testate or intestate, without court supervision.<sup>7</sup> Any interested person, which is defined as

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1. The history of property law in England reflects the tension between the titled class's desire to retain their property for posterity and the lower class's desire to obtain some of that property. Thus, the Statute of Quia Emptores (1290) gave the lesser landholders the right to transfer their property without remuneration to the overlord. The Statute of Wills (1540) gave one the right to devise his property to anyone he chose. See generally C.J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY (1962).

2. The Rule Against Perpetuities is perhaps the most noted. Illinois has statutes which limit the right of re-entry and possibility of reverter, ILL. REV. STAT. ch. 30, §§ 37(b), (e) (1947), and the fee tail, ILL. REV. STAT. ch. 30, § 5 (1953).

3. The public now believes probate to be too complex and tries to avoid it. Barnard, Williams, and Zartman, *Major Revision of Probate Act Simplifies Settlement of Decedents' Estates*, 68 ILL. B.J. 248 (1979) [hereinafter cited as *Major Revision*]. However, the English law made allowances for informal probate of wills, permitted administration of estates without court supervision, and provided for ex parte proceedings. Kindregan, *The California Crawl: Reforming Probate Administration in California*, 19 SANTA CLARA L. REV. 1, 3 (1979).

4. California, Illinois, South Dakota, Texas, and Washington have adopted their own independent administration provisions. The Uniform Probate Code (UPC), adopted in fourteen states, also provides for independent administration. See note 27 *infra*.

5. "[T]he process of winding up a decedent's affairs is mostly routine and usually friendly. . . . [A]n honest and modestly able person, with competent help, should be able to carry out the process pretty much on his own." Fletcher, *Washington's Non-Intervention Executor—Starting Point for Probate Simplification*, 41 WASH. L. REV. 33, 74 (1966) [hereinafter cited as Fletcher].

6. The term "independent administration" was coined by Texas to describe a probate procedure which has no court supervision.

7. Illinois borrowed the term "independent administration" from Texas. Washington calls a similar procedure "non-intervention" probate, while the UPC calls its provision "flexible system of decedents' estates."

one having a financial interest, property right or fiduciary status in relation to the estate proceedings,<sup>8</sup> may petition the court for independent administration.<sup>9</sup> If granted,<sup>10</sup> a personal representative<sup>11</sup> is given the power<sup>12</sup> to handle the estate as if he had court authority, normally required in probate proceedings, for each act.<sup>13</sup> Since there are no court orders, the estate is kept out of the public records resulting in almost total confidentiality for the distributees.<sup>14</sup> Additionally, a reduction in court involvement minimizes the costs of administration.<sup>15</sup>

There are other probate provisions which attempt to facilitate the transmission of wealth and should be compared with independent administration. One of these is summary adminis-

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8. ILL. REV. STAT. ch. 110½, § 1-2.11 (1979) defines an interested person as: "one who has or represents a financial interest, property right or fiduciary status at the time of reference which may be affected by the action, power or proceeding involved, including without limitation an heir, legatee, creditor, person entitled to a spouse's or child's award and the representative."

9. ILL. REV. STAT. ch. 110½, § 28-1 (1979).

10. *Id.* at § 28-2. This section states:

(a) Unless the will, if any, expressly forbids independent administration or supervised administration is required under subsection (b), the court must grant independent administration. . . .

(b) If an interested person objects to the grant of independent administration under subsection (a), the court must require supervised administration, except:

(1) If the will, if any, directs independent administration, supervised administration shall be required only if the court finds there is good cause to require supervised administration.

(2) If the objector is a creditor or a legatee other than a residuary legatee, supervised administration shall be required only if the court finds it is necessary to protect the objector's interest, and instead of ordering supervised administration, the court may require such other action as it deems adequate to protect the objector's interest.

11. ILL. REV. STAT. ch. 110½, § 1-2.15 (1979) states: "'Representative' includes executor, administrator, administrator to collect, guardian and temporary guardian."

12. ILL. REV. STAT. ch. 110½, art. 28 (1979).

13. Williams and Zartman, *Independent Administration of Decedents' Estates Heads for the Legislature*, 65 ILL. B.J. 370, 371 (1977) [hereinafter cited as *Independent Administration*].

14. *Id.* at 372.

15. *But cf.* Price, *The Transmission of Wealth at Death in a Community Property Jurisdiction*, 50 WASH. L. REV. 277, 283-84 (1975), where the author summarizes the results of a survey: "there was no indication that employment of the non-intervention procedure disadvantaged any beneficiaries, creditors or other persons interested in the estate settlement process. On the other hand, use of the procedure did not appear to reduce either the length of time required to complete estate administration proceedings or the cost of administration." In Washington, the objective of a simplified, inexpensive non-intervention system has largely failed. Fletcher, *supra* note 5, at 34.

tration,<sup>16</sup> a direct distribution of the estate's assets to the distributees by a court order.<sup>17</sup> When the court is satisfied that certain requirements are met,<sup>18</sup> the court may determine the rights of interested persons, direct the distribution and excuse the issuance of letters of office,<sup>19</sup> thus closing the administration without a great deal of time and expense. This differs from independent administration in that after the will has been admitted to probate, the representative handles the estate without court orders.

In addition, summary administration is available only to estates under \$50,000,<sup>20</sup> whereas independent administration is

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16. ILL. REV. STAT. ch. 110½, §§ 9-8, 9-9 (1979).

17. ILL. REV. STAT. ch. 110½, § 9-8 (1979) provides that:

Upon the filing of a petition therefor in the court of the proper county by any interested person and after ascertainment of heirship of the decedent and admission of the will, if any, to probate. . . the court may determine the rights of claimants and other persons interested in the estate, direct payment of claims and distribution of the estate on summary administration. . . .

18. ILL. REV. STAT. ch. 110½, § 9-8(a)-(g) (1979) lists these requirements:

(a) the gross value of the decedent's real and personal estate subject to administration in this State as itemized in the petition does not exceed \$50,000;

(b) there is no unpaid claim against the estate, or all claimants known to the petitioner, with the amount known by him to be due to each of them, are listed in the petition;

(c) no tax will be due to the United States or to this State by reason of the death of the decedent or all such taxes have been paid or provided for or are the obligation of another fiduciary;

(d) no person is entitled to a surviving spouse's or child's award under this Act, or a surviving spouse's or child's award is allowable under this Act, and the name and age of each person entitled to an award, with the minimum award allowable under this Act to the surviving spouse or child, or each of them, and the amount, if any, theretofore paid to the spouse or child on such award, are listed in the petition;

(e) all heirs and legatees of the decedent have consented in writing to distribution of the estate on summary administration (and if an heir or legatee is a minor or disabled person, the consent may be given on his behalf by his parent, spouse, adult child, person in loco parentis, guardian or guardian ad litem);

(f) each distributee gives bond in the value of his distributive share,

. . . .  
(g) the clerk of the court has published a notice informing all persons of the death of the decedent, of the filing of the petition for distribution of the estate on summary administration and of the date, time, and place of the hearing on the petition (the notice having been published once a week for 3 successive weeks in a newspaper published in the county where the petition has been filed, the first publication having been made not less than 30 days prior to the hearing); . . . .

19. ILL. REV. STAT. ch. 110½, § 9-8 (1979) specifies: "the court may determine the rights of claimants and other persons interested in the estate, direct payment of claims and distribution of the estate on summary administration and excuse the issuance of letters of office or revoke the letters which have been issued and discharge the representative."

20. ILL. REV. STAT. ch. 110½, § 9-8(a) (1979).

available to estates under \$150,000.<sup>21</sup> Both are alternatives to administering an estate valued under \$50,000. However, an estate of less than \$50,000 would not occasion the desire for privacy as would a larger estate. Accordingly, the distributees of smaller estates may prefer summary administration. Also, an estate of less than \$50,000 is not as likely to have real estate. Therefore such an estate would be easier for the court to handle summarily.

Another probate procedure which should be compared with independent administration is termed "family settlements."<sup>22</sup> Family settlements are agreements or contracts made between the decedent's heirs or legatees for a certain distribution of the estate. These agreements may or may not conform to the distribution specified in the will.<sup>23</sup> The estate involved in a family settlement must still go through probate because the purpose of the settlement is to avoid a will contest.<sup>24</sup> In contrast, independent administration keeps the estate out of probate<sup>25</sup> since the goal is to administer the will as quickly and efficiently as possible.<sup>26</sup>

Recently, the Illinois legislature drafted a bill concerning estate administration without court supervision. This article will discuss the legislative history of independent administration in Illinois. The Illinois provision will then be analyzed and compared with the provisions from the Uniform Probate Code.<sup>27</sup> In addition, the Illinois provision will be compared with the pro-

21. *Id.* at § 28-1.

22. The heirs must request independent administration. ILL. REV. STAT. ch. 110½, § 28-2 (a) (1979). In a family settlement the heirs must agree upon the distribution. See note 18 *supra*.

23. The law favors family settlement of an estate where the family compromises in order to avoid a will contest. See generally Annot., 29 A.L.R. 3d 8 (1970); Annot., 29 A.L.R. 3d 174 (1970).

24. Annot., 29 A.L.R. 3d 8, 25 (1970); Annot., 29 A.L.R. 3d 174, 181 (1970).

25. The will is admitted to probate, but it does not go through probate. The record merely reflects the independent representative's report that the administration is finished. See notes 88-98 and accompanying text *infra*.

26. *Independent Administration*, *supra* note 13, at 372.

27. UPC art. 3 (1977 official text). The UPC has been enacted in 14 states as follows: ALASKA STAT. §§ 13.06.005 to 13.36.100 (1972); ARIZ. REV. STAT. ANN. §§ 14-1101 to 14-7307 (1973); COLO. REV. STAT. §§ 15-10-101 to 15-17-101 (1973); FLA. STAT. ANN. §§ 731.005 to 735.302 (West 1974); HAWAII REV. STAT. §§ 560:1-101 to 560:8-102 (1976); IDAHO CODE §§ 15-1-101 to 15-7-307 (1971); ME. REV. STAT. ANN. tit. 18-A, §§ 1-101 to 8-401 (1979); MICH. COMP. LAWS §§ 700.1 to 700.993 (MICH. STAT. ANN. §§ 27.5001 to 27.5993 (Callaghan 1962 & Supp. 1980)); MINN. STAT. ANN. §§ 524.1-101 to 524.8-103 (West 1974 & Supp. 1979); MONT. REV. CODES ANN. §§ 72-1-101 to 72-5-502 (1974); NEB. REV. STAT. §§ 30-2201 to 30-2902 (1974); N.M. STAT. ANN. §§ 45-1-101 to 45-7-401 (1975); N.D. CENT. CODE §§ 30.1-01-01 to 30.1-35-01 (1973); UTAH CODE ANN. §§ 75-1-101 to 75-8-101 (1975).

bate statutes of California,<sup>28</sup> South Dakota,<sup>29</sup> Texas,<sup>30</sup> and Washington,<sup>31</sup> which are the only states that have adopted independent administration systems. Based on the experiences of these states, suggestions for amendments to the Illinois provision will be proffered. Finally, estate planning guidelines for independent administration will be considered.

#### ILLINOIS LEGISLATIVE HISTORY

In recent years there has been a trend to avoid probate because of its complicated and expensive procedures.<sup>32</sup> This trend created an awareness among lawyers and judges that probate proceedings should be simplified. In response to this need, a joint subcommittee of the Illinois State Bar Association (ISBA) and the Chicago Bar Association (CBA) made a thorough study of the Uniform Probate Code (UPC),<sup>33</sup> which provides for estate administration without court intervention,<sup>34</sup> known as independent administration. The subcommittee issued a report in 1972 which concluded: (1) the UPC should not be adopted by Illinois; (2) simplification of decedent's estate administration is desirable in Illinois; and (3) the independent administration concept of the UPC should be adopted by Illinois.<sup>35</sup>

28. CAL. PROB. CODE §§ 591 to 591.7 (West Supp. 1980).

29. S.D. COMP. LAWS ANN. §§ 30-18A-1 to 30-18A-16 (1976).

30. TEX. PROB. CODE ANN. §§ 145 to 154A (Vernon 1980).

31. WASH. REV. CODE ANN. §§ 11.68.010 to 11.68.120 (1967 & Supp. 1980).

32. *Independent Administration, supra* note 13, at 370.

These probate avoidance devices frequently have undesired results. Ranging from joint tenancies to elaborate inter vivos trust agreements, they may involve an unintended transfer of title and resulting loss of control during life, unexpected tax consequences, or an unforeseen disposition at death. *Major Revision, supra* note 3, at 255.

33. *Independent Administration, supra* note 13, at 370. The UPC was promulgated by the National Conference of Commissioners on Uniform State Laws. The UPC was approved by the Conference and by the American Bar Association in 1969 and has been enacted in fourteen states. See note 27 *supra*.

The UPC is a comprehensive probate system. In addition to the flexible system of administration of decedents' estates, the UPC provides for intestate succession, guardianship, non-probate transfers, and trust administration.

34. UPC art. 3 (1977 official text) (general comment).

35. *Independent Administration, supra* note 13, at 370. The UPC was first read to the Illinois House of Representatives on March 15, 1974. It was then assigned to the Committee on Assignments of Bills Committee on Judiciary I. Next it was assigned to the Interim Study Calendar. Finally, the UPC was re-referred to the Committee on Rules. LEGISLATIVE SYNOPSIS AND DIGEST OF THE 1974 SESSION OF THE SEVENTY-EIGHTH GENERAL ASSEMBLY, STATE OF ILLINOIS (Vol. I), (No. 12), at 422 (1974).

The joint ISBA and CBA subcommittee then drafted an add-on provision to the existing Illinois Probate Act<sup>36</sup> incorporating references to the existing Probate Act while providing for simplified procedures in uncontested estates.<sup>37</sup> The bill subsequently proposed by the subcommittee was presented in two parts. The first part involved amendments or revisions to several sections of the existing Probate Act plus additions and changes in certain definitions.<sup>38</sup> These revisions were necessary to effectively incorporate the second part of the bill, which was an entirely new article in the Probate Act dealing with an optional independent administration of decedents' estates.<sup>39</sup>

After the bill was introduced to the Illinois Senate, four ma-

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36. *Major Revision, supra* note 3, at 251.

37. *Id.* This add-on provision is the current Article XXVIII of the Illinois Probate Act.

38. *Independent Administration, supra* note 13, at 371. The originally proposed changes in traditional administration procedures to be made applicable to all estates, regardless of size, were the following:

(1) Admission of the will to probate would be simplified and accelerated. Heirs and legatees would no longer receive advance notice of the preliminary hearing on the will, but the court clerk would send the heirs and legatees notice promptly upon the automatic admission of the will to probate. If the will contained a proper attestation clause then no testimony or affidavit would be necessary to prove the will.

(2) In a will contest proceeding, instead of requiring summons to be issued and served on all of the parties, the clerk would notify the parties by mail.

(3) A claimant would now be able to file his claim with either the court or the representative. "Notice" pleading would be allowed, and claims would no longer need to be notarized. The representative would be authorized to allow or disallow claims. Claims not filed within six months of the issuance of the letters of office would be barred.

(4) Instead of the court appointing an appraiser of the decedents' goods and chattels, the representative would be authorized to employ an appraiser for that purpose.

39. *Independent Administration, supra* note 13, at 370. Under the proposed Article XXVIII, once the estate is opened, the representative could petition the court for permission to administer the estate without court supervision; he would thus be freed from the necessity of posting bond or security and filing motions with the court as long as no interested person objected. Once the petition for independent administration is granted, any interested person would have the right to request termination of the independent administration if he became dissatisfied.

All the existing substantive and procedural provisions of the Probate Act would continue to apply except where inconsistent with the proposed Article XXVIII. The most important exceptions would be as follows:

(1) No bond or security would be required of the independent representative.

(2) The independent representative would be required to furnish a copy of the inventory to each interested person who so requested before proceeding with the administration. However, he would not need to file an inventory with the court.

(3) The independent representative, not the court, would determine the amount of the spouse and child awards.

(4) The independent representative would have broad administrative powers exercisable without court order. In general, these powers would be

major amendments were proposed and adopted.<sup>40</sup> Three of these amendments changed only the procedural parts of the bill. The substantive portion, giving the independent representative vast rights and duties, remained the same. However, the other amendment providing for a \$150,000 limitation on those estates which would be eligible for independent administration<sup>41</sup> was a substantive limitation which may defeat the legislative desire to cut costs.<sup>42</sup> Once the amendments were adopted and despite some isolated skepticism,<sup>43</sup> the bill and accompanying amend-

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the same powers the representative would have by court order in supervised administration.

(5) When the estate had been fully administered, the representative would be accountable to all interested persons for his actions, but he would not be required to present an accounting to the court. The independent representative would only need to file a report with the court stating that he had completed his duties.

(6) At any time during the independent administration, the independent representative or any interested person would have the right to go into court to try a particular issue pertaining to a contested issue in the administration.

(7) Third persons who deal in good faith with an independent representative or his distributee would be protected much the same as they are in dealing with a trustee under Section 8 of the Trusts and Trustees Act. *Id.* at 372.

40. The first amendment mandated that the notice sent to the heirs or legatees was to include an explanation of their rights under independent administration. The second amendment was technical in that it corrected errors and incorporated changes into the Act. The fourth amendment made mandatory the requirement that the independent representative mail a copy of the estate inventory to each interested person. This amendment retained the provision that the inventory need not be filed with the court.

41. Illinois Senate Debates, May 8, 1979, at 124.

42. *Id.* However, the bar associations accepted this provision with great reluctance. The bar committee strongly believes that there should be no valuation limitation. The simplified procedures and privacy should be available to all estates. *Major Revision, supra* note 3, at 253. See notes 56-60 and accompanying text *infra*.

43. This skepticism was most succinctly stated by Senator Knuppel:

Well, this is the age of the consumer and unfortunately the probate lawyers of the State of Illinois have overcharged, they've been parasitical for years and years and years and they put out a bar schedule which you were supposed to be guilty of unethical practice if you violate it. They brought the situation on themselves and made the word probate a dirty word. But the concept that this is going to correct it, is erroneous. Now, I'm going to support the bill because it's the age of the consumer, we try to give them what they want. They're going to be so damn confused with the alternatives they're not going to save any money because lawyers have a way . . . of holding their hand and having them come in and sign one paper or do one act and charging for it anyway. And all this is going to do is confuse. It won't save money. . . . The fact is. . . the probate lawyers are behind this, the probate lawyers were behind the charges and I'll guarantee you ten years from now, if I could come back and speak to you, you'll find out that this bill has only further confused the people. It makes some people think that they're going to be able to do this themselves. They're going to ass it up so badly, the people who try to do it, that the lawyers will just make one hell of a



ments met with wide approval,<sup>44</sup> were passed by the senate and were signed into law to become effective on January 1, 1980.<sup>45</sup>

Subsequently, two amendments to the independent administration statute have been presented before the Illinois House of Representatives.<sup>46</sup> One amendment concerns removing the \$150,000 limitation on the value of an eligible decedent's estate.<sup>47</sup> The other would allow a will, and therefore the testator, to specifically provide for independent administration.<sup>48</sup> Both amend-

lot more money out of the assted up estates. And believe me this is true. . . . You still are going to have to file tax returns for the federal government, you're still going to have to file inheritance taxes for the state government. People who think they can do it themselves and that they can go in and get a box, a safety deposit box released on their own, that they can sneak around and beat the government out of money are going to end up in jail. It's a misleading piece . . . of legislation. But I say if they want to do it unto themselves, let them do it. The lawyers are the ones that are sponsoring this legislation and you can't believe nobody here is going to believe that these probate lawyers are going to gut themselves. They'll find a way, the thing will be so damn confused they'll be so many contested matters. If you ever dealt with a family in probate, if there's enough money, they're going to fight. One is going to try to cheat another one and as a result, the lawyers have written it and they hope these people make these mistakes and the lawyers will get fat off from them.

Illinois Senate Debates, May 14, 1979, at 143-44.

44. The Chicago and Illinois Bar Associations, the Senate Judiciary Committee, and Chief Judge Walter Dahl of the Cook County Probate Division supported the bill. The American Association of Retired Persons and the National Retired Teachers Association endorsed the bill. Illinois Senate Debates, May 14, 1979, at 138.

45. *Major Revision, supra* note 3, at 255.

46. Illinois HB 2785, HB 2786. The first reading was June 28, 1979.

47. Illinois HB 2785 reads in part:

Sec. 28-1. Purpose and scope of Article. This Article permits an executor or administrator to administer the estate without court order or filings, except to the extent that court order or filing is required by this Article or is requested by any interested person pursuant to this Article. . . . All provisions of this Act dealing with decedents' estates that are not inconsistent with this Article apply to and govern independent administration.

48. Illinois HB 2786 reiterates § 28-1 of Illinois HB 2785 and continues: (ch. 110½, par. 28-2)

Sec. 28-2. Order for independent administration—notice of appointment of independent administrator, (a) unless supervised administration is required under subsections (b) or (c) if the will of the decedent requires independent administration, or if the gross value of the decedent's real and personal estate subject to administration in this State, as of the date of death, does not exceed \$150,000 and the will, if any, does not expressly forbid independent administration. The court must grant independent administration (1) when an order is entered appointing a representative pursuant to a petition which requests independent administration and which is filed under Section 6-2, 6-9, 6-20, 7-2, 8-2, 9-4 or 9-6; or (2) on petition by the representative at any time or times during supervised administration and such notice to interested persons as the court directs.

(b) If there is an interested person who is a minor or disabled per-

ments have been referred to the Rules Committee where they remain.<sup>49</sup>

## ANALYSIS OF THE ILLINOIS ACT

### *Scope of Independent Administration*

The Illinois article on independent administration was a synthesis of independent administration systems from other

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son, the court may require supervised administration (or may grant independent administration on such conditions as it deems adequate to protect the ward's interest) whenever the court finds that (1) the interests of the ward are not adequately represented by a personal fiduciary acting or designated to act pursuant to Section 28-3 or by another party having a substantially identical interest in the estate and the ward is not represented by a guardian of his estate and (2) supervised administration is necessary to protect the ward's interests. When independent administration is granted, the clerk of the court must include with each notice required to be mailed to heirs or legatees under Section 6-10 or subsection (d) of Section 28-2 an explanation of the rights of heirs and legatees under this Article and the form of petition which may be used to terminate independent administration under subsection (a) of Section 28-4. The form and substance of the notice of rights and the petition to terminate shall be prescribed by rule of the Supreme Court of this State. Each order granting independent administration and the letters must state that the representative is appointed as independent executor or independent administrator, as the case may be.

(c) If an interested person objects to the grant of independent administration under subsection (a), the court must require supervised administration, except:

(1) If the will, if any, directs independent administration, supervised administration shall be required only if the court finds there is good cause to require supervised administration.

(2) If the objector is a creditor or a legatee other than a residuary legatee, supervised administration shall be required only if the court finds it is necessary to protect the objector's interest, and instead of ordering supervised administration, the court may require such other action as it deems adequate to protect the objector's interest.

(d) Not more than 14 days after entry of an order directing that original letters of office issue to an independent administrator of an intestate estate, the clerk of the court shall mail a copy of the petition for letters and a copy of the order showing the date of its entry to each of the decedent's heirs who was not entitled to notice of the hearing on the petition under Section 9-5. If the name or post office address of any heir is not stated in the petition, the clerk of the court shall publish a notice once a week for 3 successive weeks, the first publication to be not more than 14 days after entry of the order, describing the order and the date of entry. The notice shall be published in a newspaper published in the county where the order was entered and may be combined with the notice under Section 18-3. A copy of the petition and of the order need not be sent to and notice need not be published for any person who is not designated in the petition as a minor or disabled person and who personally appeared before the court at the hearing or who filed his waiver of notice. (Underlined portions represent added provisions).

49. LEGISLATIVE SYNOPSIS AND DIGEST OF THE 1980 SESSION OF THE EIGHTY-FIRST GENERAL ASSEMBLY, STATE OF ILLINOIS (Vol. I), (No. 14), 1313 (1980).

states and from the pertinent provisions of the UPC.<sup>50</sup> This synthesis was then molded to fit the existing Illinois Probate Act.<sup>51</sup> The joint committee of the Illinois and Chicago Bar Associations,<sup>52</sup> which drafted the article, was able to draw upon the experiences of Texas and Washington, whose independent administration systems have been in effect for more than one hundred years.<sup>53</sup> The result appears to be a thoroughly developed and well-integrated whole.<sup>54</sup> However, certain additional provisions from California, South Dakota, Texas, Washington, and the UPC could be interwoven with the Illinois article to make a better system. These will be considered in detail.<sup>55</sup>

Independent administration is available to any decedent's estate, testate or intestate, valued under \$150,000.<sup>56</sup> This dollar limitation, unique to Illinois, in practice defeats the purpose of independent administration.<sup>57</sup> Certain costs of estate administration do not vary, such as the inventory, notice, and accounting. However, as the value of the estate increases, more costs can be saved proportionately by having the estate independently administered and staying out of court.<sup>58</sup> The Illinois leg-

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50. *Independent Administration*, *supra* note 13, at 371. Among the states whose provisions were considered were California, Indiana, Maryland, Missouri, Ohio, Pennsylvania, Texas, Washington, and Wisconsin. Only California, South Dakota, Texas, and Washington have enacted independent administration provisions.

51. *Independent Administration*, *supra* note 13, at 371, citing Illinois Probate Act of 1975, ILL. REV. STAT. ch. 110½ (1975).

52. See notes 33-37 and accompanying text *supra*.

53. In 1843, the Republic of Texas authorized a testator to provide in his will "that no other action than the probate and registration of the will shall be had in the Probate Courts." Laws of the Republic of Texas, 1843, An Act to Amend the Probate Law § 5; 2 GAMMEL, LAWS OF TEXAS 834 (1898). In 1848 this provision was integrated into the first comprehensive probate legislation of Texas. It remains substantially unchanged in the present statute. Tex. Laws 1848, ch. 157, § 110; 3 GAMMEL, LAWS OF TEXAS 275 (1898). Washington enacted its first independent administration statute in 1868 (2 HILL'S CODE § 955 (1868)). Marschall, *Independent Administration of Decedents' Estates*, 33 TEX. L. REV. 95, 97 (1954).

These provisions are similar to those under Roman law. The purpose of the Roman will was to appoint a successor in whom the rights and liabilities of the deceased should vest as a whole. The will had to cover the entire estate. The will generally contained a number of directions, such as legacies, which the heir was to carry out. W.W. BUCKLAND, A TEXTBOOK OF ROMAN LAW 282 (3d ed. 1966).

54. When enacting the independent administration provisions, the legislature revised the existing Probate Act so the entire system would fit together. There are many cross-references between the new article and the old Act. See notes 38-39 and accompanying text *supra*.

55. See notes 59-138 and accompanying text *infra*.

56. ILL. REV. STAT. ch. 110½, § 28-1 (1979).

57. See notes 41-42 and 47 *supra*.

58. Interview with Samuel Hunt, Vice-President of Personal Trusts, Illi-

islature should seriously consider adopting the amendment which removes this limitation.

A limiting provision Illinois should adopt is Washington's restriction of independent administration<sup>59</sup> to solvent estates, testate or intestate.<sup>60</sup> An insolvent estate creates creditor problems which should be handled by a lawyer or a financial institution. Limiting the availability of independent administration to a solvent estate is rational as it does not assume the representative would possess the technical knowledge to deal with an insolvent estate.

### *Procedural Requirements*

#### *The Court Order*

When an interested person<sup>61</sup> requests independent administration, the court must grant it.<sup>62</sup> If another interested person objects,<sup>63</sup> then the court must deny the petition.<sup>64</sup> This reflects the legislative awareness that if the interested persons cannot agree on the type of administration, then further disagreements may develop. Consequently, the legislature believed the court should play an active role in situations where interested persons are in conflict. When an interested person has requested independent administration and no other interested person objects, the court order granting independent administration may be entered when a representative<sup>65</sup> is appointed<sup>66</sup> or upon petition by the representative at any time during supervised administration.<sup>67</sup> This provision allows the persons interested in the estate to determine how the estate should be administered.

#### *Independent Administration—The Testator's Choice?*

Early independent administration provisions required the

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nois Continental Bank and Trust Company, in Chicago, Illinois (Aug. 5, 1980).

59. Washington refers to independent administration as "non-intervention" proceedings.

60. WASH. REV. CODE ANN. § 11.68.010 (Supp. 1980).

61. ILL. REV. STAT. ch. 110½, § 1-2.11 (1979). See note 8 *supra*.

62. ILL. REV. STAT. ch. 110½, § 28-2(a) (1979).

63. If the will requests independent administration or if the objecting person is a creditor or non-residuary legatee, the court must find good cause to require supervised administration. ILL. REV. STAT. ch. 110½, § 28-2(b)(1) (1979).

64. *Id.* at § 28-2 (a).

65. ILL. REV. STAT. ch. 110½, § 1-2.15 (1979) states that a representative includes an "executor, administrator, administrator to collect, guardian and temporary guardian."

66. ILL. REV. STAT. ch. 110½, § 28-2(a) (1979).

67. *Id.*

testator to request independent administration in his will.<sup>68</sup> Independent administration of an intestate estate was not permitted. The Illinois provision places independent administration at the option of the interested persons and not the testator. The proponents of this provision believed the heirs and legatees, not the decedent, should have the choice of whether to go through probate or whether to administer the estate without court supervision. Those acts which allow only the testator to choose independent administration adhere to the old concepts of property ownership that the testator should control both the disposition and distribution of his property.<sup>69</sup> However, the right to control the disposition of one's property has no relation to a mandate that the testator also determine the procedure for administering his estate.<sup>70</sup> In fact, leaving the choice of probate procedure solely on the judgment of a person now dead who made the decision at some time in the past is an affront to the judgment and intelligence of those surviving him.<sup>71</sup> The Illinois legislature should adopt the proposed amendment<sup>72</sup> which allows the testator as well as the interested persons to request independent administration.<sup>73</sup>

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68. 34 C.J.S. *Executors & Administrators* § 1056 (1942).

69. This concept is fallacious because the testator may not be able to foresee the best method of distribution.

70. Fletcher, *supra* note 5, at 81.

71. *Id.*

72. See note 48 and accompanying text *supra*.

73. In allowing both the testator and the interested persons to request independent administration, the Illinois legislature would be giving added flexibility to the independent administration provision. Such flexibility would be consistent with modern concepts of property ownership giving both the donor and the donee an opportunity to control property distribution.

Fortunately, Illinois did not adopt the UPC plan which has independent administration as the usual administration procedure and court supervised administration as the optional procedure. The UPC system would be fine for most estates, see Fletcher, *supra* note 5, at 74, but there could be problems where interested persons do not agree on the administration of the estate. The UPC allows court intervention at any time upon petition by any interested person or by the personal representative. Yet the case might arise where the interested persons, including the personal representative, would rather battle things out among themselves than have the court intervene. During an estate administration, the interested persons may not be as rational as would be hoped by the legislature. Therefore, the interested persons might not invoke the supervision of the court when necessary.

The Illinois provision making independent administration optional is better in that estates that are uncontested or well planned are most likely the ones which will be independently administered. Even though the Illinois statute mandates that independent administration be granted when requested, it seems likely that the court would use its discretion and deny independent administration on its own motion when a will contest seems imminent. It could be argued that the court is also an interested person as

### Notice

When the order for independent administration is granted in Illinois, notice must be sent by the clerk of the court within fourteen days.<sup>74</sup> This notice must explain the rights of the heirs and legatees.<sup>75</sup> It must be sent to the following interested persons: heirs,<sup>76</sup> legatees,<sup>77</sup> and creditors.<sup>78</sup>

Illinois is unique inasmuch as no other independent administration system has a complete notice requirement.<sup>79</sup> All the parties involved have their rights spelled out for them. The rights of the heirs and legatees are stated in the notice and the rights of the independent representative are stated in the statute<sup>80</sup> and the will. Therefore, each knows the rights and duties of the other, and the independently administered estate should run smoothly.

### Inventory

Illinois, by adopting an inventory provision,<sup>81</sup> broke away from precedent. For example, Texas requires that the inventory be filed and approved before the independent executor act.<sup>82</sup> This provision brings the estate under the purview of the court and the estate therefore becomes a matter of public record. In contrast, Illinois requires the independent representative to mail a copy of the inventory of the estate to each interested per-

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it has a fiduciary duty to make sure the estate administration is completed according to the mandates of the law. See note 8 *supra*.

74. ILL. REV. STAT. ch. 110½, § 28-2 (c) (1979).

75. *Id.* at § 28-2 (a).

76. *Id.* at § 9-5.

77. *Id.* at § 6-10.

78. *Id.* at § 18-3.

79. Notice, in Illinois, must be sent by the clerk of the court not more than fourteen days after entry of the order for independent administration. This notice may combine all notices which are required to be sent by other sections of the Probate Act. See notes 76-78 *supra*. This notice must also explain the rights of the heirs and legatees in independent administration. CAL. PROB. CODE § 591.1 (West Supp. 1980); S.D. COMP. LAWS ANN. § 30-18A-1 (1976); WASH. REV. CODE ANN. §§ 11.68.010, 11.68.040 (Supp. 1980); and UPC § 3-705 (1977 official text) require that notice be sent to the heirs, distributees, and creditors of the estate. Texas does not require notice to be sent to creditors but only that all distributees be served with citation and notice of the independent administration. TEX. PROB. CODE ANN. § 145(f) (Vernon 1980).

80. ILL. REV. STAT. ch. 110½, § 28-8 (1979). See notes 99-118 and accompanying text *infra*.

81. UPC § 3-706 (1977 official text).

82. TEX. PROB. CODE ANN. § 145(h) (Vernon 1980). An executor is one appointed by will to administer the decedent's estate. An administrator is one appointed by court to administer an intestate estate. Illinois includes both in the term "representative." See note 11 *supra*.

son, but he need not file the inventory with the court.<sup>83</sup> Thus, the estate is not a matter of public record, and the privacy of the heirs and legatees is protected.

In one respect the UPC provision concerning inventory is more explicit than the Illinois provision. The UPC places a three month limit on the time the representative has to prepare the inventory,<sup>84</sup> whereas the Illinois provision is silent as to any time limit within which the independent representative has to prepare the inventory. If the representative delays the inventory, time is wasted and the whole scheme is defeated. This defeat should not be left to the courts to correct with the somewhat amorphous "reasonable" time limit. The Illinois legislature should amend the independent administration article to specify a time limit, such as four months. This should provide ample time for the independent representative to prepare an inventory.

### *Distribution*

In Illinois, when it becomes apparent that the assets of the estate are sufficient to pay all the claims on the estate, the independent representative may distribute the estate to those persons entitled to their respective shares of the assets.<sup>85</sup> Although all claims need not be paid at the time of the distribution,<sup>86</sup> the Illinois article requires that the assets of the estate be sufficient to cover the claims and taxes. The independent representative should distribute the estate according to the mandates of the will or the provisions in the Probate Act pertaining to intestate descent and distribution.<sup>87</sup> By not requiring court intervention in the distribution, Illinois is clearly in accordance with the theory behind independent administration—a system without court interference.<sup>88</sup>

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83. ILL. REV. STAT. ch. 110½, § 28-6 (1979).

84. UPC § 3-706 (1977 official text).

85. ILL. REV. STAT. ch. 110½, § 28-10 (1979).

86. *Major Revision, supra* note 3, at 254.

87. ILL. REV. STAT. ch. 110½, § 28-1 (1979) states: "All provisions of this Act dealing with decedents' estates that are not inconsistent with this Article apply to and govern independent administration."

88. The Illinois method of distribution allows for a greater amount of discretion on the part of the independent representative than do the California, CAL. PROB. CODE § 591.2 (West Supp. 1980), or the Washington, WASH. REV. CODE ANN. § 11.68.100 (Supp. 1980), provisions. In both California and Washington, the court must order the distribution of the estate. This seems to be an unwarranted court intervention in a system which purports not to have court intervention. The Illinois provisions for distribution are more in accordance with the theory behind independent administration.

### *Closing the Estate*

The Illinois method for closing an independently administered estate is tailored to conform to the other provisions in the Illinois Probate Act.<sup>89</sup> An independent representative must send a final accounting to all interested persons except a creditor who has been paid in full or an heir or legatee whose share in the estate has been satisfied.<sup>90</sup>

The independent representative need not file an accounting with the court. He need only file a report which states that the requisite notices have been sent,<sup>91</sup> that each claim has been dealt with,<sup>92</sup> and that taxes<sup>93</sup> and all fees<sup>94</sup> have been paid. The independent representative must also provide a list of the names and addresses of each person originally entitled to notice.<sup>95</sup>

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89. ILL. REV. STAT. ch. 110½, § 28-11 (a) (1979) states:

(a) The independent representative must file in the court a verified report stating:

- (1) In a testate estate, that notice of probate has been given in compliance with Section 6-10.
- (2) If letters of administration have been issued, that notice has been given in compliance with subsection 28-2 (c).
- (3) That the notice required by Section 18-3 has been published and that the first publication occurred more than 6 months before the date of the report.
- (4) That each claim filed has been allowed, disallowed, compromised, dismissed or is barred.
- (5) That all estate and inheritance taxes have been determined and paid.
- (6) That all claims allowed have been paid in full, or, if the estate was not sufficient to pay all the claims in full, that the claims have been paid according to their respective priorities.
- (7) That all administration expenses and other liabilities of the estate have been paid, the remaining assets of the estate have been distributed to the persons entitled thereto, copies of the inventory and final account have been mailed to all interested persons and their receipts therefor have been obtained and are attached, and the independent representative has fully accounted to all interested persons for all acts of administration and distribution.
- (8) Whether the fees paid or payable to the independent representative and his attorney have been approved by all interested persons.
- (9) The name and post office address, if known, of each person entitled to notice of the filing of the report.

90. ILL. REV. STAT. ch. 110½, § 28-11 (b) (1979).

91. *Id.* at § 28-11(a)(1)-(3).

92. *Id.* at § 28-11(a)(4),(6),(7).

93. *Id.* at § 28-11 (a)(5).

94. *Id.* at § 28-11(a)(8).

95. *Id.* at § 28-11(a)(9). Since the names of the interested persons do not appear anywhere else on record, this is the one place where both the estate and all those interested appear together in the public records.



In Illinois, the closing of an independently administered estate is entirely at the discretion of the independent representative.<sup>96</sup> The Texas<sup>97</sup> and UPC<sup>98</sup> provisions allow any interested person, not just the independent administrator, to file an application to close the proceedings when there is no longer any need to continue it. In Illinois it is impossible to force a closing. However, the Texas and UPC provisions allow the interested persons to determine the administration of the estate, thus exemplifying the purpose of independent administration as stated by the drafters of the Illinois article. Clearly, the Illinois provision concerning the closing of the estate falls short of attaining rapid administration and, therefore, Illinois should follow the lead of Texas and the UPC by allowing any interested person to force the closing of the estate.

### *Powers of the Independent Representative*

Illinois requires the independent representative to file bond before he is able to act with regard to the estate.<sup>99</sup> However, the will may specifically waive the bond requirement. Illinois requires the bond to be one and one-half times the amount of the

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96. ILL. REV. STAT. ch. 110½, § 28-11 (1979) states:

An independent representative is accountable to all interested persons for his administration and distribution of the estate but need not present an account to the court unless an interested person requests court accounting as in supervised administration. In the absence of court accounting, when the estate has been fully administered, the estate must be closed and the independent representative discharged. . . .

97. TEX. PROB. CODE ANN. §§ 151(a), 152(a) (Vernon 1980) states in part:

§ 151(a). When all of the debts known to exist against the estate have been paid, or when they have been paid so far as the assets in the hands of the independent executor will permit, and when the independent executor has distributed to the persons entitled thereto all assets of the estate, if any, remaining after payment of debts, the independent executor may file with the court a final account verified by affidavit. . . .

§ 152(a). At any time after an estate has been fully administered and there is no further need for an independent administration of such estate, any distributee may file an application to close the administration; . . .

98. UPC § 3-1001 (a) (1977 official text) states in part: "A personal representative or any interested person may petition for an order of complete settlement of the estate."

99. ILL. REV. STAT. ch. 110½, § 28-1 (1979) incorporating §§ 12-2, 12-4. Under the bar-sponsored bill, the independent representative was to be excused from furnishing bond and surety in every case. However, the Senate Judiciary Committee amended the bill so that bond was required unless excused by the will. *Major Revision, supra* note 3, at 253-54, Texas, TEX. PROB. CODE § 145(p) (Vernon 1980), Washington, WASH. REV. CODE ANN. § 11.68.030 (Supp. 1980) and the UPC, §§ 3-603 to 3-606 (1977 official text) also require the independent representative to file bond before taking any action on the estate.

estate if the surety on the bond is a corporate surety. If the surety is an individual, the bond must be double the amount of the estate.<sup>100</sup> The bond requirement is wise, because it protects not only the interested persons from a breach of duty on the part of the independent representative, but also the independent representative in his dealings with third parties, such as banks and insurance companies, while administering the estate.<sup>101</sup>

Once bond has been given, the independent representative is qualified to act and he does not have to formally accept the position.<sup>102</sup> The independent representative is not an officer of the court, but a creature of the will or, in the case of intestacy, the statute. As such, he is similar to an agent or trustee of the decedent.<sup>103</sup> Independent administration provides the representative with all the power and duties of a supervised executor, but he does not need a court order to carry out his duties.<sup>104</sup> The near total discretion given an independent representative places him in a fiduciary relationship with the interested persons.<sup>105</sup>

The Illinois provision pertaining to the independent representative's powers differs from the older Texas provision.<sup>106</sup> The Texas provision is very general, conferring on an independent executor all the powers he would have if the administration were supervised by the court. Illinois enumerates the powers of

100. ILL. REV. STAT. ch. 110½, § 12-5 (1979). See, e.g., TEX. PROB. CODE ANN. § 194 (Vernon 1980); WASH. REV. CODE ANN. § 11.28.180 (1980); UPC § 3-604 (1977 official text).

101. It has been suggested that the bonding requirement be removed since the bonds do not actually provide protection. Interview with James Zartman, partner in Chapman and Cutler, Chicago, Illinois, and chairman of the original Joint Subcommittee on the Uniform Probate Code of the CBA Probate Practice Committee and the ISBA Probate and Trust Law Section, in Chicago, Illinois (Jan. 31, 1980).

102. 34 C.J.S. *Executors & Administrators* § 1056 (1942).

103. *Id.* The heir under Roman law was regarded as continuing the personality of the deceased. Rheinstejn, *European Methods for the Liquidation of the Debts of Deceased Persons*, 20 IOWA L. REV. 431, 434 (1935).

104. The independent executor "is uncontrolled, uninformed, unchecked, and untrammelled by orders of the court directing, informing, or commanding what he shall do in the management and administration of the estate. . . . But [he] is not a law unto himself. He is required to conform to the probate laws as far as applicable." Marschall, *Independent Administration of Decedents' Estates*, 33 TEX. L. REV. 95, 108 (1954).

105. ILL. REV. STAT. ch. 110½, § 12-2 (1979), stresses the representative's fiduciary duty: "[E]very individual representative shall take and file an oath or affirmation that he will faithfully discharge the duties of his office according to law. . . ."

ILL. REV. STAT. ch. 110½, § 28-8 (1979), stresses this duty as to independent representative: "An independent representative acting reasonably for the best interests of the estate. . . ." See note 133 *infra*.

106. TEX. PROB. CODE ANN. § 145 (Vernon 1980).

the independent representative.<sup>107</sup> The powers conferred by the statute are subject to any powers granted by the will.<sup>108</sup> If the powers granted by the will are inconsistent with those powers conferred by the statute, the court must intervene.<sup>109</sup> In order to be consistent with the purpose of probate, which is to give effect to the will, the powers granted by the will should predominate over those conferred by the statute. But whether the will actually predominates must be determined by future case law. The court should balance the desires of the decedent against intent of the legislature.

For example, the will may provide that the entire estate is to be held in trust until the decedent's youngest child attains the age of twenty-one, at which time the estate is to be probated and independently administered. In giving effect to this provision, the court should look at the facts of the case. If the decedent's youngest child was already twenty-one or very near twenty-one when the decedent died, no problem will arise as the estate can be administered immediately. However, if the decedent's youngest child was only several months old when the decedent

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107. ILL. REV. STAT. ch. 110½, § 28-8 (1979) states in part:

An independent representative acting reasonably for the best interests of the estate has the powers granted in the will and the following powers, all exercisable without court order, except to the extent that the following powers are inconsistent with the will:

- (a) To lease, sell at public or private sale, for cash or on credit, mortgage or pledge the personal estate of the decedent and to distribute in kind any personal estate the sale of which is not necessary;
- (b) To borrow money with or without security;
- (c) To mortgage or pledge agricultural commodities as provided in Section 19-3;
- (d) To continue the decedent's unincorporated business without personal liability except for malfeasance or misfeasance for losses incurred; . . .
- (e) To settle, compound or compromise any claim or interest of the decedent in any property or exchange any such claim or interest for other claims or property; . . .
- (f) To perform any contract of the decedent;
- (g) To employ agents, accountants and counsel, including legal and investment counsel; to delegate to them the performance of any act of administration, whether or not discretionary; and to pay them reasonable compensation;
- (h) To hold stocks, bonds and other personal property in the name of a nominee as provided in Section 19-12;
- (i) To take possession, administer and grant possession of the decedent's real estate; . . .
- (j) To retain property properly acquired, without regard to its suitability for original purchase; and to invest money of the estate . . . in any one or more of the investments described in Section 21-1. . . .

108. ILL. REV. STAT. ch. 110½, § 28-8 (1979).

109. *Id.*

died, then the legislative intent of a faster, less-costly probate should control.

Another example would be where the testator has given the representative the power to sell all his stocks and to speculate on the market. The statute allows the representative to invest assets from the estate, but only in low-risk investments.<sup>110</sup> Here the court would have to balance not only the intent of the testator, but also the investment ability of the independent representative against a legislative intent to preserve the estate. The legislative intent should control. But if the testator has given the independent representative the power to sell his stocks and reinvest the proceeds, within certain bounds, the court should tip the balance in favor of the testator's intent. The testator has set an ascertainable limit on the independent representative's power.

Illinois independent administration does not contain a specific provision relating to the payment of claims, but instead confers a general power allowing the independent representative to handle all claims.<sup>111</sup> Illinois should consider both the Texas<sup>112</sup> and the UPC<sup>113</sup> procedures for handling claims. Texas case law has interpreted the statute in such a way that the independent executor has total discretion with respect to creditors' claims. If a creditor presents a claim to the court, the court has no duty to present it to the independent executor.<sup>114</sup>

The UPC procedure for handling creditors' claims is much more involved than the Texas provision. Under the UPC, a creditor has four months from the date of the first publication of notice to present his claim to the executor or the court.<sup>115</sup> The claims are then paid in the order of priority which is prescribed by the UPC.<sup>116</sup> The UPC also has provisions dealing with counterclaims<sup>117</sup> and encumbered assets.<sup>118</sup>

Illinois should adopt a synthesis of the Texas and UPC provisions. The four-month limitation within which a creditor may

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110. ILL. REV. STAT. ch. 110½, §§ 21-1 to 21-1.06 (1979). Section 28-1 incorporates all provisions of the Probate Act which are not inconsistent with independent administration. Article 21 provides for investments by the representative. The investments specified are for obligations of the United States; a local public agency; saving accounts or certificates of deposit, in either a state or national bank; or interests in common trust funds.

111. ILL. REV. STAT. ch. 110½, § 28-8(e) (1979).

112. TEX. PROB. CODE ANN. §§ 146, 147 (Vernon 1980).

113. UPC §§ 3-801 to -816 (1977 official text).

114. *Roy v. Whitaker*, 92 Tex. 346, 48 S.W. 892, *modified*, 49 S.W. 367 (1898).

115. UPC §§ 3-803, 3-804 (1977 official text).

116. *Id.* at §§ 3-805, 3-807.

117. *Id.* at § 3-811.

118. *Id.* at § 3-814.

present his claim, as under the UPC, would help to expedite the administration of the estate. The Texas case law allowing only the independent executor to handle the claims would also expedite the administration.<sup>119</sup> The exclusiveness of the Texas provision is also in accord with the theory of independent administration: to keep the administration of a decedent's estate out of the court.

### *Protection of Heirs and Third Persons*

#### *Spouse and Child Awards*

The state has a legitimate concern in protecting the interests of the decedent's spouse and dependent children in that if the estate is sufficient to provide for the decedent's immediate family, the state will not have to support them. Most states' probate acts, including the Illinois Probate Act, contain provisions for spouse and child awards.<sup>120</sup> Under these provisions, the spouse or child is granted necessary funds to meet any monetary demands.

Illinois independent administration incorporates these awards.<sup>121</sup> The independent representative has discretion to determine the amount of the spouse or child award to be granted. The aggregate of the awards cannot exceed five percent of the gross value of the estate as of the date of the decedent's death.<sup>122</sup> This is a good provision as it insures the statutory pro-

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119. *Griggs v. Brewster*, 62 S.W.2d 980 (Tex. 1933) (The court stated that the district court may construe a will. The probate court has no jurisdiction to pass on the claims of creditors; only the independent executor may do that. The district court has jurisdiction to review those matters.); *Roy v. Whitaker*, 92 Tex. 346, 48 S.W. 892, *modified*, 49 S.W. 367 (1898) (procedures for establishing claims against an estate are not applicable to claims administered by independent executor); *Higginbotham v. Alexander Trust Estate*, 129 S.W.2d 352 (Tex. Civ. App. 1939) (where the court stated in dicta that only the independent executor has the power to determine the claims of creditors of the estate); *Roberts v. Carlisle*, 4 S.W.2d 144 (Tex. Civ. App. 1928) (a claimant against an estate has a right to demand payment immediately upon appointment and qualification of independent executor; if no action is taken then claimant has the right to institute suit against the independent executor).

120. ILL. REV. STAT. ch. 110½, §§ 15-1, 15-2 (1979).

121. ILL. REV. STAT. ch. 110½, § 28-7(a) (1979) states:

When an award under Section 15-1 or 15-2 is allowable and is not waived or barred, an independent representative may pay the award determined under Section 15-1 or 15-2 without application to the court unless the aggregate of all awards exceeds 5% of the gross value of the estate at the date of death, as determined by the independent representative; but the minimum amount of any award under Section 15-1 or 15-2 may be paid in any event without application to the court.

122. *Id.*

tection of the decedent's spouse and dependent children when the estate is independently administered.

### *Distributees Under Disability*

Illinois provides for a personal fiduciary to represent the interests of a minor or disabled heir or distributee of an estate.<sup>123</sup> The actions of the personal fiduciary bind the ward.<sup>124</sup> Texas is the only other jurisdiction which provides for such protection.<sup>125</sup> In either Illinois or Texas, if the court finds that independent administration would not be in the best interests of the ward, it will not be granted.<sup>126</sup>

The care of a minor or otherwise disabled dependent after testator's death is becoming a great estate planning concern.<sup>127</sup> Since independent administration statutorily requires protection for such persons, a testator may request in his will that his estate be independently administered where he otherwise might not make that request absent the statutory protection. Also, because a minor or other disabled person is provided with adequate statutory protection, more interested persons would be likely to request independent administration.

### *Third Persons Who Deal with the Independent Representative*

In administering the estate, the independent representative must deal with third persons—those who have no personal interest in the estate. These persons typically include an accountant, an appraiser, a bank, and an insurance company. Such persons dealing with the independent representative may not inquire as to the independent representative's powers under the will or court order, but are legally required to assume the in-

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123. *Id.* at § 1-2.14. This section defines personal fiduciary as "one acting on behalf of a ward pursuant to Section 28-3 during independent administration."

ILL. REV. STAT. ch. 110½, § 11a-2 (1979) defines a disabled person as: [A] person 18 years or older who (a) because of mental deterioration or physical incapacity is not fully able to manage his person or estate, or (b) is mentally ill or developmentally disabled and who because of his mental illness or developmental disability is not fully able to manage his person or estate, or (c) because of gambling, idleness, debauchery or excessive use of intoxicants or drugs, so spends or wastes his estate as to expose himself or his family to want or suffering.

124. ILL. REV. STAT. ch. 110½, § 28-3(a) (1979).

125. TEX. PROB. CODE ANN. § 145(i) (Vernon 1980).

126. ILL. REV. STAT. ch. 110½, § 28-3(a) (1979); TEX. PROB. CODE ANN. § 145(i) (Vernon 1980).

127. See Swirnoff, Weinberg & Daly, *Planning for the Disabled Child*, prepared for Northwestern Mutual Life Insurance Co. (1980); see also Frolik, *Estate Planning for Parents of Mentally Disabled Children*, 40 U. PITT. L. REV. 305 (1979).

dependent representative is acting in accordance with the will or statute. A third person, dealing in good faith with the independent representative, is protected in all transactions.<sup>128</sup> If such transaction is a breach of the independent representative's fiduciary duty, the independent representative is liable for a breach of that duty.

Any bona fide purchaser for value<sup>129</sup> who acquires property of the estate from either the independent representative or a distributee takes title free and clear of all persons having an interest in the estate. The language of the statute implies that the independent representative would be liable only to the extent of the transaction.<sup>130</sup> Nevertheless, he may be additionally liable to the interested persons for a breach of a fiduciary duty.

### *Actions Which an Interested Person May Take*

#### *Court Intervention*

Illinois appears to have adopted the Washington provision which allows an independent representative to obtain court orders or decrees without losing the independent administration status.<sup>131</sup> The Illinois provision allows an interested person as well as an independent representative to petition the court for a hearing and order as to any issue, usually a will construction or advice as to distribution, which is related to the administration of the estate.<sup>132</sup> This provision allows the interested persons to

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128. ILL. REV. STAT. ch. 110½, § 28-9 (1979) states:

No person dealing with an independent representative is obliged to inquire as to the independent representative's powers under any will or court order to see to the application of any money or property paid or delivered to the independent representative. No will or court order limiting an independent representative's powers is effective as to a person with whom the independent representative deals, and such person may assume that the independent representative's act is in accordance with any applicable will or court order, unless such person has actual knowledge of the limitation. If property or a security interest therein is acquired in good faith by a purchaser or lender for value from an independent representative, the purchaser or lender takes title free of the rights of all persons having an interest in the estate and incurs no liability to the estate, whether or not the action of the independent representative was proper.

129. The bona fide purchaser for value is an objective standard. The purchaser must not know of any malfeasance on the part of the independent representative. See BLACK'S LAW DICTIONARY 224 (rev. 4th ed. 1968).

130. ILL. REV. STAT. ch. 110½, § 28-9 (1979) states in part: "If property or a security interest therein is acquired in good faith by a purchaser or lender for value from an independent representative, the purchaser or lender takes title free of the rights of all persons having an interest in the estate. . . ."

131. WASH. REV. CODE ANN. § 11.68.120 (Supp. 1980).

132. ILL. REV. STAT. ch. 110½, § 28-5 (1979) states:

influence decisions as to the administration of the estate in accordance with the primary statutory goal of allowing the interested persons to determine how the estate should be administered.<sup>133</sup>

### *Termination*

In Illinois, any interested person may petition the court for termination of the independent administration,<sup>134</sup> thus returning the estate to supervised administration.<sup>135</sup> This termi-

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At any time or times during independent administration any interested person may petition the court for a hearing and order as to any matter germane to the administration of the estate, and the provisions of this Act other than this Article shall govern any such court proceedings in the same manner as under supervised administration. If the independent representative petitions the court for instructions as to the exercise of any discretionary power, he renounces his discretion with respect to the matter before the court and the court shall substitute its judgment for his.

133. The Illinois provision allowing the independent representative discretion to determine when he needs court advice is much more consistent with independent administration than either the California, CAL. PROB. CODE § 591.2 (West Supp. 1980), or South Dakota, S.D. COMP. LAWS ANN. § 30-18A-5 (Supp. 1979) provisions. Both of those states require court supervision in certain enumerated instances. In both California and South Dakota, the independent representative must give advice of all of his proposed actions to all interested persons. This requirement appears to make independent administration inherently inconsistent. Some provisions in the statute grant the independent representative a fiduciary status, while others require that his actions in carrying out that duty be subject to the approval of all the interested persons. Such a check stands in sharp conflict with the purpose of independent administration, which is to grant only one person, and not the court, the power and discretion to handle the estate.

When the interested persons request or approve a representative, they are entrusting him with a fiduciary duty; they expect the independent representative to act on his own and in the best interests of the estate. When the statute mandates that the representative give all interested persons notice of all his actions, it is in effect stating that no one should have such a duty placed upon him. See note 105 *supra*.

134. ILL. REV. STAT. ch. 110½, § 28-4 (a) (1979) states:

(a) Upon petition by an interested person, mailed or delivered to the clerk of the court, the court shall enter an order terminating the independent administration status of the estate and the clerk of the court shall notify all interested persons of the termination, except:

(1) If the will, if any, directs independent administration, independent administration status shall be terminated only if the court finds there is good cause to require supervised administration.

(2) If the petitioner is a creditor or a legatee other than a residuary legatee, independent administration status shall be terminated only if the court finds that termination is necessary to protect the petitioner's interest, and instead of terminating independent administration status, the court may require such other action as it deems adequate to protect the petitioner's interest.

135. ILL. REV. STAT. ch. 110½, § 28-4(b) (1979) states:



nation procedure keeps a proper check on the independent representative, one fully consistent with the goal of simplified estate distribution. In Illinois, because the independent representative knows he is subject to the imposition of court supervision if an interested person terminates the independent administration, he is less likely to breach his fiduciary duty.

In contrast to the Illinois provision, Texas,<sup>136</sup> Washington,<sup>137</sup> and the UPC<sup>138</sup> allow for the removal of an independent representative without the mandatory termination of the independent administration procedure. This is a better approach than the Illinois provision, under which an interested person cannot request the removal of the independent representative without simultaneously ending the independent administration status. The interested person does not have the option, as under the Texas, Washington, and UPC provisions, of retaining independent administration status while simply replacing the representative.<sup>139</sup> Although there is no apparent bar to reinstating independent administration with a new representative after the estate is returned to court supervision, this clearly is a circuitous and lengthy method. Time and money would be saved if both termination of independent administration itself and removal of the independent representative were available separately. An interested person would be able to make a better decision as to whether he is unhappy with the independent representative or with the independent administration itself.

#### ESTATE PLANNING GUIDES<sup>140</sup>

##### Independent administration is meant for uncontested es-

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(b) After entry of an order terminating independent administration status, the representative shall be governed by all provisions of the Act applicable to the estate in supervised administration, and the order of termination shall direct the representative as to the time and manner for the performance of any acts (such as the filing of an inventory or account) which would have been required to be done earlier in supervised administration.

136. TEX. PROB. CODE ANN. § 154 (Vernon 1980). In *Bell v. Still*, 403 S.W.2d 353 (Tex. 1966), the court determined that according to the statute the probate court does not have the power to remove the independent executor because of mismanagement unless he refuses to post bond when requested to do so. However, TEX. PROB. CODE ANN. § 149C (Vernon 1980) has overruled the *Bell* case in that now the court may remove an independent executor for breach of any fiduciary duty.

137. WASH. REV. CODE ANN. § 1.68.060 (Supp. 1980).

138. UPC §§ 3-608 to 3-613 (1977 official text).

139. ILL. REV. STAT. ch. 110½, § 28-4 (1979).

140. Several forms for dealing with an independently administered estate appear in *Major Revision*, *supra* note 3, at 256-58.

tates,<sup>141</sup> which comprise the bulk of probate estates.<sup>142</sup> Careful estate planning not only cuts down on the number of contested estates, but it also helps the independent representative administer the will. When the plan is well stated, the representative need only do the ministerial duties.

When planning his estate, the first important decision the testator should make is who or what is to serve as the independent representative.<sup>143</sup> The best estate plan may be useless if the representative is incompetent.<sup>144</sup> Next, the testator should consider tax consequences, such as the marital deduction, to obtain maximum tax benefits;<sup>145</sup> the expenses which can be deducted from the federal estate tax return; the value to place on assets for the most advantageous tax results;<sup>146</sup> and the tax consequences of each proposed distribution of property.

The testator should specifically state whether long-term debts, such as a mortgage, should be paid in full or passed on to the distributee.<sup>147</sup> He should provide for the raising of funds to pay debts and administration expenses. Also, the testator should make it clear whether the estate or the legatees will pay the state inheritance tax.

The testator should also enumerate what powers the independent representative may exercise in his administration of the estate.<sup>148</sup> This would include what property to sell if sale

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141. *Id.* at 251.

142. Fletcher, *supra* note 5, at 84.

143. The testator need not state that he desires independent administration. However, if the testator does request independent administration in his will, any interested person who objects must show good cause for the court to order supervised administration. ILL. REV. STAT. ch. 110½, § 28-2 (b)(1) (1979).

144. Remy, *Will Planning for Independent Administration of Estates*, 28 TEX. B. J. 1041, 1048 (1965) [hereinafter cited as Remy]. This is an excellent guide for the careful drafting of a will requesting independent administration.

145. The Internal Revenue Code sets out the requirements for the marital deduction at I.R.C. § 2056. These requirements must be followed exactly or the entire marital deduction, which can save up to one-half of the estate from federal estate taxation, can be lost.

146. Usually a person would want to take the lowest assessed value, but when considering resale of the asset by the legatee, it may be better to consider a higher assessed value. Remy, *supra* note 144, at 1048.

147. If a will requests "to pay all my just debts," this includes a mortgage. Such an instruction can have disastrous effects leaving one legatee with some real estate free of debt worth \$80,000 and another legatee nothing when the testator's real intention was to leave each legatee \$40,000, one in real estate, the other in cash.

148. Even though the statute lists the powers of an executor, it is helpful to both the independent representative and the court for the testator to provide such instructions. ILL. REV. STAT. ch. 110½, § 28-8 (1979). An excellent checklist is given in Remy, *supra* note 144, at 1080-84.

becomes necessary, what property to retain, what property may be leased,<sup>149</sup> and what property may be mortgaged. If the testator wants his unincorporated business continued,<sup>150</sup> he must provide for that. He should list the priorities for completing business dealings. The testator should name a successor to run the business; the independent representative should not have to run the business as part of his administrative duties. However, if the testator desires to liquidate the business, he should specify the distribution of the assets.

The testator should specify any limitations on the independent representative's power to handle the assets.<sup>151</sup> Such limitations might include how much the representative could borrow, the maximum rate of interest, and the terms of the loan. The testator should also specify how the independent representative should handle the stocks and bonds in the estate. The testator should provide for the handling of claims against the estate. Such provisions in the will not only limit the independent representative's power, but also give the interested persons express rights when that power is over-extended.

The testator should make directions as to the distribution of income from any property in the estate. If there is an existing trust, the independent representative's power should not supercede that of the trustee.<sup>152</sup> The testator should also make specific directions as to how to divide and distribute his estate. He should leave nothing to be construed by the court. The court does not know the testamentary intent and can only presume such using the rules of will construction.<sup>153</sup> If the testator is quite explicit, then the will should be probated quickly and efficiently in accordance with the theory of independent administration.

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149. ILL. REV. STAT. ch. 110½, § 28-8(i) (1979) includes oil, gas, coal, and other mineral interests in the real estate.

150. ILL. REV. STAT. ch. 110½, § 28-8(d) (1979) allows the independent representative to continue the operation of an unincorporated business.

151. ILL. REV. STAT. ch. 110½, § 28-8(a)-(c), (e) (1979) grant the independent representative power to dispose of the estate without court order subject only to the provisions in the will.

152. *Fischer v. Britton*, 125 Tex. 505, 83 S.W.2d 305 (1935), *modifying* *Britton v. Fischer*, 61 S.W.2d 191 (Tex. Civ. App. 1933). Since the Illinois independent administration act is new, cases decided in other jurisdictions under the same or similar provisions may be persuasive, though certainly not precedent.

153. There are two basic methods of will construction. The "strict" construction method stresses the plain meaning of the words and that the meaning must be determined from the four corners of the will. "Liberal" construction emphasizes the testator's intent. The court here is likely to consider extrinsic evidence in determining the testator's intent. ATKINSON, *LAW OF WILLS* 808 (2d ed. 1953).

## CONCLUSION

The Illinois independent administration article is very thorough and well developed. Cross references between the existing Illinois Probate Act and the new independent administration article integrate the traditional procedure with the new optional independent procedure.

The legislative intent in giving the interested persons a great amount of discretion in the administration process has largely been fulfilled. Only an interested person may request independent administration. If one interested person objects to the independent administration, then it must be denied. An interested person may request to terminate independent administration if he becomes unhappy with the procedure. However, the legislature should consider granting an interested person the power to substitute another independent representative if he becomes dissatisfied with the representative. An interested person should also have the power to order a closing of the estate if it appears that everything has been completed.

The legislature has also provided protections for all persons involved. The interested persons receive notice of their rights when they receive notice of the independent administration procedure. The independent representative is protected through statutory provisions and the giving of bond. Any distributees under disability are protected through a personal fiduciary, who should not be the same as the independent representative. Finally, third parties are protected through a statutory provision making the independent representative personally liable for any breach of his fiduciary duty.

The legislature has provided a further protection for the distributees in that the assets of the estate are not a matter of public record. The inventory of the estate need not be filed with the court. Also the final report need not contain a thorough accounting of the administration, simply a statement that all has been completed.

In view of the progressive features of this article, the limitation to estates under \$150,000 is an insult to the excellent draftsmanship of the legislature. The basic costs of administration do not vary. It is the larger estate where the assets require careful attention that independent administration is most necessary. The representative in such an estate should not have to waste his time in court when he is familiar with the estate plan and the testator's intentions. There is no need for the court to oversee a well planned large estate.

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