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THE 1974 FLORIDA PROBATE CODE — A MARRIAGE OF CONVENIENCE*

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PART II — PROBATE AND ADMINISTRATION

For over a generation, the most prevalent criticism of existing probate laws has been directed at the time and expense involved in settling a decedent's estate.[351] The draftsmen of the 1974 Florida Probate Code (1974 Code) responded to this criticism by restructuring or eliminating many of the old statutes and adopting several of the reforms recommended by the Uniform Probate Code (UPC). Despite these often major changes, the procedures established by the 1974 Code for the probate of wills and the administration of decedents' estates remain complex. Indeed, a person examining the details of these procedures may continue to ask whether such an elaborate scheme is necessary and what function it serves. A brief answer is that some orderly procedure is needed to settle the conflicting claims that arise upon the death of the owner of property.[352] The further pertinent inquiry — whether the new procedures are the ones best suited to resolve these conflicting claims — can best be considered by an examination of the individual provisions.

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351. See text accompanying notes 1-17 *supra* (part I).

352. Much of the complexity of probate and administration procedures is a result of an attempt to provide an orderly resolution of these various types of conflicts. For instance, once the law grants the power of testation, it must provide a means for assuring that the true intention of the testator is carried out; hence the procedure for proving the validity of the will. See text accompanying notes 463-482 *infra*. This procedure also serves to establish the claims of the devisees of the will, while the contest procedure serves to protect the conflicting claims of those who, but for the will, would be entitled to the decedent's property. See text accompanying notes 525-574 *infra*. The conflicting claims between persons in possession of the decedent's property and those entitled to receive it under the will or by intestate succession could be settled by individual actions against the possessors. The expense and near chaotic results of such a method, however, dictate the designation of one or more persons to serve as personal representative, with sole authority to collect the assets of the decedent on behalf of both the beneficiaries and creditors. See text accompanying notes 593-655 *infra*.

There is, of course, a conflict between the interests of beneficiaries and creditors, not only because of possible disputes with regard to the amount and validity of a claim, but also because as long as claims are outstanding, they constitute an impediment to the receipt or enjoyment of the decedent's property by the beneficiaries. The need for prompt settlement of

THE PASSAGE OF TITLE

To justify usual probate procedures, it is frequently stated that probate is necessary to prove title to real property[353] and that administration is required because title to personal property passes to the personal representative.[354] While these statements are generally true, they merely reflect the effects of, rather than reasons for, the procedures adopted.[355] Nevertheless, the concepts regarding passage of title are so basic and so pervade the law of administration of decedents' estates that discussion of them at the outset seems desirable.

Until 1939, there was no doubt that Florida followed the common law rule that title to realty passed at death to the decedent's heirs or devisees.[356] This rule had been retained by the 1933 Probate Code, even though the personal representative was given the possession of real property and the authority to sell it for the payment of debts.[357] In 1939, however, the legislature amended section 732.26, which concerned the effect of probate, to read in part:

> (1) The will of any person who heretofore . . . or . . . hereafter dies a resident of the state must be admitted to probate in an original proceeding in the state in order to establish its validity. Until so admitted to probate, such will shall be ineffective to convey title to, or the right to possession of, real or personal property of the testator; and, until such probate proceedings have been had, no personal representative shall acquire title to, or the right to possession of, any personal property owned by the decedent at the time of his death, notwithstanding that probate or administration proceedings have been had in some other state or country . . . The title to personal property wheresoever situate of a person who hereafter dies a resident of the state shall not pass under his will to the legatee or legatees named or designated therein until after such personal property has been administered upon and distributed by the domiciliary personal representative of his estate; provided that this section shall not apply to any property as to which a valid order has been entered that no administration is necessary as to such property or as to the estate of which such property is a part.[358]

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these conflicts justifies the nonclaim procedure. See text accompanying notes 747-758 *infra*. Finally, possible conflicts between the personal representative and the beneficiaries may arise because of his acts while administering what ultimately is to be the beneficiaries' property. The statutory provision for accounting and discharge provide an orderly method for resolving these conflicts. See text accompanying notes 794-846 *infra*.

353. T. ATKINSON, LAW OF WILLS 503-05 (2d ed. 1953); T. THOMAS, FLORIDA ESTATES PRACTICE GUIDE 7-3 (1974).

354. T. ATKINSON, *supra* note 353, at 562.

355. Thus, there is no necessity that probate be used to establish title to real property. At common law, and in some states today, wills devising real property were not probated. If a question arose as to the devisee's title, the will was introduced in evidence and the attesting witnesses called to testify as to its due execution and validity. *Id.* at 481-82. Occasionally the same will was held valid in one action and invalid in another. *Id.* at 481 & n.3. Similarly, giving the title to personal property to the personal representative is not a necessary result. The UPC, §3-101, passes such title directly to the heirs or devisees, subject to the personal representative's "power over title." UPC §3-711 and Comment.

356. Jones v. Federal Farm Mortgage Corp., 132 Fla. 807, 182 So. 226 (1938). *See also* FLA. STAT. §731.21 (1973), carried forward into the 1974 Code in both §§732.514 and 733.102.

357. Jones v. Federal Farm Mortgage Corp., 132 Fla. 807, 809, 182 So. 226, 227 (1938).

358. FLA. STAT. §732.26 (1973). The primary purpose of the amendment, which was made

Thereafter, because the amendment only affected wills of Florida residents, the law appeared to be that title to the real property of a resident testator passed only upon probate of the will,[359] whereas in the case of a resident intestate or a nonresident, whether testate or intestate, the title continued to pass at death.[360]

This anomalous situation is rectified by the 1974 Code, which changes the provision to read:

> (1) The will of a person who died a resident of the state must be admitted to probate in an original proceeding in the state in order to establish its validity. Until admitted to probate, the will shall be ineffective to prove title to or the right to possession of, property of the testator and no personal representative shall have the right to possession of, or any authority to deal with personal property owned by the decedent at the time of his death, notwithstanding that administration proceedings have been had in some other state or country. The title to personal property wherever located of a person who dies a resident of the state shall not pass under his will until the personal property has been administered and distributed.[361]

By eliminating the phrases "to convey title" and "acquire title," the legislature clearly intended to revert to the common law view that title passes at death. The personal representative continues to have the right to possession of real property and the title to personal property, although neither may be proven

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by Fla. Laws 1939, ch. 19673, §1, appears to have been to supplement a new statute designed to ensure that wills of Florida residents were probated in Florida courts. That new provision, §732.36, was enacted simultaneously as a companion bill, Fla. Laws 1939, ch. 19672, and imposed criminal liability for attempting to avoid Florida probate:

"(1) From and after the effective date of this section no person or corporation shall procure, or aid, abet or assist another in procuring, the probate of the estate or will of a person who heretofore has died a resident of this state or of a person who hereafter dies a resident of this state, in any other state or country prior to the probate of such estate or will in this state.

"(2) Any person or corporation who shall knowingly and intentionally procure, or aid, abet or assist another in procuring, the probate of the estate or a will of a person who heretofore has died a resident of this state or of a person who hereafter dies a resident of this state, in any other state or country prior to probate of such estate or will in this state, shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.083."

359. *Compare In re* Purdy's Estate, 54 So. 2d 112 (Fla. 1951), *with* Estate of Bagley v. United States, 443 F.2d 1266 (5th Cir. 1971). In *Bagley*, the issue was whether the taxable estate included property subject to a power of appointment where the donee died prior to the probate of a Florida resident's will creating the power. After discussing several Florida cases, including *Purdy*, the court said: "We do not perceive that these Florida cases diminish the proposition that passage of title under a will dates back to the time of death once the will is probated. Appellant points to §732.26, *supra*, to bolster his theory of probate as interest-creating.5 We view this statute, however, *in pari materia* with §731.21, *supra*, and it becomes an integral part of title-perfecting rather than interest-creating; *i.e.*, that probate is required before title is perfected by dating passage of title back to the time of death. There is nothing in the decision in *Purdy's Estate* which militates against this construction of the two statutes." Estate of Bagley v. United States, *supra* at 1269.

360. *See* Jones v. Federal Farm Mortgage Corp., 132 Fla. 807, 810, 182 So. 226, 227-28 (1938); Nedd v. Starry, 143 So. 2d 522, 526-27 (1st D.C.A. Fla. 1962).

361. FPC §733.103 (1974).

until after probate.[362] Because the 1974 Code rejects the "flexible system of administration" advocated by the UPC, [363] this appears to be a satisfactory result; certainly it is another example of the efforts of the draftsmen to minimize changes unsupported by persuasive data.[364] Nevertheless, "scarecrow" statutes such as this provision and the current section 732.36,[365] which are designed to prevent the wills of Florida residents from being originally probated in other states, are not only completely ineffective,[366] but evidence an undesirable parochialism and should be repealed. If this were done, however, it would be desirable to substitute a provision stating that a will must be admitted to probate before it can be used to prove title, thereby avoiding any contention that the validity of a will may be established by any means other than its probate.[367]

To further emphasize the importance of probate, the 1974 Code adopts existing law requiring a will to be probated before any proceeding for its construction may be maintained.[368] Moreover, probate also appears to be required before the personal representative may petition the court for a determination of devisees.[369]

JURISDICTION, VENUE, PROCESS AND PARTIES

The concepts of jurisdiction, venue and process are basic to an understanding of the probate and administration procedures established by the 1974 Code. Equally basic is the question of who are necessary parties to the various proceedings that may be required for the settlement of a decedent's estate.

Jurisdiction

Since January 1, 1973, the circuit courts of Florida have had exclusive original jurisdiction "of proceedings relating to the settlement of the estates of decedents . . . the granting of letters testamentary . . . and other jurisdiction usually pertaining to courts of probate."[370] This transfer of probate jurisdiction from the former county judge's courts to the circuit courts has eliminated some of the jurisdictional problems in the administration of decedents'

362. For a discussion of the duty of the personal representative under the 1974 Code to take possession of real property, see text accompanying notes 633-655 *infra*.

363. The UPC considers the descent of title directly to the successors an "essential characteristic" of its "flexible system of administration." UPC art. 3, General Comment. For further discussion of this system and its rejection in the 1974 Code, see text accompanying notes 444-446 *infra*.

364. See text accompanying notes 42 and 43 *supra* (part I).

365. See note 358 *supra*.

366. The ineffectiveness of these provisions is evidenced by the fact that Florida Statutes Annotated lists no case in which the issue has even been raised.

367. See note 355 *supra*.

368. *Compare* FPC §733.211 (1974), *with* FLA. STAT. §732.42 (1973).

369. *Compare* FPC §733.105 (1974), *with* FLA. STAT. §734.25 (1973). The Code purports to allow the determination to be made "irrespective of whether the estate of the deceased person is administered," FPC §733.105(3) (1974), but it would seem necessary to establish the validity of the will by probate before the issue of uncertain beneficiaries would arise.

370. FLA. CONST. art. V, §20(c)(3); FLA. STAT. §26.012(1)(b) (1973).

estates.[371] Whether the probate judges or probate divisions of the circuit courts[372] will now handle all matters pertaining to the settlement of decedents' estates and testamentary trusts remains unclear, however.[373] Prior to 1973, matters such as a suit upon a claim to which an objection had been filed[374] and the determination of ownership of property claimed by both the estate and a third person[375] were settled by separate actions rather than by proceedings before the probate judge. After the restructuring of the courts in 1973, it was unclear whether this separation of responsibilities was to be continued. Possibly it was intended that such actions would continue to be determined by a separate circuit court judge,[376] or, where the amount in issue did not exceed $2,500, by the county court.[377]

Although a new provision of the 1974 Code may represent an attempt to clarify these uncertainties, there are several ambiguities in its language. The section provides that "[t]he court may determine all questions concerning either liquidated claims or matters not requiring trial by jury."[378] "Court" is

371. See T. THOMAS, *supra* note 353, at 6-1 to 6-5, for a discussion of decisions concerning the limitations upon the jurisdiction of the county judge's courts in matters concerning decedents' estates.

372. The Florida Constitution, art. V, §7 authorizes specialized divisions in the circuit courts. Currently, probate divisions seem to have been created in the 2d, 5th, 9th, 11th, 12th, 13th, 15th, 16th, 17th, and 18th Circuits. 48 FLA. B.J. 404-14 (1974).

373. FLA. STAT. §§26.012(2)(b), (c) (1973). As courts of general equitable jurisdiction, the circuit courts have always had jurisdiction over trusts. FLA. STAT. §26.012(2)(c) (1973).

374. See text accompanying notes 747-754 *infra*.

375. *E.g.*, Dacus v. Blackwell, 90 So.2d 324 (Fla. 1956); *In re* Estate of Sackett, 171 So. 2d 906 (1st D.C.A. Fla. 1965).

376. The only case found that has considered the relationship of the probate division and other divisions of the circuit court seems to have accepted the concept of the continued division of responsibilities. Poncier v. State Dep't of Health & Rehabilitative Serv., 284 So. 2d 463 (3d D.C.A. Fla. 1973). In that case, the trial court had denied the administrator's motion to dismiss a suit that had not been filed until three days after the time for suit had expired. On appeal, the claimant argued that denial of the motion to dismiss "was in effect an exercise by the circuit court of the authority formerly granted to county judges but now properly exercised by the circuit court to extend the time within which suits may be filed." *Id.* at 464. Relying on §733.18(2) (concerning objections to claims), the district court of appeal rejected the argument: "We think that it is clear that the power to extend the time for the filing of suits rests in the judge of the probate cause and not in the trial judge." *Id.*

377. FLA. CONST., art. V, §6(b) gives the county courts "the jurisdiction prescribed by general law," and art. V, §20(c)(4) gives them original jurisdiction "of all actions at law in which the matter in controversy does not exceed the sum of two thousand five hundred dollars ($2,500) exclusive of interest and costs, except those within the exclusive jurisdiction of the circuit courts." *See also* FLA. STAT. §34.01(1) (1973). The circuit courts have exclusive original jurisdiction "in all actions at law not cognizable by the county courts; of proceedings relating to the settlement of the estate of decedents . . . ." FLA. CONST., art. V, §20(c)(3). *See also* FLA. STAT. §26.012(1) (1973). Thus, if litigation is necessary to determine the validity of a claim of less than $2,500 that is filed in a decedent's estate, or the ownership of property worth less than $2,500 that is claimed by both the decedent's estate and a third person, whether it should be brought in the county court or in the circuit court would seem to depend upon whether these determinations are treated as "actions of law" or "proceedings relating to the settlement of the estate of decedents." FLA. CONST. art. V, §20(c)(3).

378. FPC §733.705(5) (1974).

defined as the circuit court by the 1974 Code,[379] but in this instance it must refer only to the judge handling probate matters, because other circuit court judges clearly can try jury cases.[380] A second ambiguity is whether the provision ("The court may determine . . .") is merely permissive or is intended to require the probate judge to handle all matters involving decedents' estates except those involving jury trials. Finally, the provision does not clarify what disposition is to be made of a case in which the right to a jury trial has been waived.[381] Amendments clarifying these matters and delineating the jurisdictional authority of the circuit and county courts in estate litigation involving less than $2,500[382] would avoid future litigation and insure uniformity among the circuits.

The 1973 amendment to article V also transferred to the circuit courts the administration of estates of missing persons who are presumed to be dead.[383] The 1974 Code reduces from seven years to five years the period of continuous absence necessary to raise a presumption of death.[384] In addition, a new provision expressly accords protection to persons dealing with the personal representative where the alleged decedent is later found to be alive.[385]

The jurisdictional provisions relating to foreign personal representatives and the ancillary administration of estates of nonresident decedents are discussed in a later section of this article.[386] The statutes governing jurisdiction over the appointment of guardians for minors or other incompetents, the administration of their estates, and the administration of trusts are beyond the scope of this article, although they are included in chapter 74-106.[387]

Venue

Except for two questionable additions,[388] the provisions of the 1974 Code concerning venue for probate and the granting of letters are taken from existing law with only editorial changes.[389] For the resident decedent, venue is in

379. FPC §731.201(4) (1974).

380. *See* FLA. STAT. §§26.012(2)(a), 34.01 (1973); *cf.*, State *ex rel.* Renaldi v. Sandstrom, 276 So. 2d 109 (3d D.C.A. Fla. 1973), where the court, determining the power of the circuit court to issue writs of habeas corpus, referred to the recent "consolidation of the *trial court system* into two levels, county and circuit courts." *Id.* (emphasis added).

381. *See* FLA. R. CIV. P. 1.430.

382. See discussion in note 377 *supra*.

383. The 1974 Code continues to grant the circuit courts jurisdiction over the administration of these estates. *Compare* FPC §733.209 (1974), *with* FLA. STAT. §734.32 (1973). The jurisdiction of the circuit court to appoint a conservator of a missing person's property before presumption of death arises is not entirely clear. Chapter 747 of the Florida Statutes continues to grant the circuit court jurisdiction to appoint conservators for "absentees" as defined therein, but the definitions do not seem to include a person who merely disappeared without any known reason. FLA. STAT. §§747.01-.02 (1973).

384. *Compare* FPC §731.103(3) (1974), *with* FLA. STAT. §734.32 (1973).

385. FPC §733.611 (1974).

386. See text accompanying notes 911-947 *infra*.

387. See chapters 744 and 737 of Fla. Laws 1974, ch. 106.

388. See text accompanying notes 392-395, 398-410 *infra*.

389. *Compare* FPC §733.101 (1974), *with* FLA. STAT. §732.06 (1973).

the county where the decedent had his domicile;[390] for the nonresident, it is in any county where the decedent possessed any property[391] or, if he possessed no property in the state, "where any creditor or debtor of the decedent resides."[392] The addition of the phrase "creditor or" to existing law is puzzling. Presumably, the reason for allowing venue in a county where a debtor of the decedent resides is that the debt is an asset of the estate, even though it is not "possessed" by the decedent. No such rationale exists in the case of a creditor. If the intent is to make it easier for a Florida creditor to obtain the appointment of a personal representative[393] and thereby collect his debt from the estate, the addition is undesirable. Convenience to a single creditor should not outweigh the inconvenience to other creditors and to the beneficiaries of the estate of allowing administration in a county with which the decedent had such slight contact.[394] Therefore, the phrase "creditor or" should be eliminated from the Code.[395]

The effect of laying venue in the wrong county is explicitly stated for the first time in the 1974 Code. A new subdivision has been added to the venue section, providing that the court may transfer "the action"[396] in the same manner as provided in the Rules of Civil Procedure[397] and further stating that "[a]ny action taken by the court or the parties before the transfer is not affected because of the improper venue."[398] A later section[399] bars any challenge to "venue or jurisdiction," unless it is filed within four months after the first publication of notice of administration.[400]

While these provisions quite obviously are intended to nullify the decision in *State* ex rel. *McGreevy v. Dowling*,[401] the extent to which this intent will be

390. FPC §733.101(1) (1974). Neither "domicile" nor "residence" is defined in the 1974 Code but the terms appear to be used interchangeably, as in the present law. For example, §733.101(4) provides that a married woman whose husband is "a nonresident of Florida may establish or designate a separate domicile in this state." The terms are similarly used in the UPC, which defines "nonresident decedent" as one who was "domiciled in another jurisdiction." UPC §1-201(26).

391. FPC §733.101(2) (1974).

392. FPC §733.101(3) (1974).

393. FPC §733.202 allows "any interested person" to petition for administration and FPC §731.201(17) includes "creditors" in its definition of "interested persons."

394. In State *ex rel.* McGreevy v. Dowling, 223 So. 2d 89 (3d D.C.A. Fla. 1969), the court emphasized the importance of proper venue and, in footnote 2 of the opinion, elaborated upon the "inconvenience and hindrance to creditors and other persons interested in the estate." See note 403 *infra*. If there is no debtor or property in this state, there would be no purpose in a creditor attempting to appoint a personal representative.

395. In fact, the entire subsection (3) could be replaced by a simple rewording of subsection (2) to read "in any county where any property of the decedent was located."

396. Because probate and administration matters are regularly referred to as "proceedings" in FPC §733.101 and elsewhere in the Code, the term "action" should be changed to "proceeding" for conformity.

397. FPC §733.101(5) (1974).

398. *Id.*

399. FPC §§733.210(1)(b), (3) (1974). For further discussions of §733.210 see text accompanying notes 513-524 and 747-748 *infra*.

400. FPC §733.210(1) (1974). Such notice must be published by the personal representative "upon issuance of letters." *Id.*

401. 223 So. 2d 89 (3d D.C.A. Fla. 1969).

realized must await court interpretation. In *Dowling*, the Third District Court of Appeal held that a probate court had exceeded its jurisdiction by admitting a will to probate when the original petition showed improper venue on its face. In reaching this result, the court stated:

> [A] proceeding for probate is not susceptible to waiver of the venue as fixed by law. This is so because by its nature probate is not only for the benefit of the distributees under the will or heirs and next of kin, but is equally for the benefit of possible unknown creditors and other persons interested in the estate.[402]

This point was further emphasized in a footnote[403] that elaborated upon the "inconvenience and hindrance to creditors and other persons interested in the estate" that would be created by a failure to carefully restrict venue.[404] The court's rationale seems equally persuasive under the 1974 Code. Thus, if a creditor who has filed a caveat[405] in the county of the decedent's domicile did not receive notice of the petition for administration, and therefore failed to file a claim within the nonclaim period,[406] he might well challenge the effectiveness of the publication in the county other than that of the domicile.[407] Even if the probate proceedings were not set aside entirely as an unlawful exercise of jurisdiction,[408] the facts would seem to justify a holding that the

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402. *Id.* at 91.

403. "For example, the only notice required to be given to creditors is by publication in the county in which the probate proceeding is pending, and creditors must file their claims in the cause there within six months after the first publication of such notice. §733.15 Fla. Stat., F.S.A. While it is true that probate in the county of domicile of the decedent (as provided for by the venue statute) imposes on creditors the burden of investigating in that county for probate and published notice, it would appear unduly burdensome and impracticable for creditors to be required to investigate from month to month in every other county until they located the one in which probate was in progress, or risk loss of their claims through lack of knowledge of the existence of a probate proceeding in some other or remote county.

"The same is true of persons 'interested' in an estate in which a will has been admitted to probate (in addition to those persons to whom notice of probate is required to be mailed, under §732.28 (1) and (2), Fla. Stat., F.S.A., to-wit: named legatees or devisees, or known surviving spouses or heirs at law). This is so because under §732.28 (3) Fla. Stat., F.S.A. the county judge is required to publish notice in the county in which the probate proceeding is pending giving such other 'interested' persons notice that a will of the decedent has been admitted to probate, and notice to them of the six-month period after such notice to which they are limited for challenging the probate of such will." *Id.* at 93 n.2.

404. *Id.* at 93.

405. While the statutory authorization for filing a caveat, contained in FLA. STAT. §732.29, is not continued in the 1974 Code, it is the authors' understanding that the procedure will be continued in the revised Probate and Guardianship Rules.

406. See text accompanying notes 747-758 *infra* for a discussion of the nonclaim procedure under the 1974 Code.

407. The challenge might be made less persuasive if the personal representative ensured that publication was made in a newspaper of general circulation in the county of domicile, but it would seem that the creditor has a right to rely upon receiving the actual citation demanded by his caveat, in lieu of the continual watch for the notice of publication.

408. In *Dowling*, the court said: "Although a court may possess jurisdiction consisting of power to deal with a class of cases, *it is an unlawful exercise of its jurisdiction* to entertain

personal representative is estopped from setting up the nonclaim statute as a bar to the filing and processing of the claim.[409] By similar reasoning, a beneficiary under a prior will, who had no notice of probate in the wrong venue except through publication of the petition for administration, might be allowed to contest the validity of a will after the period for contest had expired.[410] Therefore, it would appear to be inviting lengthy delay and expensive litigation to interpret these new provisions as authorizing the procedure condemned in *Dowling*.

Process

Under existing law, there is an apparent conflict between the terms used to define the type of process required in the various probate and administration procedures. The current statute refers to "citation,"[411] while the Rules of Probate and Guardianship Procedure (PGR) use the term "summons."[412] The 1974 Code resolves this conflict by introducing a new term, "formal notice," to refer to process by which jurisdiction over a party is obtained[413] and using the term "informal notice"[414] as the equivalent of "notice" as presently defined in the PGR.[415] This new terminology, which will require a reorientation in the thinking of practitioners in the field of probate and estate administration, may perhaps be justified as more consistent with the concept that such proceedings are *in rem* rather than *in personam*,[416] but the frequent use throughout the

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a case or proceeding when the initial pleading which is filed for the purpose of revoking the jurisdiction of the court shows facts which establish that the venue for such case or proceeding is not in that county, and is fixed by law in another county." State *ex rel.* McGreevy v. Dowling, 223 So. 2d 89, 91 (3d D.C.A. Fla. 1969) (emphasis added). The fact that FPC §733.210 purports to bar any challenge directed to the venue or jurisdiction of the court subsequent to four months after the first publication of notice of administration in no way changes the fact that in FPC §733.101(1) the legislature has fixed by law the venue in the county where the decedent had his domicile. Moreover, it can well be argued that FPC §§733.101(4), .210 should be applied only where there was a mistake in the choice of venue and not where venue was deliberately laid in the wrong court.

409. The earliest case applying the doctrine of estoppel to allow the late filing of a claim under the 1933 Probate Code involved a somewhat similar effort to withhold information from a creditor regarding where the estate was being administered until after the nonclaim period had run. Adams v. Hackensack Trust Co., 156 Fla. 20, 22 So. 2d 392 (1945).

410. See text accompanying notes 525-574 *infra* for a discussion of the procedure and time limitations for contests of wills under the 1974 Code.

411. FLA. STAT. §732.09 (1973).

412. PGR 5.050. The conflict is more apparent than real, however, because PGR 5.020(e) defines "process" as "citation, summons, subpoena, order to show cause, and any other order of the court by which jurisdiction is obtained of a party."

413. FPC §731.301(1) (1974).

414. FPC §731.301(2) (1974).

415. PGR 5.020(f) defines "notice" as "[t]he service of pleadings, motions and other papers subsequent to obtaining jurisdiction of the party and when required by law or these rules, other than process."

416. *In re* Williamson's Estate, 95 So. 2d 244, 246 (Fla. 1957) and cases therein cited. That this is the purpose seems corroborated by the provisions of FPC §731.301(1)(c): "Formal notice shall be sufficient to acquire jurisdiction over the person receiving formal notice *to the extent of the person's interest in the estate subject to administration*" (emphasis added), but

Code of the word "notice" without either the adjective "formal" or "informal"[417] will only cause confusion and should be rectified.

Apart from this change in terminology, the manner of service of both formal and informal notice, and proof of service, under the new statute are similar to existing modes of service of citation and notice. The one exception is that the 1974 Code allows service of formal notice to be made by certified or registered mail, as well as by the existing modes of service of citation.[418]

Parties

A perennial problem in the diverse court proceedings arising out of the administration of decedents' estates and trusts (both inter vivos and testamentary) is the determination and joinder of necessary parties. Normally all persons whose property rights are affected by the particular proceeding are necessary parties, or, to state it differently, persons whose property rights are affected by the proceeding generally are not bound thereby unless they are given notice and an opportunity to be heard.[419] There are, however, two well established exceptions to the usual rule that have been developed by the courts, either for convenience or through necessity.[420] Where a person's interest is thought to be adequately protected by a trustee, personal representative, or guardian, the fiduciary is considered the necessary party and the beneficiary or ward, even though known, need not be made a party, and will be bound by the judicial action taken.[421] Where unborn or unascertained persons may have property interests in an estate or trust that cannot be adequately represented by the fiduciary, a second exception, known as "virtual representation," has developed because of the need to provide living and ascertained persons with a prompt and final determination when required.[422] A third exception, which

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such purpose could have been better emphasized by inserting the word "only" before the italicized language.

417. See §§731.301(3) and 733.302, where the reference seems to be to both formal and informal notice; §§731.303(4), 732.901(2), 733.816(1) and 734.102(1), in which formal notice seems to be needed; and §§732.107(2), 732.204, 732.403, 732.803 and 733.705, in which informal notice would seem to be sufficient. Similarly, ambiguous use of the term "notice" may be found in chapters 737 (trusts) and 744 (guardians) of Fla. Laws 1974, ch. 106, which are not within the scope of this article.

418. *Compare* FPC §731.301 (1974), *with* PGR 5.050.

419. "It is a fundamental principle of Anglo-American law that every person is entitled to notice and an opportunity to be heard in a judicial proceeding in which his interests are to be adjudicated." 1 AMERICAN LAW OF PROPERTY §4.82, at 543 (1952).

420. "The doctrine of representation applies for reasons not only of convenience and justice, but of necessity also, because it is impossible to make them personally parties. Necessity is recognized as an all sufficient reason for it wherever such necessity exists." Blocker v. Blocker, 103 Fla. 285, 288, 137 So. 249, 252 (1931) (*quoting* 23 R.C.L. 583, 584).

421. 4 L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS 127-28 (1956). The authors point out that this is a case of "actual representation," in contrast to the "virtual representation" discussed in the text accompanying notes 422, 428-436 *infra*.

422. "The reason behind the exception is a simple one of human relationships, implicit in the principle that human laws, and all other temporal things, are for the living; not for the dead or for those not yet in being, if to hold otherwise would result in injustice to living persons. Because parties are not in being, and therefore cannot be brought before the

is not yet fully developed, concerns the binding effect of a consent or other act by a holder of a power of revocation[423] or a presently exercisable general power of appointment.[424] The theory underlying this exception is that, because a holder of such a power has unlimited control over the disposition of the property subject to it, possession of the power is tantamount to ownership and therefore his acts should be binding upon the persons who later receive the property through, or in default of, an exercise of the power.[425]

The 1974 Code codifies each of these exceptions by adopting the language of the UPC[426] with several modifications.[427] The provision allowing a trustee or personal representative to represent his beneficiaries and a guardian of the property to represent his ward, where the fiduciary has no interest in the litigation adverse to that of the beneficiaries or ward, is merely a continuation of existing Florida law.[428] The virtual representation doctrine has also been applied in Florida,[429] but a slight change in language from the UPC may limit the future use of the doctrine in this state. The UPC provides that an unborn or unacertained person is bound if represented by another party having "a substantially identical interest" in the proceeding.[430] The 1974 Code, how-

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tribunal, is not sufficient reason for a court to stand by, helpless and impotent, when rights of living persons, in ordinary common sense, ought to be adjudicated." Mabry v. Scott, 51 Cal. App. 2d 245, 252-53, 124 P.2d 659, 663-64 (Dist. Ct. App. 1942), *cert. denied,* Title Ins. & Trust Co. v. Mabry, 317 U.S. 670 (1943). *See also* Blocker v. Blocker, 103 Fla. 285, 137 So. 249 (1931). For detailed discussions of the "virtual representation doctrine," see 1 AMERICAN LAW OF PROPERTY §§4.85-.90; RESTATEMENT OF PROPERTY §§180-85 (1936); L. SIMES & A. SMITH, *supra* note 421, §§1803-24; text accompanying notes 428-436 *infra.*

423. The major case in this area arose when the beneficiaries of a revocable trust attempted to surcharge the trustee for acts that had been consented to by the settlor. Although finding a breach of trust, the New York Court of Appeals denied the surcharge, holding that the consent of the settlor bound the beneficiaries. City Bank Farmers Trust Co. v. Cannon, 291 N.Y. 125, 51 N.E.2d 674 (1943).

424. The cases in this area are more numerous, but have arisen under similar circumstances — an attempted surcharge of the trustee for acts consented to by the holder of the power. *E.g.,* Central Hanover Bank & Trust Co. v. Russell, 290 N.Y. 593, 48 N.E.2d 704 (1943); Perkins' Trust Estate, 314 Pa. 49, 170 A. 255 (1934); Johnson v. Snaman, 76 S.W.2d 824 (Tex. Civ. App. 1934). The concept is not applicable, however, if the power is not presently exercisable. State *ex rel.* Beardsley v. London & Lancashire Indem. Co., 124 Conn. 416, 200 A. 567 (1938); Scott's Estate, 353 Pa. 575, 46 A.2d 174 (1946). Nor does it appear that the takers in default will be bound by the consent of the donee of the power. Reyburn's Estate, 43 Pa. D. & C. 85 (1942).

425. *E.g.,* City Bank Farmers Trust Co. v. Cannon, 291 N.Y. 125, 51 N.E.2d 674 (1943); Perkins' Trust Estate, 314 Pa. 49, 170 A. 255 (1934). For a detailed discussion of the development of this doctrine, see 3 A. SCOTT, THE LAW OF TRUSTS §216.2 (3d ed. 1967).

426. UPC §1-403(b).

427. FPC §731.303(2) (1974).

428. FLA. R. CIV. P. 1.210 and cases cited thereunder in 30 FLA. STAT. ANN. nn. 10 *et seq.* (1967). The UPC would allow representation by a guardian of the person or a parent of a minor child, UPC §1-403(2)(ii), but FPC §731.303(3) provides: "Orders binding a guardian of the person shall not bind the ward."

429. Blocker v. Blocker, 103 Fla. 285, 137 So. 249 (1931). *See also* FLA. STAT. §§737.06, .07 (1973).

430. UPC §1-403(2)(iii).

ever, requires the other party to have "the same interest."[431] Although "same" can mean "substantially identical,"[432] the deliberate choice of the word "same" in lieu of the UPC phrase must indicate an intention to use it in its primary sense, that is, "identical." If so, this would prevent the representation of unborn and unascertained persons by anyone having an interest differing either in quantity[433] or in quality[434] from that of the unborn or unascertained persons. This unnecessarily limits the underlying theory of the doctrine[435] and will cause unnecessary expense and delay in the proceeding by requiring the more frequent appointment of a guardian *ad litem*.[436]

The new provision[437] allowing an order binding a holder of a power of revocation or a presently exercisable general power of appointment to bind other persons to the extent that their interests are subject to the power has no counterpart in existing Florida law and seems a desirable addition. The term "presently exercisable general power of appointment," used in both this section[438] and the corresponding section of the UPC,[439] presumably is derived from the definitions in the *Restatement of Property*[440] and, therefore, should

431. FPC §731.303(2)(c) (1974). Similarly §731.303(4)(b) provides: "Notice is given to unborn or unascertained persons . . . by giving notice to all known persons whose interests . . . are *the same* as those of the unborn or unascertained person." (emphasis added.)

432. BLACK'S LAW DICTIONARY 1507 (4th ed. rev. 1968). Webster also defines "same" to mean "1. being the very one; identical. 2. alike in kind, quality, amount or degree; corresponding . . . ." WEBSTER'S NEW WORLD DICTIONARY 1289 (1960).

433. For instance, in a *per stirpes* class gift, a person with a one-eighth interest in the remainder conceivably would be unable to represent unborn beneficiaries who might share a one-quarter interest.

434. An obvious example of a difference in quality would be an attempt to have a person with a remainder for life represent the ultimate remaindermen.

435. "The virtual representation doctrine is based upon two things: the impracticality of making the represented person an actual party to the proceeding, and the self-interest of the representing person who has an interest in the property *so similar* to the person whom he represents that, *in serving his own interest, he will adequately serve the interests of the person who is not in fact a party.*" 1 AMERICAN LAW OF PROPERTY §4.85 (1952) (emphasis added).

"The principal requirement for [the doctrine of virtual representation] is that the person who is actually joined (the representative) must have an interest which is *so similar* to that of the unborn person that his claim properly presented, will also be an effective presentation of the claim of the unborn person." 4 L. SIMES & A. SMITH, *supra* note 421, at §1824 (emphasis added).

436. FPC §731.303(5) allows the court to appoint a guardian *ad litem* whenever it "determines that representation of the interest otherwise would be inadequate" and continues: "If not precluded by conflicts of interest, a guardian ad litem may be appointed to represent several persons or interests." If the several persons do not have "the same" interest in quality and quantity, however, the question arises whether the court must appoint separate guardians *ad litem* for each.

437. FPC §731.301(2)(a) (1974).

438. *Id.*

439. UPC §1-403(2)(a).

440. The RESTATEMENT provides: "A power presently exercisable, as the term is used in this Restatement, is a power as to which the donor has not manifested an intent that its exercise shall be postponed." RESTATEMENT OF PROPERTY §321(2) (1936). And "[a] power is general, as the term is used in this Restatement, if (a) being exercisable before the death of the donee, it can be exercised wholly in favor of the donee, . . ." *Id.* §320(1).

be interpreted to mean "a power as to which the donor has not manifested an intent that the exercise shall be postponed" and which "can be exercised wholly in favor of the donee."[441]

BEGINNING ADMINISTRATION

Before embarking upon a discussion of the procedural aspects of the 1974 Code, the increased importance of the Probate and Guardianship Rules should be mentioned. Present statutory law is more than fifty per cent procedural and the current PGR merely follow statutory language with occasional clarifications. This probably is due to a natural reluctance on the part of rules committees to create apparent conflicts between the rules and the statutes.[442] Under the 1974 Code, however, many of the procedural provisions found in the current probate code are eliminated, although many others are retained in order to provide continuity and thus a better understanding of the new law. The intent is that, after greater familiarity with the structure of the 1974 Code is attained, most procedural provisions will be removed from the statutes and full reliance placed upon the PGR. The attainment of this goal would represent a most important contribution to probate reform. Without the inhibiting effect of detailed procedural provisions in the statutes, rules committees could more easily adjust and keep current the probate procedures. In the meantime, it should be kept in mind that seemingly incomplete procedural provisions in the 1974 Code are supplemented by the PGR and are not necessarily defects in the Code's structure.[443]

The 1974 Code offers interested parties four possible ways of proceeding with the settlement of a decedent's estate. Several of these alternatives, how-

441. *Id.*

442. The FLA. CONST., art. V, §2(a) directs the Florida supreme court to "adopt rules for the practice and procedure in all courts" and FLA. STAT. §25.371 (1973) provides: "[W]hen a rule is adopted by the Supreme Court concerning practice and procedure, and such rule conflicts with a statute, the rule supersedes the statutory provision." The authors are not inclined to enter into a futile discussion of what constitutes procedure and what constitutes substantive law. As the above quoted statute recognizes, the fact that a matter appears in the Rules would seem to be a decision by the court of last resort of this state that the matter is procedural.

443. The supreme court has recognized the importance of a definitive revision of the PGR and the time necessarily involved in making such a revision. On July 17, 1974, in *In re* Transition Rule 19, Florida Probate Code, 297 So. 2d 307, it adopted the following rule:

"The Court recognizes that the 1974 session of the Legislature has passed a comprehensive Florida Probate Code which for ready understanding and continuity included many provisions pertaining solely to procedure, a function reserved exclusively in the Florida Supreme Court under Article V, §2(a), Florida Constitution, under its rule making power.

"It is appreciated, however, that for a time, until complete new Probate and Guardianship Rules (now under review in committee) are promulgated by appropriate consideration of the rules committees of The Florida Bar and this Court, uniformity will best be provided by a transition rule allowing the temporary use of the precedural aspects included in the Probate Code, for an interim period of time effectively July 1, 1975, when said Probate Code shall become effective, and the date when a complete set of probate rules of procedure is adopted, to include the procedural aspects of said new Florida Probate Code.

"We accordingly adopt the following as Transition Rule 19, effective July 1, 1975, to terminate upon adoption by this Court of new Probate and Guardianship rules . . . .

ever, are severely restricted by limitations on the size or nature of the property within the estate. As a result, the new Code is far from the "flexible system of administration" advocated by the draftsmen of the UPC.[444] The legislative rejection of this system, and the resulting retention of close court supervision over the acts of the personal representative, evidences the paternalistic attitude that has long characterized the probate laws of this country.[445] Because this decision fails to meet the demands for reduced court supervision, it constitutes the greatest weakness in the 1974 Code and almost certainly will promote demand for further reform of our probate laws.[446] Nevertheless, some progress has been made and, hopefully, the foundation laid for greater flexibility in the future.

To facilitate a better understanding of different methods of settling an estate, the changes made in the standard procedure will be discussed first. Then the discussion will focus on the extent to which this standard procedure may be simplified by use of the statutory provisions for family administration,[447] summary administration,[448] and the disposition of personal property without administration.[449]

Petition

As under existing law, the first step in commencing the administration of a decedent's estate under the 1974 Code is the filing of a petition for ad-

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TRANSITION RULE 19. FLORIDA PROBATE CODE

"All of those matters contained in the 1974 Florida Probate Code pertaining to practice and procedure are hereby adopted as if they were rules promulgated by this Court and shall be controlling in all such matters, together with the present Rules of Probate and Guardianship Procedure; and where conflict exists between said two, the provisions of the Florida Probate Code shall control.

"This Rule shall become effective July 1, 1975, and shall automatically terminate upon adoption by this Court of new Probate and Guardianship Rules."

444. UPC art. III, General Comment.

445. The UPC seeks to eliminate this paternalism by first giving the personal representative broad powers exercisable without court supervision and then providing a system of administration by which, after appointment of the personal representative, no recourse to the court is required unless some interested party asks for court intervention and then only to the extent requested. UPC art. III, General Comment; Wellman, *The Uniform Probate Code: Blueprint for Reform in the 70's*, 2 CONN. L. REV. 453, 492-94 (1970). *But see*, Saunders, *A Texas View of Independent Administration and Other Devices for Probate Flexibility*, UPC NOTES, Nov. 1974, at 3.

446. The cost and delay caused by court supervision is the basis of most of the criticism of existing probate law. See text accompanying notes 11-34 (part I). Perhaps at one time, when the beneficiaries of the estate were uninformed and inexperienced widows and minor children, such supervision was justified. Today it seems to be a major source of irritation. To tell an adult, whether a surviving spouse or child, that it is necessary for him to bear the expense and delay of numerous court proceedings in order that his rights may be protected, when he would prefer to protect them himself, or, more frequently, feels that he needs no court portection, is to offend his sense of dignity as well as to deplete his pocketbook.

447. FPC §§735.101-.106 (1974). See text accompanying notes 953-969 *infra*.

448. FPC §§735.201-.209 (1974). See text accompanying notes 970-981 *infra*.

449. FPC §§735.301-.302 (1974). See text accompanying notes 982-988 *infra*.

ministration.[450] Although the language of the Code is different, the elements that must be included in the petition are quite similar to those required by the present statute.[451] In the case of a testate estate, a single petition will undoubtedly continue to be used for both the probate of the will and the appointment of a personal representative; the failure to include a separate section concerning the added elements needed in a petition for probate[452] is rectified by the PGR.[453] Similarly, the Rules, but not the Code, require that the petition be verified.[454] Unless a caveat is filed,[455] no notice need be given before the granting of a petition for probate,[456] or the granting of letters, if the petitioner is entitled to preference of appointment.[457] If, however, there is an individual qualified to act who is entitled to a preference "equal to or greater than" the person applying for letters,[458] formal notice[459] must be given to each such person unless it is waived in writing.[460] With the exception of the clarifying phrase quoted in the preceding sentence,[461] this procedure for obtaining letters is unchanged from present law.[462]

Proof of Wills

The Code's requirements for proving a will are undoubtedly intended to continue the existing law with only editorial changes.[463] In excepting the self-

450. FPC §733.202 (1974).

451. *Compare* FPC §733.202 (1974), *with* FLA. STAT. §732.43 (1973).

452. *Compare* FPC §732.202 (1974), *with* FLA. STAT. §732.23 (1973).

453. PGR Form 5.640.

454. PGR 5.110 and 5.200. These are incorporated into §731.104 of the 1974 Code, which provides: "When verification is required in this code *or by rule*, every document filed with the court under this code or the rule shall include an oath, affirmation or the following statement: 'Under penalties of perjury, I declare that I have read the foregoing and the facts alleged are true, to the best of my knowledge and belief.' Any person who shall willfully include a false statement in a document filed with the court under this code shall be guilty of perjury and upon conviction shall be punished accordingly." (emphasis added). See text accompanying notes 442-443 *supra*.

455. For the status of a caveat under the 1974 Code, see note 405 *supra*.

456. PGR 5.110.

457. FPC §733.203 (1974). For the preferences in appointment see FPC §733.301, discussed in text accompanying notes 483-500 *infra*.

458. See note 457 *supra*.

459. See text accompanying notes 413-418 *supra*.

460. FPC §733.203 (1974).

461. Both FLA. STAT. §732.43(3) (1973) and PGR 5.200 provided for citation to anyone "entitled to preference *over* the person applying" (emphasis added); thus it was uncertain whether citation had to be issued to a person entitled to *equal* preference.

462. *Compare* FPC §§733.202, .203 (1974), *with* FLA. STAT. §§732.23, .43 (1973).

463. *Compare* FPC §733.201 (1974), *with* FLA. STAT. §732.24 (1973). The new statute provides:

"(1) Wills other than wills that are self-proved may be admitted to probate upon the oath of any attesting witness taken before the court or before the clerk or before a commissioner appointed by the court.

"(2) If it appears to the court that the attesting witnesses have gone to parts unknown or are dead or after execution of the will have become incompetent or their testimony cannot be obtained within a reasonable time, a will may be admitted to probate upon the oath of

proved will[464] from the usual requirements of proof, however, the draftsmen inadvertently omitted any provision for the proof of such wills.[465] This omission should be rectified by adding an appropriate provision to the statute.[466] Moreover, the seemingly innocuous change from the term "executor" to "personal representative" in subsection (2) of the statute may have unforeseen consequences.[467] If no attesting witness is available, the will may be admitted to probate upon the oath of the "personal representative." This would permit using the oath of an interested person not selected by the testator, obviously contradicting the next clause of the statute, which, except in the case of an executor, only allows an oath by "any person having no interest in the estate."[468] It would be desirable to eliminate this contradiction by inserting after the words "personal representative" the phrase "nominated by the will" and thus preserve the intent of the existing law.[469]

The 1974 Code continues the special requirements for probate of foreign language wills,[470] notorial wills,[471] wills of residents after foreign probate,[472] and lost or destroyed wills,[473] although numerous editorial changes have been made in each. In the case of foreign language wills, a substantial change is effected by eliminating the requirement for a citation (or formal notice) to the surviving spouse, heirs at law, and all beneficiaries under the will before it is admitted to probate. Presumably, the purpose of the citation was to allow the parties to be heard in connection with the establishment of the complete English translation.[474] Perhaps formal notice was thought to be unnecessary in the new law because the rights of interested parties are protected by retaining the provision for a redetermination of the correctness of the translation at a

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the personal representative as provided in subsection (1) whether he is interested in the estate or not, or of any person having no interest in the estate under the will, that he believes the writing exhibited to be the true last will of the decedent."

464. The phrase "other than wills that are self-proved" was inserted in §733.201(1). See discussion of self-proved wills in text accompanying notes 126-136 *supra* (part I).

465. The draftsmen of the 1974 Code were evidently unwilling to accept the provisions of UPC §3-406(b), which provides: "If the will is self-proved, compliance with signature requirements for execution is conclusively presumed and other requirements of execution are presumed subject to rebuttal without the testimony of any witness upon filing the will and the acknowledgment and affidavits annexed or attached thereto, unless there is proof of fraud or forgery affecting the acknowledgement or affidavit."

466. PGR 5.120 has not been changed to reflect the adoption of the self-proved will provision in 1973. (FLA. STAT. §731.071 (1973)); nor would it seem appropriate to change the rule without changing the statute as long as the statutory provisions for proof of other wills are continued. If the self-proved will is to have any real significance, it would seem that a provision similar to the UPC should be adopted. See note 465 *supra*.

467. See note 463 *supra*.

468. FPC §733.201(2) (1974).

469. See FLA. STAT. §732.24(2) (1973).

470. *Compare* FPC §733.204 (1974), *with* FLA. STAT. §732.34 (1973).

471. *Compare* FPC §733.205 (1974), *with* FLA. STAT. §732.37 (1973).

472. *Compare* FPC §733.206 (1974), *with* FLA. STAT. §732.35 (1973).

473. *Compare* FPC §733.207 (1974), *with* FLA. STAT. §732.27 (1973).

474. FLA. STAT. §732.34(1) (1973). This seems the only reason for requiring citation here, where the content of the will is in doubt, and not in the case of the usual will.

later time.[475] Moreover, a second day in court on the same matter may have been thought to be anomalous. Nevertheless, it would be desirable to reinstate the provision for formal notice because the court is still charged with establishing the correct translation in the order admitting the will to probate[476] and should therefore have the assistance of all interested parties. The provision for a later redetermination of the correctness of the translation of the will, or of any part of it, also seems justified because of the virtual impossibility of anticipating at the time of probate all of the problems that may arise during administration, the determination of which may depend upon an exact translation of a particular provision of the will.[477]

Formal notice before probate of a lost or destroyed will continues to be required,[478] again, because the content and terms of the will must be established by the court. The 1974 Code[479] also clarifies two ambiguities in subdivision (3) of the existing statute,[480] thus obviating any basis for a contention that a petitioner may choose either citation *or* proof by two disinterested witnesses to satisfy the requirements of the section,[481] or that the section requires proof of *execution* of such a will to be by two disinterested witnesses.[482]

Selection of Personal Representative

With few substantive changes, the 1974 Code continues existing law concerning who may be appointed personal representative.[483] Provisions requiring designation of a resident agent for both resident and nonresident personal representatives have been eliminated from the Code, although they remain, at least for the present, in the Rules.[484] Handling the matter as procedural,

475. FPC §733.204(2) (1974). *See also* FLA. STAT. §732.34(2) (1973).

476. FPC §733.204(2) (1974).

477. Such redetermination may also be considered equivalent to construction of a will, which cannot be sought until after the will has been probated. FPC §733.211 (1974).

478. FPC §733.207(3) (1974).

479. *Id.*

480. FLA. STAT. §732.27(3) reads: "No probate of any lost or destroyed will shall be granted until citation has issued and been served upon those who, but for such will, would be entitled to the property thereby bequeathed or devised; or unless clearly and distinctly proved by the testimony of at least two disinterested witnesses, a correct copy being the equivalent of one witness." FPC §733.207(3) divides the subdivision into two sentences at the semicolon and begins the second sentence "The content of the will must be" instead of the phrase "or unless."

481. Credence is lent to this interpretation by the fact that until the general revision of the 1933 Probate Code in Fla. Laws 1945, ch. 22783, the subdivision used the word "nor" rather than "or."

482. Briefs of counsel show that this contention was made and rejected in *In re* Estate of Maynard, 253 So. 2d 923 (2d D.C.A. Fla. 1971).

483. *Compare* FPC §733.302 (1974), *with* FLA. STAT. §732.45 (1973). Minors, nonresidents, and trust companies and other corporations continue to be covered by separate statutes. *Compare* FPC §§733.303, .304, .305 (1974), *with* FLA. STAT. §§732.46, .47, .49 (1973). For a discussion of the controversy over the disqualification of nonresidents and foreign trust companies, see text accompanying notes 940-945 *infra*. A section of current law authorizing a married woman to act as an executor without the consent of her husband is understandably omitted from the 1974 Code. *See* FLA. STAT. §732.48 (1973).

484. PGR 5.210.

rather than jurisdictional,[485] seems proper, but it would be undesirable to eliminate from the Rules the requirement for either a resident or nonresident personal representative.[486]

In the section disqualifying minors from acting as personal representatives,[487] the age of 18 is substituted for 21 to accord with the changed general statutory definition of "minor."[488] The provision in the present statutes[489] allowing a minor named as personal representative in a will to qualify when he comes of age, thereby revoking any letters previously issued, has been omitted. This seems desirable because a change in personal representatives would unnecessarily delay administration and place an entirely unjustified expense upon the estate.

The new statutory provision[490] dealing with preferences in the selection of the personal representative is one of the least desirable provisions of the 1974 Code. It attempts to combine the preferences in the case of both testate and intestate estates[491] and, in so doing, compounds the difficulties the courts have

485. In Tyler v. Huggins, 175 So. 2d 239 (Fla. 1965), failure to file a designation of a resident agent before the issuance of letters was held to invalidate the letters.

486. The failure of a resident personal representative leaving the state to appoint a resident agent has been omitted as a cause for removal. FPC §733.504. See text accompanying notes 575-580 *infra*. This may indicate an intent to eliminate the requirement entirely, but for the purpose of protecting the parties dealing with the estate, a resident agent is as desirable in this situation as in the case of a foreign personal representative.

487. FPC §733.303 (1974).

488. FLA. STAT. §1.01(14) (1973).

489. FLA. STAT. §732.46 (1973).

490. FPC §733.301 (1974).

491. FPC §733.301 provides: "In the granting of letters, the following preference shall be observed: (1) the personal representative, or his successor, nominated by the will. (2) The surviving spouse. (3) The next of kin, at the time of the death of the decedent. (4) If there are several next of kin equally near in degree, the one selected in writing by a majority in interest of them who are sui juris shall be appointed. If no selection is thus made, the court may exercise its discretion in selecting the one best qualified for the office. (5) If no application is made by the next of kin, the court may appoint some capable person, but no person may be appointed under this subsection who works for the court or who holds public office under the court, nor may any person who is employed by or holds office under any judge exercising probate jurisdiction be appointed. (6) Those persons entitled to a majority interest in the estate may select a disinterested person as personal representative and if he is otherwise qualified, he shall be appointed. (7) After letters have been granted if any person who is entitled to preference over the person appointed and upon whom formal notice was not served and who has not waived his preference seeks the appointment, letters granted may be revoked, and the person may have letters granted to him after formal notice and hearing. (8) After letters have been granted if any later discovered will is produced and probated, the letters shall be revoked and letters granted to the personal representative named."

Despite the stated order of preference, a convincing argument can be made that the person selected under subsection (6) must be appointed even though the person chosen by the testator, and thus entitled to subsection (1) preference, is ready and able to serve. The argument is as follows: A statute must be construed so that each of its provisions is operative. If subsection (6) is construed to be part of the order of preference set up by the statute, it would be a nullity because the court always will have appointed "some capable person" under subdivision (5). Therefore, the legislature intended to limit the order of preference to subsections (1) through (5) and subsection (6) considered *in pari materia* with subsections (7) and (8), which clearly supersede the order of preference in particular fact situations. Thus,

experienced under the present preference statutes.[492] Moreover, it seems to violate the two basic tenets for the selection of personal representatives: first, "that a testator has the right to name the person who, after his death, shall have charge of his estate, provided that such person is not disqualified by law;"[493] and, second, that where the decedent has not chosen his personal representative, the right to administer should follow the right to the property, since self-interest is the best assurance of a careful and expeditious administration.[494] To give letters to the "next of kin" in the case of a testate estate where both the named executor and the spouse cannot or do not desire to serve, will frequently be to entrust the estate to persons who will not share in its distribution but who are attracted by the prospective fees.[495] The likelihood of this occurring is enhanced under the new statute by its express terms[496] and also by the omission from subdivision (8) of a portion of the present statute from which it was derived.[497] The deficiency of the new section becomes even more apparent when it is compared with the new order of preference statute relating to the appointment of ancillary personal representatives,[498] which carefully

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given the fact situations of subsection (6), the legislature aptly expressed its intent that the order of preference be superseded and the person selected by persons entitled to a majority interest in the estate "*shall be* appointed" (emphasis added) even if the executor named by the testator seeks appointment.

492. FLA. STAT. §§732.43(3), .44, 734.31(1) (1973). See Littel v. Rucker, 266 So. 2d 171 (1st D.C.A. Fla. 1972); *In re* Estate of Phillips, 190 So. 2d 15 (4th D.C.A. Fla. 1966); *In re* Estate of Jose, 164 So. 2d 888 (2d D.C.A. Fla. 1964); Pryor v. First Nat'l Bank of Leesburg, 97 So. 2d 143 (2d D.C.A. Fla. 1957), for difficulties encountered in connection with these statutes.

493. State v. North, 159 Fla. 351, 355, 32 So. 2d 14, 18 (1947); T. ATKINSON, *supra* note 353, at 604. *See also In re* Estate of Jose, 164 So. 2d 888 (2d D.C.A. Fla. 1964). For extreme situations in which the testator's intent may not be followed, see *In re* Estate of Maxcy, 240 So. 2d 93 (2d D.C.A. Fla. 1970), *cert. denied,* 244 So. 2d 435 (Fla. 1971); *In re* Estate of Sackett, 171 So. 2d 906 (1st D.C.A. Fla. 1965). It is conceivable, however, that under the 1974 Code such extreme cases would not be necessary and that persons with a majority interest in the estate could avoid the testator's intent. See note 491 *supra.*

494. *See In re* Estate of Jose, 164 So. 2d 888 (2d D.C.A. Fla. 1964).

495. This can also occur in intestate estates where the persons entitled to the estate are minors or are otherwise disqualified to act. *See* Littel v. Rucker, 266 So. 2d 171 (1st D.C.A. Fla. 1972); *In re* Estate of Phillips, 190 So. 2d 15 (4th D.C.A. Fla. 1966).

496. It will be impossible for the courts to continue to hold §733.301 applicable only to intestate estates and allow the appointment of an administrator c.t.a. to be governed by common law rules, as was done in Pryor v. First Nat'l Bank of Leesburg, 97 So. 2d 143 (2d D.C.A. Fla. 1957).

497. *Compare* FPC §733.301(8) (1974), *with* FLA. STAT. §732.44(7) (1973), which provides: "After letters of administration have been granted, if any will is produced and probated, the aforesaid letters shall be revoked and letters testamentary shall be granted to the executor of said will, or letters of administration cum testamento annexo shall be granted, if there is no executor ready and willing to qualify, preference being given to the person, if otherwise qualified, who is selected by the persons beneficially interested in the estate. No such will shall be probated without citation to the administrator."

498. FPC §734.102(1) reads: "If a nonresident of this state dies leaving assets in this state, credits due him from residents in this state, or liens upon property in this state, then any personal representative specifically designated in the decedent's will to administer the Florida property shall be entitled upon petition to have ancillary letters issued to him if qualified to act in Florida. Otherwise, the foreign personal representative of the decedent's estate shall be entitled upon petition to have such letters issued to him if qualified to act in

adheres to both basic tenets.[499] The section is clearly unsatisfactory and should be redrafted.[500]

Oath and Bond

The oath of the personal representative and any bond required are usually filed with the petition for convenience and to expedite the issuance of letters. It is surprising to find that the 1974 Code does not contain any provision for an oath.[501] Although difficult to justify functionally,[502] the oath is such a

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Florida; and if such foreign personal representative is not qualified to act in Florida and the will names an alternate or successor who is qualified to act in Florida, then such alternate or successor shall be entitled upon petition to have such letters issued to him. Otherwise, those entitled to a majority interest of the Florida property may upon petition have such letters issued to a personal representative selected by them who is qualified to act in Florida. If the decedent dies intestate, the order of preference for appointment of personal representative as prescribed in this Code shall be applicable. If ancillary letters are applied for by other than the domiciliary personal representative, then prior notice of such petition shall be given, as provided in this code, to the personal representative (if any) then serving in the decedent's domicile."

499. See text accompanying notes 492-494 *supra.*

500. The following provision is suggested:

"733.031 Preference in appointment of personal representative. In the granting of letters the following preferences shall be observed:
(1) Testate estates.
(a) The personal representative or his successor nominated by the will.
(b) The person selected by the persons entitled to a majority interest in the estate.
(c) A beneficiary under the will. If more than one beneficiary applies, the court may exercise its discretion in selecting the one best qualified for the office.
(2) Intestate estates.
(a) The surviving spouse.
(b) The person selected by a majority in interest of the next of kin who are *sui juris.*
(c) The next of kin. If more than one next of kin apply, the court may exercise its discretion in selecting the one best qualified for the office.
(3) In either a testate or an intestate estate, if no application is made by any of the persons named in subsections (1) and (2), as the case may be, the court in its discretion may appoint some capable person, but no person may be appointed under this subsection who works for the court or holds public office under the court, or who is employed by or holds office under any judge exercising probate jurisdiction.
(4) After letters have been granted in either a testate or an intestate estate, if any person who is entitled to preference over the person appointed and upon whom formal notice was not served and who has not waived his preference seeks the appointment, letters granted may be revoked and such person may have letters granted to him after formal notice and hearing.
(5) After letters have been granted in a testate or an intestate estate, if any later discovered will is produced and probated, the aforesaid letters shall be revoked and letters granted as provided in subsection (1) hereof."

501. Such an oath is currently required by FLA. STAT. §732.59 (1973).

502. If the oath were taken before the judge or the clerk, it might impress upon the personal representative the importance of the obligations he is assuming, but, since it usually is executed before a notary public in the office of the attorney at the time that the petition is executed, the oath tends to be viewed as merely "another paper to be signed." Nor does breach of his oath "that he will faithfully administer the estate" (PGR 5.240) appear as an

traditional part of the qualification of a personal representative that its omission is instinctively offensive. Indeed, even the UPC requires an acceptance of the office.[503] Hopefully, the PGR will continue to require the filing of an oath when the new rules are promulgated.[504]

The provisions of the 1974 Code concerning bonds are, for the most part, taken from existing law with only editorial changes.[505] One is new in form, but is actually only a simplified statement of material covered by several sections of existing statutes.[506] The testator is still allowed to waive bond,[507] but the 1974 Code rejects the recommendation of the draftsmen of the UPC that no bond be required except in specified circumstances.[508] This seems regrettable because bonds represent an unnecessary expense to both the public[509] and to beneficiaries of estates.[510] Furthermore, the requirement may delay the beginning of administration,[511] and, in some instances, may encourage the use of nontestamentary dispositions in order to avoid publicity concerning the wealth of a decedent.[512] Perhaps efforts to pass a comprehensive revision of probate law should not be jeopardized by injecting the controversial issue of the need for

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allegation in any proceeding to surcharge or otherwise hold the personal representative liable for wrongful acts.

503. UPC §3-307.

504. This is currently required under PGR 5.240. See text accompanying notes 442-443 *supra* for a discussion of the effect of the PGR on procedural provisions omitted from the 1974 Code.

505. FPC §§733.402-.405 (1974). *Compare* FPC §733.402, *with* FLA. STAT. §§732.61, .67 (1973). *Compare* FPC §733.404, *with* FLA. STAT. §732.65 (1973). *Compare* FPC §733.405, *with* FLA. STAT. §732.68 (1973). As to FPC §733.403, see FLA. STAT. §§732.61-.66, .69 (1973).

506. FPC §733.403 (1974); see note 505 *supra*.

507. FPC §733.402(1) (1974).

508. UPC §3-603. Bond is required in cases (1) where a special administrator (curator) is appointed, (2) where a will contains an express requirement for bond, (3) where a bond is demanded by a beneficiary or creditor having an interest in excess of $1,000.

509. The time spent by judges and clerks in setting the amount of bonds, releasing sureties, et cetera, adds appreciably to the cost of judicial administration.

510. It has already been pointed out (see text accompanying note 16 *supra*, (part I)) that "claims are rarely, if ever, made on bonds." The method of determining the amount of bond varies considerably in different parts of the state, as does the cost of the bond if supplied by a surety company. If a bond in the amount of twice the value of the personal property is set and the annual cost is $10 per $1,000, the beneficiaries of the estate are being charged 2% per year for protection that is of little benefit to them. The discrepancy between the benefit and the cost is dramatically illustrated by statistics from the Insurance Commissioner of Florida that show that for the years 1968 to 1972, the average premiums per year amounted to $364,968, while payments on claims averaged $21,123 per year. J. Langford, How Necessary the Administration Bond?, May 1975 (unpublished research paper submitted for Estates and Trust Seminar, spring quarter 1975, University of Florida College of Law).

511. The issuance of letters is delayed to the extent that additional time is needed (1) to determine the value of the personal property of the estate so that sufficient information can be stated in the petition to enable the court to fix the amount of the bond and (2) for a surety company to investigate the financial status of its principal and to provide the bond.

512. A frequently suggested advantage of creating a revocable trust is that neither the size of the trust nor the nature of its assets need be disclosed to the court by the petition for probate or the inventory of the estate. *See, e.g.*, T. ATKINSON, *supra* note 353, at 159-60, 162.

a bond, but it is hoped that the UPC approach will be presented to the legislature by way of a separate bill in the near future.

Notice of Administration

Once the preceding steps have been taken, the 1974 Code provides that the will, if any, shall be admitted to probate, the personal representative appointed and letters issued to him.[513] Administration can then be said to have begun, but the notice of administration properly may be considered a part of beginning administration because it governs the future course of the administration. The notice of administration[514] is a new concept in Florida law, although its various elements may call to mind existing procedures to be followed after the filing of a caveat,[515] the notice of probate,[516] the notice to creditors,[517] and the revocation of probate.[518] Since the notice affects several matters discussed in other parts of this article, it seems best merely to describe it generally here and to reserve analysis of its specific effects upon particular matters until each is discussed.[519]

The notice of administration provision is designed to avoid several recurrent criticisms of existing probate law: (1) the possibility that persons directly affected may not know that administration has been started; (2) the expense involved in publishing a variety of notices; and (3) the long period of uncertainty as to the ultimate validity of the will when probate is allowed by an *ex parte* proceeding.[520] Therefore, the new law requires the personal representative, "upon issuance of letters," to publish the notice and to serve a copy of it "upon all beneficiaries."[521] The provision for notice, which serves as a notice of

513. FPC §733.401 (1974).
514. FPC §733.210 (1974).
515. FLA. STAT. §732.29 (1973).
516. FLA. STAT. §732.28 (1973).
517. FLA. STAT. §733.15 (1973).
518. FLA. STAT. §732.30 (1973).
519. The relationship of notice to challenges to jurisdiction and venue has already been discussed. See text accompanying notes 399-410 *supra*. The contest of wills is discussed in the text accompanying notes 525-574 *infra;* claims of creditors are dealt with at notes 745-793 *infra*.
520. In the text accompanying notes 456-457 *supra* it was previously noted that in the usual case no notice is required before the probate of the will and the granting of letters. The alternative of a formal proceeding, with all interested parties served with process before the will is probated or the personal representative appointed, delays the beginning of administration for a minimum of a month (the time required to serve process plus the 20 days allowed for response). It will also frequently require the appointment of a curator (*see* FPC §733.501 (1974)) to take charge of the estate, thus increasing the costs of administration.
521. FPC §733.210 (1974). The full text of the provision reads:
"(1) Upon issuance of letters the personal representative shall publish a notice of administration. The personal representative shall also serve a copy of the notice upon all beneficiaries according to the requirements of §731.301(1). The notice shall contain the name of the decedent, the file number of the estate, the name and address of the personal representative, the name and address of the personal representative's attorney, the date of first publication and the last day when claims or objections may be presented as well as require all interested persons to file with the court, within four months of the first publication of the notice: (a) All claims against the estate. (b) Any objection by an interested person that challenges the validity of the will, qualifications of the personal representative, venue or

probate as well as a notice to creditors, bars objections to the will not filed within four months after the first publication. It also requires that any objection to the qualifications of the personal representative, to jurisdiction, or to venue[522] be filed within the same time.

The phrases quoted above merit brief comment. "[U]pon the issuance of letters" is a somewhat vague standard for determining the permissible time within which publication must be begun and copies of the notice served upon the beneficiaries. This vagueness is undoubtedly intentional. "Beneficiaries" are defined[523] in the 1974 Code as heirs at law and devisees[524] who have a present interest in the estate. Although the time required to determine the identity of such persons and obtain their addresses may vary considerably in different estates, nevertheless, it is not a problem in most instances. Therefore, to encourage prompt action, it would be preferable to state a definite time, such as 15 days after the issuance of letters, within which the personal representative must begin publication of the notice, adding a provision that the court may extend the time for good cause shown.

WILL CONTESTS (REVOCATION OF PROBATE)

As indicated earlier,[525] the 1974 Code attempts to achieve an early, yet final, determination of the validity of a probated will without the expense and initial delay involved in probate in solemn form. The extent to which this objective has been, or can be, realized and at what detriment to possible interested persons, is the focal point of the following discussion.

Who May Contest

Existing law provides that any heir or distributee of a decedent, including legatees and devisees under a prior will, may petition for revocation of probate at any time before the final discharge of the personal representative.[526] Despite this seemingly clear statutory language, the courts have not treated this provision as excluding all other parties,[527] nor even as including all of the heirs.[528]

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jurisdiction of the court or any other challenge to the legality of the proceeding.

"(2) The required publication shall be once a week for four consecutive weeks, four publications being sufficient, in a newspaper published in the county where the estate is administered, or if there is no newspaper published in the county, in a newspaper of general circulation in that county. Proof of publication shall be filed.

"(3) Objections under subsection 1(b) that are not filed within four months following the date of first publication of the notice are forever barred. Claims under subsection 1(a) are barred as provided in §733.702."

522. See text accompanying notes 399-410 *supra*.

523. FPC §731.201(1) (1974).

524. "Devisee," in turn, is defined as one entitled to receive a testamentary disposition of personal as well as real property. FPC §§731.201(6), (7) (1974).

525. See note 520 and text accompanying notes 456-457 *supra*.

526. FLA. STAT. §732.30 (1973).

527. The leading case under the 1933 Probate Act is *In re* Dana's Estate, 138 Fla. 676, 190 So. 52 (1939), which construed the similar provisions of that Act "to grant such a right or authorization [to contest a will] to heirs, legatees, devisees, distributees, spouses, creditors, or others having a property right or claim against the estate being administered." *Id.* at 678,

Instead, they have preferred to follow the generally used[529] criterion that a right to contest exists only where there is a pecuniary interest in having the will set aside.[530]

The 1974 Code eliminates the existing statutory provisions[531] and provides for "objection by an interested person that challenges the validity of the will."[532] While this provision apparently adopts the present case law test, care should be taken not to repeat the mistake of *In re Dana's Estate*[533] when seeking the meaning of "interested person" in the Code's new definitional section.[534] Not every listed person has a pecuniary interest in having the will set aside; nor does the section specifically include all of those who may have such an interest. For instance, devisees under the will being offered for probate have no such interest, while devisees under a prior will, even though no longer defined as interested persons,[535] may well have an interest adverse to the probated will. Similarly, creditors of the decedent have no interest in having the will set aside; their claims will receive the same treatment whether the estate is administered as a testate or intestate estate.[536] The express recognition of these variations in "interest" by the last sentence of the definition of "interested persons"[537] should prevent future courts from making the *Dana* mistake. The provision also suggests that the precedential value of existing case law is not affected by the failure to carry forward into the 1974 Code the express statement that a devisee under a prior will may contest.[538]

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190 So. at 53. This list appears to have been taken from the Probate Act's general definition of "interested persons" in FLA. STAT. §731.03(9). While unsatisfactory in certain respects (see text accompanying notes 533-538 *infra*), it does show that the court considered that "interested persons" other than heirs and legatees or devisees under a prior will could have sufficient reason to be granted the right to contest probate. A recent case expressly adopts the test of "interest adverse to the will" as the proper criterion in refusing to allow an heir cut off by a prior will to contest the later will. *In re* Pfeiffer's Will, 34 Fla. Supp. 132 (Dade County J. Ct.), *dismissed without opinion,* 240 So. 2d 211 (3d D.C.A. Fla. 1970).

528. *In re* Pfeiffer's Will, 34 Fla. Supp. 132 (Dade County J. Ct. 1970); *In re* True's Will, 31 Fla. Supp. 1 (Dade County J. Ct. 1968). See note 527 *supra.*

529. T. ATKINSON, *supra* note 352, at 519.

530. *E.g., In re* Dana's Estate, 138 Fla. 676, 190 So. 52 (1939); *In re* Pfeiffer's Will, 34 Fla. Supp. 132 (Dade County J. Ct. 1970).

531. *Compare* FPC §733.109 (1974), *with* FLA. STAT. §732.30 (1973).

532. FPC §733.210(1)(b) (1974).

533. See note 527 *supra.*

534. FPC §731.201(17) (1974) reads: " 'Interested person' means heirs, devisees, spouse, creditors, beneficiaries, sureties on a personal representative's bond, and any other person having a property right in or claim against a trust estate or the estate of a decedent, that may be affected by the proceeding. It also includes persons having priority for appointment as personal representative, and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purpose of, and matter involved in, any proceeding."

535. *Compare* FPC §§731.201(17), 733.210(1)(b) (1974), *with* FLA. STAT. §§731.03(9), 732.30 (1973); see text accompanying notes 531-532 *supra.*

536. See text accompanying notes 374-382 *supra;* notes 745-793 *infra* for a discussion of the rights of creditors.

537. See note 534 *supra.*

538. *Compare* FPC §§733.109, .210(1)(b) (1974), *with* FLA. STAT. §732.30 (1973). *In re* Barret's Estate, 40 So. 2d 125 (Fla. 1949) allowed a legatee under a prior will to contest

Time for Contest

Currently, a will contest may occur before probate,[539] within six months of the first publication of the notice of probate,[540] or, if such notice is not published, at any time before the final discharge of the personal representative.[541] A contest prior to probate arises when a caveator answers the petition for probate after receiving a citation.[542] Once the will has been admitted to probate, however, a contest is begun by a petition for revocation of probate.[543] Under the 1974 Code, the time for filing such a petition is reduced to four months after first publication of the notice of administration.[544] This shortened period seems desirable in the usual case where one or more of the heirs is the contestant, since they are served with a copy of the notice[545] and thus are aware of the proceedings. On the other hand, it may be unfair to beneficiaries under a prior will, who are not required to be served with a copy of the notice and who, therefore, may be barred from contesting the later will before learning of its probate. Indeed, such persons may not even become aware of the prior will until the period allowed for contest of the later will has expired. Nevertheless, the unfairness of barring a contest in such a case is probably outweighed by the need for a prompt final determination of the validity of the probated will.

Where the proponent of a later will knows of the existence of a prior will, however, he should not be allowed to rely upon publication of the notice as affording due process to beneficiaries of the earlier will.[546] Notice by publication is a notoriously ineffective mode of providing actual notice[547] and should be resorted to only in cases of necessity.[548] When the proponent is aware that others may have a pecuniary interest in the proceedings because of the ex-

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probate of the later will, while denying that right to the personal representative named in the first will. The right of a personal representative named in an earlier will is discussed subsequently. See text accompanying notes 551-560 *infra*.

539. FLA. STAT. §732.29(4) (1973).

540. FLA. STAT. §732.28 (1973).

541. FLA. STAT. §732.30(1) (1973). Although a reading of subsection (1) seems to indicate that only those barred by the caveat provisions of §732.29 are precluded from contesting a will at any time before final discharge, the Florida supreme court has construed the statute to apply only if notice of probate is not published. State *ex rel.* Ashby v. Haddock, 149 So. 2d 552 (Fla. 1962). The court's construction was based, in part, on its belief that the phrase "or who are barred under §732.29" actually was intended to refer to §733.28. *Id.* at 55 n.5.

542. FLA. STAT. §732.29(4) (1973).

543. FLA. STAT. §732.30 (1973).

544. FPC §733.210 (1974). If the caveat procedure is continued in the PGR, see note 455 *supra*, a contest could also arise before probate.

545. See text accompanying notes 523-524 *supra* for a discussion of the persons upon whom a copy of notice of administration must be served.

546. This was the unfortunate result reached in State *ex rel.* Ashby v. Haddock, 149 So. 2d 552 (Fla. 1962).

547. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

548. In *Mullane*, the Court said: "As to known present beneficiaries of known place of residence, however, notice by publication stands on a different footing. Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties. Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." *Id.* at 318.

istence of a prior will, he should be required to serve a copy of the notice of administration upon all those who have such an interest and possibly upon the person named as personal representative in the earlier will.[549]

The legislature should amend section 733.210 to so provide. Absent such a change, the attempt to bar objections of such persons may be unconstitutional under the concepts of due process enunciated in *Mullane v. Central Hanover Bank & Trust Co.*[550]

Fiduciaries as Contestants

The 1974 Code may have considerable effect upon the fine distinctions that the courts have drawn concerning the status of personal representatives and trustees as contestants of a decedent's will. As previously noted,[551] the validity of a will may be challenged by an "interested person." In defining this term, the Code specifically includes "persons having priority for appointment as personal representative."[552] Such language may change present law that a person named as personal representative in a prior will may not contest a later will.[553] The same sentence adds "and other fiduciaries representing interested persons." This seems to resolve the unsettled question as to whether an administrator appointed in an apparently intestate estate can contest a will subsequently offered for probate. It also clarifies the status of an executor of an heir who survived the decedent but died prior to the will being offered for probate.[554] It should be noted, however, that a later section adopted from the UPC[555] seemingly prohibits a contest "for the primary purpose of enhancing . . . [the fiduciary's] prospects for compensation."[556]

Although this limitation would apply, the new definition of "interested person" appears to support the position taken by the First District Court of Appeal in *State* ex rel. *Ashby v. Haddock*[557] that a trustee under a prior will may contest a later will. This view was rendered questionable by the supreme court's statement that it "need not be evaluated"[558] because the holding was being reversed on other grounds. In each of these situations, the ability of the

549. See text accompanying notes 551-560 *infra.*

550. 339 U.S. 306 (1950).

551. See text accompanying notes 532-538 *supra.*

552. FPC §731.201(17) (1974), *quoted* in text accompanying note 532 *supra.*

553. *In re* Barret's Estate, 40 So. 2d 125 (Fla. 1949); *cf.* Hopkins v. McClure, 45 So. 2d 656 (Fla. 1950).

554. Both issues were involved in *In re* Dana's Estate, 138 Fla. 676, 190 So. 52 (1939). The county judge and the circuit judge disagreed on both issues. Nor were the issues resolved by the supreme court, which held that no one was entitled to contest because "the will had nothing to affect and was to all intents and purposes revoked." *Id.* at 679, 190 So. at 54.

555. *Compare* FPC §733.618 (1974), *with* UPC §3-720, concerning reimbursement of the personal representative for expenses incurred in estate litigation entered into in good faith.

556. UPC §3-720, Comment states that such action would not be in good faith. Although involving a different issue, this same good faith requirement should be read into the definitional clause quoted in the text.

557. 140 So. 2d 631 (1st D.C.A. Fla. 1962), *rev'd. on other grounds,* 149 So. 2d 552 (Fla. 1963).

558. State *ex rel.* Ashby v. Haddock, 149 So. 2d 552, 555 (Fla. 1962).

fiduciary to contest the will seems strengthened by the final sentence of the definition.[559] If such fiduciaries are considered proper contestants, the due process problems noted earlier[560] apply equally well to fiduciaries known to the proponent and a further change should be made in section 733.210.

Other Matters Concerning Contest

Three of the remaining four sections concerning contest have been brought forward from current statutes with only slight changes. Nevertheless they deserve mention because they present troublesome deviations from the theory of probate and will contests under the new Code and therefore should be considered for revision.

Burden of Proof in Contests. The first section provides, *inter alia,* that: "In all proceedings contesting the validity of a will, the burden of proof in the first instance shall be upon the proponent of the will to establish prima facie its formal execution and attestation."[561] Because the caveat section of the old statutes[562] has been omitted from the 1974 Code, the only contest proceeding envisioned in the 1974 Code is by way of revocation of probate. Under these circumstances, it would seem that the probate record should establish the proponent's prima facie case of due execution, but, if so, the statute becomes meaningless. If more proof is required to establish a prima facie case[563] and the proponent is unable to supply it (as would be the case if the attesting witnesses were unavailable and there were no other secondary evidence beyond that offered in the probate proceeding), the contestant would win by default. Thus, merely filing a petition for revocation could nullify the statutory provisions that the proponent had satisfied in obtaining probate. A statute that requires such a result to avoid becoming meaningless is clearly in need of revision.

After Discovered Wills. There are two sections dealing with after discovered wills that do not fit comfortably with the effort to obtain a final determination of the validity and effect of a will early in the administration of the estate. In fact, they suggest the futility and undesirability of the entire effort. The first provides that upon discovery of a later will or codicil "pending probate proceedings," any interested person may offer it for probate in proceedings that "shall be similar to those for revocation of probate as nearly as practicable."[564] The phrase "pending probate proceedings" cannot be read

559. See note 534 *supra.*

560. See text accompanying notes 546-550 *supra.*

561. FPC §733.107 (1974).

562. FLA. STAT. §732.29 (1973). See note 405 *supra* concerning the status of caveat under the 1974 Code.

563. In Ferrell v. Minnifield, 275 Ala. 388, 155 So. 2d 345 (1963), the probate court record was held not to establish a prima facie case where the will had been admitted to probate upon the testimony of only one attesting witness. That case, however, involved the statutory procedure for contest, which required a suit in equity and the testimony of two subscribing witnesses.

564. FPC §733.208 (1974).

literally without rendering the entire section substantially useless.[565] If it is interpreted to cover the period of administration, however, its effect upon the use of the notice of administration to obtain an early final determination of the validity of the probated will is readily apparent. Moreover, such an interpretation raises the question whether beneficiaries under a later will deserve more time in which they may set aside the probated will than either the heirs or the beneficiaries under an earlier will. The instinctive reaction that the later will should be probated because it is the last valid expression of the testator's intent is no justification for the distinction; if the beneficiaries under an earlier will are successful in setting aside the probated will, their will becomes the last valid expression of the testator's intent.

A similar problem arises upon the discovery of a will after the settlement of the estate. In this event, the 1974 Code allows any interested person to "impress a trust upon the funds or property received by a beneficiary in the administration recently terminated that he is not justly entitled to retain because of the newly discovered will."[566] Except for one substantive change,[567] this section is also derived from existing law but its operation is uncertain due to a dearth of court interpretation of the current statute. A comparison with the section concerning discovery of a later will during administration[568] suggests that probate of the later will is not contemplated if it is discovered after administration. Nevertheless, some means of establishing its validity must be available. To allow it to be introduced in evidence and its witnesses called to testify as to its due execution in an action to impress a trust would be contrary to the basic concept that probate is necessary before a will may be used to prove title.[569] It seems likely, therefore, that the courts would allow the will to be probated despite the seemingly contrary intent of the statute.

In any event, the question recurs whether the beneficiaries of this will should be accorded more time to protect their interests than is allowed for the protection of the interests of the heirs or beneficiaries of other wills. The authors submit that there is no satisfactory reason for such distinctions and the 1974 Code should be amended to eliminate them.[570]

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565. Because "probate" is defined in FPC §731.201(22) (compare FLA. STAT. §731.03(14) (1973)) as "all steps necessary to establish the validity of the will and the admitting of the will to probate including the proof of a will," a literal reading of "pending probate proceedings" would cover such a short period of time that the section would have practically no effect.

566. FPC §733.902 (1974).

567. The period allowed for impressing the trust is reduced from three years to one year after discharge of the personal representative. *Compare FPC* §733.902(2) (1974), *with* FLA. STAT. §732.33 (1973).

568. FPC §733.208 (1974); see note 565 *supra.*

569. See text accompanying notes 352-360 *supra.*

570. One method of accomplishing this would be to amend §733.210(3) to limit its bar to persons served with a copy of the notice of administration, to repeal §733.902, and to substitute a section similar to the following:

> *Time limitation for probate of will or petition for revocation of probate.*
>
> (1) After the termination of administration and the discharge of the personal representative no will may be probated nor may a proceeding be brought for revocation of

Compromise of Will Contests. Another provision of the 1974 Code that may have a bearing on will contests is simply a codification of the common law principle that competent successors of the decedent may compromise disputes[571] or otherwise agree to alter the amounts to which they are entitled under the will or the laws of intestacy.[572] Adopted from the UPC,[573] the section also provides that the personal representative must abide by the agreement, subject to the rights of creditors, taxing authorities, or any successors of the decedent who are not parties to the agreement. The effect is to clarify what already may have been obvious: "[T]he successors of an estate have residual control over the way it is to be distributed . . . [and] may compel the personal representative to administer and distribute as they may agree and direct."[574]

CURATORS, SUCCESSOR PERSONAL REPRESENTATIVES, AND REMOVAL

Following the format of the UPC,[575] the 1974 Code groups the provisions of existing law concerning curators[576] with those relating to resignation[577] and removal[578] of personal representatives and the appointment of their successors.[579] The only substantive changes in the rearrangement are an increase from twenty to thirty days in the time allowed for a removed personal representative to file an accounting[580] and the elimination as a ground for removal of the failure of a resident personal representative leaving the state to designate a resident agent.[581] As already discussed,[582] the latter change seems undesirable. It also seems unfortunate that the 1974 Code does not require the curator to proceed with the publication of a notice to creditors and the

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probate of a will previously probated; provided that, if because of fraud the will was not probated or the proceeding for revocation of probate not brought prior to the termination of administration and the discharge of the personal representative, any person injured thereby may obtain appropriate relief against the perpetrator of, or a participant in, the fraud within two years after discovery of the fraud. A person otherwise innocent shall not be considered a participant in the fraud merely because he received a benefit from the fraud.

(2) A proceeding for fraud shall not invalidate any acts of the personal representative theretofore performed in good faith nor affect the rights of bona fide purchasers for value of any of the property of the estate.

571. *E.g.*, Hendrick v. Redfearn, 88 So. 2d 620 (Fla. 1956); Wells v. Menn, 158 Fla. 228, 28 So. 2d 881 (1946).

572. *E.g.*, Anderson v. Anderson, 128 Fla. 759, 175 So. 518 (1937) (agreement to alter will); Youngelson v. Youngelson's Estate, 114 So. 2d 642 (3d D.C.A. Fla. 1959) (agreement to settle intestate estate).

573. *Compare* FPC §733.815 (1974), *with* UPC §3-912.

574. UPC §3-912, Comment.

575. *Compare* UPC art. III, pt. 6, *with* FPC ch. 733, pt. 5 (1974).

576. FLA. STAT. §732.21 (1973); see FPC §733.501 (1974).

577. FLA. STAT. §734.09 (1973); see FPC §733.502 (1974).

578. FLA. STAT. §§734.11-.16 (1973); see FPC §§733.504-.509 (1974).

579. FLA. STAT. §734.10 (1973); see FPC §733.503 (1974).

580. *Compare* FPC §733.508 (1974), *with* FLA. STAT. §734.15 (1973).

581. *Compare* FPC §733.504 (1974), *with* FLA. STAT. §734.11 (1973).

582. See text accompanying notes 484-486 *supra*.

processing of claims against the estate without special order of the court.[583] There is every reason why this portion of the administration should proceed promptly in every estate; but where a special order has been entered, confusion has resulted,[584] which would have been avoided had this been a regular duty of every curator.

The provisions regarding the powers and duties of successor,[585] joint,[586] and surviving personal representatives[587] are taken from the UPC with only one omission. In the section concerning joint personal representatives, the final sentence of the UPC section that expressly protects a person dealing in good faith with one of the joint representatives has been omitted.[588] Perhaps it was felt to be unnecessary in view of the adoption of section 733.611,[589] which accords broad protection to parties dealing with the personal representative. The UPC draftsmen, however, did not think so, and this omission may considerably limit the willingness of third parties to accept action by one of two or more joint personal representatives.[590] Nor should a joint personal representative be misled concerning the extent of his power to delegate authority to his co-representative by a too-broad reading of the provision's second sentence, which provides: "This restriction does not apply . . . when a joint personal representative has been delegated to act for the others."[591] The comment to its UPC counterpart section reads in part: "A co-representative who abdicates his responsibility to co-administer the estate by a blanket delegation breaches his duties to interested persons."[592]

DUTIES OF THE PERSONAL REPRESENTATIVE

General Duties

It was noted previously that early in the development of the law of estates, it became the practice to designate one or more persons as personal representative to settle the conflicting claims that arise upon the death of an owner of property.[593] The general duties of this personal representative — whether an

583. *See* FPC §733.501(3) (1974).

584. *See In re* Estate of Sale, 227 So. 2d 199 (Fla. 1969).

585. *Compare* FPC §733.614 (1974), *with* UPC §3-716.

586. *Compare* FPC §733.615 (1974), *with* UPC §3-717.

587. *Compare* FPC §733.616 (1974), *with* UPC §3-718.

588. *Compare* FPC §733.615 (1974), *with* UPC §3-717.

589. See text accompanying notes 712-723 *infra*.

590. Such deliberate omissions are always subject to the interpretation that the draftsmen did not desire the result dictated by the omitted material — here the protection of the person dealing with a co-representative, even though the third party was actually unaware of the other representative or was advised by the co-representative that he had authority to act alone. *See* UPC §3-717.

591. FPC §733.615 (1974). For a discussion of the power of the personal representative to delegate authority to persons other than his co-representative, see text accompanying notes 675-682 *infra*.

592. UPC §3-717, Comment.

593. See note 352 and text accompanying notes 352-354 *supra*. At common law, and today in the absence of statutory change, a decedent's estate was not recognized as a legal entity

executor selected by the testator or an administrator chosen pursuant to statutory preference[594] — are to collect the assets,[595] including debts owed the decedent;[596] maintain and protect the estate from loss;[597] pay debts, funeral expenses and other claims against the estate;[598] and, finally, distribute the balance of the estate to the proper parties.[599] If the personal representative fails to discharge these duties properly, he is subject to being held personally liable to those damaged by his breach of duty, even though he has acted in good faith[600] or upon advice of counsel.[601]

The 1974 Code does not enumerate the duties of the personal representative, but, like the UPC,[602] states them in a more generalized fashion:

> A personal representative is a fiduciary who shall observe the standards of care applicable to trustees as described by Section 737.302, F.S. A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of his will and this code as expeditiously and efficiently as is consistent with the best interests of the estate. He shall use the authority conferred upon him by this code, the terms of the will, if any, and any order in proceedings to which he is party for the best interests of beneficiaries of the estate.[603]

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and therefore the office of the personal representative was accorded special importance. T. ATKINSON, *supra* note 353, at 576. Initially the personal representative was viewed as the absolute owner of the personal property, subject to an obligation to satisfy the next of kin or legatees; creditors of the decedent sought satisfaction from the next of kin or legatees. *See* Holmes, *Executors,* 9 HARV. L. REV. 42 (1895). This view gradually evolved to where the personal representative took the place of the next of kin and legatees and was therefore subject to the claims of creditors as well, and finally to the point where the representative was considered to hold the assets of the estate in a fiduciary capacity, similar to that of a trustee. *Id.* at 42-47. As in a trust, the personal property was divided into legal and equitable ownership interests, but in contrast to ownership of the trust corpus, the equitable owners of the decedent's property included the creditors of the decedent as well as the next of kin or legatees. Thus the personal representative was considered to be appointed for the benefit and protection of both. *E.g., P*yle v. Pyle, 53 So. 2d 312 (Fla. 1951); May v. May, 7 Fla. 207 (1857).

594. See text accompanying notes 483-500 *supra,* for preferences in appointment of the office of personal representative. Aside from the distinction that the executor distributes the estate to the beneficiaries named in the will and an administrator distributes it to the heirs, there is little difference in the duties of the two. T. ATKINSON, *supra* note 353, at 577; *see* May v. May, 7 Fla. 207 (1857). Because the executor is more likely to have had the personal confidence of the decedent, he was allowed somewhat broader powers. T. ATKINSON, *supra* note 353, at 577.

595. *E.g.,* Williams v. Howard Cole & Co., 159 Fla. 151, 31 So. 2d 914 (1947); Glidden v. Gutelius, 96 Fla. 834, 119 So. 140 (1928). Currently, this duty is statutorily imposed by FLA. STAT. §733.01 (1973).

596. *E.g.,* Mills v. Hamilton, 121 Fla. 435, 163 So. 857 (1935); Sherrell v. Shepard, 19 Fla. 300 (1882).

597. *In re* Francis' Estate, 153 Fla. 360, 14 So. 2d 803 (1943).

598. State Bank & Trust Co. v. Macy, 101 Fla. 140, 133 So. 876 (1931).

599. *E.g.,* Williams v .Howard Cole & Co., 159 Fla. 151, 31 So. 2d 914 (1947); Glidden v. Gutelius, 96 Fla. 834, 119 So. 140 (1928).

600. *See, e.g.,* Furniss v. Zimmerman, 90 Misc. 138, 154 N.Y.S. 272 (Sup. Ct. 1915); Lesesne v. Cheves, 105 S.C. 432, 90 S.E. 37 (1916).

601. Laramore v. Laramore, 64 So. 2d 662 (Fla. 1953).

602. *Compare* FPC §733.602 (1974), *with* UPC §3-703.

603. FPC §733.602(1) (1974).

The second and third sentences are simply codifications of existing case law,[604] but the first sentence substantially changes existing law and creates an obvious conflict with other statutory provisions. Section 518.11 of Florida Statutes places a duty on both personal representatives and trustees to exercise the judgment and care that "men of prudence . . . exercise in the management of their own affairs."[605] The 1974 Code, however, requires the trustee to observe the standards of "a prudent man dealing with the property of another."[606] This latter language is taken directly from the UPC[607] and is designed to make clear "the idea that a trustee must comply with an external, rather than with a personal, standard of care."[608] Thus section 733.602 places this same external standard of care upon the personal representative, creating an obvious conflict with current section 518.11, which was not amended by the 1974 Code.[609]

In addition to raising the standard of care by which the future acts of all personal representatives are to be measured, the 1974 Code takes cognizance of the increased use of corporate fiduciaries and their well advertised special qualifications. The same section provides: "[I]f the trustee has special skills or is named trustee on the basis of representations of special skills or expertise, he is under a duty to use those skills."[610] This seems a highly desirable addition to the law of fiduciary administration,[611] but it presents still another conflict with

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604. *E.g.*, Sewell Properties, Inc. v. Sewell, 45 So. 2d 198 (Fla. 1950); Fowler v. Hartridge, 156 Fla. 585, 24 So. 2d 306 (1945); Bedenbaugh v. Lawrence, 141 Fla. 341, 193 So. 74 (1940).

In the third sentence, the reference to "beneficiaries," (which are defined as "heirs at law and devisees" in FPC §731.201(1) (1974)), and omission of any reference to "creditors" could be viewed as indicating a departure from the existing rule that a personal representative has fiduciary obligations to creditors as well as beneficiaries (see note 593 *supra*). The view gains credence when it is noted that UPC §3-703(a) uses the term "successors" rather than "beneficiaries" and UPC §1-201(42) defines "successors" as "those persons, *other than creditors,* who are entitled to property of a decedent . . . ." (emphasis added). It is clear, however, that a creditor whose legitimate claim was not satisfied because of the improper acts of the personal representative would still have a cause of action against the personal representative. FPC §731.201(17) defines "interested persons" to include creditors and FPC §733.609 provides, *inter alia,* that "if the exercise of power concerning the estate is improper, the personal representative is liable to interested persons for damage or loss . . . ."

605. FLA. STAT. §518.11 (1973).

606. FPC §737.302 (1974).

607. UPC §7-302. This standard of care is not original with the UPC, but has been adopted in numerous cases involving the care required of a trustee making investments of trust property. *See, e.g.*, Miller v. Pender, 93 N.H. 1, 34 A.2d 663 (1943); Marshall v. Frazier, 159 Ore. 491, 80 P.2d 42 (1938); *In re* Hart's Estate, 203 Pa. 480, 53 A. 364 (1902). *See generally* G. BOGERT, THE LAW OF TRUST AND TRUSTEES §§541, 612, 706 (2d ed. 1960); A. SCOTT, *supra* note 425, §§227-31.

608. UPC §7-302, Comment. While beyond the scope of this article, it may be noted that the 1974 Code imposes this same standard of care upon guardians of the property of minors and incompetents. FPC §744.314(2) (1974).

609. Fla. Laws 1974, ch. 106.

610. FPC §737.302 (1974).

611. This follows the view of RESTATEMENT (SECOND) OF TRUSTS §174 (1959). The courts apparently have been reluctant to follow this view if the trustee is an individual, despite its general acceptance in the law of agency. A. SCOTT, *supra* note 425, at 1411. When corporate trustees are involved, however, the courts have often recognized that the institutions have, or hold themselves out as having, special skills. *E.g., In re* Sullenger's Estate, 2 Ariz. App. 326,

section 518.11 of the present law. To resolve these conflicts, section 518.11 should be amended to conform to the standard of care stated in section 737.302 of the 1974 Code.

The 1974 Code makes one further important change in the general duties of the personal representative. After codifying existing case law[612] that imposes a duty to proceed expeditiously with the settlement and distribution of the estate[613] and to "take all steps reasonably necessary for the management, protection and preservation of the estate until distribution,"[614] the Code adds: ". . . and, except as otherwise specified by this law or order by the court, [to] do so without adjudication, order, or direction of the court."[615] This is a heartening step toward reducing the paternalism that has permeated the probate laws of this country[616] and complements the increased powers given the personal representative to act without court direction.[617]

While his general duties can be broadly stated, the specific duties of the personal representative are legion and can vary considerably from estate to estate. Only those that are affected by the passage of the 1974 Code are discussed in this article. The duty to advise the beneficiaries of the opening of administration has already been discussed.[618] Duties of management can best be treated in connection with the powers given the personal representative.[619] His duties in regard to the claims of creditors[620] and accountings to beneficiaries[621] are also discussed in later sections.

Inventory and Appraisal

Because the inventory is the basis of the personal representative's accountability for the assets of the estate,[622] the law has refused to allow a testator to dispense with its preparation and filing.[623] Despite the importance of the inventory, the need for accuracy, and the time and effort necessarily involved in its preparation, the 1974 Code reduces the time allowed the personal representative to file the inventory from 60 to 30 days after his appointment.[624]

408 P.2d 846 (1966); *In re* Estate of Busby, 288 Ill. App. 500, 6 N.E.2d 451 (1937); Liberty Title & Trust Co. v. Plews, 142 N.J. Eq. 493, 60 A.2d 630 (Ch. 1948); Villard v. Villard, 219 N.Y. 482, 114 N.E. 789 (1916).

612. See cases cited notes 595-597 *supra.*

613. FPC §733.603 (1974).

614. FPC §733.607 (1974).

615. FPC §733.603 (1974).

616. See text accompanying notes 12-34 *supra* (part I).

617. See text accompanying notes 656-711 *infra* for a discussion of the powers of the personal representative.

618. See text accompanying notes 142-152 *supra.*

619. See text accompanying notes 656-711 *infra.*

620. See text accompanying notes 745-793 *infra.*

621. See text accompanying notes 794-846 *infra.*

622. T. ATKINSON, *supra* note 352, at 630.

623. Parker v. Robertson, 205 Ala. 434, 88 So. 418 (1921); Potter v. McAlpine, 3 Dem. 108 (Sur. Ct. N.Y. 1885); T. ATKINSON, *supra* note 352, at 630. The UPC allows the personal representative to send a copy of the inventory to interested persons who request it, in lieu of filing the original in court. UPC §3-706(2).

624. *Compare* FPC §733.604 (1974), *with* FLA. STAT. §733.03 (1973). The UPC would allow the personal representative 3 months. UPC §7-706.

This may be justified, however, by the addition of a section permitting a supplemental inventory to revise the original if additional property becomes known to the personal representative, or if he learns that values stated in the inventory are erroneous.[625] In addition to filing the originals with the court, the personal representative is also required to send copies of the inventory and any supplemental inventory to interested persons who request them.[626] The contents of the inventory will generally be the same as under existing law.[627]

The appraisal of the estate, and particularly the traditional requirement of court-appointed appraisers, has long been a favorite topic for critics of probate.[628] For example, the Cleveland study noted:

> Dissatisfaction with the appraisal system was expressed concerning the procedure for appointing the appraiser; his qualifications; the belief that appraising the estate was unnecessary or, if it had to be done, that not more than one appraiser should have been used; and the belief that the estate was overcharged for the work performed.[629]

The authors concluded:

> It would appear that the complaints levied against appraisers were not directly related to the expense involved. . . . What was being questioned was the whole appraisal system – its current structure and function.[630]

Most, if not all, of these objections appear to be met by the 1974 legislature's adoption of a modified UPC proposal that provides:

> The personal representative may employ a qualified and disinterested appraiser to assist him in ascertaining the fair market value at the date of the decedent's death or any other date which may be appropriate of any asset the value of which may be subject to reasonable doubt. Different persons may be employed to appraise different kinds of assets included in the estate.[631]

This is a marked change from existing law, for appraisers will not be appointed by the court, need not be employed if they are unneeded, and may be employed by the personal representative only if they are "qualified" to appraise particular items.[632]

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625. FPC §733.606 (1974).

626. *Compare* FPC §§733.604(2), .606 (1974), *with* FLA. STAT. §733.03 (1973). This requirement could add substantially to the cost of administration if creditors and other "interested persons" (see FPC §731.201(17) (1974)) should request copies.

627. *Compare* FPC §733.604 (1974), *with* FLA. STAT. §733.03 (1973). The current conflict between PGR 5.250 and §733.03, concerning the inclusion of homestead in the inventory, will not arise because FPC §733.604 contains no exception similar to that in §733.03.

628. See text accompanying notes 13-17 *supra* (part I).

629. M. SUSSMAN, J. CATES & D. SMITH, THE FAMILY AND INHERITANCE 258 (1970).

630. *Id.* at 242.

631. FPC §733.605 (1974). *See* UPC §3-707.

632. *Compare* FPC §733.605 (1974), *with* FLA. STAT. §733.04 (1973).

Duty To Take Possession of Assets

Currently, there is an unqualified requirement that the personal representative "shall take possession" of the decedent's personal property and "real estate (except homestead)."[633] This requirement is considerably relaxed by the 1974 Code's adoption of a section from the UPC[634] providing that any real or tangible personal property "may be left with or surrendered to the person presumptively entitled to it unless possession of the property by the personal representative will be necessary for purposes of administration."[635] Foreseeing that such persons may disagree with the personal representative as to when possession is necessary for administration, the section continues:

> The request by a personal representative for delivery of any property possessed by a beneficiary is conclusive evidence that the possession of the property by the personal representative is necessary for the purposes of administration.[636]

While eminently desirable in most situations, these provisions could cause difficulty in the case of homestead property, because the new statute makes no exception for homestead.[637] It is unlikely that the personal representative would request possession of homestead property unless he is ill-disposed toward the surviving spouse or doubtful concerning whether the property actually qualifies as homestead. Clearly the personal representative should not be allowed to oust the surviving spouse of possession out of personal feelings. Where the issue is whether the property is homestead, it would seem preferable to allow the spouse to retain possession until the matter is resolved. Although it might be possible for the spouse to defeat the request upon constitutional grounds,[638] to avoid litigation and possibly undesirable results, the new statute should be amended to except homestead property from its provisions.

A similar amendment should be made to the following section of the Code[639] in order to rectify the same oversight made in its adaptation from existing law.[640] Despite its separation from the right of possession statute, discussed in the preceding paragraph, this section continues to provide simply that "all real and personal property of the decedent . . . shall be assets in the hands of the personal representative" for the purposes of administration.[641]

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633. FLA. STAT. §733.01(1) (1973).

634. UPC §3-709.

635. FPC §733.607 (1974).

636. *Id.*

637. No exception was needed in the UPC section because homestead was to be a dollar amount rather than specific real property. See text accompanying note 226 *supra* (part I).

638. See text accompanying notes 228-230 *supra* (part I).

639. FPC §733.608 (1974).

640. FLA. STAT. §733.01(1) (1973). The phrase "all such property" in the last sentence referred to personal property and "real estate (except homestead)" mentioned in the preceding sentences; the phrase was changed to: "All real and personal property" in the new statute.

641. FPC §733.608 (1974); *see* FLA. STAT. §733.01(1) (1973).

The personal representative's other duties involving the collection of assets, such as the investigation of joint bank accounts,[642] the consideration of possible liability of Totten trust accounts for debts of the decedent,[643] the collection of life insurance proceeds[644] and other death benefits,[645] and the prosecution of suits for wrongful death[646] are beyond the scope of this article because they are not affected by the enactment of the 1974 Code. One Code provision that does deserve mention, however, concerns the collection of a debt owed the decedent by the person appointed personal representative.

Florida law currently provides:

> The appointment of a debtor or of a creditor as personal representative shall not, either in law or in equity, be construed to operate as a release or extinguishment of the debt due to or by the decedent. This section shall not be construed to prevent a testator from releasing a debtor by last will and testament.[647]

Similar statutes are quite common in this country[648] and were designed to negate the possible applicability of the rule of the English common law courts that the appointment of a person named as executor, who is indebted to the testator discharges the debt.[649] Because it was based entirely upon the testator's presumed intent, this rule had no application to the appointment of a creditor of the testator as executor, or to the appointment of a debtor as administrator of an intestate estate or as an administrator c.t.a. of a testate estate.[650] Therefore, the 1974 Code quite properly changes the provision to read:

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642. *See* Note, *Survivorship Rights in Joint Accounts,* 24 U. FLA. L. REV. 476 (1972). The failure of the Commission to consider the adoption of article VI of the UPC dealing with multiple-party accounts seems regrettable, but perhaps it was beyond the scope of its charge because Fla. H.R. 997 did not include this article of the UPC. See Fla. Laws 1973, ch. 307.

643. *See In re* Reich's Estate, 146 Misc. 616, 262 N.Y.S. 623 (Sur. Ct. 1933). The issue has not arisen in Florida, but it is covered by article VI of the UPC. See note 642 *supra.*

644. *See* FLA. STAT. §222.13 (1973).

645. FPC §733.808 (1974) is merely a reenactment of FLA. STAT. §736.172 (1973) with editorial changes.

646. *See* FLA. STAT. §§768.20, .22 (1973).

647. FLA. STAT. §732.51 (1973).

648. T. ATKINSON, *supra* note 353, at 644. Other instances of sections designed to negate common law rules are §§733.307, .309 of the 1974 Code. At common law, the executor of a deceased executor continued to administer the estate of the first testator, T. ATKINSON, *supra* note 353, at 611, and a creditor of the decedent could recover on the theory of executor *de son tort* from anyone who intermeddled with the personal property of the decedent before or after the appointment of a personal representative. *Id.* at 570-571. The UPC omits any reference to these doctrines, but the omission may create problems in states such as Florida where similar provisions appear in existing law (see FLA. STAT. §§732.52, .53 (1973)), because such omission could give rise to contentions that these common law rules have been reinstated.

649. *See* T. ATKINSON, *supra* note 353, at 644. The common law courts seem to have reasoned somewhat as follows: a person cannot sue himself, so by appointing the debtor as his executor, the testator destroyed the ability to collect the debt; by this voluntary destruction of the remedy the testator must have intended the debt to be discharged. *See* P. WILLIAMS, EXECUTORS AND ADMINISTRATORS 1123-27 (4th Am. ed. 1855).

650. *See* P. WILLIAMS, *supra* note 649, at 1123-27.

> The appointment of a debtor as executor shall not operate as a release or extinguishment of the debt due to the decedent. This section shall not prevent a testator from releasing a debtor by will.[651]

There remains, however, the question of how the debt can be collected if the personal representative, whether executor or administrator, refuses to pay voluntarily. If the issue arises prior to the final accounting of the personal representative, an appropriate procedure for a creditor or beneficiary to pursue would be to petition the court to appoint an administrator *ad litem* to sue on behalf of the estate.[652] In the alternative, or in the case of a co-representative, a petition to institute removal proceedings could be used.[653] Either procedure would entail undesirable expense and delay and neither would seem appropriate where the personal representative's failure to pay does not become known until the time of his final accounting. A simpler method would be to utilize a fiction of payment[654] and hold him accountable in his fiduciary capacity. A disadvantage of the fiction becomes apparent when the personal representative is insolvent throughout the administration and factually cannot pay the debt; in such cases his bondsman may be held liable. If, however, the Florida courts would agree that "[i]t cannot be held to be a breach of trust for the executor not to do what is beyond his power and control to perform . . . [and that] the extension of the legal fiction of payment . . . would often work great injustice to the surety,"[655] the adoption of this simple method would be desirable.

Powers of the Personal Representative

Having imposed a duty upon the personal representative to proceed with administration without "adjudication, order or direction of the court,"[656] it was necessary for the 1974 Code to increase his powers materially. This has

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651. FPC §733.306. The continuation of the phrase "or creditor" in the title seems clearly inadvertent and a technical error that could be corrected by the Statutory Revision Department. See FLA. STAT. §16.44(6)(i) (1973).

652. *See* FPC §733.308 (1974).

653. *See* FPC §§733.504-507 (1974).

654. The fiction of payment was applied in somewhat different circumstances in Dacus v. Blackwell, 90 So. 2d 324 (Fla. 1956). It was first developed by the English courts of chancery as a means of holding the executor-debtor accountable for his debt even though he could not sue himself. Having rejected the common law courts' conclusion that the testator intended to discharge the debt, see note 649 *supra*, the chancery courts reasoned as follows: although unable to sue himself, he ought to pay the debt; because of the equitable maxim that equity regards as done that which ought to be done, equity regards the personal repersentative as having voluntarily paid the debt; therefore, he is accountable in his fiduciary capacity for the amount of the debt just as he is for any other money he has collected as personal representative. The fiction has been so frequently applied by the courts of this country that it is frequently referred to as the American rule. *See In re* Jones' Estate, 115 Cal. App. 664, 667, 2 P.2d 483, 484 (Dist. Ct. App. 1931), where it is noted that this rule places the debtor-executor "in a position almost as excessively burdensome as formerly it had been advantageous."

655. Lyon v. Osgood, 58 Vt. 707, 710, 7 A. 5, 7-8 (1886). *Contra, In re* Jones' Estate, 115 Cal. App. 664, 2 P.2d 483 (Dist. Ct. App. 1931).

656. FPC §733.603 (1974). See text accompanying notes 614-617 *supra*.

been accomplished by section 733.612,[657] which gives powers to the personal representative that substantially parallel those of the trustee.[658] There are some important variations, however, both from the recommendations of the UPC and the powers given the trustee by the 1974 Code.

The most obvious, and perhaps most important, difference is that the 1974 Code does not allow a personal representative the freedom to deal with real property without court intervention. Indeed, several UPC provisions were revised to exclude real property from the scope of their operations;[659] in their place, a separate section was inserted, entitled "Personal representative's right to sell real property."[660] Subsection (1) of this statute is simply an edited version of existing law concerning sales where no power is conferred by will.[661] Similarly, subsection (2) was apparently intended to continue the present law that allows sales pursuant to a testamentary power to be accomplished without court order.[662] The new statute,[663] however, does not clearly address the title difficulties engendered by *In re Estate of Smith*,[664] which limited such sales to those actually necessary for administration.[665] Any contribution to a contention

657. FPC §733.612 (1974). The section enumerates in 27 subsections the specific actions that will be considered proper if performed reasonably for the benefit of interested persons, unless "otherwise provided by the will or by order of court and subject to the priorities stated in section 733.707." *Id.* The referenced section seems erroneous, for it refers to the order of payment of expenses and claims. The similar UPC provision refers to the order of abatement section, §733.805 of the 1974 Code. The priorities of abatement make sense in the context of powers given the personal representative, whereas the priorities of the claims of creditors seem to be irrelevant.

658. *Compare* FPC §733.612 (1974), *with* FPC §737.402 (1974). The language of the two sections differs somewhat; the former is derived from UPC §3-715, while §737.402 is taken from §3 of the Uniform Trustees Powers Act.

659. *Compare* UPC §§3-715(6), (9), [*and*] (23), *with* FPC §§733.612(5) (1974) ("excluding land" added), (7) (option to "purchase" omitted), (20) ("real or" deleted from "real or personal property").

660. FPC §733.613 (1974).

661. *Compare* FPC §733.613(1) (1974), *with* FLA. STAT. §733.23 (1973). Both statutes provide that a sale of realty by a personal representative of an intestate decedent, or of a testator who did not grant a sufficient power of sale, does not pass title until approved by the court.

662. *Compare* FPC §733.613(2) (1974), *with* FLA. STAT. §§733.22, .225 (1973).

663. The new provision reads: "(2) When a decedent's will confers specific power to sell or mortgage real property or a general power to sell any asset of the estate, the personal representative may sell, mortgage or lease without authorization or confirmation of court, any real property of the estate or any interest therein for cash, credit or for part cash and part credit, and with or without security for unpaid balances." FPC §733.613(2) (1974).

664. 200 So. 2d 547 (2d D.C.A. Fla. 1967).

665. The court invalidated a sale by the personal representative pursuant to a seemingly general power of sale given in the will, stating: "Where a power of sale is conferred by the Will and it is *necessary* for purpose of administration that assets of the estate be liquidated, the Executor may properly exercise his power to sell without resort to the Probate Court. But where it is *not necessary* to make such liquidation in order to administer the estate, even under a general power of sale, the Probate Court should sanction the sale." (emphasis in original). *Id.* at 554.

After this decision, title examiners and insurers demanded a court determination of the "necessity" of sales pursuant to a testamentary power. After several attempts to alleviate this problem, the legislature enacted Fla. Laws 1973, ch. 9, *codified as* FLA. STAT. §733.225 (1973):

that *Smith* continues viable seems most unfortunate and therefore the new statute should be amended to include a statement that such a sale of real property need not be justified by any necessity.[666]

When transactions in personal property are considered, it would seem that the broad powers given the personal representative in this area would eliminate any questions concerning necessity. It is important to keep in mind, however, that a subsequent section of the 1974 Code[667] adopts the language of the UPC that establishes a "preference for distribution in kind."[668] Thus, a personal representative is directed "to make distribution in kind whenever feasible and to convert assets to cash only where there is a special reason for doing so,"[669] or where "a contrary intention is indicated by the will."[670] Therefore, despite the broad grant of statutory powers, the draftsman should realize the importance of a well-drafted and comprehensive will clause concerning the power to sell or otherwise dispose of personal property, both to offset the statutory preference for distribution in kind and to avoid litigation similar to that in *Smith*.[671]

Because section 733.612 adopted the great majority of the powers recommended by UPC section 3-715, a convincing argument can be made that any omitted powers were specifically rejected by the legislature and, therefore, that the personal representative does not have such powers. One such omission is the power to satisfy written charitable pledges of the decedent if, in the judgment of the personal representative, the decedent would have wanted the pledges completed.[672] The power to dedicate land to public use[673] was also

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"(1) No court order is required to authorize or confirm a sale made pursuant to a general power of sale contained in a will, and such a sale need not be justified by any necessity. (2) Conveyances or transfers of property heretofore made pursuant to a general power of sale contained in a will may not be invalidated as not being justified by necessity." Thereafter, at least some title examiners accepted titles involving sales under testamentary powers without a court determination. (See THE FUND CONCEPT, Sept. 1973, at 47.)

666. The position of the authors concerning amendment of §733.613(2) may be summarized as follows: Section 733.613(2) refers to sales made pursuant to a general power. *Smith* limits sales under a general power to those that are "necessary." The key clause in §733.225, which nullifies *Smith*, is "and such sale need not be justified by any necessity." Without a similar provision in §733.613(2), a court antagonistic to sales without court approval could apply the *Smith* reasoning to the new statute. (The *Smith* court was clearly antagonistic to such sales and there are undoubtedly other judges who feel the same way.) Legislative support for this argument can be found in §733.810, which shows a marked preference for distribution in kind and thus an implicit antagonism to unnecessary sales. The mere threat of *Smith's* revival could cloud titles again. Therefore, a sentence should be added to §733.613(2) to the effect that such a sale need not be justified by any necessity.

667. FPC §733.810 (1974). For further discussion of this section and criticism that it seems inordinately preoccupied with distribution in kind, see text accompanying notes 823-829 *infra*.

668. UPC §3-906, Comment.

669. *Id.*

670. FPC §733.810 (1974); UPC §3-906.

671. See text accompanying notes 663-666 *supra*.

672. UPC §3-715(4).

673. UPC §3-715(8).

omitted. Both powers could be useful in post-mortem estate planning,[674] but they involve giving away property that would otherwise be received by the beneficiaries. It seems unlikely, therefore, that the personal representative would exercise such powers, even if given, without the full concurrence of the beneficiaries.

An omission of greater significance appears in the section specifically authorizing the personal representative to employ persons to assist him.[675] The 1974 Code deletes the following language from the similar UPC provision:

> [Personal representatives may properly] act without independent investigation upon their recommendations; and instead of acting personally, employ one or more agents to perform any act of administration, whether or not discretionary.[676]

The omitted language would eliminate the need for drawing distinctions between "ministerial" powers that can be delegated and "discretionary" ones that cannot,[677] and would even appear to reject the more functional, though vague, test that a fiduciary may delegate "acts which he cannot reasonably be required personally to perform."[678] This language goes far beyond existing law,[679] and because the problem of proper or improper delegation is a sensitive one in fiduciary law, involving a multitude of factual variations and policy considerations,[680] the decision to omit the UPC language could be accepted as a proper value judgment. This explanation is negated, however, by the fact that the same language is included in the powers given trustees by the 1974 Code.[681] The law has not previously distinguished between personal representatives and trustees in cases involving proper delegation,[682] nor does there seem to be any proper basis for such a distinction. Therefore, the two sections should be harmonized, preferably by eliminating the same language from the trustees' powers.

Another discrepancy between the powers of a personal representative and those of a trustee occurs because section 733.612 omits two provisions of the

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674. The transfers in either instance would qualify for the charitable deduction provided by INT. REV. CODE OF 1954, §2055. If made to a charitable remainder trust, they would reduce the federal estate tax and thereby increase the aftertax property available to earn income for the income beneficiary. Especially in the case of older couples, such provisions are often used in planning the estate; in a post-mortem situation, they would provide the same benefits.

675. FPC §733.612(19) (1974).

676. UPC §3-715(21).

677. Currently, such distinctions probably are required under the rule established by Thomas v. Carlton, 106 Fla. 648, 143 So. 780 (1932).

678. 2 A. SCOTT, *supra* note 425, §171, at 1388. *See also* RESTATEMENT (SECOND) OF TRUSTS §171.

679. *See* Laramore v. Laramore, 64 So. 2d 662 (Fla. 1953); Thomas v. Carlton, 106 Fla. 648, 143 So. 780 (1932); *In re* Estate of Rosenthal, 189 So. 2d 507 (3d D.C.A. Fla., 1966), *cert. denied*, 196 So. 2d 923 (1967).

680. For detailed discussions of these factors, see G. BOGERT, *supra* note 607, §§555-57; 2 A. SCOTT, *supra* note 425, §§171-171.4.

681. FPC §737.402(2)(y) (1974).

682. See cases cited note 679 *supra*.

UPC that would allow the personal representative to incorporate a decedent's business and, when so incorporated, to continue the business.[683] While the 1974 Code does allow the personal representative to continue the business for four months without court order,[684] only the trustee is permitted to incorporate and continue the business without court approval.[685] Because a trustee would rarely receive an unincorporated business as a trust asset except from a decedent's estate, this power is virtually meaningless unless the personal representative is allowed to continue the business throughout the administration. If this is to be allowed, then it would seem advantageous to allow incorporation as promptly as possible in order to limit the liability of beneficiaries of the estate, as well as that of the personal representative, for acts involved in continuation of the business. The proposed UPC provisions are not entirely satisfactory, however, because they can be construed to give the personal representative the sole discretion to incorporate.[686] Only after incorporation are the probable distributees of the business to be consulted.[687] It would seem desirable, therefore, to add to the 1974 Code provisions reading substantially as follows:

(22) ....
(c) Throughout the period of administration if the business is incorporated by the personal representative.
(23) Incorporate any business or venture in which the decedent was engaged at the time of his death if none of the probable distributees of the business who are competent adults objects to its incorporation and retention in the estate.

One other power given the personal representative merits mention because of recent developments in the transferability of stock certificates and other

683. *Compare* UPC §§3-715(24), (25), *with* FPC §733.612(22) (1974) [*and*] FLA. STAT. §733.08 (1973). Had the UPC been followed the statute would have read:

"(22) Continue any unincorporated business or venture in which the decedent was engaged at the time of his death;

"(a) In the same business form for a period of not more than four months from the date of his appointment if continuation is a reasonable means of preserving the value of the business including good will;

"(b) In the same business form for any additional period of time that may be approved by order of court; or

"(c) Throughout the period of administration if the business is incorporated by the personal representative and if none of the probable distributees of the business who are competent adults object to its incorporation and retention in the estate;

"(23) Incorporate any business or venture in which the decedent was engaged at the time of his death . . . ." The 1974 Code omits §§22(c), 23.

684. FPC §733.612(22)(a) (1974).

685. *Compare* FPC §737.402(2)(d) (1974), *with* FPC §733.612(22)(b) (1974). Neither the UPC nor the 1974 Code contains any specific provision regarding partnership property similar to FLA. STAT. §733.37 (1973), although both require the inclusion of such property in the inventory. The reasons for this omission are stated in UPC §3-709, Comment.

686. See note 683 *supra*.

687. It is recognized that the UPC provisions probably were intended to be read together, but there seems no reason to resort to litigation to decide the matter.

securities registered in the name of a fiduciary. The 1974 Code continues existing law that allows personal representatives[688] and trustees[689] to hold estate securities in their individual names or in the name of a nominee. In the past this power was needed in order to allow a prompt sale of the security.[690] Although the rules of both the New York and American Stock Exchanges were amended in 1971 to accept securities registered in the name of a fiduciary as "good delivery,"[691] it was not until July 1, 1974, that a similar rule was adopted for "over-the-counter" transactions.[692] These changes apply only to "domestic individual" fiduciaries and do not change the need for nominee registration by corporate fiduciaries.[693] It is when individual fiduciaries are involved, however, that the relaxation of the "earmarking" rule[694] is most likely to be detrimental to the estate; so detrimental that New York law for many years declared nominee registration a misdemeanor.[695] Even today, New York allows individual fiduciaries to use only bank or trust company nominees, with the added direction that "[s]uch bank shall not redeliver such securities to the individual fiduciary . . . without first registering the securities in the name of the individual fiduciary, as such."[696] While no reported case has been found in Florida indicating abuse of nominee registration by individual fiduciaries, the potential for such abuse does exist. Because nominee registration is no longer needed to allow prompt sale of the securities,[697] the 1974 Code should be amended to allow such registration only in the case of corporate fiduciaries.

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688. *Compare* FPC §733.612(12) (1974), *with* FLA. STAT. §733.361 (1973).

689. *Compare* FPC *737.402(2)(g) (1974), *with* FLA. STAT. §691.03(13) (1973).

690. *See* Fleming, *Simplification of Stock Exchange "Good Delivery" Rules on Regular Transfers,* 6 REAL PROP. PROB. & TR. J. 137, 138 (1971). The requirement originally grew out of "an unfortunate statement of Chief Justice Taney in Lowery v. Commercial Bank . . . that a corporation is a trustee for its shareholders and, wills [are] public records, [requiring] notice of them in corporate stock transactions . . . ." *Id.* at 137. Thus, "the rule developed that corporations were liable for participation in breaches of trust if they registered transfers of their stock without investigating as to the extent of the authority of the fiduciary, if such an investigation would have disclosed a breach of trust." *Id.* Although all fifty states enacted legislation to alter this rule except where the security was listed in the name of another, such as the decedent, a broker, or a transfer agent, they "failed to differentiate between securities registered in the name of the fiduciary which may be transferred without documentation and securities registered in the name of another which require papers to be attached. . . . As a result [of this confusion], rules were adopted by the several stock exchanges and over-the-counter dealers . . . to the effect that a fiduciary security, even though it had all necessary papers attached, would not be regarded as 'good delivery.'" *Id.* at 138.

691. Special Committee on Simplification of Security Transfers to and by Fiduciaries, *Developments in Simplification of Fiduciary Securities,* 9 REAL PROP., PROB. & TR. J. 611 (1974). See note 690 *supra.*

692. *Id.* at 612-13.

693. *Id.* at 614-15.

694. "Earmarking" refers to the trustee's duty to attach the trust label to all trust property. For a discussion of the development and reasons for the rule, see G. BOGERT, *supra* note 607, §596.

695. *See* Matter of Simon, 61 Misc. 2d 550, 306 N.Y.S. 232 (Sur. Ct. 1969) for a description of the development of New York law.

696. N.Y. EST., POWERS & TRUSTS LAW §11-1.6 (McKinney 1969).

697. See text accompanying notes 690-693 *supra.*

Another recent development in the law relating to the transfer of securities may make the nominee provisions of the 1974 Code inadequate for both individual and corporate fiduciaries. The Uniform Commercial Code[698] codifies the "clearing corporation"[699] device originated by the New York Stock Exchange to cut down on paperwork and the risk of loss on delivery of securities.[700] The nominee registration provisions of the 1974 Code[701] are probably not broad enough to allow fiduciaries to surrender possession of securities to either a brokerage house[702] or directly to a clearing corporation or custodian bank. Therefore, consideration should be given to following the lead of several other states[703] and adding sections to the 1974 Code to permit personal representatives and trustees to utilize the "clearing corporation."

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698. UNIFORM COMMERCIAL CODE §8-320, *adopted as* FLA. STAT. §678.320 (1973). The Official Comment to the UCC states the purpose as follows: "Consistent with the underlying purposes and policies of this Act 'to permit the continued expansion of commercial practices through custom, usage and agreement of the parties' — subsection (2)(b) of Section 1-102 — this Section expressly authorizes a newly developing and commercially useful method of transferring or pledging securities on the organized securities markets, particularly among brokers and banks but not necessarily so limited."

699. FLA. STAT. §§678.102(3), (4) (1973) reads: "(3) A 'clearing corporation' is a corporation all of the capital stock of which is held by or for a national securities exchange or association registered under a statute of the United States such as the Securities Exchange Act of 1934. (4) A 'custodian bank' is any bank or trust company which is supervised and examined by state or federal authority having supervision over banks and which is acting as custodian for a clearing corporation."

700. See the introductory statement to N.J. Laws 1973, ch. 359, *quoted in* note 703 *infra*.

701. FPC §§733.612(12), 737.402(2)(q) (1974).

702. *See* Matter of Simons, 61 Misc. 2d 550, 306 N.Y.S. 232 (Sur. Ct. 1969).

703. The NEW YORK EST. POWERS & TRUSTS LAW reads:

"*§11-1.9 Power of fiduciary or custodian to deposit securities in a central depository.*

"(a) Notwithstanding any other provision of law, any fiduciary . . . holding securities in its fiduciary capacity, any bank, trust company or private banker holding securities as a custodian or managing agent, and any bank, trust company or private banker holding securities as custodian for a fiduciary pursuant to section 11-1.1(b)(9), is authorized to deposit or arrange for the deposit of such securities in a clearing corporation (as defined in article eight of the Uniform Commercial Code). When such securities are so deposited, certificates representing securities of the same class of the same issuer may be merged and held in bulk in the name of the nominee of such clearing corporation with any other such securities deposited in such clearing corporation by any person regardless of the ownership of such securities, and certificates of small denomination may be merged into one or more certificates of larger denomination. The records of such fiduciary and the records of such bank, trust company or private banker acting as custodian, as managing agent or as custodian for a fiduciary shall at all times show the name of the party for whose account the securities are so deposited. Ownership of, and other interests in, such securities may be transferred by bookkeeping entry on the books of such clearing corporation without physical delivery of certificates representing such securities. A bank, trust company or private banker so depositing securities pursuant to this section shall be subject to such rules and regulations as, in the case of state chartered institutions, the state banking board and, in the case of national banking associations, the comptroller of the currency may from time to time issue. A bank, trust company or private banker acting as custodian for a fiduciary shall, on demand by the fiduciary, certify in writing to the fiduciary the securities so deposited by such bank, trust company or private banker in such clearing corporation for the account of such fiduciary. A fiduciary shall on demand by any party to a judicial proceeding for the settlement of such fiduciary's account or on demand by the attorney for such party, certify in writing to such

The remaining powers enumerated by section 733.612 are generally modifications of the UPC,[704] and, in several instances, are similar to existing law, except that court approval is not required.[705] Most require no comment, for

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party the securities deposited by such fiduciary in such clearing corporation for its account as such fiduciary.

(b) This section shall apply to any fiduciary holding securities in its fiduciary capacity, and to any bank, trust company or private banker holding securities as a custodian, managing agent or custodian for a fiduciary, acting on the effective date of this section or who thereafter may act regardless of the date of the agreement, instrument or court order by which it is appointed and regardless of whether or not such fiduciary, custodian, managing agent or custodian for a fiduciary owns capital stock of such clearing corporation."

Other states with similar statutes are: ARIZ. REV. STAT. ANN. §§6-189 *et seq.* (1974); CAL. FIN. CODE §1563 (West Supp. 1974); CONN. GEN. STAT. ANN. §§45-100f(16)(a)-(b) (Supp. 1975); GA. CODE ANN. §108-452 (Supp. 1974); ILL. ANN. STAT. ch. 26, §§304.11-.12 (Smith-Hurd Supp. 1974). *See also* ME. REV. STAT. ANN. tit. 9, §1096 (Supp. 1974); N.J. STAT. ANN. tit. 3A §§15-31, 32 (Supp. 1975); N.C. GEN. STAT. §53-159 (1975); ORE. REV. STAT. §709.170 (1973).

The introductory statement attached to N.J. LAWS 1973, ch. 359, explains the purposes of such statutes as follows:

"This bill would permit fiduciaries, including individuals and banks qualified to act as fiduciaries, to deposit securities held by them in a clearing corporation, as defined in companion bills to this bill, Senate Bills Nos. 2082 and 2083.

"Although the technical aspects of a clearing corporation's operations are complex, the essence of clearing corporation transfers is quite simple. Depositors maintain quantities of eligible securities on deposit with a clearing corporation. Their accounts are credited with the securities deposited and certificates representing these securities are then registered in the name of the clearing corporation's nominee. The clearing corporation does not acquire any beneficial interest in these shares.

"To make delivery, a selling depositor instructs the clearing corporation to debit its account in the amount of the securities sold and to credit the buying depositor's account at the clearing corporation in the same amount. Title to the securities is transferred by computerized bookkeeping entry while the certificates themselves remain immobilized. At the end of each day, the clearing corporation computes the amounts owed by or owing to each depositor for the day's transactions and receives and issues checks from and to such depositors in settlement of the transactions.

"Use of a clearing corporation depository eliminates a vast amount of physical handling and consequent opportunity for error, loss and theft. A brokerage firm executing a sale not handled by a clearing corporation must obtain a relevant certificate, ensure that it is signed, checked, stamped, counted and otherwise processed, and then make physical delivery. The buying brokerage firm, similarly, must receive the certificate, examine it, log it in, check it, stamp it and otherwise process it — a reciprocal sequence of time-consuming steps.

"Studies indicate that if this proposed legislation is enacted, a system of regional depositories, with banks and brokers throughout the county participating, is expected to reduce such stock certificate movements by about 75%.

"This bill has been patterned after a law presently in force in New York."

704. *E.g.*, FPC §§733.612(1), (6), (9), (13) (1974), which give the personal representative the power to retain assets owned by the decedent pending distribution, to make repairs or alterations in buildings, to abandon property that is of no value to the estate, and to insure the assets against loss and himself against third party liability.

705. *Compare, e.g.*, FPC §§733.612(2), (8), (14) (1974), *with* FLA. STAT. §§733.32, .38, .39 (1973). Although subsection (2) concerns performance of the decedent's contracts, the Comment to the UPC makes it clear that the provision "is not intended to affect the right to performance or to damages of any person who contracted with the decedent. To do so would constitute an unreasonable interference with private rights. The intention of the subsection is simply to give a personal representative who is obligated to carry out a decedent's contracts

they are generally self-explanatory. There are two additions, however, that merit brief mention. The first allows the personal representative to waive the statute of limitations concerning assessment and collection of federal taxes,[706] an action that is often necessary in settlement proceedings. The other permits partial distribution of any part of the estate that is not needed for claims, expenses, et cetera.[707] Its inclusion in the 1974 Code should reduce the need to utilize non-probate assets to provide sufficient income for the decedent's family during administration.

In addition to the specific powers granted by section 733.612, the 1974 Code contains several other provisions governing the powers of the personal representative. As noted earlier,[708] section 733.608 provides that all of the decedent's real and personal property within Florida are assets in the hands of the personal representative for purposes of administration. It is interesting to note, however, that although the section is entitled "General Power of The Personal Representative," it does not grant the type of general power envisioned by the UPC:

> Until termination of his appointment a personal representative has the same power over the title to property of the estate that an absolute owner would have, in trust however, for the benefit of the creditors and others interested in the estate. This power may be exercised without notice, hearing, or order of court.[709]

The reason for the omission seems clear; as noted earlier,[710] the draftsmen of the 1974 Code were unwilling to give the personal representative the power to deal with real property without court supervision, or to grant several of the other powers provided by the UPC. Nevertheless, the provision would be very beneficial in clarifying the personal representative's powers to engage in transactions that are not enumerated in section 733.612. Therefore, the section should be added to the 1974 Code, changing it, if necessary, to make it subject to the limitations of section 733.613.[711]

TRANSACTIONS WITH THIRD PARTIES

Regardless of how broad the statutory powers of a personal representative

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the same alternatives in regard to the contractual duties which the decedent had prior to his death." UPC §3-715, Comment.

706. FPC §733.612(25) (1974).

707. FPC §733.612(26) (1974). In this situation, under existing law the beneficiaries must file a petition with the court asking for a partial distribution. FLA. STAT. §734.03(1) (1973).

708. See text accompanying notes 640-641 *supra*.

709. UPC §3-711. Thus, the UPC intended that "[t]he personal representative be given the broadest possible 'power over title.' " UPC §3-711, Comment.

710. See text accompanying notes 659-666, 672-674 *supra*.

711. Without such a general provision, transactions not specifically enumerated in §733.612 would probably be forbidden under the rule *expressio unius est exclusio alterius*. On the other hand, if the provision were adopted, it is unlikely that it would require a specific clause applying the limitations of §733.613, for the same result should be reached by application of the principle *ejusdem generis*. Of course, a specific limitation would avoid the question entirely.

may be, a de facto limitation upon them is the willingness of third parties to accept a title from a personal representative or otherwise deal with him. To state the matter more concretely, unless third parties are adequately protected in their dealings with a personal representative, the administration of the estate may be seriously hampered. Similarly, if third parties are reluctant to deal with heirs or devisees after an estate has been distributed, a primary objective of administration is thwarted. This section discusses the extent to which the 1974 Code affords the protection needed to assure a willingness by third parties to deal freely and without hesitation with the personal representative and the beneficiaries of the estate.

Protection of Third Parties Acting in Good Faith Transactions with the Personal Representative

Traditionally, third parties dealing with a fiduciary have had the burden of ascertaining whether the fiduciary has the power to make the deal.[712] If no power exists, the fiduciary need not perform, and if he has performed, the agreement can be set aside. Existing law, while generally adhering to the traditional view,[713] protects good faith purchasers for value from a personal representative when the probate of the will is revoked,[714] or when a later will is found after the termination of administration and the discharge of the personal representative.[715]

The 1974 Code not only retains these protections,[716] but also includes a section that nullifies the traditional view by providing that "[a] person who in good faith either assists a personal representative or deals with him for value is protected as if the personal representative properly exercised his power."[717] Moreover, the section provides that "[t]he fact that a person knowingly deals with the personal representative does not alone require the person to inquire into the existence of a power or the propriety of its exercise."[718] These provisions are taken from the UPC and are designed to protect the third party

712. 4 A. SCOTT, *supra* note 425, §497. For an application of the rule to a trustee of a passive trust, see Baum v. Corn, 167 So. 2d 740 (2d D.C.A. Fla. 1964).

713. *See Id.*

714. FLA. STAT. §732.30 (1973).

715. FLA. STAT. §732.33 (1973).

716. FPC §§733.109(2), .902 (1974). For a discussion of the desirability of §733.902 in other respects, see text accompanying notes 566-570 *supra*.

717. FPC §733.611 (1974). A similar provision regarding third persons dealing with trustees is found in §737.405. The nonsensical second sentence of the latter statute is due to a transposition of the phrase "a third person" that will undoubtedly be corrected. Section 7 of the Uniform Trustees Powers Act, from which the section is taken, reads: "§7. [*Third Persons Protected in Dealing with Trustee*] — With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, the existence of trust powers and their proper exercise by the trustee may be assumed without inquiry. The third person is not bound to inquire whether the trustee has power to act or is properly exercising the power; and a third person, without actual knowledge that the trustee is exceeding his powers or improperly exercising them, is fully protected in dealing with the trustee possessed and properly exercising the powers he purports to exercise. A third person is not bound to assure the proper application of trust assets paid or delivered to the trustee."

718. FPC §733.611 (1974).

unless he has actual knowledge of the personal representative's lack of power.[719] If the courts give the new section its intended effect, the other provisions designed to protect good faith purchasers for value will be unnecessary.[720] Nevertheless, until the new section has been applied by the courts and third persons are assured that it does furnish full protection,[721] it seems desirable not only to retain the specific provisions, but even add to them.[722]

There is one other addition to this provision that should be made. Quite clearly, the 1974 Code does not intend this section to protect a purchaser of real property from a personal representative without a court order, unless the personal representative is acting pursuant to a specific or general testamentary power of sale.[723] To avoid a third party being misled by the broad language of the new section, it should be amended to begin: "Except as provided in section 733.613(1)...."

Transactions with Beneficiaries. As noted earlier,[724] the 1974 Code contemplates distribution of assets in kind whenever possible[725] and also requires the personal representative to deliver an instrument proving distribution to the distributee.[726] A purchaser for value from a distributee "who has received"[727] such an instrument is protected whether or not the distribution was proper. The quoted phrase indicates that the purchaser would be protected whenever the distributee had received such an instrument, even though the purchaser had not relied upon it. In addition to this protection, the 1974 Code continues existing law that an order directing the surrender of real property or delivery of personal property by the personal representative is conclusive in favor of bona fide purchasers for value from the beneficiary or distributee.[728]

Liability for Contracts and Torts

In the absence of statute, the personal representative or trustee is personally

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719. UPC §3-714, Comment.

720. Only in the case of a sale or mortgage of real property by the personal representative of an intestate estate could it be argued that the statutory ban on such transactions, FPC §733.613(1), discussed note 661 *supra,* constitutes actual knowledge of the personal representative's lack of power. If the purchase was from the personal representative of a testate estate, the purchaser would be justified under this section in assuming that the personal representative was acting pursuant to a general testamentary power.

721. Because this section represents a marked change in Florida law, the courts may not receive it with open arms. Recall the *Smith* court's interpretation of a seemingly clear statutory provision, discussed in notes 662-666 *supra* and accompanying text.

722. Such an addition was made at the end of §733.613(1). Because of the doubt concerning the effectiveness of §733.613(2) (see text accompanying notes 662-666 *supra*), it would seem appropriate to add a provision to that subsection protecting the good faith purchaser for value in that situation.

723. See text accompanying notes 662-666 *supra.*

724. See text accompanying notes 667-671 *supra.*

725. FPC §733.810 (1974).

726. FPC §733.811 (1974).

727. FPC §733.813 (1974).

728. *Compare* FPC §733.802(2) (1974), *with* FLA. STAT. §734.03(2) (1973).

liable on contracts signed in his fiduciary capacity[729] and for torts committed by him or his agents during his administration.[730] The third party must sue the fiduciary in his individual capacity and cannot proceed in the first instance against the estate or trust.[731] These rules have led to much circuity of action[732] and occasional injustice to the third party[733] or to the fiduciary.[734] The UPC would remedy this by making the decedent's estate or trust,[735] a "quasi-corporation,"[736] against which the third party could proceed by suing the personal representative or trustee in his fiduciary capacity.[737] Whether the ultimate liability rests with the estate or trust, or with the fiduciary individually, would be determined in the accounting or other appropriate proceeding.[738]

The UPC procedure reflects the trend in statutory and case law in recent years.[739] It is beyond the scope of this article to evaluate the desirability of these developments[740] other than to state the writers' approval of the UPC position. The 1974 Code followed the UPC in the case of trustees (although the final subparagraph was omitted),[741] but there is no similar provision concerning personal representatives. Perhaps this was inadvertent;[742] there seems no reason for distinguishing between personal representatives and trustees in this regard. Therefore a similar provision for personal representatives should be added to the 1974 Code.[743]

Claims of Creditors

Many of the UPC provisions for probate and administration were designed to allow certain variations from state to state.[744] The draftsmen of the UPC, however, made a special plea for uniformity of law regarding creditors' claims.[745] Despite this request, the 1974 Code substantially continues existing

729. T. Atkinson, *supra* note 353, at 650-51; 3 A. Scott, *supra* note 425, §262.

730. T. Atkinson, *supra* note 353, at 649-50; 3 A. Scott, *supra* note 425, §264.

731. G. Bogert, *supra* note 607, §712.

732. Thus, the third party must sue the fiduciary, who, if he acted within his powers, could then receive reimbursement in an action against the beneficiaries. *Id.*

733. *E.g.*, Auxier v. Aetna Ins. Co., 222 Ky. 243, 300 S.W. 617 (1928); Gates v. Avery, 112 Wis. 270, 87 N.W. 1091 (1901).

734. *E.g.*, *In re* Gibbon's Estate, 132 Neb. 538, 272 N.W. 553 (1937); East River Sav. Bank v. 245 Broadway Corp., 170 Misc. 779, 10 N.Y.S.2d 927 (1939).

735. UPC §§3-808, 7-306.

736. UPC §3-808, Comment.

737. UPC §§3-808(c), 7-306(c).

738. UPC §§3-808(d), 7-306(d).

739. *See* G. Bogert, *supra* note 607, §§712, 715, 716, 732; 3 A. Scott, *supra* note 425, §§266-271A.3., for a description of these changes.

740. For discussion of desirability, see citations in note 739 *supra*, particularly 3 A. Scott, *supra* note 425, §§267, 271A-A2.

741. *Compare* FPC §737.306, *with* UPC §7-306.

742. UPC §3-808 may have been overlooked because it is in the claims of creditors provisions that the 1974 Code rejects in favor of following existing statutory provisions.

743. See discussion in text accompanying notes 882-884 *infra* for a modification in the section if it is to be adopted.

744. UPC art. 3, General Comment.

745. UPC art. 3, part 8, General Comment reads in part:

"The need for uniformity of law regarding creditors' claims against estates is especially

law in this area,[746] occasionally adopting UPC language to clarify or simplify existing provisions.

Procedure

As noted earlier, the notice to creditors normally will be published as a part of the notice of administration.[747] As at present, claims must be presented within four months of the first publication to avoid the statutory bar to enforcement.[748] The claim must still be filed with the court, and a copy delivered to the clerk, who must then "furnish" it to the personal representative.[749] The time for filing an objection to a properly filed claim, however, has been reduced from six to five months after first publication of notice[750] and a copy of the objection must be served within ten days after filing, rather than the existing thirty days.[751] The 1974 Code also changes the time allowed the claimant for bringing suit from "one calendar month" to "30 days" from the date of service of the notice.[752]

In addition to reducing these periods, the 1974 Code makes several other procedural changes. First, the alternative of bringing suit, rather than filing a claim, has been omitted.[753] As a result, neither a suit nor the filing of a motion to substitute the personal representative as defendant in a suit pending against

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strong. Commercial and consumer credit depends upon efficient collection procedures. The cost of credit is pushed up by the cost of credit life insurance which becomes a practical necessity for lenders unwilling to bear the expense of understanding or using the cumbersome and provincial collection procedures found in 50 codes of probate.

"The sections which follow facilitate collection of claims against decedents in several ways. First, a simple written statement mailed to the personal representative is a sufficient 'claim.' Allowance of claims is handled by the personal representative and is assumed if a claimant is not advised of disallowance. Also, a personal repersentative may pay any just claims without presentation and at any time, if he is willing to assume risks which will be minimal in many cases . . . ."

746. *Compare* FPC §§733.701-.709 (1974), *with* FLA. STAT. §§733.15-.22 (1973).

747. FPC §733.701 (1974). See text accompanying notes 513-524 *supra* for a discussion of the notice of administration.

748. *Compare* FPC §733.702(1)(a) (1974), *with* FLA. STAT. §733.16(1) (1973). The four-month nonclaim period contains an exception that allows the personal representative to "settle" any claim without necessity of filing, if the beneficiaries approve the "settlement." FPC §733.702(1)(a) (1974). The use of the quoted words may be misleading, because they connote a compromise. Section 733.708, however, prevents any compromise until after the nonclaim period has expired. To avoid any misunderstanding, the words "settle" and "settlement" should be changed to their intended meanings, "pay" and "payment."

If no notice is published, claims are barred three years after the decedent's death. FPC §§733.108, .702(1)(a) (1974). A claim that is filed will be barred if no further action is taken for a period of three years after the date of filing. FPC §733.709 (1974).

749. *Compare* FPC §733.703 (1974), *with* FLA. STAT. §733.16(1) (1973). Because §733.703 also provides that "[t]he claim is presented when filed," the failure of the clerk to furnish the copy to the personal representative would not seem to affect the validity of presentation.

750. *Compare* FPC §733.705(2) (1974), *with* FLA. STAT. §733.18(2) (1973).

751. *Id.*

752. *Compare* FPC §733.705(3) (1974), *with* FLA. STAT. §733.18(2) (1973).

753. *Compare* FPC §733.702(2) (1974), *with* FLA. STAT. §733.16(1)(a) (1973). The UPC would permit this alternative. UPC §3-804.

the decedent at the time of his death[754] will be treated as the equivalent of filing a claim. Moreover, several requirements have been added to the form of the claim by the adoption of UPC language.[755] Failure to comply with these new requirements, however, does not invalidate the presentation made, except in the case of a failure to indicate the basis of the claim.[756]

These statutory provisions for payment and objection to claims also include a new subsection, which provides that "[t]he court may determine all questions concerning either liquidated claims or matters not requiring trial by jury."[757] This ambiguous language has no counterpart in either the UPC or in existing law; its possible meaning has already been discussed.[758]

Claims Not Required To Be Filed

Although it is phrased in the terminology of the UPC, the 1974 Code continues existing law that allows payment of certain liabilities even though no claim has been filed.[759] Thus, proceedings to enforce any mortgage, pledge, or other lien upon property of the estate are not subject to the nonclaim period.[760] Similarly excluded is any proceeding to establish liability of the decedent, or the personal representative, that is covered by casualty insurance, but only to the extent of such insurance.[761]

The express exemptions[762] from filing a claim for a legatee's, devisee's, or heir's share of the estate, or for administration expenses, preferred funeral expenses, or family allowance were not continued in the 1974 Code. Presumably such exemptions were felt to be unnecessary because they do not concern a "claim or demand . . . that arose before the death of the decedent."[763] Some confusion could result, however, concerning a claim for funeral expenses, because the 1974 Code defines "claims" as "liabilities of the decedent . . . and liabilities of the estate that arise at or after the death of the decedent, includ-

754. *See* Kornblum v. Heflin, 183 So. 2d 843 (2d D.C.A. Fla.), *cert. denied,* 189 So. 2d 632 (1966). UPC §3-804(2) provides that "[n]o presentation of claim is required in regard to matters claimed in proceedings against the decedent which were pending at the time of his death."

755. *Compare* FPC §733.703 (1947), *with* UPC §3-804(1). As under existing law, the claim must be in writing and contain the place of residence and post office address of the claimant. FLA. STAT. §733.16(1) (1973). *See also* Fields v. Fields, 140 Fla. 269, 191 So. 512 (1939). In addition, the new statute requires the claim to indicate its basis and, if not due, the date when it will become due, or, if contingent or unliquidated, the nature of the uncertainty, or, if secured, a description of the security.

756. FPC §733.703 (1974).

757. FPC §733.705(5) (1974).

758. See text accompanying notes 378-381 *supra.*

759. *Compare* FPC §733.702(3) (1974), *with* UPC §3-803(c) [*and*] FLA. STAT. §733.16(1)(b) (1973).

760. FPC §733.702(3)(a) (1974).

761. FPC §733.702(3)(b) (1974). The phrase "or the personal representative" seems unnecessary because the 1974 Code did not adopt the UPC requirement that a claim arising after death be filed within four months after it arises or after performance by the personal representative is due. UPC §3-803(b).

762. FLA. STAT. §733.16(2) (1973).

763. FPC §733.702 (1974).

ing funeral expenses."[764] Especially when considered in conjunction with the decision in *Twomey v. Clausohm*,[765] it would be desirable either to amend the definition of "claims," or to include an express exception for preferred funeral expenses.

As a result of the *Twomey* decision, a subsection was added to existing law in 1971 that, unfortunately, is omitted from the new Code. The provision allows any person who pays, or a personal representative who pays or proposes to pay, any funeral expenses or debt for which no claim has been filed, to file a claim or statement concerning such payments.[766] While ill-conceived in one respect,[767] this subsection afforded additional flexibility in paying routine claims against the estate, and, with appropriate revision,[768] should be reinstated in the law.

Allowance and Payment of Claims

Under existing law, it is not entirely clear whether a failure to object to a claim is equivalent to allowing it.[769] This uncertainty is not clarified by the 1974 Code, which continues a provision that limits objections to five months from the first publication of notice,[770] without placing a limit on the time this can be extended by the court for good cause.[771] Moreover, the Code did not adopt a UPC provision providing that "[f]ailure of the personal representative to mail notice to a claimant of action on his claim for 60 days after the time for original presentation of the claim has expired has the effect of a notice of

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764. FPC §731.201(2) (1974).

765. 234 So. 2d 338 (Fla. 1970). In *Twomey*, the administratix was held not entitled to credit for payment of funeral expenses where the claim was presented to her, but never filed in the probate court.

766. FLA. STAT. §733.16(1)(e) (1973). The 1974 Code does continue a provision of existing law that allows the personal representative to pay claims approved by the beneficiaries "without the necessity of the claim being filed by the creditor." FPC §733.702(1)(a) (1974). At first glance, the provision seems superfluous, because the agreement of the beneficiaries would prevent any surcharge of the personal representative. Nonetheless, its continuation will prevent claims paid in this manner from being denied deductibility on the federal estate tax return. *See* Rev. Rul. 75-177, 1975-19 INT. REV. BULL. 21.

767. The provision that if an objection is filed to the personal representative's statement, he "shall be deemed to have an interest adverse to the estate," seems unduly burdensome to the estate. FLA. STAT. §733.16(1)(e)(2) (1973) (requiring the appointment of an administrator *ad litem*). The objection could equally well be raised in connection with the personal representative's accounting.

768. The sentence could be changed to read: "If the propriety of the personal representative's acts as herein contemplated is questioned, the matter shall be determined upon the final accounting of the personal representative."

769. *See* Goggin v. Shanley, 81 So. 2d 728 (Fla. 1955).

770. FPC §733.705(2) reads in part: "(2) On or before the expiration of five months from the first publication of notice to creditors a personal representative or other interested person may file a written objection to any claim filed in the clerk's office." Currently, FLA. STAT. §733.18(2) (1973) allows 6 months.

771. *Compare* FPC §733.705(3) (1974), *with* FLA. STAT. §733.18(2) (1973). *In re* Jeffries' Estate, 136 Fla. 410, 181 So. 833 (1938), established the rule that the court may grant extensions after the time limit has expired.

allowance."[772] This would be a desirable addition to the 1974 Code, for, without it, the uncertainty continues.

From the point of view of the creditor, this uncertainty may be critical. The 1974 Code omitted an existing section entitled "Suspension of statute of limitations in favor of claimants,"[773] but continued a companion provision that suspends the statute of limitations in favor of the personal representative.[774] Although the omitted provision is not a model of clarity, it probably was intended that the nonclaim procedure supersede the general statute of limitations when a claim is filed.[775] It has been so construed,[776] but unfortunately a later case reached the opposite result, without mentioning the statute or the earlier case.[777] If the omission of the section is intended to indicate acceptance of the later decision, it seems most unfair to the creditor. He no longer can bring suit as an alternative to filing his claim.[778] Having filed the claim, he should be entitled to expect "like proceedings had as in other claims against the estate"[779] and not be required to devise some method of expediting or avoiding the nonclaim procedure in order to establish his rights prior to the running of the regular statute of limitations.[780] Therefore, a provision appropriately worded to effect this objective should be included in the 1974 Code.[781]

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772. UPC §3-806(a).

773. FLA. STAT. §734.28 (1973). The provision reads: "If a person against whom a cause of action exists dies before the expiration of the time limited for commencement thereof and the cause of action survives, claim shall be filed thereon and like proceedings had as in the case of other claims against the estate."

774. *Compare* FPC §733.104 (1974), *with* FLA. STAT. §734.27 (1973).

775. See note 773 *supra*. The intent could be clarified by adding to the provision a sentence reading: "The filing of the claim shall suspend the running of any other statute of limitations relating to the cause of action."

776. Miami Beach First Nat'l Bank v. Borbiro, 201 So. 2d 571 (3d D.C.A. Fla. 1967). In that case, the debtor died and the creditor filed his claim prior to the expiration of the general statute of limitations. Thereafter, the personal representative filed an objection to the claim and claimant brought suit. The court held that because the claimant had complied with §734.28, that statute "governs these proceedings" and "the one-year Statute of Limitations [relating to wage claims] would not bar her claim. . . ." *Id.* at 573. *See also* Toney v. Adair, 120 So. 2d 622 (3d D.C.A. Fla. 1960), holding that a failure to file a claim for wrongful death within the nonclaim period bars the claim even though suit is brought within the two years statute of limitations for wrongful death suits.

777. Azaroglu v. Jordan, 270 So. 2d 422 (3d D.C.A. Fla. 1972), *cert. denied,* 275 So. 2d 12 (1973). In that case the claim was filed, then the special statute of limitations on wage claims expired. Subsequently, an objection was filed and suit was brought pursuant to the nonclaim procedure. The court held the suit was barred. Relying upon a federal circuit court of appeals decision, which did not involve the nonclaim statute, the court said: "[W]hen two statutes of limitations are applicable to a particular situation, both statutes limit the time in which an action may be brought and the dilatory litigant is caught by whichever runs first." *Id.* at 424.

778. See text accompanying notes 753-754 *supra*.

779. FLA. STAT. §734.28 (1973).

780. UPC §3-802 provides in part: "For purposes of any statute of limitations, the proper presentation of a claim . . . is equivalent to commencement of a proceeding on the claim."

781. See notes 775, 780 *supra*.

Order of Payment of Claims

The 1974 Code considerably reduces the number of claims that are given preferred status.[782] Costs and expenses of administration, including compensation of the personal representative and attorneys' fees, continue to be given first priority. Class two claims for reasonable funeral expenses now expressly include interment expenses, and the amount preferred is raised from $1,000 to $1,500. Preferred expenses of the last illness are limited to "[r]easonable and necessary medical and hospital expenses of the last sixty (60) days of the last illness of the decedent, including compensation of persons attending him,"[783] thus apparently eliminating debts for board and lodging. The family allowance continues to be given class four preference, contrary to the recommendation of the UPC that it be "exempt from and [have] priority over all claims . . . ."[784] A new provision grants fifth priority to debts incurred in continuing a decedent's business, but only to the extent of the assets of the business.[785] All other debts are given equal priority, thus eliminating present preferences for wage claims, judgments obtained against the decedent during his lifetime, and liens of various types.[786] The supplementary family allowance and allowance for dependent minor children[787] are also omitted.

By giving expenses of the last illness preference over the family allowance, and by omitting any preference for claims of the federal government, such as income taxes, the section remains a potential source of litigation. The federal preference statute[788] defers federal claims to expenses of administration,[789] funeral expenses,[790] and family allowance,[791] but gives them preference over expenses of the last illness.[792] The Joint Editorial Board of the UPC has recognized this problem and recommends a reordering of the UPC to give third preference to federal debts and taxes.[793] Section 733.707 of the 1974 Code should similarly be changed in order to avoid further depletion of an insolvent estate by litigation on this point.

ACCOUNTING AND DISTRIBUTION

Although the 1974 Code adopts the UPC headings for Parts Eight and Nine of Chapter 733 — "Special Provisions for Distribution" and "Closing Estates" — the more familiar title is used here because the Code continues to require a court accounting,[794] instead of following the UPC design for informal distribu-

782. *Compare* FPC §733.707 (1974), *with* FLA. STAT. §733.20 (1973).
783. FPC §733.707(1)(c) (1974).
784. UPC §2-403.
785. FPC §733.707(1)(e) (1974).
786. FLA. STAT. §§733.20(e)-(g) (1973).
787. *Id.* at (i), (j).
788. 31 U.S.C. §191.
789. United States v. Weisburn, 48 F. Supp. 393 (E.D. Pa. 1943).
790. *Id.; In re* Carl's Estate, 43 Ohio Op. 52, 94 N.E.2d 239 (P. Ct. 1950).
791. *In re* Carl's Estate, 43 Ohio Op. 52, 94 N.E.2d 239 (P. Ct. 1950).
792. *Id.*
793. See UPC 331 (Official Text, 1974 ed.).
794. FPC §733.901 (1974).

tion and the closing of estates without court intervention.[795] Thus, section 733.901 follows existing law to a certain extent, by providing that, when a personal representative has completed administration except for distribution, he shall file a final accounting and a petition for discharge.[796] The remainder of the section, however, is new to Florida law. The petition is required to set forth the proposed plan of distribution and a copy of the petition must be given to all interested parties.[797] If no objection is filed within 30 days,[798] the personal representative may distribute according to the plan of distribution and, upon receipt of evidence of proper distribution, the court will enter an order of discharge.[799] Presumably the discharge is final immediately, since the order also releases any surety and there is no provision, as in existing law, permitting a suit after the date of the discharge.[800] This procedure is a desirable streamlining of existing law, for it does not require the court to examine the accounting and eliminates a separate order of distribution.[801]

Unfortunately, the other provisions concerning distribution[802] are such a mixture of existing law and the UPC that, in certain instances, they do not seem properly synthesized. The confusion is most evident in the provisions governing the adjustment of the beneficiaries' rights in making distribution — exoneration,[803] the order in which assets are appropriated,[804] advancements,[805] abatement and contribution,[806] retainer,[807] and the apportionment of estate taxes[808] — which are, for the most part, merely continuations of existing law.

Perhaps the most glaring example of the uncoordinated union of the UPC and existing law is section 733.804. Adopted from another area of the UPC,[809] the section substantially duplicates section 733.803, concerning the right to

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795. UPC §3-1003.

796. *Compare* FPC §733.901(1) (1974), *with* FLA. STAT. §734.22 (1973).

797. This appears to satisfy the objection that by simply requiring publication of the petition, FLA. STAT. §734.22(1) (1973), may not meet the requirements of due process. See discussion in text accompanying notes 546-550 *supra*.

798. The 30-day period may be waived upon the written consent of all interested persons. FPC §733.901(4) (1974).

799. If an objection is filed, the court determines the plan of distribution and proceeds as in the case of no objection, upon receipt of evidence of proper distribution. FPC §733.901(3) (1974).

800. FLA. STAT. §734.23 (1973) permits the bringing of suit within one year of discharge.

801. Currently, even if no objection is filed, the order of distribution may be entered only "if it appears to the circuit judge that said applicant has faithfully administered the estate." FLA. STAT. §734.22(1) (1973). After entry of the order, the personal representative must furnish satisfactory evidence that the distribution has been made as ordered, before the circuit judge will enter an order of discharge. FLA. STAT. §734.23 (1973).

802. FPC §§733.801-.817 (1974).

803. FPC §§733.803, .804 (1974).

804. FPC §733.805 (1974).

805. FPC §733.806 (1974). This section has already been discussed in text accompanying notes 323-337 *supra* (part I).

806. FPC §733.807 (1974).

807. FPC §733.809 (1974).

808. FPC §733.817 (1974).

809. UPC §2-609.

exoneration.[810] Its only addition is an express statement that an intent to exonerate is not shown by a general directive in the will to pay debts. If such an express statement is thought desirable, it could be added as a separate sentence at the end of section 733.803.

Sections 733.805 and 733.807 are further examples of the lack of coordination in the distribution provisions. Although they are both found in the current statutes,[811] it seems redundant and confusing to continue the "two sides of the same coin" treatment of abatement. This repetition led to the unfortunate decision of *In re Estate of George*[812] and could lead to other disparities, depending on which section is applied.[813] The two sections could easily be combined, and should be.[814] If this is not done, at least the parenthetical exception of section 733.805 — "(except as otherwise provided in section 733.817 with respect to estate, inheritance and other death taxes)" — should be inserted after the words "intent appears" of the second sentence of section 733.807, to ensure that the *George* decision will not still be viable.

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810. *Compare* FPC §733.803 (1974), *with* FPC §733.804 (1974).

811. FLA. STAT. §§733.05, .06 (1973).

812. 200 So. 2d 256 (2d D.C.A. Fla. 1967). For a detailed discussion of this case, see Riggs, *Florida Estate Tax Apportionment*, 25 U. FLA. L. REV. 719, 725-27 (1973).

813. Section 733.807 does not mention property undisposed of by will, although §733.805 does. Similarly, there is no mention in §733.807 of funds needed to raise the share of a pretermitted spouse or child. On the other hand, §733.805 does not cover the treatment of a demonstrative legacy where the fund from which it is to be paid fails or is insufficient. It is the authors' position that because the two sections need to be read together, they should be combined.

814. By omitting the first two sentences of §733.807 and substituting the remainder of the section for subsection (2) of §733.805 the combined statute would read:

> (1) If a testator makes provision by his will or designates the funds or property to be used for the payment of debts, estate and inheritance taxes, family allowance, exempt property, charges and expenses of administration and devises, they shall be paid out of the funds or from the property or proceeds as provided by the will so far as sufficient. If no provision is made, nor any fund designated, or if it is insufficient, the property of the estate shall be used for such purposes (except as otherwise provided in §733.817 with respect to estate, inheritance and other death taxes) and to raise the shares of a pretermitted spouse and children in the following order:
>
> (a) Property not disposed of by the will.
>
> (b) Property devised to the residuary devisee or devisees.
>
> (c) Property not specifically or demonstratively devised.
>
> (d) Property specifically or demonstratively devised.
>
> (2) Demonstrative devises shall be classed as general devises, upon the failure or insufficiency of fund or property out of which payment should be made to the extent of the insufficiency. Devises to the decedent's surviving spouse given in satisfaction of or instead of his statutory rights in the estate shall not abate until other devises of the same class are exhausted. Devises given for a valuable consideration shall abate with other devises of the same class only to the extent of the excess over the amount of value of the consideration until all others of the same class are exhausted. Except as herein provided, devises shall abate equally and ratably and without preference or priority as between real and personal property. When property that has been specifically devised or charged with a devise is sold or taken by the personal repersentative, other devisees shall contribute according to their respective interests to the devisee whose devise has been sold or taken, and before distribution the court shall determine the amounts of the respective contributions, and they shall be paid or withheld before distribution is made.

A new section dealing with the right of retainer has been adopted from the UPC.[815] While the question does not seem to have been litigated in Florida, the section represents standard law[816] and its codification could prevent future litigation.

The provisions for apportionment of estate taxes are taken from present law,[817] with several clarifying changes, and two other changes that seem of considerable importance. Present law allows the order of apportionment to be entered after notice of publication, but makes such apportionment only prima facie correct in any proceedings to collect the tax that was apportioned to an interest not within the control of the personal representative.[818] The 1974 Code requires formal notice[819] to all interested persons and omits any reference to the apportionment being only prima facie correct.[820] The intent seems to be to give notice in a form that will finalize the order of apportionment by binding all parties. This is a desirable change and will result in less delay than the currently required publication for four consecutive weeks. Moreover, it will eliminate the cost of publication and reduce future litigation to collect the tax apportioned. The omission of the final sentence of the present subdivision (5)[821] also seems desirable; the sentence might encourage a personal representative not to take the prompt action needed to prevent an *inter vivos* transferee from removing assets from the state that might be needed to satisfy his share of the tax.[822]

A second series of sections, all derived from the UPC, seems to indicate an inordinate preoccupation with distribution in kind. For example, after establishing the general preference for distribution in kind noted previously,[823] section 733.810 has separate provisions concerning specifically devised and exempt property,[824] the family allowance and general devises,[825] and the residuary estate.[826] Specific devises and exempt property would be so distributed in any event and it is difficult to envision a situation in which the person entitled to the family allowance would not demand cash, as he is allowed to do.[827] The general devisee may also defeat distribution in kind by demanding cash; if he does not do so, the property used to satisfy his devise must be agreed

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815. *Compare* FPC §733.809 (1974), *with* UPC §3-903.

816. *See* T. ATKINSON, *supra* note 353, at 787.

817. *Compare* FPC §733.817 (1974), *with* FLA. STAT. §734.041 (1973).

818. FLA. STAT. §734.041(5) (1973). Presumably this was done to avoid constitutional problems. See Riggs, *supra* note 812, at 735-37.

819. See the discussion of formal notice in the text accompanying notes 412-418 *supra*.

820. FPC §733.817(5) (1973).

821. FLA. STAT. §734.041(5) (1973) reads: "The fiduciary shall not be required to seek collection of any portion of tax attributable to any interest not within his control until after the entry of such order of apportionment."

822. *See* Riggs, *supra* note 812, at 736 & n.123.

823. See text accompanying notes 667-670 *supra*.

824. FPC §733.810(1) (1974).

825. FPC §§733.810(2), (3) (1974).

826. FPC §733.810(4) (1974).

827. FPC §733.810(2)(a) (1974).

upon by him, the personal representative, and the residuary devisees.[828] Even in the case of the residuary estate, distribution in kind may not occur if there is an objection or if it is impracticable to distribute undivided interests.[829] The possible effect of the preference for distribution in kind upon the powers given the personal representative has already been discussed.[830] Because of the combination of this effect with the redundancy noted here, it appears desirable to omit section 733.810 from the 1974 Code.

The sections concerning distribution are better suited to the informal distributions and closing of estates envisioned by the UPC[831] than to the 1974 Code's formal procedures for accounting and distribution.[832] Although they will be inapplicable to the final distribution, these sections should be retained because they will be of value when partial distributions are made in kind. For instance, section 733.811 provides:

> Proof that a distributee has received an instrument transferring assets in kind or payment in distribution or possession of specific property from a personal representative is conclusive evidence that the distributee has succeeded to the interest of the estate in the distributed assets, as against all persons interested in the estate, but the personal representative may recover the assets or their value if the distribution was improper.

It is clear that the section can apply only to partial distributions, and not to those made pursuant to final accounting and discharge. Similarly, the sections concerning improper distribution[833] and protection of purchasers from distributees[834] are not needed after final accounting and discharge, but will be of value in partial distributions. It is unfortunate, however, that the UPC section[835] clarifying the references to "instruments transferring assets . . . or possession" was not included in the 1974 Code.

Section 733.814 allows partition proceedings to be used for the purpose of distribution. This seems a valuable addition to Florida law, because it removes any doubt that partition may be had as a part of the administration of an estate.[836] If made in connection with the final accounting proceeding, the partition should save expense and delay to the parties entitled to the property.

828. FPC §733.810(2)(c) (1974) allows any residuary devisee to request that a particular asset remain a part of the residue. It is not clear whether the personal representative is obligated to comply with such request if he can do so.

829. FPC §733.810(4) (1974).

830. See text accompanying notes 667-670 *supra*.

831. See UPC §3-1003 and Comment.

832. See text accompanying notes 794-801 *supra*.

833. FPC §733.812 (1974).

834. FPC §733.813 (1974).

835. UPC §3-907 reads: "If distribution in kind is made, the personal representative shall execute an instrument or deed of distribution assigning, transferring or releasing the assets to the distributee as evidence of the distributee's title to the property."

836. *See* Leonard v. Brown, 134 So. 2d 872 (1st D.C.A. Fla. 1961): "There is no statutory provision vesting the probate court with jurisdiction to partition the property of an estate between the heirs or devisees, or authorizing the circuit court to partition such property while it remains under the jurisdiction of the probate court incident to administration of the estate." *Id.* at 874. *See also* Nedd v. Starry, 143 So. 2d 522 (1st D.C.A. Fla. 1962).

There is, however, an inconsistency between the formal notice required by this section and the informal notice required for the final accounting.[837] The section also poses the recurrent problem of whether the probate judge or another judge of the circuit court is to make the partition.[838]

The last distribution section adopted from the UPC provides that private agreements among distributees are binding on the personal representative, except as they affect his duties to creditors, taxing authorities, or other beneficiaries not parties to the agreement.[839] As the UPC draftsmen observe, this section may be "only a restatement of the obvious"[840] but its purpose "is to make it clear that the successors to an estate have residual control over the way it is to be distributed."[841] It may well serve the added function of making the court more willing to allow incorporation of the terms of the agreement into the proposed plan of distribution, even though all interested persons are not parties to the agreement.

The section dealing with the disposition of unclaimed funds held by the personal representative makes two changes in the current statute. After receiving the funds from the personal representative, the clerk is required to hold them for six months, rather than the present thirty days, before they are deposited with the state treasurer.[842] Once so deposited, however, the time allowed for the person entitled to the funds to claim them is reduced from twenty to ten years.[843]

One final point concerning distribution should be mentioned. It is no longer necessary for a testamentary trustee to qualify before he can receive a distribution from the personal representative. The provisions of current law that require qualification,[844] and that impose penalties upon a personal representative who distributes to a trustee who has not qualified[845] have been omitted from the 1974 Code. In the case of nonresident trustees, a provision is added that "local qualification by a foreign trustee is not required in order for the trustee to receive distribution from a local estate."[846]

THE COST OF ADMINISTRATION

The principal expenses of administration in the average estate are attorney's fees and the commissions of the personal representative. Court costs, costs of publication of notices, and even appraisers' fees add to this burden, but they are of greater significance in small estates, where they can amount to a substantial percentage of the estate. These expenses of administration form a

837. FPC §733.901(1)(c) requires that a copy of the petition be given to all interested persons "in accordance with the provisions of section 731.301(2)" — that is, informal notice.

838. See text accompanying notes 370-382 *supra*.

839. FPC §733.815 (1974).

840. UPC §3-912, Comment. Apparently, it is not obvious in Wisconsin, however. See cases cited in Annot., 97 ALR 468 (1940).

841. UPC §3-912, Comment.

842. *Compare* FPC §733.816(1) (1974), *with* FLA. STAT. §734.221(1) (1973).

843. *Compare* FPC §733.816(3) (1974), *with* FLA. STAT. §734.221(3) (1973).

844. FLA. STAT. §§734.22(1), 737.02 (1973).

845. FLA. STAT. §737.21 (1973).

846. FPC §737.105 (1974).

primary basis for criticism of present probate laws and are a chief motivation for avoidance of probate.[847] Some of the efforts of the draftsmen of the 1974 Code to reduce these costs have already been examined,[848] and others will be discussed subsequently in connection with family administration and small estates.[849] Court costs are not changed by the 1974 Code[850] and therefore only the provisions concerning compensation of the personal representative and attorney's fees are discussed here.

Compensation of the Personal Representative

American law has long since rejected the English view concerning compensation of fiduciaries that is exemplified by Lord Chancellor Hardwicke's statement: "In general this court looks upon trusts as honorary, and a burden upon the honor and conscience of the person entrusted, and not undertaken upon mercenary views."[851] The American view seems predicated upon the hypothesis

847. See notes 2-4 *supra* and accompanying text (part I).

848. Inclusion of the notice to creditors in the notice of administration is discussed in the text accompanying notes 513-521 *supra;* the avoidance of unnecessary appraisers is noted in the text accompanying notes 628-632 *supra.*

849. See text accompanying notes 953-969, 982-988 *infra.*

850. Effective October 1, 1972, uniform filing fees were adopted for probate matters. Fla. Laws 1972, ch. 397, §1. When jurisdiction of probate matters was transferred to the circuit courts on January 1, 1973, (see text accompanying notes 370-371 *supra*) the fee schedule for probate matters was transferred to chapter 28 of the Florida Statutes as §28.2401. It now reads:

"(1) Except when otherwise provided, the fees to be charged for the following services shall be:

(a) For the opening of any estate of one document or more, but not to include issuance of letters or orders of no administration $10.00

(b) For the filing of all documents in an administration unnecessary or no further administration required $25.00

(c) For filing of all documents in any estate having an inventory value not exceeding $60,000.00 ..... $60.00

(d) For filing of all documents in all other estates $75.00

(2) The filing fees in the above-mentioned classifications include all documents filed in an estate, except that all certified copies shall be a separate item and the following charges shall be imposed for making and certifying copies of the record:

(a) First page $1.50

(b) Each additional page $1.00

(3) Recording shall be required for all petitions opening and closing an estate, and regarding real estate and all orders, letters, bonds, oaths, wills, proofs of wills, returns and such other papers as the judge shall deem advisable to record, or that shall be required to be recorded under the Florida probate law."

851. Ayliffe v. Murray, 26 Eng. Rep. 433 (1740) (footnotes omitted). A few years earlier, another Lord Chancellor offered more pragmatic reasons for the English rule: "It is an established rule that a trustee, executor, or administrator, shall have no allowance for his care and trouble: the reason of which seems to be, for that on these pretences, if allowed, the trust estate might be loaded, and rendered of little value. Besides, the great difficulty there might be in settling and adjusting the *quantum* of such allowance, especially as one man's time may be more valuable than that of another; and there can be no hardship in this respect upon any trustee, who may chose whether he will accept the trust, or not." Robinson v. Pett, 24 Eng. Rep. 1049 (1734). (footnotes omitted). The view is still applicable in England, except that compensation provisions in wills and trust agreements are given

that it benefits the beneficiaries of the estate or trust to have part of the property used in the payment of compensation because of the higher caliber of service that will be obtained.[852] There are undoubtedly some disinterested persons who would serve well without compensation, but they are probably rare. Thus, the legislatures in most states, including Florida,[853] have established methods for providing the personal representative with reasonable compensation. The prevailing method in the past was to measure reasonable compensation by a statutory percentage of the estate,[854] but such a measure has been subject to constant criticism as providing inadequate compensation in small estates and overcompensation in large estates.[855]

In response to this criticism, the 1974 Code adopts a modified UPC provision that eliminates the existing statutory percentage and simply provides that the personal representative is "entitled to reasonable compensation."[856] This accords with existing law concerning compensation of the trustee,[857] as well as the similar 1974 Code provision.[858] Whether this somewhat dramatic shift in the method of measuring compensation for the personal representative will result in an equally dramatic change in the amount of his compensation is problematical. It should be noted, however, that the existing case law concerning reasonable compensation for trustees[859] and the allowance of compensation for extraordinary services of the personal representative[860] will have relevance to all estates in the future.

Although the personal representative is equated with the trustee in determining the method of measuring his compensation, the 1974 Code refuses to allow him the same freedom as the trustee in calculating and paying the actual amount deemed reasonable. The trustee may determine his compensation and pay himself, subject only to a court review of the reasonableness of the amount upon petition of an interested person.[861] On the other hand, the 1974 Code provides:

> *No compensation shall be paid* to the personal representative . . . unless prior to payment . . . all persons bearing the impact of the pay-

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effect and the court will award compensation to corporate fiduciaries. *See generally* G. BOGERT, *supra* note 607, §975; 3 A. SCOTT, *supra* note 425, §242.

852. For a collection of the American decisions and statutes, see 3 A. SCOTT, *supra* note 425, §242, at 2108-09 nn.3 & 4.

853. FLA. STAT. §734.01 (1973).

854. See P-H EST. PLAN. ¶14,601 for statutes governing compensation of personal representatives. Trustees' commissions are usually similarly based, either by statute or custom. G. BOGERT, TRUSTS AND TRUSTEES §975, at 55-69 (1962, Supp. 1974). *See* FLA. STAT. §734.01 (1973).

855. *Compare* Wellman, *The Uniform Probate Code: Blueprint for Reform in the 70's*, 2 CONN. L. REV. 453, 454 (1970), *with* N. DACEY, HOW TO AVOID PROBATE (1965).

856. *Compare* FPC §733.617(1) (1974), *with* UPC §3-719.

857. FLA. STAT. §737.22 (1973).

858. FPC §737.204 (1974).

859. *E.g.*, West Coast Hosp. Ass'n v. Florida Nat'l Bank, 100 So. 2d 807 (Fla. 1958); Osius v. First Nat'l Bank, 74 So. 2d 779 (Fla. 1954).

860. *In re* Lieber's Estate, 103 So. 2d 192 (Fla. 1958).

861. FPC §737.204 (1973).

ment *have consented to the compensation* in a signed writing filed in the proceeding, or . . . the court has ordered the payment following informal notice . . . to [such] persons . . . .[862]

While the statute is not explicit, the italicized phrases seem to require that the consent must be to a definite amount – the amount to be paid. No similar provision appears in the UPC section from which the first two subsections are taken.[863] The inclusion of the restrictions in the 1974 Code suggests that the draftsmen felt that abuses had occurred under present procedures and that the affected beneficiaries had not been sufficiently aware of the amounts involved before payment. If this is true, it would justify the additional restrictions; if not, they seem undesirable since the greater freedom for the trustee is more in accord with the other relaxations of court control over the personal representative.[864]

Under existing law, a personal representative may renounce any compensation provided in the will and thereby receive the statutory compensation.[865] This is continued by the 1974 Code,[866] but, by adopting the language of the UPC,[867] an undesirable change has been made in an already unsatisfactory provision. Provisions almost identical with those of existing law are found in the laws of approximately twenty jurisdictions.[868] Their only justification appears to be a legislative belief that beneficiaries fare better where the personal representative is allowed reasonable compensation[869] and a legislative determination to protect them against the misguided attempts of a testator to provide otherwise.[870] If so, the UPC qualification – that "[i]f a will provision concerning a fee is framed as a condition on the nomination as personal representative, it could not be renounced,"[871] – is contrary to legislative policy and also undesirable because it places an undue premium on the expertise of the draftsman.[872] Acceptance of this position could even encourage the type of strained

862. FPC §733.617(3) (1973) (emphasis added). Generally, the persons bearing the impact of the payment will be the residuary devisees.

863. UPC §3-719.

864. See text accompanying notes 657-658 *supra.*

865. FLA. STAT. §734.01(1)(c) (1973).

866. FPC §733.617(2) (1974) reads: "(2) If a will provides for compensation of the personal representative and there is no contract with the decedent regarding compensation, he may renounce the provisions before qualifying and be entitled to reasonable compensation. A personal representative also may renounce his right to all or any part of the compensation. A renunciation of the fee shall be filed with the court."

867. UPC §3-719.

868. *See* P-H EST. PLAN. ¶14,604 for statutes of each state concerning renunciation of the compensation provided by will.

869. See text accompanying note 852 *supra.*

870. The alternative reason, that these provisions represent efforts of personal representatives to further their own financial interest, is no justification and, if accepted, should lead to the elimination of such provisions from statutory law.

871. UPC §3-719, Comment. This statement seems to be an acceptance of the decision in Butler University v. Danner, 114 Ind. App. 236, 50 N.E.2d 928 (1943). *Cf.* Suverkrup v. Suverkrup, 106 Ind. App. 406, 18 N.E.2d 488 (1939). *See also* Matter of Roth, 291 N.Y. 1, 50 N.E.2d 281 (1943).

872. For example, a testamentary provision reading "I appoint *X* as my executor, and I

construction placed on a similar statute by lower New York courts, to the effect that if the will provides for no compensation, the personal representative cannot renounce.[873] Reaching a contrary result, a California appellate court exhibited a far greater understanding of the legislative intention when it reasoned:

> It is the plain and mandatory purpose of those sections that executors should receive the statutory compensation therein provided unless the will makes other provision for compensation, and even then the executor is given the right, in spite of the desire of the testator as expressed in the will, to renounce the compensation provided for by will, and claim the statutory fees. Estate of Shaw, 85 Cal. App. 518, 260 P. 351. It cannot be that the Legislature intended that, if the testator provided by will that the executor should receive $1 as compensation for his services, he could renounce the $1 and demand the statutory fees, but that, if the will provided that he receive nothing for his services, he would not be entitled to the statutory fees. To permit such a result would be to defeat the clear legislative intent that under any circumstances an executor should be entitled to receive the statutory compensation if he elected to do so.[874]

To avoid these problems, the authors submit that the legislature should either eliminate the provision entirely or amend it to prevent legal machinations by knowledgeable testators and draftsmen that thwart its obvious intent.[875] If the latter choice is made, the phrase adopted from the UPC requiring the renunciation to be filed "before qualifying,"[876] should also be omitted. Not only is it contrary to the usual interpretation, allowing renunciation within a reasonable time after qualification,[877] but in many instances, the personal representative's decision whether to accept the specified compensation will depend on facts concerning the size of the estate and the complexities of the administration that cannot be determined before qualification without substantially delaying the opening of the administration.

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direct that he serve for $1,000" would allow *X* to renounce and receive reasonable compensation. *See* Suverkrup v. Suverkrup, 106 Ind. App. 406, 18 N.E.2d 488 (1939). On the other hand, a provision reading, "I appoint *X* as my executor on the condition that he serve for $1,000," would prevent *X* from renouncing and force him to choose between accepting the limited compensation or refusing the appointment. *See* Butler University v. Danner, 114 Ind. App. 236, 50 N.E.2d 928 (1943).

873. Secor v. Sentis, 5 Redf. Sur. 570 (N.Y. 1882); Matter of Flagg, 192 Misc. 397, 81 N.Y.S. 2d 514 (Sur. Ct., 1948).

874. *In re* Fritz' Estate, 130 Cal. App. 725, 729, 20 P.2d 361, 364 (Dist. Ct. App. 1933) (emphasis added).

875. Such an amendment could read: If a will provides that the personal representative serve for specified compensation or for no compensation, whether such provision purports to be a condition to his appointment or not, and there is no contract . . . .

876. UPC §3-719.

877. Suverkrup v. Suverkrup, 106 Ill. App. 406, 18 N.E.2d 488 (1939); *see* Annot., 19 A.L.R.3d 520, 551-53 (1968). *See also* N.Y. SUR. CT. PRO. ACT §2307(5) (1967); OHIO REV. CODE ANN. §2113.36 (Page 1970), both allowing the personal representative four months after qualifying in which to renounce.

Attorney's Fees

While the 1974 Code contains several sections dealing with attorney's fees, it omits two sections of the present law that should have been retained.[878] In addition, several of the provisions that are included overlap and must be read together for proper understanding.

The power of the personal representative to employ, without court order, an attorney to assist him in the administration is merely a continuation of existing law.[879] Payment for these services, however, is now subject to the same restrictions as is payment of his own fees,[880] presumably for the reasons previously discussed.[881] These restrictions are consistent with the theory that the contract with the attorney is a personal obligation of the personal representative and that he is only entitled to reimbursement from the estate for what the court finds to be a reasonable fee.[882] There would be a marked effect on this theory, however, if the legislature were to follow an earlier recommendation of the authors and adopt the UPC section that makes the estate a "quasi-corporation" for the purpose of suits on contracts made by the personal representative.[883] To avoid this problem, the "quasi-corporation" concept should be modified to exclude attorney's fees from its scope.[884]

In another example of the occasionally uncoordinated union of the UPC and existing law,[885] two sections of the 1974 Code seem to overlap where at-

878. See text accompanying notes 895-910 *infra.*

879. *Compare* FPC §733.612(19) (1974), *with* FLA. STAT. §§734.01(1), (3)-(4), (1973) [*and*] *In re* Payne's Estate, 128 Fla. 151, 174 So. 430 (1937).

880. FPC §733.617 (1974). Thus, before payment is allowed in either case, the persons "bearing the impact of the payment" must have consented in a signed writing or the court must have given informal notice to such persons before ordering payment.

881. See text accompanying notes 861-864 *supra.*

882. *In re* Payne's Estate, 128 Fla. 151, 174 So. 430 (1937); Annot., 13 A.L.R.3d 518, 522 (1967).

883. UPC §3-808 (discussed in text accompanying notes 729-744 *supra*).

884. The modification could be made by adding the italicized words so that the statute would read:

> (a) Unless otherwise provided in the contract, a personal representative is not individually liable on a contract *except a contract for attorney's fees* properly entered into in his fiduciary capacity in the course of administration of the estate unless he fails to reveal his representative capacity and identify the estate in the contract.
>
> (b) A personal representative is individually liable for obligations arising from ownership or control of the estate or for torts committed in the course of administration of the estate only if he is personally at fault.
>
> (c) Claims based on contracts *except contracts for attorney's fees* entered into by a personal representative in his fiduciary capacity, on obligations arising from ownership or control of the estate or on torts committed in the course of estate administration may be asserted against the estate by proceeding against the personal representative in his fiduciary capacity, whether or not the personal representative is individually liable therefor.
>
> (d) Issues of liability as between the estate and the personal representative individually may be determined in a proceeding for accounting, surcharge or indemnification or other appropriate proceeding.

885. Other examples of this lack of proper synthesization are discussed in the text accompanying notes 802-841 *supra.*

torney's fees are concerned. The first is taken from the UPC[886] and deals in broad terms with attorney's fees as an expense in estate litigation.[887] The second, entitled "Costs," is derived mainly from existing law,[888] and concerns attorney's fees in a single situation. It reads:

> (1) In all probate proceedings costs may be awarded as in chancery actions.
> (2) When costs are to be paid out of the estate, the court may direct from what part of the estate they shall be paid.
> (3) A personal representative of the last know will, being prima facie justified in offering a will in due form for probate, shall receive his costs and attorney's fees out of the estate even though he is unsuccessful.[889]

The 1974 Code inserts a phrase limiting in both sections their operation to personal representatives "of the last known will" of the decedent. This is in accord with the recent admonition of the Supreme Court of Florida that "the probate court should be very cautious in determining that special circumstances and situations exist that justify the unsuccessful attempt to probate a will made prior to the *last* will and testament."[890] Nonetheless, these two sections could come into conflict, because "offering a will in due form for probate"[891] could well be considered an instance where the personal representative "prosecutes any proceeding."[892] In the first instance, however, he need only be "prima facie justified,"[893] whereas under the second statute he must be acting "in good faith."[894] Because two sections seem unnecessary to deal with attorney's fees in this situation, the two sections should be combined into a single consistent section to avoid any conflict.

It seems unfortunate that the 1974 Code omits the existing section that allows a personal representative, if he is a practicing Florida attorney, to receive, in addition to his compensation as personal representative, reasonable compensation for legal services rendered to the estate.[895] The provision may have been thought unnecessary because the personal representative is given the power to employ attorneys "even if they are associated with [him]."[896] On the other hand, it may have been felt that because the personal representative is to receive "reasonable compensation,"[897] any legal services he rendered would be

886. UPC §3-720.

887. FPC §733.618 (1974) provides: "If any personal representative or person nominated as personal representative of the last known will defends or prosecutes any proceeding in good faith, whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorney's fees incurred."

888. FLA. STAT. §§732.14(2), (3) (1973).

889. FPC §733.106 (1974).

890. *In re* Estate of Whitehead, 287 So. 2d 9, 12 (Fla. 1973) (emphasis in original).

891. FPC §733.106(3) (1974).

892. FPC §733.618 (1974).

893. FPC §733.106(3) (1974).

894. FPC §733.618 (1974); *see In re* Estate of Whitehead, 287 So. 2d 9 (Fla. 1973).

895. FLA. STAT. §734.01(4) (1973). The UPC contains no similar provision.

896. FPC §733.612(19) (1974).

897. FPC §733.617(1) (1974). See text accompanying notes 856-860 *supra* for a discussion of the change in method of compensating the personal representative.

included in the measure of this reasonable compensation. The general rule is well established, however, that, although a personal representative who is himself an attorney may properly employ another attorney to render necessary legal services for the estate, if he elects to act as his own attorney, he will not be entitled to an allowance for his legal services in the absence of statutory authorization.[898] Because the general rule encourages easy but unethical evasion,[899] and because performance of legal services by the personal representative may result in increased efficiency of administration at a decreased over-all cost to the estate,[900] it seems undesirable to cast any doubt upon the prevailing practice. Therefore, the provision of the present law should be inserted into the 1974 Code.

Another unfortunate omission from the 1974 Code is the present section allowing any attorney who has "rendered services to an estate" to apply for an allowance of fees payable from the estate.[901] This is the only statutory provision that recognizes the power of the probate court to authorize the personal representative to pay the fees of an attorney not employed by him. Instances may occur in the administration of an estate – for example, a will construction proceeding requiring interpretation to the court of alternative interpretations[902]

898. T. ATKINSON, *supra* note 353, at 656; Annot., 65 A.L.R.2d 809 (1959).

899. For example, the rule has been held to allow the personal representative-attorney to retain his own firm "if it was agreed between him and his partners that he is not to share in the moneys to be received by the firm for its services." Matter of Parker, 200 Cal. 132, 251 P. 907 (1926). *See also* Annot., 65 A.L.R.2d 809, 827 (1959). The effect such an agreement could have upon the division of other fees when the partnership agreement is next revised is obvious.

900. The personal representative-attorney will, in most cases, have been the attorney for the decedent. The time involved in familiarizing another attorney with the affairs of the decedent can result in a double charge to the estate – both the time of the personal representative and that of the other attorney.

901. FLA. STAT. §734.01(2) (1973).

902. *In re* Atwood's Trust, 227 Minn. 495, 35 N.W.2d 736 (1949), presents an excellent discussion of the problem of attorney's fees in trust interpretation proceedings:

"Appellants contend that costs such as attorneys' fees and other expenses incurred in litigation by a beneficiary of a trust may in no event be allowed and paid out of the trust fund corpus unless such beneficiary thereby confers a benefit upon the trust as a whole by either preserving it from dissipation or by increasing its corpus . . . . Although respondent failed in having his interpretation of the trust instrument adopted, he was not an interloper, but an essential party to a proceeding in which he was joined as a defendant. All parties recognized that the trust settlor's language was ambiguous, and all parties requested the court's aid in determining its meaning. An intricate and involved question of law was presented. Substantial interests and issues were at stake. The trustees were in no position to carry on the administration of the trust until the intent of the settlor, as revealed by his chosen language, could be finally determined. Obviously, a benefit to the entire trust, aside from benefits conferred by acts which protect or increase the trust corpus may, in exceptional cases, also be conferred by litigation which is unquestionably essential to a judicial determination of the meaning of ambiguous language employed by the settlor, where the administration of the trust has broken down because the rights of the beneficiaries and the duties and powers of the trustees cannot with reasonable safety be ascertained without a judicial determination. . . .

"Costs and reasonable counsel fees may be allowed to the trustees where instructions have been properly sought. 2 Perry, Trusts and Trustees, 7th Ed., §476a; City of St. Louis v. McAllister, 302 Mo. 152, 257 S.W. 425; Laughlin v. Page, 108 Me. 307, 80 A. 753. It is also

or an effort by a beneficiary to set aside a charitable bequest[903] where the personal representative is in effect a stakeholder and neither he nor his attorney is justified in taking any position in litigation affecting the estate. In other situations, the personal representative's interest may be adverse to that of the estate or a beneficiary, as in a proceeding to surcharge the personal

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recognized that costs and attorneys' fees may be allowed out of the trust estate to any necessary party who is acting primarily for the benefit of the estate in securing a clarification of ambiguous trust-instrument language where a reasonable doubt as to its meaning exists . . . . In such cases, the litigation is indispensable to the proper administration of the trust and is a proper charge thereon. If the issues are immaterial or trifling, or if the conduct of a party is vexatious and litigious, or if he raises improper points, or in any way creates unnecessary delay or expense, the court will not only refuse him costs and counsel fees but will order him to pay costs. . . . The situation in the instant case clearly indicates that the adjudication was primarily for the benefit of the entire trust, although as an incident thereof respondent and plaintiff both asserted rights which if recognized would have redounded to their sole benefit.

"A similar rule is applied in the analogous situation where there is a necessity for the judicial construction of ambiguous language used by a testator in his will. In Straw v. Trustees of East Maine Conference of Methodist Episcopal Church Societies, 67 Me. 493, 495, the court held:

" 'The costs of this suit, including counsel fees on both sides, are to be paid from the general assets of the estate; as having been occasioned by the want of care and precaution on the part of the testatrix herself.'

"This rule has been followed in many pior and subsequent cases.

"A reasonable allowance for counsel fees to be paid out of the trust corpus may be made to necessary parties to a proceeding for the construction of ambiguous trust provisions, regardless of whether their interests are promoted or defeated by the final result. Obviously, the necessary parties will have divergent views as to the legal effect of the trust instrument; otherwise there would be no need for a judicial construction. Under such circumstances, a bona fide clash of divergent views, coupled with the production of evidence and a presentation of oral and written argument pro and con, is of great value to any genuine adjudication and is of benefit to the entire trust, although the court may not completely adopt the views of any party. The value of counsel's services rendered in good faith is not to be measured in terms of the success or nonsuccess of any necessary party."

903. *In re* Blankenship's Estate, 136 So. 2d 21 (2d D.C.A. Fla. 1961). The court in that case seems to have overlooked the stakeholder position of the personal representative when it stated:

"The record in this case establishes the fact that there was a most difficult legal question involved in the litigation, and all parties concede that there is no question here concerning the good faith nor ability of the attorneys. Their employment was not on a contingent fee basis. There appears in the record the uncontroverted statement of the attorney for the executor to the effect that neither the executor nor his attorneys withdrew from the matter, but because they considered the attorneys for the charitable devisees able counsel, the executor and his attorneys did not attempt to duplicate the services. The legal services rendered by the attorneys for the charitable devisees produced no benefit to the estate and they were not necessary because of the failure of the personal representative to perform his duties, and, therefore, the attorneys are not entitled to payment of their fees from the assets of this estate."

Compare *In re* McCune's Estate, 223 So. 2d 787 (4th D.C.A. Fla. 1969), where a beneficiary was successful in validating certain bequests of income to individuals. As a result, a large additional estate tax was incurred by the estate. In allowing the beneficiary's attorney's fees to be paid from the estate, the court said: "The validating of the bequest rights was carrying out the testator's intent. This is decidedly rendering service to an estate regardless of how the tax assessment falls." *Id.* at 789.

representative on his accounting, or to revoke the probate of the will under which the personal representative is acting.[904] In such cases, the beneficiary or other person who retains an attorney should not be obligated to proceed at his own expense, nor should his rights against the estate be determined solely by his success or failure in the litigation. The probate court should be given power to award attorney's fees from the estate where the attorney's services were necessary for its proper administration. While not capable of automatic application, this test is preferable to the current tests, embodied in the ambiguous phrase "has rendered services to an estate."[905] This phrase is susceptible of various interpretations,[906] including the interpretation that the services must financially benefit the estate by enhancing its value.[907] Such an interpretation would automatically preclude an award for services in a will construction proceeding, although statutes in at least three states have made awards in such proceedings available to attorneys for *all* parties.[908] Therefore, it would seem highly desirable to include in the 1974 Code a revised version of the existing statute,[909] which, to avoid misinterpretation, should also contain a statement of legislative recognition of the need for the services of additional attorneys in will construction proceedings.[910]

FOREIGN PERSONAL REPRESENTATIVES AND ANCILLARY ADMINISTRATION

In the beginning of this article, it was noted that the administration of estates of decedents with property in two or more states – the so-called "multi-

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904. *In re* Estate of Whitehead, 287 So. 2d 9 (Fla. 1973); *In re* Estate of MacPhee, 216 So. 2d 489 (2d D.C.A. Fla. 1968).

905. FLA. STAT. §734.01(2) (1973).

906. *Compare In re* Blankenship's Estate, 136 So. 2d 21 (2d D.C.A. Fla. 1961), *with In re* McCune's Estate, 223 So. 2d 787 (4th D.C.A. Fla. 1969). *See also* Watts v. Newport, 149 Fla. 181, 23 So. 2d 485 (1945), where, after quoting what is now FLA. STAT. §734.01(2) (1973), the court stated: "This seems to be a declaration of the equitable principle that an attorney who had been employed to obtain or create a fund for the joint benefit of all parties or whose efforts have enhanced the value of or resulted in preserving such a fund may if successful in his efforts have the right to be compensated from the fund for his services. Lewis, as Executor, etc. et al. v. Gaillard, 70 Fla. 172, 69 So. 797. And in order for attorneys to recover under this Section the services rendered must have benefited the estate." *Id.* at 487.

907. *See* Watts v. Newport, 149 Fla. 181, 23 So. 2d 485 (1945); *In re* Blankenship's Estate, 136 So. 2d 21 (2d D.C.A. Fla. 1961).

908. CONN. GEN. STAT. ANN. §52-251 (1958); MASS. GEN. LAWS, ch. 215, §39B (1951); N.Y. CIV. PRAC. LAW §8303 (McKinney 1963). The Connecticut statute reads: "In any action brought to a court of equitable jurisdiction for the construction of a will or for the advice of the court as to the administration of an estate or trust under a will or trust instrument, by any person acting in a fiduciary capacity thereunder, there shall be allowed *to each of the parties* to such proceeding such reasonable sum for expenses and counsel fees as such court, in its discretion, deems equitable; which allowance shall be taxed as costs in the cause, to be paid out of such estate." (emphasis added).

909. The revision could begin:

The attorney for the personal representative or any attorney who has rendered services that were necessary for the proper administration of the estate may apply, etc.

910. See note 908 *supra*.

state estates"[911] or "multiple-state estates"[912] — illustrates the parochialism of the American probate laws and constitutes a main area of criticism of such laws.[913] In response to this criticism, article IV of the UPC attempts to simplify the handling of assets outside the domiciliary jurisdiction, to unify administration by avoiding separate personal representatives, and to centralize all of the problems in the domiciliary administration.[914] Its draftsmen recognized, however, that the UPC does not eliminate all of the complexities of such administration.[915] Although the problems of multi-state estates are of great importance in Florida because of its large number of retirement residents, any detailed comparison of the UPC and the 1974 Code provisions would involve revisiting many of the provisions previously discussed[916] and is unwarranted in this article. Nevertheless, the major similarities and differences deserve mention in order to evaluate any charge of undue parochialism in the 1974 Code.

Powers of Foreign Personal Representative

The 1974 Code continues existing law that allows foreign personal representatives to perform several activities without instituting ancillary administration. Foreign personal representatives are allowed (1) to maintain actions in the Florida courts, (2) to be sued in this state in actions concerning Florida property, (3) to defend any such actions, and (4) if no demand has been made by a local personal representative or curator within sixty days of the foreign personal representative's appointment, to receive payment of debts due the decedent, or delivery of personal property belonging to the estate, from local debtors and persons in possession of the decedent's property.[917] These provisions are in accord with the UPC;[918] in fact, they seem to be a prototype for the UPC provisions.[919] It should be noted, however, that under the UPC, local creditors can require local administration by notifying a local debtor or person in possession of personal property not to pay the debt or deliver the property to the domiciliary foreign personal representative.[920] This is less clear under the 1974 Code, which speaks only of a "written demand . . . from a personal representative or curator appointed in this state."[921] Adoption of the UPC provision would have a desirable clarifying effect and would remove from the

911. Wellman, *How the Uniform Probate Code Deals with Estates That Cross State Lines*, 5 REAL PROP. PROB. & TR. J. 159 (1970).

912. Vestal, *Multiple-State Estates Under the Uniform Probate Code*, 27 WASH. & LEE L. REV. 70 (1970).

913. See text accompanying note 12 *supra* (part I).

914. Vestal, *supra* note 912, at 90.

915. Wellman, *supra* note 911, at 166.

916. "Approximately 50 of the 301 sections of the Uniform Probate Code contain language having a direct bearing on multi-state estates." Wellman, *supra* note 911, at 159. *See also* UPC, art. IV, General Comment.

917. *Compare* FPC §734.101 (1974), *with* FLA. STAT. §734.30 (1973). The 60-days provision of the 1974 Code is a change from the three-months limitation of existing law.

918. UPC §§4-201, -204, -206.

919. Vestal, *supra* note 912, at 75-76.

920. UPC §4-203.

921. FPC §§734.101(3), (4) (1974).

local creditor the burden of instituting ancillary proceedings within 60 days of the appointment of the foreign personal representative in order to preserve local assets for payment of his claim.

As under existing law, ancillary administration is avoided if the foreign personal representative files a certified transcript of the domiciliary proceeding with the circuit court and thereafter publishes a notice to creditors. By following this procedure, he may process any claims filed in the same manner as a local personal representative.[922] This, of course, adds somewhat to the cost of over-all administration and is not in accord with the UPC, which would bar Florida creditors by the nonclaim proceedings at the domicile.[923]

A further deviation from the UPC involves the disposition of real property situated in this state that is devised by a nonresident decedent. If the domiciliary personal representative is able to collect any personal property of the estate in the manner just discussed, and the interested parties do not desire an immediate transfer of title to the real property, nor a reduction in the period for creditors' claims,[924] they may wait until three years after the death of the decedent, or perhaps until "any time after the domiciliary personal representative has been discharged."[925] They may then file a duly certified copy of the will and its domiciliary probate. If the will conforms to Florida law regarding execution, it may be admitted to probate and, when so admitted, is effective to pass title to real property in the state.[926]

There is one final difference between the UPC and the 1974 Code, that, unlike the others, may support a charge of undue parochialism on the part of the legislature. Under the UPC, a domiciliary foreign personal representative who has filed copies of his appointment is granted all the powers of a local personal representative.[927] The 1974 Code rejects this and, as in existing law, grants such powers only to a duly appointed ancillary personal representative.[928]

Jurisdiction Over Foreign Personal Representatives

A section of the 1974 Code, substantially adopted from the UPC,[929] provides that the foreign personal representative submits personally to the jurisdiction of the "courts of this state" if he either elects to use the claims procedure just described[930] or receives money or personal property from Florida debtors

922. *Compare* FPC §734.103 (1974), *with* FLA. STAT. §§734.29(2)-(5) (1973).

923. UPC §3-803(a)(1).

924. The three-year statute of limitations may be reduced only upon the publication of the notice to creditors. FPC 733.702(1) (1974). See text accompanying notes 747-756 *supra.*

925. FPC §734.104(1) (1974). The quoted language indicates that the will could be filed within three years of death if the domiciliary personal representative has been discharged. It seems unlikely that this is the intent of the statute, because claims of creditors against unadministered estates are not barred until three years after the decedent's death. FPC §733.108 (1974).

926. FPC §734.104 (1974). This is essentially a modified version of FLA. STAT. §736.06 (1973).

927. UPC §4-205.

928. FPC §734.102(6) (1974).

929. UPC §4-301.

930. See text accompanying notes 922-923 *supra.*

or holders of the decedent's property.[931] In the latter case, the UPC would limit jurisdiction to "the money or the value of personal property collected."[932] The 1974 Code omits this limitation,[933] thereby converting the *quasi in rem* jurisdiction envisioned by the UPC into a much broader *in personam* jurisdiction. Jurisdiction "over the person" is also achieved if the personal representative does "any act as a personal representative in this state that would have given the state jurisdiction over him as an individual."[934]

In each of these provisions, the question of whether a foreign personal representative is subject to the jurisdiction of the Florida courts is determined by his own actions. No choice is permitted, however, by another section of the 1974 Code that purports to subject the foreign personal representative to the jurisdiction of "the courts of this state" to the same extent that the decedent was subject immediately before his death.[935] Sections of the UPC complementing this section[936] have been omitted from the 1974 Code, possibly because their content was considered covered by the Florida "long-arm" statutes.[937] The interrelationship of these statutes and the 1974 Code provision requires much greater analysis than can be given in this article.[938] It may be noted, however, that the phrase "the courts of this state" is considered by the UPC draftsmen to include a federal court having jurisdiction in Florida.[939]

Ancillary Administration

In addition to continuing existing law concerning the powers of the ancillary personal representative,[940] the 1974 Code clarifies the order of preference of appointment and permits the court to order the ancillary personal representative to distribute the property directly to the heirs or devisees rather than merely directing that the property be transferred to the domiciliary personal representative. The clearly stated order of preference for appointment[941] is a desirable change because it eliminates the possibility of future litigation such as that of *In re Jose's Estate*.[942] Less desirable is the continued limitation that the preferred person can only be appointed "if qualified to act in Flor-

931. FPC §734.201 (1974). See text accompanying notes 917-921 *supra*.
932. UPC §4-301.
933. *Compare* UPC §4-301, *with* FPC §734.201(2) (1974).
934. FPC §734.201(3) (1974).
935. FPC §734.202 (1974).
936. UPC §§3-703(c), 4-303.
937. FLA. STAT. §§48.171-.193 (1973).
938. *See generally* Note, *In Personam Jurisdiction—Due Process and Florida's Short "Long-Arm,"* 23 U. FLA. L. REV. 336 (1971).
939. UPC §4-301, Comment.
940. See text accompanying notes 927-928 *supra*.
941. FPC §734.102(1) (1974). *See* FLA. STAT. §734.31(1) (1973).
942. 164 So. 2d 888 (2d D.C.A. Fla. 1964). The primary executors named in the will were disqualified to act, but the alternatively named executors met the Florida requirements. The widow claimed priority because §734.31(1) provided that if the domiciliary personal representative were not qualified to act "the preference of appointment prescribed in this law shall be applicable." The court rejected the contention as "plausible but not tenable." *Id.* at 890.

ida."[943] This is a requirement of the law of many states[944] that is frequently criticized but tenaciously retained. An expose of the underlying conflicts involved in the appointment of nonresidents as either ancillary or primary personal representatives is found in a recent opinion of a New York Surrogate and the response it elicited.[945]

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943. FPC §734.102(1) (1974).

944. *See Ancillary Administration and the Uniform Probate Code,* 4 REAL PROP. PROB. & TR. J. 242, 244-45 (1969).

945. Estate of Harrison, N.Y.L.J., Dec. 20, 1974 (not yet otherwise reported). The opinion is of sufficient interest to reproduce in its entirety:

"ESTATE OF ESTELLE F. HARRISON, deceased.—In this proceeding to judicially settle the account of ancillary executors of a decedent who died a resident of Florida, all issues have been disposed of by previous decision, except the fee of the attorney for the executor. This fee is fixed and allowed in the amount requested.

"The court is constrained in comment upon the unfortunate fact pattern present in this matter as a result of the laws of the State of Florida. Decedent was a woman of mature years. She had resided for most of her life in the State of New York. At the time of her death, the bulk of her estate was located in New York, although decedent herself had become a resident of the State of Florida.

"Decedent's last will and testament which was executed on October 19, 1967 clearly reflects an intent to have her husband, her attorney and her accountant all act as primary co-executors of her estate to the maximum extent possible under the applicable laws of each jurisdiction which would be involved in the administration of her estate.

"As indicated in an earlier decision rendered with reference to this estate, this court would have entertained an application for original probate pursuant to SCPA 1605, if the proponent had chosen to so proceed (Matter of Harrison, N.Y.L.J. June 12, 1974, p. 19, col. 2-33.

"It appears that the decedent's relationship with both her attorney and her accountant was one of long standing and represented the type of trusted relationship upon which people normally seek to depend for the administration of their estates. The duties of an executor do not involve the practice of any profession that is ordinarily subject to state licensing provisions. It is a personal responsibility which individuals confer on those they trust without regard to any fixed professional training. The only disqualification to serve as executors under the Florida statute imposed upon the attorney and the accountant is their lack of residence in that State, coupled with their lack of required blood relationship to the decedent. The injustice of this restriction to executors who are neither related to a decedent or residents of Florida is exceeded by the inequitable restriction it imposes upon residents of Florida.

"The right to choose one's own executors represents a fundamental property right of a competent adult having testamentary capacity. There is no logical basis for imposing upon a party seeking to become a resident of the State of Florida a forfeiture of their freedom of choice in naming an executor as a pre-condition to residence. It is difficult to distinguish the right of a party to do business with whom they choose in their lifetime from their right to designate the same parties to handle their affairs after death. In the instant matter the desire of the decedent to circumvent the statutory restriction placed upon her in selecting her executors resulted in burdening her will with circuitous provisions otherwise unnecessary which rendered the administration of her estate unduly complex.

"At best, the Florida statute is inequitable. It is the opinion of this court that the residency restrictions it places upon its citizens in naming executors is not only inequitable but is offensive to the spirit and letter of the U.S. Constitution. The Supreme Court of the United States has looked with disfavor upon states imposing preconditions to residency that constitute a restriction on the free movement of parties from state to state. In Sugarman v. Dougall (413 U.S. 634), the court held prohibitions against aliens holding competitive civil service jobs to be constitutionally offensive. It is difficult to conceive that prohibiting an alien from taking a competitive civil service examination is constitutionally offensive and

The change permitting the court to direct the ancillary personal representative to distribute the property in his hands directly to the heirs or distributees[946] seems fully justified as a means of expediting distribution and reducing the costs of duplicate administration.[947] It could result, however, in cutting off domiciliary creditors in the rare situation where the domiciliary estate is insufficient to meet such claims. Clearly the court should not exercise its new discretion to accomplish a result so undesirable.

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prohibiting a non-resident from serving as an executor would not also be unconstitutional.

"In Shapiro v. Thomson (394 U.S. 618), in striking down state residency requirements with reference to receiving welfare benefits, the court stated at page 630, 631:

" 'We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision. It suffices that, as Mr. Justice Stewart said for the Court in United States v. Guest, 393 U.S. 745, 757-758 (1966):

" 'The constitutional right to travel from one state to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.

" '. . . The right finds no explicit mention in the Constitution. The reason it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.'

"The understandable desire of the State of Florida to promote its economy by insuring the maximum of business for both its banking institutions and attorneys should not be enhanced by interference with the right of new residents who migrate to seek the benefit of its gentle climate to select the executors of their choice. It is hoped that legislative wisdom will correct these unfortunate restrictions without the necessity for some estate to assume the burden of a search for judicial relief that may extend from the courts of Florida into our Federal system. Decree signed. Surrogate Gelfand"

The desire to "insure the maximum business for . . . banking institutions and attorneys" is not limited to Florida, however, as illustrated in the following letter to the editor elicited by the opinion:

"TO THE EDITOR:

"My compliments to Surrogate Bertram R. Gelfand of Bronx County for his opinion in the matter of Estate of Estelle F. Harrison (N.Y.L.J. Dec. 20).

"His criticism of the Florida statute which makes it impossible for any nonresidents there, even a close relative, to act as a fiduciary of Florida estates is more than justified.

"I would like to call attention to the Surrogate's note that he would have entertained application for original probate pursuant to SCPA section 1605 if the proponent had chosen so to proceed.

"Being painfully aware of the Florida statutes for some years, we have made it a practice to arrange for clients, who migrated to the south to retain one bank account in New York. On that basis we have not had any difficulty in probating wills here.

"I need not point out that where an attorney, a resident of New York, is named executor, this procedure results in his not losing out either as executor or as attorney for the estate."

Harry N. Newman
New York, N.Y.

(N.Y.L.J. Dec. 30, 1974).

946. FPC §734.102(5) (1974).

947. It can also be viewed as a new move in the conflict described in note 945 *supra*.

ALTERNATIVES TO REGULAR ADMINISTRATION

Under existing law, the only alternatives to regular administration are the special procedures governing small estates[948] and administration unnecessary.[949] Because of their limited applicability, however, these procedures have done little to assuage the demand for reducing the costs and delays of regular administration. Although they rejected the UPC's "flexible system of administration" – which does offer interested parties a way of reducing such costs and delays – the draftsmen of the 1974 Code seem to have felt compelled to make obeisance to the concept. This was done by introducing a new concept of "family administration,"[950] and modifying the administration unnecessary provisions of existing law, which are continued under a new title, "summary administration."[951] In addition, they included an existing procedure for dispensing with administration in estates that contain only homestead, exempt property, and additional property sufficient to meet the preferred claims for funeral expenses and expenses of the last illness.[952] Each of these alternatives will be examined separately to determine the extent to which they meet the demand for reducting the costs and delays of regular administration.

Family Administration

If the value of a decedent's estate, exclusive of income, is less than $60,000,[953] and the will, if any, does not direct regular administration,[954] then family administration is available where the only heirs or beneficiaries of the estate are the surviving spouse or lineal descendants, or both.[955] If these requirements are met, the personal representative is not required to file annual accountings or file a copy of the inventory in court (provided a copy has been furnished to all beneficiaries who have requested it); nor is he required to comply with any other procedural duties that may be dispensed with by the court.[956] Otherwise, the personal representative is to proceed as he would in regular administration.[957]

Apparently, the $60,000 limitation was chosen because estates under that amount are not required to file a federal estate tax return[958] and the draftsmen of the Code had the entirely justifiable belief that if a federal estate tax return must be filed, little can be done to expedite the final settlement of the estate.[959]

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948. FLA. STAT. §§735.01-.03 (1973).
949. FLA. STAT. §§735.04-.12 (1973).
950. FPC §§735.101-.106 (1974).
951. FPC §§735.201-.209 (1974).
952. FPC §735.301 (1974).
953. FPC §735.103(2) (1974).
954. FPC §735.103(3) (1974).
955. FPC §§735.101, .103(1) (1974). The personal representative may elect, however, to administer in the same manner as other estates, FPC §735.102. Moreover, any interested person may petition the court to require administration, FPC §735.106.
956. FPC §735.104 (1974).
957. FPC §735.105 (1974).
958. INT. REV. CODE OF 1954, §6018(a).
959. The return must be filed within nine months of the decedent's date of death. INT.

If this is the reason, the limitation should be phrased in terms of the gross estate for federal estate tax purposes, rather than merely "the value of the estate exclusive of income."[960] "Estate" is defined by the 1974 Code as "property . . . subject to administration";[961] this definition does not include homestead property,[962] insurance payable to named beneficiaries,[963] property passing to a surviving joint tenant or by the entireties, or inter vivos transfers that the decedent may have made – yet all of these items may be part of the gross estate for tax purposes.[964]

The limitation of family administration to estates in which only the surviving spouse and lineal descendants share, appears to be based upon the premise that these members of a decedent's immediate family are more likely to be a small group having common objectives in the estate.[965] On this basis it would be desirable to include the decedent's parents in the permitted class; they would not share in an intestate estate,[966] but might well be included in the decedent's will. It seems unfortunate to eliminate the estate from family administration merely because the parents of the decedent are to share in the estate. For similar reasons, the statute should also be amended to allow small testamentary provisions for friends and long-time employees.

The above discussion assumes that a system of family administration can be developed to offer greater benefits than those presently offered. It seems unlikely that the new concept will be frequently used as it stands at present. A small gift to a parent, friend, or servant automatically prevents its use, and even when available, the incentives to use it are slight. Nowhere in the 1974 Code is there a requirement that any personal representative file an annual accounting and, even if such a requirement is continued in the Rules,[967] the preparation of an annual accounting in an estate of less than $60,000 is hardly burdensome. Moreover, even though an inventory need not be filed with the court, the personal representative must prepare one for his own protection, and to enable him to furnish a copy to any beneficiary who may request it. Finally, while the court may dispense with other procedural duties,[968] it seems unlikely that most courts will be willing to waive the truly expensive and delaying procedures, such as the notice to creditors or the final accounting.

REV. CODE OF 1954, §6075. The Service then generally has three years to review the return and assess any deficiency. INT. REV. CODE OF 1954, §6501(a). Only after the Service has had time to audit the return and is satisfied the full tax has been paid will it grant a general certificate of release. INT. REV. CODE OF 1954, §6325.

960. FPC §735.103(2) (1974).

961. FPC §731.201(9) (1974).

962. FPC §732.401 (1974); Spitzer v. Branning, 135 Fla. 49, 184 So. 770 (1938).

963. FLA. STAT. §22.13 (1973).

964. INT. REV. CODE OF 1954, §§2035-42.

965. Of the 74 cases in the Cleveland wills study in which the spouse and lineal descendants or ascendants were the surviviors, the surviving spouse received all of the estate or at least more than her intestate share in 57, "most often because others who had claims to the estate signed over their shares." M. SUSSMAN, J. CATES & D. SMITH, *supra* note 629, at 126.

966. See text accompanying note 57 *supra* (part I).

967. PGR 5.310 (1972).

968. FPC §735.104(3) (1973).

On the other hand, the concept of family administration contains the germ of an idea that could go far toward meeting the public's demand for expeditious administration. If the legislature seriously wishes to meet this demand, it could do so by continuing the present conditions, with the modifications previously suggested, and where such conditions are met, allowing the parties to proceed as in summary administration[969] to settle the estate immediately.

Summary Administration

As previously noted,[970] this is the old wine of administration unnecessary in a new bottle; unfortunately, in making the transfer, much of the body has been lost. The existing statute has received differing interpretations by courts dealing with difficult fact situations,[971] but it does set forth a comprehensive statement of legislative intent concerning how the order is obtained, its effect, and the remedies of parties who may be aggrieved by its issuance.[972] Regrettably, the 1974 Code[973] blurs this intent by omissions that leave the Code much

969. See note 972 and text accompanying notes 975-980 *infra*.

970. See text accompanying note 951 *supra*.

971. *Compare* Laramore v. Laramore, 49 So. 2d 517 (Fla. 1950), *with In re* Estate of Bernard, 183 So. 2d 715 (1st D.C.A. Fla. 1966), [*and*] Mudarri v. Gillespie, 226 So. 2d 808 (Fla. 1969).

972. Existing law may be summarized as follows: Administration unnecssary may be granted if the estate (1) consists entirely of property exempt from creditors (§735.04(1)); or (2) is an estate that is not indebted and does not exceed $10,000 in value, exclusive of exempt property, and the parties entitled to it agree upon its disposition (§735.04(2)); or (3) is an estate of any size where the decedent has been dead three years and no letters have been issued or the will probated either in this state or elsewhere, and the parties entitled to the estate agree upon its disposition (§735.04(3)). In this third instance creditors have been barred by lapse of time. FLA. STAT. §733.211 (1973). The petition must disclose these facts, as well as a detailed schedule of all the decedent's property, the cash value of each item and a statement of the agreed distribution among the takers (§735.05). After a hearing, if the judge is satisfied that the estate is entitled to the special benefits of this law, he may enter an order that administration is unnecessary and, in the order, direct what particular properties shall be distributed to each taker (§§735.07(2)(b), (3)(b)). The legal effect of the order is to give each person to whom specified items of the estate have been assigned the right to receive and collect such items (§735.09(1)) and to authorize debtors and those holding property of the decedent to pay or deliver the specified items to the assignee, providing that they "shall not be accountable to anyone else for such property" (§735.09(2)). Bona fide purchasers for value from the assignee take the items assigned him free and clear of all claims (§735.09(3)), but items remaining in his hands continue to be liable for claims (735.09(4)). Each assignee becomes jointly and severally liable for all claims up to the aggregate gross value of the estate, exclusive of exempt property (§735.09(5)), for three years after the death of the decedent (§735.09(6)). Should a claimant appear during the three year period, his only remedy (§735.09(7)) is to impress a trust upon the nonexempt property remaining in the hands of the assignees and to require the assignees to account for the value of any items not still in their hands (§735.11(1)). If one or more of the assignees desires to shorten the time during which he remains liable for claims, he may publish a notice of the entry of the order, thereby barring all claims after six months from the first publication of the notice (§735.10). Finally, any heir, legatee, or devisee lawfully entitled to share in the estate, who was excluded by the order, "may enforce his rights against those who procured such order in the manner hereinabove presecribed for creditors and claimants" (§735.11(3)).

973. FPC §§735.201-.209 (1974).

too vague. Detailed analysis of the effect of these omissions requires a criss-crossing of sections of the old and new statutes that is in itself confusing; it is set forth in a footnote for readers sufficiently interested to pursue it.[974] What is clear is that the entire part of the new statute concerning summary administration needs revising to make it a viable procedure. This could be done by developing a new method for handling these estates or by returning to the more clearly delineated structure of existing law. The authors suggest the latter approach with two modifications: the optional notice of entry of the order should not be continued,[975] and the omitted heir or devisee should be given a separate remedy and not be required to enforce his rights "in the manner prescribed for creditors."[976]

The first modification is suggested because it seems undesirable and unnecessary to encumber summary administration with an optional procedure to bar creditors.[977] Since such creditors rarely appear,[978] setting up the separate procedure needed for processing their claims[979] seems unjustified. If the takers desire early protection, they should be required to proceed under regular administration until claims of creditors are barred and then petition for sum-

974. Section 735.206 authorizes the entry of an order of summary administration "allowing disbursement and distribution of the assets to the persons entitled to them." There is no provision similar to FLA. STAT. §735.07(2)(b), (3)(b) (1973) requiring the order to state the particular items to be distributed to each taker. Neither does §735.203(2) require the petition to include any statement of agreed distribution, as does FLA. STAT. §735.05(1) (1973). Yet §735.207(1) provides that only "[t]hose to whom specified parts of the decedent's estate are assigned by the order shall be entitled to receive and collect the parts . . . ." and §735.207(2) authorizes debtors and those holding property of the decedent to pay or transfer only "to those specified in the order the parts . . . assigned to them by the order . . . ."

The omission of FLA. STAT. §§735.09(7), .11(1), (2) (1973) leaves no form of remedy prescribed for either creditors or omitted heirs or devisees. Section 735.207(7) speaks of the omitted heir or devisee enforcing his rights "in the manner prescribed for creditors," but no manner is prescribed. Section 735.207(5) seems to contemplate a suit by the creditor against one or more of the petitioners for the order, but §735.208(2) seems to indicate that claims should be filed in the manner prescribed by §§733.702, .703. In such a case, it is not clear to whom the clerk must deliver copies of the claims — to all of the petitioners or only to one of them. If the claim is not admitted to be valid, there is no provision for processing the claim — that is, objection and ultimate suit by the claimant. A mere reference to §733.705 would not be satisfactory, because there is no personal representative to be sued. Nor does §735.208 provide a time period after which unfiled claims are forever barred. Presumably the intention would be to allow four months after the first publication of the notice of entry of the order, as is provided in FLA. STAT. §735.10 (1973) but §§733.702, .703 refer to four months after the publication of the notice of administration and in summary administration there is no notice of administration.

The intent of §735.208(2) is to bar claims of heirs and devisees as well as creditors, but the bar against them would be based on §733.210(3) and the requirement that they file their objections as stipulated in §733.210(1)(b). In other words, the reference to §§733.702, .703 is not appropriate for the claims of excluded heirs or devisees.

975. Only one case has been found in which the optional notice was used and in that instance it was held ineffective. *In re* Bernard's Estate, 183 So. 2d 715 (Fla. 1966).

976. FPC §735.207(7) (1974); FLA. STAT. §735.11(3) (1973).

977. FPC §735.208 (1974); FLA. STAT. §735.10 (1973).

978. See note 975 *supra*.

979. See note 974 *supra*.

mary administration, a procedure allowed by both the old and the new law.[980]

The second modification is called for because the position of a creditor is quite distinct from that of an heir or devisee. Quite correctly, the creditor is given no right against exempt property,[981] but the heir or devisee may well have a proper interest in sharing in such property. An appropriate remedy for him, therefore, might be quite different from that prescribed for creditors.

Disposition of Personal Property Without Administration

As a third alternative to regular administration, chapter 735 of the 1974 Code adopts one section directly from existing law,[982] and a second that is essentially new,[983] although it encompasses the situation under the existing administration unnecessary statute where the entire estate is exempt from the claims of creditors.[984] The latter section allows the court to authorize the transfer of personal property of the decedent to the successors without administration or an order of summary administration.[985] Such authority is limited, however, to estates consisting only of personal property whose entire value, less liens and encumbrances, does not exceed homestead property,[986] exempt property, and the preferred funeral expenses and expenses of the last illness.[987]

This procedure has been utilized to a limited extent without specific statutory authority. Its statutory recognition by the 1974 Code could constitute one of the major reforms in the probate law of Florida. Because its availability and procedures are little known, the authors are grateful for the permission of the Honorable Frank B. Dowling, senior probate judge of Dade County, to include as a footnote his clear and comprehensive statement of the history and procedures of the section, made before the Florida Conference of Circuit Court Clerks on February 26, 1975.[988]

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980. FPC §735.205 (1974); FLA. STAT. §735.051 (1973).

981. FPC §735.207(5) (1974); FLA. STAT. §735.09(5) (1973).

982. *Compare* FPC §735.302 (1974), *with* FLA. STAT. §735.14 (1973).

983. FPC §735.301 (1974).

984. FLA. STAT. §735.04(1) (1973).

985. The authorization must be made "by letter or other writing under the seal of the court." FPC §735.301(2) (1974).

986. The reference to homestead property may be confusing because, if homestead is a part of the estate, the decedent could never die "leaving only personal property." However, since "estate" is defined as "property . . . subject to administration" (see text accompanying notes 961-962 *supra*) the existence of the homestead should not preclude use of the procedure allowed by this section. It might, however, enlarge its use beyond that intended because it can be argued that the value of personal property that can be disposed of without administration is to be measured by the value of the homestead, the exempt property, and the preferred funeral expenses and expenses of the last illness.

987. FPC §735.301(1) (1974). For discussion of the preferences of funeral expenses and expenses of the last illness, see text accompanying notes 782-793 *supra*.

988. Address by Honorable Frank B. Dowling, senior probate judge of Dade County, Florida, before the Florida Conference of Circuit Court Clerks, Feb. 26, 1975.

DISPOSITION OF PERSONAL PROPERTY WITHOUT ADMINISTRATION: SMALL ESTATES
DEPARTMENT OF THE PROBATE DIVISION OF THE CIRCUIT COURT

"*History.* Before the consolidation of the courts of Florida under Article V of the Constitution which became effective January 1, 1973, the administration of decedents estates was

handled exclusively in the County Judge's Court. Over 30 years ago the County Judge's Court in Dade County created a Small Estates Department and a clerk of the court was given the specific duty of interviewing persons coming to the court seeking assistance in releasing a small bank account, transferring stock certificates, and disposing of other tangible and intangible assets of a deceased person where the aggregate value of the estate was so small that formal administrative procedures were impractical and burdensome from the cost standpoint. This practice of handling these very small estates has been continued in Dade County since the consolidation of the courts and is a very important function of the Probate Division of the Circuit Court in Dade County.

"During all these years there has been no specific statutory authority for the procedures that we have followed in disposing of these small estates and many judges have refused to adopt procedures followed by the Dade County court because of a lack of Florida law specifically authorizing such procedures. Over the years thousands of decedents estates have been closed in Dade County by a simple letter from the Judge addressed to a bank, a savings and loan association, the transfer agent of a corporation, and other like entities. I have no knowledge that there has ever been an instance where a complaint has been made by any one that he was harmed by the procedure. In fact, many complimentary letters have been received from people who were given immediate relief by this simple procedure. In order that this procedure may be specifically authorized for all of the circuit courts in the handling of probate matters, Section 735.301 of the new Florida Probate Code was enacted in 1974.

"*Procedure.* The purpose of this procedure is to give immediate relief to the family or friends of the decedent in securing the turnover to those entitled to the same of personal property, tangible and intangible, of a decedent where the amount involved does not justify formal proceedings. We know that the law provides an exemption of $1,000 to the widow and heirs of a decedent free from the decedent's debts (FLA. CONST. article X, §4). Statutory law of Florida makes the funeral expense of a decedent a preferred claim against his estate to the extent of $1,500 and further provides that medical and nursing care or maintenance of a decedent during his last 60 days shall be a preferred claim against his estate. The exemption and preferred claims are the framework within which the Small Estates Department operates. Rarely will there be an instance where the Department will be handling or involved in matters exceeding $2,500 in total value. Generally, the amount involved will be less than $1,000; it would be unconscionable to require the services of an attorney and to pay court costs of $25 or $60 in order to obtain the release and transfer of such a small estate.

"The usual situation that calls for the handling by the Small Estates Department is as follows: The surviving spouse or a member of the family, or a close friend of the decedent, will come to the court seeking help in releasing a small bank account. Generally, he has already gone to the bank and the bank has referred him to the court for help. The person in the Small Estates Department designated to handle these matters will interview the person. This is an intensive interview to determine if the estate comes within the scope of the small estate idea and the purpose of the department is explained to him at that time. The applicant is questioned as to all of the assets of the decedent of every nature. If real estate is involved, he is told immediately that he must have formal proceedings and the department can be of no assistance to him. If the interview discloses that the only assets involved are tangible or intangible assets within the exempt and preferred claims limitations, then full information as to the location, number of the bank account, the specific identity of stock certificates, the payroll check, personal property held by the police department and hospital, and other like matters, are noted. The death certificate is required to be exhibited and the funeral bill must be presented, whether paid or unpaid.

"All information obtained from the applicant, such as the title of the bank accounts, amount of the same, is verified. Our office has a list of the officers in each bank or savings and loan institutions who will give the clerk the necessary information over the telephone. The banks, savings and loan associations, and credit unions have always been most cooperative. If funds are to be released to the surviving spouse or child of the deceased, a paid funeral bill must be presented. If someone other than a member of a family has paid the funeral bill and there is no known family, upon presentation of the paid funeral bill re-

imbursement will be authorized to that person. If the Welfare Department has buried the decedent, the funds will be released to the Welfare Department for the amount of their usual charge in that respect. In the absence of family or friends, often the funeral home itself applies to the court for a letter authorizing the bank to release the account to the funeral home in satisfaction of their account. Under these procedures, we can release small checking accounts, savings accounts, credit union accounts, patient accounts in nursing homes, payroll checks, stocks of corporations, and personal property held by various police departments or hospitals. Insurance policies can be paid to those entitled to the proceeds if no beneficiary is named or the beneficiary has died. Letters of authorization for the disposal of funds under this procedure have been honored by banks and savings and loan associations throughout the country and by transfer agents of corporations.

"When all information has been secured and verified and the amount involved comes within the framework of the amounts above mentioned, the clerk will prepare a letter addressed to the proper institution authorizing the institution to turn over the assets of the decedent to the proper person or institution entitled to them. This letter is presented to the Judge, who reviews the contents and if satisfied, signs it and the seal of the clerk of the court is affixed. The letter authorizes the release or transfer of the property; it does not order the institution to do so. This is not a mandatory proceeding. The letter is issued only in the event the court in its discretion feels that it should be. Attached to the letter is the paid funeral bill and such supporting documents as may be required in the particular situation.

"To release the funds represented by a check payable to the decedent's estate, a letter is written to the bank on which the check is drawn but mailed to the individual authorized to cash the same to be deposited as a collection item.

"Corporate stocks to be released or transferred go to the transfer agent by certified mail with the letter of authorization and the following:

> 'Stock certificate, certified copy of death certificate; stock transfer assignment with signature guaranteed by commercial bank or trust company; social security number of individual to receive the transfer; and affidavit of domicile.'

"The Small Estates Department, as above noted, handles no matters where real estate is involved. We can do nothing to assist with matters relating to government checks or savings bonds. With reference to social security benefits, we have a special application and order form that has been approved by Social Security in order that reimbursement of funeral expenses may be obtained from Social Security. Motor vehicles are transferred by the state when no probate is had through the Department of Motor Vehicles or the county tax agency. If the decedent was a nonresident of Florida, property must be held in this state for a period of 90 days after letters are issued or, if no probate elsewhere, 90 days after death.

"*Cost.* If the interview reveals only personal property and qualifies for this department, a charge of $2.50 for each letter necessary is collected. The Florida Statutes provide for the service charge by the Clerk of the Circuit Court of $2.00 plus 50¢ for the affixing of the seal. A receipt is written, receipted by the court cashier, and the original given to the applicant.

"*Closing.* Records of all of this are kept in the department. We use a plain legal size envelope with name of deceased, date of death, and type of information on the top. These envelopes hold copies of notes of all interviews and any correspondence pertaining to the handling of each transaction. They are filed in a cabinet alphabetically. When all property has been released, the envelope is marked "closed." Each year these files are purged of all envelopes and correspondence that are 3 years old, as creditors are barred in an estate after 3 years."

FRANK B. DOWLING
Circuit Judge — Probate Division

26 February 1975

CONCLUSION

Upon initial examination, the 1974 Code appears to be a substantial restructuring of the existing Florida probate laws. Further study, however, shows the effect of haste and inadequate study before probate reform was attempted.[989] Harried by the proponents of the UPC, impeded by the advocates of the status quo, and frustrated by the scope of its assignment,[990] the Study Commission produced, and the legislature passed, what can best be described as a "marriage of convenience" of existing law and the UPC. In terms of the objectives of the UPC,[991] comparatively little has been accomplished. Intestate succession under the Code better accords with the probable wishes of the average decedent,[992] and the increased values for exempt property and the family allowance better reflect an inflationary economy.[993] From a procedural standpoint, the paternalism evidenced by close court supervision of administration has been somewhat decreased.[994] In addition, the Code has accomplished some reduction in the cost and delay of administration.[995] Aside from these basic reforms, clarifications have been made in existing law that should reduce future litigation.[996]

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989. For example, compare the Florida approach to reform that is described in the text accompanying notes 7-9 *supra* (part I) with the five-year study that preceded the 1966 adoption of the NEW YORK ESTATE POWERS AND TRUST ACT. Ives, *The History and Organization of the Temporary State Commission on Estates,* 33 BROOKLYN L. REV. 407 (1967). The New York study was conducted by a fourteen-member commission (subsequently expanded to seventeen members), aided by a group of 30-40 research counsel. *Id.* at 408 n.3.

990. In creating the Study Commission, the legislature charged it as follows:

"(2) The commission shall study all facets of the Florida version of the uniform probate code (House Bill 997; Regular Session, 1973) with a view toward insuring that Florida's law provides an efficient and effective system governing the property and affairs of persons and decedents affected by the uniform probate code. The commission shall recommend such new legislation or amendments to House Bill 997 (Regular Session, 1973) as are needed to achieve that goal.

(3) As part of its work the commission shall review the laws of other states in areas covered by the uniform probate code, the changes in the uniform probate code as adopted or proposed by other states, and the reports of special committees of the American Bar Association and the Florida Bar. The commission shall obtain the views of the public and business and professional groups affected by the uniform probate code.

(4) The commission shall prepare and submit to the legislature and the governor, not later than February 1, 1974, a report which shall contain:

(a) Such proposals for change in legislation as are recommended by the commission;

(b) Analyses of, and comment on, other relevant reports and studies of the uniform probate code; and

(c) Review of, and recommendations of the current statutes and effectiveness of court administration and costs with regard to probate administration.

(5) The commission shall prepare and submit an interim report to the legislature not later than November 30, 1973.

Section 2. This act shall take effect July 1, 1973." Fla. Laws 1973, ch. 73-307.

991. See text accompanying notes 12-26 *supra* (part I).

992. See text accompanying notes 35-55 *supra* (part I).

993. See text accompanying notes 231-245 *supra* (part I).

994. For example, see text accompanying notes 444-446, 656-658, 797-801 *supra.*

995. For example, see text accompanying notes 520-522, 628-632 *supra.*

996. For example, see text accompanying notes 191-222 (part I), 940-942 *supra.*

The value of the 1974 Code, however, should not be judged solely by its limited successes. Viewed not as a final product, but as an interim "working paper," it stands as a valuable contribution to the cause of probate reform in Florida. It challenges the thesis that the UPC is a panacea for Florida's probate ills.[997] Certain modifications of existing law call attention to the need for change, although they are not in themselves successful in meeting particular needs.[998] Worthwhile innovations have been offered, but in some instances there is a failure to provide workable procedures to implement them.[999] In short, the 1974 Code focuses attention upon the necessity for further change and challenges those concerned — the bench, the bar, the public, (and commentators such as the authors) — to suggest further improvements. Through such attention and challenge the 1974 Code could produce true probate reform for Florida as the offspring of the "marriage of convenience."

997. For example, see text accompanying notes 251-255 (part I), 927-928 *supra*.
998. For example, see text accompanying notes 70-86 (part I), 490-500, 564-570 *supra*.
999. For example, see text accompanying notes 564-570, 953-969 *supra*.

APPENDIX B

THE 1974 FLORIDA PROBATE CODE: TITLES, SOURCES, AND ARTICLE REFERENCES

Note: Many procedural provisions have been omitted from the 1973 "source" statutes and there have been editorial changes made in almost all sections. These changes are not mentioned; when changes are noted (chgs.), they are believed to be substantive. Article references refer to both the text and footnotes accompanying the designated footnote numbers.

1974 Code Section	Title	Source	Article Reference
731.101	Short title	UPC §1-101; F.S. §731.01	nn. 8-10
731.102	Construction against implied repeal	UPC §1-105	
731.103	Evidence as to death or status	UPC §1-107	n. 384
731.104	Verification of documents	New	
731.201	General definitions	UPC §1-201 (chgs.)	nn. 45, 379, 523-524, 534-537, 552-553, 604, 764, 961
731.301	Notice; method and time; proof	UPC §1-401 (chgs.); *see* F.S. §732.09	nn. 413-418
731.302	Notice; waiver	UPC §1-402; *see* F.S. §732.09	n. 417
731.303	When parties bound by others	UPC §1-403 (chgs.);	nn. 417, 426-441
732.101	Intestate estate	UPC §2-101	n. 45
732.102	Share of spouse	UPC §2-102 (chgs.); *see* F.S. §731.23	nn. 45-55, 242-245
732.103	Share of other heirs	UPC §1-403 (chgs.) F.S. §731.23 (chgs.)	nn. 50-60, 79-80
732.104	Inheritance per stirpes	F.S. 731.25	nn. 42, 50
732.105	Half-blood	F.S. §731.24	nn. 44, 69, 218
732.106	Afterborn heirs	UPC §2-108 (chgs.)	nn. 311-315
732.107	Escheat	F.S. §731.33 (chgs.); *see* UPC §2-105	nn. 44, 61, 417
732.108	Adopted persons and persons born out of wedlock	UPC §2-109; *see* F.S. §§731.29, .30	nn. 70-96, 217-219, 283, 290, 292
732.109	Debts of decedent	UPC §2-111	nn. 189-190
732.110	Aliens	UPC §2-112; *see* F.S. §731.28	nn. 347-349
732.111	Dower and curtesy abolished	UPC §2-113	
732.201	Right to elective share	UPC §2-201 (chgs.); *see* F.S. §731.34	nn. 176, 246-263

1974 Code Section	Title	Source	Article Reference
732.202	Election to take elective shares	UPC §2-203; F.S. §731.35	nn. 176, 266-272
732.203	Preexisting right to dower	F.S. §731.35(4)	nn. 176, 257
732.204	Proceedings on the election	UPC §2-205(d) (chgs.)	nn. 176, 266-272, 417
732.301	Pretermitted spouse	F.S. §731.10; UPC §2-302	nn. 156, 163-167
732.302	Pretermitted children	F.S. §731.11 (chgs.); UPC §2-302	nn. 156, 163-168
732.401	Descent of homestead	F.S. §731.27	nn. 55, 227-230, 962
732.402	Exempt property	UPC §2-402 (chgs.); F.S. §731.36	nn. 55, 231-235, 243
732.403	Family allowance	UPC §2-403 (chgs.); *see* F.S. §733.20	nn. 55, 236-245, 279, 417
732.501	Who may make a will	UPC §2-501; *see* F.S. §731.04	n. 100
732.502(1)	Execution of wills	F.S. §§731.07(1), (2) (chgs.)	nn. 104, 107-135
732.502(2)		F.S. §731.07(3) (chgs.)	nn. 123-125
732.502(3)		F.S. §731.07(5)	nn. 113, 119
732.502(4)		F.S. §731.07(6)	
732.502(5)		F.S. §731.07(7)	n. 106
732.503	Self-proof of will	F.S. §731.071 (chgs.); UPC §2-504 (chgs.)	nn. 126-135
732.504(1)	Who may witness	UPC §2-505(a)	
732.504(2)		UPC §2-505(b) (chgs.)	n. 119
732.505	Revocation by writing	F.S. §§731.12, .13; *see* UPC §2-507(1)	nn. 154, 160
732.506	Revocation by Act	F.S. §731.14(1); *see* UPC §2-507(2)	nn. 155, 160
732.507	Effect of subsequent marriage, birth, or dissolution of marriage	F.S. §§731.14(2), .101; *see* UPC §2-508	nn. 156, 169-176
732.508	Revival by revocation	F.S. §731.15 (chgs.)	nn. 177-180
732.509	Revocation by codicil	F.S. §731.16	n. 177
732.510	Republication of wills by codicil	F.S. §731.17	n. 177
732.511	Republication of wills by reexecution	F.S. §731.18	n. 177

1974 Code Section	Title	Source	Article Reference
732.512	Incorporation by reference	UPC §2-510	nn. 136-140
732.513	Devises to trustees	F.S. §736.17; *see* UPC §2-511	nn. 143-144
732.514	Vesting of devises	F.S. §731.21	n. 356
732.515	Separate writing identifying devises of tangible property	UPC §2-513 (chgs.)	nn. 150-153
732.516	Devise of homestead	FLA. CONST. art. X, §4(c), *as amended,* F.S. §731.05	nn. 227-230
732.517	Penalty clause for contest	UPC §3-905 (chgs.)	nn. 307-309
732.601	Simultaneous death law	F.S. §736.05	nn. 181, 211, 316-322
732.602	Construction that will passes all property	UPC §2-604; *see* F.S. §731.05(2)	nn. 183, 212
732.603	Anti-lapse; deceased devisee; class gifts	UPC §2-605 (chgs.)	nn. 184-190
732.604	Failure of testamentary provision	UPC §2-606; *see* F.S. §731.20(2)	n. 185
732.605	Change in securities; accessions; nonademption	UPC §2-607 (chgs.)	nn. 191-198
732.606	Nonademption of specific devises in certain cases; sale by guardian of the property; unpaid proceeds of sale, condemnation, or insurance	UPC §2-608	nn. 197, 199-210
732.607	Exercise of power of appointment	UPC §2-610	n. 214
732.608	Construction of generic terms	UPC §2-611 (chgs.)	nn. 216-220, 283
732.609	Ademption by satisfaction	UPC §2-612	nn. 211, 323-337
732.610	Devises to be per stirpes	New	nn. 221-222
732.701(1)	Agreements concerning succession	F.S. §731.051	nn. 300-306
732.701(2)		UPC §2-701	nn. 300-306
732.702(1)	Waiver of right to elect and of other rights	UPC §2-204 (chgs.)	nn. 273-279
732.702(2), (3)		New	nn. 273-276
732.801	Disclaimer of interests in property passing by will or by intestate succession or under certain powers of appointment	F.S. §731.37	n. 350
732.802	Murderer	F.S. §731.31	nn. 292-299

1974 Code Section	Title	Source	Article Reference
732.803	Charitable devises	F.S. §731.19 (chgs.)	nn. 113, 280-286, 417
732.804	Provisions relating to cremation	New	nn. 338-346
732.901	Production of wills	F.S. §732.22	n. 417
732.1001-.1010	Anatomical gifts	F.S. §§736.21-.31	nn. 338-346
733.101	Venue of probate proceedings	F.S. §732.06 (chgs.)	nn. 389-398, 405-410
733.102	Vesting of devises	F.S. §731.21	n. 356
733.103	Effect of probate	F.S. §732.26 (chgs.)	nn. 361-367
733.104	Suspension of statute of limitations in favor of the personal representative	F.S. §734.27	nn. 774-781
733.105	Determination of beneficiaries	F.S. §734.25 (chgs.)	n. 369
733.106	Costs	F.S. §732.14 (chgs.)	nn. 885-894
733.107	Burden of proof in contest	F.S. §732.31	nn. 561-563
733.108	Limitations against unadministered estates	F.S. §734.29	n. 748
733.109	Revocation of probate	F.S. §§732.30(4), (5)	nn. 531-538, 712-716
733.201	Proof of wills	F.S. §732.24	nn. 463-469
733.202	Petition	New	nn. 450-462
733.203	Notice; when required	F.S. §732.43(3)	nn. 457-462
733.204	Probate of will written in a foreign language	F.S. §732.34 (chgs.)	nn. 470, 474-477
733.205	Probate of notarial will	F.S. §732.37	n. 471
733.206	Probate of will of resident after foreign probate	F.S. §732.35	n. 472
733.207	Establishment of probate of lost or destroyed will	F.S. §732.27 (poss. chgs.)	nn. 473, 478-482
733.208	Discovery of later will	F.S. §732.32	nn. 564-565, 568
733.209	Estate of missing person	New; see F.S. §§734.32 *et seq.*	nn. 383-385
733.210	Notice of administration; filing of objections and claims	New	nn. 399-400, 405-410, 514-524, 532-538, 544-550, 560, 570, 947
733.211	Probate as prerequisite to petition for construction of will	F.S. §732.42	nn. 368, 417

1974 Code Section	Title	Source	Article Reference
733.301	Preference in appointment of personal representative	F.S. §732.44 (chgs.)	nn. 490-500
733.302	Who may be appointed personal representative	F.S. §732.45(1)	nn. 483-486
733.303	Minor not qualified	F.S. §732.46 (chgs.)	nn. 483, 487-489
733.304	Non-residents	F.S. §734.47 (chgs.)	n. 483
733.305	Trust companies and other corporations	F.S. §732.49	n. 483
733.306	Effect of appointment of debtor or creditor	F.S. §732.51 (chgs.)	nn. 647-655
733.307	Succession of administration	F.S. §732.52	
733.308	Administrator ad litem	F.S. §732.55	n. 652
733.309	Executor de son tort	F.S. §733.53	
733.401	Issuance of letters	New; see UPC §3-601	n. 513
733.402	Bond of personal representative; when required; form	F.S. §§732.61, .67	nn. 505-512
733.403	Amount of bond	New; see F.S. §§732.63-.66 & .69	nn. 505-506
733.404	Liability of surety	F.S. §732.65	n. 505
733.405	Release of surety	F.S. §732.68	n. 505
733.501	Curators	F.S. §732.21	nn. 576, 583
733.502	Resignation of personal representative	F.S. §734.09	n. 577
733.503	Appointment of successor upon resignation	F.S. §734.10	nn. 578-579
733.504	Causes of removal of personal representative	F.S. §734.11 (chgs.)	nn. 486, 578, 581-582, 653
733.505	Jurisdiction in removal proceedings	F.S. §734.12	nn. 578, 653
733.506	Proceedings for removal	F.S. §734.13	nn. 578, 653
733.507	Administration following removal	F.S. §734.14	nn. 578, 653
733.508	Accounting upon removal	F.S. §734.15 (chgs.)	nn. 578, 580
733.509	Surrender of assets upon removal	F.S. §734.16	
733.601	Time of accrual of duties & powers	UPC §3-701	n. 344
733.602	General duties	UPC §3-703	nn. 602-611

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733.603	Personal representative to proceed without court order	UPC §3-704	nn. 613-617, 656
733.604	Inventory	UPC §3-706. *See* F.S. §733.03	nn. 622-627
733.605	Appraisers	UPC §3-707; *see* F.S. §733.05	nn. 628-632
733.606	Supplementary inventory	UPC §3-708	nn. 625-627
733.607	Possession of estate	UPC §3-709; *see* F.S. §733.01	nn. 614, 633-638
733.608	General power of the personal representative	F.S. §733.01(1)	nn. 638-646
733.609	Improper exercise of power, breach of fiduciary duty	UPC §3-712 (chgs.)	n. 604
733.610	Sale, encumbrance or transaction involving conflict of interest	UPC §3-713; *see* F.S. §733.31	
733.611	Persons dealing with the personal representative; protection	UPC §3-714; *see* F.S. §§733.41-.42	nn. 385, 589, 712-723
733.612	Transactions authorized for the personal representative; exceptions	UPC §3-715 (chgs.)	nn. 656-660, 672-707, 710-711
733.612(1)			n. 704
733.612(2)		*See* F.S. §733.32	n. 705
733.612(5)			n. 659
733.612(6)			n. 704
733.612(7)			n. 659
733.612(8)		*See* F.S. §733.38	n. 705
733.612(9)			n. 704
733.612(12)		*See* F.S. §733.361	nn. 688-703
733.612(13)			n. 704
733.612(14)		*See* F.S. §733.39	n. 705
733.612(19)			nn. 675-682, 879, 896
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733.612(21)		*See* F.S. §733.39	
733.612(22)		*See* F.S. §733.08	nn. 683-687
733.612(25)			n. 706

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733.612(26)			n. 707
733.613	Personal representative's right to sell real property		nn. 659-666, 711
733.613(1)		F.S. §733.23	nn. 661, 270-723
733.613(2)		New; *see* F.S. §§733.22-.25	nn. 662-666
733.614	Powers and duties of successor personal representative	UPC §3-716	n. 585
733.615	Joint personal representatives; when joint action required	UPC §3-717 (chgs.)	nn. 586, 588-592
733.616	Powers of surviving personal representative	UPC §3-718	n. 587
733.617	Compensation of personal representatives and professionals providing services	UPC §3-719 (chgs.)	nn. 851-884, 895-900
733.618	Expenses in estate litigation	UPC §3-720	nn. 555-556, 885-894
733.701	Notice to creditors	F.S. §733.15(1); UPC §3-801	nn. 267, 516, 747
733.702	Limitations on presentation of claims	UPC §3-803 and F.S. §733.16(1)	nn. 748, 753, 759-768, 924, 947
733.703	Form and manner of presenting claims	UPC §3-804(1) (chgs.); *see* F.S. §733.16	nn. 749, 755-756, 947
733.704	Amendment of claims	F.S. §733.17	
733.705	Payment of and objection to claims	F.S. §733.18 (chgs.)	nn. 378-382, 417, 750-752, 757-758, 769-772, 947
733.706	Execution and levies	F.S. §733.19 (chgs.); *see* UPC §3-812	
733.707	Order of payment of expenses and claims	F.S. §733.20 (chgs.); *see* UPC §3-805	nn. 782-793
733.708	Compromise	F.S. §733.21	
733.709	Claims undisposed of after three years	F.S. §733.211	n. 748
733.801	Delivery of devises and distributive shares	F.S. §734.02 (chgs.)	
733.802	Proceedings for compulsory payment of devises or distributive interest	F.S. §734.03	n. 728

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733.803	Encumbered property; liability for payment	F.S. §734.051	nn. 803, 809-810
733.804	Non-exoneration	UPC §2-609	nn. 803, 809-810
733.805	Order in which assets are appropriated	F.S. §734.05	nn. 804, 811-814
733.806	Advancement	UPC §2-110; *see* F.S. §734.07	nn. 323-337, 805
733.807	Abatement and contribution	F.S. §734.06	nn. 806, 811-814
733.808	Death benefits; disposition of proceeds	F.S. §736.172	
733.809	Right of retainer	UPC §3-903	nn. 807, 815-816
733.810	Distribution in kind; valuation	UPC §3-906(a) (chgs.); *see* F.S. §734.031	nn. 667-671, 725, 823-830
733.811	Distribution; right or title of distributee	UPC §3-908	nn. 726-728, 831-835
733.812	Improper distributions; liability of distributee	UPC §3-909	n. 833
733.813	Purchasers from distributees protected	UPC §3-910	nn. 727-728, 834
733.814	Partition for purpose of distribution	UPC §3-911	nn. 836-838
733.815	Private agreements among successors to decedent binding on personal representative	UPC §3-911 (poss. chgs.)	nn. 571-574, 839-841
733.816	Disposition of unclaimed funds held by personal representatives	F.S. §734.221 (chgs.)	nn. 417, 842-843
733.817	Apportionment of estate taxes	F.S. §734.041 (poss. chgs.)	nn. 262-265, 808, 817-822
733.901	Distribution; final discharge	New; *see* F.S. §734.22	nn. 794-801, 837
733.902	Discovery of will after settlement of estate	F.S. §732.33 (chgs.)	nn. 566-570, 712-716
733.903	Subsequent administration	F.S. §734.26	
734.101	Foreign personal representative	F.S. §734.30 (chgs.)	nn. 917-921
734.102	Ancillary administration	F.S. §734.31 (chgs.)	nn. 417, 498, 927-928, 940-947
734.103	Ancillary administration; claims	F.S. §§734.29(2)-(5)	nn. 922-923
734.104	Foreign wills; record and effect after three years from death of testator	F.S. §736.06	nn. 924-926

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734.201	Jurisdiction by act of foreign personal representative	UPC §4-301	nn. 929-934
734.202	Jurisdiction by act of decedent	UPC §4-302	nn. 935-939
735.101	Family administration; nature of proceedings	New	nn. 953-969
735.102	Administration in the same manner as other estates	New; *see* F.S. §735.02	n. 955
735.103	Petition for family administration	New	nn. 953-955, 960
735.104	Certain administrative steps dispensed with	New	nn. 956, 967-968
735.105	Administration in the same manner	New	n. 957
735.106	Petition to require administration under chapter 733	New	n. 955
735.201	Summary administration; nature of proceedings	New; *see* F.S. §735.01	nn. 970-981
735.202	May be administered in the same manner as other estates	F.S. §735.02	
735.203	Summary administration; petition	F.S. §735.05 (chgs.)	n. 974
735.204	Summary administration; testate estate; petition	New; *see* §735.05(2)	
735.205	Filing of petition	F.S. §735.051	n. 980
735.206	Summary administration; distribution	New; *see* F.S. §735.07	n. 974
735.207	Legal effect of order and summary administration	F.S. §§735.09, .11 (chgs.)	nn. 974, 976, 981
735.208	Optional publication of notice of entry of order	F.S. §735.10	nn. 974, 978
735.209	Joinder of heirs, etc., in summary administration	F.S. §735.14	
735.301	No administration required	New; *see* F.S. §735.04	nn. 982-988
735.302	Income tax refunds in certain cases	F.S. §735.15	n. 982