

1944

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Recommended Citation

Rufford G. Patton, *PREPARATION OF A MODEL PROBATE CODE*, 42 MICH. L. REV. 961 (1944).

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MICHIGAN LAW REVIEW

Vol. 42

JUNE, 1944

No. 6

PREPARATION OF A MODEL PROBATE CODE

*Rufford G. Patton**

AT THE 1940 meeting of the American Bar Association held in Philadelphia, the Section of Real Property, Probate and Trust Law included in its program a discussion of the proposal of a Model Probate Code.¹ The section had previously had committees to consider the subjects of uniformity in probate codes and improvement in probate practice, and its programs had included not only reports of these committees but addresses outlining the increasing importance of probate law and the need for statutes which would create adequate standards of practice and administration. During the year 1940 the *Journal of the American Judicature Society* had carried a series of articles by Professor Thomas E. Atkinson on probate courts and procedure which was concluded in the February issue under the heading "Wanted—A Model Probate Code."² After pointing out a few of the archaic and inconsistent provisions of the codes of some states, Professor Atkinson called attention to the fact that in recent years several states³ had enacted new probate codes, all of them undoubted improvements over their previous codes. The drafting was done by committees, councils or commissions and the new acts indicate the borrowing of provisions from other states. However, as pointed out by the author, it is important for such draftsmen to consult and fully consider the statutes of all the other states so as to select the best ideas and the most appropriate phraseology. He raised the question, is the remedy a uniform probate act; and if so, under whose auspices should it be prepared? He concluded that such an act would be an improvement upon the best of existing probate codes and called attention to various organizations which have been interested in the improvement of statutes, The Na-

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¹ Section Proceedings, 1940, p. 17.

² 23 AM. JUD. SOC. J. 183 (1940).

³ Ohio, Florida, Minnesota, Illinois, Kansas and Michigan.

tional Conference of Commissioners on Uniform Laws, The American Judicature Society, The American Law Institute, The National Conference of Judicial Councils and the Committees on Improvement in Probate Practice and on Uniformity in Probate Codes, of the Section of Real Property, Probate and Trust Law of the American Bar Association.

All of the foregoing was reviewed at the 1940 meeting of the section and as a result a committee was appointed which since then has been actively engaged upon the project.

In addition to work by the section's committee, the latter has had the assistance of advisory committees appointed by the state bar associations of most of the states. The initial work consisted in the preparation of a list of proposed general headings of matters which should be included in a Model Probate Code and the order of classification. Most of the consultation was of necessity by correspondence but the committee has held open meetings during the subsequent annual sessions of the American Bar Association. On account of the distance separating the committee from its advisory committees, the initial work proceeded slowly. Nevertheless, by the time of the Indianapolis meeting (1941) there had been compiled a tentative but fairly definite classification of major titles and subtitles. The major difficulties were as to what should be excluded, members and advisory members from particular states having become accustomed to a code which included such items as liquidation of partnerships by a surviving partner, determination of survivorship among joint tenants, administration by the probate court of testamentary trusts, etc. The fact that some particular phase of law practice, other than the administration of estates of decedents and of wards, has been included in the probate code of a particular state was found to be an unreliable criterion as to whether it was appropriate for inclusion in a Model Code.

Having completed this initial work of classification, inclusion and exclusion, the committee was squarely faced with the problem of finding members or others who could give the necessary time to examining the existing probate statutes of all the states, of selecting from them the sections best worded on particular subdivisions or compilations of sections gathered from various codes, for inclusion as the section or as an alternative section of the proposed model on the subdivision covered. The committee had arrived at the same stone wall which has faced state groups charged with the duty of proposing a draft

which would be superior to the existing law. It had no members who could spare the necessary time to make the research which the importance of the subject demanded, neither did the committee know of any foundation or endowment to which it might appeal for financial assistance. At this critical point it received the suggestion that the University of Michigan was carrying on a number of legal research projects and that a program might be worked out by which its assistance to the committee could be procured. From that beginning a plan was formulated under which the research could be made under the supervision of our own member, Professor Lewis M. Simes, and, as a result, a Model Probate Code could be promulgated jointly by the section and by the university. Commencing late in 1942, this research has been in progress. There have been three meetings of a subcommittee comprising the Chairman, Professor Simes and Professor Atkinson, at which the work has been reviewed as it progressed and at two of these meetings Professor Simes's associates in the research have attended the conference.

In the preliminary research which is necessary before the various provisions of a Model Probate Code can be drafted, Professor Simes has been ably assisted by two members of the Research Staff of the University of Michigan Law School, Professor Paul E. Basye, research associate, now on leave from the faculty of the University of Kansas City Law School, and Miss Elizabeth Durfee, research assistant. The general plan has been for one or more of these persons to prepare a monograph or memorandum on each important subject to be dealt with in the code, after a careful examination of all existing American statutes and such other materials as may be pertinent. It is expected that, from time to time, these monographs will be published, not only to furnish a justification for provisions in the Model Probate Code, but also for the general information of the legal profession. The first of these monographs, by Professors Simes and Basye, is entitled "The Organization of the Probate Court in America." The first part of it is published in this number of the *Michigan Law Review* and will be concluded in August. It is expected that other monographs on probate law will follow.

As to the preparation of the Model Code itself, substantial progress has already been made, and a considerable portion of it will be considered at the meeting of the Committee on Improvement of Probate Statutes of the Real Property, Probate and Trust Law Section at the

time of the American Bar Association meeting this September. It should be emphasized that the proponents of this code regard it, not as a uniform law to be copied, but as a model to be used to the full extent that local conditions will permit. Necessarily, any state which embarks on a general revision of its probate laws will evolve a new code in the light of its existing judicial organization. But this process of evolution can be satisfactory only if the necessary research in probate law has been made and its results are available in the form of suggested legislation.