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The Uniform Probate Code - Some Problems and Prospects

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THE UNIFORM PROBATE CODE

Some problems and prospects

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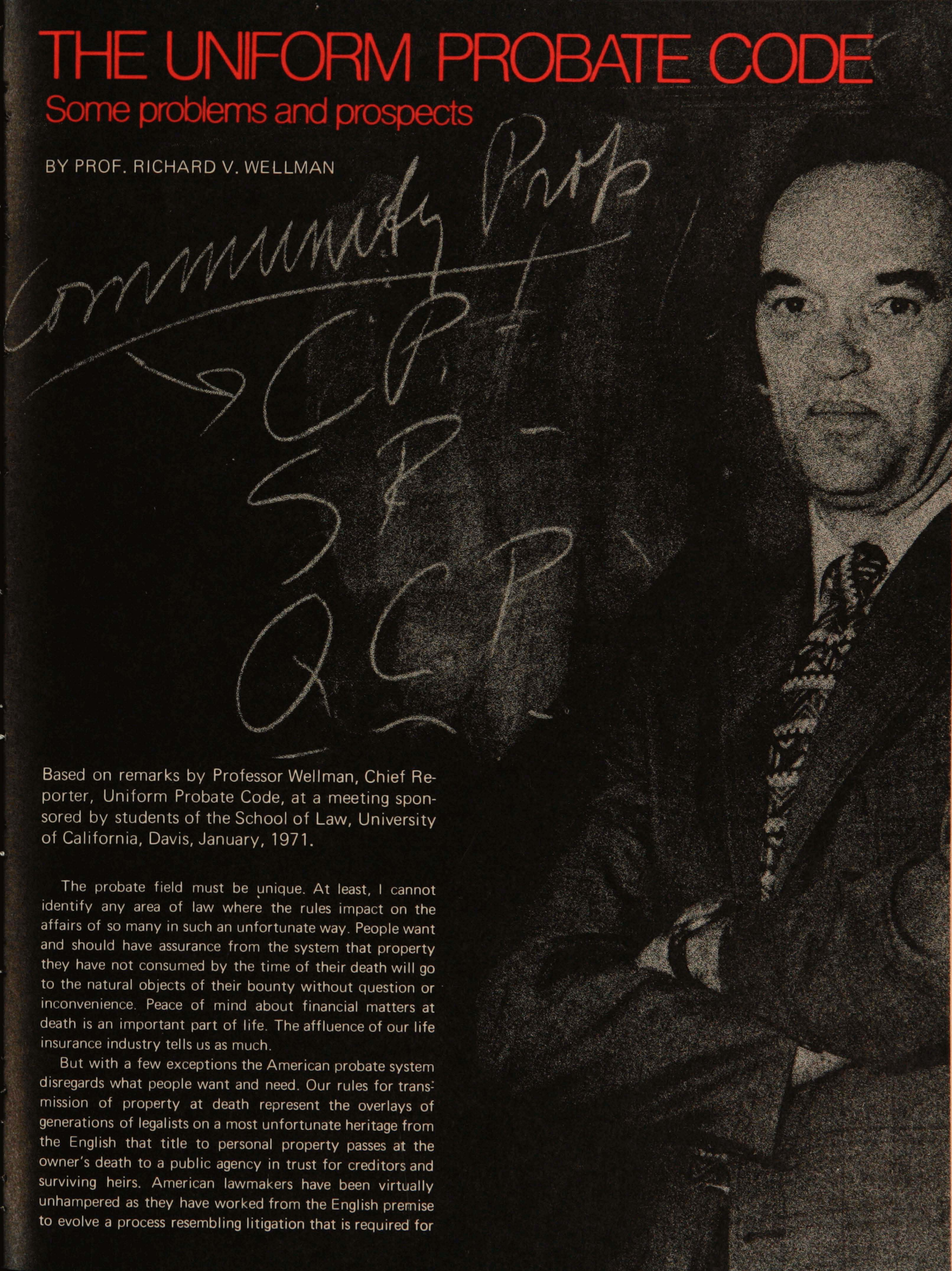

Based on remarks by Professor Wellman, Chief Reporter, Uniform Probate Code, at a meeting sponsored by students of the School of Law, University of California, Davis, January, 1971.

The probate field must be unique. At least, I cannot identify any area of law where the rules impact on the affairs of so many in such an unfortunate way. People want and should have assurance from the system that property they have not consumed by the time of their death will go to the natural objects of their bounty without question or inconvenience. Peace of mind about financial matters at death is an important part of life. The affluence of our life insurance industry tells us as much.

But with a few exceptions the American probate system disregards what people want and need. Our rules for transmission of property at death represent the overlays of generations of legalists on a most unfortunate heritage from the English that title to personal property passes at the owner's death to a public agency in trust for creditors and surviving heirs. American lawmakers have been virtually unhampered as they have worked from the English premise to evolve a process resembling litigation that is required for

every estate. Consequently helpless family survivors must wait while notices, hearings, orders, and the passage of time settle hypothetical questions that no one has raised and which purify inheritances that survivors would much prefer to take sooner and as is. In many states, the situation is made much worse by specialized courts that handle probate business. In these states, particularly, the result is an insensitive, autocratic bureaurocracy that controls the process of probate legislation to the point that even practicing lawyers can do little but live with it. For survivors, the worst state systems delay delivery of inherited assets for six or more months and shrink about 10 per cent from all that passes through for fees and expenses.

But, there are many ways of avoiding probate, so why worry? Probate avoidance has been a pastime for cagey Americans for generations. It is my guess that it has become the rule, rather than the exception. I suspect that probate avoidance helps explain figures from Cleveland where a recent, careful survey indicates that more than one half of all estates in probate gross less than $16,000. But, probate avoidance is a game for persons who think about money matters; also, it must be played with know-how. Hence, it's

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not an acceptable substitute for benevolent law that would support, rather than harass, its subjects. Probate avoidance tends to take many well-informed persons out of the circle of people who might be interested in probate law reform. Thus, it adds to the difficulty of finding political muscle to match that of the probate bureaucracy that figures its power in numbers, of estates, each with attendant requirements of bond, legal advertising, appraisers, and work schedules for court personnel, as much as in volume of dollars flowing through. Probate avoidance has alarmed some lawyers, because it means that their stock in trade, the will, loses as joint tenancies and deposit trusts provided by stock brokers, bankers, and realtors become more popular. The attitudes of these lawyers undoubtedly contributed to the climate that made it possible to produce the Uniform Probate Code.

I should not leave you with the impression, however, that most lawyers are eager for probate law reform. Too many of the most powerful represent clients who do not mind paying big probate fees that are borne in important part by government in the form of tax deductions. Too many others are in the high production specialty of modern estate planning keyed to the revocable trust. Taxes and probate worries drive moneyed people into the arms of planners and planners are not quite ready to buy the argument that tax pressures alone would sustain their present volume of business.

The Uniform Probate Code is sponsored by the American Bar Association and the National Conference of Commissioners on Uniform State Laws. From what I've said, you might doubt that a product of these organizations of lawyers would offer much as a vehicle for significant reform. I suspect that many who have heard of the Code have tossed it off as public relations gimmick to fool people about what lawyers really want and to divert energy from better corrective approaches. And if it is a vehicle for reform as it is represented to be, you will ask, "How come?"

My short answers to these questions are (1) the Code offers exciting prospects for truly significant reform of the probate institution; and (2) in spite of the fact that it took a series of minor miracles to see it through the long process of preparation and approval, the Code has arrived. The organized bar cannot ignore or deny it. There's a struggle ahead in regard to its enactment, but the Code looks like the best means of getting at and eliminating the sad heritage of 200 years of the wrong kind of probate law making.

First, let me give you a brief peek at the more promising features of the Code. (1) The Code should relieve persons without tax or family problems of any pressure to make a will or use probate-dodging alternatives. If a spouse survives, $15,000 can be zipped through an executor or administrator to her in as little time as a week after death. The tools operative here are exemptions that put so much over to the spouse ahead of creditors or the terms of any will, and an affidavit procedure that will permit a fiduciary, with full power to create saleable titles to inherited assets, to get letters of authority from a probate clerk as soon as five days from death have passed.

(2) If there's no will, the Code gives the next $50,000 to the spouse, and divides the excess between spouse and children where there are no children by a prior marriage. This substantive plan will align with what all the signs tell us most married persons want. It dovetails with a new look in probate procedure that will permit the fiduciary to collect, pay debts, and make final distribution of estates with no more contact with public office than the affidavit proceeding by which he obtains his letters. The adjudicative processes of the court will be entirely passive, ready to be activated to solve any question that may arise, or to protect fiduciaries from the dangers of hindsight review of their business for the estate, but limited to dealing with matters that petitions present. The fiduciary is not an officer of the court, and statutory requirements relating to bonds, appraisers, and court accountings go out with the abandoned concept.

(3) Statutes of limitation that run 3 years after death will permit survivors who claim in intestacy to avoid all contact with any public office. Hence, for heirs who are content to wait three years, the system says "sit tight and everything will be OK."

(4) Most guardianships and conservatorships can be

avoided under the Code. If property protection for a living but disabled person becomes necessary, the Code abandons the idea of supervision by a court in favor of the statutory trustee.

(5) The code contains a provision that should carry deeds, notes, mortgages, and all forms of contracts containing provisions shifting benefits at death past the peril of being classed as testamentary. In a sense, this section is intended to keep the probate process honest by approving a broad range of probate alternatives that can be used if bureaucrats refuse to permit the Code's administrative features to work as intended.

When other details are examined, it will be seen that the Code changes the answers to questions about the trustworthiness of people, the need for protection of creditors of decedents, and the necessity for exact correctness in transmissions at death that over many generations have been resolved against survivors and in favor of the legal system. Over-all, it represents a determined effort to move probate matters away from bureaucrats and back to people and their counselors who are anxious to give sensitive and needed service in regard to family financial matters.

THE DIRTY WORDS "COMMUNITY PROPERTY" KEPT FILTERING INTO OUR DISCUSSIONS AND THREATENED TO TEAR US APART.

However, to the same degree that the Code has promise, it is frightening to those whose ways it would change. How did it come about? . . .

The code project started in the ABA's Real Property, Probate, and Trust Law Section. . . . It happened that in 1961-62, the Section chairman and the officers below him in the move-up scheme were more interested in probate law than in title insurance, trust administration, tax planning, and other topics that commonly occupy the attention of the membership.

Once persons from different parts of the country start talking probate, the topic of reform is very likely to get top attention. Probate means red tape everywhere and men who make their livings hacking at red tape frequently are as anxious as any to get rid of it. Twenty or so years earlier, the Section had sponsored preparation of the Model Probate Code—a project for which Prof. Lewis Simes was principally responsible. In 1961, the idea approved for a long range, new section project was to modernize the 20-year-old Model Code, and to seek its wider acceptance as a means of cutting down on probate red tape.

The 1961 project would have gone nowhere but for the fact that the ABA sponsors managed to talk the National Conference of Commissioners on Uniform State Laws into taking primary responsibility for the job. NCCUSL is an old organization (80 plus years now) made up entirely of uncompensated lawyers who are appointed by the governors or legislatures of their states to consider proposals for uniform state legislation. Through most of its history, the pattern of the Conference had been to avoid big, controversial projects. It had declined to get into probate in the early 1940s when the Model Code was being started. But, by 1962, it was feeling its oats. The Uniform Commercial Code was a success; in another year, the Conference was to employ Allison Dunham of Chicago Law School as its first Executive Director. Its high officers included a remarkable colleague of mine from Ann Arbor, one Bill Pierce, whose philosophy about the National Conference was that it should be deeply involved in the process of law reform, and that big projects were sometimes easier to handle than small ones. Prof. Pierce was also very much concerned about the probate mess—he had been the first chairman of Michigan Bar Association's Probate Law Section, and had written about the stagnation and corruption that characterized the probate bureaurocracy in the large cities of the east and midwest.

But even with its new energy, the National Conference would not have undertaken a probate code project without the recommendation and promise of continuing support of the ABA group. Even reformers like to work where they are most likely to succeed. Thus, the clubby atmosphere of the governing council of the Property Section provided the vital spark that could come from no other quarter. Certainly, no probate code revision project that might be launched in any particular state could possibly become sufficiently detached from local politics to come at the problems with the needed new look.

Framing a charter for a useful project and getting useful work started are different matters. Prof. Dunham labored to find some gift money to finance the project—there was almost none to be had. It was 1963 before the project invited seven interested professors to Chicago to form the reporters group. The word there was that there was no money; that it would be very difficult to get a probate code through the National Conference where long-standing rules required three line by line readings of proposals before the Committee of the Whole before there could be a vote of acceptance. The predictions were that every commissioner of the 150 or so who attend the once-a-year, week-long meetings at which the Conference conducts its business, would know enough about probate to question every word of any Code. We left that first meeting with very general assignments to put our thoughts on paper. In return, we were promised a return trip to exciting Chicago in another six months or so for more talk. When the second meeting rolled around, very little had been done. The little energy there was was spent in trying to identify goals; it all seemed very non-productive. 1965 was helped some by a February meeting in New Orleans and a summer meeting in Hollywood, Florida. Still, the gloom of continuing reports of no money and the indecisiveness of volunteers who were unwilling to stick their necks out against the risk that they

would be tabbed for even more unpaid and possibly pointless work, dominated these meetings. At each get-together, the leaders from the ABA Property Section would appear to see what was going on and to make statements. We argued—interminably it seemed to me—about who got title to real estate on death. We wallowed around with assumptions about the court that was to handle probate jurisdiction. Each person knew his own court system well and could think of no other. Proposals for allowing any court of probate to settle problems of title to land inevitably ground down to a series of speeches about Missouri, Tennessee, New Jersey, or Wisconsin probate officials and constitutions, and how no end of good talk could change things.

Then Mr. Dacey wrote his best seller, ***How To Avoid Probate,*** and the fat was in the fire. The National Conference reviewed its tight budget and found enough to hire two of us for the summer of 1966; object, get a code on paper. Suddenly, three years of seemingly pointless discussion paid off. Our meetings had at least stayed close to business and the two reporters had some idea of what might work. We managed to produce a draft of about 200 pages which we hauled to the annual meeting at Montreal. That

ONCE THE LABEL "MODEL" IS ATTACHED, EVERYONE RELAXES AND CONFERENCE SUPPORT MONEY DISAPPEARS. . .WE KNEW THE CODE WOULD BE "MODEL" RATHER THAN UNIFORM IN IMPACT, BUT WE COULD NOT GIVE UP THE LABEL "UNIFORM."

first draft would have been a disaster under normal circumstances, but it served its major purpose of being at the right place, at the right time, with lots of paper. It demonstrated to the powers in the Property Section and the National Conference that the joint project was underway and could produce something. It assured us that no other national lawyers' group would try to respond to the Dacey furor. From then on, our project gave the American Bar Association an answer to press and public queries about Dacey, lawyers, and probate: e.g., "We are working on it." Happily, some real problems with the first draft got lost in the shuffle. One was the result of a notion of mine that statutes would be more comprehensible if written in a narrative form. My original portion on probate procedure was like nothing any lawyer had ever seen before in a statute. Fortunately, few outside the inner circle ever read it. . . .

The period from August 1966 to August 1969 was an exceedingly full one for me and others who worked closely with the Code. I became Chief Reporter in early 1967. From that point until copy for the approved draft was finally cleaned up and packed off to the printer, life was full of meetings, lonely evenings of trying to sort out jumbled notes, letter writing, speech writing, and draft after draft of parts and all of the emerging job. There was lots of travel. With draftsmen and committee members from east and west coasts, and from north and south, it didn't make much difference in terms of cost where we met. Including annual meetings, we saw Houston, Boulder, Honolulu, New Orleans, Phoenix, Philadelphia, Seattle, and Dallas, as well as far too much of Chicago.

There were three major drafting spurts after the first draft in 1966. The most important occurred during the summer of 1967 when all eight reporters and a couple of professor observers spent five weeks in a drafting seminar at Boulder, Colorado. With our families housed in nearby student dormitories, we worked daily from 8:00 to 4:00 for five solid weeks. In the mornings, persons worked alone or with one or two others as drafting sub-committees. At 1:00 p.m. every afternoon, the whole group would listen and argue as drafting sub-committees followed a cruel time-table in bringing their problems and drafts before the entire group. With three secretaries and plenty of duplicating facilities, the paper and arguments flew. At 4:00 o'clock every afternoon, we'd retreat back to a dormitory lounge that had been assigned to us, often to continue the battles for the benefit of long suffering wives. Somehow, it all worked out. When the end of the fifth week arrived, we had Articles I, II, III, IV, V, and VI with Comments on paper. Moreover, only the guardianship article, Art. V, had not been fully read, discussed, and approved by all eight whose names went on the package. Another miracle was that we became and remain fast friends. It was quite an experience.

. . . The next major drafting input occurred the following summer when three of us met for four weeks in Berkeley to hammer out Article VII on trust procedures. There's no question but that three can think and write together more effectively than eight. Partly because of this, and partly because the time for committee criticism and re-writing was more limited, I believe that Article VII represents the best work in the Code. I do not mean to say that the group who worked directly on the earlier portions of the Code should have been smaller. It was very important to get as many people as possible in as participants in the drafts to dealing with the mess in decedents' estate. Wide consensus among leading people is more important than bright ideas or crisp prose when you're trying to alter the direction of something as massive as our probate institution.

The final major drafting input occurred in the last six months before the 1969 summer meeting in Dallas. . . . A small group, including the project chairman, two high conference officers, and I, met for four days to iron out kinks and resolve dilemmas that had developed. In the process, we practically re-wrote the guardianship article which had haunted us from 1966.

Little and big battles sparked the Code's development. In the beginning, we had time to argue interminably over some very silly points as illustrated by the squabble I alluded to earlier over whether title to real estate should be deemed to pass to a personal representative. Yes—shouted

those who wanted to strengthen the trust concept. No—responded the traditionalists who feared that title might somehow float into never-never land if given to a personal representative who forgot to close the estate. Finally, the happy compromise emerged. Title descends to heirs or devisees, but the personal representative has the power over title of an owner! Marvelous!

We battled over the names to be given to a guardian of the estate of an incompetent. The original draft of this Article used a civil law term "curetel." The reviewing lawyers were shocked. But the draftsman resisted use of "conservator." To him, this brought memories of hated representatives of the federal reserve who stole banks from their stockholders and officers in the Great Depression. Two hours of expensive O'Hare Inn meeting time involving about 25 people finally produced "curetelic-trustee" as a compromise. Later, and without any very clear authority, I substituted the word conservator in a manuscript then being prepared and that was the end of it.

Our biggest struggles were with independent as opposed to supervised administration for executors and administrators, and with the question of whether general notice to all interested persons must precede probate and appointment. The independent administration hurdle was finally jumped by agreement that the Code should offer options that would allow lawyers everywhere to say that the way they were accustomed to handle estates was still OK. The battle over notice was much tougher. I was convinced that a statutory requirement of general notice to all interested persons would wreck the idea that non-court procedures were being approved. We resolved the issue in 1966, only to re-debate it again in 1967 and 1968. Again, a form of compromise won the day. No prior notice is required, but after appointment, a personal representative has a fiduciary obligation to inform heirs and devisees that he's in office.

ULTIMATELY. . . RESPONSIBILITY FOR THE CODE WILL REMAIN WHERE IT SHOULD BE—SQUARELY WITH THE LEGAL PROFESSION WHICH STANDS TO GAIN IN PUBLIC ESTIMATE AND TO LOSE NOTHING EXCEPT THE CURSE OF RED TAPE THAT SHROUDS ITS EFFORTS. . . .

The dirty words "community property" kept filtering into our discussions and threatened to tear us apart. The Commissioner co-chairman in 1968-1969 were from Washington and Texas. Also, one reporter was from California. Invariably, when community property was mentioned, we'd get three speeches about how common law lawyers didn't understand community, and how it was different in each community state. Just as invariably, the commissioners from several of the common law states would go to sleep.

Our struggles with community property related to discussion of what to do about dower, spouse's elective share, and related ideas. This is the toughest part of the entire Code. In Michigan where I served as draftsman for a state bar association probate code drafting committee, progress came to a dead stop when it reached this subject. After half a winter of fruitless bi-weekly meetings I decided to push for elimination of all statutory protection against disinheritance of a spouse. I argued that no scheme that would get by a table full of lawyers had been suggested, that the power of a spouse to get a will contest to a jury was a sufficient deterrant, and that we were wasting our time. To my surprise, the committee agreed and the Michigan Bar's probate code drafting project lurched forward.

The national committee's debate over this lasted through the entire period of preparation. Argument raged over how to relate any meaningful check on a spouse's gift-making propensities to all kinds of non-probate transfers that can serve as will substitutes. Various ideas for distinguishing deserving from undeserving spouses were tried and rejected. Many proposed that judges should have wide discretion in dealing with claims by disinherited spouses; more resisted this approach. I made a serious effort to get the group to adopt the Michigan position. It didn't work. Finally, the necessity to do something forced us to agree on provisions we knew would be ineffective against any determined spouse-hating planner who could hire a sharp-eyed lawyer. The conviction born in compromise was that political facts of life required inclusion of some provision; that we had to meet the obvious problems with existing legislation; but that the wealthy, malevolent planner should not be the object of a statutory net. The law review critics are already hard at work on these sections.

The attacks from outside were somewhat more exciting. It was at Philadelphia in 1968 that the Commissioners had their first eyeball to eyeball confrontation with opposition. A delegation from the National Newspaper Association appeared to present their arguments in favor of many statutory requirements for published probate notices. They wanted four ads per estate, each with three insertions. We provided for one and permitted it to be finessed. Their slightly veiled threat of determined resistance at all political levels in all state legislatures if we did not accede to their extravagant demands helped the cause of getting the Code through the National Conference. The participating commissioners had a high sense of public purpose by this time, and the raw threat of retaliation only strengthened their determination to shape a code dictated by the merits rather than by special interests.

The opposition at Dallas the following year was much more worrisome. First, a trade association known as the American Insurance Association upset with Code proposals to eliminate statutory requirements for fidelity bonds for administrators, sent a hard hitting, memorandum in support of their position to every commissioner prior to the meeting. This was followed up at Dallas by a delegation of effective salesmen who talked of the claims their companies had paid. The bondmen had a powerful complaint. It was that the Code's proposal that interstate administrators be bonded only when a family member or a creditor demanded, was without known parallel in the statutes of the

United States, England, and Canada. We had two sources for a counter argument. First, to keep a big sub-committee of the ABA's Property Section occupied the previous year, we had circulated an elaborate questionnaire among lawyers from all parts of the country that included some pretty pointed questions about the cost and utility of probate bonds. The responses were not surprising, but extremely useful. I remember particularly the response from one Chicagoan who, in answering a question about his experience with recoveries on probate bonds, said that in all of his years of practice, he had seen no claim made on a bond, let alone a recovery. He added that he had questioned all of the lawyers in his rather large firm, and none had ever been involved in a claim on a bond. Indeed, the respondent said that he could find only one lawyer of many he had talked to who had even heard of a probate loss that produced a bond claim. This questionnaire also told us that the cost for the same bond in the 50 states ranged from a low of $10.00 to over $100.00, and that probate bond rates had been stable since 1929. We did not succeed in efforts to get the bonding companies to reveal their loss experience. Also, we used the figures from Cleveland to show how interstate estates were usually very small, and how lawyers across the country were unanimous in excusing bond in wills they prepared for affluent clients. The commissioners turned down the AIA appeal.

The officers of the National Conference who planned the Code's progress through the ordeal of line-by-line readings before the Conference worked with skill and intimate knowledge of their group. The principal tactic was repetition. The Uniform Probate Code became an annual agenda item as soon as the Conference approved the project. Before the reporters had their first meeting, small drafts of sections dealing with execution of wills and simultaneous death had been inserted into the summer programs for a few minutes of argument. When a complete draft of a full code was first placed on the Commissioner's desks in Honolulu in 1967, it was the fifth consecutive year in which the Conference had assigned formal time to probate. The process developed familiarity, acceptance, and momentum. The group was fully prepared to take the time necessary at Dallas in 1969 to finish the job.

The Code was approved by a 44 to 4 vote of the states after the commissioners spent three days and one evening in the tedious business of line-by-line reading of the last draft. At every break, the committee huddled to re-write provisions that had been torn up by debate on the floor, and to plan for the next go-round. Before the final vote of approval, a last minute motion to change the label of the code from uniform to model was soundly defeated. We had fought off this move for all of the years of Conference consideration of the Code—principally because in the Conference, the label "model" means that the commissioners are not duty-bound to work for adoption in their states. Worse, once the label "model" is attached, everyone relaxes, and Conference support money disappears. It has come to be an euphemism for ash can. We knew the Code would be "model" rather than uniform in impact, but we could not give up the label "uniform."

. . . Now the struggle for adoptions is under way. The Code's proponents are staying with it via a 10-man editorial committee charged with answering questions and criticisms, furnishing speakers and technical assistance to committees and legislatures in states which become interested. The first battle in each state is to get as broad a group as possible to make the first report. This isn't easy. In West Virginia, the legislative counsel bounced the ball to the state bar which in turn asked its standing probate and trust law committee to look at the Code and report back. The results were predictable and negative. Local committees of existing probate experts, usually older than the average age of all lawyers, are not likely to agree that they must change their ways to the extent called for by the Code. Of course, this isn't the way their report reads. Constitutional doubts, concern over the need for change of long-held principles for determining heirs, and a suggestion that a set of limited amendments that were being proposed to the existing West Virginia Code would do as well, frame the negative report.

In other states, the Code appears to be faring better. It was introduced in the Idaho legislature recently after a broadly representative committee of the state spent the better part of 1970 looking it over. The signs from Hawaii, Arizona, Alabama, and many other states are quite favorable. Still, it will be years before we'll know its ultimate fate. Some states, like Montana and New Jersey, will go at it piece-meal. This year, Montana legislators will be asked to enact the Code's guardianship article. In New Jersey, a few sections dealing with execution of wills will be pushed forward. In other states, notably New York, Wisconsin, Maryland, and Oregon, recently approved new probate codes mean that local interest in the subject is exhausted, so that nothing more will happen for a long time.

In the meantime, the ABA and the Commissioners will try to stir up interest. A six-article newspaper series about the Code is being released to national newspapers. We are trying to interest labor unions, credit unions, old folks' organizations, and anyone else who will listen, in passing the good word. There's a chance of rousing these non-professional segments of the public, but I doubt that any of them can be counted upon for more than rather bland endorsements. Ultimately, therefore, responsibility for the Code will remain where it should be—squarely with the legal profession which stands to gain in public estimate and to lose nothing except the curse of red tape that shrouds its efforts to provide useful family financial counselors, if it can be nudged forward in support.

The Code sponsors will continue the effort to try to get lawyers to understand that the Code is designed to help the profession, rather than to do it in. But, many lawyers won't read or react until they have to. In the meantime, they usually do not like what they don't know or understand. Progress will be slow, at best.

In the final analysis, the prospects of the Code may turn on the degree to which law teachers decide to use it to teach Wills and probate procedure. Like the old federal rules of civil procedure, the Code offers teachers everywhere a common alternative to the typical local maze of probate statutes and rules. If enough teachers start working with the Code, in 10 or so years, most lawyers will no longer recoil at the words Uniform Probate Code. It took 10 years for UCC to get around—probate will take longer, but old optimists never say die.