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Uniform Probate Code

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Excerpts from remarks by Richard V. Wellman, Project Director, before Committee of the Whole, National Conference of Commissioners on Uniform State Laws in Honolulu, August 4, 1967

After more than five years of preliminary work, the reporters for the Uniform Probate Code Project are pleased to introduce a comprehensive draft of a complete code dealing with estates of deceased and disabled persons and with transfers effective at death.

Let me retrace some of the history of the project.

The work began in 1962 when it was jointly agreed by representatives of the National Conference and members of a special subcommittee of the Real Property Probate and Trust Law Section of the American Bar Association that effort should be made to update and revise the [1946] Model Probate Code. . . .

By 1964, a Committee of Reporters for this project had been assembled. Portions of preliminary drafts were presented at your meetings in 1964, 1965, and 1966. . . .

Last year at Montreal, we announced to you that the special committee had approved the reporters' proposal to broaden the project to include some coverage of the law of trusts. One specific objective is to provide a common pattern of procedures for inter vivos and testamentary trusts. While we have not abandoned this undertaking, we have not yet prepared any drafts dealing with this subject.

Perhaps it is evident from the history of the project that a very determined attempt has been made to get as broad a base as possible for the drafts being distributed here. We started with the benefit of the very careful research and excellent thinking that went into the 1946 Model Probate Code. The reporters for this project . . . were selected with an eye toward obtaining geographic diversity, as well as experience in the teaching and practice of estates law. In the person of Reporter Paul Basye, we secured the expertise of a practitioner familiar with California procedures and community property problems, as well as of a scholar-author who worked closely with Professor Simes on the Model Probate Code. The seven other reporters represent many decades of teaching and practical experience with the law of estates.

Moreover, we have had the benefit of a good deal of contact with state and other efforts to improve probate law. Professors Richard Effland and James MacDonald are the principal draftsmen of a new probate code recently proposed in Wisconsin. Professor Allan Vestal has had a close relationship with Iowa's new probate code. Professor Eugene Scoles has worked closely with Illinois Bar Association committees on probate legislation there. Professor William Fratcher of Missouri worked with the New York Commission on Estates. Moreover, he was supported by a Ford Foundation Fellowship in a year's study of modern English probate law and practice and has written extensively of his observations. Incident to the proposed revision of the Michigan Probate Code, I have

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worked for about a year with a group of Michigan lawyers and judges in an intensive study of the draft which the national project spawned last summer. As a result of all of these contacts, many of the ideas that have found their way into the draft you are receiving today were first suggested by practicing lawyers, experimental trustmen, and probate judges.

Moreover, copies of last summer's draft were distributed to more than a hundred ABA committee members. Two *very active* subcommittees of the Real Property, Probate and Trust Law Section of the ABA have made projects of study of portions of last summer's preliminary draft. Another group of ABA advisors have commented to us on the entire draft. Thus, literally hundreds of interested persons have contributed very significantly to this new draft by their oral and written reactions to some of the major ideas as well as the detail of what you are receiving today. We have sought the broadest possible base for this draft and I believe we may have achieved it. . . .

During the early years of this project, many questioned the practicality of effort to produce a uniform probate code. Knowledgeable lawyers conceded the obsolescence of much of existing probate law, but expressed doubt that legislatures could be interested in the heavy work involved in recasting so formidably large an area of law. In many states, well-entrenched political establishments have grown about the existing probate structure and it seemed unlikely that the public or the bar could be sufficiently interested in probate innovation to mount the drive needed for new legislation.

But, in 1966, Mr. Dacey's controversial book, *How To Avoid Probate,* became a best seller. At about the same time, a *Reader's Digest* article "The Mess in our Probate Courts" attracted wide attention. Newspaper and magazine articles about the archaic and irrelevant character of probate law and procedure have proliferated. Those of

us like Messrs. Dunham, Pierce, and myself, whose names have been publicly associated with the possibility of probate reform, can attest to the fact of widespread public interest in the subject. Clearly the public will now support and encourage legislators in considering a different approach to many ancient probate problems. Indeed, I would hazard the guess that there is no area of civil law that is more concerning to the public. This is not surprising. Relatively fewer people are involved in divorce or auto accidents or commercial swindles than are concerned with inheritance at some time or another. Moreover, it's the reading and thinking part of our affluent public who are concerned with probate matters.

Practicing lawyers have many, *completely professional,* reasons for being interested in probate reform. Under present assumptions, clients are under pressure to turn to bankers, trust companies, life insurance salesmen, and a variety of other kinds of sellers of services for assistance in estate planning, and they are doing so in thousands and thousands of cases. Lawyers, whose stock in trade has been the will, cannot, in good conscience, describe the will as competitive from the standpoint of post-death expense and delay, with the host of will substitutes that are available. *But,* there is no totally satisfactory substitute for the will. The revocable trust comes closest, perhaps, and may be recommended to some as a satisfactory will substitute, but the trust device is, at best, awkwardly applied to situations where the parties in interest want to retain full ownership until death. Moreover, the trust is unsuited to modest estates ranging up to say $50,000 in value. Various forms of joint ownership supply useful answers for some small estate situations, but joint ownership does not offer the flexibility of testamentary schemes. In sum, modern emphasis on total estate planning has made lawyers increasingly aware that the will is of unique utility, but that it is also uniquely encumbered by post-death costs. They are also aware that the public associates the will with lawyers and compares them unfavorably wth other sellers of services whose specialties are more efficient. Lawyers would like to make the will as efficient a device in estate planning as possible and reform of probate codes is necessary to that end.

Moreover, of course, the day when we can afford to have different probate laws in fifty states has passed. People no longer live and die in one location of the country with the frequency of former times. Estates are more likely than not to involve assets or survivors located in several states. Lawyers need to be able to predict the estate laws and procedures of other states and clients need to be relieved of the necessity to recast estate plans with every change of domicile or new acquisition of out-of-state land. The present variance in state laws which requires replanning of wills with each inter-state move or acquisition is not only a nuisance; it's probably a positive hindrance to the free mobility of capital among the several states.

The over-all approach of the draft you are receiving is to *shift probate and estate laws away from their present historical orientation toward what people want and need.* We have attempted to implement this purpose on all fronts. For instance, the law's plan for persons who die intestate should be rational and as uncomplicated in respect to administrative detail as a statute can make it. We should not make intestacy a chambers of horrors so that people will be driven to write wills. Lawyers cannot afford the public irritation with the law that retention of obsolete patterns and practices respecting intestate estates generates. The formality required for wills must be rational, rather than ritualistic. The settlement of estates should be streamlined so that *if* there are no problems, there will be no need for involved court procedures. Procedures relating to settlement of estates should start from the assumption that *estates belong to the survivors,* and that the office of the law and rules is to assist rather than impede the natural desire to accelerate the transfer from dead to living. Guardianship also should be moved away from cumbersome historic assumptions. The law should cease to terrorize persons approaching old age and possible senility with the prospect that they may need to be adjudicated incompetent simply because assets may need to be sold to secure their support. Transfers serving as will substitutes should not be condemned nor discouraged. Rather, the office of the law should be to define transactions with a view to *implementing,* rather than discouraging, what people want. . . .

We want especially to emphasize Article III because we believe that its provisions relating to probate of wills and administration of decedents' estates may represent the most important steps in the effort to move probate matters closer to the needs of the people. It represents our effort to modernize probate *procedures;* e.g., the way estates are handled after death. Many of the other antiquities applicable to probate matters can be neutralized by well drawn wills. Thus, it is quite possible today for a well advised person to obtain a will which moves his affairs away from archaic rules concerning intestacy and from ancient traps that highlight such subjects as lapse, ademption and abatement of legacies, and exoneration, to mention a few. But, a will draftsman is *virtually helpless* when it comes to his ability to free an estate from unnecessary and expensive involvement by the probate court. Whatever the will may say, it must be proved

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after death. In a large number of states, proof of the will may be obtained only by commencing a court proceeding after full notice to all *possibly interested* persons. Attesting witnesses must trudge to the courthouse to testify on matters that no one questions. Worse, perhaps, the court proceedings thus commenced may tend to entangle the estate for some time, for out of it comes the appointment of one who is technically an officer of the court and who is charged by law with pursuing a formidable number of steps, most of which must be culminated by an order of the court approving what the representative proposes to do. The result has been called the "probate deep-freeze" for assets are rather effectively frozen for a year or more after death while the archaic machinery of another era cranks through its process. There are, of course, exceptions to this dreary situation in the multi-

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tude of procedural patterns available in the several states. But, it remains true of a very great part of modern probate procedure that the process of proving a will after death, securing the appointment of a personal representative, and administering the estate is characterized by *required court proceedings* which have tended to become more and more cumbersome and complex as we lawyers have sought to make the system provide meaningful protections and also to reshape statutes and procedures to meet the modern demands of procedural due process.

The major change we propose is not novel or dramatic. We simply propose that the relationship of probate courts to estates be made more like the normal relationship that courts bear toward persons in respect to civil matters. Thus, we have designed a system under which the judge occupies a passive, supportive relationship to every estate. We have sought to give every interested person easy access to a judge capable of fully handling any kind of question relating to an estate. But, we have sought to have the ultimate question of whether and when a judge will be involved determined by the interested persons, rather than by a system which denies survivors their assets until they have paid homage to the probate court. We have sought also to keep the scope of necessary judicial matters to the dimensions dictated by questions raised in pleadings. Hence, unless someone with an interest in an estate wants a judicial order for the resolution of a question, or the elimination of a risk, no judicial order will be required by the state code.

It might be thought that we are making it difficult for persons interested in estates to gain the protection presently available or supposedly available, in probate proceedings. But this is not the case. We assume the continuation of a special court to handle estate problems. We continue the present ease with which persons interested in estates may be bound after fair notice in respect to their interests in a decedent's property. And, as suggested earlier, we provide easy access to the judge for those with problems.

Nor are we recommending a complete switch from common law assumptions about probate of wills and designation of representatives of decedents, to the civil law assumptions where succession may be a completely private, non-court affair centered around the heir who takes assets and liabilities of the decedent. We have retained the idea that a will is unavailable for proof of succession until it is officially validated, e.g., probated, after death. Also, a personal representative still derives authority from appointment by a public agency, rather than from will or relationship.

The key to our drafts is this: where there is no dispute, or wish for total protection, a will may be probated, and a personal representative may be appointed in what we call *"informal proceedings."* Informal proceedings may be handled by non-judicial persons who are employees of the estates court. Perhaps they will be called Registrars. . . . The name is unimportant. The important thing is that they can probate a will without adjudicating rights by making an administrative determination concerning certain necessary matters that are clearly defined by the Code. At the same time we do not make any set of survivors take the risks implicit in informal probate. The Code does not impose informal probate on survivors or attorneys who fear the risks involved. As indicated earlier, any interested party can get the judge to pass on the issue of will or no will, or to resolve disputes concerning who may be appointed. The important change is that he does not have to do so. Thus, the Code gives him a legitimate way to take risks. . . .

> Lawyers whose stock in trade has been the will, cannot, in good conscience, describe it as competitive from the standpoint of post-death expense and delay, with the host of will substitutes that are available. But, there is no totally satisfactory substitute for it.

What will the Code do to fees and costs of probate? In a nutshell, it eliminates much of the make-work aspects of probate administration. In time, as lawyers become acquainted with its potential, there will be a move toward charges based on the time spent on the estate, rather than a set percentage fee. The Code does nothing of a direct sort about this, however. Its only mention of fees relates to those of personal representatives who are stated to be entitled to "reasonable compensation." We believe, however, that the professional interest on the part of good lawyers to give service as needed and wanted by clients will lead the way toward a new approach to probate fees.