Preface

THE publication of the Model Probate Code, together with related monographs and appendix notes, serves a dual purpose. It is the report of a committee of the Probate Division of the American Bar Association. It is also the product of a research project carried on by the University of Michigan Law School. Mr. R. G. Patton, in his "Presentation of the Report of the Committee on Model Probate Code," printed elsewhere in this volume, has provided an appropriate preface for this publication in its first aspect. As a product of research, however, some prefatory remarks may be added at this point.

In the fall of 1942 the University of Michigan Law School entered into negotiations with Mr. Patton, as Chairman of the Committee on Improvement of Probate Statutes, of the Real Property, Probate and Trust Law Section of the American Bar Association, whereby the Law School undertook to do the research necessary for the preparation of a Model Probate Code. Professor Thomas E. Atkinson, then of the University of Missouri Law School, had already written his noteworthy articles in the Journal of the American Judicature Society on probate reform; the Committee had laid the groundwork for probate research by setting up advisers in various states and by approving a general outline which indicated the scope of the proposed Code.

The general plan of procedure in carrying forward this research project was as follows. The probate statutes of the various states were read and classified by members of the research staff of the Law School. On more difficult points memoranda were prepared, summarizing the applicable statutes or relevant case law. Monographs were also prepared
by members of the research staff on some of the most basic topics. Preliminary drafts of portions of the proposed Model Code were prepared and mimeographed and were distributed to members of the Committee and to other persons whose comments might prove valuable. Conferences were held from time to time,—sometimes of the entire Committee and sometimes of the sub-committee on drafting,—at which these drafts were criticized and revised. Ten tentative drafts were prepared and criticized prior to the final draft which is printed in this volume. Besides the five monographs which appear as a part of this volume, many memoranda of statute or case law, which were prepared as a part of the research incident to the Code, are published herewith. The latter appear as Appendix A to the Code.

While I assumed responsibility for the research and preliminary drafting incident to the Model Code, much of this was done by other members of the research staff of the Law School. Mr. Paul E. Basye, as Research Associate, for a period of approximately a year devoted his entire time to the work of the Code, drafting many sections as well as participating in numerous aspects of the research, and since that time he has continued to assist in the work connected with the Code. Professor Thomas E. Atkinson, in addition to cooperating actively in the work of the Committee from the beginning of the movement in 1940 until the final report of the Committee in 1945, came to Ann Arbor in the summer of 1945 as Visiting Research Professor in the University of Michigan Law School and for a period of six weeks devoted his entire time to the Model Code. During that period, he drafted much of the division of the Code concerned with guardianship, and participated in the final revision of the entire Code. Throughout the period of three years during which the University of Michigan participated in the project, Miss Elizabeth Durfee, Research Assistant of the Law School staff,
has been assigned to this research. Most of the appendix notes on the Code were prepared by her. She also collected and classified materials in connection with the preparation of the monographs entitled "The Organization of the Probate Court in America," "The Administration of a Decedent's Estate as a Proceeding in Rem" and "The Function of Will Contests." I am glad to acknowledge here the great assistance rendered by these services.

No series of acknowledgments would be complete without a reference to the financial assistance for this research project which has been provided from gifts to the University of Michigan by the late William W. Cook. Without these funds the research would have been impossible. They have provided salaries for members of the research staff engaged in the project and have made possible this publication.

It must not be supposed, however, that the project was without valuable advice and assistance from persons who are not on the research staff of the Law School. First of all, recognition should be made of the work of Mr. R. G. Patton who, as chairman of the Committee, cooperated with the research staff throughout the period in which the research and drafting were in progress. In addition to the advice of members of the Committee on Model Probate Code and state advisers appointed by Mr. Patton, the counsel of other experts on various branches of probate law was sought. Specifically, I desire to acknowledge valuable suggestions received from the following: Dean Alvin E. Evans, College of Law, University of Kentucky; Mr. H. R. Pool and Mr. Y. D. Mathes, attorneys on the staff of the Veterans Administration; Hon. Stephen H. Clink, Probate Judge, of Muskegon, Michigan; Hon. Frank L. McAvinchey, Probate Judge, of Flint, Michigan; Mr. H. W. Nichols, General Counsel of the National Surety Corporation, and members of his staff; Mr. Gilbert T. Stephenson, Director of the Trust Research Department,
PREFACE

Graduate School of Banking of the American Bankers Association; Mr. James C. Shelor, Chairman of the Committee on Fiduciary Legislation, Trust Division, American Bankers Association; Mr. D. H. Redfearn, Chairman of the Committee of the Florida Bar Association appointed to draft a new guardianship act; Miss Mary Stanton, consultant on guardianship, of the Children's Bureau, United States Department of Labor; and Mr. Elbridge D. Phelps, of the Cleveland bar.

Mimeographed copies of later drafts of the Model Code were sent to those who requested them, as well as to a selected list of other persons, and criticisms were solicited. All criticisms received prior to the completion of the final draft were carefully considered by the sub-committee on drafting. I am glad to acknowledge the assistance furnished by those criticisms.

A few criticisms were received after the report of the Committee was completed and in process of publication. One of these, prepared by Mr. Nathan A. Wagner, of the Judicial Department of the Fidelity and Deposit Company of Maryland, and transmitted by its Vice-President and Manager, Mr. Wm. H. C. Griffith, to Mr. Walter W. Land, Chairman of the Section of Real Property, Probate and Trust Law, contains suggestions which can be summarized here. First, it is suggested that, in place of the present § 106 of the Model Probate Code, which gives a discretion to the judge in fixing the amount of the personal representative's bond, the following be substituted:

"Except as provided in section 107, every personal representative shall, before entering upon the duties of his office execute and file a bond procured at the expense of the estate with sufficient surety or sureties in an amount not less than the value of the personal estate to be administered plus the probable value of the annual rents, issuance and profits of all the property of the estate; in case real estate is to be sold by
the terms of the will, the amount of the bond shall not be less than the value of the personal estate to be administered, and the value of the real estate to be sold plus the probable value of the annual rents, issuance and profits of all the property of the estate; except that where the person or persons about to be appointed is or are entitled to the whole estate, or where acknowledged consents that a bond be dispensed with or fixed at a reduced amount are executed and filed by all of the persons interested in the estate, the court may dispense with the bond or fix the penalty at such sum as will adequately protect the rights of all creditors.” It is also suggested that the Code should include “a provision making it incumbent upon the court to inquire into the amount of the bond at the time the appraisal is filed and to make such order, either increasing or decreasing it, as may then appear necessary in order to comply with the statute.” It is further suggested that subsection 118(a) be deleted and that notice be given to the surety of all proceedings pertaining to the administration of the estate. The following recommendations are made as to § 116, which concerns the release of sureties before the estate is fully administered:

“1. That the statute specify by whom the petition for the release of the bond can be filed;

“2. That even if the right to be released is conditioned upon the showing of good cause that the word ‘shall’ be substituted for the word ‘may’ in the first line, so that it would read—‘For good cause, the court shall before . . . ’ It would seem that this would grant the court sufficient discretion but would not permit it to decline to grant the release irrespective of whether or not cause therefor had been shown.

“3. That before the original sureties are released the personal representative shall file a full and complete accounting so that there may be an absolute cutoff of liability between the first and the succeeding sureties.”
PREFACE

It is also suggested, with respect to this section, that it be so amended "that the liability of the new bond would be limited to acts and omissions occurring from and after its execution. In the event that for some reason this is not done, . . . that the date from which the new bond is to be liable should be determined by the court at the time it is ordered to be given. . . ."

It would be inappropriate for me to present arguments at this point for the positions of the Committee which are inconsistent with these recommendations. In connection with the question of notice, however, attention should be directed to §§ 67 and 209 as well as to other provisions in the Model Code on this subject.

Since statutory citations play such a large part in the material presented in this volume, a word may be said as to their date. In the comments to the Model Code and in the appendix notes, statutory citations were revised as of January 1, 1945; also, in so far as 1945 amendments were available at the time of going to press, they have been inserted. In each of the monographs, the statutory citations are, in general, brought down to the date on which that monograph was published in the Michigan Law Review.

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