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INFORMAL PROCEEDINGS UNDER THE UNIFORM PROBATE CODE: NOTICE AND DUE PROCESS

by Roger A. Manlin* and Richard A. Martens**

I. Introduction

On August 7, 1969, the Uniform Probate Code was formally approved by the National Conference of Commissioners on Uniform State Laws. The Code, which now goes to the state legislatures for debate and possible enactment, contemplates a speedy and efficient system of settling a decedent's estate by providing interested persons with alternative methods of securing both probate of a will and the appointment of a personal representative.

Lord Brougham, speaking in the 19th century, expressed dissatisfaction with the probate procedures of his era when he said, "A lawyer is a learned gentleman who rescues your estate from your enemies and keeps it himself." In more recent times numerous authors emphasizing the need for modernization and for revision of existing probate procedures have repeated Lord Brougham's sentiment before a receptive public.

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1 This procedure includes settlement of any question concerning testacy, the proving of a will, and the appointment of a personal representative to distribute the estate and to satisfy creditors' claims.

2 U.P.C. § 1-201

"Interested persons includes heirs, devisees, children, spouses, creditors, beneficiaries and any others having a property right in or claim against a trust estate or the estate of a decedent, ward or protected person which 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 purposes of, and matter involved in, any proceeding.

3 Henry, Peter, Lord Brougham [1778-1868].

In the late 1920's the National Conference of Commissioners on Uniform State Laws attempted to improve the procedures regarding probate and contest of wills. In 1933, however, the committee appointed by the National Conference to study the problem reported that it was impossible to secure any uniformity concerning the probate of wills, and the effort was accordingly abandoned. On January 1, 1946 the Model Probate Code was published under the auspices of the Section of Real Property, Probate and Trust Law of the American Bar Association. The provisions of the Model Probate Code have been accepted or rejected by the state legislatures in varying degrees. Indeed, the Model Probate Code was not presented as a uniform act but rather as "a reservoir of ideas...from which legislative committees may draw the framework of new probate codes." The erratic adoption and rejection of the Model Probate Code's provisions coupled with the confusion of lawyers and of the general public caused by the dissimilarity in probate law and practice gave impetus to a further attempt at unification. The Uniform Probate Code is the culmination of an effort initiated in 1962 under the joint sponsorship of the National Conference on Uniform State Laws and a special committee of the Real Property, Probate and Trust Law Section of the American Bar Association.

At the heart of the Uniform Probate Code's system are the informal proceedings which permit settlement, with varying degrees of finality, of all sizes of estates without delay or adjudication. By allowing persons to settle an estate promptly after the decedent's death by application to an officer of the court, the Code permits the successors of a decedent to settle their affairs concerning the estate without the constant scrutiny of the judicial machinery. This is consistent with the proposition accepted by the drafters of the Code that the probate court's proper role is to be readily available to aid in the settlement of an estate when such aid is requested rather than to impose its unsolicited super-

6 SIMES & BASYE, PROBLEMS IN PROBATE LAW INCLUDING A MODEL PROBATE CODE, 10 (1946).
8 U.P.C. §§ 3-301 to 311.
9 Uniform Probate Code, at xxxiii (Working Draft No. 5).
vision to see that otherwise non-contentious settlements are formally correct.\textsuperscript{10}

The Code's formal procedures, which require that notice be mailed or be personally delivered to interested parties prior to any formal proceeding, seem to offer little difficulty in terms of due process. However, the Code's informal procedures, insofar as they encompass no-notice proceedings, have suffered some criticism.\textsuperscript{11} It is the purpose of this article to respond to these criticisms, and to demonstrate that the informal procedures of the Code as accepted by the National Conference of Commissioners on Uniform State Laws do in fact offer all interested persons adequate protection of their interests in an estate and are fully consistent with the United States Supreme Court's standards of fairness and due process of law.

II. Informal Proceedings Under the Uniform Probate Code

A. Informal Procedure

Under the Uniform Probate Code, an interested person may choose either informal or formal procedures for each step in the settlement of an estate.\textsuperscript{12}

Informal proceedings are administrative rather than judicial in character,\textsuperscript{13} and may be completed without any notice having been given except to those persons who file a demand for notice with the court and to any personal representative of the decedent whose appointment has not been terminated.\textsuperscript{14} Application for informal probate is made by submitting to the Registrar\textsuperscript{15} a detailed statement, made under oath before a public official, that the

\textsuperscript{10} Wellman, \textit{The Uniform Probate Code: A Possible Answer to Probate Avoidance}, 44 \textit{Ind. L. J.} 191, 199 (1969).

\textsuperscript{11} See for example, Comment, 53 Iowa L. Rev. 508.

\textsuperscript{12} U.P.C. §§ 3-102, 3-105.

\textsuperscript{13} U.P.C. § 3-302 and Comment.

\textsuperscript{14} See U.P.C. §§ 3-306, 3-310.

\textsuperscript{15} The "Registrar" is either a judge of the court or a person, including the clerk, designated by a written order filed and recorded in the office of the court. U.P.C. §§ 1-201 (ii), 1-307.
will is entitled to the advantages of the informal procedures. Upon findings by the Registrar that the application is complete and that the applicant has sworn that the statements contained therein are true to the best of his knowledge and belief, a written statement of informal probate will be issued. It is provided, however, that if for any reason the Registrar is not satisfied that a will is entitled to be probated in informal proceedings, he may decline the application.

The appointment of a personal representative, which is necessary to commence the administration of an estate, may be accomplished through informal or formal procedures. This is the case whether the decedent died testate or intestate, and whether no proceedings (intestacy), informal proceedings (will) or formal testacy proceedings (either) have been used to identify probable successors. If the interested party seeking administration elects

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16 Included in the application for informal probate of a will or for informal appointment of a personal representative are: 1) a statement of the interest of the applicant; 2) names and addresses of all heirs and devisees of the decedent so far as ascertainable with reasonable diligence by the applicant; 3) the name and address of any personal representative of the decedent whose appointment has not been terminated; 4) a statement indicating whether the applicant has received a demand for notice or is aware of any such demand; 5) that the original of the decedent's last will is in the possession of the court; 6) that the applicant, to the best of his knowledge, believes the will to be valid and that after the exercise of reasonable diligence the applicant is unaware of any instrument revoking the will. U.P.C. § 3-301.

17 In addition, the Registrar shall determine that 1) the applicant is an interested person; 2) that venue is proper; 3) that an original, duly executed and unrevoked will is in the Registrar's possession; 4) that notice has been given to any persons who have demanded notice; and 5) that the time limit for original probate has not expired. U.P.C. § 3-303.

18 U.P.C. § 3-302.

19 Although the refusal of informal probate cannot be appealed, the proponent may initiate a formal proceeding and put the matter before a judge. U.P.C. § 3-305 and Comment.

20 U.P.C. § 3-103.

21 A "testacy proceeding" is a proceeding to establish a will or to determine intestacy. U.P.C. § 1-201 (qq). If the decedent is assumed to have died intestate, the heirs at law may, if they choose, simply seek appointment of a personal representative to administer the estate without seeking a testacy proceeding. If, after three years, no will has been offered for probate, the assumption of intestacy becomes conclusive. U.P.C. § 3-108 and Comment. If, on the other hand, the decedent died testate, it becomes necessary to have the will admitted to probate by either formal or informal procedures. U.P.C. § 3-102. After the will has been admitted to probate, a personal representative must be appointed to commence administration. U.P.C. § 3-103. However, upon the petition of an interested person a formal testacy proceeding may be commenced which requests the court, after notice and hearing, to determine whether a decedent left a valid will, to enter an order probating a will, to prevent or set aside an informal probate of a will, or for a determination that the decedent died intestate. U.P.C. § 3-401. Whatever the order of the formal testacy proceeding, a personal representative must be appointed to distribute the estate. U.P.C. §§ 3-103, 3-401 and Comment.
to apply for informal appointment\textsuperscript{22} of a personal representative, the Registrar possesses the same power to accept or decline the application for informal appointment\textsuperscript{23} as in the informal probate proceedings. Upon appointment, however, the personal representative must make his appointment known to all persons who appear to have an interest in the estate, including those who appear to be disinherited by the assumption concerning testacy under which the personal representative was appointed.\textsuperscript{24} This would include the heirs at law of a decedent whose will was being informally probated. In addition, the personal representative must, upon his appointment, publish a notice in a newspaper of general circulation once a week for three successive weeks, notifying creditors of the estate to present their claims within four months or be forever barred.\textsuperscript{25}

For the protection of heirs who are not also devisees of a decedent, and for the protection of devisees of an undiscovered will, the Code provides for a period of one year after informal probate or three years after death of the decedent, whichever occurs later, in which any interested person may contest the will or invoke the power of the court and initiate formal proceedings.\textsuperscript{26} As a consequence, a will formally probated becomes conclusive three years after the date of death or one year from informal probate, if later.\textsuperscript{27} The order of a formal proceeding, however, can be vacated only upon appeal, or for one of the following reasons: (1) the offer of a later discovered will of the decedent only if it is shown that the proponents of the later discovered will were unaware of its existence at the time of the earlier formal proceeding in spite of the exercise of reasonable diligence in efforts to locate any will, or were unaware of the earlier proceeding and were given no notice thereof; (2) if intestacy has been ordered, the determination of heirs may be

\textsuperscript{22} U.P.C. § 3-308.

\textsuperscript{23} U.P.C. § 3-309.

\textsuperscript{24} The information concerning the representative's appointment is not to be confused with the notice requirements of formal proceedings. The communication is to be delivered or sent by ordinary mail only to those whose addresses are reasonably available to the personal representative. Furthermore, no notice is required if no personal representative is appointed. U.P.C. § 3-705 and Comment.

\textsuperscript{25} U.P.C. § 3-801.

\textsuperscript{26} U.P.C. § 3-108 and Comment.

\textsuperscript{27} Id.
reconsidered if it is shown that a person was unaware of his relationship to the decedent or was unaware of any proceeding concerning his estate; (3) a vacation of the order may be made upon the discovery that the alleged decedent is alive; and (4) for good cause shown.\textsuperscript{28}

\textbf{B. Formal Procedure}

Formal procedures are judicial rather than administrative in character; that is, they are procedures conducted before a judge after notice to interested persons.\textsuperscript{29} If formal procedures are selected to settle the question of whether the decedent left a will, notice must be given to certain interested persons by mail or by personal service prior to the hearing concerning testacy.\textsuperscript{30} Similarly, if formal appointment proceedings are requested after a formal or informal determination of the testacy question, notice by mail or by personal service must be given to interested parties prior to the hearing upon a petition for appointment.\textsuperscript{31} The Code, however, permits “formal testacy” proceedings requiring notice to all interested persons to occur before, after or without appointment of a personal representative.\textsuperscript{32} Moreover, appointment proceedings may be without notice to all interested persons, that is, be informal, even though the testacy question is handled in a formal proceeding.\textsuperscript{33} This flexibility allows interested persons to employ informal proceedings in uncontested matters while always providing access to judicial determination of matters in need of

\textsuperscript{28} U.P.C. §§ 3-412, 3-413.
\textsuperscript{29} U.P.C. § 1-201(o).
\textsuperscript{30} Upon commencement of either a formal testacy proceeding or a formal appointment proceeding, notice shall be given by mail or by personal service to the surviving spouse, children and other heirs of the decedent, the devisees and executors named in any will that is being, or has been probated, and any personal representative whose appointment has not been terminated. In addition, notice shall be given by publication. U.P.C. §§ 3-403, 1-401.

After notice to interested persons including all persons interested in the administration of the estate as successors under the applicable assumption concerning testacy, any previously appointed personal representative and any person having or claiming priority for appointment as personal representative, the court shall determine who is entitled to appointment. . . . U.P.C. § 3-414.

\textsuperscript{31} U.P.C. § 3-403.
\textsuperscript{32} U.P.C. § 3-414, Comment.
\textsuperscript{33} U.P.C. §§ 3-414, Comment, 3-107, 3-301(c)(d), 3-307.
resolution. In addition, any interested party may petition the Court at any time for supervised administration which is a single proceeding to secure the complete administration and settlement of a decedent's estate under the continuing authority of the court. Such supervised administration requires notice to all interested parties by mail or by personal service when judicial control is instituted and again when the final order is entered.

C. Flexibility of the U.P.C.: An Illustration

Most testators desire that their estate pass to the named devisees as smoothly and as quickly as possible with minimal court interference. The Code satisfies this desire by establishing a broad range of alternative procedures which facilitate the efficient disposition of estates. At the same time, the Code provides all interested persons with easy access to a court in which any problems that arise may be quickly and efficiently resolved.

The flexibility of the Code may be easily illustrated. Assume that the testator dies survived by his wife, one adult daughter and two adult sons. An apparently well executed will leaves three fourths of his estate to his widow and the balance to his daughter. His sons want nothing and everyone is willing to cooperate. One possible approach to settlement of the estate would be the initiation of informal probate proceedings followed by informal appointment proceedings. After such proceedings the executor need only pay all known bills and have the estate distributed to the widow and daughter. This choice of procedure is fast and in-

34 U.P.C. § 3-414, Comment. Article III Introduction.
35 U.P.C. § 3-501.
38 See Administrative Portions of Draft Uniform Probate Code—An Appraisal, 2 REAL PROPERTY, PROBATE & TRUST J., No. 3 at 274 (Fall, 1967).
39 "Hopefully efficient and inexpensive procedures will be used to handle even substantial estates if there does not appear to be any reasonable likelihood of controversy." Wellman, The Proposed Uniform Probate Code, 107 TRUSTS AND ESTATES, 238, 241 (March, 1968). See in this connection, note 12 supra; and "Flexible System for Administering Decedents' Estates," U.P.C. Table V. at xxvii et seq. (Working Draft No. 5) for illustrations of how different combinations of formal and informal proceedings may be employed in the handling of an estate depending on the circumstances surrounding the estate and the desires of interested persons; and 2 REAL PROPERTY, PROBATE & TRUST JOURNAL, No. 3, 273, 278 (Fall, 1967).
40 U.P.C. § 3-703.
expensive. It is, however, very risky. Since the informally probated will remains subject to challenge for a period of three years from death, there remains the possibility of a will contest by any interested person, the discovery of another will, or claims of a prior spouse or forgotten children who may unexpectedly appear. Moreover, if the claim of the spouse or children involves a homestead allowance or exempt property, it may not be cut off even after the three year period.

Employing informal probate and informal appointment procedures to distribute the estate, and employing formal probate procedures after administration to ensure protection against subsequent challenges to the testacy status of the decedent would seem to provide a safer approach. If an interested person desires to seal off any questions that might arise between the representative and the distributees, or among the distributees, formal proceedings may be instituted by petitioning the court for an order construing the will and adjudicating final settlement and distribution of the estate. This order, however, if sought under an informally probated will, will not adjudicate the testacy status of the decedent. The testacy status, having been determined in an informal proceeding, remains subject to attack for three years, and accordingly, the settlement and distribution of the estate may be overturned. If full protection is desired, the formal adjudication of settlement and distribution may be coupled with a formal probate proceeding to establish the will. Regardless of which procedure or combinations of procedures is used, the choice is controlled privately by the persons interested in the estate and is dependent upon the degree of protection thought necessary or desirable.

III. Informal Proceedings: Protection of Interested Persons

In deciding which of the alternative procedures to use in set-

41 U.P.C. § 2-401 entitles the spouse, or, if there is no spouse, the dependent children, to a homestead allowance of $5,000 in addition to any share passing to the surviving spouse or minor children by will, by intestate succession or by way of elective share.

42 U.P.C. § 2-402 entitles the surviving spouse, and if there is no spouse, the children, to a portion of the estate the value of which does not exceed $3,500 in addition to any benefit or share passing to the surviving spouse or children by will, by intestate succession, or by way of elective share of homestead allowance.

43 U.P.C. § 3-1002.

44 Id.
tling an estate, the individual's own self interest will be the deter-
mining factor. Informal procedures would be most suitable for
matters which are reasonably free of doubt and present little risk
of future contention. On the other hand, the existence of a three
year period in which all matters settled informally may be chal-
lenged would encourage the use of formal procedures in han-
dling matters which are uncertain or which run a risk of possible
contention.

Although there is a possibility that a real heir may be dis-
inherited via informal probate, the Code has made the risk toler-
able by procedural and natural safeguards. First, the extended
period during which an informally probated will remains in-
conclusive significantly decreases the risk of disinheritance.
During this period any interested party, which includes heirs who
would take in intestacy, may initiate formal proceedings to chal-
lenge the will. If it is found that administration has resulted in an
improper distribution of the decedent's estate by either distri-
bution under an invalid will, distribution under the mistaken
belief that the decedent died intestate or distribution under an
improper appointment, a distributee is liable to return the prop-
erty improperly received as well as income from the date of dis-
tribution. If the distributee does not possess the property, he is
liable for the value of the property and its income and any gain
realized therefrom.

Second, an heir is likely to receive the natural notice provided
by death. It has been argued that the mobility of present day
society and the breakdown of traditional family ties have reduced
the probability that interested persons will receive actual notice of
death. Even with present day mobility, however, it seems rare
indeed that an individual would fail to learn of the death of a
spouse, parent or other close relative within three years.

46 U.P.C. § 3-501, Comment.
47 One exception is the protection provided by the Code to a bona fide purchaser for value
without actual knowledge of any impropriety in a previous informal proceeding or
distribution who has purchased assets directly from the personal representative or
from a distributee who has received a deed of distribution from the personal represen-
tative. U.P.C. §§ 3-703(b), 3-714, 3-910.
48 U.P.C. § 3-709.
49 U.P.C. §§ 3-909 and Comment, 3-1006.
50 Note 11 supra at 514.
Third, potentially interested persons are further protected by the requirement that every will offered for informal probate be checked by the Registrar to determine whether the will meets certain conditions set forth in a statutory list. The Registrar may decline the application for informal probate of any will which he feels is not entitled to such informal proceedings. Thus, any will of doubtful validity would be forced into formal probate.

Fourth, the Code provides that, upon appointment, every personal representative give notification of his appointment to all heirs and devisees whose addresses are reasonably available. As a result, if a personal representative were appointed, information concerning the estate proceedings would be sent to all heirs who might take in intestacy. There remains the risk that an heir may not receive notice in those cases in which an interested party has sought informal probate of a will without requesting appointment of a personal representative. However, the possible ill effects of such a situation are significantly decreased by provisions of the Code allowing a spouse or creditor to file a claim against the estate for several months after publication of notice to creditors. Since publication of notice to creditors is part of the administration of an estate, it can only be accomplished after appointment of a personal representative which is necessary to commence administration. Any attempt to sell property during the three year period following death on the basis of an informally probated will without an appointment would most likely be futile because of the priority of the widow’s elective share and of creditors’ claims. Furthermore, purchasers for value are protected

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51 Note 17 supra.
52 U.P.C. § 3-305.
53 U.P.C. § 3-705. U.P.C. § 3-301 provides that any application for informal probate include the names and addresses of heirs and devisees so far as known or ascertainable with reasonable diligence by the applicant. Those heirs and devisees whose addresses were made available to the personal representative by their being listed on the application for informal probate would be the very same as those who would receive notice pursuant to U.P.C. § 3-403 prior to formal proceedings.
54 U.P.C. § 2-201 gives a surviving spouse a right of election to take an elective share of the estate. § 2-205 establishes the time limit for electing the elective share at six months after publication of notice to creditors. U.P.C. § 3-803 provides that creditors’ claims are not barred against a decedent’s estate until four months after publication of notice, or, if notice to creditors has not been published, claims are not barred until three years after decedent’s death.
55 U.P.C. § 3-103.
only if they purchase from a personal representative\(^{56}\) or from a
disturbenee possessed of property received from a personal repre-
representative.\(^{57}\) After a three year period, however, no personal repre-
sentative can be appointed. Consequently the right to claim an
elective share, which must be done through a personal representa-
tive, would appear to be barred after that time, although the Code
is not clear on this point. The Code is clear, however, in provid-
ing that, absent the appointment of a personal representative, the
three year limitation does not bar the claims to homestead allow-
ance\(^{58}\) and exempt property.\(^{59}\) As a result, without the appoint-
ment, purchasers for value are unprotected and would be liable
for any property claimed by the spouse as a homestead allowance
or as exempt property, even after three years. Furthermore, al-
though a will is conclusive after three years, it is always subject to
interpretation if there has been no personal representative ap-
pointed to make distribution.

Finally, protection against deliberate misrepresentation in an
attempt to disinherit a rightful heir is provided by allowing dam-
ages or any other appropriate relief in an action against the
perpetrator of the fraud commenced within two years from the
discovery of the fraud or an action for restitution from any person
benefitting from the fraud other than a bona fide purchaser.\(^{60}\) In
addition, there is a possibility of an action for perjury.\(^{61}\)

Although there remains a possibility that a true heir may be
disinherited in spite of the above precautions, the probability of
such is more than tolerable when balanced against the overall
fairness and efficiency of the informal procedures. However, the
possibility of disinherance inherent in informal probate requires

\(^{56}\) U.P.C. § 3-714.
\(^{57}\) U.P.C. § 3-910.
\(^{58}\) Note 41 supra.
\(^{59}\) Note 42 supra.
\(^{60}\) U.P.C. § 1-106.
\(^{61}\) Forcing one who seeks informal probate or informal appointment to make oath before a
public official concerning the details required of applications should deter persons
who might otherwise misuse the no-notice feature of informal proceedings. The
application is available as a part of the public record. If deliberately false representa-
tion is made, remedies for fraud will be available to injured persons without specified
time limit. The section is believed to provide important safeguards that may extend
well beyond those presently available under supervised administration for persons
damaged by deliberate wrongdoing. U.P.C. § 3-301, Comment.
an evaluation of the no-notice provisions in terms of constitutional due process.

IV. Informal Proceedings: Mullane and Due Process

A. The Mullane Decision

In 1959 the U.S. Supreme Court decided Mullane v. Central Hanover Bank and Trust Co. The basic question was whether published notice of a final judicial settlement of accounts in a common trust fund provided beneficiaries with due process of law under the Fourteenth Amendment. Although notice by publication was found sufficient for beneficiaries whose whereabouts were unknown and for "...those beneficiaries whose interests are either conjectural or future, ..." the Court held that "...known present beneficiaries of known place of residence..." were entitled to be informed of the proceedings at least by ordinary mail. Justice Jackson, speaking for the majority, wrote:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

No explicit standard of reasonableness was enunciated; there is no absolute test of due process which may be rigidly applied to all proceedings. Rather, a determination of whether or not due process is satisfied must depend on the circumstances and facts of each case. "The reasonableness and hence the constitutional validity of any chosen method [of notice] may be defended on the ground that it is in itself reasonably certain to inform those affected..." This interpretation is entirely consistent with the

63 339 U.S. at 317.
64 339 U.S. at 318.
65 339 U.S. at 314.
66 "The Court has not committed itself to any formula...determining when constructive notice may be utilized, or what test it must meet." 339 U.S. at 314.
67 339 U.S. at 315.
Court's policy first enunciated in 1877 by Mr. Justice Miller when he said:

[T]here is wisdom, we think, in the ascertaining of the intent and application of [the due process clause] by the gradual process of judicial inclusion and exclusion, as the cases presented for decision require.68

The question is thus raised whether the general notice requirements enunciated in Mullane are applicable to probate proceedings,69 and if so, whether the informal probate procedures of the Uniform Probate Code adequately conform to those requirements.

B. Applicability of Mullane to Probate Proceedings

The Court in Mullane indicated that the new standard of notice was perhaps applicable to certain fields of law where published notice had previously been considered adequate.70 The opinion of the Court makes it quite clear, however, that the holding of


70 It is not readily apparent how the courts of New York did or would classify the present proceeding, which has some characteristics and is wanting in some features of proceedings both in rem and in personam. But in any event we think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. at 312. See also Note, Requirements of Notice in In Rem Proceedings, 70 HARV. L. REV. 1257 (1957).
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Mullane is not as far-reaching as it may at first appear. Speaking of the balance sought between the interests of the State and those of the individual which are protected by the Fourteenth Amendment, Justice Jackson stated:

The Court has not committed itself to any formula achieving a balance between these interests in a particular proceeding or determining when constructive notice may be utilized or what test it must meet. Personal service has not in all circumstances been regarded as indispensable to the process due to residents, and it has more often been held unnecessary as to nonresidents. We disturb none of the established rules on these subjects. [Emphasis added.]

Consequently, before any determination of whether the Code's procedures are consistent with the Mullane requirements, it should be determined whether the Code's informal procedures consist of the "established rules on these subjects" which the Court intended to leave undisturbed by its decision.

The most obvious category of old "established rules" are those rules relevant to a "subject" which have been repeatedly enunciated by the Court in its earlier decisions. Moreover, situations where age-old procedures have been sanctioned by a substantial number of state courts, although not binding on the Supreme Court, would probably influence its thinking with respect to what is and is not due process.

The informal and formal procedures of the Code closely parallel the common form and solemn form methods of proving wills.

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71 Against this interest of the State [in bringing any issues as to its fiduciaries to a final settlement] we must balance the individual interest sought to be protected by the Fourteenth Amendment. This is defined by our holding that "the fundamental requisite of due process of law is the opportunity to be heard." 339 U.S. at 314.

72 339 U.S. at 314.

73 See Perry, The Mullane Doctrine—A Reappraisal of Statutory Notice Requirements, 1952 CURRENT TRENDS IN STATE LEGISLATION, 32, 47 et seq.

74 See Simes, The Administration of a Decedent's Estate as A Proceeding In Rem, 43 MICH. L. REV. 675, N. 69 (1945), for a list of early state cases holding common form probate without notice fully consistent with due process.

75 See 2 J. WOERNER, AMERICAN LAW OF ADMINISTRATION, §§ 216, 217 (3rd ed. 1923), T. ATKINSON, LAW OF WILLS § 93 at 482, (2d ed. 1953) and U.P.C. § 3-303, Comment.
in the English ecclesiastical courts.\textsuperscript{76} An executor wishing to prove a will in common form simply produced it and proved its execution by his own oath.\textsuperscript{77} As with the informal procedures of the Code, no notice had to be given to any party. However, a will proved in common form could, within a certain period of time, be proved again in solemn form in which case interested parties, such as those who would take in intestacy, were given notice and allowed to contest the will in a final judicial proceeding.\textsuperscript{78}

These procedures were carried over to the American Colonies and formed the core of American probate law.\textsuperscript{79} Many states have retained no-notice probate procedures and several refer to these procedures as "common form" probate.\textsuperscript{80} Other states have

\textsuperscript{76} For a discussion of the English traditions in general, see Simes and Basye, The Organization of the Probate Court in America; 42 Mich. L. Rev. 965, 43 Mich. L. Rev. 113 (1944); Comment, 50 Mich. L. Rev. 124, 129-132 (1951).

\textsuperscript{77} You shall swear that you believe this to be the last will and testament of the deceased, and that you will pay all the debts and legacies of the deceased, so far as the goods will extend, and the law shall bind you; and that you will cause all the said goods to be apprized, and make a true and perfect inventory of the said goods, (at a day appointed by the judge, if none be then exhibited) and likewise a true and just account of the said goods, when you shall be thereto lawfully called. So help you God. H. Conset, Practice of the Spiritual or Ecclesiastical Courts 12 (3rd ed. 1708).

\textsuperscript{78} See note 75, supra.


made various changes in the procedure such as requiring some form of notice before proving a will whether it be mailed notice, notice by publication, or notice at the discretion of the judge.\textsuperscript{81} These traditional probate proceedings, which trace their beginnings to the ecclesiastical courts of England, and which have been held on several occasions to be consistent with due process requirements,\textsuperscript{82} clearly constitute "established rules" left undisturbed by the \textit{Mullane} decision.

The hesitancy of the Court to employ the due process clause as a means of revising traditional state practices is well illustrated in \textit{Ownbey v. Morgan} where the Court stated:

The due process clause does not impose upon the states a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship... A procedure customarily employed, long before the Revolution, in the commercial metropolis of England, and generally adopted by the States as suited to their circumstances and needs, cannot be deemed inconsistent with due process of law.\textsuperscript{83}

This description of the due process clause has been affirmed several times by the Supreme Court.\textsuperscript{84}

\textsuperscript{81} For examples of statutes requiring mailed notice, see \textit{ILL. ANN. STAT.} ch. 3, §§ 63, 64 (Smith-Hurd Supp. 1969); \textit{MINN. STAT.} §§ 525.24, .83 (1969); \textit{NEV. REV. STAT.} §§ 136.110 (1967); \textit{OKLA. STAT.} tit. 58, § 25 (1969 Supp.); \textit{UTAH CODE ANN.} § 75-3-5 (1953). For examples of statues requiring less than mailed notice, see \textit{HAWAII REV. LAWS} § 317-12 (1955) (published notice only); \textit{ME. REV. STAT. ANN.} tit. 18, §§ 102, 201 (1965) (notice by publication or personal service as directed by the Court); \textit{VT. STAT. ANN.} tit. 14, § 107 (1959) (published notice only). For examples of statutes which, as in the U.P.C., require some form of notice upon the appointment of a personal representative, see \textit{ARK. STAT. ANN.} §§ 62-2012, 2110, 2111 (Supp. 1967) (notice mailed to, or personally served upon known heirs and devisees); \textit{IND. ANN. STAT.} §§ 7-105, 107 (Supp. 1969) (notice by ordinary mail to heirs and devisees whose addresses appear in the application for probate); \textit{MO. REV. STAT.} §§ 473.017 (Supp. 1969), 473.033 (1959) (notice by ordinary mail to heirs and devisees whose addresses appear in the application for probate.)

\textsuperscript{82} See note 74 supra.

There is little authority dealing specifically with the validity of common form probate notice requirements in terms of due process. Indeed, these notice requirements have never been seriously challenged. However, some early authority can be found which indicates the Court's acceptance of the no-notice, common form probate proceedings as fully consistent with due process of law. In any event, it is clear that the due process clause is rarely used as a means of revising state procedures which have been practiced since the Revolution in order that they continue to adjust to ever-changing standards of "reasonableness."

C. Informal Proceedings and the Mullane Requirements: Is Due Process Afforded?

Assuming, however, that the Mullane standards could hurdle the "established practice" restriction placed on due process decisions and were applicable to probate proceedings, the Code's procedures would nonetheless accord with the demands of that decision. The Court clearly restricted its formulation of adequate notice to proceedings which are to be accorded finality. Under the Code, only formal proceedings, preceded by adequate notice,

85 In Farrell v. O'Brien, 199 U.S. 89 (1905), the heir at law of a decedent challenged the probate of a will, alleging that notice was not given them as required by state statute. The Court said:

\[\ldots\text{[D]espite the mere preliminary admission to probate, there was full right to assail the existence of the will (within one year) and its probate, which was not lost by failure to give notice.\ldots}\text{Indeed, the contention made on this subject amounts to asserting that every state law which provides for a probate in common form is repugnant to the due process clause of the Constitution, even although \ldots interested parties may subsequently, within a time fixed by law, be heard in the probate proceedings to question the existence of a will or its probate. When the result of the proposition is thus ascertained it becomes obvious that it is \ldots so in conflict with the adjudications of this court \ldots that it is devoid of all foundation in reason.\ldots}\text{199 U.S. at 118.}\]

See also, Robertson v. Pickrell, 109 U.S. 608, 611 (1883).


87 An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. 339 U.S. 306 at 314 (1950). [Emphasis added].
are to be accorded finality,\textsuperscript{88} while informal proceedings are open to attack at any time within a period of three years from the death of the decedent. During this period any interested party may petition for a formal proceeding which immediately supercedes the non-judicial informal probate.\textsuperscript{89}

The Supreme Court of Iowa held that \textit{Mullane} did not require mailed notice of a hearing to admit a will to probate, reasoning that since the probate order allowed for an original action to be brought to set aside the will within two years after notice of admission, the order was not final.\textsuperscript{90} Nor is this reasoning invalidated by the Supreme Court's decision in \textit{Schroeder v. City of New York},\textsuperscript{91} which held that published and posted notice of a condemnation proceeding was insufficient, even though there was a three year statute of limitations for filing claims against the City. In \textit{Schroeder}, the length of time allowed to present a claim was irrelevant, for the nature of the action taken by the city was not such as would be likely in itself to inform an affected party that his property was being taken.\textsuperscript{92}

Probate procedures do not encounter this communication difficulty. Notice of death generally travels fast, especially to heirs at law. This type of notice, which implies to the recipient that probate proceedings are likely to be pending, has been depended upon in common form probate and has been found satisfactory by state courts.\textsuperscript{93} Accordingly, the three year period allowed by the Code in which any interested person may initiate formal proceedings or contest a will would seem to be more than ample time for the natural notice of death to reach heirs at law and to warn them of possible probate proceedings.

\textsuperscript{88} U.P.C. § 3-403.
\textsuperscript{89} Note 26, supra and accompanying text.
\textsuperscript{90} \textit{In Re Pierce's Estate}, 245 Ia. 22, 60 N.W.2d 894, 897 (1953).
\textsuperscript{91} 371 U.S. 208 (1962).
\textsuperscript{92} The city was diverting a portion of a river 25 miles above appellant's property which consisted of a house and three and one-half acres of land situated on the bank of the river. The proceedings to divert the river were begun by the city in 1952. Appellant complained, however, that she knew nothing about the condemnation proceedings nor of her right to make a claim against the city until after she had consulted a lawyer in 1959. 371 U.S. at 210, 211 (1962).
Mullane makes it clear that the issue of adequate notice depends upon the reasonableness of the notice rather than upon any rigid statutory formula or requirement.\footnote{See note 66 supra, and accompanying text.} Certainly the fact that probate procedures follow from a person's death, with the natural notice afforded thereby, distinguishes these procedures from the other areas of in rem litigation where natural notice is generally lacking. The notice afforded by death seems "reasonably calculated, under all the circumstances to apprise interested parties of the pendency of the action,"\footnote{Mullane v. Central Hanover Bank & Trust Co., 339 U.S. at 314.} and the three year challenge period is adequate time to "afford them an opportunity to present their objections."\footnote{339 U.S. at 314.}

Moreover, all interested persons, including those who appear to be disinherited by the assumption concerning testacy, are required to be informed of the appointment of a personal representative regardless of whether the appointment is made in formal or informal procedures.\footnote{Text accompanying note 24 supra.} Consequently the Code's informal procedures would appear to provide greater protection for the heirs at law than those states which presently provide for no-notice common form probate.

Furthermore, Schroeder involved the physical alteration of land. When such alteration has taken place and restoration is impossible or highly impractical, the injured party's only alternative is to seek compensatory damages. Therefore the party whose land is being affected should be informed of the condemnation in order to contest the action and protect the property rather than having to settle for money damages. Probate proceedings, on the other hand, frequently involve the transfer of real property to devisees without liquidation. Under the Code, unless the property has been sold to a bona fide purchaser for value before the will is challenged, a disinherited heir would receive fully adequate relief through recovery of the same property originally devised.\footnote{U.P.C. § 3-909 and Comment.} If the property in question has been sold, the purchaser is protected only if he bought from the personal representative or from a
distributee after distribution by a personal representative\textsuperscript{99} in which case information of proceedings would have previously been given to all interested persons.\textsuperscript{100} If the purchaser is protected, however, the distributee is liable for the value as of the date of disposition of the property improperly received and its income and gain received by him.\textsuperscript{101}

It is also significant that the Mullane decision and subsequent decisions extending the Mullane doctrine\textsuperscript{102} apply the rigid notice requirements only to known present beneficiaries. The court stated in Mullane: "As to known present beneficiaries of known places of residence . . . the reasons disappear for resort to means less likely than the mails to apprise them of its pendency."\textsuperscript{103} Any heirs at law, however, not mentioned in a decedent's testament would more likely be "beneficiaries whose interests are either conjectural or future"\textsuperscript{104} rather than present beneficiaries and would consequently not be entitled to Mullane notice. The interests of heirs at law disinherited by a decedent's will are contingent upon successful contest of the will\textsuperscript{105} and are therefore not vested as were the interests of the beneficiary in Mullane and those interested parties in cases where the Mullane standards have been extended.\textsuperscript{106}

\section*{V. Conclusion}

The Uniform Probate Code offers the individual seeking probate of a will an array of alternative methods which allow him to dispose of the matter in an efficient and timely manner. The Code permits an individual to make his own decision in this matter while offering him as much protection, through a combination of formal and informal procedures, as he deems necessary and desirable. The provisions calling for a detailed sworn application, a statutory check by the registrar of all wills informally offered for

\textsuperscript{99} Notes 56 and 57, supra, and accompanying text.
\textsuperscript{100} See text accompanying note 24, supra.
\textsuperscript{101} U.P.C. § 3-909.
\textsuperscript{102} See note 69, supra.
\textsuperscript{103} Mullane v. Central Hanover Bank & Trust Co., 339 U.S. at 318.
\textsuperscript{104} 339 U.S. at 317.
\textsuperscript{105} In Re Pierce's Estate, 245 Ia. 22, 60 N.W.2d 894, 898 (1953).
\textsuperscript{106} Note 69, supra.
probate and the generous three year period in which a will may be contested assures that the no-notice characteristic of informal probate will not work substantial injustice. Additional protection is supplied by the requirement that all interested persons be informed by ordinary mail of the appointment of a personal representative. The injustice of unnecessary delay too often occasioned by present probate proceedings, coupled with the fact that the great majority of wills are uncontested,\(^{107}\) point out the need for reorganization of American probate law. The flexible response of the Uniform Probate Code offers an efficient, expeditious method of settling estates while maintaining that fairness commensurate with the Supreme Court's due process standards. It serves as an excellent guide for state legislatures in their efforts to reform probate law and procedures.

\(^{107}\) See Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 CHI. L. REV. 241 (1963). A study made by Professor Dunham in Cook County revealed "that 85 percent of the deaths in the sample resulted in no probate proceedings," at 244. See also, Simes & Basye, *The Organization of the Probate Court in America; II*, 43 MICH. L. REV. 113, 114 (1944), where the authors state: "No statistics are required to justify the observation that the vast majority of smaller estates is handled by American probate courts without any controversies whatever."