MODEL PROBATE CODE AND MONOGRAPHS ON PROBATE LAW: A REVIEW

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THE current volume in the Michigan Legal Studies, *Problems in Probate Law: Model Probate Code*, is an outstanding example of what can be achieved by the cooperation of a professional association and a well-financed and forward-looking law school. The Probate Division of the Section of Real Property, Probate and Trust Law of the American Bar Association initiated the project of preparing a model probate code and sponsored the project through to completion. The code is the Probate Division's proudest achievement. But the code would not have been possible without the Herculean labors of Professor Lewis M. Simes, Director of Legal Research at the University of Michigan Law School, Professor Thomas E. Atkinson, of the New York University School of Law, Mr. Paul E. Basye, of the San Francisco, California Bar, formerly Research Assistant at the University of Michigan Law School, and the other members of the research staff of the University of Michigan Law School. Nor would the project have been possible without the financial aid afforded by the William W. Cook endowment. Other philanthropists should observe how wisely the Cook funds have been used in this joint venture.

The need for a model probate code was made clear by Professor Atkinson in an article published in the Journal of the American Judicature Society in 1940. During the same year a committee of the Probate Division of the Section of Real Property, Probate and Trust Law was appointed to study the matter with Mr. R. G. Patton of Minneapolis, Minnesota, as chairman. The drafting of the code was started in 1942 by a sub-committee consisting of Messrs. Patton, Simes, Atkinson and Basye. The probate code was carried through ten tentative

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2 Proceedings of the Section of Real Property, Probate and Trust Law, American Bar Association, p. 17 (1940).
drafts before the final report was submitted to the Section of the American Bar Association. The code and the supporting memoranda and monographs are the result of five years of research, drafting and revision, almost continuous correspondence with representative attorneys in all of the states, and consultation with all interested professional groups. The story of the evolution of the code and of the methods followed is interestingly told by Mr. Patton in his committee report to the Section of Real Property, Probate and Trust Law of the American Bar Association at the 1945 meeting.

The current volume contains three parts: Part One, the Model Probate Code, with comments on many of the sections; Part Two, Appendices to the Model Probate Code, which are for the most part comparative studies of state statutes; and Part Three, Monographs on Problems in Probate Law, which are authoritative studies by Professor Simes and Mr. Basye of several of the basic problems encountered in the preparation of the code. The monographs have all been published in the Michigan Law Review.

To appreciate the competence of the work which has been done, a reader of this volume would do well, first, to read the code and the comments quickly, so that he could see the scope and outline of the project, then to read the memoranda comparing the statutes of the different states, then to read the monographs, and finally to re-read the code against the background he has acquired. Everyone who follows this method must be impressed by the tremendous amount of labor which has gone into this venture, as well as by the fairness, the imagination, the resourcefulness and the restrained audacity of the draftsmen. This is no hack job. Nor is it a mere massing of material for the sake of overwhelming the reader. Bulk there is, but the scholars engaged on this project have mastered the detail and have made order out of chaos.

Every beginning student of the American law relating to the administration of decedents' estates is bewildered by the variations from state to state in the organization of the probate courts, in the jurisdic-

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tion of the courts, and in the status of the court and of the probate judge. A New York student who learns that a Surrogate in New York has the most coveted judicial position among trial judges, with full legal and equitable powers within his specialized jurisdiction, is mystified by the status of a Surrogate in New Jersey, who has principally clerical functions, and by the respective jurisdictions in New Jersey of the surrogate's court, the orphan's court, and the prerogative court. He finds in Connecticut that the probate court is an inferior court, with no presumption of regularity accorded to its proceedings, and with an appeal allowed from its orders to a trial court of general jurisdiction for a trial de novo.

In view of the many differences in probate jurisdiction and procedure, no attempt has been made to draft a uniform act. The Model Probate Code is intended to be what the title suggests—a model. The current volume, with the code, comments, memoranda and monographs, is offered as an aid to the various state commissions which are now or soon will be engaged on the task of revising the probate statutes of various states. There was a substantial reform movement before the war with a number of new probate codes adopted. The current volume should prove a powerful stimulus to the movement. While some changes in the code might have to be made because of state constitutional provisions or because of the local judicial system or deep-rooted local traditions, it is earnestly hoped that the basic system of the code will be widely adopted. While the code is not a uniform act it has been integrated with the uniform acts which have been adopted by the National Conference of the Commissioners on Uniform State Laws or are now being promulgated.

During the current year Justice William T. Collins resigned as Justice of the Supreme Court of New York to become one of the two Surrogates of New York County. A few years ago, Justice Francis D. McGarey resigned as Justice of the Supreme Court to become Surrogate of Kings County.

See REPPY AND TOMPKINS, HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS 174-177 (1928); Simes and Basye, "Organization of the Probate Court in America," PROB. PROBATE L. 405-407.


Introduction, PROB. PROBATE L. 9 et seq.


Introduction, PROB. PROBATE L., 11-12.
I

GENERAL PLAN OF THE CODE

The code is drafted on the basic assumption that the probate judge will have the status of a trial judge of general jurisdiction, will have equal qualifications, and will receive an equal salary. The probate court is not to be an inferior court with an appeal allowed to a trial court for a trial de novo. Its decrees are to be conclusive, subject only to be vacated by the court itself or reversed on appeal to an appellate court.

The code includes a number of innovations. On the supposition that most probate matters are non-contentious, the draftsmen have included a method of initiating administration without notice but have provided for a notice early enough in the proceeding to permit timely objections. The published notice to creditors is combined with the original notice. The jurisdiction of the probate court is extended to land. Indeed, in the fullest sense real property is included with personal property in the administration. Only one contest is permitted and the number of appeals is reduced to the minimum. The emphasis is on the decree of final distribution, not on the order admitting the will to probate. The time schedule for administration is speeded up. The code goes far in dispensing with administration or providing for summary administration of small estates. A number of these features will be discussed in the course of this review.

II

SPECIFIC PROVISIONS OF THE CODE

A. Status of Probate Court: Jurisdiction

One who reads the monograph, "The Organization of the Probate Court in America," will realize how necessary it is to have thoroughly qualified probate judges. The code provides that a probate judge must have been a member of the bar or held judicial office for at least five years (§ 4). The probate judge is to be paid a salary equal to that of a trial judge of general jurisdiction (§ 5). The probate court is to have co-ordinate status with the trial court of general jurisdiction and, within its special jurisdiction, is to have full legal and equitable powers (§ 6). Its decrees are to have the same effect as judgments in a court of general jurisdiction. The court is not to be in any sense an inferior court.

18 Prob. Probate L. 385.
as the probate court is in so many states today. Its jurisdiction is to be exclusive. Broad rule-making powers are given in further recognition that the court is not an inferior tribunal (§ 10).

A concomitant of the elevation of the probate judge from the position held in many states is the shifting of certain ministerial powers and judicial powers in non-contested matters to the clerk (§ 11). This is sound as proved by the experience in England and in the Counties in New York City. In New York County, two surrogates are able to handle the tremendous volume of business by the intelligent use of clerks with specialized powers; only one surrogate is needed in Kings County, and only one in Queens County. Another advantage of having a clerk with limited judicial powers is that there can be a clerk in each locality even though the probate judge serves a large area.

B. The Administration Proceeding: Notice

One of the important features of the code is the method of giving notice to interested parties. The proceeding for the administration of a decedent's estate is conceived of as a unit from the filing of the first petition to the discharge of the last personal representative (§ 62). It is a true proceeding in rem. Only the first notice is jurisdictional (§ 62). Although notice to interested persons of the hearing on the petition for a decree of final distribution is provided for (§ 183), a defect in notice at this stage would not justify collateral attack (§ 62).

It is not required that notice be given before probate or appointment of a personal representative. The code embodies a modern version of probate in common form without notice (§ 68). Unless an interested person has filed a demand for notice or has opposed the petition, the court may act on the verified petition for probate or appointment of a personal representative ex parte and without notice (§ 68). This summary proceeding enables a personal representative to start his official duties almost immediately after the death of the decedent. There is no need for a temporary administrator and little chance for the intermeddling of others.

If a demand for notice has been filed, or the petition has been opposed, or the court believes that notice is desirable, the court can direct service by publication and by delivery of a copy of the notice

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16 PROB. PROBATE L. 421 et seq.
17 Id. 469, Comment.
18 Id. 395-399.
19 Id. 489-526.
20 Id. 437-443.
personally or by registered mail to each known heir and devisee (§ 69). By standing order, the court can require notice in advance of the hearing (§ 14-b) and this might be a desirable general rule in large cities, but an inflexible rule for notice in advance would defeat the scheme of the code. If the notice is published, a notice to creditors to file their claims or be forever barred is added so that only one publication is needed (§ 69-c).

If no notice of hearing has been given, as soon as general letters are issued, the clerk is required to publish a notice of the appointment of a personal representative which shall include a notice to creditors (§ 70). A copy of the notice shall also be served personally or by registered mail on each known heir and devisee. Thus, in either case, only one published notice is needed, and if notice is not given before the personal representative is appointed, notice is given very early in the proceeding. If notice of the hearing has been given, the grounds of any contest must be filed before the hearing (§ 73-b-1); if notice is given after the appointment of the personal representative, the grounds of objection must be filed within four months (§73-b-2). The only exception is that if the ground of objection is that another will has been discovered the objections must be filed before the final decree of distribution 19 (§ 73-a) or within five years if no such decree is made 20 (§ 83).

Everything possible has been done to make the order admitting the will to probate or granting administration final if uncontested or unappealed from (§ 81), subject only to be vacated or modified by the court itself for good cause (§ 19). Therefore, if the fact of death is in doubt, a notice of hearing on the petition must be published and a copy sent by registered mail to the last known address of the alleged decedent (§ 69-b). Upon the application of any interested person the court may direct the personal representative to conduct a search for the alleged decedent by advertising for information, by notifying public welfare agencies in appropriate localities, or by engaging the services of an investigating agency (§ 71). Since the alleged decedent is a party, and will be bound by the decree (§ 81), it is of course necessary to take all possible steps to determine once and for all the fact of death. If the decedent is not dead he may, notwithstanding the decree, recover any assets yet in the hands of the personal representative or the distributees (§ 81-c).

Some critics of the code will object to the admission of a will to probate or the appointment of a personal representative without notice in advance. Yet this system works well in England.\textsuperscript{21} In one-third of our states prior notice is not required.\textsuperscript{22} The code cures the defect which exists in many states by requiring a published notice immediately after the appointment of the personal representative. As there will be only one contest, and the contest will be tried in the probate court (§ 74), it should make little difference whether it is before or after initial probate.\textsuperscript{23} Since all interested parties will receive notice, it should not matter greatly whether notice is given before or immediately after appointment of a personal representative. After all, no one objects to probate in the vast majority of cases. The summary disposition of non-contentious matters as certainly desirable when adequate opportunity is afforded for objections. The scheme of the code, especially the notice just after appointment, is novel but seems economical, practical, and fair.

A further objection might be made to the requirement of a published notice in every case. Certainly published notices reach the attention of few persons in a metropolitan area,\textsuperscript{24} and are often not needed in a small community. The published notice, however, combines the notice to heirs and other interested persons with a notice to creditors to present their claims within four months or be forever barred. There is, therefore, only one published notice. Since the non-claim period is a complete cut-off under the code, a published notice is probably necessary to satisfy the requirement of due process.\textsuperscript{25} If so, the code scheme of combining the function of the two notices is simple and economical.

The view that the administration proceeding is a single unit, requiring only one notice to interested parties is not one which prevails

\textsuperscript{21} Id. 438 et seq.

\textsuperscript{22} See stat. note, "Requirement of Notice for Probate of Will or Grant of Letters of Administration," Id. 269.

\textsuperscript{23} See monograph, Simes, "The Function of Will Contest," id. 682, especially at 755-756.

\textsuperscript{24} In New York the publication of notice to creditors has fallen into disuse. If notice to creditors is published, all claims must be presented within six months of the first publication; but if no notice is published, all claims must be presented within seven months of the issuance of letters. N.Y. Surr. Ct. Act (Cahill, 1937) §§ 207, 208. The difference of only one month is seldom worth the trouble and expense of publication.

\textsuperscript{25} In New York the non-claim statute does not bar the claims of creditors against heirs and devisees. N.Y. Dec. Est. L. (McKinney, 1938) §§ 170-194.
widely. Yet some states go too far in the other direction. For example in New York, persons interested in an estate might have to be cited half a dozen times during a single proceeding: when the petition for probate or administration is filed; when real property is to be sold, mortgaged or leased (and there are no express powers in the will); when either a compromise proceeding or a construction proceeding is necessary; when an advance payment on account of commissions is required; or when an attorney wants his fee approved and an advance payment made on account. And the proceeding for a judicial settlement of the executor’s or administrator’s account is quite separate, separately entitled and requiring a new citation. The view adopted in the code seems preferable.

C. Intestate Succession

The sections on intestate succession are not an essential part of the code but since they embody the modern views on several matters they are worthy of inclusion. First of all the code cuts off all distant relatives after the issue of grandparents in favor of the state (§ 22-b-6). That is, a first cousin or a first cousin once or more removed could inherit but a second or third cousin could not (§ 22-b-5). The state is preferred to the “laughing heir.” A repetition of some of the spectacular heir hunts will be avoided.

Another feature is the increased share of the surviving spouse (§ 22-a). Since all distinctions between the devolution of real and personal property have been abolished in the code, the surviving spouse becomes an heir and is entitled to at least one-half of the net estate, and more if no issue of the decedent survives him (§22-a-1,2). If the intestate is not survived by issue, parent, or issue of a parent, the entire net estate goes to the surviving spouse (§ 22-a-3).

28 Id. §§ 215, 236.
31 Id. § 221.
32 Id. § 285b.
33 Id. §§ 231a, 231b.
34 Id. §§ 260, 262.
The shares of others than the surviving spouse are determined by an eclectic system which is neither the parentelic nor the civil law system. Parents do not take to the exclusion of brothers and sisters (§ 22-b-2). A provision avoids the ambiguities implicit in the common law doctrine of representation (§ 22-c). The various situations in which issue take per capita or per stirpes are carefully worked out (§ 22-b, 1-5). The draftsmen have been influenced by the English statute of descent and distribution. Reference is made in a comment to the similar model statute once drafted by Professor Eagleton for the Conference of Commissioners on Uniform State Laws.

The doctrine of ancestral property is abolished; kindred of the half-blood take the same share with those of the full blood (§ 24); and adopted children are treated as if natural children of adopting parents (§ 27). Several troublesome aspects of the law of advancements have been specifically covered (§ 29). The value of the advancement is determined as of the time when the advancee comes into possession, unless that time is after the decedent’s death (§ 29-b). The lineal heir of an advancee who pre-deceases the intestate is charged proportionately, whether or not he takes by representation (§ 29-c).

D. Taking Against the Will

Dower and curtesy are flatly abolished (§ 31). This is an advance over the pioneer New York statute which abolished dower prospectively but retained the shell of the old institution so as to embarrass conveyancers and yet confer slight benefit on widows. A widow in New York will elect dower only where her husband loses all or most of his fortune; yet a purchaser of land must worry about the release of dower because he can never be sure how prosperous the husband will be at death.

Under the code the surviving spouse is also given a right of election against the will of a deceased spouse so that the surviving spouse may take his intestate share up to $5000, and above that amount one-half of his intestate share (§ 32). The share so elected passes to the spouse.

86 See comment to § 22, Prob. Probate L. 62-63.
87 Id. 63; See Eagleton, “The Intestacy Act,” 20 Iowa L. Rev. 241 at 244 (1935).
89 See: N.Y. Dec. Est. L. (McKinney, 1938) §§ 18(7), 82. The elections under § 18 and § 83 are substantially more than dower except where the husband is insolvent or nearly so at the time of his death.
by descent (§ 32-b). This section is obviously designed to cover the
great bulk of estates throughout the nation since most are of moderate
amount. It is not so well adapted to the large estate where the income
for life on a share of the estate might give the spouse an adequate
interest. For this reason an alternative section is suggested which
would seem preferable, at least in the states where wealth is concen­
trated. Under the alternative section a spouse takes one-half of a net
estate if it is not over $20,000. If the estate is larger, the spouse may
elect either $10,000 outright, or one-half of the estate, but he must
accept a life income interest in a testamentary trust at its principal
value. The alternative provision is similar to the New York statute.41

The least defensible section is the one covering inter vivos disposi­
tions which reduce the estate of one spouse to the prejudice of the sur­
viving spouse (§ 33). Obviously it is not desirable to read back a type
of inchoate dower by giving a surviving spouse a claim against a pur­
crher of property from the deceased spouse. Nor did the draftsmen
wish to follow the “illusory trust” doctrine of Newman v. Dore.42
Such a view casts doubt on the validity of inter vivos trusts in which
the settlor reserves powers which are generally thought permissible.43

The section of the code provides that an inter vivos gift made by a
person “in fraud of the marital rights of his surviving spouse to share
in his estate” may be avoided by the surviving spouse (§ 33). The term
“fraud” is not defined. Some light as to its meaning is cast by a sub­
section which provides that any gift made by a married person within
two years of his death is presumed to be in fraud of the marital rights
of the surviving spouse (§ 33-b).

Is this provision an improvement on the “illusory transfer” test of
Newman v. Dore?44 The New York Court of Appeals in that case
repudiated the fraud test by pointing out that motive should not be

40 The alternative section is set forth in the comment to § 32, PROB. PROBATE
L. 69.
Dissenting Spouse May Obtain,” PROB. PROBATE L. 258. See also, stat. note, “Spouse’s
Misconduct as Barring Right of Election,” id 263-267.
42 275 N.Y. 371, 9 N.E. (2d) 966 (1937).
43 Compare, Bolles v. Toledo Trust Co., 144 Ohio St. 195, 58 N.E. (2d) 381
(1944), with Kerwin v. Donaghy, 317 Mass. 559, 59 N.E. (2d) 299 (1945), and
Beirne v. Continental Equitable Title and Trust Co., 307 Pa. 570, 161 A. 721
(1932).
44 Cf. The present status of “illusory trusts”—the doctrine of Newman v. Dore
brought down to date, 44 MICH. L. REV. 151 (1945).
controlling.\textsuperscript{45} One who has acquired land from a husband without paying "adequate compensation" may be unwilling to improve the property, or be unable to mortgage it or sell it, when an inquiry as to the husband’s motive may result in giving his widow an election to recover half or even all of the property.

If an election is to be given to a surviving spouse to avoid any otherwise effective transfers, why not state more precisely what transactions are avoidable? One possibility might be to permit a surviving spouse to take a forced share in any of the decedent’s property which would be includible in the decedent's gross estate for federal estate tax purposes. The principal objection would be that gifts "in contemplation of death" would be almost as troublesome as gifts in fraud of marital rights. A better idea might be to enumerate specifically the transactions which a surviving spouse could treat as testamentary dispositions. Included would be inter vivos deeds of trusts in which the settlor has reserved the life income, or the power of revocation or amendment,\textsuperscript{46} and all transfers which create a joint tenancy.\textsuperscript{47}

E. Venue

The venue provisions of the code presuppose that the problem of venue is basically different from the problem of jurisdiction. Whether the courts of a given state have jurisdiction depends on facts like domicile and location of property. It is a question of power. The problem of venue is to determine which court within the state can best handle the matter. It is largely a question of convenience.\textsuperscript{48} The code, therefore, locates the venue for probate and administration in the county where the decedent was domiciled, or, if the decedent was a non-resident, in any county wherein he left property or into which any property belonging to his estate may have come (§ 61). If proceedings are initiated in more than one county, all but the first proceeding may be

\textsuperscript{45} 275 N.Y. 371 at 379.

\textsuperscript{46} Most of the celebrated cases have involved trusts of this type. In addition to the cases cited in note 44 supra, see: Rose v. Union Guardian Trust Co., 300 Mich. 73, 1 N.W. (2d) 458 (1942); Smith v. Northern Trust Co., 322 Ill. App. 168, 54 N.E. (2d) 75 (1944); Brown v. Fidelity Trust Co., 126 Md. 175, 94 A. 523 (1915); Marine Midland Trust Co. v. Stanford, 256 App. Div. 26, 9 N.Y.S. (2d) 648 (1939), affd. mem. op. 281 N.Y. 760, 24 N.E. (2d) 20 (1939); Krause v. Krause, 285 N.Y. 27, 32 N.E. (2d) 779 (1941). The cases are hardly reconcilable.


stayed until the matter of venue is determined (§ 61-b). At any time until entry of the final decree of distribution the proceeding may be transferred if it would be for the best interest of the estate (§ 61-c). The venue provisions of the code are similar to the New York statute which has stood the test of experience.49

F. Will Contest

A special feature of the code is that only one will contest is permitted—instead of two as in some states and even three in others.60 Since no appeal lies to another trial court for a trial de novo, there can be no second contest by that means (§ 20). Any interested person may contest a will by stating his grounds in writing (§ 72). If notice is given before the hearing of the petition, the contest must take place before the will is admitted to probate (§ 73-b-1). If notice is given after probate, objections may be filed within four months thereafter (§ 73-b-2), except that if a new will has been discovered an objection on that ground may be filed any time before the decree of final distribution (§ 73-a). If the new will is not discovered until after five years from the death of the decedent the will may not be admitted to probate even though the final decree of distribution has not yet been entered (§ 83). This limitation will be of special importance where no prior will has been offered for probate because after the five year period heirs may deal with the land as owners. As a necessary corollary, title to land cannot be proved by an unprobated will (§ 85).

G. Dispensing With Administration

It is a disgrace to the legal profession that means have not heretofore been adopted to provide for a summary and economical settlement of small estates. Pioneer work has been done in a few states but in most jurisdictions the law is quite inadequate.61 New York has gone farther than most: the tentative trust of a savings bank account is often called the poor man’s will.62 The joint savings bank account is useful because of the statutory conclusive presumption of ownership of the

62 Matter of Totten, 179 N.Y. 112, 71 N.E. 748 (1904). See also N.Y. Banking L. (McKinney, 1942) §§239 (2), 134(2); id. (Supp. 1946) § 310(5).
survivor. Small balances in savings and industrial banks may be paid to close relatives of deceased depositors without administration.\(^{54}\) Wage claims up to $150 may be paid to the widow or children of a decedent. \(^{55}\) Social security or state unemployment insurance benefits may be paid to the public administrator to be administered informally. \(^{56}\) The spouse and children are entitled to certain exempt personal property and not to exceed $300 in money. \(^{57}\) But these provisions are haphazard. There is no provision for dispensing with administration because the estate is small. \(^{58}\) There is no short-cut if the decedent owned registered securities, an automobile, or had money owing to him. Without full-dress administration there is no one who can effect a transfer, maintain an action, or give a receipt.

The sections in the code relating to the administration of small estates seem humane, fair and practical. They represent an important advance. They are the result of comprehensive research and a masterful study of the problem by Mr. Basye. \(^{59}\)

First of all, the code provides for the distribution of exempt property (§§ 42, 43) and for a family allowance (§ 44). The allowance is payable in money and is designed to maintain the family during the period of administration. Secondly, the code provides that after five years from the date of death, the heirs of the decedent take free of all creditors (§ 135-d) and even free of the devisees under a later discovered will (§ 83). These sections minimize the need for administration. But the important features relate to the small estate. If the estate does not have a gross value (excluding homestead and exempt property) in excess of $1000, and if after thirty days no one has applied for the appointment of a personal representative, then a distributee may on his affidavit perform the few acts necessary to administer the estate (§ 86). The affidavit shows the amount of the estate and the names and relationship of the distributees. Such an affidavit may be furnished to a person who owes money to the estate, to a custodian 

\(^{58}\) N.Y. Banking L. (McKinney, 1942) § 239(3).
\(^{54}\) N.Y. Banking L. (McKinney, 1942) §§ 239(4), 134(4), 310(1).
\(^{58}\) The Public Administrators of the Counties in New York City are authorized to administer estates of a gross value of less than $500 without formal letters. N.Y. Surr. Ct. Act (Cahill, 1937) § 136(r).
\(^{59}\) Basye, "Dispensing with Administration," Prob. Probate L. 862.
of property of the decedent or to a registrar or transfer agent with respect to registered property of the decedent, with a demand for payment, delivery or transfer. If the person who receives the affidavit refuses to act, he may be sued by the distributee on behalf of himself and other distributees (§ 87). The person who pays what is due the estate, delivers property or transfers securities pursuant to such a demand, relying on such an affidavit, is protected to the same extent as if he had dealt with an appointed personal representative (§ 87). Since there is no published notice to creditors there is no non-claim period and, therefore, estate assets remain subject to the decedent's debts until the regular statutes of limitations have run. Any creditor who feels aggrieved by this procedure may avoid it by a timely application for the appointment of a personal representative. There seems little reason to fear that distributees will be less honorable in dealing with the decedent's assets than a relative who is named executor and serves without bond.60 Indeed, it would seem justifiable to permit this informal administration in estates of somewhat larger gross value, perhaps $2000 or $3000.61

The code also provides for a summary administration of estates which have a gross value not to exceed $2500 (exclusive of homestead and exempt property) and do not exceed the amount which the surviving spouse and children are entitled to as a family allowance (§ 88). The court may, on proper petition and proof of the facts alleged make an order that no administration is necessary and after finding that funeral and administration expenses have been paid, may make an allowance to named members of the family from the balance of the assets (§ 89). The order of no administration, until revoked, permits the members of the family named in the order to deal with the estate as a personal representative could (§ 90).

Another section provides a summary proceeding where the estate is only large enough to pay administration expenses and other preferred claims against the estate (§ 92). If a personal representative is appointed he may pay the claims in order of their priority and then obtain a summary settlement of his account and be discharged.

60 Cf. id. 676.
H. Bond

There are a number of controversial problems relating to the bond of the personal representative. Should the court have discretion in fixing the amount of the bond or should the statute set the standard? If the latter, should bond be fixed, as in some states, at double the value of the personal property, or at an amount equal to such value, or in some reduced amount? If bond is excused by the testator, should the court, nevertheless, have the power to require a bond? Certainly, the requirement of a bond, even in a reduced amount, has a salutary effect on the personal representative. It is odd that so many testators are willing to dispense with a bond to protect their estates after their deaths when they insist on bonding even their trusted employees while they live. Statutory requirement of a bond in an amount disproportionate to the risk may well be responsible for the current popularity of stock clauses dispensing with bond.

The code handles the requirement of bond in a fair and realistic manner. The court is given discretion in fixing the amount of the bond. In the ordinary case the court shall fix the bond “in the amount of the value of any part of the estate which it can determine from examination that the personal representative might easily convert during the period of administration plus the value of the gross annual income of the estate” (§ 106). The bond is not required (1) where excused by the testator (unless the court then or later finds it proper or necessary), (2) where collateral is deposited with the court, (3) where personal assets are deposited with a trust company subject to the order of the court, or (4) where the personal representative is a corporate fiduciary (§ 107). In fixing the bond the court may of course be influenced by the fact that the personal representative is also a distributee or that other distributees have waived the protection of a bond.

Some surety companies have not been satisfied with the bond provisions of the code. But if they have lost because the court is given discretion to fix the bond in a reduced amount they have gained in that more bonds are likely to be required, and, further, that personal sureties will be virtually unobtainable under the strict provisions of the code. A personal surety must be not merely a landowner; he must offer as security a lien on a specific parcel of real property (§§ 111, 113). The sufficiency of the bond and of the security must be approved by

63 See comments in Preface, Prob. Probate L. viii-x.
the court (§112). This is the New York practice64 and while it safeguards the estate by avoiding "straw" bondsmen it does almost eliminate the personal surety.

The bond will give full protection to all persons interested in the estate (§ 109) as to all violations of duty by the personal representatives (§§ 110, 172). Execution of the bond is deemed an appearance by the surety and there may be summary enforcement of the bond in the administration proceedings (§ 118). Liability on the bond for acts of the personal representative prior to his discharge extends until two years after his discharge (§ 119).

I. Claims

The sections of the code relating to claims are of special interest. In the first place, the non-claim period is short: only four months from the date of the first published notice to creditors (§ 135). The only claims not so limited are administration expenses and claims of the United States. All claims must be filed within the period, even claims which are unmatured, contingent, or unliquidated. Furthermore, a claim once barred is barred forever, not only against the estate and the personal representative but against the heirs, devisees and legatees. The cut-off is complete. Mortgages, pledges and liens are, of course, unaffected (§ 135-e). Furthermore, if no administration is commenced within five years after the date of death, all claims are barred and estate assets are free of claims (§ 135-d).

Even if the complete cut-off feature is accepted, some critics will object to the requirement that contingent claims must be filed with the court within the four month period (§ 140). The creditor must file a claim before he knows the amount of his claim or even whether he has one. If no such claim need be filed, devisees and legatees remain subject to such claims and are not free to treat the acquired property as their own. The code requires that contingent claims be filed and proved as such. The claimant and the personal representative may agree on a settlement of the claim on the basis of its probable present value (§ 140-a). If the court approves the settlement the matter is disposed of; otherwise the court must determine what reserves should be retained; or whether assets should be distributed subject to the claim and with a refunding bond (§ 140-c). On the whole it does not seem unreasonable to require the filing of contingent claims. As suggested

64 N.Y. Surr. Ct. Act (Cahill, 1937) § 105.
in the comment: "Death of a debtor is a hazard which all creditors should assume and if the creditor seeks to avoid it, he can do so by taking security for his claim." 65

An innovation is proposed with respect to proof of claims not due —unmatured as opposed to contingent claims. If the obligation was entered into after the date of the adoption of the code, the court will allow the claim at its then value as if it were an absolute claim. For pre-existing obligations, the court may order the retention of assets or the furnishing of a bond to secure future payment if the creditor refuses to accept a settlement on the basis of present value (§ 138). This provision again tends toward speed and finality in administration.

J. Probate of Heirship

Since real property is included in all administration proceedings,66 there will seldom be a need for a separate proceeding to determine heirship. The proceeding provided does not bar creditors' claims and therefore is of no value until five years after the death of the decedent (§ 195). It will be used only where there has been no administration and where none is possible because of the five-year limitation.

K. Guardianship

Part IV of the code relates to guardianship. It is divided into two subdivisions, one relating to guardians of minors and incompetents in general and the other to guardians of incompetent veterans. The latter subdivision contains the Uniform Veterans' Guardianship Act.

As pointed out in the introductory comment,67 there are fewer modern codes relating to guardianship than to decedents' estates and therefore the draftsmen have had to do more of a pioneering job. No attempt has been made to do anything revolutionary. The basic concept of the ward as owner of the property under guardianship has been retained (§ 221), as well as the basic rule that a guardian makes contracts in his own name and is personally liable thereon. The guardian may, however, sue or be sued in his representative capacity, and causes of action which affect him in his personal or representative capacity may be combined in one proceeding (§ 228-a, b). Claims are made much

65 Comment, Prob. Probate L. 142.
66 See Code, §§ 84, 124, 183.
as in decedents' estates, but there is no non-claim period since there is no need for early settlement of the estate (§ 227).

This part of the code is drafted on the correct assumption that a guardianship statute should be patterned partly on the law of decedents' estates and partly on the law of trusts. Since guardianship usually endures for a much longer time than the period of administration, it is necessary to work out some matters such as investment policy and accounting procedures by analogy to the law of trusts.

Some of the anachronisms of the law of guardianship have been eliminated. For example, guardianship in socage is abolished.68 Guardianship in chancery is also abolished, the probate court having exclusive power to appoint guardians except guardians ad litem (§ 199). Testamentary guardianship as such is also abolished. All guardians must be appointed by the court but testamentary nominations of persons as guardians must be considered by the court (§ 203). The usual list of eligible guardians is extended to include the State Welfare Department or an equivalent agency (§ 202). Even if not appointed a guardian, such an agency is given a right to apply for the appointment or removal of a guardian (§ 206). Such an agency may be guardian of the person or of the estate or both. A single guardianship is possible for two or more persons who are closely related, such as children of a common parent or husband and wife (§ 205). The code contains conventional provisions relating to bond (similar to the sections relating to the personal representative's bond) (§ 213), inventory and appraisement (§ 218), maintenance orders (§ 223), and annual accounts (§ 233).

In line with the provisions of the earlier parts of the code, guardianship may be dispensed with if the estate is less than $500 (§ 237). Further, the guardian is authorized to administer a deceased ward's estate in a summary fashion if no application is made for the appointment of a personal representative within thirty days after the ward's death (§ 235).

The investment sections may be thought to be too restrictive. No investment may be made except in state or United States bonds or in obligations guaranteed by the United States without a prior order of the court (§ 225). The court, however, may approve the purchase of any security which is legal for trustees in that state. The requirement of a court order may be justified by the fact that guardians as a class

are less experienced in investment matters than persons who are called upon to be trustees.

L. Ancillary Administration

One of the greatest defects in the law governing administration of decedents' estates in America today is in ancillary administration. There is such diversity in the different states in substantive law and procedure that administration of out-of-state assets is unreasonably difficult and expensive. Local statutes are usually designed to protect local creditors. Such solicitude is usually unnecessary. It is believed that in the vast majority of cases there would be no risk in granting the domiciliary representative power to deal as freely with assets located outside the decedent's domicile as with the assets within it when there is no local representative. This is the gist of the Uniform Powers of Foreign Representatives Act, which is incorporated in the code (§§ 256-260). It should face no obstacle except inertia.

Some of the uniform acts on ancillary administration which are incorporated into the code by reference have not as yet been promulgated by the Conference of the Commissioners on Uniform State Laws. When they are, it is urgently hoped that state bar associations will sponsor their adoption. It takes altruism because no state is especially interested in making it easy for the representative of non-resident decedents. But general adoption would be a great help to estate lawyers and a great saving to the beneficiaries of estates.

III
Conclusion

The Model Probate Code is a remarkable piece of work. Liberal provisions for the decedent's family are reconciled with the finality which is desired for transfer of his realty; both of these somewhat divergent interests will be subserved by the simplicity, speed and economy which the code contemplates.

At the very least the code is worth the careful study of legislative committees in all states. The comments, legislative notes, and monographs are a rich treasury to draw on. But while the code has been drafted as a model, it should not be adopted piece-meal. It is too carefully constructed to be mutilated by unnecessary changes—by concessions to habitual ways of doing things. Some local traditions may
be too deep to be disturbed but the system and symmetry of the code should not be needlessly sacrificed.

The adoption of the code in some states like New York would not involve a radical change. The adoption of the code in the states where the probate court is an inferior court would cause a much wider departure. The time has come when all states should consider a modern probate code. The *Model Probate Code* reflects the best thinking that has been done in this field. Almost all parts of the code have stood the test of experience somewhere. The genius of the code is that the best features of many statutes have been integrated into a rational and efficient system.