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ARKANSAS AND THE UNIFORM PROBATE CODE: SOME ISSUES AND ANSWERS

*Richard V. Wellman**

The Uniform Probate Code¹ (U.P.C.) may be considered by the Arkansas General Assembly at some future date. Thanks to the interest and efforts of the organized elderly and other consumer groups, the U.P.C. was studied carefully by a seventeen member commission appointed by Former Governor Pryor to formulate recommendations to the legislature regarding probate law. The Commission's report recommended the enactment of the U.P.C. with very few changes. However, the proposed Bill based on the U.P.C. was referred to an interim judiciary committee and thus its future is uncertain.^{1.1}

In an effort to add light to the general understanding of the U.P.C., this article offers insights regarding the purpose and effect of some of the provisions of the U.P.C. No effort will be made to compare the Code with existing Arkansas law; the Arkansas Bar Committee and others who are knowledgeable about present Arkansas statutes can provide the Arkansas details. Undoubtedly, there are many points of similarity between present Arkansas statutes and the U.P.C. because both are derived from the *Model Probate Code*.² Both bodies of law have been demonstrated in operation.³ If

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1. UNIFORM PROBATE CODE (West 1977).

1.1. H.B. 169, 72d General Assembly (1979).

2. L. SIMES & P. BASYE, MODEL PROBATE CODE (1946).

3. The Uniform Probate Code was first enacted in Idaho where it became effective July 1, 1972. Subsequent enactments and effective dates are Alaska, Jan. 1, 1973; Arizona, Jan. 1, 1974; Colorado, July 1, 1974; Montana, July 1, 1975; North Dakota, July 1, 1975; Minnesota, Aug. 1, 1975; New Mexico, July 1, 1976; Nebraska, Jan. 1, 1977; and Utah, July 1, 1977. The Code was enacted in South Dakota, originally to take effect, July 1, 1975. The effective date was later postponed to Jan. 1, 1976, and the Code became effective briefly but was

the Arkansas law is not producing results for consumers comparable to those that have been achieved by the U.P.C. in other states, a change is indicated. It is possible, of course, to patch up an existing probate code with provisions borrowed from the U.P.C., but the major articles of the Code covering inheritance, guardianship, joint bank accounts and trusts are carefully coordinated both internally and with definitions and supportive structural provisions in Articles I and VIII. If any change of law is warranted, it should be accomplished by a complete replacement rather than a piece-meal adaptive process. The format and major organizational assumptions of the U.P.C. should be accepted completely; changes to meet unbending Arkansas assumptions should be substituted when necessary.

The discussion in this article is limited to the U.P.C. treatment of inheritance⁴ rather than the U.P.C. provisions dealing with guardianship,⁵ survivorship accounts,⁶ trusts,⁷ and other matters which comprise approximately one-third of the Code. This selection avoids an unduly long commentary and focuses on probate and settlement of estates and inheritance where controversy most likely exists.

The U.P.C. represents the beliefs that probate law should be modernized and simplified and that the process of settling decedents' estates should be made less costly and time consuming. The discussion in Part I of issues arising from the U.P.C. coverage of the substantive rules of intestate and testate succession relates to the portion of the Code that promises most by way of modernization and simplification of inheritance law. Part II, dealing with the U.P.C. system for probating wills and settling estates, discusses points that

repealed in early 1976, with the repeal becoming effective July 1, 1976. See *The UPC Defeat in South Dakota*, 17 U.P.C. NOTES 3 (Oct. 1976). New probate codes bearing strong organizational resemblance to the U.P.C. have been enacted in Florida (FLA. STAT. ANN. §§ 131.005 et. seq. (West 1976)) and Hawaii (HAW. REV. STAT. §§ 560-1-101 et. seq. (1976)). Neither of these enactments has been recognized by the Joint Editorial Board for the Uniform Probate Code as an enactment of the Uniform Probate Code. The Florida Probate Code is discussed in Fenn & Koren, *The 1974 Florida Probate Code—A Marriage of Convenience*, 27 U. FLA. L. REV. 1, 615 (1974-75). See also *Hawaii Is Not A UPC State*, 17 U.P.C. NOTES 2 (Oct. 1976). For discussions of the variations in the first nine U.P.C. enactments, see Wellman & Gordon, *The Uniform Probate Code: Article III Analyzed in Relation to Changes in First Nine Enactments*, 1975 ARIZ. ST. L.J. 477 (1975) [hereinafter cited as *Article III Analyzed*]; Wellman & Gordon, *Uniformity in State Inheritance Laws: How UPC Article II Has Fared in Nine Enactments*, 1976 B.Y.U.L.R. 357 (1976) [hereinafter cited as *Uniformity in Inheritance*].

4. UNIFORM PROBATE CODE arts. II, III, IV.

5. *Id.* art. V.

6. *Id.* art. VI.

7. *Id.* art. VII.

are related to procedural costs and delays that have become synonymous with inheritance in the minds of millions of Americans. Part III concludes the article and focuses on the future consideration of the U.P.C. by the Arkansas General Assembly.

I. INHERITANCE

A. *Intestate Succession*

The proposals contained in Article II of the U.P.C. regarding intestate succession are not likely to be particularly controversial. The innovations of the Code here are few and well in line with most perceptions about the proper content of the statutory scheme for persons who fail to make their own estate plans.⁸ The circle of prospective heirs contains no new faces; spouses, blood relatives (with children and their descendants preferred over others), and adopted persons, who would be heirs to those adopting them and persons tracing kindred through them, constitute the potential takers. Suggestions for inclusion of step-children,⁹ unrelated dependents, and for variable shares for spouse and dependents, based on need as determined by a court,¹⁰ were rejected. Curiosities from ancient sources and some prejudices still reflected in some current state statutes also were rejected. For example, the Code draws no distinction between ancestral and other property, personal and real property, and relationships based on whole and half-blooded connections. In addition, the time honored discrimination against recognizing the connection between fathers and their illegitimate offspring was rejected. This happily occurred before the United States Supreme Court's recent decision which invalidated this form of unequal statutory treatment of children as effected by a typical inheritance statute.¹¹

8. See M. SUSSMAN, J. CATES, & O. SMITH, *THE METHOD, PROCESS, AND FREQUENCY OF WEALTH TRANSMISSION AT DEATH* (1970); a summary of previous surveys of the functioning of probate law is contained in the SUSSMAN, CATES, & SMITH book at 37-40. Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241 (1963). See also Fellows, Simon, Snapp & Snapp, *An Empirical Study of the Illinois Statutory Estate Plan*, 1976 U. ILL. L.J. 717 (1976).

9. Ohio law, for example, includes a provision for inheritance by step-children where there are no blood kindred. OHIO REV. CODE ANN. § 2105.06 (Page 1976).

10. English family maintenance legislation enables the courts to make "reasonable provision for the maintenance of" certain dependents of a decedent out of the income or principal of the decedents' estate. See Inheritance (Family Protection) Act, 1938, 1 & 2 Geo. 6, c. 45, as amended by Intestates' Estates Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 64; Family Provision Act, 1966, c. 35; Family Law Reform Act, 1969, c. 46; Law Reform (Miscellaneous Provisions) Act, 1970, c. 33, § 6(1). Family maintenance legislation is discussed in LeVan, *Alternatives to Forced Heirship*, 52 TUL. L. REV. 29 (1977).

11. Trimble v. Gordon, 430 U.S. 762 (1977).

In addition to the new posture on illegitimates, there are only three important innovations to be found in the provisions of the Code that govern intestate devolution. The first, and most important, is a substantial increase in the spouse's share as against descendants, parents, and other relatives. Reflecting studies that show married people usually want all of their assets remaining at death to pass to the surviving spouse,¹² the Code gives a spouse the entire intestate estate if there is no surviving issue or parent of the decedent. The Code also allows the spouse to take a value of \$50,000 when there is no issue by a prior marriage plus one-half of the balance of the intestate estate as against issue if any, or as against any surviving parent if no issue survives.¹³ A spouse of a decedent who is survived by issue of a prior marriage receives 50% of all of the estate no matter how small or large; the other half goes to the issue of the decedent.

The pattern of intestate devolution has proved popular with legislatures, including several in states that thus far have failed to adopt most other U.P.C. recommendations.¹⁴ States have differed, however, on whether \$50,000 is the right amount for the spouse's 100% step, possibly because U.P.C. drafters bracketed the figure in the official text to indicate that the precise size of the step was left to local option.¹⁵

The second principal innovation in this part of the Code is a required five-day survival period for heirs, with the qualification that survival for any moment of time is sufficient to qualify an heir as against the state's residual right to take property when there are

12. SUSSMAN, CATES, & SMITH, *supra* note 8, ch. 13.

13. UNIFORM PROBATE CODE § 2-102 [*Share of the Spouse*], which provides the following:

The intestate share of the surviving spouse is:

- (1) if there is no surviving issue or parent of the decedent, the entire intestate estate;
- (2) if there is no surviving issue but the decedent is survived by a parent or parents, the first [\$50,000], plus one-half of the balance of the intestate estate;
- (3) if there are surviving issue all of whom are issue of the surviving spouse also, the first [\$50,000], plus one-half of the balance of the intestate estate;
- (4) if there are surviving issue one or more of whom are not issue of the surviving spouse, one-half of the intestate estate.

14. For examples of legislation in non-U.P.C. states that give a surviving spouse priority in a set value of intestate assets see CONN. GEN. STAT. ANN. § 46-12 (1978) (\$50,000 if no issue by a prior marriage); OHIO REV. CODE ANN. § 2105.06 (Page 1976) (\$30,000 or \$10,000 priority for surviving spouse, depending on whether the spouse is the natural or adoptive parent).

15. See *Uniformity in Inheritance*, *supra* note 3, at 366.

no heirs.¹⁶ This provision derives from an effort by U.P.C. drafters to offer a statutory estate plan that includes some protection against problems related to quickly successive deaths. These problems include the need for multiple administrations before assets reach a living owner and the unpopularity of distributions from estates of deceased intestates to persons unrelated to the decedent who derive their right from an heir who may have survived the intestate only by a matter of minutes, hours, or a few days. The five-day period of survival coincides with a five-day waiting period found in Article III of the U.P.C. that must run before any but emergency moves to probate a will or to open an administration may be acted upon by probate court personnel.¹⁷ Every state legislature that has accepted the U.P.C. formulations regarding intestate succession has agreed with the wisdom of the survival requirement.¹⁸

The third innovation deals with the infrequently encountered tradition of permitting certain *inter vivos* gifts by an intestate to be taken into account as advancements that alter the statutory scheme of distribution of probate assets among heirs. Changing the traditional doctrine that raises a presumption of intention to advance from the mere making of important capital gifts to heirs-apparent, the Code requires that the intention to advance be proved by written declaration of the decedent or written acknowledgment by the recipient.¹⁹ The framers believed and hoped that this added formal-

16. UNIFORM PROBATE CODE § 2-104 [*Requirement That Heir Survive Decedent For 120 Hours*], which provides the following:

Any person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for purposes of homestead allowance, exempt property and intestate succession, and the decedent's heirs are determined accordingly. If the time of death of the decedent or of the person who would otherwise be an heir, or the times of death of both, cannot be determined, and it cannot be established that the person who would otherwise be an heir has survived the decedent by 120 hours, it is deemed that the person failed to survive for the required period. This section is not to be applied where its application would result in a taking of intestate estate by the state under Section 2-105.

17. The delay period, described as 120 hours rather than five days to avoid time zone questions, appears in UNIFORM PROBATE CODE § 3-302 (informal probate of will) and UNIFORM PROBATE CODE § 3-307(a) (informal appointment of executor or administrator).

18. See *Uniformity in Inheritance*, *supra* note 3, at 393. The indication in the table of deviations that Colorado's version of UNIFORM PROBATE CODE § 2-104 varies substantially from the Official Text is accurate but not relevant to the point made here.

19. UNIFORM PROBATE CODE § 2-110 [*Advancements*], which provides the following:

If a person dies intestate as to all his estate, property which he gave in his lifetime to an heir is treated as an advancement against the latter's share of the estate only if declared in a contemporaneous writing by the decedent or acknowledged in writing by the heir to be an advancement. For this purpose the property advanced is valued as of the time the heir came into possession or enjoyment of the property or as of the time of death of the decedent, whichever first occurs. If

ity would relieve fiduciaries of the burden of probing a decedent's lifetime history of gifts to his children in order to be safe in distributing in compliance with the statute. Elimination of this kind of unrealistic burden for personal representatives should mean that the option offered by the procedural article of the Code to distribute pursuant to or without protective court order will be used to avoid court orders in routine cases.

B. Family Exemptions

Another major component of U.P.C. Article II, the family protection package,²⁰ deviates from conventional patterns in order to advance the overall purpose of the Code by increasing the efficiency of the probate process. The most important part of this package consists of three exemption provisions, two of which apply only when the decedent left a spouse, minor, or dependent children. These two exemptions consist of a \$5,000 allowance in lieu of homestead²¹ and a variable allowance for support during administration which may be set by the fiduciary as high as \$6,000 without court order.²² The third exemption, acting as a substitute for a hodge-

the recipient of the property fails to survive the decedent, the property is not taken into account in computing the intestate share to be received by the recipient's issue, unless the declaration or acknowledgment provides otherwise.

20. *Id.* art. II, pts. 2, 3, 4 constitute the bulk of the family protection package. The definitions of "child," "exempt property," and "minor" contained in § 1-201, the 120 hour survivorship requirement in § 2-104, and the definition of "spouse" in § 2-802 are also relevant.

21. *Id.* § 2-401 [*Homestead Allowance*], which provides the following:

A surviving Spouse of a decedent who was domiciled in this state is entitled to a homestead allowance of [\$5,000]. If there is no surviving spouse, each minor child and each dependent child of the decedent is entitled to a homestead allowance amounting to [\$5,000] divided by the number of minor and dependent children of the decedent. The homestead allowance is exempt from and has priority over all claims against the estate. Homestead allowance is in addition to any share passing to the surviving spouse or minor or dependent child by the will of the decedent unless otherwise provided, by intestate succession or by way of elective share.

22. *Id.* §§ 2-403, -404. Section 2-403 [*Family Allowance*] provides the following:

In addition to the right to homestead allowance and exempt property, if the decedent was domiciled in this state, the surviving spouse and minor children whom the decedent was obligated to support and children who were in fact being supported by him are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration, which allowance may not continue for longer than one year if the estate is inadequate to discharge allowed claims. The allowance may be paid as a lump sum or in periodic installments. It is payable to the surviving spouse, if living, for the use of the surviving spouse and minor and dependent children; otherwise to the children, or persons having their care and custody; but in case any minor child or dependent child is not living with the surviving spouse, the allowance may be made partially to the child or his

podge of old statutes exempting certain kinds of household chattels from probate administrations, gives \$3,500 in chattel value or money to the spouse, or if none, the surviving children without regard for age and dependency.²³

The procedural provisions of the Code give the spouse priority to administer when no executor is nominated,²⁴ enables appointment of a fiduciary to occur as soon as five days after death,²⁵ confers immediate distributive powers on an appointee²⁶ and enables a dis-

guardian or other person having his care and custody, and partially to the spouse, as their needs may appear. The family allowance is exempt from and has priority over all claims but not over the homestead allowance.

The family allowance is not chargeable against any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided, by intestate succession, or by way of elective share. The death of any person entitled to family allowance terminates his right to allowances not yet paid.

Section 2-404 [*Source, Determination and Documentation*] provides the following:

If the estate is otherwise sufficient, property specifically devised is not used to satisfy rights to homestead and exempt property. Subject to this restriction, the surviving spouse, the guardians of the minor children, or children who are adults may select property of the estate as homestead allowance and exempt property. The personal representative may make these selections if the surviving spouse, the children or the guardians of the minor children are unable or fail to do so within a reasonable time or if there are no guardians of the minor children. The personal representative may execute an instrument or deed of distribution to establish the ownership of property taken as homestead allowance or exempt property. He may determine the family allowance in a lump sum not exceeding \$6,000 or periodic installments not exceeding \$500 per month for one year, and may disburse funds of the estate in payment of the family allowance and any part of the homestead allowance payable in cash. The personal representative or any interested person aggrieved by any selection, determination, payment, proposed payment, or failure to act under this section may petition the Court for appropriate relief, which relief may provide a family allowance larger or smaller than that which the personal representative determined or could have determined.

23. *Id.* § 2-402 [*Exempt Property*], which provides the following:

In addition to the homestead allowance, the surviving spouse of a decedent who was domiciled in this state is entitled from the estate to value not exceeding \$3,500 in excess of any security interests therein in household furniture, automobiles, furnishings, appliances and personal effects. If there is no surviving spouse, children of the decedent are entitled jointly to the same value. If encumbered chattels are selected and if the value in excess of security interests, plus that of other exempt property, is less than \$3,500, or if there is not \$3,500 worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the \$3,500 value. Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate, except that the right to any assets to make up a deficiency of exempt property shall abate as necessary to permit prior payment of homestead allowance and family allowance. These rights are in addition to any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided, by intestate succession, or by way of elective share.

24. *Id.* § 3-203.

25. *Id.* § 3-307(a).

26. *Id.* § 3-701.

tributee to sell a title that will be marketable for purchasers.²⁷ In concert with these provisions, the exemption package means that estates of up to \$14,500 in unencumbered values can be cleared of all probate entanglements within a week after death where there is a surviving spouse. If there are no additional assets, distributions permitted under the exemption provisions will end matters. If the estate is larger than allowable exemptions, immediate and safe partial distribution is facilitated by the exemption package.

The same administrative profile applies when there is no spouse and the heirs are minor or dependent children who also are entitled to \$14,500 in exemptions. Although minor heirs would need to be represented in the appointment proceedings by a conservator or a guardian,²⁸ the guardianship provisions of the Code make it possible for the will of a surviving parent to appoint a testamentary guardian for minor or incompetent children.²⁹ Hence, it is entirely possible that no additional complications will be encountered in clearing small estates inherited by minor children.

From another perspective, the exemption package constitutes a small restraint on testamentary power that makes it unimportant whether a married person with a probate estate of \$14,500 or less has a will. Wills for such persons will continue to be important to cover the possibilities of more assets at death than anticipated and of the owner's survival of the spouse.

The exemption package also means that unmarried persons whose children are fully independent adults lose testamentary control, as against surviving children, of household and other chattels of up to \$3,500 in unencumbered value. At first blush this qualification might seem unjustified, but several considerations tend to support the provision. First, the actual disposition of household chattels of moderate value is believed to be frequently handled by consent among family survivors otherwise than directed by will. Second, the statutory exemption does not prevent lifetime gifts of personal items. Last, the exemption of modest amounts of chattel values tends to facilitate administration of all estates by relieving fiduciaries of responsibility for liquidating and accounting for the proceeds of various household effects that are likely to be of more bother to sell than they are worth. The statute, in effect, gives every estate the administrative conveniences that follow where there is a will containing a specific bequest of personal items to the spouse or

27. *Id.* §§ 3-711, -910.

28. *Id.* § 3-203.

29. *Id.* § 5-202.

children. Wills can be simplified because the statute makes this form of boilerplate unnecessary; persons without wills can be assured that the statute treats them as well as if they were to make a typical will. The chattel exemption provision thus aids in moving the entire probate process much closer to the needs of persons in average circumstances.

C. Pretermitted Spouses; Children

A remaining portion of the family protection package consists of provisions protecting the spouse and children from being omitted unintentionally by a decedent's will.³⁰ By extending familiar legislative patterns in favor of "pretermitted children" to spouses, the Code achieves protection against unintended disinheritance of a spouse by a relatively simple procedure. The protection assumes the conclusion that there was unintentional omission of one who married the decedent after the execution of the will has occurred. The result is that the law shrinks the effective control of the will to whatever estate remains after allowing a share for the spouse equal to a spouse's share in intestacy. If the spouse would be the sole heir,

30. *Id.* §§ 2-301, - 302. Section 2-301 [*Omitted Spouse*] provides the following:

(a) If a testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, the omitted spouse shall receive the same share of the estate he would have received if the decedent left no will unless it appears from the will that the omission was intentional or the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

(b) In satisfying a share provided by this section, the devise made by the will abate as provided in Section 3-902.

Section 2-302 [*Pretermitted Children*] provides the following:

(a) If a testator fails to provide in his will for any of his children born or adopted after the execution of his will, the omitted child receives a share in the estate equal in value to that which he would have received if the testator had died intestate unless:

(1) it appears from the will that the omission was intentional;

(2) when the will was executed the testator had one or more children and devised substantially all his estate to the other parent of the omitted child; or

(3) the testator provided for the child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

(b) If at the time of execution of the will the testator fails to provide in his will for a living child solely because he believes the child to be dead, the child receives a share in the estate equal in value to that which he would have received if the testator had died intestate.

(c) In satisfying a share provided by this section, the devise made by the will abate as provided in Section 3-902.

as where no descendant or parent survives, the will, of course, becomes ineffective save for nondispositive provisions such as the naming of an executor. If the law is overlooked and the will is used to control distribution, the estate will be distributed incorrectly, and the fiduciary and distributees will incur liabilities which will disappear in time as appropriate limitations periods run.³¹

Some people may object to the kind of evidence required to determine whether an "after-acquired" spouse was intentionally omitted from a will. The test, according to the Code, is whether it "appears from the will that the omission was intentional or the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence."³² Arguably, this language leaves room for debate in some easily imagined cases. On the other hand, the number of troublesome cases should not be great. Instances in which wills made before a marriage will show an intention to disinherit persons who are then legal strangers to the testator will not be common and should pose no problems when they arise. The remaining cases involve testators who, following their marriage, fail to change wills that take no account of the marriage. There should be no question about the result in these cases except when the decedent also "provided for his spouse by transfer outside the will." In context, the word "transfer" plainly is used in the broad sense of any form of settlement, whether by money payments to an insurance company for a contract benefiting the spouse, or otherwise. Is the outside benefit intended to be "in lieu of testamentary provisions?" The size of the settlement, any statements by the testator, and any other evidence may be considered. The results in a given case in this category may not be easily predicted, but is there a better answer to a hard case of this sort than to leave the matter to the judgment, presumably sound, of a court charged with determining what a decedent intended? Those affected by the question are free to resolve the matter by settlement or to take their chances about what the court will determine.

Protection against disinheritance through inadvertance is also provided for children, but not for more remote descendants.³³ The primary focus of this provision is to avoid unintended disinheritance of children who come into the family after the making of the will.

31. *Id.* § 3-1005, -1006.

32. *Id.* § 2-301(a); see the quoted text in note 30 *supra*.

33. *Id.* § 2-302; see the quoted text in note 30 *supra*.

Where not precluded by express provision, after-acquired children take as in intestacy unless one of two qualifications apply. First, they will be excluded from an intestate portion if they have been provided for by some nonprobate transfer and the testator has manifested intention that the outside provision be in lieu of any share in the probate estate. Second, an after-acquired child will be excluded if the will devises substantially all of the estate to the other parent of the omitted child and if other living children also were omitted from the will.

Probably most wills prepared by lawyers for married persons of child-bearing age now contain express language disinheriting after-acquired children presumably because language of disinheritance is necessary to protect the typical intention of married testators to give the entire estate to the surviving spouse.³⁴ The Code merely makes express language of disinheritance unnecessary for married testators who make wills in favor of the other spouse when they have one or more children. Wills prepared by careful lawyers, however, will continue to have advantages for married testators who are childless at the time of execution and for testators whose wills become subject to the law of some non-U.P.C. state.

D. Spouse's Elective Share

The least important component of the U.P.C. family protection package is likely to be the most controversial in pre-enactment debate about the Code. The spouse's elective-share remedy as provided by the Code³⁵ should prove to be unimportant in real life principally because it guards against a calamity that almost never occurs. The remedy is useful only when one spouse has deliberately planned his estate so that there will be nothing, or relatively little, for the surviving spouse *and* when this pattern of deliberate disinheritance is not supported by a written instrument signed by the persons involved.³⁶ The remedy will become a legal reality only when a surviving spouse who has been disinherited without the use of a planned writing moves within a relatively short period of time to

34. SUSSMAN, CATES, & SMITH, *supra* note 8, at 289.

35. UNIFORM PROBATE CODE §§ 2-201 to 207. For the text of these sections see Appendix I *infra*.

36. The remedy provided by UNIFORM PROBATE CODE § 2-301, quoted note 30 *supra*, for cases of unintentional disinheritance of a spouse automatically takes precedence over an elective share remedy because the latter includes account for all assets in the probate estate to which the spouse is entitled by the terms of the will or by operation of law. Hence, a spouse who has been unintentionally disinherited as provided in § 2-301 automatically has a minimum interest in the distributable probate estate of one-half.

start the lawsuit that is necessary to gain relief as authorized by the Code.³⁷ Since most spouses do not seek to hurt their mates by disinheritance,³⁸ and since those few who attempt spousal disinheritance probably know their partner well enough to be able to predict whether omission or niggardly treatment will be tolerated or accepted, attacks on disinheritance attempts should be rare. Indeed, no instances of litigation involving the elective-share remedy and continuing to judgment have come to the attention of national monitors to date. This observation has no pertinancy to the community property states of Arizona, Idaho, and New Mexico that are included in the first group of states to enact the Code, and no application to Minnesota where the U.P.C. enactment omitted this remedy.³⁹ It is noteworthy that no serious case of spousal disinheritance appears to have arisen to date under the Code as enacted in Alaska, Colorado, Montana, Nebraska, North Dakota, or Utah. Cumulatively, the remedy has been on the statute books for 20 years in these states.

In spite of demonstrated innocuousness, the elective-share remedy will probably create controversial discussions about how it is supposed to work. The statutory formula is complex; only the most gifted can expect, on the first or second reading, to grasp the full impact of the provision's seven sections. Section 2-202 is so long and complicated that readers tend to liken it to highly unpopular provisions of the Internal Revenue Code, an analogy that may halt rather than further comprehension. Further, the emerging pattern is unfamiliar. Traditional statutory patterns providing elections for surviving spouses have concentrated on the probate estate and usually have failed to charge the survivor with nonprobate values received from the decedent. The U.P.C. scheme departs sharply from the traditional approach on these and other points. The coverage of the proposed statute is one about which almost everyone concerned has some conception of what the law has provided or is supposed to provide. It is not surprising that discussions of the elective share often bog down.

Critics of the U.P.C. elective-share remedy usually pull back when they are asked to come up with a simple solution to the multifaceted problem addressed by the Code. It is tempting to recom-

37. See § 2-205(a) in Appendix I *infra*.

38. See Plager, *The Spouse's Nonbarrable Share: A Solution in Search of a Problem*, 33 U. CHI. L. REV. 681 (1966).

39. Minnesota statutes antedating enactment of the Uniform Probate Code include provisions extending the remedy of disinherited spouse to certain nonprobate transfers. See MINN. STAT. ANN. §§ 525.212, .216 (West 1975).

mend, as a few have done,⁴⁰ abolition of any forced share. The wisdom and political viability of such an approach can be seriously questioned. Another simplistic solution is to perpetuate the traditional remedy that takes no account of nonprobate transfers. Will substitutes, however, account for more than 50% of all assets passing at death from decedents in ordinary wealth ranges;⁴¹ therefore, the old approach is patently lop-sided and more conducive to game playing than to the ends of justice. The statute must become complicated unless we are willing to enact a short statute that gives a court power to re-order the distribution of all of a decedent's wealth when a spouse petitions for relief from what he considers to be unfair or unwise treatment by a decedent. This approach, tending to achieve the objectives of the English Family Maintenance Act, has some strong support in the United States,⁴² but U.P.C. drafters concluded that the consensus of national legal thinking would not accept a solution for the problem of spousal disinheritance that conferred so much discretion on the judicial system.

In addition to complexities resulting from a formula that covers nonprobate transfers, the U.P.C. remedy meets the following subordinate objectives: (1) It takes account of both community and common law titles which, in this mobile society, frequently co-exist in any given state.⁴³ (2) It protects a decedent's estate plan by rejecting the time-honored approach of election. Under the U.P.C., an "electing" spouse may only seek more than the decedent's plan has provided; thus, there is no "election" which involves the rejection of decedent's plan in favor of a substitute provided by law. (3) Working in concert with the U.P.C. system for probate of wills and administration of estates, the remedy supports the objective of efficiency in probate in several respects. First, neither the probate fidu-

40. See Chaffin, *Protection of Surviving Spouse Against Disinheritance*, 16 U.P.C. NOTES 6 (July 1976).

41. See PALMER'S TRUSTS AND SUCCESSION (3d ed. R. Wellman, L. Waggoner, & O. Browder, Jr., 1978) at 13-14.

42. See, e.g., LeVan *supra* note 10.

43. Note that "the value of the share of the surviving spouse resulting from rights in community property in this or any other state formerly owned with the decedent," is included in Uniform Probate Code § 2-202(2)(i) for purposes of charging the spouse with values already received from the decedent. See also Uniform Disposition of Community Property Rights at Death Act (1971) for another product of the National Conference of Commissioners on Uniform State Laws that attempts to coordinate community property and common law property rights for elective share remedy purposes in a common law state. This uniform act and the Uniform Probate Code are not duplicative or inconsistent; both should be enacted in every common law jurisdiction. The Uniform Probate Code is designed for enactment by community property states; the Uniform Disposition of Community Property Rights at Death Act is designed for enactment in community property states and common law property states.

ciary nor the court has any initial responsibility to take action to see that a spouse receives due protection; the remedy is activated by the spouse's petition to the court. Second, land titles are not clouded so far as the elective-share remedy is concerned because there is no requirement that both spouses sign *inter vivos* transfers of land belonging to either one; furthermore, land in an estate is not made unmarketable by the possibility of election. The right of an electing spouse relates to values in excess of those provided by the decedent's estate plan; no lien on particular assets in the estate results.⁴⁴ (4) The remedy is coordinated to fit multistate estates. The law of a U.P.C. state directs a spouse to the state of the decedent's domicile for protection against disinheritance.⁴⁵ If the decedent was domiciled in a U.P.C. state, the courts there are empowered to give relief against recipients of the decedent's probate and nonprobate assets wherever they may be situated. (5) The remedy is coordinated with a simple device by which husbands and wives may adjust the property rights that would accrue at death by merely signing an instrument after fair disclosure; no consideration or impending marriage or dissolution is necessary.⁴⁶

E. Wills

A third major component of Article II's formulations regarding

44. A recently received report of the Maine Probate Law Revision Commission includes the following comments about the U.P.C.'s elective-share remedy:

This augmented estate device has a number of advantages over more traditional attempts at spousal protection. (1) It prevents disinheritance more effectively in the ways that intentional disinheritance is usually achieved, since, in addition to the probate estate, it includes property transferred by *inter vivos* will-substitutes. (2) It reduces problems of land title stability by excluding from the elective share all bona fide transfers for value as well as transfers not characterizable as will-substitutes. (3) It prevents over-protection of the surviving spouse who has been in fact adequately provided for by the decedent's *inter vivos* transfers or insurance benefits, by including such amounts in the value from which the share is determined and in the property that is counted toward making up the share to which the surviving spouse is entitled. (4) Finally, the device protects valid estate plans from disruption through election, by eliminating the over-protection referred to above and by using the property devised to a spouse in making up the value of the elective share.

The system thus has advantages for the surviving spouse, the estate planner, the decedent who makes adequate provisions for the surviving spouse in the total estate plan, and for title attorneys and others who are interested in the stability of land titles.

MAINE PROBATE LAW REVISION COMMISSION, REPORT TO THE 109TH MAINE LEGISLATURE AND SUMMARY OF THE COMMISSION'S STUDY AND RECOMMENDATIONS CONCERNING MAINE PROBATE LAW (Oct. 1978) at 35-36 [hereinafter cited as REPORT TO THE 109TH MAINE LEGISLATURE].

45. See *A Question About 2-201(b)*, 22 U.P.C. NOTES 8 (May 1978).

46. See UNIFORM PROBATE CODE § 2-204 in Appendix I *infra*.

the nonprocedural side of inheritance covers execution, revocation, and construction of wills.⁴⁷ Like the Code's provisions governing intestate succession, the treatment of wills is much more conventional than innovative. For states that have not recognized holographic wills, section 2-503 will be controversial principally because lawyers have been trained to believe that holographic wills, usually home-made and prepared without professional assistance, are a great source of ambiguity. As a result, lawyers also believe these wills have a tendency to fill the courts with litigation to distinguish wills from notes, letters, and other writings that lack testamentary intention and to translate amateurish expressions in conceded wills into definite legal formulations. What lawyers usually fail to perceive, possibly because of conflicting interests in the fees that come from assisting persons with wills, is that the public plainly insists on being permitted to use a "do-it-yourself" approach to will making, as is permitted in virtually every other enterprise. Further, the legal profession should note its relatively low status in polls showing consumer confidence and respect for various professions and callings. If there is concern for upgrading the image of the profession, it may be beneficial to take a close look at rules that appear to force the public to rely on lawyers. If holographic wills prove to be a source of trouble and litigation, it will become obvious to the consuming public that lawyers have valuable training and experience to offer prospective testators.

Another U.P.C. provision aids home-made wills that are not handwritten and are therefore valid, if at all, only because witnessed. The assistance comes in the form of section 2-505 which provides that will witnesses who are also beneficiaries of the instruments validated by their signatures neither forfeit benefits available to them under the instrument nor lack capacity to be witnesses. Most pre-U.P.C. statutes penalize beneficiary-witnesses by denying them any benefit from the will.⁴⁸ In effect, these statutes create a conclusive presumption that the witness involved is guilty of unduly influencing the testator. Most will witnesses, however, are not aware of the terms of the instruments they aid; therefore, it is patently harsh to penalize beneficiary witnesses without concern for whether they were aware of the provisions in their favor.⁴⁹ The practical impact of section 2-505 is on home-made wills because professional draftsmen, who take great care to avoid any suggestion that a testa-

47. UNIFORM PROBATE CODE art. II, pts. 5, 6.

48. Rees, *American Wills Statutes*, 46 VA. L. REV. 613, 625 (1960).

49. See Mechem, *Why Not A Modern Will Act?*, 33 IOWA L. REV. 501, 506-08 (1948).

tor signed under pressure, routinely use only disinterested witnesses.

Once the harshness and basis of the beneficiary-witness forfeiture statutes are understood, opposition to section 2-505 tends to evaporate. The section does not condone undue influence of a testator; it merely equalizes the treatment of witness-beneficiaries and all other will beneficiaries as far as undue influence is concerned.

All other features of the U.P.C. treatment of wills need not be detailed here. For the most part, the drafters of the U.P.C. chose will provisions from relatively standard statutes that reduced the emphasis on form and thus increased the opportunity for courts to find and effectuate a decedent's probable intention. The sections permitting partial revocation by act and revival, if revival is intended,⁵⁰ and preventing partial intestacy when one or more of several persons named as residuary beneficiaries survive,⁵¹ plainly serve these ends.

Section 2-513 of the U.P.C. validates will references to separate, testamentary writings which fall short of meeting the formal requirements for attested or holographic wills. The separate writing may be prepared or changed after execution of the principal will.⁵² Restricted in effectiveness to dispositions of tangible personal property other than money and property used in trade or business, section 2-513 aids testators who persist in using informal notes and memoranda to express wishes, usually frequently changed, about disposition at death of valued, family heirlooms. The device also helps lawyers who counsel testators in this category because it facilitates avoidance of long, detailed wills, and the correlative use of frequent codicils, which usually cost law offices more than can be covered by the fees charged without risk of losing a client.

A final comment is in order about two sections that have special

50. UNIFORM PROBATE CODE §§ 2-507, -509.

51. *Id.* § 2-606.

52. *Id.* § 2-513 [*Separate Writing Identifying Bequest of Tangible Property*], which provides the following:

Whether or not the provisions relating to holographic wills apply, a will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money, evidences of indebtedness, documents of title, and securities, and property used in trade or business. To be admissible under this section as evidence of the intended disposition, the writing must either be in the handwriting of the testator or be signed by him and must describe the items and the devisees with reasonable certainty. The writing may be referred to as one to be in existence at the time of the testator's death; it may be prepared before or after the execution of the will; it may be altered by the testator after its preparation; and it may be a writing which has no significance apart from its effect upon the dispositions made by the will.

potential for reducing litigation construing the meaning of wills. The provisions are section 2-602,⁵³ which enables a testator to select the state laws that will govern the meaning and legal effect of his will, and section 2-611,⁵⁴ which relates the meaning of class gifts to the Code's formulations about adoptions, births out of wedlock, and relationships affected by successive marriages and half-blooded siblings.

The choice of laws provision, which defers a testator's chosen law only to local policy, should be held to control devises of land as well as personalty. Local land may be governed by the law of another state because the administrative system of the Code relieves local title examiners of concern for the meaning of wills. Deeds of distribution by personal representatives protect purchasers even though the fiduciary involved may have erred in construing the will.⁵⁵ Thus wills for persons who have changed their domicile since making their wills may be made far more secure in meaning than is presently possible.

By aligning the meaning of class gifts and the personal relationships defined by the Code for purposes of intestate succession, the U.P.C. offers will draftsmen and construing fiduciaries relief from problems that have generated a wealth of will construction litigation. Courts in states that have not adopted the Code or other similarly comprehensive legislation dealing with class gifts affected by adoption, illegitimacy, or half-blooded relatives will hopefully respect the U.P.C. formulations in this troublesome area. They clearly should do so when a testator has selected the U.P.C. to govern his will and when a testator has defined a class term in accordance with the Code as incorporated into his will by reference.

53. *Id.* § 2-602 [*Choice of Law as to Meaning and Effect of Wills*], which provides the following:

The meaning and legal effect of a disposition in a will shall be determined by the local law of a particular state selected by the testator in his instrument unless the application of that law is contrary to the provisions relating to the elective share described in Part 2 of this Article, the provisions relating to exempt property and allowances described in Part 4 of this Article, or any other public policy of this State otherwise applicable to the disposition.

54. *Id.* § 2-611 [*Construction of Generic Terms to Accord with Relationships as Defined for Intestate Succession*], which provides the following:

Halfbloods, adopted persons, and persons born out of wedlock are included in class gift terminology and terms of relationship in accordance with rules for determining relationships for purposes of intestate succession. [However, a person born out of wedlock is not treated as the child of the father unless the person is openly and notoriously so treated by the father.]

55. *Id.* § 3-910.

II. PROBATE AND SETTLEMENT

A. *Historical Perspective*

The U.P.C. system for probate of wills and administration of estates marks a progression beyond the assumption of the Model Probate Code of the mid-1940's that estates should be opened, administered, and closed in a single, continuous judicial proceeding.⁵⁶ Stemming as it did from the efforts of academicians to evolve a coherent pattern from America's hodge-podge of probate procedures, the Model Probate Code accurately reflected and extended an earlier trend toward increased use of conventional adjudicative procedures to eliminate ghostly questions about missing wills or heirs and to settle distributions and accounts of fiduciaries. The U.P.C. drafters worked during a period of unparalleled consumer criticism of probate delays and costs.⁵⁷ The drafting also occurred when increased use of a revocable trusts and other nonadjudicative probate alternatives both demonstrated the efficiency of nonadjudicative alternatives and confronted lawyers with doubts about the durability of their ancient monopoly regarding the transmission of wealth at death.⁵⁸ Understandably, the drafters looked to history, practice, and analogy for ways to make probate avoidance procedures available to survivors of persons who failed to consider the probate court's standard routine for settling inheritances.

B. *Common Form Opening Procedures*

The drafting committees experienced little difficulty in identifying familiar efficient concepts. Common form procedures for admitting wills to probate and appointing estate fiduciaries evolved in ecclesiastical courts in England and are available today in several states in the eastern and southern regions of the country. These procedures illustrate how administrative determinations can serve as the basis for opening estates.⁵⁹ In contrast to the notice and op-

56. See L. SIMES & P. BASYE, *supra* note 2, at 9-19; Simes, *The Administration of a Decedent's Estate as a Proceeding in Rem*, 43 MICH. L. REV. 675 (1945), reprinted in L. SIMES & P. BASYE at 489-526, wherein Simes observes, "This series of steps in the administration of a decedent's estate may be, and commonly is, for the purposes of determining the requirements of notice and a fair hearing, a single proceeding." *Id.* at 526.

57. See Wellman, *The Uniform Probate Code: Blueprint for Reform in the 70's*, 2 CONN. L. REV. 453 (1970) [hereinafter cited as *Blueprint*]; Wellman, *The New Uniform Probate Code*, 56 A.B.A.J. 636 (July 1970).

58. See Wellman, *The Uniform Probate Code: A Possible Answer to Probate Avoidance*, 44 IND. L.J. 191 (1969).

59. Simes, *The Function of Will Contests*, 44 MICH. L. REV. 503, 505, 516 (1946).

portunity for interested persons to be heard that due process demands of judicial determinations, the administrative approach of common form proceedings offers obvious advantages of speed. An administrative determination of whether the decedent left a valid will and of the other facts relevant to appointment of an estate fiduciary, however, may be upset in an adjudication proceeding. It nevertheless seems sensible to permit nonadjudicative opening procedures in cases where the risks of court challenge are remote.⁶⁰

The procedures for probating wills and opening administrations without adjudication are called "informal proceedings"⁶¹ in the U.P.C. "informal probate" tentatively establishes a will;⁶² "informal appointment" creates a "personal representative."⁶³ Both procedures are necessary to give authority to an executor named in a will, but the two may be combined in a single petition and administrative response.⁶⁴ In intestate cases, only "informal appointment" is necessary to produce the opening of an estate by appointment of an administrator. It should also be noted that the Code uses the

60. See REPORT TO THE 109TH MAINE LEGISLATURE, *supra* note 44, at 18. The Commission stated,

Many of the benefits of this flexible system of administration will be realized in the small or modest sized estates where there are no particular tax problems and no controversies—the kind of estates that make up the vast majority of probate administrations. Unless the successors or creditors themselves want it otherwise, these estates can be handled much more expeditiously and inexpensively. Less time will be required of the attorneys and of the courts and registers in performing much of the routine paperwork and court appearances that are now performed with little or no meaning in terms of its supposed protection of the decedent's successors and creditors. In this sense, the bill is a measure to benefit the consumers of probate services, the attorneys who work in the area, and the courts and court officials by helping to conserve our judicial resources.

The Code proceeds on the assumption that the parties to a probate administration are as capable of performing their duties and looking after their own interests as are the trustees and beneficiaries of *inter vivos* trusts. In most areas, the law allows and requires persons to do these things without a theoretical, continuous judicial proceeding requiring routine court appearances and adjudications in order to supposedly watch over the interests of the persons involved and to constantly guard against possible abuse or disregard of legal duties. This is certainly true in the areas of contract enforcement and the law of trusts. Such a burdensome system in the variety of areas where it might be imposed with as much justification as in probate administration would be intolerably cumbersome and wasteful. So it is today in probate administration.

61. UNIFORM PROBATE CODE § 1-201(19) [General Definitions] provides, "Informal proceedings' mean those conducted without notice to interested persons by an officer of the Court acting as a registrar for probate of a will or appointment of a personal representative."

62. *Id.* §§ 3-102, -301 to 306.

63. *Id.* §§ 3-103, -307 to 311.

64. See § 3-107 quoted note 66 *infra*.

term "personal representative" to cover both executors and administrators.⁶⁵

C. *Independent Administration*

The other major tool used by the U.P.C. drafters to permit greater efficiency in estate settlements is an independent administration. After appointment, a personal representative may proceed as a statutory fiduciary to collect, settle, and distribute the decedent's estate without having to make a report to, or receive an order from, the appointing court. Thus, his administration may be independent of probate court supervision.⁶⁶

The procedure is described by several sections of the U.P.C. that prevent the probate court from retaining supervisory jurisdiction following appointment, describe the general duty and authority of personal representatives as noncourt fiduciaries, and protect this status from retroactive vacation in cases of error.⁶⁷ These sections

65. UNIFORM PROBATE CODE § 1-201(30) [*General Definitions*] provides, "'Personal representative' includes executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status. 'General personal representative' excludes special administrator."

66. Under the U.P.C. all personal representatives are independent unless they are "supervised." This is the meaning of §§ 3-501 to 505 and 3-107. Section 3-107 [*Scope of Proceedings; Proceedings Independent; Exception*] provides,

Unless supervised administration as described in Part 5 is involved, (1) each proceeding before the Court or Registrar is independent of any other proceeding involving the same estate; (2) petitions for formal orders of the Court may combine various requests for relief in a single proceeding if the orders sought may be finally granted without delay. Except as required for proceedings which are particularly described by other sections of this Article, no petition is defective because it fails to embrace all matters which might then be the subject of a final order; (3) proceedings for probate of wills or adjudications of no will may be combined with proceedings for appointment of personal representatives; and (4) a proceeding for appointment of a personal representative is concluded by an order making or declining the appointment.

67. UNIFORM PROBATE CODE § 3-107 blocks retained jurisdiction by a probate court; § 3-703, quoted note 88 *infra*, describes a personal representative; §§ 3-709 to 715 confer administrative powers; §§ 3-801 to 816 deal with creditors' claims; §§ 3-901 to 910 describe the distributive process; §§ 3-1003 to 1006 describe the process of closing without court order. See also § 3-307, which provides as follows:

(a) Upon receipt of an application for informal appointment of a personal representative other than a special administrator as provided in Section 3-614, if at least 120 hours have elapsed since the decedent's death, the Registrar, after making the findings required by Section 3-308, shall appoint the applicant subject to qualification and acceptance; provided, that if the decedent was a non-resident, the Registrar shall delay the order of appointment until 30 days have elapsed since death unless the personal representative appointed at the decedent's domicile is the applicant, or unless the decedent's will directs that his estate be subject to the laws of this state.

also confer wide administrative powers on personal representatives, enable determination of valid claims without court order, and support nonadjudicated distributions and closings.⁶⁸

The potential contribution of independent administration to efficiency in estate settlements is obvious. Estates can be collected, distributed, and closed as soon as circumstances and paper work permits. No papers in proper form for routine probate court filings need to be prepared; no delays for court orders prior to paying claims or distributing assets need to be tolerated. Time and money can be saved.

Independent administration is not a probate novelty. An early English executor who gained authority from a will probate in common form operated independently of the ecclesiastical authority that gave life to the nominating will. In effect he was subject only to the strictures of courts of law or chancery that might be invoked by interested persons to complain about an administration.⁶⁹ In this country, independent administration has been freely available in varying degrees in Georgia,⁷⁰ Texas,⁷¹ and Washington⁷² under wills containing the right words, and in New Jersey and parts of Pennsyl-

(b) The status of personal representative and the powers and duties pertaining to the office are fully established by informal appointment. An appointment, and the office of personal representative created thereby, is subject to termination as provided in sections 3-608 through 3-612, but is not subject to retroactive vacation.

68. See the sections cited note 67 *supra*.

69. L. SIMES & P. BASYE, *supra* note 2, at 386-95; 2 WILLIAMS, EXECUTORS 1263-65 (1st Am. ed. 1832).

70. "A testator may by will dispense with the necessity of his executor's making inventory or returns, provided the same does not work any injury to creditors or third persons, other than legatees under the will." GA. CODE ANN. § 113-1414 (1975).

71. See Marschall, *Independent Administration of Decedents' Estates*, 33 TEX. L. REV. 95 (1954); Woodward, *Independent Administration Under the New Texas Probate Code*, 34 TEX. L. REV. 687 (1956). In *Altgelt v. Mernitz*, 37 Tex. Civ. App. 397, 83 S.W. 891 (1904), the court stated,

While he takes charge of and administers the estate of his testator without action of the county court in relation to the settlement of the estate, and may do, without an order, every act which an executor administering an estate under the control of the court may do with such order, he is uncontrolled, uninformed, unchecked and untrammelled by orders of the court, directing, informing or commanding what he shall do in the management and administration of the estate. He is an executor at large, exercising his own judgment and discretion, acting and doing what he pleases, unless brought to account for his actions by someone interested in the estate

Id. at 401, 83 S.W. at 894. See also Saunders, *A Texas View of Independent Administration and Other Devices for Flexibility*, 10 U.P.C. NOTES 3 (1974); 11 U.P.C. NOTES 3 (1975).

72. See Fletcher, *Washington's Non-Intervention Executor—Starting Point for Probate Simplification*, 41 WASH. L. REV. 33 (1966).

vania for executors and administrators in intestacy.⁷³ For Pennsylvania and New Jersey probate fiduciaries, as well as for their counterparts in many other localities in the country, the absence of watch-dog probate officials has led to customs that permit estates to be closed without paper work for a public office. Closings occur by private agreement and the simple process of distribution, receipt, and release by devisees and heirs. Furthermore, in virtually all states, executors of wills containing boilerplate language conferring broad administrative powers enjoy independence from many probate court orders that remain necessary for administrators in intestacy, although final accounts still must be filed and accepted by the appointing court.⁷⁴

The principal challenge for the U.P.C. drafters was to provide workable answers for those people in or concerned with the make-believe world of title examiners whose worries about unbarred creditors, unknown heirs, or devisees under wills not yet discovered frequently translate into objections to titles derived through an estate where all possible claims have not been extinguished by limitations or adjudication.⁷⁵ The response evolved by the drafters rests on purchaser protection concepts derived from the equitable doctrine of bona fide purchase and the commercial law concept of negotiability. Under the Code, a purchaser of land from an heir or a devisee is secured in his acquisition by a piece of paper such as a deed of distribution from a personal representative of his seller. By statute the purchaser is relieved of inquiring into the probate court file to determine whether potential will contestants or creditors have been barred and whether the distribution was proper.⁷⁶

Once it is understood that the statute enables an heir or devisee to sell a better title than he has received, the title examiner's concern should be reduced to questions about the validity of the statute, a matter that is discussed hereafter.⁷⁷ There may be doubts, however, about the utility of titles that are insecure for inheritors

73. See Straus, *Is the Uniform Probate Code the Answer?*, 111 TRUSTS & ESTATES 870 (Nov. 1972).

74. Illustratively, if it becomes necessary to sell land of a decedent during the course of administration, and there is no power of sale conferred by will, it is necessary in practically all non-U.P.C. states to obtain a court order for sale in a special proceeding for the purpose. Wills conferring power of sale on executors make this sort of court order unnecessary in many states, and so achieve a degree of independence for a probate administration that is denied to intestate administrators.

75. See Wellman, *Titles Under UPC*, 13 U.P.C. NOTES 4 (Sept. 1975).

76. The relevant provisions, contained in Appendix II *infra*, are §§ 1-201(10), 3-715(27), -907 to 910.

77. See text at page 30 *infra*.

although marketable in the hands of their purchasers. The insecurity may be lessened by limitations that bar correction of distributions at the later of three years from death or one year from distribution,⁷⁸ but there remains possible beneficiary liability for the return of an improperly distributed asset, or, if unavailable, the value thereof, plus income.⁷⁹ The drafters believed that most inheritors would be willing to take the risk of ghosts in their own family in view of the relatively short periods of limitations on proceedings to correct erroneous distributions built into the Code. For those people desiring early certainty with respect to their right to retain distributed assets, the proposed law offers a variety of adjudicative procedures that may be used to gain a timely resolution of doubts concerning the identity of the true heirs or devisees.⁸⁰

D. Safeguards

When a U.P.C. neophyte has understood the Code's machinery for making unadjudicated successions practical for estates involving land, his concerns may shift to questions regarding the safety of the system for all concerned.⁸¹ What protections are left for the lawful inheritors when an unbonded personal representative with full power of sale over estate assets comes into existence because of an administrative act of a probate clerk of which they have no knowledge or notice? What is the value of a lawful heir's right to land if one who gains a deed of distribution thereto by mistake or fraud can create a superior right in a purchaser? How are estate beneficiaries to be protected from outlandish fees by personal representatives and their hirelings, including attorneys, when compensation can be taken from an estate without court order or statutory standard? How can persons or corporations nominated to be estate fiduciaries

78. UNIFORM PROBATE CODE § 3-1006 [*Limitations on Actions and Proceedings Against Distributees*], which provides the following:

Unless previously adjudicated in a formal testacy proceeding or in a proceeding settling the accounts of a personal representative or otherwise barred, the claim of any claimant to recover from a distributee who is liable to pay the claim, and the right of any heir or devisee, or of a successor personal representative acting in their behalf, to recover property improperly distributed or the value thereof from any distributee is forever barred at the later of (1) three years after the decedent's death; or (2) one year after the time of distribution thereof. This section does not bar an action to recover property or value received as the result of fraud.

79. See L. SIMES & P. BASYE, *supra* note 2, at § 3-909.

80. The proceedings described by UNIFORM PROBATE CODE §§ 3-1001, -1002, -401, -501, and -105 provide varying degrees of protection from risks of erroneous distributions.

81. See Kelley, *Defensive Remedies Under the Uniform Probate Code*, 12 U.P.C. NOTES 3 (June 1975).

tolerate the risks associated with the laws governing fiduciary conduct unless they can be assured by an adjudication at the time of distribution that there will be no dangling liabilities?

Answers to these and related questions have been woven into the Code. For those people who are apprehensive about the likelihood that irresponsible wastrels will gain appointment as personal representatives through the Code's informal opening procedures, there are several safeguards. These include (1) a mandatory five-day waiting period after death before any but emergency appointments will be made;⁸² (2) an opportunity to use the delay period to file a demand for notice and thereby prevent an appointment without notice to the demandant;⁸³ (3) a statutory requirement that the appointing official shall first receive an application complying with various informational requirements by one willing to accept the risk of penalties for contempt and long-lasting civil liability for losses resulting from any intentional misrepresentation;⁸⁴ and (4) an opportunity to block an informal appointment and to suspend the power of one already appointed without notice to interested persons by initiating an adjudicative proceeding for appointment.⁸⁵

Perhaps the most important security against surprise appointments of unqualified persons comes from the section that describes who is eligible for appointment.⁸⁶ If there is a will naming an executor, the nominee has priority. If there is no will or effective nomination, the spouse can claim priority. In other cases, all heirs or all devisees share priority, therefore, no one of them can qualify without waivers or consents from the others. In effect, those people most likely to be concerned and knowledgeable about the reliability of anyone seeking appointment must be consulted and satisfied. These same persons and major creditors may gain the additional security of a bond securing the appointee's performance if they desire and demand it; the same security is available when interested persons distrust the executor selected by the testator or the decedent's spouse.⁸⁷

The continuing fidelity of one gaining appointment is assured by rules similar to those protecting beneficiaries of express trusts.⁸⁸

82. UNIFORM PROBATE CODE §§ 3-302, -307.

83. *Id.* at § 3-204.

84. *Id.* at §§ 3-301, 1-106 (quoted note 91 *infra*), -310.

85. *Id.* at § 3-401.

86. The relevant provision, contained in Appendix III, is § 3-203.

87. UNIFORM PROBATE CODE §§ 3-603 to 605.

88. *Id.* § 3-703(a) [*General Duties; Relation and Liability to Persons Interested in Estate; Standing to Sue*], which provides the following:

If the risk of personal liability for mismanagement or erroneous distribution is not a sufficient deterrent against fiduciary error or defalcation to satisfy estate beneficiaries, the beneficiaries have the option of moving the administration into the familiar format of supervised administration.⁸⁹ Furthermore, if a fiduciary is unwilling to distribute without a protective order, a formal closing procedure is freely available even though the opening and ensuing administration have been handled without prior adjudication.⁹⁰

Persons who remain unconvinced about these several safeguards tend to emphasize the risks to inheritors who fail to realize that they have rights or fail to take steps that are adequate to protect their interests. To be unprotected, inheritors whose connections to a decedent were so insubstantial that they did not learn of his death, or, upon learning of it, failed to realize that they were heirs or devisees, must also be beyond the knowledge of survivors who seek to probate a will or to open an administration. This is true because if those persons moving to perfect an inheritance intentionally conceal their awareness of other successors, those persons wrongfully omitted gain a right to damages for fraud that is not barred until three years after discovery.⁹¹

Other cases involving innocent omission of inheritors can be divided into two categories. In one, there may be no known heirs. In the second, the heirs may be minors or residents of a foreign country who are patently handicapped and can not look after their own interests. In either case, there may or may not be a will.

(a) A personal representative is a fiduciary who shall observe the standards of care applicable to trustees as described by Section 7-302. A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this Code, and as expeditiously and efficiently as is consistent with the best interests of the estate. He shall use the authority conferred upon him by this Code, the terms of the will, if any, and any order in proceedings to which he is party for the best interests of successors to the estate.

89. *Id.* § 3-501.

90. *Id.* §§ 3-1001, -1002.

91. *Id.* § 1-106 [*Effect of Fraud or Evasion*], which provides the following:

Whenever fraud has been perpetrated in connection with any proceeding or in any statement filed under this Code or if fraud is used to avoid or circumvent the provisions or purposes of this Code, any person injured thereby may obtain appropriate relief against the perpetrator of the fraud or restitution from any person (other than a bona fide purchaser) benefitting from the fraud, whether innocent or not. Any proceeding must be commenced within 2 years after the discovery of the fraud, but no proceeding may be brought against one not a perpetrator of the fraud later than 5 years after the time of commission of the fraud. This section has no bearing on remedies relating to fraud practiced on a decedent during his lifetime which affects the succession of his estate.

Cases involving no known heirs should trigger procedures by which the state may claim as ultimate heir. The Code does not require notice to the state in these cases, but the probate court has the discretion to permit or to refuse no-notice applications, and it is predictable that this discretion will be exercised to assure notice to the state in cases of possible "escheat."⁹²

Cases involving absent or incompetent heirs pose no perils except where the nominee of a will or a decedent's spouse can qualify as personal representative without the approval of all apparent successors.⁹³ When the appointment of a nominated executor or spouse imperils the interests of distant or incompetent successors, the court may deny informal probate.⁹⁴ Whether the court will exercise its discretionary authority will depend on whether those seeking an informal appointment or probate have the approval of distant heirs or include proper representatives of any minor inheritors. Once the full array of possibilities is measured against the details of the Code, very little risk for anyone remains.

Those persons who remain unsatisfied and insistent on procedures that involve mandatory court protections against every conceivable risk have two problems. First, they must demonstrate why the vast majority of estates must be surrounded with mandatory protections that are of utility only in very rare cases. Second, they must show that the risks they apprehend are adequately offset by protections available in probate procedures currently in use. Plainly, it does not follow from the mandatory notices and adjudications which presently complicate conventional probate procedures that no risk of error remains. The position of those persons who seek to add more protective measures becomes untenable because the present system has been classified by the public and most experts as too cumbersome.

92. *Id.* §§ 3-305, -309. Section 3-305 [*Informal Probate; Registrar Not Satisfied*] provides the following:

If the Registrar is not satisfied that a will is entitled to be probated in informal proceedings because of failure to meet the requirements of Sections 3-303 and 3-304 or any other reason, he may decline the application. A declination of informal probate is not an adjudication and does not preclude formal probate proceedings.

Section 3-309 [*Informal Appointment Proceedings; Registrar Not Satisfied*] provides the following:

If the Registrar is not satisfied that a requested informal appointment of a personal representative should be made because of failure to meet the requirements of Section 3-307 and 3-308, or for any other reason, he may decline the application. A declination of informal appointment is not an adjudication and does not preclude appointment in formal proceedings.

93. See § 3-203 in Appendix III *infra*.

94. UNIFORM PROBATE CODE § 3-401.

The other side of the debate seems more persuasive. The public is massively disenchanted with the protections and attendant costs of present probate procedures. This revulsion has been accompanied by a widespread move toward some probate avoidance devices that are inherently risky for all concerned. Is it not patently foolish for lawmakers to listen to the judges and other persons who want current protections and practices continued or made more complicated in the name of avoiding risks to inheritors when, in reality, the policy advocated by these Code critics has moved the real world of transfers at death sharply toward probate avoidance schemes?

E. Limitations

There may be some objections to the Code's limitation periods. One limitation period bars unsecured creditors of a decedent, including those who are presently owed and those whose claims are contingent or immature, unless the claims are presented within four months after the first publication of the fiduciary's notice to creditors.⁹⁵ The result may appear to deal harshly with persons who are

95. *Id.* § 3-803 [*Limitations on Presentation of Claims*], which provides the following:

(a) All claims against a decedent's estate which arose before the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:

(1) within 4 months after the date of the first publication of notice to creditors if notice is given in compliance with Section 3-801; provided, claims barred by the non-claim statute at the decedent's domicile before the first publication for claims in this state are also barred in this state.

(2) within [3] years after the decedent's death, if notice to creditors has not been published.

(b) All claims against a decedent's estate which arise at or after the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:

(1) a claim based on a contract with the personal representative, within four months after performance by the personal representative is due;

(2) any other claim, within 4 months after it arises.

(c) Nothing in this section affects or prevents:

(1) any proceeding to enforce any mortgage, pledge, or other lien upon property of the estate; or

(2) to the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which he is protected by liability insurance.

unaware of a debtor's death or who assume that they are protected as long as their rights to collect from another person have not fully matured. Contingent claimants consisting of potential plaintiffs who have rights against a decedent's estate because of his tort are given relief against this bar which, in the worst imaginable cases, may operate against claimants before they recover sufficiently from personal injuries to know that they have a claim. The relief takes the form of an exception to the nonclaim statute that permits late recoveries of sums covered by liability insurance carried by the decedent.⁹⁶ The harshness of the bar for other potential claimants is the price of a statutory policy favoring expeditious settlement of decedents' estates.⁹⁷ In this connection, it should be noted that the U.P.C. nonclaim period is longer than that to be found in some nonuniform statutes.⁹⁸ Furthermore, broad adoption of the U.P.C. provisions relating to creditors of decedents may elevate a single standard above the existing hodge-podge of variant nonclaim periods and provisions so that the rule becomes more widely publicized and understood by everyone. If this occurs, it should increase the ability of those persons dealing with prospective decedents to safeguard their interests. Alternatively, credit life insurance and property and personal security interests that give protection against nonclaim statutes are freely available.

Another period of limitations, serving to bar probate of most late-discovered wills, contests of wills probated in nonadjudicated procedures (informal probate), and commencement of administration of estates not previously opened, runs when three years have elapsed since the decedent's death.⁹⁹ The Code is well within famil-

96. *Id.* (c)(2).

97. See Langrock, *What Price Certainty*, 6 TRIAL, Sept. 1970, at 20.

98. *E.g.*, 3 months from date of first publication in Florida, FLA. STAT. ANN. § 733.702 (West 1976); 90 days from first publication of notice in Nevada, NEV. REV. STAT. § 147.040 (1973); 3 months from date of court order in Wisconsin, WIS. STAT. ANN. § 859.050 (West 1971).

99. UNIFORM PROBATE CODE § 3-108 [*Probate, Testacy and Appointment Proceedings; Ultimate Time Limit*], which provides the following:

No informal probate or appointment proceeding or formal testacy or appointment proceeding, other than a proceeding to probate a will previously probated at the testator's domicile and appointment proceedings relating to an estate in which there has been a prior appointment, may be commenced more than 3 years after the decedent's death, except (1) if a previous proceeding was dismissed because of doubt about the fact of the decedent's death, appropriate probate, appointment or testacy proceedings may be maintained at any time thereafter upon a finding that the decedent's death occurred prior to the initiation of the previous proceeding and the applicant or petitioner has not delayed unduly in initiating the subsequent proceeding; (2) appropriate probate, appointment or testacy proceedings may be

iar patterns as far as the possibility of probating late-discovered wills is concerned, and much more considerate to late-blooming will contestants than many existing statutes.¹⁰⁰ The feature of this limitations provision that is most unusual when compared with existing statutes is the bar on opening estates for administration. The bar is included so that intestate estates, as well as testate estates under wills that have been admitted to probate for muniment of title purposes, may be settled by limitations when the period expires before anyone moves to open the estate for administration.¹⁰¹ An alternative proceeding in the probate court is provided in the Code to settle questions involving determinations of heirship and construction of wills that cannot be resolved in the normal course of administration once the bar applies.¹⁰² To the extent that recourse to the alternative procedure is necessary and more expensive than an unsupervised administration would be, the Code rewards and therefore induces prompt settlement of estates. This combination of limitations and optional procedures makes it possible for many inherited titles to estates to be made marketable without any estate administration. It promotes the U.P.C. purpose of simplifying and eliminating court-oriented procedures by sidestepping title problems that arise merely because administration may occur. The principal inconvenience to be anticipated from this new approach is that lawyers and title insurers will have to re-examine old learning about clearing inherited titles. Costs will be incurred in the process, but they will be nonrecurring.

F. Constitutionality of U.P.C.

If there have been serious constitutional challenges in court to the U.P.C. as enacted to date, the news has not yet reached those

maintained in relation to the estate of an absent, disappeared or missing person for whose estate a conservator has been appointed, at any time within three years after the conservator becomes able to establish the death of the protected person; and (3) a proceeding to contest an informally probated will and to secure appointment of the person with legal priority for appointment in the event the contest is successful, may be commenced within the later of twelve months from the informal probate or three years from the decedent's death. These limitations do not apply to proceedings to construe probated wills or determine heirs of an intestate. In cases under (1) or (2) above, the date on which a testacy or appointment proceeding is properly commenced shall be deemed to be the date of the decedent's death for purposes of other limitations provisions of this Code which relate to the date of death.

100. See L. SIMES & P. BASYE, *supra* note 2, at 307.

101. See I UNIFORM PROBATE CODE PRACTICE MANUAL (2d ed. 1977), at 189-90.

102. See UNIFORM PROBATE CODE §§ 3-105, -106.

persons in national committees that attempt to monitor the legislation. Doubts about constitutionality in the minds of title insurers and examiners, however, can generate impediments to the intended functioning of the Code without involving litigation. If persons in these service industries decide that the Code is, or may be, unconstitutional in some respect that touches a title, the result will be the refusal of their company or office to insure or pass titles based on the statute. It's unlikely that these doubts will result in litigation because those persons desiring the requested approval of a title will simply go through whatever combination of procedures the title examiners deem safe.

Hopefully title lawyers will read the statute and supporting commentary with great care and, like the courts whose opinions they must anticipate, give considerable weight to the legislative judgment that the Code is valid and useful. The power wielded by title insurers and examiners over the acceptability of various probate procedures is great, but it is not unlimited. Few title insurers or examiners lack present or potential competition to the extent that they would be unworried about the impact of purely arbitrary judgments to refuse to go along with the title clearing devices built into the Code. Most title lawyers should be keenly interested in the experience of other U.P.C. states, as well as in the arguments that support the validity of the Code's title clearance features.

Persons who examine the reaction of title lawyers in U.P.C. states find that the news is favorable for those who want to simplify the settling of inheritances. Except in portions of New Mexico and, for a time at least, for persons electing to trade with certain title companies in Arizona, title insurance appears to be readily available to prospective purchasers from distributees who receive land in unadjudicated distributions, including those deriving their authority from informal probate and appointment proceedings. Every U.P.C. state's title specialists have had to adjust from past practice which emphasized the insurability of title of heirs and devisees. Under the U.P.C., heirs and devisees do not have insurable title unless their distributions have been approved by, or received pursuant to, a formal closing proceeding.¹⁰³ This form of proceeding is a mandatory feature of supervised administration, but supervised administration is not required to make a distributee's title insurable since formal closing proceedings are available for ordinary administrations as well.¹⁰⁴ As noted earlier, however, an heir or devisee who

103. See Wellman, *supra* note 73.

104. See UNIFORM PROBATE CODE §§ 3-1001, -1002.

is unwilling to pay the cost of a formal closing procedure merely to gain peace of mind about the risks of unknown and unbarred heirs and devisees need not obtain a marketable title for himself as a precondition to being able to tender a title that will be marketable for a purchaser.

Title lawyers interested in technical arguments for and against the Code's constitutionality should be aware of two recent and important state supreme court rulings concerning validity of no-notice probate procedures. One involved a time-honored procedure available to Georgia widows for obtaining a year's support from a deceased husband's estate. There is no statutory ceiling on the values that can be transferred in this manner;¹⁰⁵ consequently, the proceeding is frequently used to clean out probate estates of substantial value.¹⁰⁶ Available both as an original proceeding and as a proceeding following probate of any will and appointment of a fiduciary, allowance of a year's support historically has not required notice except by publication to interested persons. The court of probate, following the receipt of report of special appraisers customarily rounded up by the applicant for the purpose, merely orders the recommended payment or transfer without further ado. The court's order constitutes muniment of title to real or other property described therein and the award has priority against the claims of creditors, devisees, and heirs. Hence, the procedure produces a title for the widow that prevails over the usual title snags attributable to a probate succession, such as, unbarred claims, unprobated wills, and unlocated or incompetent heirs.

In *Allan v. Allan*¹⁰⁷ the Georgia Supreme Court, in a ruling expressly limited to cases arising thereafter, invalidated the year's support statute as applied to unopened estates. The opinion concluded that a binding order of a probate court made without notice and an opportunity to be heard for interested persons was vulnerable to constitutional challenge under the doctrine of *Mullane v. Central Hanover Bank & Trust Co.*¹⁰⁸ Anticipating that the holding also might jeopardize two other Georgia probate institutions, common form probate and notice by publication to bar creditors, the court expressly limited its ruling to binding court orders. Noting

105. The procedure, as amended effective July 11, 1977, to comply with the ruling of the Georgia Supreme Court in *Allan v. Allan*, 236 Ga. 199, 223 S.E.2d 445 (1976), is described at GA. CODE ANN. § 113-1002 (1975).

106. The probate court order in *Allan v. Allan*, 236 Ga. 199, 223 S.E.2d 445 (1976), assigned assets having a fair market value of \$45,000 to the widow.

107. 236 Ga. 199, 223 S.E.2d 445 (1976).

108. 339 U.S. 306 (1949).

that neither common form probate nor publication to bar creditors entailed conclusive barriers to persons jeopardized thereby, the court indicated that neither was affected by its ruling. This position was accompanied by express recognition that each proceeding, like the year's support proceeding in suit, required no more than notice by publication to interested persons, including those known to the moving party to have adverse interests.

A recent case involving the Kansas nonclaim statute provides further support for the proposition that *Mullane* notice requirements apply only to binding adjudications by a court. In *Gano Farms, Inc. v. Estate of Kleweno*¹⁰⁹ a creditor that failed to learn of its debtor's death in time to present its claim within six months after first publication of notice to creditors challenged the constitutionality of the statute on *Mullane* grounds. Distinguishing a notice that merely starts a period of limitations by measuring the time within which creditors may start or enter a judicial proceeding from notices alerting one whose interests are assumed to be before a court and are jeopardized by a ruling that might be made, the Kansas Court of Appeals rejected the creditor's challenge. The court distinguished its ruling from an earlier Kansas Supreme Court holding which required notice other than by publication to heirs known to be jeopardized by a proceeding to probate a will.¹¹⁰ The court reasoned that an heir, facing the prospect of a *court order* which would establish conclusively that the decedent's will is valid and therefore eliminate his chance of taking in intestacy, is entitled to notice as required by *Mullane*. On the other hand, the creditor, who is excluded by a statute of limitations, is not entitled to the same notice as is required for one jeopardized by the prospect of a court order that will bind him.

Since Kansas statutes presently do not admit the possibility, the court of appeals did not go on to indicate whether an heir similarly could be precluded by limitations from contesting a will previously established in *nonbinding* proceedings. Its distinction between bars by statutes of limitation and bars by binding court orders, like the distinction approved in the *Allan* case between binding and nonbinding court orders, suggests that a statute of limitations might be enacted that would bar heirs and devisees who seek, after a period of time, to initiate a court proceeding to establish rights not previously brought before a court or adjudicated.

The validity of the U.P.C. provisions designed to settle inheri-

109. 582 P.2d 742 (Kan. Ct. App. 1978).

110. *In re Estate of Barnes*, 212 Kan. 502, 512 P.2d 387 (1973).

tances after a time and without court adjudication rests on the assumption that a state legislature may qualify rights arising from inheritance in various ways that serve the public interest.¹¹¹ Rights of heirs and devisees under the U.P.C. are expressly conditioned by all of its provisions to facilitate prompt and efficient settlement of estates.¹¹² One such provision gives personal representatives of decedents administrative powers by which they may transform a decedent's land or other assets into money or other exchange.¹¹³ The transformation may decrease the security an heir believes he should have, but the Code plainly relegates the heir to the proceeds and any rights he may have against an estate fiduciary; rights that would arise, for example, if the will purported to require retention of the land, or if the sale were improper for some other reason. Another provision expediting estate settlements is the Code's limitations period that cuts off rights, not previously terminated by adjudication, of devisees who fail to locate and secure probate of wills within three years from death.¹¹⁴ Furthermore, treating heirs as persons that the decedent probably would have favored if he had thought about making a will, the Code subjects heirs to a requirement of initiating will contests within three years from the time of death, subject to the right of a will proponent to seek an earlier court adjudication that finally establishes his right to exclude the heirs.¹¹⁵ The right of distributees of a personal representative to create a marketable title in a purchaser derives from another Code provision designed to facilitate administration of estates.¹¹⁶ Without it, the Code's efforts to encourage administration and distribution of estates without time consuming and expensive adjudications would be

111. See PALMER'S TRUSTS AND SUCCESSIONS, *supra* note 41, at 344-49.

112. UNIFORM PROBATE CODE § 3-101 [*Devolution of Estate at Death; Restrictions*], which provides the following:

The power of a person to leave property by will, and the rights of creditors, devisees, and heirs to his property are subject to the restrictions and limitations contained in this Code to facilitate the prompt settlement of estates. Upon the death of a person, his real and personal property devolves to the persons to whom it is devised by his last will or to those indicated as substitutes for them in cases involving lapse, renunciation, or other circumstances affecting the devolution of testate estate, or in the absence of testamentary disposition, to his heirs, or to those indicated as substitutes for them in cases involving renunciation or other circumstances affecting devolution of intestate estates, subject to homestead allowance, exempt property and family allowance, to rights of creditors, elective share of the surviving spouse, and to administration.

113. *Id.* § 3-715.

114. *Id.* § 3-108, quoted note 99 *supra*.

115. *Id.*

116. *Id.* § 3-910.

an empty gesture for estates involving land.

It should also be noted that all limitations periods in the Code, except for those designed to clear inheritances of claims of creditors of decedents, commence at the death of the decedent. Heirs and devisees have assurance under the Code that, though their expectancies in particular assets may be shifted to sale proceeds and to rights to surcharge fiduciaries or to secure refunds from persons receiving erroneous distribution, they cannot be barred by limitations without notice until three years after the death. Any earlier bar will result from a judicial determination, and they must be given notice of that determination in a manner best calculated to reach their attention. It is of possible significance in litigation about the constitutionality of the Code to note that heirs and devisees may be fairly charged with notice of the death of a decedent under whom they claim. As heirs, they are the nearest relatives; as devisees, it is likely that they are close acquaintances or charitable objects who have been informed by the decedent of his purpose to benefit them by will and have therefore become attentive to his physical well-being.

The *Gano Farms* case may also be of comfort to one who seeks to uphold the Code's provisions designed to protect inheritors against unknown creditors. As noted earlier, unsecured creditors may be barred by limitations running four months from first publication by the personal representative. One might argue that such a short period, running from a publication that may occur any time between five days after death and a practical time limit more than two and a half years later,¹¹⁷ is unduly harsh on creditors who arguably lack the opportunity for news of a death that heirs and devisees enjoy through family connection. If the resulting discrimination is challenged on due process or equal protection grounds, *Gano Farms* offers a useful answer; it holds that there are obvious and rational grounds for legislative discrimination between heirs and unsecured creditors of decedents. Little else needs to be said.

Inherited titles should continue to be marketable or insurable in the hands of purchasers from personal representatives or distribu-

117. No notice by publication will occur before a personal representative is appointed and informal appointment is not to be made until after 120 hours from death. *Id.* § 3-307. It is unlikely that advertising for claims will occur later than two and a half years after death because all creditors' claims are barred three years from death without publication. See § 3-803(a)(2), quoted note 95 *supra*. Appointment in formal proceedings is not subject to the five day from death delay period, but appointment in this manner involves notice, which may be waived by competent and adult parties in interest, and hearing, making quick appointments unlikely.

tees even if the four-months nonclaim provision is held to be ineffective to bar creditors of whom the personal representative was aware. This is true because the Code contains a fall-back system to handle unbarred creditors' claims; distributees are liable to the extent of values received for unbarred claims.¹¹⁸ This provision has no connection with the Code sections that are designed to protect purchasers from estate fiduciaries and distributees. Presumably, this system would remain intact for purposes of a claim saved from nonclaim by constitutional considerations just as it plainly does for a claim that remains unbarred because a personal representative failed to start the short nonclaim period by advertising for claims.

The Code strikes a reasonable balance between the goals of protecting everyone entitled to protection because of a decedent's actual or presumed preference and of providing administrative convenience to all estate beneficiaries. There is no foreseeable, valid reason to predict that its provisions which make inherited titles of distributees marketable in the hands of purchasers will be held invalid.

III. CONCLUSION

The Arkansas General Assembly should give great weight to the study and recommendations of the Arkansas Uniform Probate Code Study Commission concerning the Uniform Probate Code. This group, made up of seven members of the General Assembly and ten other distinguished Arkansans, including a law professor, a chancellor, several prominent attorneys, and representatives of lay groups interested in probate law reform, devoted several months of activity and many hours in meetings to the question of how best to tune Arkansas probate law to the needs of the times. For them, the Uniform Probate Code is the right formula; the General Assembly should agree.

Arkansas legislators and lawyers may also be interested in the gist of a voluminous and highly favorable report about the Uniform Probate Code made by the Maine Probate Law Revision Commission. This body, created in 1973 by action of the Maine legislature, worked in the grand tradition of New Englanders given to prefer patient reflection to more dramatic modes of reacting to new proposals. After five long years, the Maine Commission recently issued a 662 page report of its deliberations and recommendations together with a 51 page summary.¹¹⁹ Like the Arkansas Commission, the

118. UNIFORM PROBATE CODE § 3-909, quoted in Appendix III *infra*.

119. See REPORT TO THE 109TH MAINE LEGISLATURE, *supra* note 44.

Maine Commission recommended the Uniform Probate Code for local enactment, virtually without change. The following excerpt from the Summary Report from Maine provides powerful corroboration for the conclusions reached by the Arkansas Commission and affirms, if affirmation is needed, that people in widely separated parts of the country share a strong desire to reshape local probate laws to meet the needs of families:

The Commission created by the Legislature of the State of Maine was heavily made up of persons with extensive experience in probate law. Eleven of the fifteen current members are lawyers who are actively practicing or otherwise working in the probate area, including the Chairman, Vice-chairman and Secretary-Treasurer. In addition to the three active Probate Judges designated as consultants to the Commission, and who actively participated in the Commission's study and proceedings, three other members have also served as Probate Judges in this State. Thus, six of the fifteen current members of the Commission have had experience as Maine Probate Judges. The interest of ordinary working men and women and the public at large was also well represented among the Commissioners. The working memoranda of the Commission — well over 1,000 pages — were made available over the course of the study to a special committee set up by the Maine State Bar Association to follow the work of the Commission, so that that committee could be fully informed of the work of the Commission throughout.

Given the extensive probate law experience of the great majority of the Commission members, one of the more instructive developments over the course of the Commission's study was a perceptible change in attitude of the Commissioners from one of early skepticism about the Uniform Probate Code to one of acceptance and enthusiastic endorsement. The Commission's proposed Maine Probate Code is based overwhelmingly, after countless hours of consideration and comparison, on the Uniform Probate Code. Once the selection of the membership of the Commission had been completed and its work was underway, two things became apparent: (1) the Commission members were very much aware of the need for probate reform and were anxious to accomplish it, but they were also equally determined to accomplish it in a deliberately thorough manner even if it meant that the original time schedule established by the Legislature would need to be extended, and (2) the probate reform experience of the past three or four decades, culminating in the Uniform Probate Code, offered the best means of achieving that reform and producing a comprehensive and workable set of probate laws responsive to modern needs and perceptions, logically organized and located essentially within

one Title of the Maine Revised Statutes — a result which could not be well achieved by approaching the task by amendments made here and there throughout the various parts of the present Maine law of probate.¹²⁰

The Uniform Probate Code, now only a bit over nine years old, already constitutes an increasingly well understood and widely emulated proposal for unifying American probate law. Arkansas, a state with a distinguished record for accepting uniform law recommendations emanating from the National Conference of Commissioners on Uniform State Laws, should aid itself and the national cause of probate law reform by enacting the Uniform Probate Code.

120. *Id.* at 5-6.

APPENDIX I: Selected Provisions of the UNIFORM PROBATE CODE
Section 2-201. [*Right to Elective Share.*]

(a) If a married person domiciled in this state dies, the surviving spouse has a right of election to take an elective share of one-third of the augmented estate under the limitations and conditions hereinafter stated.

(b) If a married person not domiciled in this state dies, the right, if any, of the surviving spouse to take an elective share in property in this state is governed by the law of the decedent's domicile at death.

Section 2-202. [*Augmented Estate.*]

The augmented estate means the estate reduced by funeral and administration expenses, homestead allowance, family allowances and exemptions, and enforceable claims, to which is added the sum of the following amounts:

(1) The value of property transferred to anyone other than a bona fide purchaser by the decedent at any time during marriage, to or for the benefit of any person other than the surviving spouse, to the extent that the decedent did not receive adequate and full consideration in money or money's worth for the transfer, if the transfer is of any of the following types:

(i) any transfer under which the decedent retained at the time of his death the possession or enjoyment of, or right to income from, the property;

(ii) any transfer to the extent that the decedent retained at the time of his death a power, either alone or in conjunction with any other person, to revoke or to consume, invade or dispose of the principal for his own benefit;

(iii) any transfer whereby property is held at the time of decedent's death by decedent and another with right of survivorship;

(iv) any transfer made to a donee within two years of death of the decedent to the extent that the aggregate transfers to any one donee in either of the years exceed \$3,000.00.

Any transfer is excluded if made with the written consent or joinder of the surviving spouse. Property is valued as of the decedent's death except that property given irrevocably to a donee during lifetime of the decedent is valued as of the date the donee came into possession or enjoyment if that occurs first. Nothing herein shall cause to be included in the augmented estate any life insur-

ance, accident insurance, joint annuity, or pension payable to a person other than the surviving spouse.

(2) The value of property owned by the surviving spouse at the decedent's death, plus the value of property transferred by the spouse at any time during marriage to any person other than the decedent which would have been includible in the spouse's augmented estate if the surviving spouse had predeceased the decedent to the extent the owned or transferred property is derived from the decedent by any means other than testate or intestate succession without a full consideration in money or money's worth. For purposes of this paragraph:

(i) Property derived from the decedent includes, but is not limited to, any beneficial interest of the surviving spouse in a trust created by the decedent during his lifetime, any property appointed to the spouse by the decedent's exercise of a general or special power of appointment also exercisable in favor of others than the spouse, any proceeds of insurance (including accidental death benefits) on the life of the decedent attributable to premiums paid by him, any lump sum immediately payable and the commuted value of the proceeds of annuity contracts under which the decedent was the primary annuitant attributable to premiums paid by him, the commuted value of amounts payable after the decedent's death under any public or private pension, disability compensation, death benefit or retirement plan, exclusive of the Federal Social Security system, by reason of service performed or disabilities incurred by the decedent, any property held at the time of decedent's death by decedent and the surviving spouse with right of survivorship, any property held by decedent and transferred by contract to the surviving spouse by reason of the decedent's death and the value of the share of the surviving spouse resulting from rights in community property in this or any other state formerly owned with the decedent. Premiums paid by the decedent's employer, his partner, a partnership of which he was a member, or his creditors, are deemed to have been paid by the decedent.

(ii) Property owned by the spouse at the decedent's death is valued as of the date of death. Property transferred by the spouse is valued at the time the transfer became irrevocable, or at the decedent's death, whichever occurred first. Income earned by included property prior to the decedent's death is not treated as property derived from the decedent.

(iii) Property owned by the surviving spouse as of the decedent's death, or previously transferred by the surviving spouse, is presumed to have been derived from the decedent except to the extent that the surviving spouse establishes that it was derived from another source.

(3) For purposes of this section a bona fide purchaser is a purchaser for value in good faith and without notice of any adverse claim. Any recorded instrument on which a state documentary fee is noted pursuant to [insert appropriate reference] is prima facie evidence that the transfer described therein was made to a bona fide purchaser.

Section 2-203. [*Right of Election Personal to Surviving Spouse.*]

The right of election of the surviving spouse may be exercised only during his lifetime by him. In the case of a protected person, the right of election may be exercised only by order of the court in which protective proceedings as to his property are pending, after finding that exercise is necessary to provide adequate support for the protected person during his probable life expectancy.

Section 2-204. [*Waiver of Right to Elect and of Other Rights.*]

The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement or waiver signed by the party waiving after fair disclosure. Unless it provides to the contrary, a waiver of "all rights" (or equivalent language) in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights to elective share, homestead allowance, exempt property and family allowance by each spouse in the property of the other and a renunciation by each of all benefits which would otherwise pass to him from the other by intestate succession or by virtue of the provisions of any will executed before the waiver or property settlement.

Section 2-205. [*Proceeding for Elective Share; Time Limit.*]

(a) The surviving spouse may elect to take his elective share in the augmented estate by filing in the Court and mailing or delivering to the personal representative, if any, a petition for the elective share within 9 months after the date of death, or within 6 months

after the probate of the decedent's will, whichever limitation last expires. However, that nonprobate transfers, described in Section 2-202(1), shall not be included within the augmented estate for the purpose of computing the elective share, if the petition is filed later than 9 months after death.

The Court may extend the time for election as it sees fit for cause shown by the surviving spouse before the time for election has expired.

(b) The surviving spouse shall give notice of the time and place set for hearing to persons interested in the estate and to the distributees and recipients of portions of the augmented net estate whose interests will be adversely affected by the taking of the elective share.

(c) The surviving spouse may withdraw his demand for an elective share at any time before entry of a final determination by the Court.

(d) After notice and hearing, the Court shall determine the amount of the elective share and shall order its payment from the assets of the augmented net estate or by contribution as appears appropriate under Section 2-207. If it appears that a fund or property included in the augmented net estate has not come into the possession of the personal representative, or has been distributed by the personal representative, the Court nevertheless shall fix the liability of any person who has any interest in the fund or property or who has possession thereof, whether as trustee or otherwise. The proceeding may be maintained against fewer than all persons against whom relief could be sought, but no person is subject to contribution in any greater amount than he would have been if relief had been secured against all persons subject to contribution.

(e) The order or judgment of the Court may be enforced as necessary in suit for contribution or payment in other courts of this state or other jurisdictions.

Section 2-206. [*Effect of Election on Benefits by Will or Statute.*]

A surviving spouse is entitled to homestead allowance, exempt property, and family allowance, whether or not he elects to take an elective share.

Section 2-207. [*Charging Spouse With Gifts Received; Liability of Others for Balance of Elective Share.*]

(a) In the proceeding for an elective share, values included in the augmented estate which pass or have passed to the surviving

spouse, or which would have passed to the spouse but were renounced, are applied first to satisfy the elective share and to reduce any contributions due from other recipients of transfers included in the augmented estate. For purposes of this subsection, the electing spouse's beneficial interest in any life estate or in any trust shall be computed as if worth one-half of the total value of the property subject to the life estate, or of the trust estate, unless higher or lower values for these interests are established by proof.

(b) Remaining property of the augmented estate is so applied that liability for the balance of the elective share of the surviving spouse is equitably apportioned among the recipients of the augmented estate in proportion to the value of their interests therein.

(c) Only original transferees from, or appointees of, the decedent and their donees, to the extent the donees have the property or its proceeds, are subject to the contribution to make up the elective share of the surviving spouse. A person liable to contribution may choose to give up the property transferred to him or to pay its value as of the time it is considered in computing the augmented estate.

APPENDIX II: Selected Provisions of the UNIFORM PROBATE CODE

Section 1-201. [*General Definitions.*]

(10) "Distributee" means any person who has received property of a decedent from his personal representative other than as creditor or purchaser. A testamentary trustee is a distributee only to the extent of distributed assets or increment thereto remaining in his hands. A beneficiary of a testamentary trust to whom the trustee has distributed property received from a personal representative is a distributee of the personal representative. For purposes of this provision, "testamentary trustee" includes a trustee to whom assets are transferred by will, to the extent of the devised assets.

Section 3-715. [*Transactions Authorized for Personal Representatives; Exceptions.*]

Except as restricted or otherwise provided by the will or by an order in a formal proceeding and subject to the priorities stated in Section 3-902, a personal representative, acting reasonably for the benefit of the interested persons, may properly:

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(27) satisfy and settle claims and distribute the estate as provided in this Code.

Section 3-907. [*Distribution in Kind; Evidence.*]

If distribution in kind is made, the personal representative shall execute an instrument or deed of distribution assigning, transferring or releasing the assets to the distributee as evidence of the distributee's title to the property.

Section 3-908. [*Distribution; Right or Title of Distributee.*]

Proof that a distributee has received an instrument or deed of distribution of assets in kind, or payment in distribution, from a personal representative, is conclusive evidence that the distributee has succeeded to the interest of the estate in the distributed assets, as against all persons interested in the estate, except that the personal representative may recover the assets or their value if the distribution was improper.

Section 3-909. [*Improper Distribution; Liability of Distributee.*]

Unless the distribution or payment no longer can be questioned because of adjudication, estoppel, or limitation, a distributee of property improperly distributed or paid, or a claimant who was

improperly paid, is liable to return the property improperly received and its income since distribution if he has the property. If he does not have the property, then he is liable to return the value as of the date of disposition of the property improperly received and its income and gain received by him.

Section 3-910. [*Purchasers from Distributees Protected.*]

If property distributed in kind or a security interest therein is acquired for value by a purchaser from or lender to a distributee who has received an instrument or deed of distribution from the personal representative, or is so acquired by a purchaser from or lender to a transferee from such distributee, the purchaser or lender takes title free of rights of any interested person in the estate and incurs no personal liability to the estate, or to any interested person, whether or not the distribution was proper or supported by court order or the authority of the personal representative was terminated before execution of the instrument or deed. This section protects a purchaser from or lender to a distributee who, as personal representative, has executed a deed of distribution to himself, as well as a purchaser from or lender to any other distributee or his transferee. To be protected under this provision, a purchaser or lender need not inquire whether a personal representative acted properly in making the distribution in kind, even if the personal representative and the distributee are the same person, or whether the authority of the personal representative had terminated before the distribution. Any recorded instrument described in this section on which a state documentary fee is noted pursuant to [insert appropriate reference] shall be prima facie evidence that such transfer was made for value.

APPENDIX III: Selected Provision of the UNIFORM PROBATE CODE

Section 3-203. [*Priority Among Persons Seeking Appointment as Personal Representative.*]

(a) Whether the proceedings are formal or informal, persons who are not disqualified have priority for appointment in the following order:

- (1) the person with priority as determined by a probated will including a person nominated by a power conferred in a will;
- (2) the surviving spouse of the decedent who is a devisee of the decedent;
- (3) other devisees of the decedent;
- (4) the surviving spouse of the decedent;
- (5) other heirs of the decedent;
- (6) 45 days after the death of the decedent, any creditor.

(b) An objection to an appointment can be made only in formal proceedings. In case of objection the priorities stated in (a) apply except that

(1) if the estate appears to be more than adequate to meet exemptions and costs of administration but inadequate to discharge anticipated unsecured claims, the Court, on petition of creditors, may appoint any qualified person;

(2) in case of objection to appointment of a person other than one whose priority is determined by will by an heir or devisee appearing to have a substantial interest in the estate, the Court may appoint a person who is acceptable to heirs and devisees whose interests in the estate appear to be worth in total more than half of the probable distributable value, or, in default of this accord any suitable person.

(c) A person entitled to letters under (2) through (5) of (a) above, and a person aged [18] and over who would be entitled to letters but for his age, may nominate a qualified person to act as personal representative. Any person aged [18] and over may renounce his right to nominate or to an appointment by appropriate writing filed with the Court. When two or more persons share a priority, those of them who do not renounce must concur in nominating another to act for them, or in applying for appointment.

(d) Conservators of the estates of protected persons, or if there is no conservator, any guardian except a guardian ad litem of a minor or incapacitated person, may exercise the same right to nomi-

nate, to object to another's appointment, or to participate in determining the preference of a majority in interest of the heirs and devisees that the protected person or ward would have if qualified for appointment.

(e) Appointment of one who does not have priority, including priority resulting from renunciation or nomination determined pursuant to this section, may be made only in formal proceedings. Before appointing one without priority, the Court must determine that those having priority, although given notice of the proceedings, have failed to request appointment or to nominate another for appointment, and that administration is necessary.

(f) No person is qualified to serve as a personal representative who is:

(1) under the age of [21];

(2) a person whom the Court finds unsuitable in formal proceedings;

(g) A personal representative appointed by a court of the decedent's domicile has priority over all other persons except where the decedent's will nominates different persons to be personal representative in this state and in the state of domicile. The domiciliary personal representative may nominate another, who shall have the same priority as the domiciliary personal representative.

(h) This section governs priority for appointment of a successor personal representative but does not apply to the selection of a special administrator.