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Uniform Probate Code - Abolishing the Distinction between Real and Personal Property in Estate Administration

Body F. Goldsworthy

UNIFORM PROBATE CODE—ABOLISHING THE DISTINCTION BETWEEN REAL AND PERSONAL PROPERTY IN ESTATE ADMINISTRATION

BOYD F. GOLDSWORTHY*

The struggle of the law to modernize is mirrored in the struggle to abolish the distinction between real and personal property in the administration of estates. An authority on property law wrote in 1879, almost one hundred years ago:

> The distinction between real and personal property might be done away, without any disturbance of substantial rights or interests. There would be a savings of money, of time, of temper, of trouble; a saving of vexatious lawsuits and of those worst of quarrels—family quarrels; vast masses of antique and unintelligible law might be forever forgotten; but beyond this, there would be little change, certainly no change which the veriest Tory could call revolutionary.[1]

Since that date we have seen some progress, but it has been unnecessarily slow. We have to agree with Maitland, who went on to state:

> A few little changes have been made—for accidents will happen in the best regulated museums—but on the whole, this interesting specimen of antiquity has been most carefully preserved.[2]

There is little disagreement that probate administration could be simplified, hastened and made less expensive if this ancient doctrine could be everywhere abolished.

HISTORY OF THE DISTINCTION BETWEEN REAL AND PERSONAL PROPERTY IN ESTATE ADMINISTRATION

In early English law, at a time when the basic feature of a feudal economy was landed estates, land descended in large units

* LL.B., 1939, Harvard University; partner in the law firm of Goldsworthy and Fifield, Peoria, Illinois.

1. F. MAITLAND, COLLECTED PAPERS 162, 170 (Westminister Review 1879).
2. *Id.* at 175.

by primogeniture to the eldest son, while personalty, considered to be of far less importance, passed to all the children. When the American states adopted English law, the distinction became ingrained in our law so that a decendent's personal property passed to his executor or administrator and real property directly to the heirs or devisees and could be sold only if the estate were otherwise insolvent. Thus, the fact that there is a distinction in administration between real and personal property is largely historical.[3]

At common law the surviving spouse was not an heir and no real estate descended to her. She was entitled to dower, which was a life estate in one-third of all lands of which her deceased husband was seized of an estate of inheritance at any time during the marriage. A widower was entitled to an estate for life by curtesy in all of the land that his deceased wife owned in fee, provided a child was born alive to the marriage. Other than this, estates of inheritance descended at death to the eldest son, to the complete exclusion of the other descendants. However, if there was no son or issue of a deceased son, the daughters took in equal shares.

On the other hand, personal property was administered by the ecclesiastical courts under law derived from the Roman law.[4] Personal property of a married woman passed to her husband. The widow took outright one-third of the personal estate of her husband if the husband was survived by issue, and one-half if not. The children shared equally in the remainder, with no preference for sons, and the distribution was *per stirpes*. The husband took absolute ownership of his deceased wife's personalty, including leaseholds. More remote distribution was generally to those relatives who stood in the closest degree of heirship to the decedent according to the rules of the civil law.[5]

Legislation in the United States has tended, for the past one hundred and fifty years, to reduce or eliminate the differences between the descent of real property and distribution of personal property in all states. Primogeniture and the preference for males has been practically abolished.[6]

Until the year 1540 under English law, a tenant in fee simple could not disinherit his heir; but by the Statute of Wills of that year, a tenant in fee simple could defeat his heir by will as to two-thirds of his lands held by military tenure and all land held by socage tenure. After 1646 this limitation was abolished, and English law

3. 3 AMERICAN LAW OF PROPERTY § 14.6 (A.J. Casner ed. 1952); Fratcher, *Toward Uniform Succession Legislation*, 41 N.Y.U. L. REV. 1037 (1966); Basye, *Determination of Heirship*, 54 MICH. L. REV. 737 (1956).

4. Fratcher, *Toward Uniform Succession Legislation*, 41 N.Y.U. L. REV. 1037, 1046 (1966).

5. Statute of Distribution, 22 & 23 Car. 2, c. 10, §§ 5, 6 (1670).

6. *Supra* note 4, at 1037, 1046-7; *but cf.* N.D. CENT. CODE § 30-20-27 (1960).

permitted complete disinheritance of children as to real property by will. Common law, however, protected widows by the device of dower, although there was no dower in leasehold estates. Neither dower nor curtesy could be eliminated by will.

The Statute of Wills of 1540 required wills of real property to be in writing, but there was no requirement for signing. The Statute of Frauds in 1676 required a will of land to be signed by the testator and witnessed by at least three competent witnesses. Personalty could be passed by an oral will, provided there were three witnesses. Today, in all American states, the formalities for the execution of written wills are uniform as to real and personal property.[7]

In this country, by tradition, title to personal property of the decedent passed to his personal representative and thence to his next of kin or legatees. Title to land, however, belonging to a decedent devolved directly upon the heir or devisee.[8]

Not until the Land Transfer Act of 1897[9] did the executor or administrator in England have any control over realty. Prior to that time land was not chargeable for the decedent's debts, although the heir himself was liable in some instances.[10] Since probate courts were organized in America some one hundred years before this development in England in 1897, we inherited the earlier English system.

It is obvious that under English law, where land was the bulwark of the economy and the feudal system required it to be passed on to the eldest son, an early distinction between the administration of real and personal property was natural. However, England has now completely abolished the distinction between real and personal property. This took place in 1925 with the passage of the Administration of Estates Act.[11] The reason for the rule having ceased, England abolished the rule. Nevertheless, in the United States, although the reason for the distinction has ceased, in a large number of states the distinction is continued. While no scientific study has been made, there are indications that real estate makes up only about twenty percent of the value of estates.[12]

In an article entitled *The Method, Process and Frequency of Wealth Transmission at Death,*[13] Professor Allison Dunham reviews a study of the transmission of wealth at death made under a grant to the University of Chicago by the Ford Foundation which involved

7. Fratcher, *Toward Uniform Sucession Legislation,* 41 N.Y.U. L. REV. 1037, 1069 (1966).
8. Basye, *Determination of Heirship,* 54 MICH. L. REV. 737, 738 (1956).
9. 60 & 61 Vict., c. 65 (1897).
10. *Supra* note 8, at 739.
11. 15 Geo. 5, c. 23, § 1(1) (1925).
12. 100 TRUSTS & ESTATES 745 (1961).
13. Dunham, *The Method, Process and Frequency of Wealth Transmission at Death,* 30 U. CHI. L. REV. 241 (1963).

the analysis of ninety-seven estates for which probate proceedings were initiated in 1953 in Cook County, Illinois, and seventy-three estates of decedents who died in 1957. A study was made of the age of the decedents, the percentage with wills, the percentage leaving life insurance, the professions and occupations of the decedents and the percentage leaving real estate. The author states:

> The table [appearing at page 265] vividly shows the decline of real estate as a significant asset in the decedent's estate. Fifty per cent had no real estate in the inventory, and, if the family residence is excluded as an item of investment, only 33 per cent had investment real estate. Forty-four per cent of the estates had either publicly or closely held stocks in the inventory, and about the same number had bank accounts, including shares of savings and loan associations. One out of four estates had government bonds in the portfolio.[14]

No effort is made to compare the value of real and personal property in the estates.

Fratcher observes in his article[15] that our probate system is derived from those in use in England in the seventeenth century and then states:

> In a number of respects the current English systems embody statutory and administrative changes, calculated to adapt them to modern conditions, to a much greater extent then those currently used by the typical American state.[16]

A better understanding of the English probate system will certainly aid the efforts of American lawyers to become convinced of the need for reform and to suggest specific improvements.

In England, executors are deemed to be and are treated as trustees for many purposes. There, the estate of a person who dies testate passes at death to his executor, and the estate of one who dies intestate passes to the President of the Probate, Divorce and Admiralty Division of the High Court of Justice pending issuance of letters of administration and, upon a grant of such letters, to the administrator to whom the grant is made. "Estate" for this purpose includes both real and personal property, whether the decedent held legal title or an equitable interest.[17]

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14. *Id.* at 266.
15. Fratcher, *Fiduciary Administration in England,* 40 N.Y.U. L. REV. 12 (1965).
16. *Id.*
17. *Id.* at 41-2; Administrations of Estates Act, 15 Geo.5, c. 23 § 1(1) (1925); WILLIAMS, EXECUTORS AND ADMINISTRATORS, 259 (14th ed. 1960).

CONTINUING THE DISTINCTION BETWEEN REAL AND PERSONAL PROPERTY IN THE ADMINISTRATION OF ESTATES TODAY IS AN ANACHRONISM

An expensive, time-consuming procedure is required in many states to sell real estate in the settlement of the estate, including filing a separate complaint, service of process, taking a default decree, hearing, order of court, report and confirmation of sale. This is so even though only one vacant lot in the decedent's estate, worth $1,000.00, is to be sold, while a million dollars in General Motors' stock or a valuable business operated as a sole proprietorship could be sold without delay by an *ex parte* petition to the probate court. If the husband sold the same lot during his lifetime, without the wife joining, she would obtain dower in many states; but the husband could have disposed of the General Motors' stock or the business without so much as notifying her. Thus the type of property, real or personal, which the decedent owned at the time of his death determines, in many states, whether the wife is adequately protected.

Modern estate planning and administration require that real and personal property be treated alike and with flexibility. The difficulty of passing title to real estate from a decedent's estate has led to various unnatural and expensive schemes designed solely for the purpose of transferring title to real estate and with no other business purpose, e. g., the creation of a trust for no other purpose than holding title to real estate in the decedent's own or another state, or the organization of a corporation to hold title to all of decedent's real estate.

Many states, including Illinois until 1965,[18] require income-producing personal property to be sold to pay debts, legacies and costs of administration before unproductive real estate can be sold, without regard to the needs of the family. This rule still prevails in a substantial number of states. In such states, personal property specifically bequeathed must be exhausted before resort can be had to the real estate specifically devised. States which treat the two types of property alike have generally specified in their statutes that real or personal property shall abate ratably in discharging indebtedness or in satisfying monetary legacies.[19]

The existence of common law dower is assuredly an obstacle to free commerce in land and a threat to the merchantability of titles. If a man owning land desires to sell and his wife is hostile, mentally incompetent or missing, he is unable to convey an acceptable

18. ILL. REV. STAT. ch. 3, § 225 (1963).
19. *See* 1 P-H WILLS & TRUSTS ESTATE PLANNING SERV. ¶ 2701, for reference to the applicable statutes in each state.

title or mortgage the property. A title examiner cannot know that a woman who signs as a man's wife today is his actual wife or whether there is another woman from whom he has never been divorced. At the same time, dower does not provide adequate protection for women in an economy which classifies most wealth as personal property.[20] A husband's wealth may consist of valuable long-term leaseholds or other forms of personal property to which dower does not attach; and, consequently, his wife has no protection.

Legislation enacted from the late 1700's to the 1960's has increasingly given the widow a share in personal property,[21] which she may elect to take in lieu of the provisions made for her by the husband's will; but the same liberty does not generally apply to real estate.

All common law states, except the Dakotas, apparently impose some restriction on the power of a spouse to disinherit the other.[22]

A MAJORITY OF THE STATES HAVE MOVED TOWARD ABOLISHING THE DISTINCTION

Some twenty-six states have completely, or substantially, abolished the distinction between real and personal property in administration.[23] Some of these, however, still maintain vestiges of the old distinction[24]. In 1965, Illinois took a major stride in the direction of the abolition of the distinction, but a number of remnants still remain.[25] For instance, while not required for personal property, a formal proceeding to sell real estate is retained, necessitating the filing of a petition to sell, service of process on all interested parties as in other civil cases, mandatory appointment of a guardian *ad litem* for minors and incompetents, the filing of a special bond, hearing, order of court authorizing deed, report of sale and order confirming sale. This is a proceeding which would normally require at least sixty days, assuming there are no objections. If the whereabouts of interested parties is unknown, publication is required.[26] This is needlessly cumbersome and time consuming when the exec-

20. *See* MCDONALD, FRAUD ON THE WIDOW'S SHARE (1960).
21. Fratcher, *Toward Uniform Succession Legislation*, 41 N.Y.U. L. REV. 1037, 1054 (1966).
22. *See* UNIFORM PROBATE CODE art. II, pt. 2 (Comment); 1 P-H WILLS & TRUSTS ESTATE PLANNING SERV. ¶ 2701; Plager, *The Spouse's Nonbarrable Share: A Solution in Search of a Problem*, 33 U. CHI. L. REV. 681 (1966).
23. *See generally* Scoles, *Improving Administration of Estates—The Abolition of the Distinction Between Real and Personal Property*, 52 ILL. B. J. 594 (1964); Basye, *Abolition of the Distinction Between Real and Personal Property in the Administration of Decedents' Estates*, 51 ILL. B. J. 214 (1962); and 1 P-H WILLS & TRUSTS ESTATE PLANNING SERV. ¶ 2701, where reference to most of the statutes in the United States and annotations to them can be found.
24. *Supra* note 23.
25. ILL. ANN. STAT. ch. 3, §§ 225-242 (Smith-Hurd Supp. 1970).
26. *Id.*

utor or administrator could be entrusted by statute to sell and convey real estate with as little difficulty as the sale of the equivalent in value of personal property.

In North Dakota, in order to complete a contract for sale of real estate made by the decedent, the personal representative must file a petition, and ". . . all persons interested in the estate must be cited as in other proceedings."[27] If the court is satisfied, after hearing, that the petition should be granted, a decree is entered. After the conveyance is made, the personal representative must make a report to the county court. Thus a distinction is made, as there is no such requirement before the personal representative can carry out the decedent's contract to sell personalty.

All personal property of the estate may be sold by the personal representative without notice and without securing an order of court.[28] On the other hand, to obtain an order for the sale of real property, an executor or administrator must present a verified detailed petition.[29] If it appears to the court from the petition that it is necessary or to the advantage of the estate and those interested in it, the petition must be filed, a hearing date set and a citation issued and served.[30] The Act specifies what must be contained in the order of sale.[31] No private sale can be made without a published notice of sale and an opportunity given for written bids.[32] Nor can a private sale be made for less than ninety percent of the appraised value based on an appraisal made within one year. A report of sale to the court is required and so is an order confirming sale before the sale is final.[33] These are typical provisions and establish far more stringent requirements for the sale of real estate than for the sale of personal property, regardless of respective values. In the case of *In re Foster's Estate*, the Supreme Court of North Dakota in 1958 construed this statute and wrote:

> A proceeding to sell real estate while within the framework of the administration of the estate is separate and distinct from general administration. It is available when necessary to the proper administration of the estate, where it is for the best interests of the estate or is assented to by all persons interested. Section 30-1909 NDRC 1943. The proceeding is wholly statutory and it is the duty of both the court and the administrator to render substantial compliance with the applicable statutory provisions.[34]

27. N.D. CENT. CODE § 30-13-12 (1960).
28. *Id.* § 30-19-01 (1960).
29. *Id.* § 30-19-05 (1960).
30. *Id.* § 30-19-06 (1960).
31. *Id.* § 30-19-10 (1960).
32. *Id.* § 30-19-14 (1960).
33. *Id.* § 30-19-18 (1960).
34. 89 N.W.2d 112, 115 (1958).

The facts of the case reveal a sale of real estate which was invalidated because of failure to follow the rigid statutory requirements. No such requirements would have applied to a sale of a business, of corporate stock or chattels worth ten times the value of the land.

In 1965, Illinois amended the Probate Act[35] to abolish some of the distinctions by placing possession and control of real as well as personal property for purposes of administration in the personal representative. Title, however, passes to the heir or devisee. This legislation followed generally the provisions of the Model Probate Code of 1946. Priority of real over personal property was eliminated, so that all property is equally chargeable with legacies, costs of administration and claims in determining which property shall be sold. The personal representative was given authority to pay taxes, insure the property and keep it in repair. He can institute a proceeding to determine title, but only with court permission. However, the Act did not go far enough in simplifying administration, since in order for real estate to be sold by the personal representative (except, of course, pursuant to the power of sale in the will), a cumbersome and time-consuming proceeding must be conducted as referred to above.

In addition, other vestiges of the distinction remain, but they are being gradually removed. It was only by an act effective December 31, 1967, that Illinois provided that a mortgage on real estate need not be paid off with personal assets in the estate.[36] On August 28, 1969, the governor signed into law an amendment simplifying the procedure for completing a decendent's contract to convey real estate, making it virtually the same as that for personalty.[37] These are examples of piecemeal legislation slowly removing the sanctity of real estate over personal property.

The North Dakota statutes, in connection with the partition of the real property in the estate, provide that if the court approves a report of the commissioners that they cannot divide the real estate without prejudice or inconvenience, they may assign the whole to one party who will accept it, ". . . always preferring the male to female, and, among children, preferring the elder to the younger"[38] (an echo of primogeniture). The party accepting the whole must pay to the other parties interested their just proportion of the true value to their satisfaction.[39]

The trend in the United States is definitely toward giving the

35. ILL. ANN. STAT. ch. 3, §§ 225-242 (Smith-Hurd Supp. 1970).
36. *Id.* § 219.
37. *Id.* § 252.
38. N.D. CENT. CODE § 30-21-27 (1960).
39. *Id.*

executor or administrator not only possession of real estate but also a right and, in fact, a duty to collect the rents and profits, to pay taxes on the property, to keep it insured and in tenantable repair, and to account to the ultimate distributees for the receipts and disbursements.

The Model Probate Code completed in 1946 was the basis for the Uniform Probate Code. In the interim, many states have adopted portions of the Model Probate Code which should make it more acceptable and easier for the Uniform Probate Code to achieve general acceptance. Maryland, in 1969, enacted a new Probate Code[40] which follows the pattern of the Uniform Probate Code, with some modifications. It seems inevitable that other states will follow.

BENEFITS FROM ABOLISHING THE DISTINCTION

There are some very definite improvements which can be made when the distinction between real and personal property in estate administration is abolished. In general, the result is a speedier, more efficient and more economical settlement of estates.

1. When personal property must be consumed before real property can be used to pay debts, income-producing personal property may have to be sold before unproductive real estate in order to pay debts or legacies, without regard to the needs of the decedent's family. Thus, the stock of a closely held family business corporation technically may have to be sold before an unimproved lot. Income from real property is not available to pay debts in many states, whereas personalty is available. Priority as to which asset will be sold to pay debts may depend upon whether land is held directly by the decedent or through a wholly-owned corporation, a land trust or under a Uniform Partnership Act partnership. Where land and personalty are treated alike, debtors can be paid, while at the same time the maximum value of the assets may be salvaged for the family and the distributees.

2. There are serious administrattive problems where the distinction is being retained. If the personal representative cannot take possession of realty, there is always confusion with regard to assets which include both real and personal property, such as furnished apartments, stores with fixtures or farms and shops with equipment. However, where the distinction is abolished, income from land, as well as stocks, bonds, land trusts or land equitably converted by contract for deed or direction to sell are treated the same for purposes of administration.

40. MD. ANN. CODE art. 93, § 1 *et seq.* (1969).

3. In many states, when the distinction is maintained, there is no reliable muniment of title to realty owned by the decedent and passing upon his death. On the other hand, where the administration is concluded by an order of distribution which covers the realty, such an order can be the equivalent of a judicial determination of title which will avoid reliance upon affidavits of heirship to prove title.[41]

4. Where a separate proceeding must be conducted, and various parties are served with process and a hearing is held, slight defects in these proceedings affect the merchantability of title, as any title examiner will verify. This is not so likely where the personal representative can take control of real as well as personal property from the beginning. The heirs and devisees are notified of the opening of the probate in the beginning and need not be made parties defendant if a sale of the real estate is necessary or at the time of distribution.[42] After the estate is opened, the proceeding is "in rem". In many states, unless the estate is insolvent, there is no power to sell realty in court proceedings; and in order to clear title, it may be necessary to obtain deeds from heirs who are widely separated geographically.[43]

5. When the distinction is abolished in administration, the adoption of uniform laws of inheritance applying alike to both real and personal property frequently follow.

THE UNIFORM PROBATE CODE'S TREATMENT OF REAL AND PERSONAL PROPERTY ADMINISTRATION

The Uniform Probate Code,[44] follows the Model Probate Act of 1946[45] by completely eliminating the distinction between real and personal property in estate administration. Property is defined as including both real and personal property.[46] It is a ". . . basic premise of the Code that distinctions between real and personal property should be abolished."[47]

The Uniform Probate Code provides that, unless the will otherwise directs, every personal representative shall take possession or control of the decedent's property (real and personal), except that

41. *See* Basye, *Determination of Heirship*, 54 MICH. L. REV. 737 (1956).
42. *Id.* at 772.
43. Scoles, *Improving Administration of Estates—The Abolition of the Distinction Between Real and Personal Property*, 52 ILL. B. J. 594 (1964).
44. The Uniform Probate Code was promulgated by the National Conference of Commissioners on Uniform State Laws and approved by the House of Delegates of the American Bar Association in August 1969.
45. *See generally* Niles, *Model Probate Code and Monographs on Probate Law: A Review*, 45 MICH. L. REV. 321 (1947).
46. UNIFORM PROBATE CODE § 1-201(hh).
47. *Id.* § 2-112 (Comment).

any real property or tangible personal property may be left with or surrendered to the person presumptively entitled thereto. This is so unless or until the personal representative believes possession of the property by him will be necessary for administration. Thereupon, he may request possession, and it shall be given to him.[48] Title to real and personal property passes immediately upon death to the heirs or, if there is a will, to the devisees.[49] However, the personal representative has "power over title" from the time of his appointment until his discharge.[50] "Power over title" is a new concept introduced by the Code. It is designed to ease the succession of assets which are not possessed by the personal representative, according to the official comments.[51] Thus, if the power is unexercised prior to the discharge of the personal representative, its lapse clears the title of devisees and heirs. The personal representative is given the same "power over title" as an absolute owner would have. This is intended to embrace all possible transactions which might require a conveyance or encumbrance of assets or a change of right to possession.[52]

The relationship of the personal representative is that of trustee, which imposes a well-defined and strict set of duties and responsibilities. Thus, if the personal representative exercises the power improperly, he is liable for a breach of his fiduciary duty to interested persons for damages to the same extent as the trustee of an express trust.[53] Sales by the personal representative to bona fide purchasers, without notice, are valid, although the personal representative acts beyond his authority.[54]

The Uniform Probate Code is designed to make the deed of conveyance or instrument of distribution upon closing of the estate the usual muniment of title.[55] This is fortified by a provision that "[p]roof 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. . . ."[56]

Also, the Uniform Probate Code is quite clear that, in the distribution of assets, whenever abatement is necessary, it shall be ". . . without any preference or priority as between real and personal

48. *Id.* § 3-709.
49. *Id.* § 3-101.
50. *Id.* § 3-711.
51. *Id.* § 3-711 (Comment).
52. *Id.* § 3-711.
53. *Id.* § 3-712.
54. *Id.* § 3-714.
55. *Id.* § 3-714 (Comment).
56. *Id.* § 3-908.

property. . . ."[57] In addition, the personal representative is given full powers to deal with the estate, including executing deeds of conveyance upon the receipt of all sums remaining due on a contract for deed, repairing and altering buildings, subdividing land, adjusting boundaries, selling, mortgaging and leasing real property.[58]

Taking a typical case under the Uniform Probate Code, if the decedent left stocks, accounts in banks, and real estate, the personal representative could immediately take possession of all. He could sell the stocks and real estate, converting it to cash, and distribute the cash; or he could permit possession of real estate to pass to and remain in the devisee under the will or the heirs if there was no will. If a sale of the real estate was desirable, it could be sold by a deed of the personal representative with no more formality than the sale of corporate stock. This would obviously expedite administration, would make it less expensive and, at the same time, would improve the merchantability of title, since there would be less opportunity for defects to creep into proceedings to sell real estate. This assumes, of course, a formal testacy proceeding in which all interested parties would have received notice at the time of the opening of probate.

SOME HIGHLIGHTS AND ADVANTAGES OF THE UNIFORM PROBATE CODE

While it is not the objective of this article to discuss generally the provisions of the Uniform Probate Code, other than as they apply to the administration of real and personal property, it is noteworthy here that the Code has many modern provisions which will permit more effective and efficient estate planning. A uniform law on probate will meet the needs of the constant dispersion of American property holders, their beneficiaries and their assets, since estate problems are becoming increasingly national in scope.

The updating and modernization of probate law and practice in the United States has its best chance for success through the Uniform Probate Code, which many believe is as much needed as was the Uniform Commercial Code. Adoption of the Uniform Probate Code will answer much of the challenge of recent attacks upon probate law and practice. The adoption of the Uniform Probate Code would reduce action by the probate court in routine matters to a minimum. Two optional types of administration are possible under the Code, one being referred to as "independent administration" or "informal administration". This procedure may be used when there is an interest in staying out of court. "Supervised administra-

57. *Id.* § 3-902(a).
58. *Id.* § 3-715.

tion", on the other hand, is administration under the continuing authority of the court as now exists in most states. This flexible system of administration available under the Code would permit an interested person to start with letters and then, if it were later discovered that the assets and the risks were small, to distribute the estate quickly without further formality.[59]

Independent administration with full opportunity for any interested party to have recourse to the probate court when it is needed is an accurate description of the way administration is handled in practice in many states.[60] The personal representative has a fiduciary relationship which may produce several occasions for recourse to courts for resolution of particular problems, but in routine estates no such recourse may be necessary. It seems to the author, as a practicing lawyer, that the Code would give us what most careful and conscientious lawyers would want—that is, freedom from having to go to court for unneeded orders or with unrequested reports, and when necessary, a forum and a basic statute available for the resolution of controversies and issues. It would permit steering a course which would allow service to clients that is more responsive to the demands of the occasion. The Code will serve both the Bar and the public well if the process of leaving property by will can be simplified to the point where it is no more complicated than the process of setting up inter vivos trusts for the purpose of controlling property after death. If this can be accomplished, clients will again rely upon lawyers for much of the estate planning work which has moved to alternatives in the last several years.

LAWYERS' INTEREST IN PROBATE SIMPLIFICATION AND REFORM

We must recognize that the public is becoming increasingly more conscious of the cumbersome procedures necessary in many states to probate an estate. There are archaic complexities which can be eliminated.[61] Lawyers can well admit that probate, as it exists in many states today, should best be avoided, if feasible. By skillful planning and the use of well-known devices, an attorney can guide a client toward avoiding probate. These include the joint and survivorship registration of savings and checking accounts, real estate,

59. Wellman, *The Uniform Probate Code: A Possible Answer to Probate Avoidance*, 44 IND. L. J. 191 (1968-69).

60. *Id.* at 199.

61. That there is public interest in the subject of avoiding probate is evident from the fact that N. DACEY, HOW TO AVOID PROBATE (1965), ran first in the non-fiction best seller list in the late months of 1966. The publication consists of about 50 pages of text and 291 pages of duplicated forms. Nevertheless, sales have exceeded 670,000 copies. Dacey, a non-lawyer, charges specifically and quite seriously that probate law and procedure are archaic and needlessly complex; that succession through probate is terribly time-consuming and costly. He advises his readers to not trust the law of succession but to work around probate by the use of self-declared trusts of various assets and joint tenancy designations.

bonds, stocks, and promissory notes. By the use of inter vivos revocable and irrevocable trusts, land trusts, the chartering of a corporation solely to hold title to real estate, and through the use of the small estates act of his state for the remnants an attorney can also help his client to avoid probate. Such planning and execution takes time and money and means the client must sacrifice some measures of control and freedom of action. Should he do it? This depends on how abominable *is* probate! What does it cost? How long does it take? The answers to these questions rest upon the applicable probate law and the state or states in which the client owns property. If probate laws were uniform, streamlined and contained the necessary options so that these questions could be answered to the client's satisfaction, he could forget about undesirable changes in his plan of holding title to his property, unless, of course, tax planning is controlling.

A new approach eliminating many steps in routine estate settlement is needed.[62] The ideal system would be one in which, immediately and automatically upon death, ownership of the decedent's property, real and personal, would belong to his heirs or devisees, with all creditors paid and with no residual title problems. This cannot happen automatically and immediately, but there should be a better system than that which has spawned such devices as the above in order to "avoid probate", the current vogue.

People are not asking the right questions and are, therefore, not getting the right answers. The questions are, "Is probate the best system? If so, how can it be made speedier and more economical?" There would be no reason why clients would want to "avoid probate" if the disadvantages of this traditional system could be removed. Yet, the system, including the use of the will as the cornerstone of the plan, is changing. If the present trend away from wills as a method of passing large amounts of wealth from one generation to the next continues, the will may become as much a museum piece as "foeffment to uses".

Unfortunately, it can scarcely be refuted that the Uniform Probate Code, as presently drafted, is an extremely complex, lengthy form of proposed legislation requiring intensive study in order to comprehend its terms and its application. The Code covers some one hundred and twenty pages of fine print, introduces several new doctrines and concepts such as the "power over title" concept, changes the laws of descent, abolishes dower and curtesy and introduces the "augmented estate" to protect the surviving spouse. Many of these new concepts will be controversial. However, when

62. Wellman, *The Lawyer's Stake in Probate Reforms*, 47 MICH. ST. B. J. 10 (Mar. 1968).

the proposed statute is understood, it is apparent that it will streamline and make administration much simpler and presumably less expensive. Simplicity of operation, it is believed, would be in adverse ratio to the complexity of the document itself. If a much simpler, shorter, less complex statute could have been drafted with the prospect of equivalent results, all who work in the probate area would have applauded. The problem with the Code will be in inducing enough lawyers and legislators to study, analyze and understand it in order to have it adopted by the fifty legislatures as the Uniform Probate Code applicable generally in the United States, as the Uniform Commercial Code has been almost (now 49 states) universally adopted.

The basic scheme of the Uniform Probate Code is to provide the various major features of the different probate systems presently followed in the fifty states as options in a single system. The exigencies of the particular estate and the personalities involved will determine which features the lawyer for the estate will elect to use.

Specialists in probate law, in order to serve clients best either in planning or administering their estates, must be able to render services that cross state lines. To accomplish this, uniformity is essential. If this is difficult because of local desires to minimize change from present procedures, it is understandable, but it is hoped that legislatures will resist the temptation and stay within the Uniform Probate Code, as drafted, in the interest of true uniformity. This is necessary so that a lawyer can give reliable estate planning advice to a client who may live elsewhere when he dies.

The answer to probate reform will undoubtedly be in the number of dedicated lawyers who are willing to give the time, study and attention to promoting the adoption of the Uniform Probate Code, from the local bar association to the various state bar associations, culminating in recommendations to the legislatures of the fifty states.[63]

The realities of practice today, coupled with extensive and continuing legal education, have made the Bar more receptive to innovation in this field. It is believed that the Code will be accepted by city-oriented lawyers as well as by lawyers in rural communities. There is no doubt that a selling job remains to be done, for the lawyers and legislatures of the fifty states must be convinced of the need for a Uniform Probate Code and the desirability of this particular Code. In the meantime, and regardless, it is hoped that

63. Lawyers can take credit for the progress being made toward the Uniform Probate Code since it originated through a sub-committee of the American Bar Association, financed almost entirely by lawyers' dues and gifts channelled through the American Bar Foundation. The project has been active since late 1962. The Uniform Probate Code, when widely adopted, will refute Dacey's charge that lawyers cannot work for and achieve probate reform.

the trend toward abolishing the distinction between real and personal property for estate administration purposes will continue. This, in itself, is progress and improvement. Holmes says it best in his *The Path of the Law*:[64]

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[65]

CONCLUSION

If this article leads to the conclusion that reform of private law is a slow and laborious process, it is true. One hundred years seems to be a short period in probate reform. Nevertheless, the existence of the Uniform Probate Code should speed up the process. If the Code does no more than stimulate interest in at least modernizing some aspects of probate, such as abolishing the distinction in administration between real and personal property, it will be an impressive forward step.

64. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).
65. *Id.* at 469.