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1. THE UNIFORM PROBATE CODE

On August 7, 1969, the National Conference of Commissioners on Uniform State Laws adopted by a vote of the states the Uniform Probate Code. The following week the House of Delegates of the American Bar Association approved the Code.[1] In these actions a giant step forward was taken toward uniformity in probate law in the United States. Although no state has had the opportunity to consider and adopt the Uniform Code, there is reason to believe that a number of states will give serious consideration to the Code in the near future.

For some time in the post World War II period various segments of the legal profession and the lay public had been dissatisfied with the methods of passing property from one generation to another.[2] This had resulted in a number of probate revisions which have taken place or which have been urged.[3] In the decade of the sixties impetus for re-

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[1]The House of Delegates approved the UNIFORM PROBATE CODE with an amendment which provides:

> Resolved, that the Section of Real Property, Probate and Trust Law be authorized to present the views of the American Bar Association regarding the Uniform Probate Code with appropriate recommendations for implementation to state and local Bar Associations to make in-depth studies, including studies of the long-term advantages of uniformity on particular points of probate and related law, customs and practices; and that the National Conference of the Commissioners on Uniform State Laws be urged to continue its Special Drafting Committee.

After the adoption of the UNIFORM PROBATE CODE (hereinafter cited as UPC) by the National Conference and its approval by the House of Delegates of the American Bar Association, a version of the UPC was published by Prentice-Hall under the date of August 27, 1969. In a letter from the Executive Secretary to the Commissioners it was stated:

> This edition of the Code was printed by Prentice-Hall, Inc., and contains the changes made at Dallas.
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> However, it does not contain style changes which will appear in the official draft of the Uniform Probate Code.

[2]*See* M. BLOOM, THE TROUBLE WITH LAWYERS, ch. 11 (1968); *Let's Rewrite the Probate Laws,* CHANGING TIMES, Jan. 1969, at 39.

[3]For example, the IOWA PROBATE CODE was revised by a committee of the Iowa Bar Association and submitted to the Iowa General Assembly in 1963. IOWA CODE ch. 633 (1966). This was adopted almost without change by the legislature and became effective on January 1, 1964. On the new IOWA PROBATE CODE, see *Symposium on the New Iowa Probate Code,* 49 IOWA L. REV. 633 (1964) with forward

form has come from Wisconsin, Michigan, Oregon, Alabama, Maryland and other states. In the early 1960's the National Conference of Commissioners on Uniform State Laws (hereinafter the National Conference) and the Real Property, Probate and Trust Section of the American Bar Association both became actively interested in the matter of probate reform.[4]

In August, 1963, a joint meeting was held of the Model Probate Code Special Committee of the National Conference and members of the Section on Real Property, Probate and Trust Law of the ABA.[5] At this meeting the preliminary efforts of these two groups were merged into a common project, a "joint venture," "the development of a Model Probate Code."[6] Following this meeting in 1963, a group of reporters started work on drafting a code dealing with probate and related matters. At the Hollywood, Florida, meeting of the National Conference in August of 1965, a draft of part of the Code was presented for the first time. Following this beginning the personnel working on the project has changed,[7] the title of the project has changed,[8]

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by Willard L. Boyd (early draftsman of the UPC), and articles by Shirley A. Webster, Jack W. Peters, Matthew J. Heartney, Jr. and N. William Hines.

For a discussion of 1965 changes in New York probate law see Note, *Recent Reforms in the Law of Estates, Wills and Trusts,* 40 ST. JOHN'S L. REV. 230 (1966).

[4]The Conference has been interested in estate administration for a number of years as indicated by the uniform acts passed in the area. The UNIFORM FOREIGN PROBATED WILLS ACT was approved in 1915 (withdrawn); the MODEL EXECUTION OF WILLS ACT was drafted in 1940; the UNIFORM POWERS OF FOREIGN REPRESENTATIVES ACT was approved in 1944; the UNIFORM ANCILLARY ADMINISTRATION OF ESTATES ACT was approved in 1949; the UNIFORM PROBATE OF FOREIGN WILLS ACT was approved in 1950; and the MODEL SMALL ESTATES ACT was approved in 1951.

[5]This meeting was held in the Hotel Knickerbocker, Chicago, Illinois, during the 72d Annual Conference of the National Commissioners. Representing the ABA were J. Pennington Straus, Edward B. Winn, Harrison Durand, Paul Basye and William Fratcher (the latter two later became reporters on the UPC). Representing the National Conference were Allison Dunham, Earl Sachse, Clarke Gravel, Harvey S. Reynolds, Clarence Swainson, William Pierce, Herbert H. McAdams and Sverre Roang.

[6]This language is taken from the notes of the meeting and is attributed to Clarke Gravel, Chairman of the 1962-63 Model Probate Committee of the National Conference.

[7]The original chairman of the National Conference Committee was Judge Sverre Roang, of Janesville, Wisconsin, who was not renamed a Commissioner in 1967. In the Hawaii meeting Tom Martin Davis of Houston, Texas, and Charles Horowitz, of Seattle, Washington, were named co-chairmen of the Committee. During the crucial year, 1968-69, the members of this Special Committee on the UNIFORM PROBATE CODE were Fred T. Hanson (Nebraska), James T. Harrison (Montana), Thomas L. Jones (Alabama), Robert A. Lucas (Indiana), Miller Manier (Tennessee), Bert McElroy (Oklahoma), Godfrey L. Munter (D.C.), J. William O'Brien (Vermont), Russell W. Smith (Indiana), Clarence A. Swainson (Wyoming), C. P. Von Herzen (California), Joe W. Worley (Tennessee), Robert R. Wright (Arkansas), and the author of this article.

[8]The initial discussion was in terms of a "Model" Code. Later the goal became

and the scope of the project has been modified,[9] but the principal thrust has remained the same—the creation of simplified methods of transferring property on death and protecting the interests of certain legally incompetent persons. A great impetus to the development of the Code was given by a meeting of the draftsmen in 1967 at Boulder, Colorado.[10] During a five week session the draftsmen put together the so-called "Boulder Draft" which was the first extensive, cohesive draft covering all of the articles then proposed. A session of three draftsmen was held in Berkeley the following year and Article VII on trusts was produced in this meeting.[11] This is the background of the adoption of the Uniform Probate Code (UPC) in Dallas in 1969.

The UPC is composed of seven articles dealing with various phases of the very broad topic of estates of both decedents and persons under disability in addition to coverage of some non-probate transfers and trusts. Article I, General Provisions, covers the application of the act, definitions, the probate court itself, a general notice provision, right to trial by jury, and a broad fraud provision. Article II provides for intestate succession and wills. This includes elective share of the surviving spouse, pretermitted heirs, exempt property and allowances, rules of construction for wills, and contractual arrangements concerning death. This article in a bracketed section also deals with the effects of homicide on succession to property.

Article III covers the probate of wills and the administration of estates, either through supervised or independent administration. Parts of Article III deal with appointment proceedings, the personal rep-

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a Uniform Act. To the National Conference the difference is very significant. For a discussion of the distinction between a "Model" Act and a "Uniform" Act see HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 328 (1968). Basically the "Uniform" Act has widespread support among the commissioners and is expected to have a good chance of enactment in a substantial number of jurisdictions.

[9]The addition of the Article on Trusts in 1968 was the most notable change.

[10]Attending the seminar in Boulder, Colorado, were draftsmen Paul E. Basye, Hastings College of the Law of the University of California, Richard Effland, now of the College of Law of Arizona State University, William F. Fratcher, School of Law, University of Missouri, James McDonald, Law School of University of Wisconsin, Eugene Scoles, now Dean of the School of Law, University of Oregon, Richard V. Wellman, Law School of the University of Michigan, Harold G. Wren, Law School of Boston College, and the author. Observers at the meeting were Thomas L. Jones of the Law School, University of Alabama (later named a Commissioner and a member of the Special Committee on the UNIFORM PROBATE CODE) and Thomas W. Mapp, School of Law, University of Oregon.

[11]The three men attending this meeting were Edward Halbach, Dean of the School of Law, University of California at Berkeley, Gene Scoles, now Dean of the School of Law, University of Oregon, and Richard Wellman, Law School of the University of Michigan.

resentative and his duties and powers, claims of creditors, distribution, and closing. The article also includes a provision for handling small estates.

Article IV covers the matters under consideration in this article, foreign personal representatives and ancillary administration.

Article V deals with the protection of persons under disability and their property. Article VI, on non-probate transfers, covers multiple-party accounts and provisions in contracts dealing with the effect of death. The final article, VII, deals with the administration of trusts. Although there is some interrelationship between articles, they generally can stand alone.[12]

The Uniform Probate Code was designed to remedy some of the deficiencies so readily apparent in the present scheme of property passage by probate administration. It may be true that the Code goes to extremes in attempting to solve some of the problems, but nonetheless radical steps seemed to be necessary. The National Conference has prepared a comprehensive document which deserves serious consideration by all members of the legal profession.

2. Foreign Personal Representatives; Ancillary Administration

Article IV deals with estates which involve more than a single state.[13] Generally, this involves the domiciliary jurisdiction[14] and a second state in which the decedent had property or in which a claim is asserted against the estate. Obviously more than two states can be involved. The multi-state contacts can arise in numerous ways. The retired Iowa farmer, who keeps his farm but moves to Florida and decides to reside there, may have property in both Iowa and Florida on death. The Illinois businessman, who decides to invest in a savings

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[12]In the latter stages of drafting there has been some pressure to separate some articles out for special treatment as model rather than uniform provisions. To the members of the N.C.C.U.S.L. this difference is very significant. The uniform laws have much more status or prestige. *See* note 8 *supra*.

[13]For a general discussion of the current state of the law on suits by and against foreign personal representatives see Currie, *The Multiple Personality of the Dead: Executors, Administrators, and the Conflict of Laws*, 33 U. Chi. L. Rev. 429 (1966).

[14]The UPC in section 3-202 provides for the situation where there is a conflict concerning the state of domicile. The final sentence states, "The determination of domicile in the proceeding first commenced must be accepted as determinative in the proceeding in this state." Since this is keyed to the action first commenced and not to the first judgment handed down, there may be some constitutional problem concerning full faith and credit. *See also* Riley v. New York Trust Co., 315 U.S. 343 (1942) (determination of domicile not entitled to full faith and credit as to those not parties to prior determination).

and loan association in California, on death will have a multi-state estate. If a Kansas motorist, killed in an automobile accident in Missouri, is at fault, his personal representative handling his estate in Kansas may find that he is involved in litigation in Missouri.[15] The Montana resident who invests in land in Arizona has a multi-state estate on death. All of these hypotheticals are commonplace; the American population is no longer tied to its place of birth. People are mobile; wealth is mobile.

Whenever more than one state is involved, administration at the present time is complex and difficult. Assembling assets from several states is not easy. While jurisdictions increase arithmetically, difficulties seem to increase geometrically. Just as troublesome is the possibility that the personal representative or the assets of the estate may be the subject of litigation in several states.

Article IV is designed to simplify and unify the estate administration. It may have some other collateral effects, but the main thrust is toward these goals.

3. Marshalling Assets of Estate; Collecting Debts or Property Owed to Decedent

One of the recurring problems in estate administration is collecting debts and property of a decedent outside the domiciliary jurisdiction. An example of this difficulty is found when the decedent has deposited money in a savings and loan association in a foreign state. The personal representative is forced to go to the foreign state to get this asset. Should the savings and loan association be willing to pay without court proceedings, this does not necessarily solve the difficulty completely. There remains the possibility that payment may not terminate liability.

The courts of a number of states have held that the personal representative appointed by the foreign, domiciliary court[16] may ac-

[15]Brooks v. National Bank of Topeka, 251 F.2d 37 (8th Cir. 1958) (Kansas executor sued in federal court in Missouri by Florida residents). Note, *Should Iowa Again "Reach Out" for Estate Representatives of Non-resident Motorists?*, 44 Iowa L. Rev. 402 (1959); Note, *Amenability of Foreign Administrators to Suit Under Non-Resident Motorist Statutes*, 57 Yale L.J. 647 (1948).

[16]Although there may be some confusion about the terminology, it seems reasonable to separate probate courts in a given estate into a domiciliary court (in the state where the decedent was domiciled) and ancillary courts (all other states). *In re* Maxton's Estate, 335 Ill. App. 240, 81 N.E.2d 658 (1948); First Nat'l Bank v. Blessing, 231 Mo. App. 288, 98 S.W.2d 149 (1936); *In re* Smith's Estate, 126 Mont. 558, 255 P.2d 687 (1953); *In re* Smith's Estate, 55 Wyo. 181, 97 P.2d 677 (1940). A court may be ancillary although there has been no domiciliary administration. Payne v. Payne, 239 Ky. 99, 39 S.W.2d 205 (1931).

cept voluntary payment and give acquittance so long as no local creditors are prejudiced. For example, the Supreme Court of New Hampshire has stated,

> By comity, in the absence of the appointment of an ancillary administrator in this state, a foreign administrator may collect the assets of the estate located here when there is no prejudice to local interests . . . . If there is need, any creditors may petition for ancillary administration in this state.[17]

Minnesota,[18] California,[19] Connecticut,[20] New York[21] and Delaware[22] have reached similar conclusions. The Maryland court has stated, "[T]he general current of the decisions has held that such voluntary payment is valid, and a good discharge of the debt."[23]

Colorado and Florida have statutes covering this matter. Conditioned on "no prior written demand from a creditor" and a delay of six months, the Colorado statute protects a debtor of the estate by providing: "Upon such payment or delivery, such person is released to the same extent as if payment or delivery had been made to a personal representative appointed by a court of this state."[24] The Florida statute, along this same line, provides,

> All persons indebted to the estate of a decedent or having possession of personal property, either tangible or intangible, belonging to the estate of a decedent, who have received no written demand from a personal representative or curator appointed in this state, for payment of such indebtedness or the delivery of such property, are authorized to make payment of such indebtedness or to deliver such personal property to the foreign personal representative after the expiration of three months from the date of his appointment.[25]

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[17]Swann v. Bill, 95 N.H. 158, 161, 59 A.2d 346, 348 (1948). *See also* Wolfe v. Bank of Anderson, 123 S.C. 208, 212, 116 S.E. 451, 452 (1923).

[18]Dexter v. Berge, 76 Minn. 216, 220, 78 N.W. 1111, 1113 (1899) held that a foreign executor had the authority to receive a voluntary payment of indebtedness even without complying with a statute which preceded MINN. STAT. § 525.273 (1965) (providing that a foreign representative may collect debts after filing authenticated copy of his letter at office of local register of deeds).

[19]*See, e.g.*, Fishback v. J. C. Forkner Fig Gardens, Inc., 218 Cal. 401, 402, 23 P.2d 293 (1933); *In re* Rawitzer's Estate, 175 Cal. 585, 587, 166 P. 581, 582 (1917); Winbigler v. Shattuck, 50 Cal. App. 562, 563, 195 P. 707, 708 (Dist. Ct. App. 1920).

[20]*See* Selleck v. Rusco, 46 Conn. 370, 372 (1878).

[21]Mass v. German Sav. Bank, 176 N.Y. 377, 68 N.E. 658 (1903); Schluter v. Bowery Sav. Bank, 117 N.Y. 125, 22 N.E. 572 (1889); Parson v. Lyman, 20 N.Y. 103 (1859).

[22]*See* Bowles v. R. G. Dun-Bradstreet Corp., 25 Del. Ch. 32, 42, 12 A.2d 392, 396 (1940).

[23]Citizens Nat'l Bank v. Sharp, 53 Md. 521, 529 (1880).

[24]COLO. REV. STAT. ANN. § 153-6-9 (1963).

[25]FLA. STAT. ANN. § 734.30 (1963).

Florida also has a parallel statute dealing with bank accounts of nonresident decedents.[26]

Section 4-201 of the UPC is similar to the Colorado and Florida statutes in allowing voluntary payment. It provides that the personal representative from the domiciliary jurisdiction can, after the death of the decedent, contact

> any person indebted to the estate of a . . . decedent or having possession or control of personal property, or of an instrument evidencing a debt, obligation, stock or chose in action belonging to the estate of the . . . decedent . . . .

and ask for payment or delivery.[27] The personal representative is to present an affidavit stating:

(1) the date of the death of the nonresident decedent,
(2) that no local administration, or application or petition therefor, is pending in this state,
(3) that the domiciliary foreign personal representative is entitled to payment or delivery.[28]

Upon the presentation of this affidavit, the debtor or person in possession, if he acts in good faith, can pay or deliver to the domiciliary personal representative and will be discharged of his obligation.[29] This simplifies the handling of debts or assets in a non-domiciliary jurisdiction. At the present time in many states these can be handled with protection to the delivering party only through the opening of an ancillary administration.[30]

Under this section of the UPC the debtor of the estate is not required to make payment. If he wishes, he can refuse to pay and force the foreign personal representative to use other techniques available to him to collect the debt. This section does not cover the matter of transfer of securities since, it is felt, this "is adequately covered by section 3 of the Uniform Act for Simplification of Fiduciary Security Transfers."[31]

There is one apparent danger in the UPC provision. A resident creditor of the nonresident decedent may wish to look for satisfaction

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[26]FLA. STAT. ANN. § 654.04 (1966).
[27]UNIFORM PROBATE CODE § 4-201.
[28]*Id.*
[29]*Id.* § 4-202.
[30]*See, e.g.,* Robinson v. First Nat'l Bank, 45 F.2d 613, 614 (N.D. Tex. 1930), *aff'd,* 55 F.2d 209 (5th Cir. 1932); Noel v. St. Johnsbury Trucking Co., 147 F. Supp. 432, 433 (D. Conn. 1956); Jones v. Turner, 249 Mich. 403, 408-09, 228 N.W. 796, 798 (1930).
[31]UNIFORM PROBATE CODE § 4-201, Comment.

to the assets of the decedent located in the local state. He may not want the assets carried back to the domiciliary jurisdiction. Article IV provides that such a resident creditor may notify "the debtor . . . or the person having possession of the [decedent's] personal property" that the assets should not be delivered to a foreign personal representative. When such notice has been given, payment or delivery may not be made under section 4-201.[32] This provision is similar to the Colorado provision[33] and reflects the desire found in other states to protect local creditors of the decedent.[34]

4. FOREIGN PERSONAL REPRESENTATIVE ACTING AS LOCAL PERSONAL REPRESENTATIVE WITH ALL POWERS

Under the existing law of a number of states, the foreign personal representative has the power to maintain actions to recover debts owed to the decedent.[35] For example, the Kansas statute provides:

> A fiduciary duly appointed in any other state or country may sue or be sued in any court in this state, in his capacity of fiduciary, in like manner and under like restrictions as a nonresident may sue or be sued.[36]

Other states have similar provisions.[37] This power to sue may be given to the foreign personal representative only after he has met certain local requirements. In Indiana he is authorized to file a duly authenticated copy of his letters and give a bond "under the laws regulating the maintaining of suits by non-resident citizens."[38] In Arkansas he is required to file a bond.[39]

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[32]*See Id.* § 4-203.

[33]*See* COLO. REV. STAT. ANN. § 153-6-9 (1963).

[34]*See, e.g.,* GA. CODE ANN. § 113-2404 (1959); VA. CODE ANN. § 54.1-130 (Repl. Vol. 1968).

[35]*See* Note, *The Extraterritorial Authority of Executors and Administrators to Sue and Collect Assets,* 52 IOWA L. REV. 290, 292-98 (1966) (analysis of state statutory authorization of foreign personal representatives to sue).

[36]KAN. STAT. ANN. § 59-1708 (1964).

[37]*See, e.g.,* FLA. STAT. ANN. § 734.30 (1963); GA. CODE ANN. § 113-2401 (1959); N.Y. DECED. EST. LAW § 160 (McKinney Supp. 1966). *See also* Note, *supra* note 35, at 297-98.

[38]IND. ANN. STAT. § 7-753 (Repl. Vol. 1953). A foreign personal representative may be allowed to sue in Indiana without producing a copy of his letters unless his capacity is challenged. Upton v. Adams' Executors, 27 Ind. 432 (1867). A foreign personal representative cannot sue on a note when ancillary administration has been granted. Hensley v. Rich, 191 Ind. 294, 132 N.E. 632 (1921).

[39]ARK. STAT. ANN. § 27-805 (Supp. 1965). For cases interpreting this and its progenitor see McGraw v. Simpson, 208 Ark. 471, 187 S.W.2d 536 (1945); St. Louis, I.M. & S. Ry. v. Cleere, 76 Ark. 377, 88 S.W. 995 (1905); Gibson v. Ponder, 40 Ark. 195 (1882).

The Conference chose to incorporate a provision in the UPC granting broad power to a domiciliary personal representative who files certain documents in the local state. Under section 4-204, if no local administration is pending, the foreign personal representative can file with the local court in a county in which the deceased had property (1) authenticated copies of his appointment, and (2) copies of his official bond if he has given one.[40] Upon filing these documents, the foreign personal representative may exercise "all powers of a local personal representative, and may maintain actions and proceedings in [the local state] subject to any conditions imposed upon nonresident suitors generally."[41]

The grant of "all powers of a local personal representative" to the foreign personal representative means that the foreign personal representative "has the same power over the title to property of the estate as an absolute owner would have . . . ." This power of the personal representative "may be exercised without notice, hearing, or order of court." The property, of course, is held in trust for the benefit of the creditors and other individuals having an interest in the estate.[42] Equating the foreign personal representative with the local personal representative also means that the former may have the power to "receive assets from fiduciaries, or other sources,"[43] and "prosecute or defend claims, or proceedings . . . for the protection of the estate . . . ."[44]

The Uniform Probate Code provides that the powers under sections 4-201 and 4-205 "shall be exercised only when there is no administration or application therefor pending in this state."[45] An application for ancillary administration terminates powers under the two sections to collect assets of the decedent and to exercise the powers of a local personal representative. However, "the local Court may allow the foreign personal representative to exercise limited powers to preserve the estate."[46] When a local personal representative is named, he then is "subject to all duties and obligations which have accrued by virtue of the exercise of the powers by the foreign personal representative and

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[40]For examples of similiar filing requirements see GA. CODE ANN. § 113-2403 (1959); KY. REV. STAT. § 395.170 (1969); MINN. STAT. § 525.273 (1961); MISS. CODE ANN. § 622 (1957); N.Y. DECED. EST. LAW § 160 (McKinney Supp. 1966); N.D. CENT. CODE § 35-01-25 (1960). For other examples of similar bond requirements see ALA. CODE tit. 61, § 151 (1958); KY. REV. STAT. § 395.170 (1969).

[41]UNIFORM PROBATE CODE § 4-205.

[42]*Id.* § 3-711.

[43]*Id.* § 3-715(2).

[44]*Id.* § 3-715(22).

[45]*Id.* § 4-206.

[46] *Id.*

may be substituted for him in any action or proceedings in this state."[47] This continuity in administration reflects the underlying policy of unifying estate administration which is found in the UPC.

Since there may be some confusion about the powers in this period of transition, the UPC protects a relying party by providing that

> No person who before receiving actual notice of a pending local administration has changed his position by relying on the powers of a foreign personal representative shall be prejudiced by reason of the application or petition for, or grant of, local administration.[48]

5. ANCILLARY ADMINISTRATION

A. *Procedure*

Another method of dealing with the assets of a nonresident decedent, provided in the Uniform Probate Code, is ancillary administration.

Under the UPC the appointment of a personal representative can be sought first by persons given priority. These include:

(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 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.[49]

It is clear that persons without priority may seek the appointment of a personal representative although only in a formal proceeding.[50] Should appointment be sought, then the local court must, if there are local assets of the decedent, appoint a personal representative and so open an ancillary administration of the estate. This ancillary administration will be instituted even though there is a domiciliary personal representative who has filed authenticated copies of his appointment and of his bond, if any.[51] This ancillary administration will probably be sought by someone other than the domiciliary personal representative since he can obtain all of the powers of a local personal representative

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[47] *Id.*
[48] *Id.*
[49] *Id.* § 3-203.
[50] *Id.* § 3-203(e). Formal proceedings are judicial and are covered by Article III, Part 4; informal involve only the Registrar, § 1-201(ii), and are covered by Article III, Part 3.
[51] *Id.* § 4-206.

without going through the procedures of informal or formal appointment.[52]

A non-domiciliary administration may be had where there is no administration in the place of domicile of the decedent. It is possible that a decedent might die with all of his assets outside his state of domicile or under circumstances so that there would be no administration at his place of domicile. This might happen, for example, in the case of an Iowa farmer who decided to retire to Florida. He might have a farm and equipment in Iowa—the bulk of his wealth—while his residence is in Florida. On death there might not be an administration in Florida, his place of residence, while there might be an administration in Iowa. This latter would be an ancillary, not domiciliary, administration.[53]

Ancillary administration under the UPC follows the general pattern of administration under Article III. There are, however, some points of difference. In an original administration there is a three year period of time within which the appointment of the personal representative must take place. This statute of limitation does not apply if there has been a prior appointment. If a personal representative has been appointed in one state, then additional appointments are possible under the UPC even though the three year period has run.[54]

The proper venue for the appointment of a personal representative is the place of domicile of the decedent. In the case of a non-resident there is no place of domicile in the state and the Code provides that the proper venue for an ancillary appointment is "any [county] where property of the decedent was located at the time of his death."[55] To solve some of the problems concerning the location of property, subsection (d) establishes some rules. It provides:

> A debt, other than one evidenced by investment or commercial paper or other instrument in favor of a non-domiciliary is located where the debtor resides or, if the debtor is a person other than an individual, at the place where it has its principal office. Commercial paper, investment paper and other instruments are located where the instrument is. An interest in property held in trust is located where the trustee may be sued.[56]

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[52]*Id.* § 4-205. A decedent in his will may provide for different personal representatives in the domiciliary jurisdiction and an ancillary jurisdiction. The UPC will not interfere with such a decision. *See* §§ 3-203(g), 3-611(b). This multiple appointment will destroy to some extent the unity sought under the UPC. A provision for different personal representatives can be implemented in the ancillary judisdiction only by a formal appointment. *See* discussion Sections 5 B and C text *infra.*

[53]*See* cases cited note 16 *supra.*

[54]UNIFORM PROBATE CODE § 3-108.

[55]*Id.* § 3-201(a)(2).

[56]*Id.* § 3-201(d).

In the proceedings brought for the appointment of a personal representative in a non-domiciliary jurisdiction the procedures set out in Article III, Part 3 (informal appointment) or Part 4 (formal appointment) would be used. Those seeking the appointment of a personal representative could choose either of the tracks, formal or informal.[57]

B. *Informal Appointment*

The informal procedure, involving only the Registrar, is not available if a personal representative has been named in the domiciliary jurisdiction. Section 3-308 provides that an application for informal appointment must be denied if it is indicated that

> the decedent was not domiciled in this state and that a personal representative whose appointment has not been terminated has been appointed by a Court in the state of domicile . . . .

This indicates that an ancillary appointment, where there is a domiciliary personal representative, can be obtained only in a formal proceeding under Part 4 of the UPC.

The basic provision concerning the application for informal appointment is section 3-301 which includes a requirement of disclosure of, among other things, the place of domicile of the decedent and "a statement identifying and indicating the address of any personal representative of the decedent appointed in this state or elsewhere whose appointment has not been terminated."

Section 3-307, dealing with informal appointment, includes a proviso 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.

This provision, that a domiciliary personal representative can be appointed an ancillary personal representative through the informal procedure, seems inconsistent with section 3-308 which states that informal appointment is not available for a non-domiciliary decedent where a personal representative has been named in the state of domicile. A state adopting the Uniform Probate Code would probably wish to resolve this apparent inconsistency by either (1) clearly allowing an informal appointment under section 3-308 if the domiciliary personal representative is the applicant, or (2) deleting the exception for the domiciliary personal representative in section 3-307. It would seem

[57] *Id.* § 4-207.

that the first alternative is preferable. If a domiciliary personal representative is the applicant, there would seem to be little reason for requiring a formal proceeding.

The notice provided in the informal appointment of a personal representative includes notice to all persons having a prior or equal right to appoint. The priority concerning appointment is established by section 3-203 and this includes in (g) the following:

> 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 representatives 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.

Therefore, anyone seeking an ancillary appointment where there is a domiciliary personal representative would be required, by this section, to notify the latter of the applicant's intention to seek an informal appointment. As indicated above, this informal appointment would be proper only if there is no known domiciliary personal representative.

C. *Formal Appointment*

In the typical estate where there is a domiciliary personal representative recourse would (absent the change suggested above) be to the appointment of an ancillary personal representative through the formal proceeding involving a judge. Notice under section 3-403 must be given to

> executors named in any will that is being, or has been, probated, or offered for informal or formal probate in the [county], or that is known by the petitioner to have been probated, or offered for informal or formal probate elsewhere, and any personal representative of the decedent whose appointment has not been terminated.

So here, as in the case of informal appointment, notice must be given to the domiciliary personal representative if there is one.

The appointment in the formal proceeding is provided for in section 3-414. Reference in that section is made to the priority established by section 3-203 which gives preference to the domiciliary personal representative. Here, as in the informal ancillary appointment, preference is given to the domiciliary personal representative in an attempt to maintain the unity of the estate administration.

D. *Estate Administration*

Once the ancillary personal representative has been named, the provisions of Article III control and the administration follows the general pattern established by that article.[58] There are, however, some special provisions for ancillary administrations dealing with exceptional problems which may arise.

The UPC attempts to minimize conflicting adjudications where assets are located in more than one state. To this end, section 3-408 provides that an adjudication in the court of the state of domicile

> determining testacy, the validity or construction of a will, made in a proceeding involving notice to and an opportunity for contest by all interested persons must be accepted as determinative by the courts of this state . . . .

By so applying the concept of res judicata/preclusion the UPC again emphasizes the unity of the estate administration. Recognizing that some jurisdictions may not provide for the probating of a will, section 3-409 provides in part:

> A will from a place which does not provide for probate of a will after death, may be proved for probate in this state by a duly authenticated certificate of its legal custodian that the copy introduced is a true copy and that the will has become operative under the law of the other state.

This procedure, of course, does not rise to the level of the binding effect of section 3-408 where a will has been established. It does, however, provide a simple method of proving the document.

Where an ancillary personal representative has been named, other than the domiciliary personal representative, there may be a desire to unify the administration by having the domiciliary personal representative named in the ancillary jurisdiction. Section 3-611 (b) states in its last sentence:

> Unless the decedent's will directs otherwise a personal representative appointed at the decedent's domicile, incident to securing appointment of himself or his nominee as ancillary personal representative, may obtain removal of another who was appointed personal representative in this state to administer local assets.

Under this a domiciliary personal representative can oust any person serving as ancillary personal representative regardless of the sequence of appointment.

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[58] *Id.* § 4-205.

During the course of the administration of the estate in the ancillary jurisdiction, the personal representative is under an obligation to notify creditors of his appointment.[59] Under the UPC the non-claim period, that time during which creditors must present their claims or else be barred, is four months, which runs from the date of the notice.[60] In the case of ancillary administration a serious problem arises where notice to creditors is given at different times in different jurisdictions. The problem of different statutes of limitations and different non-claims periods gave the draftsmen of the UPC a great deal of trouble. The final draft provides that any claims against the decedent's estate arising prior to the decedent's death are barred unless presented within the four-months' period, with the proviso that "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 . . . ."[61] So if the non-claims provision has run in the domiciliary jurisdiction before the first advertisement in the ancillary administration, claims will be barred in both jurisdictions. This may seem to be unfair to the local creditor who has relied on the assets of the decedent available in the local state. However, he does have the right to initiate administration[62] and should do so to protect himself if it is not started promptly by those with superior priority.

If the first advertisement in the ancillary state should occur before the running of the non-claim period in the domiciliary jurisdiction, then claims are not barred. Some interesting possibilities may occur under this section. Assuming that a domiciliary personal representative has been appointed, knowledgeable creditors will file in the domiciliary administration. Should there be, however, uncertainty about a group of creditors, an attempt might be made to extend the period for filing by starting an ancillary administration and thus taking advantage of section 3-803(1).

A creditor, with sixth priority forty-five days after the death of the decedent,[63] can seek an appointment as a personal representative. This would have to be in a formal proceeding.[64] The creditor could attempt to time his appointment to come close to the end of the four-months' non-claim period in the domiciliary jurisdiction. A vindictive creditor

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[59]*Id.* § 3-801.

[60]*Id.* § 3-803(1).

[61]This provides for three published notices at weekly intervals in a newspaper of general circulation in the county.

[62]UNIFORM PROBATE CODE § 3-203(a)(6).

[63]*Id.*

[64]Since a domiciliary personal representative has been named. See discussion at Section 5 C text *supra.*

could thus effectively extend the non-claim period for somewhat less than four months giving creditors who were unascertained or uncertain an additional period of time in which to file. This, of course, assumes the existence of assets of the decedent in the ancillary jurisdiction.

In the administration of the estate in the ancillary jurisdiction, the personal representative must recognize that "[a]ll assets of estates being administered in [the ancillary state] are subject to all claims, allowances and charges existing or established against the personal representative wherever appointed."[65] Should the assets in the domiciliary jurisdiction prove to be insufficient to pay homestead allowance, or family allowance, or exempt property allowance, then the assets in the ancillary jurisdiction would be used to make up the difference.

E. *Insolvent Estate*

The troublesome problem of the estate which is insolvent in a single state while solvent in other states has not been satisfactorily settled in the general provisions of the UPC. In the First Tentative Draft of the Model/Uniform Probate Code, dated July, 1966, in Part III, section 317, there was a provision dealing with an "insolvent estate transferred to federal bankruptcy court." This provision was included in section 3-112 of the Honolulu Draft, 1967, in the following language:

> Incident to a petition for supervised administration, if it appears that the estate is insolvent, the court may, upon petition of the principal creditor or creditors, order the proceedings transferred to the jurisdiction of the federal district court in bankruptcy, provided federal laws permit such court to administer an insolvent decedent's estate, and provided, further, that the rights of the surviving spouse and children of the decedent to homestead, family, and support allowances and to exempt property, are or can be protected in the process.

In the UPC there is no such provision concerning an insolvent estate. Section 3-815, however, does cover the payment of claims in case of insolvency. Under this section the family exemptions and allowances and prior charges are to be satisfied, and then all claimants whose claims have been allowed "either in this state or elsewhere in administrations of which the personal representative is aware" are to be paid equal proportions of his claim. The local jurisdiction in its distribution is authorized to balance out inequitable treatment given in another

[65] UNIFORM PROBATE CODE § 3-815(a).

state.[66] Section 3-815(c) sets forth a procedure to be used in a non-domiciliary jurisdiction when local assets available for the payment of claims are either greater than or smaller than necessary to pay the correct proportional share. If assets beyond the proper proportional share are available locally, these are to be transferred to the domiciliary personal representative.[67] Again, the unity theory which runs through this entire Code in its treatment of multi-state estates can be seen. The ancillary administraion does not stand apart from the domiciliary administration; rather the two are considered together.

F. *Final Distribution*

The provision concerning the final distribution of the estate in the ancillary jurisdiction also reflects the unity concept. This section, 3-816, provides:

> The estate of a non-resident decedent being administered by a personal representative appointed in this state shall, if there is a personal representative of the decedent's domicile willing to receive it, be distributed to the domiciliary personal representative for the benefit of the successors of the decedent . . . .

There are, however, exceptions to this general provision. First, if the decedent's will provides that his successors are to be identified "pursuant to the local law" of the forum state then the transfer of funds need not be made. Second, if according to the applicable choice of laws rules, the successors are to be determined "pursuant to the local law of [the forum state] without reference to the local law of the decedent's domicile." One obvious application of this exception would be in the case of real property located in the forum state. Under the usual conflicts rule this property will pass according to the law of the state of situs—the forum state—and therefore the property would not be distributed to the domiciliary personal representative. The apparent reasoning is that if the law of the forum state is to be applied, the forum state should apply it.

A third exception to the transfer of funds to the domiciliary jurisdiction occurs when the local personal representative is unable to discover a domiciliary personal representative. If he cannot find a domiciliary personal representative through "reasonable inquiry," he has no duty to transfer funds. Finally, a court in a proceeding for

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[66] *Id.* § 3-815(b).

[67] *Id.* § 3-815(c). This section was derived from the UNIFORM ANCILLARY ADMINISTRATION OF ESTATES ACT as amended in 1953. 9 UNIFORM LAWS ANNOTATED 69-70 (1957).

closing under section 3-1001, or in a supervised administration, can order local distribution or make any other order regarding distribution which it feels appropriate.[68]

6. JURISDICTION OVER ANCILLARY PERSONAL REPRESENTATIVE

Section 3-602 provides:

> By accepting appointment, a personal representative submits personally to the jurisdiction of the Court in any proceeding relating to the estate that may be instituted by any interested person.

This section also sets out the procedure to be used in serving notice on the personal representative. By using the procedure set forth, service can be made on any personal representative, domiciliary or ancillary, named by a court of the state. Since there is a substantial contact between the individual and the state there would seem to be no constitutional question about the validity of the provision for service.[69]

7. JURISDICTION OVER FOREIGN PERSONAL REPRESENTATIVE

Section 4-301 is designed to deal with the foreign personal representative who has not been appointed a local representative by the local court. The foreign personal representative who (1) collects funds as authorized by section 4-201, (2) files his authenticated copies of his appointment thereby getting all the powers of a local personal representative, or (3) does any act as a personal representative which would give the state jurisdiction over him as an individual, submits to the jurisdiction of the courts of the local state.[70] In the case of collection of funds, jurisdiction is "limited to the money or value of personal property collected."[71]

In all of these situations there seems to be a sufficient minimum contact so that it is reasonable for the state to exercise jurisdiction over the foreign personal representative.[72]

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[68]UNIFORM PROBATE CODE § 3-1001(a).

[69]McGee v. International Life Ins. Co., 355 U.S. 220 (1957); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[70]UNIFORM PROBATE CODE § 4-301. Only a domiciliary personal representative can file authenticated copies of his appointment under section 4-204. Collecting funds under section 4-201 can be done only by a domiciliary personal representative; either a domiciliary or an ancillary personal representative could do acts in the state which might give the state jurisdiction over "him as an individual" thus giving the state jurisdiction over the personal representative.

[71]*Id.* § 4-301.

[72]*See* cases cited note 69 *supra*.

The UPC also provides in section 4-302, that "a foreign personal representative is subject to the jurisdiction of the courts of this state to the same extent that his decedent was subject to jurisdiction immediately prior to death." This provision covers the situation, for example, where the decedent, involved in an automobile accident outside the state of his residence, tortiously injured another person and died. Had the tortfeasor lived, the injured person would have been able to bring an action under the usual non-resident motorist provision.[73] Because of the death of the tortfeasor, a rather complex legal problem arises. Some states have held that they could not exercise jurisdiction over the person of the foreign personal representative even though he had been served in the forum state or had appeared in the proceeding. The theory seems to be that the person *qua* personal representative can be found only in the state of appointment and that only the courts of that state have any power over him.[74] The federal court sitting in Iowa, speaking to this point, stated:

> [A]n executor or administrator appointed in one state, cannot by voluntary appearance in an action in another state confer upon the court of such other state jurisdiction to render judgment against him in his representative capacity where there is no property belonging to the estate in the state where the action is brought.[75]

The court concluded that the Iowa provision for service on the foreign personal representative was invalid and that the court acquired no jurisdiction over the foreign administration.[76] Although there is some question about this judgment,[77] the Iowa General Assembly decided to use a different technique to reach assets of the non-resident motorist who is deceased.[78]

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[73]Jox, *Non-Resident Motorists Service of Process Acts*, 33 F.R.D. 151 (1964).

[74]Thorburn v. Gates, 225 F. 613 (S.D.N.Y. 1915); Burton v. Williams, 63 Neb. 431, 88 N.W. 765 (1902) (foreign personal representative could not be sued in Nebraska); State *ex rel.* Scott v. Zinn, 74 N.M. 224, 392 P.2d 417 (1964) (Texas personal representative not subject to suit in New Mexico). For a good discussion of the possibility of suing foreign personal representative see Note, *Amenability of Foreign Administrators to Suit Under Non-Resident Motorist Statutes*, 57 YALE L.J. 647 (1948).

[75]Knoop v. Anderson, 71 F. Supp. 832, 845 (N.D. Iowa 1947).

[76]*Id.* at 852.

[77]*See* Brooks v. National Bank of Topeka, 251 F.2d 37 (8th Cir. 1958) (contra to the *Knoop* case); *In re* Estate of Fagin, 246 Iowa 496, 504, 66 N.W.2d 920, 925 n.1 (1954) (Mulroney, J., dissenting). *See also* Note, *Amenability of Foreign Administrators to Suit Under Non-Resident Motorist Statutes*, 57 YALE L.J. 647, 653-54 (1948); Note, *Should Iowa Again "Reach Out" for Estate Representatives of Nonresident Motorists?*, 44 IOWA L. REV. 402 (1959); 36 IOWA L. REV. 128 (1950).

[78]*See* IOWA CODE § 321.512 (1966).

The more numerous group of states has decided that a state can exercise jurisdiction over the non-resident tortfeasor's personal representative named by another state. This is the path chosen by the UPC.[79]

The UPC, if adopted in the state of domicile of the deceased tortfeasor, would give the personal representative the right to defend when so served. Section 3-715 provides that a personal representative (here of the deceased tortfeasor) may "(22) prosecute or defend claims, or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the performance of his duties." Section 3-703(c) also provides:

> A personal representative of a decedent domiciled in this state at his death has the same standing to sue and be sued in the courts of this state and *the courts of any other jurisdiction as his decedent had immediately prior to death.* (Emphasis supplied.)

This provision, being tied to the status of the decedent prior to death, is the complementing provision to that dealing with service on the personal representative under conditions when the decedent could have been reached immediately prior to death.

> The mechanics of service are covered by section 4-303 which states:
> (a) Service may be made upon the foreign personal representative by registered or certified mail, addressed to his last known address, requesting a return receipt signed by addressee only. Notice by ordinary first class mail is sufficient if registered or certified mail service to the addressee is unavailable.
>
> Service may be made upon a foreign personal representative in the manner in which service could have been made under other laws of this state on either the foreign personal representative or his decedent immediately prior to death.

The foreign personal representative so served is to be given at least thirty days in which to move or appear.[80]

8. EFFECT OF ADJUDICATION; UNITY OF ADMINISTRATION

The final section of Article IV provides:

> A prior adjudication rendered in any jurisdiction for or against any personal representative of the estate is as conclusive as to the local personal representative as if he were a party to the adjudication.[81]

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[79]UNIFORM PROBATE CODE § 4-302.
[80]*Id.* § 4-303(b).
[81]*Id.* § 4-401.

This general statement of res judicata/preclusion in connection with the administration of the estate is still another part of the general attempt to unify the estate administration. This not only provides that adjudications in the domiciliary jurisdiction will be preclusive; it also provides that an adjudication in any other ancillary administration will be binding. This binding effect includes both issue preclusion and claim preclusion.[82] Although there is no fraud exception specifically set out, it is obvious that an adjudication resulting from fraud or collusion would not be binding.[83]

9. THRUST OF PROVISIONS

An examination of the provisions of Article IV indicates that the draftsmen have hoped to achieve some very specific ends. First is simplicity in the handling of the assets of the estate outside the domiciliary jurisdiction. Second is the unifying of the administration to avoid conflicting fiduciaries or, more positively, to simplify and expedite administration. Third is the goal of centralizing all of the problems in the domiciliary administration by allowing suits against the domiciliary personal representative in a number of jurisdictions. The unifying of administration is promoted, finally, by the res judicata/preclusion effect to be given adjudications "in any jurisdiction for or against any personal representative of the estate."

All of these attempts of the draftsmen—to simplify, to unify the administration, to centralize the problems of the estate—if successful will make estate administration a much more attractive way of handling the passage of property from one generation to another.[84] In the multistate estate provisions of the UPC, the draftsmen have presented a document which deserves the careful consideration of the legal profession.

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[82]*See generally* Vestal, *Extent of Claim Preclusions*, 54 IOWA L. REV. 1 (1968); Vestal, *Res Judicata/Claim Preclusion: Judgment for the Claimant*, 62 NW. U.L. REV. 357 (1967); Vestal, *Preclusion/Res Judicata Variables: Nature of the Controversy*, 1965 WASH. U.L.Q. 158; Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 IOWA L. REV. 27 (1964).

[83]There is an overriding fraud provision in UNIFORM PROBATE CODE § 1-106.

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

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