Flexibility, The Uniform Probate Code's Procedural Article and Some Comparisons with Kentucky Statutes

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FLEXIBILITY, THE UNIFORM PROBATE CODE'S PROCEDURAL ARTICLE, AND SOME COMPARISONS WITH KENTUCKY STATUTES

The present state of the law in America governing the succession to decedents' estates is badly in need of reform. There is a growing awareness of the inadequacy of present probate procedure even among ordinary citizens unschooled in the law. One leading proponent of probate reform has succinctly characterized the problem:

Intestate succession patterns in every state defy the intention of the average married person by dividing even very small estates between surviving spouse and issue, and ancient distinctions between real and personal property still cause variations in inheritance patterns. Rights of inheritance from blood relatives frequently stand as glaring contradictions to the generally accepted idea that adopted children fare best if spared all knowledge of the identity of their family of origin. Execution requirements for wills perpetuate ancient and demeaning ceremonies in a society which is generally accustomed to transacting business by mere signature. Inheritance rights for children are vigorously asserted, only to be more zealously guarded by cumbersome guardianship procedures which make no sense at all from the standpoint of the family. The old game of protecting imaginary local creditors, combines with that of protecting local land titles from the tampering of 'foreign' courts of adjacent and other sister states, to force multiple probates on the survivors of persons with assets in two or more states. Worse, these and many other examples of probate nonsense are jammed down the throats of the unhappy public as wave after wave of idealistic new probate officials assume their jobs with fresh dedication to see that the estates coming before them are handled with meticulous respect for law. It's a small wonder that community respect for this area of our legal system has all but disappeared in some areas of the country.

The public awareness of the problems of probate and its demand for reform are apparent from the spate of articles and books which have dealt with probate "pains" and methods for avoiding them. This demand and the efforts of reform-minded scholars have culminated in a proposed solution—the Uniform Probate Code.

1 Richard V. Wellman, Professor at the University of Michigan College of Law, served as the Chief Reporter for the Uniform Probate Code.
4 UNIFORM PROBATE CODE [hereinafter cited as UPC].
The UPC is the result of the efforts of many people—the Conference on Uniform State Laws, members of the bar, and some outstanding probate scholars. Among all of these, the work of the UPC reporter, Richard V. Wellman, is perhaps the most significant. Because the UPC is, in a unique way, Professor Wellman’s creation, it is essential for anyone analyzing the UPC to examine his explanations of it. Therefore, at the outset, it is necessary to acknowledge the magnitude of this note’s reliance on Professor Wellman’s writings regarding the UPC.

It must also be noted that the UPC is large in scope and must therefore be broken down into its components for discussion. Certainly, the UPC is much too large and important a document to be dealt with in its entirety within a single note or article. Therefore, after some brief remarks as to the general purpose and structure of the UPC, this note will be confined to a comparison of its more important procedural aspects set forth in Article III—“the heart of the UPC”—with the corresponding sections of the existing Kentucky statutes governing administration of decedents’ estates.

It is the firm belief of this writer that the probate scheme of the UPC (at least as to the procedural article) is a major improvement in this area and should be adopted by the Kentucky legislature. Hopefully the desirability of such a change will be made apparent by the following discussion and analysis.

I. THE ESSENTIAL PLAN OF THE PROCEDURAL UPC

The probate administrative structure delineated by the UPC establishes two distinct levels of offices. The first of these is a probate court having general jurisdiction “over all subject matter relating to (1) estates of decedents, including construction of wills and determination of heirs and successors of decedents, and estates of protected persons; (2) protection of minors and incapacitated persons; and (3) trusts.”

The court has “full power to make orders, judgments and decrees and all other action necessary and proper to administer justice in the matters which come before it.”

The second level office provided for by the UPC is that of a Registrar, whose responsibility it is to handle certain non-adjudicative duties which will be discussed later under specific procedures available to interested parties. Among his more important functions is the

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5 Supra note 1.
6 Blueprint for Reform, supra note 2, at 488.
7 UPC § 1-302(a).
8 UPC § 1-302(b).
handling of the Code's "informal" proceedings to establish wills or appoint personal representatives. Duties assigned by the UPC to this officer may be performed by a judge, a clerk, or anyone else designated by the court.

The key to understanding the procedural provisions of the UPC is the realization that the interested parties themselves determine how many contacts they will have with these public offices—the court and the Registrar. Flexibility and choice are the predominant policies underlying the UPC. The procedural provisions are designed to be applicable to both intestate and testate estates and to provide persons interested in decedents' estates with as little or as much by way of procedural and adjudicative safeguards as may be suitable under varying circumstances.

The role of the court within this scheme is wholly passive until some interested person invokes its power to resolve a specific issue.

It is contemplated that the UPC's procedural sections may be reshaped to fit the needs of the adopting state so long as twelve "essential characteristics" are carefully preserved in the UPC as finally enacted. These twelve concepts are as follows:

(1) Post-mortem probate of a will must occur to make a will effective and appointment of a personal representative by a public official after the decedent's death is required in order to create the duties and powers attending the office of personal representative. Neither are compelled, however, but are left to be obtained by persons having an interest in the consequence of probate or appointment.

(2) Two methods of securing probate of wills which include a non-adjudicative determination (informal probate) on the one hand, and a judicial determination after notice to all interested persons (formal probate) on the other, are provided.

(3) Two methods of securing appointment of a personal representative which include appointment without notice and without final adjudication of matters relevant to priority for appointment (informal appointment), on the one hand, and appointment by judicial order after notice to interested persons (formal appointment) on the other, are provided.

(4) A five day waiting period from death preventing informal probate or informal appointment of any but a special administrator is required.

(5) Probate of a will by informal proceedings or an adjudication of intestacy may occur without any attendant requirement of appointment of a personal representative.

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9 UPC §§ 3-301 to -311.
10 UPC § 1-307.
11 UPC Art. III, General Comment at 74.
(6) One judicial, in rem, proceeding encompassing formal probate of any wills (or a determination after notice that the decedent left no will), appointment of a personal representative and complete settlement of an estate under continuing supervision of the Court (supervised administration) is provided for testators and persons interested in a decedent’s estate, whether testate or intestate, who desire to use it.

(7) Unless supervised administration is sought and ordered, persons interested in the estates . . . may use an ‘in and out’ relationship to the Court so that any question or assumption relating to the estate, including the status of an estate as testate or intestate, matters relating to one or more claims, disputed titles, accounts of personal representatives, and distribution, may be resolved or established by adjudication after notice without necessarily subjecting the estate to the necessity of judicial orders in regard to other or further questions or assumptions.

(8) The status of a decedent in regard to whether he left a valid will or died intestate must be resolved by adjudication after notice in proceedings commenced within three years after his death. If not so resolved, any will probated informally becomes final, and if there is no such probate, the status of the decedent as intestate is finally determined, by a statute of limitations which bars probate and appointment unless requested within three years after death.

(9) Personal representatives appointed informally or after notice, and whether supervised or not, have statutory powers enabling them to collect, protect, sell, distribute and otherwise handle all steps in administration without further order of the Court, except that supervised personal representatives may be subjected to special restrictions on power as endorsed on their letters.

(10) Purchasers from personal representatives and from distributees of personal representatives are protected so that adjudications regarding testacy status of a decedent or any other question going to the propriety of a sale are not required in order to protect purchasers.

(11) Provisions protecting a personal representative who distributes without adjudication are included to make nonadjudicated settlements feasible.

(12) Statutes of limitation bar creditors of the decedent who fail to present claims within four months after legal advertising of the administration and unsecured claims not previously barred by nonclaim statutes are barred after three years from the decedent’s death.12

As evidenced by the plethora of choices offered in its procedural aspects, the whole philosophical stance of the UPC is one of non-interference by the state. The state should only provide interested parties with possible remedies rather than thrusting itself uninvited

12 Id. at 74-75.
into the midst of family affairs. To the extent that state aid is needed, it is presumed that it will be requested.\textsuperscript{13} In essence, the probate apparatus under the UPC becomes like that of other courts, functioning only to resolve those disputes and issues raised by the parties to an action.

A. The UPC's Options

1. No Probate, No Administration

It is possible under the UPC for interested persons to elect to do nothing at all by way of settlement of the decedent's estate. This option is expressly provided by Section 3-101 which states that the decedent's property, absent a testamentary disposition, devolves:

... to his heirs, or to those indicated as substitutes for them in cases involving renunciation or other circumstances affecting devolution of intestate estates, subject to homestead allowance, exempt property and family allowance, to rights of creditors, elective share of the surviving spouse, and to administration.\textsuperscript{14}

This alternative would probably be most appropriate in cases of solvent intestate estates over which there is no contest. Since the estate is solvent, the creditors would have no interest in forcing official estate proceedings unless their payment is delayed. Moreover, inasmuch as there is no contest among the decedent's heirs, there is no need for an official proceeding from their viewpoint. If discord does develop, they will be protected by the UPC's three year statute of limitations on the production of a will for probate. If no will is presented for probate within three years of the decedent's death, the presumption of intestacy becomes conclusive.\textsuperscript{15}

If any interested person\textsuperscript{16} petitions the court for informal probate under Part 3 of Article III, however, this initial "do-nothing" option is withdrawn. It should be noted, further, that although administration of both testate and intestate estates can be avoided under the UPC, "... [i]t's fair to say at the outset that administration should offer more advantages than problems for most categories of survivors."\textsuperscript{17}

\textsuperscript{13} \textit{Id.} at 75.
\textsuperscript{14} UPC § 3-101. There is an alternative section, § 3-101A, concerning devolution in community property states which is inapplicable to Kentucky.
\textsuperscript{15} UPC § 3-102, Comment, and § 3-108.
\textsuperscript{16} "Interested person" is defined in UPC § 1-201(20) to include: ... heirs, devisees, children, spouses, creditors, beneficiaries and any others having a property right in or claim against a trust estate or the estate of decedent, ward or protected person which may be affected by the proceeding. It also includes persons having priority for appointment as personal representative, and other fiduciaries representing interested persons.
\textsuperscript{17} \textit{Blueprint for Reform, supra} note 2, at 492.
2. Informal Probate and Appointment

The UPC's plan for informal probate and appointment is perhaps the most interesting part of the overall scheme. To initiate these proceedings, the interested party files with the Registrar\(^{18}\) a written application, completed according to the specifications contained in Section 3-301. This application must include: (1) a statement of the interest of the applicant; (2) certain facts about the decedent including name, date of death, names and addresses of surviving spouse and heirs; (3) a statement of venue if the decedent was not domiciled in the state when he died; (4) identification of any personal representative that has been appointed; and (5) whether the applicant has received a demand for notice.\(^ {19} \)

In addition to the above requirements, an application for informal probate must include statements that: (1) the original or an authenticated copy of the offered will is in the possession of the court or accompanies the application; (2) the applicant believes the will to be valid; (3) "after the exercise of reasonable diligence," the applicant believes the will to be unrevoked; and (4) the application is being made within the period of limitation (generally three years) provided for informal probate.\(^ {20} \)

There are fewer additional requisites for an application for informal appointment of a personal representative to administer a will. This application must: (1) describe the will by date of execution; (2) set out the time and place of probate or application for probate;\(^ {21} \) (3) provide the name, address and priority for appointment of the offered candidate.\(^ {22} \) If however, the petitioner is proceeding on a theory of intestacy and wishes to utilize the informal appointment proceeding, he must comply with the requirements of a general filing as set out above. Furthermore, the petitioner must also state that he knows of no existing will and must satisfy the Registrar with respect to the priority of the candidate offered for appointment.\(^ {23} \)

Irrespective of the nature of the application, the filing must be sworn and verified before the Registrar "... to the best of [the applicant's] knowledge and belief."\(^ {24} \) The purpose of the filing requirement

\(^{18}\) The Registrar, who is not a judge, serves more the role of a judicial clerk. He is the official of the probate court with whom interested persons file whatever writings are required under the UPC, and it is the Registrar to whom inquiries are first directed about any matter.

\(^{19}\) UPC § 3-301(1).

\(^{20}\) UPC § 3-301(2).

\(^{21}\) UPC § 3-301(3).

\(^{22}\) Id.

\(^{23}\) UPC § 3-301(4).

\(^{24}\) UPC § 3-301.
is to make all of the specified information part of the public record; if an applicant files a deliberately false statement, remedies for fraud thus are available to injured parties without limitation of time. In addition, one who intentionally files a false statement may be prosecuted for perjury. The expectation is that the public filing will discourage fraud and "... deter persons who might otherwise misuse the no-notice feature of informal proceedings."

Upon receiving a petition for informal probate or appointment, the Registrar must make certain determinations. If the proceeding is for probate of a will, he must satisfy himself that: (1) the application is complete and sworn; (2) the applicant is an interested person; (3) venue is proper; (4) the will is apparently "duly executed", unrevoked and the original is in his possession; (5) any required notice has been given; (6) there is not more than one will offered; and (7) the statute of limitations does not prevent probate. Independent of the Registrar's determination of whether there has been compliance with these requirements, the UPC provides that informal probate will be denied if a personal representative has already been appointed elsewhere, or if there has been a previous probate order regarding the decedent.

All of these requirements concern only the face of the instrument. If the will is fair on its face, the Registrar's task in regard to these required findings is complete. There is, however, one further protection incorporated into this otherwise formalistic proceeding: If for any reason, the Registrar is not satisfied that the will should receive informal probate, he may deny the application. This, of course, entrusts the Registrar with a great deal of discretion, but it must be

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25 UPC § 1-310.
26 UPC § 3-301, Comment.
27 UPC § 3-303(a)(1)-(2).
28 For a definition of "interested person" see supra note 16. The term also includes "... persons having priority for appointment as personal representative, and other fiduciaries representing interested persons." UPC § 1-201(20).
29 UPC § 3-303(a)(4).
30 UPC § 3-303(a)(5)-(6). The notice required is set forth under § 3-204, that is, a demand for notice filed with the court. The form of the notice is defined in § 1-401 which is personal service or mailing by ordinary or registered mail at least 14 days before the proceeding of which the demandant needs notice.
31 UPC §§ 3-303(a)(6), -304. If the offered will(s) is "one (or more) of a known series of testamentary instruments (other than wills and codicils)," informal probate is unavailable. UPC § 3-304.
32 As referred to elsewhere, this statute of limitations is three years from the death of the decedent with rare exceptions. UPC § 3-108.
33 UPC § 3-303(b). The list of considerations in the text is not exhaustive.
34 For a more detailed explication, as with other discussion in this note, the reader is referred to the UPC itself. See UPC § 3-303.
35 See UPC § 3-303, and accompanying comment.
36 UPC § 3-305.
remembered that informal probate, coupled with the running of the statutory period, is final. It should also be noted that denial of informal probate is not an adjudication as to the estate. If the applicant wishes to obtain review of the Registrar’s decision, he need only institute a formal testacy proceeding. Although he will not obtain informal probate of the offered will, he may obtain formal probate of the same instrument after proper proof in an adversary proceeding.\textsuperscript{36}

As a general rule, there is no requirement that notice of informal probate be provided.\textsuperscript{37} Exceptions to this provision are allowed only for those instances when notice has been \textit{demanded} under Section 3-204 or when there is already a personal representative whose appointment is still valid.\textsuperscript{38}

Informal proceedings seeking the appointment of a personal representative may be commenced no sooner than 120 hours after the death of the decedent.\textsuperscript{39} If they are timely commenced, the Registrar may appoint a representative;\textsuperscript{40} but before making an informal appointment, the Registrar must find that: (1) the application for appointment is complete; (2) the applicant has taken the proper oath; (3) he is an interested person; and (4) venue is proper.\textsuperscript{41} If the requested appointment relates to a will, the instrument must have been formally or informally probated.\textsuperscript{42} Again, the Registrar must ascertain whether notice has been given under Section 3-204 if required, and whether the person seeking appointment has the necessary priority.\textsuperscript{43} A personal representative should not be informally appointed in the forum state if a representative has already been appointed in a non-resident decedent’s domicile.\textsuperscript{44} Finally, no informal appointment is available where there is a possibility of the existence of an unrevoked will that has not been processed for probate.\textsuperscript{45}

As in the situation involving informal probate, the Registrar possesses broad discretion to deny an application for informal appoint-

\textsuperscript{36} \textit{See} UP\textsuperscript{C} § 3-305, Comment. As to formal testacy proceedings see UP\textsuperscript{C} §§ 3-401 to -414.
\textsuperscript{37} UP\textsuperscript{C} § 3-306.
\textsuperscript{38} \textit{Id.}
\textsuperscript{39} UP\textsuperscript{C} § 3-307(a).
\textsuperscript{40} \textit{Id.} There is an exception in the case of a non-resident decedent. In such a case, appointment may not be made until 30 days have elapsed from the death.
\textsuperscript{41} UP\textsuperscript{C} § 3-308(a)(1)-(4).
\textsuperscript{42} UP\textsuperscript{C} § 3-308(a)(5).
\textsuperscript{43} UP\textsuperscript{C} § 3-308(a)(6)-(7). The priority here referred to is that set out in UP\textsuperscript{C} § 3-203. The order of priority is: a person nominated in a probated will, the surviving spouse if a devisee, other devisees, the surviving spouse, other heirs, and finally any creditor 45 days after the death of the decedent. UP\textsuperscript{C} § 3-203(a)(1)-(8).
\textsuperscript{44} UP\textsuperscript{C} § 3-308(b) and Comment.
\textsuperscript{45} UP\textsuperscript{C} § 3-311.
In addition to the above described reasons for granting such power to the Registrar in the case of informal probate, there is a further justification for allowing him such discretion over informal appointments. Under the UPC, the personal representative is given extremely broad powers over estate assets. The authority vested in the Registrar is simply one more safeguard against illegal dissipation of the estate.

The informal appointment proceeding is likewise similar to informal probate in that there is normally no notice requirement in both proceedings. A moving party need only give notice "to any person" who demands such under Section 3-204, or to "any person having a prior or equal right to appointment not waived in writing and filed with the Court."

3. Formal Testacy and Appointment

If the option of a formal testacy or appointment proceeding, or both, is selected by any interested party, the estate settlement issues are resolved by litigation. A formal testacy proceeding, "... litigation to determine whether a decedent left a valid will," is initiated by any interested person filing with the court a petition for "formal probate of a will, or adjudication of intestacy with or without request for appointment of a personal representative. . . ." When presented with such a petition, the court may decree that the decedent died testate or intestate, that a pending informal probate proceeding be enjoined, or that the existing informal probate of a will be set aside.

The initiation of a formal probate proceeding is an escalation over an informal proceeding. Its effect is to prevent the Registrar from processing any informal application regarding the estate, and, unless the formal petition requests that an informally appointed representative be confirmed, a previously appointed personal representative who receives notice of this petition is enjoined from further distribution.

46 UPC § 3-309.
47 See UPC §§ 3-701 to 721.
48 UPC § 1-401.
49 UPC § 1-401. The priority here referred to is that given under UPC § 3-203.
50 "Testacy" as used in the UPC refers to "... the general statute of a decedent in regard to wills. Thus it embraces the possibility that he left no will. . . ." UPC § 3-401, Comment.
51 UPC § 3-401.
52 The court is the second and upper tier of the UPC's probate court system; it is a court in the full sense of the word with general probate jurisdiction and powers as set out in UPC § 1-302.
53 UPC § 3-402(a); see also UPC § 3-401, Comment.
54 UPC § 3-401.
of the estate. The proceeding has no other effect on the powers of a previously appointed personal representative unless the petitioner requests the suspension of other powers.

The formal petition must set out the same basic factual information as the application for informal probate. In addition, the petitioner must state that he believes the will to be valid and unrevoked. But if the original will or an authenticated copy is not produced, the petitioner must “... state the contents of the will, and indicate that it is lost, destroyed, or otherwise unavailable.” A petition for adjudication of intestacy must also request a judicial determination of the heirs.

Among the most important differences between informal probate and formal testacy proceedings are those concerning the notice requirements. The commencement of a formal proceeding brings into play a very broad notice requirement which runs to persons enumerated in the UPC. Section 3-403 provides that

.notice shall be given to the following persons: the surviving spouse, children, and other heirs of the decedent, the devisees and executors named in any will that is being, or has been, probated, or offered for ... probate ... [,] and any personal representative of the decedent whose appointment has not been terminated. Notice may be given to other persons. In addition, the petitioner shall give notice by publication to all unknown persons ... who have any interest in the matters being litigated.

Anyone who opposes the formal probate of a will must state his objections in his pleadings. If the petition is unopposed, the court may enter an order of probate or intestacy without further proceedings. Alternatively, the court has the right to order a full evidentiary hearing on any or all points necessary to sustain the relief sought by the petitioner. One key to an understanding of the UPC is provided in the comment to the section covering this point. There the commentators state their belief that

[t]here is no good reason for summoning attestors when no interested person wants to force the production of evidence on a

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55 Id.
56 Id.
57 See text accompanying notes 18-20 supra; see also UPC § 3-402(a)(2).
58 UPC § 3-402(a)(2); UPC § 3-301(2)(ii)-(iii).
59 UPC § 3-402(a).
60 UPC § 3-402(c). Again, it should be noted that the textual discussion of these provisions is not meant to be exhaustive.
61 UPC § 3-403(a) (emphasis added); see UPC § 1-401 for the methods of providing notice.
62 UPC § 3-404.
63 UPC § 3-405.
64 Id.
formal probate. Moreover, there seems to be no valid distinction between litigation to establish a will, and other civil litigation, in respect to whether the court may enter judgment on the pleadings.65

After a determination that the required notice has been given, the testator is dead, venue is proper, and the proceeding was initiated within the three year limitation period, the court "... shall determine the decedent's domicile at death, his heirs and his state of testacy."66 Once the court has made a decision, its order is final as to all issues concerning the estate which relate to the testacy status of the decedent,67 unless there is a modification or vacation of the order or a showing that certain heirs were wrongfully excluded.68 The UPC provides various specified periods of limitation after which a vacation petition may not be filed.69 If a personal representative was appointed, the petition must be filed before a final order approving distribution, or six months after the filing of a closing statement,70 or within twelve months from entry of the order sought to be vacated.71 In no event may an order be vacated more than three years after decedent's death.72 Of course, this final order is appealable, as is any other,73 but there is an additional safeguard that affords the court an opportunity to prevent injustice: for any other "good cause shown, an order in a formal testacy proceeding may be modified or vacated within the time allowed for appeal."74

Formal proceedings concerning the appointment of a personal representative where the issue of testacy is not litigated are similar to such proceedings wherein that issue is raised. In addition to the requirements of Section 3-301(1),75 the petitioner must also detail any questions of priority which he desires that the court resolve.76 Upon receiving notice of the formal proceeding for appointment, any in-

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65 UPC § 3-405, Comment.
66 UPC § 3-409. However, a final order of the court of another state where the decedent was domiciled at death is binding upon the forum court concerning testacy or construction of a will if made after all interested persons received notice and an opportunity to be heard. UPC § 3-403.
67 UPC § 3-412.
68 In this case, "wrongfully excluded" means that these heirs were "... unaware of their relationship to the decedent, were unaware of his death or were given no notice of any proceeding concerning his estate, except by publication." UPC § 3-412(2).
69 UPC § 3-412(3).
70 UPC § 3-412(3)(i).
71 UPC § 3-412(3)(iii).
72 UPC § 3-412(3)(ii); UPC § 3-108.
73 UPC § 1-308.
74 UPC § 3-413.
75 UPC § 3-301(1).
76 UPC § 3-414(a).
formally appointed representative is enjoined from any further action regarding the estate, except that he may exercise such discretion as is necessary to preserve the estate.\textsuperscript{77} After all interested persons receive the required notice, the court conducts a hearing and decrees a formal appointment.\textsuperscript{78}

It should be noted that there is no requirement that a person seeking a formal testacy determination also petition for a formal appointment or vice versa. These proceedings may be used in conjunction with one another, but there is no requirement that they be so joined. It is entirely possible for a party to combine informal probate with formal appointment or a formal testacy proceeding with informal appointment. If there is a dispute as to testacy but not as to who has priority of appointment, the latter approach could be utilized. Likewise, if there is no dispute as to testacy status but there is dispute over who should be appointed personal representative, the former could be used.\textsuperscript{79} It is essential to remember that the two fundamental goals of the UPC are flexibility and the use of the court only to the extent desired or required by interested persons.

4. \textit{Supervised Administration}

Supervised administration is the most intricate of the alternatives offered by the UPC. It is essentially "a single in rem proceeding to secure complete administration and settlement of a decedent's estate under the continuing authority of the Court ..."\textsuperscript{80} and is designed to provide a complete and ongoing adjudication concerning all aspects of the estate settlement process, including close supervision by the court of the personal representative. A request for supervised administration, filed by any interested person at any time, may accompany a request for formal testacy or appointment proceedings.\textsuperscript{81} After all interested persons receive notice,\textsuperscript{82} the court must decree supervision if the decedent's will directs supervised administration, unless the court determines that there is no need for such administration. By the same token, if the court decides that supervision is necessary to protect interested persons, it will decree supervision even if this is contrary to the testator's wishes.\textsuperscript{83} Even though the court declines to decree supervised administration, it must, unless the issues have

\textsuperscript{77} Id.
\textsuperscript{78} UPC § 3-414(b). This appointment is made according to the priority of appointment set out in UPC § 3-203.
\textsuperscript{79} See UPC § 3-414, Comment.
\textsuperscript{80} UPC § 3-501.
\textsuperscript{81} UPC § 3-502.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
been adjudicated previously, render a decision regarding testacy and appointment of a personal representative.\textsuperscript{84}

The filing of a petition for supervised administration, like the filing for formal proceedings, suspends any action on an informal application and prevents any previously appointed personal representative, after he receives notice of the formal proceeding, from making distributions of the estate.\textsuperscript{85} If supervised administration is decreed, the powers of the personal representative (who will be formally appointed) are circumscribed—he has all of the powers of other personal representatives under the UPC,\textsuperscript{86} except that he may make no distribution of the estate without a court order.\textsuperscript{87} The court may further restrict him as it sees fit, but these additional restrictions must be endorsed on his letters of appointment.\textsuperscript{88} It should be noted that formal proceedings do not require supervised administration, but supervised administration does require formal proceedings.\textsuperscript{89}

5. Summary Administration for Small Estates

Although the informal proceedings described in Article III may easily be utilized to settle small estates, the drafters of the UPC included an alternate procedure specifically designed to facilitate the probate of “small estates”.\textsuperscript{90} Pursuant to Section 3-1201 of the UPC, an estate which contains property that “… less liens and encumbrances, does not exceed $5,000” may be collected by affidavit of the decedent’s successor.\textsuperscript{91} This procedure may be utilized thirty days after the decedent’s death when there is no pending request for informal or formal proceedings.\textsuperscript{92} The UPC protects those who deliver property to the successor affiant by providing that anyone who pays, delivers, or transfers anything pursuant to the affidavit “… is discharged and released to the same extent as if he dealt with a personal representative of the decedent. He is not required … to inquire into the truth of any statement in the affidavit.”\textsuperscript{93}

If there is a personal representative and it appears from the inventory appraisal that the estate “… less liens and encumbrances, does not exceed homestead allowance, exempt property, family allow-

\textsuperscript{84} Id.
\textsuperscript{85} UPC § 3-503.
\textsuperscript{86} See UPC §§ 3-701 to -721.
\textsuperscript{87} UPC § 3-504.
\textsuperscript{88} Id. If further restrictions are not so endorsed, they are ineffective as to anyone who deals in good faith with him.
\textsuperscript{89} See UPC § 3-414, Comment; UPC § 3-502.
\textsuperscript{90} UPC §§ 3-1201 to -1204.
\textsuperscript{91} UPC § 3-1201(a).
\textsuperscript{92} Id.
\textsuperscript{93} UPC § 3-1202.
ance, costs and expenses of administration, reasonable funeral expenses, and reasonable and necessary medical and hospital expenses of the last illness of the decedent . . . ,”94 he may, without providing notice to creditors, distribute the estate immediately to those persons entitled to receive a portion thereof. Once the distribution is completed, the personal representative files a closing statement with the court; and if no action is filed against him within one year, his appointment terminates.95

B. Duties and Powers of a Personal Representative

The UPC gives the personal representative broad powers. It is necessary to delineate these powers in order to facilitate comparisons of the UPC with parallel sections of the existing Kentucky probate law.

The powers of the personal representative take effect immediately upon his appointment.96 His authority is exclusive;97 it is established by any order of appointment, formal or informal, and he incurs no liability for any act of administration or distribution “. . . if the conduct in question was authorized at the time.”98 He is a fiduciary99 and is under a duty “. . . to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this Code, and as expeditiously and efficiently as is consistent with the best interests of the estate.”100

Except in the case of supervised administration or where he invokes the court’s aid in resolving questions or disputes,101 the personal representative must proceed with the settlement and distribution without adjudication or court order. He must notify all heirs and devisees within thirty days of his appointment and indicate whether a bond has been filed.102 In addition, he must prepare and file an inventory of the assets of the estate with the court within three months after his appointment or provide copies of this inventory to all in-

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94 UPC § 3-1203 (emphasis added).
95 UPC § 3-1204. The procedure is not available in the case of supervised administration. The statement must be sent to all creditors of the estate of whom he is aware and whose claims are unsatisfied and not barred. UPC § 3-1204(a)(3).
96 UPC § 3-701.
97 UPC § 3-702.
98 UPC § 3-703(b) (emphasis added). The emphasized language is extremely important because it makes the essential question of personal liability dependent on “. . . whether the act was ‘authorized at the time.’” See UPC § 3-703, Comment.
99 UPC § 3-703(a).
100 Id. “His fundamental responsibility is that of a trustee.” UPC § 3-703, Comment.
101 UPC § 3-704.
102 UPC § 3-705.
interested persons who request it. Once appointed, the personal representative has the same right to possession of the assets of the estate as a true owner would have. Coupled with this right to possession is the duty to exercise such powers "in trust . . . for the benefit of the creditors and others interested in the estate." This language vests the personal representative with the broadest possible power over title to the assets—but not with title itself. Under this "trusteeship" theory, the personal representative is liable to any interested party for a breach of his fiduciary duty in the same manner as a trustee of an express trust. Notwithstanding a breach of fiduciary duty, the "power" concept enables the personal representative generally to pass good title to a person who in good faith gives value for an estate asset.

This summary of the UPC's sections dealing with the powers and duties of the personal representative is far from exhaustive. It should be sufficient, however, to demonstrate that the UPC confers extremely broad powers on the personal representative without regard to proceedings utilized to obtain his appointment.

C. Does the Code Protect Interested Parties?

The foregoing summary of the UPC's procedural alternatives and of the extensive powers of the personal representative, may prompt one to ask, "Are all interested persons (including creditors) adequately protected under the UPC?" The answer is a decisive "yes". In fact, the UPC provides a number of safeguards which should serve to protect the rights and interests of all interested parties at every stage of the probate procedure. These include: (1) strict requirements regarding the qualifications and status of personal representatives;

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103 UPC § 3-706. Breach of the duty inventory may result in removal.
104 UPC § 3-709. Note that the language here is "right to possession". The personal representative has the discretion not to take possession of assets if he feels such possession is unnecessary or not desirable for purposes of his administration. UPC § 3-709, Comment.
105 UPC § 3-711.
106 Id.
107 See UPC § 3-711, Comment. He is given a power rather than formal title to ease the succession of assets. For example, when this power lapses, the title to the estate's assets remains with the heirs and devisees without necessitating any formal conveyance of title from the personal representative.
108 UPC § 3-712. For a discussion of the fiduciary duty as an important safeguard in the UPC, see Blueprint for Reform, supra note 2, at 494-96.
109 The two exceptions to the rule that the personal representative can pass good title are: 1) when restrictions are indorsed on his letters in supervised administration or 2) when the purchaser has actual notice of a restriction on the personal representative's power. UPC § 3-714.
110 See Blueprint for Reform, supra note 2.
(2) clearly delineated notice requirements and procedures; and (3) varying degrees of court supervision available upon request.

1. Qualifications and Status of Personal Representatives

Perhaps the most important safeguard offered by the UPC in this respect is the requirement that before a person may exercise the powers of personal representative, he must appear before a public official and offer, in support of his appointment, a sworn application or petition, the substance of which is prescribed in the UPC.\(^{112}\) These statements entail complete material disclosure. False swearing in these documents is punishable as perjury, and intentional fraud subjects the guilty party to personal liability running to anyone injured by the fraud.\(^{113}\) This liability extends for two years after discovery of the fraud.\(^{114}\)

The UPC's system of appointment priorities is structured to provide the first opportunity for appointment to those persons with the greatest interest in the estate.\(^{115}\) Those seeking such appointment must convince the Registrar or court that they are entitled to appointment on the basis of their priority.\(^{116}\) If the Registrar cannot determine that one person has priority, the appointment must be obtained through formal court proceedings.\(^{117}\)

Any beneficiary or creditor further may require the personal representative to post bond before or after the latter receives his letters of appointment.\(^{118}\) Additional judicial protective devices include removal for cause and injunctive relief against certain acts of the personal representative.\(^{119}\) It must also again be emphasized that the personal representative is a fiduciary. His position, as established by the UPC is similar to that of a trustee and he bears similar liability. All of the common law rights and remedies available against breaching fiduciaries thus are available against a personal representative who misuses his powers.\(^{120}\)

\(^{112}\) UPC §§ 3-301, -402.
\(^{113}\) UPC §§ 1-106, 1-310, 3-301, 3-402.
\(^{114}\) UPC § 1-106.
\(^{115}\) UPC §§ 3-203, 3-308(a)(7).
\(^{116}\) Id.
\(^{117}\) UPC § 3-203(e).
\(^{118}\) UPC §§ 3-601, -605. UPC §§ 3-601 to -618 have been omitted from this summary discussion. These provisions cover control of the personal representative by the court by itself or on petition of interested persons, contain some exceptions to the UPC's general rule that no bond need be posted and provide circumstances for termination of the appointment of the personal representative. Any more extensive analysis of the UPC's protective features should involve examination of these provisions.
\(^{119}\) UPC § 3-607, -611.
\(^{120}\) See UPC § 3-712 and accompanying comment.
2. Notice Requirements

The personal representative is required to give notice of his appointment to heirs and devisees.\(^{121}\) In addition, he must publish notice for creditors at least once a week for three weeks following his appointment; failure to duly publish this notice renders him personally liable to any creditor who prefers to sue him instead of pursuing a claim against already distributed property.\(^{122}\) Only those creditors who receive notice in accordance with the provisions of the UPC are bound.\(^{123}\)

When notice is required under the UPC, it must ordinarily be given either personally or by mail.\(^{124}\) Notice by publication is sufficient to curtail rights only when creditors actually receive notice that their claims must be filed. Failure to initiate a claim within a four month period after the first publication of notice results in the claim being forever barred.\(^{125}\)

If formal proceedings are instituted, the personal representative must serve notice (by mail or personal service) to all interested persons who are known; notice by publication must be given to all known persons who have an interest in the estate but whose addresses are unknown as well as to all unknown persons.\(^{126}\) If later formal proceedings—initiated within 12 months of informal proceedings or three years from the death, whichever is later—overturn improper distributions made pursuant to a previous formal proceeding, the previous distributees are liable for the share they received (though the personal representative is not).\(^{127}\)

3. Court Supervision

Additional provisions, safeguarding interested persons by providing varying degrees of court supervision, can be invoked within three years from the decedent’s death. For example, if an interested party does not wish the estate to be settled by informal or summary proceedings, he need only petition for formal probate or testacy proceedings to suspend the informal application.\(^{128}\) If the petitioner seeks even greater court

\(^{121}\) UPC § 3-705.
\(^{122}\) UPC § 3-801. No such notice is required for small estates. UPC § 3-1203.
\(^{123}\) UPC § 3-106.
\(^{124}\) UPC § 1-401.
\(^{125}\) UPC § 3-403. UPC §§ 3-801 to -816, also omitted from this summary, contain the UPC’s provisions relating to creditors’ claims. Of greatest importance is that claims must be presented in writing to the personal representative within four months of the death of the decedent. UPC § 3-802. To do justice to the UPC’s protective system, these provisions should also be carefully examined.
\(^{126}\) UPC § 3-801.
\(^{127}\) UPC § 3-909. However, purchasers from the earlier distributees are protected. UPC § 3-910.
\(^{128}\) See UPC §§ 3-401 to -505.
involvement than provided by the ordinary system of formal proceedings, he may ask for supervised administration and obtain—for all practical purposes—the complex and cumbersome but extremely protective supervision of ongoing court participation. In supervised administration the personal representative lacks authority to make any distribution of the estate without prior court approval. Moreover, the court has authority to show additional restrictions on the personal representative's letters of appointment.

It should now be apparent that the UPC offers sufficient safeguards to protect the rights of all interested parties. The UPC permits such persons to decide for themselves just how many of the above protections—over a required minimum—will be invoked. It must be remembered that the fundamental philosophy of the UPC is to offer interested persons alternatives in the management of decedents' estates. The system of safeguards it provides is entirely consistent with this concept and allows the flexibility that is the cornerstone of the UPC.

II. KENTUCKY PROBATE PROCEDURE AND THE UPC

A. Jurisdiction

In Kentucky, jurisdiction to probate wills and to appoint personal representatives of decedents' estates is vested solely in the county courts. Orders of the county court in these matters are conclusive, remaining in force unless amended or appealed to the circuit court. The Kentucky procedure represents an imperfect marriage of the two common law methods of probate—"common form" and "solemn form". Common form was a somewhat informal ex parte procedure under which the parties were not even summoned to appear in court. Under common form probate, the will was offered and an order probating it was final unless contested within thirty years. A contest triggered the invocation of solemn form, a method which brought all interested parties before the circuit court for a de novo proceeding. Kentucky's present statutory scheme utilizes both proceedings in a modified, hybrid version.

Initiation of proceedings to probate wills and to appoint personal

\[\text{\footnotesize\textsuperscript{129} See UPC §§ 3-501 to -505.} \]
\[\text{\footnotesize\textsuperscript{130} UPC § 2-504.} \]
\[\text{\footnotesize\textsuperscript{131} Ky. REV. STAT. § 25.110 (1970) [hereinafter cited as KRS]; see also 1 A. RUSSELL & J. MERRITT, KENTUCKY PRACTICE: PROBATE PRACTICE AND PROCEDURE § 640, at 437 (1955) [hereinafter cited as RUSSELL & MERRITT].} \]
\[\text{\footnotesize\textsuperscript{132} KRS §§ 394.130, .340; see also 1 RUSSELL & MERRITT § 641.} \]
\[\text{\footnotesize\textsuperscript{133} 1 RUSSELL & MERRITT § 624, at 413.} \]
\[\text{\footnotesize\textsuperscript{134} Id. at 413-14.} \]
\[\text{\footnotesize\textsuperscript{135} See KRS §§ 394.220, .180. The former provides for a no-notice proceeding while the latter incorporates notice with an adversary proceeding.} \]
representatives is procured by application to the county court of the county where the decedent was domiciled at death.\textsuperscript{136} If a will exists, it is the duty of its custodian to present it to the court, although it may be offered by any interested party.\textsuperscript{137} In this proceeding there is no statutory notice requirement; the giving of notice is optional with the person who offers the will for probate.\textsuperscript{138} If, however, the initiating party does not propose that notice be served on other interested persons, the court may, on its own motion, order that such notice be given.\textsuperscript{139} Technically, there are no "parties" to an ex parte will probate, but the proceeding binds all persons unless it is appealed to the circuit court. The same is true of the appointment of an administrator.\textsuperscript{140} One important safeguard regarding this no-notice proceeding is the priority for appointment of fiduciaries (absent a testamentary selection by the decedent) set out in the statutes.\textsuperscript{141}

It is readily apparent that the informal proceedings contemplated by the UPC are not drastically dissimilar from the present Kentucky county court procedure. Indeed, it seems that the UPC's informal probate and appointment scheme is modeled after "common form" probate. The formal probate and appointment proceedings likewise reflect much the same policy as "solemn form" probate. Furthermore, UPC's system with its varying degrees of formality—from informal proceedings to formal proceedings to supervised administration—is clearly but a small theoretical departure from the general statutory plan of the present Kentucky statutes.

There are, however, equally obvious differences between Kentucky's probate procedure and that set forth in the UPC. First, the proceeding in the county court is judicial as compared with the quasi-judicial function of the Registrar under the UPC. Moreover, in Kentucky there is no bifurcation of state offices charged with regulation of probate procedures. The county court of the domicile of the decedent has jurisdiction over the probate of any will or the settlement of any intestate estate.\textsuperscript{142} Under the UPC there is no necessity for displacement of this court's jurisdiction, since the UPC contemplates a probate court of broad judicial power as the upper level of its system.\textsuperscript{143} The major structural change that would be required by adoption of the UPC is the delegation of certain of the court's powers to an inferior

\textsuperscript{136} 1 Russell & Merritt §§ 629, 642, at 440; see also KRS § 395.030.
\textsuperscript{137} 1 Russell & Merritt § 628.
\textsuperscript{138} KRS § 394.170; see also 1 Russell & Merritt § 631, at 425.
\textsuperscript{139} KRS § 394.180.
\textsuperscript{140} 1 Russell & Merritt § 631.
\textsuperscript{141} KRS § 394.040.
\textsuperscript{142} KRS § 395.030.
\textsuperscript{143} See text accompanying notes 7-11 supra.
The jurisdictional change that would be required if the UPC were adopted in Kentucky is largely philosophical. As discussed previously, the UPC aims to offer the parties interested in the estate various alternatives from which to choose the amount of state intrusion into their affairs in settling an estate. Currently, the Kentucky statutes outline a system whereby the state necessarily steps in and maintains its presence throughout the probate process. Unlike the UPC's mandate that the probate court should not force itself upon the parties, Kentucky courts enter the process at the moment of appointment and remain involved until the distribution of the assets and the discharge of the personal representative. This involvement occurs whether the estate is testate or intestate, contested or uncontested. And because Kentucky offers only general, broad court supervision, the present law lacks the flexibility inherent in the alternatives offered by the UPC.

B. Appointment

Before one can assume any of the duties of a personal representative in Kentucky, he must apply to the court for appointment. Section 395.015(1) of the Kentucky Revised Statutes [hereinafter cited as KRS] provides that:

> before being appointed as executor [or] administrator . . . every person shall make and file in duplicate a written application under oath, which must state the names of the deceased's surviving spouse and all of his heirs-at-law or such as are known, their post-office address if known, the date of death and also a statement in general terms as to what the estate consists of and the probable value of the personal and real estate and also a statement of any indebtedness owing by the applicant to the deceased.

If there is a will, the wishes of the testator should, and in most cases will, be respected by the court. Therefore, an executor chosen by the testator in his will will normally be appointed by the court. If the decedent dies intestate without a surviving spouse or if the surviving spouse waives the right to act as administrator or to nominate an administrator and if there are multiple resident heirs entitled to appointment as personal representative, the court is required to conduct an appointment hearing. Notice of this hearing must be given by registered mail to the surviving spouse and to the heirs. It is clear

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144 Id.
145 See KRS §§ 395.001-.990, 396.010-.180.
147 Id.
148 2 RUSSELL & MERRITT § 857.
150 KRS §§ 395.015-.016.
that this proceeding comprehends a greater degree of court involve-
ment than does informal probate under the UPC,\(^{151}\) although there is
a superficial similarity in terms of the writing that must be filed.\(^{162}\) One important distinction is that in the case of the UPC this filing is
with the Registrar, whereas under Kentucky law it is with the county
court.

Of considerable importance in comparing the present Kentucky
law to the UPC is the Kentucky requirement that the personal repre-
sentative ordinarily be a Kentucky resident.\(^{153}\) Specifically, the statute
requires that the fiduciary be either a resident of Kentucky who is over
21 years old, a national bank located in Kentucky which has fiduciary
powers, or any state bank or trust company incorporated in Kentucky.\(^{154}\)
In addition, KRS § 395.005 was amended in 1970 to allow the appoint-
ment of certain non-residents of legal age. This exception to the
residency requirement operates in favor of: the spouse of the decedent;
blood relatives of the decedent; spouses of blood relatives of the
decedent; the father, mother, brother or sister of the spouse of the
decedent; and the legally adopted children or the adoptive parents of
the decedent.\(^{155}\) The UPC, in contrast, makes no such distinction
between resident and non-resident applicants for appointment as per-
sonal representatives.

The Kentucky procedure as outlined above resembles the informal
appointment proceedings under the UPC.\(^{156}\) The petition that initiates
informal proceedings resembles that required in Kentucky, similarly,
neither the UPC's provisions for informal proceedings nor the Kentucky
statutes authorizing county court proceedings contain a blanket notice
requirement.\(^{157}\) Additionally, it should be noted that both the Ken-
tucky procedure in circuit court and the UPC's formal proceeding
comprehend an adjudicative hearing before a contested appointment
can be made. The Kentucky section on the order of priority for appo-
intment purposes is also generally the same as that under the UPC\(^{158}\)
—first, the surviving spouse; second, relatives next-in-line for distribu-
tion; and finally, creditors of the estate.\(^{159}\)

One key difference in the two approaches is that while the Ken-

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\(^{151}\) See UPC §§ 3-301 to -311.
\(^{152}\) See UPC § 3-301.
\(^{153}\) See KRS § 395.005(1); see also 2 Russell & Merritt § 864.
\(^{154}\) Id.
\(^{155}\) KRS § 395.005(2) (1970), amending KRS § 395.005 (1968); see also 2 Russell & Merritt § 864.5 (Supp. 1974).
\(^{156}\) See UPC §§ 3-301 to -311.
\(^{157}\) Compare UPC §§ 3-301, -306 with KRS § 394.170; see also 1 Russell & Merritt § 631.
\(^{158}\) Compare KRS § 395.040 with UPC § 3-203.
\(^{159}\) Id.
This is a detailed comparison of the Kentucky probate procedure and the Uniform Probate Code (UPC). The Kentucky procedure requires court-ordered appointment even in uncontested proceedings, while the UPC authorizes litigation regarding only those issues, including appointment, that are actually contested. Furthermore, once proceedings for appointment are initiated in Kentucky, the entire probate apparatus is set in motion. This is obviously not the case under the UPC, where the court assumes an ongoing and comprehensive role only when interested parties invoke supervised administration.

Once appointed, the duties of the personal representative under Kentucky law are quite similar to those under the UPC. Both schemes envision the personal representative as a fiduciary, but the UPC permits him to exercise his powers with less direct supervision by the court (even when supervised administration is utilized). In Kentucky, before a personal representative may act, he must receive letters of appointment from the county court. Once he receives his letters, his duties are those established by the common and statutory law governing fiduciaries; he is also subject to such additional obligations as the court may order. Among his statutory responsibilities is that of conserving the assets of the estate; however, he may sell the estate's assets, including real and personal property and choses in action, on court order. The UPC, on the other hand, requires no court order for the sale of such assets even under supervised administration. The personal representative may compromise claims against the estate without court order in Kentucky, a power that he also has under the UPC. Both Kentucky law and the UPC require the personal representative to prepare an inventory of the assets of the estate and file it with the court. In both cases, failure to file this inventory is grounds for his removal for cause. Under both systems, the representative is liable only for so much of the estate as he is charged with administering. Under the UPC the personal representative is released from any claim, except for fraud or inadequate

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160 See UPC Art III, General Comment.
161 See UPC §§ 3-501 to -505.
163 KRS § 395.105.
164 Id.
165 See KRS §§ 395.200, .220, .240.
166 Id.
167 UPC § 3-504; see also UPC §§ 3-701 to -721.
168 KRS § 395.240.
169 UPC § 3-715(17), (21).
170 Compare KRS § 395.250 with UPC § 3-706.
171 Compare KRS §§ 395.160, .255 with UPC § 3-706.
172 Compare KRS § 395.290 with UPC § 3-1005; see also UPC § 3-808.
disclosure, six months after filing the closing statement, whereas in Kentucky his liability ceases with the court order closing the estate. Both systems protect those who deal in good faith with subsequently removed administrators, but the protection of the UPC is broader, extending even to transactions in breach of the representative’s fiduciary duty.

An important difference between Kentucky law and the UPC is the requirement under the former that the personal representative must generally post a bond; under the UPC this action is ordered by the court only after an interested person requests it. The exception to the bond requirement in Kentucky is the photographic negative of the UPC provisions:

> Every fiduciary . . . shall provide surety on his bond unless, on petition of any interested party, the court upon being satisfied that all interests are adequately protected excuses the requirement, or unless by the terms of the will . . . surety is not required.

The relaxed bond requirement is one of the essential points of reform within the UPC.

C. Distribution

In Kentucky the assets of the estate may not be distributed except upon court order at least six months after the appointment of the personal representative. Actions of the personal representative in this respect, as well as those involving the discharge of his general management duties, are reviewed periodically by the county court. This is accomplished by the personal representative submitting—first, one year after his appointment and yearly thereafter—to the appointing court accounts which he is required by law to keep. These accountings, itemized statements of all income and disbursements, also provide the court with an annual report on the status of the estate. More frequent accounting may be ordered by the court

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173 UPC § 3-1005.
174 Compare KRS § 395.330 with UPC § 3-714.
175 UPC § 3-714.
176 KRS § 395.130(1).
177 UPC § 3-605.
178 KRS § 395.130(1); cf. UPC § 3-603.
179 UPC § 3-603, Comment.
180 Also of striking difference is the Kentucky treatment of non-resident personal representatives and the UPC’s plan involving “ancillary administration”. Compare KRS § 395.170 with UPC Art. IV. Unfortunately, although procedural in scope, a discussion of this important difference must be left outside the general discussion of this note.
181 KRS § 395.150; see generally 2 RUSSELL & MERRITT §§ 1201-36.
182 2 RUSSELL & MERRITT § 1202.
183 Id. § 1201.
on its own motion or on the motion of any interested person "for good cause shown."184

Under the UPC, the personal representative has power to make distributions without court order.185 This power is subject to recapture of the assets, or their value, from distributees if distribution was wrongful.186 If the distribution can no longer be questioned because of adjudication, estoppel, or limitation, then the distribution by the personal representative is final.187 The purpose of these provisions is to permit the personal representative to make distributions, where possible, without adjudication. Again, it should be noted that bona fide purchasers from distributees are protected under the UPC.188

D. Closing

A major break between present Kentucky law and the provisions of the UPC concerns the closing of estates. Currently in Kentucky an estate may be closed only by court order.189 Since the county court has jurisdiction to settle the estate and the accounts of the personal representative,190 the normal method of settlement is for an interested party to petition the county court to require the personal representative to present his final accounts. The county judge may appoint a commissioner to oversee and review the closing process.191 After notice of the commissioner's hearing has been given, he is empowered to question the fiduciary under oath and to hear evidence affecting his accounts.192 Notice of the settlement filing by the commissioner must be given to enable interested persons to enter timely exceptions.193 The settlement in the county court may be appealed within thirty days,194 and, as noted earlier, if such an appeal is taken the circuit court adjudicates the controversy de novo.195

By comparison the UPC permits the estate to be closed by court order or by sworn statement of the personal representative no earlier than six months after the personal representative's appointment.196 If

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184 KRS § 25.175.
185 UPC § 3-715(27).
186 UPC § 3-609.
187 Id.
188 UPC § 3-910. The general provisions of the Code covering distribution are set out in UPC §§ 3-901 to -916.
189 2 RUSSELL & MERRITT § 1210.
190 Id.
191 Id.
192 Id. §§ 1211-12.
193 Id. § 1214.
194 Id. § 1221.
195 Id. § 1223.
196 UPC §§ 8-1002 to -1008.
no proceedings are pending in court one year after the closing statement is filed, the appointment of the personal representative terminates.197

It should also be noted that under the UPC if no action is taken within three years from the death of the decedent, no proceeding, absent a showing of fraud, may be commenced to probate a will or challenge any distribution of the estate.198 This is in effect an absolute three year statute of limitations. Kentucky’s present statute of limitation for probate of an estate is twenty years.199

E. Creditors

The general rule under both Kentucky law and the UPC is that after settlement of preferred claims (e.g. burial expenses, estate administration fees, hospital services rendered to the decedent within one year preceding decedent’s death) all claims against the estate are of equal dignity.200 Kentucky requires that creditors be provided notice by publication and offered an opportunity to prove their claims before a commissioner.201 If they fail to present their claims within six months from date of last publication, they are barred from asserting them against the administrator to the extent that the estate has already been distributed; however, they may proceed against distributees to the extent of the share of the estate they received.202 Distributees may also be required to post bond to cover the debts of the estate.203 In contrast, the UPC too requires notice by publication to creditors but provides a four month period during which they file their claims in writing with the personal representative—with an opportunity to file suit against him if he refuses the claim—or be forever barred.204 Even if no notice is given, all claims are barred by the running of three years.205 The personal representative may accept or disallow any claim, and if the creditor does not petition the court for allowance within sixty days after receiving a denial, his claim is barred.206 Failure by the personal representative to respond within sixty days of

197 UPC § 8-1003(b).
198 UPC § 8-108.
199 KRS § 395.010. A will must be probated within 10 years of death absent tolling of the statute; an intestate estate must be administered within 20 years of death.
200 KRS § 396.090; UPC § 8-805(b).
201 KRS § 395.520.
203 KRS § 395.545. On the court’s own motion or the motion of any interested party, bond may be required.
204 UPC §§ 8-801 to -804.
205 UPC § 8-803(a)(2).
206 UPC § 8-806(a).
presentation of a claim constitutes an acceptance of the claim.\textsuperscript{207} The personal representative may pay the allowed claims beginning four months after the last publication of notice.\textsuperscript{208}

Collection of claims is facilitated by the UPC's provision that they may be presented in a simple writing to the personal representative.\textsuperscript{209} This writing need include only a statement of the claim, an indication of its basis, the amount and the name and address of the claimant.\textsuperscript{210} This simplified procedure compares favorably with the complex system presently used in Kentucky where the creditor must "verify" his claim by affidavits and, if required, by testimony.\textsuperscript{211}

Payment is simplified under the UPC because most legitimate claims will be allowed and paid by the personal representative without court order.\textsuperscript{212} However, if the personal representative desires more protection for any reason, he may petition the court for an order awarding payment of doubtful claims through adjudication.\textsuperscript{213}

One final innovation of the UPC must be noted. Section 3-815 subjects all assets of the decedent, wherever situated, to all claims properly presented locally. This includes claims of out-of-state creditors.\textsuperscript{214} This section is a rational step away from parochialism among sister states.\textsuperscript{215}

The UPC's four month limitation on the presentation of claims is reasonable, since creditors may be expected to become aware of the death of their debtors within that time. This is especially true in light of the requirement of publication notice for the benefit of creditors.\textsuperscript{216} This limitation period should expedite the settlement of claims and consequently the closing of estates.

F. Reform

A recent development in Kentucky law seems to indicate a recognition on the part of the legislature that probate reform is necessary.

\textsuperscript{207} Id.

\textsuperscript{208} UPC § 3-807(a). This system has been severely criticized as giving creditors too little protection. See Zartman, Uniform Probate Code—Policies and Prospects, 61 ILL. B.J. 428 (1973). For policies favoring such procedures see UPC Art. III, Prt 8, General Comment.

\textsuperscript{209} UPC § 3-804.

\textsuperscript{210} UPC § 3-804(1).

\textsuperscript{211} KRS § 396.010.

\textsuperscript{212} UPC § 3-806(a). Although at present court order is not required for allowance of the claim in Kentucky, the personal representative would be more reluctant to pay even valid claims without authorization than would a personal representative under the UPC, because in Kentucky he may be liable for wrongful payment. See generally 2 RUSSELL & MERRITT §§ 1226, 1228.

\textsuperscript{213} UPC § 3-809(b).

\textsuperscript{214} UPC § 3-815(a) and accompanying Comment.

\textsuperscript{215} UPC §§ 3-815 to -816.

\textsuperscript{216} UPC § 3-809(a)(1). If no notice is published at decedent's death, the claims are not barred until three years after the date of death. UPC § 3-809(a)(2).
The 1970 and 1972 Kentucky legislative sessions added certain sections to the Kentucky Revised Statutes that permit the court to dispense with the administration of small estates if certain conditions are satisfied.\footnote{See KRS § 395.460 (Supp. 1972).} This new proceeding in many respects parallels the UPC's provisions for summary administration.\footnote{See UPC § 3-1201 to -1204.} For example, if the decedent dies intestate, the statute authorizes the court to conduct a hearing at which the surviving spouse—or the surviving children—may prove that the personal property on hand does not exceed the surviving spouse's exemption of $3,500 and any preferred claims.\footnote{See KRS § 395.460 (Supp. 1972).} Creditors are entitled to prove the existence of assets in excess of the exemption. If, after considering the claims of all interested parties, the court is satisfied that the probatable assets do not exceed by $3,500 the total amount of preferred debts, it may enter an order dispensing with administration.\footnote{KRS § 395.460 (1) (Supp. 1972).}

At this point several glaring differences distinguish the Kentucky and the UPC approaches to small estates. Whereas the Kentucky system implies that notice must be given to creditors, the UPC specifically exempts this proceeding from any creditor notice requirement so long as it appears that there will be no residue after payment of preferred debts similar to those enumerated in the Kentucky statute.\footnote{UPC § 3-1203.} Secondly, no court hearing is required under the UPC. The procedure is undertaken by any successor,\footnote{UPC § 3-1201.} who collects the estate's assets by simple affidavit presented to the person in possession of the asset.\footnote{UPC § 3-1201(a) requires the affidavit must contain the following factors: 
\begin{itemize}
  \item (1) the value of the entire estate, wherever located, less liens and encumbrances, does not exceed $5,000;
  \item (2) 30 days have elapsed since the death of the decedent;
  \item (3) no application or petition for the appointment of a personal representative is pending or has been granted in any jurisdiction; and
  \item (4) the claiming successor is entitled to payment or delivery of the property.
\end{itemize}} Finally, the UPC's maximum figure is $5,000 rather than $3,500.\footnote{UPC § 3-1201.}

III. CONCLUSION

American probate law is in need of fundamental reform. As presently constituted, it simply does not meet the needs of our society. Professor Wellman did not overstate the problem when he wrote that:

\footnote{224 UPC § 3-1201.}
... persons want out [of probate], and surely they are finding more and more ways of getting out. Unless present trends are reversed, our probate system is simply going to become meaningless to almost everyone. ... [We] cannot ignore the fact that people do not trust probate and are no longer willing to tolerate its red tape. ... [We] must seek ways of assisting people in what they want to do with their property.225

One well-reasoned solution to this problem is the Uniform Probate Code. Although certainly not a complete remedy, the UPC's simplified approach and overall flexibility make it an attractive alternative, worthy of close scrutiny by the legal profession and by legislative bodies charged with restructuring this area of the law. Perhaps only when many such groups accept the guidance provided by Professor Wellman in the UPC will probate laws be equal to the task of meeting modern needs and expectations.226

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